



BRB No. 18-0149

ROBERT KATAGIRI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MATSON TERMINALS, INCORPORATED	)	
	)	DATE ISSUED: <u>Aug. 15, 2018</u>
and	)	
	)	
SIGNAL MUTUAL INDEMNITY	)	
ASSOCIATION	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Granting Summary Decision and the Order Denying Relief on Reconsideration of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

Cory A. Birnberg (Birnberg & Associates), San Francisco, California, for claimant.

David L. Doeling (Aleccia & Mitani), Long Beach, California, for employer/carrier.

Before: BOGGS, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Granting Summary Decision and the Order Denying Relief on Reconsideration (2017-LHC-01548) of Administrative Law Judge Steven B. Berlin rendered on a claim filed pursuant to the provisions of the

Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant has a prosthetic right knee. On April 16, 2012, while working as a wharf clerk, claimant was unloading an automobile ship and needed to place a packet inside a car. While getting out of the car, claimant pushed up with his right leg and heard "an audible pop." Claimant required surgery to fix a screw that had come loose in his prosthetic knee.

Claimant filed a claim for benefits. In a decision issued on December 10, 2015, Judge Dorsey found that claimant's work caused the screw to break such that employer was responsible for the resulting injury and surgery. Judge Dorsey accordingly awarded claimant temporary total disability benefits from April 19 to July 28, 2012, and medical benefits. Judge Dorsey also stated,

Mr. Katagiri's knee injury is a scheduled injury, meaning compensation for permanent partial disability is prescribed by §8 of the Act. No doctor has rated Mr. Katagiri with a percentage loss of use of his leg and Mr. Katagiri spent no time in his post-trial brief addressing permanent disability. He has not shown he is entitled to permanent disability benefits, nor has he requested them.

Decision and Order Granting Benefits at 22. Neither party appealed Judge Dorsey's decision.

Employer filed an LS-208, Notice of Final Payment form, on December 22, 2015, noting that it made the last payment of disability benefits on December 21, 2015. Emp. Motion for Summary Decision at EX 2. On February 8, 2017, claimant filed his "Request for Permanent Disability Award," attaching a report from Dr. Diamond rating his right knee impairment at 75 percent. Employer filed a motion for summary decision, asserting that claimant's request for permanent disability benefits was a petition for modification under Section 22, 33 U.S.C. §922, and that it was untimely because it was filed more than one year after employer made the last payment of disability compensation. Claimant responded to the motion for summary decision, asserting that the request for permanent disability benefits was a timely new claim under Section 13, 33 U.S.C. §913, because it was filed within one year of claimant's learning that his condition was stable and ratable.

Judge Berlin (the administrative law judge) concluded that claimant was requesting modification of Judge Dorsey's decision because it was undisputed that claimant's current claim is based on the same injury that was the subject of the prior adjudication. Decision and Order Granting Summary Decision at 6. He further found there is no dispute that employer made the last disability payment under the prior award on December 21, 2015. He thus found that the February 2017 claim was untimely under Section 22 because it was filed more than one year after December 21, 2015. Accordingly, the administrative law judge granted employer's motion for summary decision. Claimant filed a motion for reconsideration, which the administrative law judge denied.

Claimant appeals the administrative law judge's decision granting employer's motion for summary decision. Employer filed a response brief, urging affirmance. Claimant filed a reply brief.

In determining whether to grant a motion for summary decision, the fact-finder must review the evidence in the light most favorable to the non-moving party and determine whether there are any genuine issues of material fact and the moving party is entitled to summary decision as a matter of law. *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006); 29 C.F.R. §18.72. If it is necessary to weigh evidence or make credibility determinations on the issue presented, summary decision is inappropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Walker v. Todd Pacific Shipyards*, 47 BRBS 11 (2013), *vacating in part on recon.*, 46 BRBS 57 (2012).

We reject claimant's contention that the administrative law judge erred in finding that his Request for Permanent Disability Award was a request for modification under Section 22 rather than a new claim under Section 13 of the Act. Claimant contends that he was not seeking to modify the prior award because he did not cite a change in condition or a mistake in fact, but was seeking permanent partial disability benefits for the first time.

Section 22 of the Act permits the modification of an award if the party seeking to alter the award establishes either a change in condition or a mistake in a determination of fact. 33 U.S.C. §922; *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). Claimant's request, filed on February 8, 2017, made no mention of a new injury due to his employment after April 16, 2012, but referred only to Judge Dorsey's prior decision awarding him temporary disability benefits. In addition, it is well settled that a filing is not a "new claim" merely because it requests benefits for a different type of disability from those sought in a previously adjudicated claim on the same injury. See *Alexander v. Avondale Industries, Inc.*, 36 BRBS 142 (2003) (holding that the claimant's claim for temporary total disability benefits for a back injury was not a new claim but a request for modification where claimant did not allege any subsequent intervening injury but made a claim based on the same work injuries for which claimant

had already received permanent partial disability benefits). In this case, before the administrative law judge, claimant did not indicate that he had suffered any new injury to his knee, but stated only that he had now obtained a permanent disability impairment rating for his previous right knee injury, which is the same injury that was the subject of the claim adjudicated by Judge Dorsey. We therefore affirm the administrative law judge's conclusion that claimant's filing constitutes a request for modification under Section 22.

We further conclude that the administrative law judge did not err in finding claimant's request untimely. Section 22 of the Act permits modification of an award "at any time within one year of the last payment of compensation, whether or not a compensation order has been issued, or within one year of the rejection of a claim." 33 U.S.C. §922. The administrative law judge granted employer's motion for summary decision on the ground that claimant's motion was filed more than one year after employer made the last payment of disability benefits to claimant. Claimant contends that his request was timely because "compensation," as used in Section 22, includes medical benefits, which employer paid pursuant to Judge Dorsey's Decision and Order as recently as September 2017, less than one year prior to claimant's filing the motion for modification.

Claimant's contention is without merit. The administrative law judge's conclusion that "compensation" for the purposes of Section 22 does not include the payment of medical expenses accords with law. *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 637 F.3d 280, 45 BRBS 9(CRT) (4th Cir. 2011), *cert. denied*, 565 U.S. 1058 (2011) (so holding, noting that otherwise the one-year statute of limitations for a petition for modification would effectively be written out of the statute).<sup>1</sup>

Section 22 states that the filing period runs from "the last payment of compensation." Claimant's request for modification was filed more than one year after

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<sup>1</sup> Although this decision is not controlling precedent in this case, which arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, *Wheeler* represents the only precedent on this issue. In *Wheeler*, the court addressed whether an employer's "voluntary payment" of medical benefits was "compensation" for purposes of Section 22, and held that it was not. 637 F.3d at 282, 291, 45 BRBS at 10, 16(CRT). However, nothing in the court's analysis suggests a different result for medical benefits that were paid pursuant to a prior order, as here. The court consistently characterized its conclusion as being that, "[the term] 'compensation' in Section 22 does not include payment of medical benefits." *Id.*, 637 F.3d at 286, 45 BRBS at 14(CRT). We note further that in affirming the Board's decision, 43 BRBS 179 (2010), the court did not endorse the Board's rationale which distinguished between medical benefits paid to a claimant as reimbursement for expenses paid and those paid directly to the provider.

employer made its last payment of disability benefits for claimant's right knee injury on December 21, 2015, and was therefore untimely. Claimant has not established that any questions of material fact exist to preclude the administrative law judge from granting summary decision in this case. We therefore affirm the administrative law judge's grant of employer's motion for summary decision as employer was entitled to such as a matter of law. 29 C.F.R. §18.72.

Accordingly, the administrative law judge's Decision and Order Granting Summary Decision and the Order Denying Relief on Reconsideration are affirmed.

SO ORDERED.

JUDITH S. BOGGS  
Administrative Appeals Judge

GREG J. BUZZARD  
Administrative Appeals Judge

RYAN GILLIGAN  
Administrative Appeals Judge