

BRB No. 04-0237

GARY N. JOHNSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DEPARTMENT OF THE AIR FORCE	)	DATE ISSUED: <u>Oct. 29, 2004</u>
	)	
and	)	
	)	
AIR FORCE INSURANCE	)	
FUND	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Order of Dismissal of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Gary N. Johnson, Sacramento, California, *pro se*.

Kim M. Hoffman (Office of Legal Counsel, Air Force Services Agency), San Antonio, Texas, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Order of Dismissal (2003-LHC-1873) of Administrative Law Judge Alexander Karst 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), as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §1301 *et seq.* (OCSLA). In an appeal filed by a claimant without representation, 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). If they are, they must be affirmed.

Claimant alleged that he suffered a shoulder injury on May 20, 1966, while working as a cook for the United States Army at Fort Ord, California, and that this work injury is compensable under the OCSLA. Claimant filed his claim on April 25, 2003. *See* Attachment 8-4 to Emp. 2003 Motion for Summary Decision. On April 9, 2003, claimant had filed a motion for modification under Section 22 of the Act, 33 U.S.C. §922, of a denial of benefits for a different claim filed under the Nonappropriated Fund Instrumentalities Act (NFIA), 5 U.S.C. §8171 *et seq.* *See* Attachment 6 to Emp. 2003 Motion for Summary Decision.

With regard to the previously filed NFIA claim, claimant had alleged that he injured his head, right arm and shoulder, and right knee in a 1982 traffic accident while working as a welder at McClellan Air Force Base in California, and that he sustained cumulative traumas to his right shoulder in 1983, 1986, and 1987. Prior to his filing a NFIA claim, claimant had received awards under the Federal Employees' Compensation Act (FECA) for his right arm and knee injuries, and subsequently received a disability retirement from the federal government. Prior to the scheduled hearing date in the NFIA claim, employer filed a Motion for Summary Decision with the administrative law judge arguing that it was not liable for claimant's injuries under NFIA since claimant was not paid out of nonappropriated funds and was limited to a recovery under FECA. Administrative Law Judge Stewart agreed with employer, granted its motion for summary decision, and denied benefits. *See* Attachments 1 and 2 to Emp. 2003 Motion for Summary Decision. The Board affirmed Judge Stewart's Order Granting Summary Decision and Order Denying Motion for Reconsideration of the NFIA claim. *Johnson v. Air Force Ins. Fund*, BRB No. 00-0542 (May 4, 2000)(unpub.); *see also* Attachments 3 and 4 to Emp. 2003 Motion for Summary Decision. The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, subsequently affirmed the Board's decision. *Johnson v. Director, OWCP*, No. 00-71036 (9<sup>th</sup> Cir. Sept. 21, 2001); *see also* Attachment 5 to Emp. 2003 Motion for Summary Decision.

Prior to the scheduled hearing date in the instant case, employer filed a Motion for Summary Decision. Employer argued that the administrative law judge lacked jurisdiction to consider claimant's April 9, 2003, motion for modification because Judge Stewart's orders were final; that Judge Stewart did not make a mistake in a determination of fact, or if he did, that it was harmless; that claimant never had an employer/employee relationship with the Air Force but instead alleged such relationship with the United States Army; that claimant's 2003 OCSLA claim was untimely with respect to his alleged injury on May 20, 1966; that no jurisdiction exists with respect to it as it is not covered under OCSLA; and that claimant does not meet either the situs or status test of OCSLA. Employer requested that the administrative law judge dismiss the case, deny all benefits sought, and cancel the formal hearing.

The administrative law judge granted employer's Motion for Summary Decision, treating it as a Motion to Dismiss. *See* Order of Dismissal at 2. The administrative law judge held that claimant did not establish his right to coverage under OCSLA as he did not satisfy

its status and situs tests. Claimant had not alleged an injury occurring on the outer continental shelf and was excluded from coverage under OCSLA as an active duty member of the United States Army in 1966 or as a civilian employee of the United States Air Force. Moreover, the administrative law judge found that claimant's 2003 motion for modification was untimely since it was filed more than one year after Judge Stewart's orders became final on September 21, 2001, when the Ninth Circuit affirmed the denial of benefits. Consequently, the administrative law judge dismissed claimant's claim and found moot claimant's request for consolidation.<sup>1</sup>

On appeal, claimant challenges the administrative law judge's dismissal of his claims. Employer responds in support of the administrative law judge's order of dismissal.

Upon consideration of the record, employer's briefs, and the submissions by claimant, we affirm the administrative law judge's Order of Dismissal as it is rational, supported by substantial evidence, and in accordance with law. The administrative law judge properly dismissed this case and granted employer's motion for summary decision both because no genuine issue of material fact existed which could establish coverage under OCSLA and claimant's motion for modification was untimely. *See Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11<sup>th</sup> Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Buck v. General Dynamics Corp.*, 37 BRBS 53 (2003). The administrative law judge's finding that claimant did not meet the status test of OCSLA is in accordance with law because claimant alleged that he was an active duty member of the United States Army or a civilian in the Air Force at the time of the alleged work-related injuries, and the OCSLA specifically excludes from coverage any officer or employee of the United States. *See* 43 U.S.C. §1333(b)(1); Order of Dismissal at 2; Attachment 8-4 to Emp. 2003 Motion for Summary Decision. Moreover, the administrative law judge's finding that claimant did not meet the situs test of OCSLA is in accordance with law since claimant alleged that the work injuries occurred on military bases and not on the outer continental shelf. *Kirkpatrick v. B.B.I., Inc.*, 38 BRBS 27 (2004); *Martin v. Pride Offshore, Inc.*, 34 BRBS 192 (2001); Order of Dismissal at 2; Attachment 8-4 to Emp. 2003 Motion for Summary Decision.

The administrative law judge's finding that claimant's motion for modification was

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<sup>1</sup>Claimant had attempted to consolidate his claims filed under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. §4301 *et seq.*, the Veterans Employment Opportunities Act of 1998 (VEOA), 5 U.S.C. §2101 *et seq.*, and the Whistleblower Protection Act of 1989 (WPA), 5 U.S.C. §1201 *et seq.*, and with the Office of Special Counsel (OSC), and the Office of Administration (OA). Employer had opposed claimant's request for consolidation. The administrative law judge noted that there was no authority to consolidate claimant's claims filed under other statutes before other agencies with claims filed under the Longshore Act and its extensions.

untimely filed also is in accordance with law inasmuch as a motion for modification must be filed no later than one year after the final rejection of the claim.<sup>2</sup> *See Alexander v. Avondale Indus., Inc.*, 36 BRBS 142 (2002); *Moore v. Virginia Int'l Terminals, Inc.*, 35 BRBS 28 (2001); *Black v. Bethlehem Steel Corp.*, 16 BRBS 138, 142 n. 7 (1984), *appeal dismissed*, 760 F.2d 274 (9<sup>th</sup> Cir. 1985)(table); Order of Dismissal at 2; Attachment 6 to Emp. 2003 Motion for Summary Decision. Lastly, the administrative law judge properly found that neither the Act nor the regulations provides a basis for consolidating claims filed under different federal statutes with claims under extensions of the Longshore Act. *See* Order of Dismissal at 2.

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<sup>2</sup>In this case, that date would have been one year after September 21, 2001, when the court of appeals decision was issued. However, claimant did not file his request for modification until April 9, 2003.

Accordingly, the administrative law judge's Order of Dismissal is affirmed.<sup>3</sup>

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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<sup>3</sup>Claimant's letters to the Board dated December 12 and 29, 2003, contain evidence regarding claimant's 1966 and 1982 injuries as well as his Veteran's Administration denial of benefits on September 6, 1997. This evidence is not contained in the record and therefore the Board cannot consider it. 33 U.S.C. §921(b)(3); *Williams v. Hunt Shipyards, Geosource, Inc.*, 17 BRBS 32 (1985). Even if this evidence were considered, it does not aid claimant in establishing entitlement to benefits under his OCSLA claim as claimant cannot meet its requisite situs and status tests. Nor can this evidence help claimant in his modification request of his previous NFIA claim as it is time-barred. *See discussion, infra.*