



BRB No. 19-0514

RANDALL HARPER)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
TEMCO, LLC)	DATE ISSUED: 04/08/2020
)	
and)	
)	
SIGNAL MUTUAL INDEMNITY)	
ASSOCIATION, LIMITED)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Order Denying Reconsideration of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz (Law Office of Charles Robinowitz), Portland, Oregon, for claimant.

James M. Babcock (Babcock Holloway Caldwell & Stires), Lake Oswego, Oregon, for employer/carrier.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Denying Reconsideration (2015-LHC-01365) of Administrative Law Judge Richard M. Clark rendered on a petition for an attorney’s fee filed pursuant to the Longshore and Harbor Workers’ Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We review the administrative law judge’s Order Denying

Reconsideration for abuse of discretion and compliance with law. *See, e.g., Duran v. Interport Maint. Corp.*, 27 BRBS 8 (1993).

Claimant sustained work-related injuries to his head, neck, back, hearing and vision on February 5, 2014, prompting him to file a claim for benefits under the Act. On April 2, 2018, the parties entered into a settlement agreement pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i). The administrative law judge approved the settlement and set the briefing schedule for claimant's counsel's attorney's fee petition and responses thereto. In his Attorney Fee Order dated June 20, 2019, the administrative law judge awarded claimant's counsel an attorney's fee totaling \$58,549.01, payable by employer. The district director filed and served the Attorney Fee Order on June 24, 2019.

Claimant mailed his motion for reconsideration of the Attorney Fee Order on July 5, 2019; it was received by the Office of Administrative Law Judges (OALJ) on July 9, 2019. Employer challenged claimant's motion as both untimely and without merit. The administrative law judge denied claimant's motion for reconsideration as untimely filed because the OALJ received it more than 10 days after the district director filed the Attorney Fee Order. Citing a general OALJ Rule at 29 C.F.R. §18.30, which states that a "paper is filed when received,"¹ the administrative law judge held that claimant's motion should have been received by the OALJ on July 5, 2019, not July 9, 2019.

On appeal, claimant challenges the administrative law judge's denial of his motion for reconsideration as untimely. Employer responds, urging affirmance of the administrative law judge's denial. Employer also filed as supplemental authority the recent decision by the United States Court of Appeals for the Ninth Circuit in *Zumwalt v. National Steel & Shipbuilding Co.*, ___ F. App'x ___, No. 18-72257, 2019 WL 6999492 (9th Cir. Dec. 20, 2019), *aff'g* 52 BRBS 17 (2018) (en banc), which we accept. 20 C.F.R. §802.215. Claimant responds that *Zumwalt* supports his position.

Claimant contends the administrative law judge's finding that his motion for reconsideration was untimely is legally incorrect. Citing the Board's decision in *Zumwalt*, 52 BRBS 17, claimant maintains the "governing regulation" applicable to this case, 20 C.F.R. §802.206(c), establishes that the mailing date of July 5, 2019, rather than the delivery date of July 9, 2019, determines the timeliness of his motion for reconsideration. We agree.

¹ 29 C.F.R. §18.30(b)(2) states:

Filing: when made - in general. A paper is filed when received by the docket clerk or the judge during a hearing.

A timely motion for reconsideration is one that is filed not later than ten days from the date the district director files the administrative law judge's decision. 20 C.F.R. §802.206(b)(1); *see Zumwalt*, 52 BRBS at 20-21. In *Zumwalt*, the Board held the period for filing a motion for reconsideration with an administrative law judge is determined by Section 802.206(b)(1) because it is a governing program regulation that takes precedence over the general OALJ Rule at 29 C.F.R. §18.93. *See* 29 C.F.R. §18.10(a).² *Id.* The Board thus held the claimant's motion for reconsideration of the administrative law judge's decision, submitted by fax thirteen calendar days after the decision was filed in the district director's office, was untimely. *Id.* The Ninth Circuit affirmed the Board's decision because "Board regulations, including 20 C.F.R. § 802.206, govern the deadline to file a reconsideration motion" *Zumwalt*, 2019 WL 6999492 at *2.

² 20 C.F.R. §802.206(b)(1) states:

In a case involving a claim filed under the Longshore and Harbor Workers' Compensation Act or its extensions (see § 802.101(b)(1)-(5)), a timely motion for reconsideration for purposes of paragraph (a) of this section is one which is filed not later than 10 days from the date the decision or order was filed in the Office of the [District Director].

Section 18.10(a) of the OALJ Rules states:

In general. These rules govern the procedure in proceedings before the United States Department of Labor, Office of Administrative Law Judges. They should be construed and administered to secure the just, speedy, and inexpensive determination of every proceeding. ***To the extent that these rules may be inconsistent with a governing statute, regulation, or executive order, the latter controls. If a specific Department of Labor regulation governs a proceeding, the provisions of that regulation apply, and these rules apply to situations not addressed in the governing regulation.*** The Federal Rules of Civil Procedure (FRCP) apply in any situation not provided for or controlled by these rules, or a governing statute, regulation, or executive order.

29 C.F.R. §18.10(a) (emphasis added). 29 C.F.R. §18.93 addresses motions for reconsideration to OALJ in cases in which there are not specific program provisions, and provides a period of ten days "after service of the decision on the moving party."

In this case, the administrative law judge found the district director filed and served the Attorney Fee Order on June 24, 2019. Counting from June 25, 2019, the day after the event that triggered the time period, the administrative law judge found that under the program-specific regulation at Section 802.206(b)(1) the tenth day fell on July 4, 2019, a legal holiday. He therefore found Friday, July 5, 2019, was the due date. Order Denying Recon. at 2. The administrative law judge then applied the general OALJ Rule, 29 C.F.R. §18.30(b)(2), which sets the date of receipt as the date of filing. *See* n.1, *supra*. Because claimant's motion was not received by the OALJ until July 9, 2019, he denied it as untimely.

The administrative law judge, however, did not discuss Section 802.206(c). This regulation states in pertinent part:

If the motion for reconsideration [to the OALJ] is sent by mail and the fixing of the date of delivery as the date of filing would result in a loss or impairment of reconsideration rights, it will be considered to have been filed as of the date of mailing.

20 C.F.R. §802.206(c). Pursuant to the Board's holding in *Zumwalt* that its regulation at 20 C.F.R. §802.206(b)(1) governs the filing of motions for reconsideration with the OALJ, Section 802.206(c) is equally applicable to determining whether a motion for reconsideration, sent by mail, was timely filed. This regulation, too, is a Longshore Act-specific rule that takes precedence over the general OALJ regulation at 29 C.F.R. §18.30(b)(2). *Zumwalt*, 52 BRBS at 20; 29 C.F.R. §18.10.

Section 802.206(c), at issue in the present appeal, addresses filings by mail. It was not discussed by the Board in *Zumwalt* because in that case the claimant filed his motion for reconsideration with the OALJ by fax, not by mail. Nevertheless, as discussed, the Board's holding in *Zumwalt* that Section 802.206(b)(1) controls the deadline for filing a motion for reconsideration dictates that Section 802.206(c) applies in the present claim.

As it is undisputed claimant mailed his motion for reconsideration to the OALJ on Friday, July 5, 2019, it was, by application of Section 802.206(c), filed in a timely manner. We, therefore, reverse the denial of claimant's motion for reconsideration as untimely and remand the case for the administrative law judge to address the issues raised in claimant's motion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge