BRB No. 06-0392

BARBARA ANDERSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: 01/31/2007
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Lorraine B. D'Angelo (Rutter Mills, L.L.P.), Norfolk, Virginia, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order (2005-LHC-1662) of Administrative Law Judge Larry W. Price 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 which 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, a material supply clerk, suffered an injury to her leg when she slipped and fell while getting on a forklift on August 6, 1994, and subsequently underwent several surgeries. By Order dated February 28, 2002, based on the parties' stipulations, the district director awarded claimant compensation for temporary total disability for the periods of November 11, 1995, to January 18, 1996, and from November 1, 2000, to

January 8, 2001, as well as a schedule award for a five percent impairment to her left lower extremity. EX 13. Employer paid all benefits due on March 5, 2002. On March 8, 2002, claimant's attorney sent a letter to the district director requesting modification under Section 22, 33 U.S.C. §922, but stating that claimant was not requesting an informal conference or formal hearing at that time. EX 9. Claimant underwent additional surgery on February 21, 2002, and June 23, 2005, and she alleged periods of disability from February 21, 2002, to March 5, 2002, and from June 23, 2005, to June 27, 2005. EX 1. On May 10, 2005, claimant requested a formal hearing, seeking compensation for these two additional periods of disability as well as an increase in her permanent disability rating to 15 percent of her left leg. CX 4.

In his Decision and Order, the administrative law judge found that claimant's March 2002 letter to the district director was an anticipatory request for modification based on the "content and context" of the letter. Thus, he found it was not a "valid" motion for modification and did not serve to hold open the claim until 2005 when claimant claimed additional compensation. Accordingly, he denied additional benefits.

Claimant appeals, contending that the administrative law judge erred in finding that she did not file a valid, timely motion for modification. Employer responds, urging affirmance.

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 to re-open 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. *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.), *cert. denied*, 519 U.S. 807 (1996). In order to determine whether a filing constitutes a valid motion for modification manifesting an actual intent to pursue a claim for benefits, the administrative law judge must consider both the content of the filing and the context in which it was filed. *Jones v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 105, 110 (2002), *citing Consolidation Coal Co. v. Borda*, 171 F.2d 175 (4th Cir. 1999).

In the instant case, employer's last payment of compensation was on March 5, 2002. On March 8, 2002, claimant's counsel sent a letter to the district director requesting modification. The letter stated:

> Enclosed is [sic] an original and two copies of the LS-203 for the above-captioned matter. An Order was entered in this matter on February 28, 2002. Please consider this claimant's request for a Section 22 modification

> in that the claimant continues under a disability in regards to this injury and cannot perform his [sic] pre-injury duties. He [sic] anticipates additional loss likely in the future and requests an entry of a *de minimis* award consistent with the decision in *Rambo I.* Claimant does not request an informal conference or formal hearing at this time.

EX 9. The administrative law judge found that this letter did not constitute a valid motion for modification under the case precedent of the Fourth Circuit and Board. For the reasons that follow, we vacate the administrative law judge's finding that claimant's March 2002 letter is not a valid motion for modification, and we remand the case for further findings.

The Fourth Circuit has stated that an application for modification "must manifest an *actual* intention to seek compensation for a particular loss and filings anticipating future losses are not sufficient to initiate §22 review." *Greathouse,* 146 F.3d at 226, 32 BRBS at 103(CRT) (emphasis in original). A motion for modification should reference a change in condition, a mistake in fact, additional evidence concerning claimant's disability or dissatisfaction with an earlier decision. *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). Thus, the validity of a motion for modification must come from the "content and context of the [request for modification] itself…." *Borda,* 171 F.3d at 181; *see, e.g., Porter v. Newport News Shipbuilding & Dry Dock Co.,* 36 BRBS 113 (2002); *Jones,* 36 BRBS 105.

In reviewing the content of the March 2002 letter, the administrative law judge observed that claimant did not desire the scheduling of an informal conference or formal hearing. Such a statement, in conjunction with other relevant facts, may support a finding that a claimant does not intend to pursue a present claim for compensation and that the filing is merely anticipatory. *See Kea v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 113 (2006); *Porter*, 36 BRBS at 117-118; *Meekins*, 34 BRBS at 8-9. The administrative law judge also noted that the letter did not specify a mistake in fact or a change in condition and did not reference additional evidence concerning claimant's disability. In reviewing the context in which the letter was filed, the administrative law judge noted that it was filed mere days after the entry of the prior order and payment, *see Porter,* 36 BRBS at 117, and requested a type of benefits, a nominal award, to which claimant arguably would not be entitled, as a claimant with a scheduled permanent partial disability is not eligible for an award premised on Section 8(h), 33 U.S.C. §908(h). *Porter*, 36 BRBS at 118. *But see Gillus v. Newport News Shipbuilding & Dry Dock Co.,* 37 BRBS 93 (2003), *aff'd mem.,* 84 Fed.Appx. 333 (4th Cir. 2004) (claimant with injury to scheduled member may receive a *de minimis* temporary partial disability award pursuant to Section 8(e), which is premised on Section 8(h)).

The administrative law judge, however, did not discuss the LS-203 claim form dated March 8, 2002, that claimant attached to the letter. On this form, claimant checked the box "yes" to the question: "Are you still disabled on account of this injury." CX 5. In addition, the administrative law judge did not discuss the fact that claimant had undergone additional surgery on February 21, 2002, just before the district director issued the compensation order on February 28, 2002, based on the parties' stipulations concerning claimant's prior periods of disability. As claimant argued below and reiterates on appeal, the record contains contemporaneous medical evidence concerning claimant's surgery on February 21, 2002, and ensuing disability that was sent to both employer and to the Office of Workers' Compensation Programs. *See* EX 7 at 18-21. Because the administrative law judge did not address the claim form and medical evidence in combination with the March 8, 2002, letter, we vacate his finding that claimant's motion for modification was invalid, and we remand the case for further consideration of all the evidence in light of the whole body of law. *See Bailey v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 11 (2005); *Gilliam v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 69 (2001). On remand, the administrative law judge must determine if the contents of the filing, in the context in which it was filed, state a present claim for a disability in existence at the time it was filed. If, on remand, the administrative law judge determines that a valid petition for modification was filed on March 8, 2002, the claim was open and pending at the time claimant sustained the additional period of temporary total disability in 2005. As a claimant may amend a pending claim for modification, *Gilliam*, 35 BRBS at 74, the administrative law judge would then be required to address any other remaining issues raised by the parties.

Accordingly, the administrative law judge's Decision and Order is vacated and the case remanded for further consideration consistent with this opinion.

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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JUDITH S. BOGGS
Administrative Appeals Judge