BRB No. 00-0440

JAMES B. BUTTS, SR.	)	
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Claimant-Respondent	)	
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NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: Jan. 17, 2001
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	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Granting Compensation Benefits for a Low Back Impairment of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason, Cowardin & Mason), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Granting Compensation Benefits for a Low Back Impairment (90-LHC-0889, 98-LHC-2214) of Administrative Law Judge Richard K. Malamphy 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 findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant sustained a work-related, low back injury while working as a shipfitter on April 13, 1989. He also developed bilateral carpal tunnel syndrome as a result of his employment. Claimant last worked in May 1992. In 1991, a dispute developed between

the parties regarding an alleged period of temporary total disability for the back injury. The parties resolved the dispute by means of stipulations which formed the basis for an order issued by the district director on February 1, 1993, regarding the 1989 low back injury. Emp. Ex. 13.

Relevant to the instant appeal, claimant had back surgery on May 6 and 12, 1993. Jt. Exs. 7, 9. On October 5, 1993, claimant's counsel wrote to the district director seeking additional compensation for the back injury by way of modification of the previous order. Jt. Ex. 14. By letter to employer dated June 23, 1994, claimant's counsel sought temporary total disability benefits from October 11, 1993 through April 27, 1994. Jt. Ex. 19. On July 22, 1994, employer agreed to pay temporary total disability benefits from October 11, 1993 to January 25, 1994. Jt. Ex. 25. It was employer's position that on January 25, 1994, employer had available employment for claimant within the restrictions due to his back injury, and that claimant's inability to work from January 25, 1994, was due to the carpal tunnel syndrome. Cl. Ex. 7a. Claimant then received payments for temporary total disability due to the carpal tunnel syndrome. Emp. Ex. 12.

Claimant's fifth back surgery was performed by Dr. Byrd on March 10, 1995, and he was subsequently temporarily totally disabled from March 10, 1995, through February 5, 1996, for which employer paid temporary total disability benefits. Cl. Ex. 5. The last payment employer designated as for the back injury was on February 6, 1996. Claimant, however, continued to receive disability payments as the awards for his arm impairments were not fully paid. Claimant underwent a sixth surgical procedure on his back on June 10, 1997. Jt. Ex. 110. While he was recuperating from the back surgery, he was receiving compensation payments denominated as being for the bilateral hand condition. Employer suspended all compensation payments after November 23, 1997. By letter to

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[1]This order set out employer's liability for various periods of temporary total and partial disability benefits for the back impairment through April 1, 1991. Emp. Ex. 13.

[2]Ultimately, claimant received temporary total disability benefits for the carpal tunnel syndrome from July 15, 1992 through March 10, 1993, and from April 24, 1994 through March 9, 1995, and permanent partial disability benefits for a 20 percent impairment to each arm. 33 U.S.C. §908(b), (c)(1); Emp. Ex. 12.

[3]Employer may have been paying claimant temporary total disability for the arm impairments at this time. In acknowledging its liability for temporary total disability for the back injury following the May 1995 surgery, employer stated it intended to seek a credit for payments made for the arm impairments against its liability for temporary total disability for the back injury. Cl. Ex. 5; *but see Vinson v. Newport New Shipbuilding & Dry Dock Co.*, 27 BRBS 220 (1993) (employer may not credit an overpayment for one injury against its liability for an unrelated injury pursuant to 33 U.S.C. §914(j)).

the district director dated February 10, 1998, claimant requested resumption of benefits for the low back injury commencing around December 1, 1997, based on the assumption that the schedule awards to claimant's arms had been paid in full. Jt. Ex. 115.

The administrative law judge found that claimant filed a timely request for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, and he awarded claimant temporary total disability benefits for the back injury from November 23, 1997, to December 31, 1997, and temporary partial disability benefits from January 1, 1998, and continuing, based on the parties' stipulation as to claimant's post-injury wage-earning capacity. *See* 33 U.S.C. §908(e). On appeal, employer contends that claimant's February 10, 1998, letter is untimely under Section 13 of the Act, 33 U.S.C. §913, as a new claim, and under Section 22 as a motion for modification. Employer argues that as the last compensation payment made to claimant for the back injury was in February 1996, the February 1998 letter is untimely, as it is over one year from the last payment of benefits for the back injury. Employer also maintains that the February 1998 letter is insufficient to constitute a request for modification. Claimant responds, urging affirmance of the administrative law judge's decision.

A motion for modification pursuant to Section 22 must be filed within one year of the denial of the claim or of the last payment of benefits. 33 U.S.C. §922. It is well settled that an application for modification under Section 22 need not be formal in nature or on any particular form, as long as it can be discerned that an actual claim for additional compensation is being made. *See Consolidation Coal Co. v. Borda*, 171 F.3d 181, 21 BLR 2-545 (4th Cir. 1999); *Greathouse v. Newport News Shipbuilding & Dry Dock Co.*, 146 F.3d 224, 32 BRBS 102(CRT) (4th Cir. 1998); *I.T.O. Corp. of Virginia v. Pettus*, 73 F.3d 523, 30 BRBS 6(CRT) (4th Cir. 1996), *cert. denied*, 519 U.S. 807 (1996); *Fireman's Fund Ins. Co. v. Bergeron*, 493 F.2d 545 (5th Cir. 1974); *Meekins v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 5 (2000), *aff'd mem.*, No. 00-1421, 2000 WL 1718629 (4th Cir. Nov. 17, 2000); *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988); *Hudson v. Southwestern Barge Fleet Services, Inc.*, 16 BRBS 367 (1984); *see also Youghiogheny & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 22 BLR 2-46 (6th Cir. 1999).

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[4]Inasmuch as the claim for the April 13, 1989, back injury was the subject of a compensation order dated February 1, 1993, and there is no argument that claimant sustained a new injury to his back, Section 22 is properly applied to claimant's claim for additional benefits for this injury. *See Greathouse v. Newport News Shipbuilding & Dry Dock Co.*, 146 F.3d 224, 32 BRBS 102 (CRT)(4th Cir. 1998); *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988). Employer's contentions regarding Section 13 therefore need not be addressed. We note, however, that the analysis regarding the sufficiency of a writing is generally the same under Sections 13 and 22. *See I.T.O. Corp. of Virginia v. Pettus*, 73 F.3d 523, 30 BRBS 6(CRT) (4th Cir. 1996), *cert. denied*, 519 U.S. 807 (1996).

We affirm the administrative law judge's finding that claimant timely filed a motion for modification based on the totality of the circumstances in this case, which we shall chronicle. In October 1993, claimant wrote to the district director and formally requested additional compensation for his back injury following surgery in May 1993. Jt. Ex. 14. Although the letter requesting additional compensation referenced all four types of disability compensation, claimant clearly had additional disability to claim at this time, based on his 1993 surgery and restrictions placed by Dr. Muizelaar. *See, e.g.*, Jt. Ex. 17; *cf. Meekins*, 34 BRBS at 8 (letter referencing all four types of disability and requesting that the district director not schedule an informal conference is not a request for modification as it was filed at a time when the claimant did not have a disability to claim). Claimant clarified his position in a letter to employer on June 23, 1994, requesting temporary total disability from October 11, 1993 to April 27, 1994. Jt. Ex. 19. Employer agreed to pay claimant temporary total disability benefits from October 11, 1993 to January 25, 1994, for the back injury. Jt. Ex. 25. Although claimant did not continue to pursue a claim at that time for additional benefits following the 1993 surgeries, it is significant that the 1993 modification request, made within one year of the February 1993 compensation order, was never the subject of a formal compensation order. *See generally Intercounty Construction Corp. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975).

Following claimant's back surgery in 1995, employer paid claimant temporary total disability benefits from March 10, 1995, through February 5, 1996. Cl. Ex. 5; *see* n. 3, *supra*. The last payment employer designated as for the back injury was on February 6, 1996, following which employer resumed permanent partial disability payments for the carpal tunnel syndrome. Jt. Exs. 86, 89; Emp. Ex. 12. When employer completed its permanent partial disability payments on November 23, 1997, claimant wrote to the district director on February 10, 1998, requesting resumption of benefits for the back injury, inasmuch as claimant had additional back surgery on June 10, 1997. Contrary to employer's contention that this letter does not constitute a valid request for modification, the letter requests resumption of total disability compensation for claimant's back condition following additional back surgery in 1997, "from on or about December 1, 1997," Cl. Ex. 3a, and thus clearly manifests claimant's intent to claim additional compensation for a particular disability commencing at a specific time. *See Greathouse*, 146 F.3d 224, 32 BRBS 102(CRT); *Pettus*, 73 F.3d 523, 30 BRBS 6(CRT); *Meekins*, 34 BRBS 5. Moreover, the February 1998 letter specifically requested that the district director schedule an informal conference. Cl. Ex. 3. Therefore,

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[5]Apparently, claimant was receiving temporary total disability for his bilateral carpal tunnel syndrome at the time of the May 1993 back surgery. When claimant's hand condition reached maximum medical improvement, employer began paying claimant permanent partial disability benefits instead of temporary total disability for the back injury. *See* Jt. Ex. 19; *see also* n. 8, *infra*.

it is clear from this context that claimant intended that the claim be processed in accordance with the Act, and that the letter constitutes a valid claim for modification. *See Borda*, 171 F.3d 181, 21 BLR 2-545; 33 U.S.C. §§919, 922; 20 C.F.R. §702.373.

Moreover, that this claim was made more than one year after the last payment of benefits reported as being for the back injury is not dispositive on the facts herein. The claim clearly was made within one year of the last payment of benefits by employer, and employer had paid benefits for the two injuries in virtually the same amounts since 1992. Based on the evidence showing the district director's continuing inquiries into which injury employer was compensating, *see* Jt. Exs. 26, 29, 36, 41, 58, 73, 79, and the administrative law judge's finding that employer conceded that the payments were about the same amount for each impairment, the administrative law judge rationally concluded that it was not "obviously" clear whether the payments were for one disorder or the other. Furthermore, based on the course of dealings between the parties over the years, claimant had a reasonable expectation that benefits for his back injury would resume following surgery or when benefits lapsed for the carpal tunnel syndrome. Following his back surgeries in 1993 and 1995, employer paid claimant benefits for temporary total disability, suspending compensation for the hand condition. *See, e.g.,* Jt. Exs. 25, 86. Thus, following the completion of scheduled permanent partial disability benefits for the hand injuries, claimant could reasonably expect that he would be compensated for the disability resulting from the June 1997 back surgery. The claim for additional benefits in February 1998, therefore, clearly is timely, given the interrelatedness of the payments made over the years.

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[6]Section 22 of the Act states that a claim for modification should be processed "in accordance with the procedure prescribed in respect of claims in section 19." 33 U.S.C. §922. *See also* 20 C.F.R. §702.373.

[6]Claimant testified that the checks for the hand injuries were $313.13, and $318.77 for the back injuries. Tr. at 35.

[7]The principles applicable to concurrent awards for two injuries are relevant here, although whether these principles were correctly applied is not explicitly raised. Claimant's total compensation cannot exceed the 66 2/3 awarded for total disability. Thus, where he is temporary totally disabled by either or both of two injuries, he receives only one award. Since a schedule award is paid at the 66 2/3 rate, it cannot run concurrently with an award for temporary total disability. While the claimant is temporarily totally disabled due to one injury, the schedule award for the other injury lapses. *See Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 235 n.4 (1985). Two partial disability awards should be paid concurrently, provided claimant does not receive more than he would if he were totally disabled. *I.T.O. Corp. of Baltimore v. Green*, 185 F.3d 239, 33 BRBS 151(CRT) (4th Cir. 1999). Under such circumstances, the amount paid under the schedule may be reduced, and the number of weeks for which claimant is paid extended. *Id.*

In this regard, we note the administrative law judge's reliance on the fact that employer was aware of claimant's continuing back problems. The administrative law judge found that employer, through Crawford and Company, was apprised by Dr. Byrd of claimant's course of treatment, including the surgery performed on June 10, 1997, and claimant's follow-up care. This finding is supported by substantial evidence. *See, e.g.,* Jt. Exs. 105-110; Cl. Ex. 1. While these reports, standing alone, do not suffice as a motion for modification as they do not manifest an intent to seek compensation for a particular loss, *see Greathouse,* 146 F.3d 224, 32 BRBS 102(CRT)*; Pettus,* 73 F.3d 523, 30 BRBS 6(CRT), nonetheless, they are evidence of employer's awareness of claimant's condition in the period immediately prior to the cessation of benefits.

In sum, in view of the facts that claimant's 1993 motion for modification was never formally adjudicated, the benefits for the two disabling conditions were for about the same amount, there often was confusion as to which disability was being compensated, employer previously paid claimant benefits following back surgery, and employer was informed as to claimant's continuing back problems, including the surgery in 1997, we hold that the administrative law judge properly found that claimant timely requested modification within one year of the last payment of benefits. *See generally House v. Southern Stevedoring Co.*, 703 F.2d 87, 15 BRBS 114(CRT) (4th Cir. 1983).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge