BRB No. 06-0241

CHARLENE DAVIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIP SYSTEMS, INCORPORATED/ AVONDALE DIVISION	)	DATE ISSUED: 10/30/2006
	)	
	)	
Self-Insured Employer-Respondent	)	
	)	DECISION and ORDER

Appeal of the Order Granting Avondale's Motion to Dismiss Claimant's Motion for Modification and the Order Denying Claimant's Motion for Reconsideration of Motion for Summary Decision Finding Employer in Default of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Joseph G. Albe, Bay St. Louis, Mississippi, for claimant.

Richard S. Vale, Christopher K. LeMieux, Frank J. Towers, Corey M. Fitzpatrick, and Pamela F. Noya (Blue Williams, L.L.P.), Metairie, Louisiana, for self-insured employer.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Granting Avondale's Motion to Dismiss Claimant's Motion for Modification and the Order Denying Claimant's Motion for Reconsideration of Motion for Summary Decision Finding Employer in Default (2005-LHC-01015) of Administrative Law Judge Richard D. Mills 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 injured her back during the course of her employment in 1993. Employer voluntarily paid claimant temporary total disability benefits for various periods between 1993 and 1995 and again commencing in 1998. In the decision on the merits, the administrative law judge found that claimant's psychological condition is related to her work injury. He awarded claimant future medical benefits for psychiatric treatment and a combined total of $736.50 for a Section 14(e), 33 U.S.C. §914(e), assessment and interest. He denied claimant's claim for past medical benefits and continuing disability compensation, as he found that she did not have a loss in wage-earning capacity. This decision was dated March 9, 1999, and was filed by the district director on October 6, 1999. No party sought reconsideration, nor was the decision appealed.

Subsequently, the administrative law judge awarded claimant's counsel an attorney's fee of $15,500, payable by employer. Appeals and remand orders ensued. *Davis v. Avondale Industries, Inc.*, BRB Nos. 00-345/A (Dec. 8, 2000) (unpublished); *Davis v. Avondale Industries, Inc.*, BRB No. 01-0659 (May 7, 2002) (unpublished) (McGranery, J., dissenting); *Avondale Industries, Inc. v. Davis*, 348 F.3d 487, 37 BRBS 113(CRT) (5th Cir. 2003). The administrative law judge awarded claimant's counsel an attorney's fee of $16,300 after remand by the Fifth Circuit, in an Order issued on July 19, 2004. He awarded counsel a supplemental fee in an Order issued on September 7, 2004.

On December 17, 2004, claimant filed a motion for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, in which she requested compensation for temporary total disability from May 14, 1999, due to her work-related psychological condition. In his Order Granting Avondale's Motion to Dismiss Claimant's Motion for Modification, the administrative law judge found that claimant's motion was not timely inasmuch as it was filed more than one year after the decision denying benefits became final in 1999. Order at 3. The administrative law judge found that the subsequent appeals of the attorney's fee award did not toll the one-year limitations period under Section 22. The administrative law judge also rejected claimant's contention that the alleged manifestation in 1999 of an increased psychological disability should be treated as a new claim under Section 13 of the Act, 33 U.S.C. §913. The administrative law judge also denied claimant's motion to find employer in default under Section 18(a), 33 U.S.C. §918(a), regarding the award of medical benefits. Accordingly, the administrative law judge granted employer's motion to dismiss the claim, and he denied claimant's motion for summary decision on the issue of employer's alleged default.

Claimant filed a timely motion for reconsideration on the issue of employer's alleged default in payment of medical benefits. The administrative law judge found that the parties had reached an agreement regarding claimant's entitlement to mileage reimbursement for travel to her medical appointments. The administrative law judge found that claimant's treating psychiatrist, Dr. Anastasio, has not billed employer for claimant's treatment. Rather, he has instead been paid by Medicaid, and employer has

not received any invoices from Medicaid regarding payments. The administrative law judge found employer willing to provide medical benefits for claimant's psychological condition, and that, absent employer's having received bills, there is no dispute regarding unpaid medical treatment upon which to render a ruling. Accordingly, claimant's motion for reconsideration was denied.

On appeal, claimant challenges the administrative law judge's denial of her motion for modification, his finding that Section 13 does not apply to the claim for an alleged increased psychological disability, and his denial of her motion to find employer in default in payment of medical benefits pursuant to Section 18. Employer responds, urging affirmance of the administrative law judge's orders.

Section 13(a) of the Act, 33 U.S.C. §913(a), provides that a claim for benefits must be filed within one year of the time the claimant was aware, or should have been aware, of the relationship between her injury and her employment. The time for filing does not begin to run until the claimant is aware of the full impact of her injury, *i.e.*, when she learns of impairment to her wage-earning capacity. *Ceres Gulf, Inc. v. Director, OWCP [Fagan]*, 111 F.3d 17, 31 BRBS 21(CRT) (5th Cir. 1997); *Marathon Oil Co. v. Lunsford*, 733 F.2d 1139, 16 BRBS 100(CRT) (5th Cir. 1984). Where no final compensation order has been issued, the provisions of Section 13, rather than Section 22, are to be applied to a filing. *Intercounty Constr. Corp. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975); *Seguro v. Universal Maritime Service Corp.*, 36 BRBS 28 (2002). When a claim has been previously adjudicated, however, Section 22, and not Section 13, determines whether a later filing is timely. *Alexander v. Avondale Industries, Inc.*, 36 BRBS 142 (2002); *Moore v. Int'l Terminals, Inc.*, 35 BRBS 28 (2001). Relevant to this case, Section 22 requires a party to file a motion for modification within one year after the last payment of compensation or the rejection of a claim.[1] 33 U.S.C. §922; *Alexander*, 36 BRBS at 144-145.

[1] Section 22 states, in relevant part,

> Upon his own initiative, or upon the application of any party in interest . . . on the ground of a change in conditions or because of a mistake in a determination of fact by the [administrative law judge], the [administrative law judge] may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case . . . and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. . . .

We reject claimant's assertion that her written pleadings filed with the district director in 2004 constitute a new claim under Section 13. Claimant filed a timely claim for her 1993 work injury, and her claim alleging total disability based, in part, on her work-related psychological condition, was denied by the administrative law judge in a Decision and Order issued in 1999. Under the plain language of Section 22, the administrative law judge was authorized to review this case "at any time prior to one year after the rejection of the claim." 33 U.S.C. §922. As claimant did not allege a new injury, but based her assertion of a new claim only on a new period of total disability, the prior adjudication of her claim for her work injuries results in application of the limitations period of Section 22 rather than Section 13.[2] *See Alexander*, 36 BRBS at 145; *see also Greathouse v. Newport News Shipbuilding & Dry Dock Co.*, 146 F.3d 224, 32 BRBS 102(CRT) (4th Cir. 1998).

As the claim for benefits for claimant's injuries resulting from the 1993 work injury was adjudicated in 1999, and as claimant seeks additional benefits for the same condition addressed in that adjudication, her claim is governed by Section 22. Because benefits were denied in the decision issued in 1999, and claimant did not appeal the decision, the time for filing a motion for modification expired one year after the rejection of her claim became final. *See Alexander*, 36 BRBS at 146-147; *Moore*, 35 BRBS at 30-31. In this regard, we reject claimant's contention that the administrative law judge's 1999 decision did not become final until 30 days after the administrative law judge's decision awarding an attorney's fee after remand from the Fifth Circuit was issued on July 19, 2004. Section 22 states that a party may request modification "at any time prior to one year after the date of the last payment of compensation ... or at any time prior to one year after the rejection of a claim." 33 U.S.C. §922. An attorney's fee award is paid directly to the claimant's counsel, and is paid "in addition to the award of

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33 U.S.C. §922.

[2] Accordingly, we need not address claimant's contention that Section 13(c) applies to toll the time for filing a new claim alleging total disability from May 14, 1999.

compensation." 33 U.S.C. §928(a). Therefore, an attorney's fee is not "compensation" as defined by the Act.[3] *Guidry v. Booker Drilling Co.*, 901 F.2d 485, 23 BRBS 82(CRT) (5th Cir. 1990); *Greenhouse v. Ingalls Shipbuilding, Inc.*, 31 BRBS 41 (1997). As claimant was not awarded additional "compensation" in the administrative law judge's attorney's fee orders, the time for filing a motion for modification pursuant to Section 22 was not tolled by the appeals of the initial fee award or by the administrative law judge's 2004 order awarding an additional fee after remand from the Fifth Circuit. The period for filing a motion for modification therefore expired one year after the denial of compensation benefits became final, in 2000. As the administrative law judge properly found that claimant did not file a timely motion for modification in this case, we affirm the administrative law judge's order dismissing the claim for additional disability benefits. *See House v. Southern Stevedoring Co.*, 14 BRBS 979 (1982), *aff'd*, 703 F.2d 87, 15 BRBS 114(CRT) (4th Cir. 1983).

We next address the administrative law judge's denial on reconsideration of claimant's motion to find employer in default for non-payment of medical benefits, pursuant to Section 18(a). Section 18(a) provides that where an employer defaults in payment of compensation for 30 days after it is due and payable, a claimant may apply to the district director for a supplemental order declaring default, and he may then take a certified copy of that order to federal district court for enforcement thereof. 33 U.S.C. §918(a). Medical benefits are included in the term "compensation" for purposes of enforcement proceedings under Section 18(a). *Lazarus v. Chevron USA, Inc.*, 958 F.2d 1297, 25 BRBS 145(CRT) (5th Cir. 1992). Supplemental orders issued by the district director pursuant to Section 18 are final when issued and are not subject to review by the Board. *Henry v. Gentry Plumbing & Heating Co.*, 704 F.2d 863, 15 BRBS 149(CRT) (5th Cir. 1983). However, where there is no amount in default or the district director declines to issue a Supplemental Order, an appeal may properly be taken to the Board. *See Sea-Land Service, Inc. v. Barry*, 41 F.3d 903, 29 BRBS 1(CRT) (3d Cir. 1994); 33 U.S.C. §921(b)(3). Claimant's appeal of the administrative law judge's denial of claimant's motion to find employer in default pursuant to Section 18(a) is thus within the jurisdiction of the Board. *See Bray v. Director, OWCP*, 664 F.2d 1045, 14 BRBS 341 (5th Cir. 1981).

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[3] Section 2(12) of the Act provides:

> "Compensation" means the money allowance payable to an employee or his dependents as provided for in this chapter, and includes funeral benefits provided therein.

33 U.S.C. §902(12).

In his order on reconsideration, the administrative law judge found that, pursuant to a telephone conference with the parties on August 15, 2005, the parties agreed to the disposition of the amount due for mileage charges. Order on Reconsideration at 2. Addressing the payment for Dr. Anastasio's treatment, the administrative law judge found that the medical bills were paid by Medicaid, that employer has not received any invoices from Medicaid requesting reimbursement, and that employer is willing to pay for claimant's treatment by Dr. Anastasio after it receives the appropriate billing forms. The administrative law judge therefore denied claimant's motion to find employer in default inasmuch as employer expressed its willingness to pay for claimant's psychological treatment upon receipt of bills.

On appeal, claimant does not challenge these findings specifically, but contends that the district director should not have referred the case to the administrative law judge on this issue but should have issued a default order himself. The regulation at 20 C.F.R. §702.372(a) states that an application for a default order should be processed by the district director as if it were an original claim for compensation, subject to the informal proceedings of Sections 702.315 and 702.316. 20 C.F.R. §§702.315, 702.316. In this case, the claims examiner held an informal conference to discuss, *inter alia*, claimant's motion for a default order on the issues of mileage reimbursement and payment of Dr. Anastasio's bills. The claims examiner stated,

> The carrier may in fact be in default for not reimbursing the claimant for mileage in a timely manner. However, the mileage reports submitted do not contain details regarding which doctor's office the claimant took each trip. However, the employer had more than enough time to find this information out and has not. In any event, I cannot issue a default order as I do not have enough information to calculate an amount due to which a 20% penalty should be added.

Memo. of Informal Conference dated Jan 28, 2005, at 3. The claims examiner did not address whether employer was in default of Dr. Anastasio's bills, and employer averred that it had not received any bills from this physician. Claimant subsequently requested the case be forwarded to the Office of Administrative Law Offices on all issues but the ones pertaining to the default order, as she alleged that the district director had sufficient information on which to base a decision in this regard. The district director did not issue a default order and the case was transferred for a formal hearing.

We reject claimant's contention that the district director should not have referred the case to the administrative law judge. The claims examiner stated he had insufficient information from which he could calculate the amount of the default on the mileage reimbursement issue, and moreover, it is apparent from the memorandum of informal conference that there was not agreement on the amount of medical benefits due. *See*

Hanson v. Marine Terminals Corp., 34 BRBS 136 (2000). Thus, it was appropriate for the district director to transfer the case to the administrative law judge for findings on the issues raised in claimant's motion for a default order as well as on the other issues raised. 20 C.F.R. §702.316; *see generally Carter v. Merritt Ship Repair*, 19 BRBS 94 (1986). Moreover, as claimant does not challenge the administrative law judge's findings in support of his denial of claimant's motion for a default order, those findings are affirmed. *See generally Plappert v. Marine Corps Exch.*, 31 BRBS 109, *aff'g on recon. en banc*, 31 BRBS 19 (1997).

Accordingly, the administrative law judge's Order Granting Avondale's Motion to Dismiss Claimant's Motion for Modification and the Order Denying Claimant's Motion for Reconsideration of Motion for Summary Decision Finding Employer in Default are affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge