BRB No. 00-0574

MILLIE MAE JOHNSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ARMY & AIR FORCE EXCHANGE SERVICE	)	DATE ISSUED:
	)	
and	)	
	)	
CONTRACT CLAIMS SERVICES	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Order Denying Request for Modification of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Millie Mae Johnson, Columbus, Georgia, *pro se*.

William F. Sayegh (Army & Air Force Exchange Service), Dallas, Texas, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Order Denying Request for Modification (97-LHC-2120) of Administrative Law Judge Clement J. Kennington (the administrative law judge) 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act). In an appeal by a claimant without representation by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law to determine 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). If

they are, they must be affirmed.

This case is before the Board for the second time. Claimant sustained work-related injuries to her back and neck on October 18, 1985, for which she obtained immediate medical treatment. She subsequently received treatment for psychiatric problems related to her back pain. On April 7, 1986, claimant underwent a lumbar laminectomy. While being transported home from the hospital by ambulance on May 8, 1986, claimant sustained a cervical contusion when she was dropped from a stretcher by the ambulance attendants. Claimant subsequently filed a third-party suit against the ambulance service for the injuries sustained on May 8, 1986, which she settled, on December 28, 1987, for $15,000, without the prior written approval of employer. On March 22, 1988, employer suspended its voluntary payment of temporary total disability benefits under Section 8(b) of the Act, 33 U.S.C. §908(b), on the basis of claimant's failure to obtain employer's prior written approval of this settlement under Section 33(g) of the Act, 33 U.S.C. §933(g). Following referral of the case to the Office of Administrative Law Judges, employer moved for summary decision on the ground that further compensation was barred by Section 33(g) because claimant entered into a third-party settlement for an amount less than the amount to which she would have been entitled under the Act, without obtaining the prior written approval of employer.

In a Decision and Order on Motion for Summary Decision-Denial of Benefits issued on February 27, 1990, Administrative Law Judge Joel R. Williams granted employer's motion for summary decision, ruling that further entitlement to compensation and medical benefits for claimant's October 18, 1985 work-related injury is barred by Section 33(g). Claimant did not timely appeal Judge Williams's Decision and Order.

Claimant, who never returned to work following the October 1985 work incident, averred that she continued to report to employer's personnel office on a semiannual basis in order to update her employment status. Claimant asserted that when she visited employer's office on April 1, 1994, she was advised that computer records listed her as having been on administrative leave without pay (LWOP), but that effective April 1, 1994, she would be terminated. According to claimant, before leaving employer's building on April 1, 1994, she suffered chest pains, which were later diagnosed as symptoms of a panic attack.[1] Subsequent to this incident, claimant underwent psychiatric treatment for a panic disorder. On May 5, 1997, claimant filed a claim for compensation under the Act for depression, post-traumatic stress, and chest pain related to the April 1, 1994, incident in employer's personnel office. Before the administrative law judge, employer moved for summary decision on the basis that

[1]Claimant's statements regarding these events were made during a telephonic, pre-hearing conference call before the administrative law judge on October 5, 1998.

claimant was not an employee at the time of the alleged April 1, 1994 injury, and, thus, her claim is not cognizable under the Act. In support of its motion, employer produced personnel records and the affidavit of employer's human resources manager indicating that claimant was placed on LWOP status on October 19, 1985 because of her workers' compensation injury and was separated from LWOP on June 19, 1987, in accordance with Army regulations restricting LWOP to a period of one year.

In an Order Granting Employer's Motion for Summary Decision, the administrative law judge ruled that the injury allegedly sustained by claimant did not arise out of and in the course of employment pursuant to Section 2(2) of the Act, 33 U.S.C. §902(2), inasmuch as there was no employer-employee relationship between employer and claimant at the time of the alleged April 1, 1994, incident which resulted in claimant's present psychological condition. The administrative law judge found, in this regard, that there was no evidence to indicate a continued employer-employee relationship after June 19, 1987, even assuming that claimant was not notified of the termination of her employment prior to April 1, 1994.[2] In an Order Denying Motion for Reconsideration issued November 16, 1996, the administrative law judge ruled that the initial Decision and Order issued by Judge Williams on February 27, 1990 is final and, thus, is not subject to attack in the proceeding before him. In addition, the administrative law judge rejected claimant's contention that she remained an employee as of April 1, 1994, that contention having been considered and found to be without merit in his previous October 21, 1998, Order.

Claimant, without the assistance of counsel, appealed the administrative law judge's denial of her claim. In its decision dated December 3, 1999, the Board affirmed the administrative law judge's finding that claimant was not an employee at the time of her alleged injury on April 1, 1994, and thus affirmed the administrative law judge's determination that her claim, based upon an incident occurring on April 1, 1994, is not

[2]The administrative law judge additionally found that receipt of workers' compensation benefits is not tantamount to continued employee status and, even if it were, claimant's compensation ceased on March 22, 1988.

compensable under the Act.[3] *Johnson v. AAFES*, BRB No. 99-0297 (Dec. 3, 1999)(unpub.).

Claimant thereafter requested modification of the administrative law judge's decision, pursuant to Section 22 of the Act, 33 U.S.C. §922, alleging that she had new evidence showing a permanent job-related post-traumatic stress disorder (PTSD). In his Order, the administrative law judge initially determined that claimant submitted no new evidence of PTSD. Alternatively, the administrative law judge found that even if claimant suffered from PTSD, as a result of the either the original October 18, 1985, injury or subsequent April 1, 1994, incident, she would not be entitled to any additional benefits. Specifically, the administrative law judge determined that a compensation claim for any disability arising out of the October 18, 1985, work-related injury is barred by Section 33(g) of the Act, in accordance with Judge Williams's 1990 decision. Similarly, the administrative law judge found that claimant would not be entitled to any compensation for disability arising from the April 1, 1994, incident, as claimant was not an employee at that time and thus any injury occurring on that date did not arise out of and in the course of employment covered by the Act.

On appeal, claimant, appearing *pro se*, challenges the administrative law judge's denial of her request for modification. Employer responds, urging affirmance.

[3]The Board noted that even if claimant's panic disorder and accompanying claim were viewed as the natural and unavoidable result of claimant's original 1985 work-related injury, she would nevertheless be barred from receiving any additional compensation in light of Judge Williams's 1990 decision holding the claim for those injuries barred by Section 33(g), as the judge's decision was not appealed and had become final. *Johnson*, slip op. at 5, n. 4.

Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing otherwise final decisions; modification pursuant to this section is permitted based upon a mistake of fact in the initial decision or a change in claimant's physical or economic condition. *Metropolitan Stevedore Co. v. Rambo,* 515 U.S. 291, 30 BRBS 1 (CRT)(1995). Under Section 22, the administrative law judge has broad discretion to correct mistakes of fact "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971), *reh'g denied*, 404 U.S. 1053 (1972); *see also Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, *reh'g denied*, 391 U.S. 929 (1968). On modification claimant alleged that employer deliberately withheld medical evidence from her regarding her condition. As the administrative law judge determined, claimant submitted no new evidence of PTSD. Moreover, he rationally determined that there is no basis, or for that matter any evidence evincing any change in conditions or mistake in fact to warrant modification.[4] We therefore affirm the administrative law judge's denial of modification.

[4]Additionally, we note that claimant did not produce any evidence suggesting that there was a mistake in the administrative law judge's determination of fact regarding the date of her termination, *i.e.*, that claimant was placed on LWOP status on October 19, 1985, because of her workers' compensation injury and was separated from LWOP on June 19, 1987, in accordance with Army regulations restricting LWOP to a period of one year.

Additionally, we affirm the administrative law judge's alternative determination that claimant is not entitled to any additional benefits for injuries arising out of either the October 18, 1985, work-related injury or the April 1, 1994, alleged incident. In the Board's decision, the Board affirmed the administrative law judge's finding that an employer-employee relationship no longer existed between employer and claimant at the time of the April 1, 1994 incident. The Board therefore affirmed the administrative law judge's determination that claimant was not an employee at the time of her alleged injury on April 1, 1994, and, thus, her claim based upon an incident occurring on that date is not compensable under the Act. *Johnson,* slip op. at 5-6. Similarly, the Board held that even if claimant's condition was the natural and unavoidable result of her original 1985 work-related injury, she would nevertheless be barred from receiving any additional compensation pursuant to Section 33(g) of the Act, as Judge Williams's initial decision on that issue was not appealed.[5] *Johnson*, slip op. at 5, n. 4. As no change in condition or mistake in fact has been demonstrated with regard to these findings, we affirm the denial of modification.

Accordingly, the administrative law judge's Order Denying Request for Modification is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY

[5]Any error in the application of law by Judge Williams, or change in legal interpretation since his decision, *see generally White v. Peterson Boatbuilding Co.*, 29 BRBS 1 (1995), cannot be raised via Section 22. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971), *reh'g denied*, 404 U.S. 1053 (1972).

Administrative Appeals Judge