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| LEONARD LASSITER |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| NEWPORT NEWS SHIPBUILDING AND |) | DATE ISSUED: <u>APR 26, 2005</u> |
| DRY DOCK COMPANY |) | |
| |) | |
| Self-Insured |) | |
| Employer-Respondent |) | DECISION and ORDER |

Appeal of the Decision and Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna Klein Camden L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2003-LHC-1313) 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained work-related bilateral carpal tunnel syndrome. On August 20, 1999, the district director issued a compensation order awarding claimant temporary total disability benefits from July 29, 1998 to November 4, 1998, inclusive, and permanent partial disability benefits under the schedule for a three percent loss of each arm. CX 7. Employer's final payment of compensation occurred on September 27, 1999. EX 5.

On July 20, 2000, claimant wrote to the district director,

Claimant has noted a worsening of his condition, which is now interfering with his working. He requests compensation for additional permanent partial disability in addition to what he has been previously awarded and for temporary total disability which will be due for the additional time he will now need to be out of work to undergo additional treatment.

CX 8. Claimant saw his physician, Dr. Davlin, on March 1, 2001, for the first time since the district director's compensation order was issued in 1999. At this time, claimant complained of right elbow pain of a "long standing period of time," CX 2-o, and Dr. Davlin issued a slip stating claimant should not do grinding work for one month. CX 3-a. On March 29, 2001, the light-duty restrictions were extended for one month. CX 3-c. Claimant underwent a lateral release of the elbow on May 30, 2001, EX 3, and was released to light-duty work on July 9, 2001. CX 2-r; CX 3-e. On November 29, 2001, Dr. Davlin stated claimant has an additional two percent impairment of the elbow and that claimant should avoid pneumatic equipment. CX 2-w; CX 5.

Claimant sought temporary total disability benefits for the period following his elbow surgery and additional permanent partial disability benefits for the increased arm impairment. Employer did not dispute the additional impairment rating, but contended that claimant's July 2000 letter was an anticipatory motion for modification pursuant to *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), and *Greathouse v. Newport News Shipbuilding & Dry Dock Co.*, 146 F.3d 224, 32 BRBS 102(CRT) (4th Cir. 1998), because claimant did not have any disability to claim at the time he filed for modification. Claimant testified at the hearing that he met with his attorney in July 2000 because his pain had increased and had "moved to my arm," even though he was provided work within his restrictions due to the carpal tunnel syndrome. Tr. at 11-12.

The administrative law judge found that claimant's July 2000 letter manifested an intent to seek additional compensation. However, because claimant did not seek medical treatment until many months after the letter was filed and there were no "objective" findings of increased disability at that time, the administrative law judge found that the filing was anticipatory in nature. Thus, the administrative law judge denied claimant's claim for additional benefits. Claimant appeals, and employer responds, urging affirmance.

On appeal, claimant contends that his timely request for modification referenced claimant's worsening condition and sought identifiable benefits; therefore, claimant contends his claim for modification is "valid." Claimant further contends that since his

initial motion for modification was valid and unadjudicated, his later claim for additional temporary total disability benefits following surgery was viable. Employer responds that the administrative law judge properly found claimant's letter to be anticipatory because it made no reference to an extant disability.

Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing otherwise final decisions; modification pursuant to this section is permitted based on a mistake of fact in the initial decision or on a change in claimant's physical or economic condition. See *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). An application to reopen a claim need not meet any formal criteria. Rather, it need only be a writing such that a reasonable person would conclude that a modification request has been made. *Pettus*, 73 F.3d 523, 30 BRBS 6(CRT); *Fireman's Fund Ins. Co. v. Bergeron*, 493 F.2d 545 (5th Cir. 1974). The Fourth Circuit, within whose jurisdiction this case arises, has stated that the modification application "must manifest an *actual* intention to seek compensation for a particular loss, and filings anticipating future losses are not sufficient to initiate § 922 review." *Greathouse*, 146 F.3d at 226, 32 BRBS at 103(CRT) (emphasis in original). In this regard, the motion should reference a change in condition, a mistake in fact in an earlier decision, additional evidence concerning claimant's disability, or dissatisfaction with earlier decisions. *Pettus*, 73 F.3d at 527, 30 BRBS at 9(CRT); see also *Meekins v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 5 (2000), *aff'd mem.*, 238 F.3d 413 (4th Cir. 2000) (table). The Fourth Circuit has further explained that the validity of a motion for modification must come from the "content and context of the [request for modification] itself. . . ." *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 181 (4th Cir. 1999); see, e.g., *Porter v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 113 (2002); *Jones v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 105 (2002).

We must remand this case for reconsideration, as the administrative law judge did not discuss all of the pertinent law or fully discuss the relevant standard, which requires analysis of the "content and context" of claimant's filing in order to determine whether it manifests the requisite intent to seek compensation for a specific loss. In this regard, the Board recently addressed an administrative law judge's consideration of a similar request in *Bailey v. Newport News Shipbuilding & Dry Dock Co.*, ___ BRBS ___, BRB No. 04-0603 (March 30, 2005), which further discusses the issue of "valid" motions for modification. On remand the administrative law judge must address the case law discussed herein and the relevant facts in order to determine the validity of claimant's motion.

In *Pettus* and *Meekins*, the letters that were held insufficient to constitute motions for modification essentially sought "any and all" benefits to which the claimants might be entitled. The letters did not reference any specific disability or worsening of the claimants' conditions since, or a mistake in fact in, the prior decisions. *Pettus*, 73 F.3d at

527, 30 BRBS at 9(CRT); *Meekins*, 34 BRBS at 6, 8. Moreover, in these two cases, the letters purportedly seeking modification were filed prior to the time that the claimants alleged they actually sustained an additional period of disability. Finally, in *Meekins*, claimant specifically requested in his letter that the district director not schedule an informal conference. Thus, the “context” of the letter as well as its content demonstrated claimant lacked the present intent to pursue a claim.

In this case, the administrative law judge rather summarily concluded that the instant case is most like *Meekins*, because “there were no objective findings of increased disability” when the document was filed. The decisions in *Pettus* and *Meekins*, however, do not turn on the existence of objective findings, but rather on whether claimant demonstrated an actual intent to seek compensation based on the circumstances surrounding each filing as well as on its content. Moreover, more recent decisions provide further guidance on this issue.

In *Gilliam v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 69 (2001), within one year of a denial of benefits, the claimant wrote to the district director:

Kindly accept this letter as a request for modification in the decision previously filed in the Office of the District Director on January 31, 1997. Mr. Gilliam believes his condition has deteriorated and that he is now further disabled. He has been back to see Dr. Byrd since the administrative law judge’s decision. Apparently it is now being considered that Mr. Gilliam may need further surgery. In light of this change in medical circumstances, claimant now requests compensation for additional temporary total disability as of the date he needs surgery and for permanent partial disability as of the current date and continuing.

Gilliam, 35 BRBS at 74. The Board held that this request for modification was “valid” pursuant to *Pettus* because it showed a clear intent to seek modification for a deteriorating condition, it made a claim for a specific type of benefits, and it referenced a specific period for which claimant sought permanent partial disability benefits. *Id.*;¹ see also *Gillus v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 93 (2003), *aff’d mem.*, 84 Fed.Appx. 333 (4th Cir. 2004); *Jones*, 36 BRBS at 108-109 (motions for modification seeking *de minimis* award are not anticipatory, as such compensates a current disability nominal in extent, and as claimants referenced a deteriorating condition;

¹ The Board also held in *Gilliam* that because the claimant’s claim for present permanent partial disability benefits was a valid motion for modification, which remained open and unadjudicated at the time of the later request for temporary total disability benefits, the later request also was timely. *Gilliam*, 35 BRBS at 74.

where claimant's motion requesting this award was pending, subsequent request for additional benefits was timely).

In *Bailey*, the claimant, within one year of the last payment of benefits, wrote to the district director,

Please consider this correspondence the claimant's request for permanent partial disability benefits. She will be scheduling an appointment to meet with Dr. Gilbert for this purpose and I will forward the medical report to your attention upon receipt.

The claimant, however, did not see the doctor until eleven months later, at which time claimant received an additional five percent impairment rating to her arm. The administrative law judge found that claimant's motion for modification was "valid," and the Board affirmed. *Bailey*, slip op. at 6-8. Unlike *Pettus* and *Meekins*, wherein the claimants sought "any and all benefits to which they might be entitled," claimant *Bailey* specified that she sought permanent partial disability benefits. The administrative law judge further reasoned that because the claimant's injury was to her hands, and she referenced an impairment rating, her request was for scheduled permanent partial disability benefits. In addressing the time gap between the modification request and the claimant's obtaining an impairment rating, the Board held that the administrative law judge rationally relied on the parties' stipulation that the claimant's condition reached maximum medical improvement on a date before she sought modification, inasmuch as a scheduled permanent partial disability award runs from the date of maximum medical improvement. *Bailey*, slip op. at 6-7. Thus, the administrative law judge found the case to be most like *Gilliam*, wherein the claimant requested, *inter alia*, current permanent partial disability benefits.

In affirming, the Board observed that in *Bailey*, as in *Gilliam*, the letter seeking modification did not attempt to quantify the extent of the claimant's permanent partial disability, which in *Gilliam* was an alleged loss in wage-earning capacity pursuant to Section 8(c)(21), (h), 33 U.S.C. §908(c)(21), (h). The Board stated that "*Pettus* requires that the claimant seek compensation for a 'particular loss,' . . . [but] the court did not require that the full extent of that loss be quantified in the pleading." *Bailey*, slip op. at 7-8. In this regard, the Board relied on the holdings in *Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003), *aff'g Craig v. Avondale Industries, Inc.*, 35 BRBS 164 (2001) (*en banc*), *aff'd on reconsideration en banc*, 36 BRBS 65 (2002), wherein the Board and the Fifth Circuit held that a claim for hearing loss need not be accompanied by an interpreted audiogram in order to trigger employer's duty to pay benefits for purposes of avoiding fee liability under Section 28(a), 33 U.S.C. §928(a). Rather, the Fifth Circuit held that merely filing a claim form, LS-203, is sufficient to

constitute a validly filed claim.² *Avondale Industries*, 355 F.3d at 852, 37 BRBS at 118(CRT), *citing Bergeron*, 493 F.2d 545. Thus, in the instant case, the fact that claimant's modification request did not contain "objective findings of increased disability" is not dispositive of the validity of claimant's motion if the motion otherwise references a change in condition, a mistake in fact in an earlier decision, additional evidence concerning claimant's disability, or dissatisfaction with earlier decisions. *Bailey*, slip op. at 8 .

Inasmuch as the administrative law judge did not discuss the Board's decision in *Gilliam*, and in light of the Board's recent decision in *Bailey*, we vacate the administrative law judge's denial of claimant's claim for modification. On remand, the administrative law judge should fully analyze the validity of claimant's motion for modification in light of all relevant case law.

² An LS-203 claim form states only, "I hereby make claim for compensation benefits, monetary and medical, under the [Act]." There is no requirement in the Act or its regulations that claimant submit evidence at the time he files his claim. *See* 33 U.S.C. §§913, 914; 20 C.F.R. §702.221. Generally, the issue of what constitutes a valid filing is analyzed the same whether the case arises under Section 13 or under Section 22. *See, e.g., Bergeron*, 493 F.2d 545 (discussing the sufficiency of various filings); *see also Pettus*, 73 F.3d at 528 n.3, 30 BRBS at 10 n.3(CRT).

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated, and the case is remanded for reconsideration consistent with this decision.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge