

receipt of a letter from employer dated October 25, 2018, indicating that the administrative law judge had issued an order on reconsideration, dated October 23, 2018, along with a copy of that order, and explained that employer's letter had not been associated with the file prior to the Board's November 14, 2018, Order.¹ Because Section 802.206(f) of the Board's regulations, 20 C.F.R. §802.206(f), requires dismissal of an appeal upon the filing of a timely motion for reconsideration of an administrative law judge's decision, the Board dismissed BRB Nos. 19-0040 and 19-0040A in its December 6, 2018, Order. In that same Order, the Board construed employer's October 25, 2018, letter as a notice of appeal of the administrative law judge's original decision as well as his order on reconsideration. *See* 20 C.F.R. §802.206(d). The Board acknowledged the appeal, assigned it BRB No. 19-0069, and set the briefing schedule.

Claimant seeks reconsideration of the dismissal of his appeal, contending Section 802.206(f)² is not applicable because the error employer alleged in its "motion for reconsideration" was merely a clerical error – changing the commencement of benefits from June 7 to June 8, 2016 – and its filing with the administrative law judge was mislabeled. Claimant asserts that the correction of a clerical error does not affect the finality of the decision or the time for filing an appeal, citing *Graham-Stevenson v. Frigitemp Marine Div.*, 13 BRBS 558 (1981), so his appeal should not have been dismissed as premature. Alternatively, claimant contends his "Notice of Cross-Appeal," filed in conjunction with his Motion for Reconsideration, should be considered timely with respect to the Board's December 6, 2018, Order acknowledging employer's appeal in BRB No. 19-0069. As another alternative, claimant seeks dismissal of employer's appeal in BRB No. 19-0069 because the Board erroneously construed its October 25, 2018, letter as a notice of appeal. Employer opposes claimant's motion for reconsideration, asserting its motion for reconsideration to the administrative law judge was substantive, and the Board correctly applied Section 802.206(f). Employer also opposes claimant's motion to dismiss its appeal.

We agree with claimant that his December 7, 2018, filing constitutes a timely notice of cross-appeal. Employer's October 25, 2018, letter states, in its entirety: "Please note

¹ The administrative law judge's Order Granting Reconsideration was filed by the district director on October 25, 2018, and employer's letter to the Board was filed on November 5, 2018.

² If a timely motion for reconsideration is filed with the administrative law judge, "any appeal to the Board, whether filed prior to or subsequent to the filing of the timely motion for reconsideration, shall be dismissed without prejudice as premature." 20 C.F.R. §802.206(f).

that there is no longer a Motion for Reconsideration in the above-referenced matter pending before the Office of Administrative Law Judges pursuant to the attached order.” Although claimant was served with this letter, nothing in it directly indicates that employer was filing a notice of appeal. The Board construed this letter as a timely notice of appeal as to the administrative law judge’s order on reconsideration, *see* 20 C.F.R. §802206(d), and claimant learned this upon receipt of the Board’s December 6, 2018, Order. Claimant filed his notice of cross-appeal the next day.

Section 802.205(b) of the regulations provides in pertinent part:

If a timely notice of appeal is filed by a party, any other party may initiate a cross-appeal by filing a notice of appeal within 14 days of the date on which the first notice of appeal was filed. . . . In the event that such other party was not properly served with the first notice of appeal, such party may initiate a cross-appeal by filing a notice of appeal within 14 days of the date that service is effected.

20 C.F.R. §802.205(b). As claimant was unaware until receipt of the Board’s December 6, 2018, Order that it was construing employer’s October 25, 2018, letter as a notice of appeal, claimant’s notice of cross-appeal, which was filed within 14 days of the December 6, 2018, Order was timely filed pursuant to Section 802.205(b). *See generally Urso v. MVM, Inc.*, 44 BRBS 53 (2010). We acknowledge claimant’s cross-appeal and assign it the Board’s docket number 19-0069A. 20 C.F.R. §802.210. All correspondence pertaining to this appeal must bear this number.³

Additionally, employer, on behalf of claimant and employer, has informed the Board that the parties have filed motions for modification of the administrative law judge’s Decision and Order. 33 U.S.C. §922. The Director, OWCP, thus has filed a motion to remand the case for modification proceedings. We grant the motion to remand. We dismiss employer’s appeal, BRB No. 19-0069, and claimant’s cross-appeal, BRB No. 19-0069A, without prejudice, and we remand this case to the administrative law judge for modification proceedings. 20 C.F.R. §802.301(c). Employer’s appeal and/or claimant’s cross-appeal of the administrative law judge’s Decision and Order Awarding Benefits and Order Granting Reconsideration will be reinstated provided the petitioner files a motion for reinstatement within 30 days of the date the decision on modification is filed by the district director. Any party adversely affected by the decision granting or denying

³ In light of claimant’s timely cross-appeal, claimant’s motion for reconsideration in BRB No. 19-0040A is denied as moot.

modification may file a new appeal with the Board within 30 days of the date the decision on modification is filed. 33 U.S.C. §921(a); 20 C.F.R. §§802.205, 802.301(c).⁴

Accordingly, we deny claimant's motion for reconsideration in BRB No. 19-0040A. We acknowledge claimant's cross-appeal in BRB No. 19-0069A. We dismiss without prejudice the appeals in BRB Nos. 19-0069 and 19-0069A, and we remand the case to the administrative law judge for modification proceedings.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

⁴ The Director's motions for an extension of time to file a response to claimant's cross-appeal and to dismiss employer's appeal are moot.