BRB No. 91-1697

ROBERT RYAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LANE AND COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
EMPLOYERS NATIONAL INSURANCE	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Motion for Modification of A. A. Simpson, Jr., Administrative Law Judge, United States Department of Labor.

Thomas W. Thorne, Jr. (Lemle & Kelleher), New Orleans, Louisiana, for employer/carrier.

Samuel J. Oshinsky (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Denying Motion for Modification (90-LHC-2934) of Administrative Law Judge A. A. Simpson 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 back injury on August 20, 1974. By Decision and Order filed August 15, 1986, Administrative Law Judge McColgin ordered employer to pay claimant temporary total disability benefits from August 20, 1974 until May 27, 1977, and permanent total disability benefits thereafter. The administrative law judge also indicated that claimant was entitled to annual cost of living adjustments on the award of permanent total disability compensation pursuant to Section 10(f) of the Act, 33 U.S.C. §910(f), consistent with *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981). In *Holliday*, the United States Court of Appeals for the Fifth Circuit held that claimants, upon becoming permanently totally disabled, are entitled to an increase in payments reflecting cost-of-living adjustments that accrued during any period of temporary disability. The administrative law judge also awarded employer Section 8(f), 33 U.S.C. §908(f), relief from continuing compensation liability. The administrative law judge's Decision and Order was not appealed and accordingly became final 30 days after its August 1986 filing. *See Yalowchuk v. General Dynamics Corp.*, 17 BRBS 131 (1985).

Subsequently, in *Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 23 BRBS 36 (CRT)(5th Cir. 1990)(*en banc),* the Fifth Circuit overruled its decision in *Holliday* and held that claimants are not entitled to Section 10(f) adjustments during previous periods of temporary total disability. Employer accordingly sought an "adjustment" of claimant's prospective benefits award based on *Phillips* before the district director.

Characterizing employer's request to adjust claimant's benefits as a motion for modification, the district director denied the request, indicating that modification cannot be granted based on a change in law. *See* 33 U.S.C. §922. The district director also informed the carrier that all new orders issued after March 7, 1990, the date *Phillips* was issued, would be calculated in accordance with that decision, but that previous orders would not be disturbed.

Thereafter, the matter was referred to the Office of Administrative Law Judges. Employer filed a brief with Administrative Law Judge Simpson in which it argued that, as it was only seeking prospective application of *Phillips*, it was not seeking modification. The Director, Office of Workers' Compensation Programs (the Director), filed a Motion to Dismiss, in which it characterized employer's action as an impermissible request for modification based on a change in law. In two subsequent letters to the administrative law judge, employer responded that modification would be appropriate, as a change in law also represented a change in condition, or alternatively, that since the benefits involved are adjusted annually, the adjustments presented a mixed question of fact and law.

In a Decision and Order Denying Motion for Modification, Administrative Law Judge Simpson rejected employer's argument that its request to recalculate claimant's benefits did not constitute a request for modification under Section 22, indicating that he could find no authority to support employer's theory. The administrative law judge interpreted *Phillips* as being applicable to those claimants whose cases are properly pending and not to those whose claims are, as the instant case, the subject of a final compensation order. The administrative law judge reasoned that since Administrative Law Judge McColgin's decision has become final, the only method to reopen the award is by way of a modification proceeding. As employer was not seeking modification based on a mistake in fact or change in condition, but rather based on a change in law, the administrative law judge determined that no valid basis exists for modification and that the need for finality in decision-making outweighs the interest of justice in reopening the case.

On appeal, employer reiterates the arguments it made below as to why its request for recalculation is not a request for modification. In addition, employer raises several additional arguments as to why it should be allowed to recalculate claimant's benefits pursuant to the *Phillips* decision. The Director responds, arguing essentially that as Administrative Law Judge McColgin's decision in this case has become final, Administrative Law Judge Simpson properly determined that the award could not be reopened pursuant to Section 22 based on a change in law.

Initially, we reject employer's argument that *Phillips* mandates that its holding be retroactively applied to the present case. Employer cites the following passage from *Phillips* in support of its position:

> Thus, we direct that as to Phillips and other claimants in this circuit, future payments may be adjusted to the amount that would have been calculated absent the *Holliday* formula, although no refund of past excess payments made pursuant to *Holliday* shall be required. This treatment is fair especially in light of the fact that the excess payments in accordance with *Holliday* resulted from the Director's own position, now repudiated, as presented in *Holliday*.

Phillips, 895 F.2d at 1036, 23 BRBS at 39 (CRT). In denying modification, Judge Simpson reasonably inferred that the reference to "other claimants in this circuit" contained in this passage refers to those claimants whose cases are properly pending, and not those whose claims are, as in the instant case, the subject of a final compensation order. As the Director asserts, moreover, retroactive application of *Phillips* to this case would be contrary to the United States Supreme Court's decision in *Pittston Coal Group v. Sebben*, 488 U.S. 105, 12 BLR 2-89 (1988). In *Sebben*, the Supreme Court held that while the Secretary of Labor applied an incorrect legal standard in adjudicating black lung claims, it would not order the readjudication of claims decided under the erroneous standards where the cases had already become final by reason of the claimants' failure to pursue administrative remedies or appeals to the courts within the prescribed time. As the administrative law judge's determination that *Phillips* should not be retroactively applied is in accordance with law, it is affirmed.

We also reject employer's argument that its request for recalculation of claimant's benefits was not a request for modification. Inasmuch as Judge McColgin's award of benefits is final, Judge Simpson properly determined that employer's sole means of re-opening the award is by way of a modification proceeding under Section 22.[1] Section 22 permits modification based on a mistake in fact in the initial decision or a change in condition. *Swain v. Todd Shipyards Corp.*, 17 BRBS 124, 125-126 (1985). Employer, however, has not raised any mistake in fact or change in condition with regard to the initial award of benefits, including the Section 10(f) adjustments. Rather, employer seeks to reopen the case based on the Fifth Circuit's subsequent legal interpretation of Section 10(f) of the Act. Section 22 does not apply to an issue involving legal interpretation which is decided against a party; legal issues must be timely appealed under Section 21 of the Act, 33 U.S.C. §921. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *Maples v. Marine Disposal Co.*, 16 BRBS 241 (1984). As reopening the case under Section 22 in order to permit employer to present a new theory of the case once it discovers a subsequent decision which may be favorable to its position does not serve the orderly administration of justice which depends in part upon finality of judicial determinations, the administrative law judge's determination that no valid basis exists for granting modification in this case is affirmed. *General Dynamics Corp. v. Director, OWCP*, 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982); *see also Sebben*, 488 U.S. at 105, 12 BLR at 2-89.

Although employer also contends that balancing the equities in the instant case mandates that the normal rule for refusing to allow modification based on a change in law be set aside, we disagree. Even assuming that equitable concerns could provide a legal basis for modification, in the present case the administrative law judge weighed the need to render justice against the need for finality and, acting within his discretion, reasonably concluded that the equities weighted in favor of finality. *See generally McDonald v. Director, OWCP*, 897 F.2d 1510, 23 BRBS 56 (CRT)(9th Cir. 1990).

[1]Employer contends that this case does not involve a final award for purposes of modification, as the payments thereunder are subject to annual increases. No one disputes that the request for relief under Section 22, 33 U.S.C. §922, is timely as payments are being made; the issue is whether proper grounds for modification are present. The fact that annual increases occur is not relevant to this issue, as these increases are automatic under the statute. Moreover, employer does not challenge the annual future adjustments, but the increase in benefits resulting from the inclusion of Section 10(f) adjustments accruing during claimant's temporary total disability from 1974 to 1977 in his compensation rate when he became permanently disabled in 1977.

Employer's remaining arguments are similarly without merit. Employer asserts that the Director, having misinformed the Fifth Circuit into adopting *Holliday*, should be estopped from opposing employer and perpetrating that error. The Director, however, is not asking the Board to perpetrate *Holliday*, but is only asserting that no valid basis exists for reopening the case on the facts presented. Although employer also cites *Bowen v. Director, OWCP*, 912 F.2d 348, 24 BRBS 9 (CRT)(9th Cir. 1990), for the proposition that benefits can be recalculated, *Bowen* is distinguishable from the present case because the award of benefits in *Bowen* had not become final. Finally, employer asserts that in opposing its motion, the Director is taking a position contrary to the interests of the Special Fund. This fact, however, is not determinative, as it is the Director's duty to fairly and impartially execute and administer the Act. *See generally* 20 C.F.R. §802.201.[2] We therefore reject employer's arguments and affirm the administrative law judge's denial of modification in the present case.

Accordingly, the administrative law judge's Decision and Order Denying Motion for Modification is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[2]Employer also asserts that different compensation districts are applying *Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 23 BRBS 36 (CRT)(5th Cir. 1990)(*en banc)* inconsistently, and attaches an administrative law judge's order in which *Phillips* was retroactively applied. Such orders, however lack any precedential value, and the rationale set forth by the administrative law judge here is compelling.