BRB No. 11-0151

KELLUP STREET	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TRANSOCEAN TERMINAL OPERATORS/P&O PORTS LOUISIANA, INCORPORATED	)	DATE ISSUED: 10/27/2011
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order on Modification and Decision on Motion for Reconsideration of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Darleen M. Jacobs, New Orleans, Louisiana, for claimant.

Collins C. Rossi (Collins C. Rossi, PLC), Metairie, Louisiana, for self-insured employer.

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

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order on Modification and Decision on Motion for Reconsideration (2009-LHC-0620) of Administrative Law Judge C. Richard Avery 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On January 6, 2001, claimant was working on a forklift on a barge and suffered a crushing injury to his right lower leg when a ten-to-eleven ton coil fell on him. He underwent extensive medical treatment to save his right leg. Claimant was paid disability benefits from January 2001 through August 2006. Employer stopped paying

compensation based on its determination that claimant was not totally disabled and that employer had paid the full amount of his scheduled benefits. In September 2006, claimant began complaining of pain in his left leg and lower back.

In a Decision and Order dated October 18, 2007, and filed by the district director on October 19, 2007, Administrative Law Judge Patrick M. Rosenow determined that, due to his right leg injury, claimant was entitled to temporary total disability benefits from January 7, 2001, to December 30, 2002, permanent total disability benefits from December 31, 2002, to January 20, 2003, and scheduled permanent partial disability benefits from January 20, 2003, for 205 weeks. In this regard, Judge Rosenow found that employer established the availability of suitable alternate employment on January 20, 2003, that took into account claimant's limitations from his right leg impairment, as well as the pain in his left leg and back. Judge Rosenow found that claimant's left leg and back pain is related to the crush injury to claimant's right leg; however, because they did not cause any additional impact on claimant's post-injury earning capacity, he was not entitled to additional compensation for those injuries.

With a letter dated September 10, 2008, claimant filed an LS-203 claim form requesting compensation for an impact injury to both legs that occurred on January 6, 2001. Claimant stated he was filing another claim for compensation, because employer "totally refused to pay [claimant's] compensation, as ordered by the administrative law judge," and "[w]e desire to pursue [claimant's] claim." On October 15, 2008, claimant submitted a letter to the Office of Workers' Compensation Programs (OWCP) requesting a modification hearing. *See* 33 U.S.C. §922. Claimant sought modification of the prior Decision and Order based on both a change in condition and mistake of fact regarding the nature and extent of the injuries to his left leg and back. Employer challenged the timeliness and validity of claimant's request for modification and argued there was no evidence to support modification.

In the Decision and Order on Modification, Administrative Law Judge Avery (the administrative law judge) concluded that the October 15, 2008, letter to the OWCP constituted a valid and timely request for modification. The administrative law judge found that Judge Rosenow made a mistake of fact regarding the nature and extent of claimant's injuries to his left leg and back. Specifically, the administrative law judge found that claimant had additional restrictions due to these work-related conditions such that employer did not establish the availability of suitable alternate employment until July 2009. The administrative law judge also found that all of claimant's work-related injuries were temporary in nature until his back condition reached permanency in August 2009. Decision and Order on Modification at 10-11. Accordingly, the administrative law judge granted claimant's motion for modification. Thus, the administrative law judge ordered employer to pay temporary total disability benefits from January 6, 2001 to July 24,

2009, temporary partial disability benefits from July 24, 2009 to August 3, 2009, and permanent partial disability benefits commencing August 6, 2009. The administrative law judge found claimant entitled to both a Section 8(c)(21) award for the disability attributable to claimant's back, and the previously paid scheduled permanent partial disability award for his right leg. The administrative law judge adjusted the awards so that claimant's concurrent partial awards would not exceed the maximum weekly compensation rate for total disability. *See I.T.O. Corp. of Baltimore v. Green*, 185 F.3d 239, 33 BRBS 139(CRT) (4th Cir. 1999). The administrative law judge denied employer's motion for reconsideration.

Employer appeals the decision, asserting that the administrative law judge erred in finding that claimant filed a valid and timely modification request, and that claimant established a basis for modification of the prior decision. Claimant responds in support of the administrative law judge's decision.

Employer first asserts that the October 15, 2008, letter should not have been considered a request for modification because it was not submitted into evidence, it was not timely filed, and was not a valid request. The administrative law judge found claimant's October 2008 letter to be a timely request for modification, because "not only was [c]laimant receiving compensation for his scheduled injury, but his request was made within one year of the original Decision and Order." Decision and Order on Modification at 9. Further, the administrative law judge found the request valid as to form because claimant expressly indicated his intent to seek modification. *Id*.

Section 22, 33 U.S.C. §922, provides the only means for changing otherwise final compensation orders.[1] Under Section 22, any party-in-interest, at any time within one year of the last payment of compensation or within one year of the rejection of a claim, may request modification because of a mistake in fact or change in condition. *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995); 20 C.F.R. §702.373. It is well-settled that an application for modification under Section 22 need not be formal in nature or on any particular form, as long as it can be discerned that an actual claim for additional compensation is being made. *See Banks v. Chicago Grain Trimmers Assoc.*, 390 U.S. 459 (1968); *Fireman's Fund Ins. Co. v. Bergeron*, 493 F.2d 545 (5th Cir. 1974); *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988); *Hudson v. Southwestern Barge Fleet Services, Inc.*, 16 BRBS 367 (1984). The party requesting modification bears the burden of showing that the claim comes within the scope of Section 22. *See, e.g., Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *R.V. [Vina] v. Friede Goldman Halter*, 43

[1]Judge Rosenow's Decision and Order was not appealed.

BRBS 22 (2009); *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990).

We reject employer's assertion that, because the October 2008 letter was not submitted into evidence, the administrative law judge could not consider it. A request for modification need only be timely and validly "filed." *See generally Intercounty Constr. Co. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975); *Hudson*, 16 BRBS 367. There is no provision in the Act or regulations requiring a request for modification, already filed with the district director, be submitted into evidence before an administrative law judge may consider it. *See generally Hudson*, 16 BRBS 367. The motion, like other pleadings, is part of the record upon filing. *See generally Harris v. Capehart-Farnsworth Corp.*, 207 F.2d 512 (8th Cir. 1953); *Pension Advisory Group, Ltd. v. Country Life Ins. Co.*, 771 F.Supp. 2d 680 (S.D. Tex 2011). Further, as claimant observes, employer does not explain how it was prejudiced by the administrative law judge's consideration of the letter as employer was sent a copy of the letter by claimant's counsel at the time it was sent to the OWCP.[2] *See G.K. [Kunihiro] v. Matson Terminals, Inc.*, 42 BRBS 15 (2008), *aff'd mem. sub nom. Director, OWCP v. Matson Terminals, Inc.*, No. 09-72979, 2011 WL 2689355 (9th Cir. July 12, 2011); Cl. Br. at 6. The administrative law judge, therefore, did not err in addressing whether the October 2008 letter was a timely and valid request for modification.

As the administrative law judge properly found, the October 2008 letter clearly exhibits an intent to seek modification because it specifically requested "a Modification Hearing due to both a change in [claimant's] condition and a mistake in determination of fact. . . ." We, however, must reverse the administrative law judge's finding that the letter was timely because it was filed within one year of Judge Rosenow's decision. In *Intercounty Constr. Co.*, 442 U.S. at 9, 2 BRBS at 9, the Supreme Court addressed the circumstances to which Section 22 applies.[3] In holding that Section 22 applies only after a compensation order has been issued, the Court stated, "the phrase 'whether or not a compensation order has been entered' is properly interpreted to mean merely that the one year time limit imposed on the power . . . to modify existing orders runs from the date of final payment of compensation even if the order sought to be modified is actually entered only after such date." *Id*. Thus, as the date of the last compensation payment in this case

[2]Employer does not question whether the letter was filed in October 2008, nor assert that it did not receive a copy of the letter when it was filed.

[3]Section 22 of the Act states that a compensation case may be reviewed "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. . . " 33 U.S.C. §922. *See also* 20 C.F.R. §702.373(b).

was October 12, 2007, *see* EX 1 of Emp.'s Objection to Attorney Fee Petition (Feb. 7, 2008), claimant's motion for modification had to be filed before October 12, 2008, even though Judge Rosenow's decision was issued after this date. *Intercounty Constr. Co.*, 442 U.S. at 9, 2 BRBS at 9; *see House v. Southern Stevedoring Co.*, 14 BRBS 979 (1982), *aff'd*, 703 F.2d 87, 89, 15 BRBS 114, 119(CRT) (4th Cir. 1983). Consequently, because claimant's October 15, 2008, letter was untimely filed pursuant to Section 22, we reverse the administrative law judge's finding in this regard.

Employer additionally asserts that claimant's September 10, 2008, LS-203 form does not constitute a valid request for modification because it "makes no reference to the prior compensation order or of any change in [c]laimant's condition nor does it reference what mistake of fact the ALJ is alleged to have committed." Emp. Br. at 9. This document was timely filed as to the last payment of compensation. A request for modification need only be a writing which indicates an intention to seek further compensation. *Bergeron*, 493 F.2d 545; *Hudson*, 16 BRBS 367. A request for modification may be informal in nature and need not specifically characterize the basis of the request for modification. *Cobb v. Schirmer Stevedoring Co.*, 2 BRBS 132 (1975). As the administrative law judge did not address this document in the first instance or make findings regarding the sufficiency of this letter as a request for modification, we remand the case for him to do so.[4]

In the interest of judicial economy, we will address employer's challenges to the administrative law judge's findings on the merits. The administrative law judge granted modification based on a mistake in fact, stating that the new evidence submitted establishes that: claimant suffered additional disability due to his left leg and back pain; claimant was incapable of returning to the work force until July 24, 2009, rather than January 20, 2003, as found by Judge Rosenow; and that claimant reached maximum medical improvement for the body as a whole on August 6, 2009, rather than December 30, 2002, as found by Judge Rosenow. Decision and Order on Modification at 10-12. On appeal, employer asserts that the administrative law judge erred in finding a mistake

[4]Citing *I.T.O. Corp. of Virginia v. Pettus*, 73 F.3d 523, 30 BRBS 6(CRT) (4th Cir. 1995), *cert. denied*, 519 U.S. 807 (1996), employer argues that claimant's LS-203 form is an "anticipatory filing." Employer's reliance on *Pettus* is misplaced as the United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has explicitly declined to adopt the Fourth Circuit's approach to anticipatory filings enunciated in *Pettus*. *Pool Co. v. Cooper*, 274 F.3d 173, 181, 35 BRBS 109, 115(CRT) (5th Cir. 2001); *see also Kea v. Newport News Shipbuilding & Dry Dock Co.*, 488 F.3d 606, 41 BRBS 23(CRT) (4th Cir. 2007) (the request for modification need only state a claim for an allegedly existing disability).

in fact established based on the evidence postdating Judge Rosenow's decision, and that there is no evidence to support a change in claimant's condition.[5]

It is well established that:

> There is no limitation to particular factual errors. . . . The plain import of [Section 22] was to vest [the administrative law judge] with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted.

O'Keeffe v. Aerojet-General Shipyards, Inc. 404 U.S. 254, 256 (1971). Thus, the administrative law judge has broad discretion to reconsider the evidence, old, new or cumulative, pursuant to a motion for modification. *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2d Cir. 2003). Contrary to employer's assertion, therefore, an administrative law judge may find a mistake of fact established, as well as a change in condition, based on newly submitted evidence that post-dates the initial decision. *O'Keeffe*, 404 U.S. 254; *Banks*, 390 U.S. 459; *Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174 (1988). In this case, claimant submitted treatment records of Drs. Truax, Rynik, Toomer, and Dupin; treatment records from Lurline Smith Mental Health Clinic; Shanna Ferguson's November 16, 2009, functional capacity evaluation; Dr. Truax's August 11, 2009, deposition; and pictures of his right leg and back in support of his contention that the prior award should be modified.

Nonetheless, we agree with employer that the administrative law judge did not adequately explain his findings and conclusions. In the original decision, Judge Rosenow found that claimant's left leg and back pain did not result in any physical restrictions beyond those already imposed by claimant's right leg injury, that claimant's right leg injury reached maximum medical improvement in 2002, and that employer's January 2003 labor market survey established the availability of suitable alternate employment. On modification, the administrative law judge found the evidence establishes that claimant was temporarily totally disabled from the time of the accident until his back condition reached maximum medical improvement in August 2009, and that claimant was unable to work until July 2009 when employer first established suitable alternate employment. The administrative law judge relied on Dr. Truax's previously submitted opinion dated November 2, 2006, that claimant's left leg and back conditions cause him

[5]In response, claimant asserts that, although the administrative law judge stated that he found a mistake in fact established, his finding of "additional disability" could indicate that he granted modification based on a change in conditions.

additional disability, and Dr. Truax's newly submitted August 6, 2009, treatment note stating that he did "not anticipate [that CL's chronic radiculopathy] is going to change appreciably." CX 13, CX 16 at 56-57 (original claim exhibits); CX 1 at 28; Decision and Order on Modification at 11. Dr. Truax's note can support a finding that claimant's work-related back condition did not reach permanency until August 2009. *See Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994). However, the administrative law judge did not provide a basis for finding that claimant's disability was temporary from the date of injury through August 2009 because Judge Rosenow found that claimant did not complain of left leg and back pain until September 2006. The administrative law judge did not make any findings that these conditions existed prior to this date, and thus, the administrative law judge did not provide a basis in the evidentiary record for modifying the award between January 20, 2003 and September 2006.[6] *See* 5 U.S.C. §557(c)(3)(A); *H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000).

In finding that claimant was unable to work at all until July 2009, the administrative law judge credited the November 2009 functional capacity evaluation as establishing additional work restrictions beyond those originally established. The administrative law judge also relied on the opinions of Drs. Truax and Toomer, and of Ms. Ferguson, the therapist who performed the 2009 functional capacity evaluation, that claimant was "likely unemployable" due to these restrictions. Decision and Order on Modification at 10, 12; CX 1; CX 3 at 22; CX 5 at 23-24. The administrative law judge found that, nonetheless, claimant communicated well at the hearing and that three sedentary jobs identified by employer in its July 2009 labor market survey were suitable for claimant given his specific physical restrictions.[7] In so finding, however, the administrative law judge did not explain in terms of a mistake in fact or change in conditions what additional restrictions the functional capacity evaluation established beyond those established for claimant's right leg injury in 2003, or why claimant was incapable of performing the jobs listed in the 2003 and 2007 labor market surveys, but

[6]Moreover, it does not necessarily follow that claimant was totally disabled merely because his back condition was temporarily disabling, as separate inquiries are required for the nature and extent of a claimant's disability. *See generally Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991).

[7]The jobs are: telephone operator; bill collector; and bridge toll collector. EX 7. Claimant did not appeal this finding.

capable of performing the jobs listed in the 2009 labor market survey.[8] *See Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001); *Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998). Specifically, the administrative law judge did not identify any increased or different restrictions for claimant's right leg injury or any additional restrictions due to claimant's left leg and back pain. In addition, the jobs found suitable by Judge Rosenow from the 2003 labor market survey are similar to those in the July 2009 survey found suitable by the administrative law judge, and the administrative law judge did not address employer's April 2007 labor market survey.[9] Therefore, the administrative law judge did not adequately explain the basis for his total disability award in terms what specific restrictions claimant had that rendered him totally disabled prior to July 2009.

Because the administrative law judge did not adequately explain the basis for granting modification, we vacate his findings thereunder. If, on remand, the administrative law judge finds that claimant timely requested modification, he must make clear findings regarding how the evidence establishes a mistake in fact or change in conditions. In so doing, the administrative law judge must address the fact that claimant did not complain of back and left leg pain until September 2006 and make findings regarding the date of permanency consistent with the onset of claimant's complaints. Further, the administrative law judge must make specific findings regarding claimant's ability to work at relevant times, as well as concerning his restrictions and vocational abilities and the sufficiency of employer's vocational evidence. *See generally Hinton*, 243 F.3d 222, 35 BRBS 7(CRT); *Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90(CRT) (5th Cir. 1991). If the administrative law judge finds claimant is permanently partially disabled by both his work-related back pain and his scheduled leg injuries, concurrent awards are appropriate. *See Green*, 185 F.3d 239, 33 BRBS 139(CRT); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994).

[8]Although the administrative law judge stated that the older labor market surveys could not establish suitable alternate employment because they did not account for claimant's "additional" restrictions established by the 2009 functional capacity evaluation, Decision and Order on Modification at 10, this finding is inconsistent with his determination to credit the July 2009 labor market survey, which predates the November 2009 functional capacity evaluation. *See* 5 U.S.C. §557(c)(3)(A); *H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000).

[9]Judge Rosenow had found suitable sedentary jobs as a dispatcher, a bridge monitor, a parking lot cashier, and an unarmed security guard.

Accordingly, the administrative law judge's Decision and Order on Modification and Decision on Motion for Reconsideration are vacated, and the case is remanded for further proceedings consistent with this decision.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

_____
ROY P. SMITH
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring:

I agree with the majority's decision to hold that the October 15, 2008, letter was not a timely filed request for modification. However, I would hold that claimant's September 10, 2008, LS-203 claim for compensation is a request for modification as a matter of law. Claimant stated he was enclosing "another" request for compensation for the January 6, 2001, accident in which steel coils fell "on both legs – impact injury to both legs." This clearly reflects his disagreement with Judge Rosenow's order awarding compensation only for his right leg injury. It evinces an intent to seek additional compensation for the injuries sustained in the work accident and, thus, claimant filed a valid and timely request for modification. *See Fireman's Fund Ins. Co. v. Bergeron*, 493 F.2d 545 (5th Cir. 1974); *see also Employers Liability Assurance Corp. v. Donovan*, 279 F.2d 76 (5th Cir. 1960), *cert. denied*, 364 U.S. 884 (1960). I would remand this case only for the administrative law judge to further explain his findings as to the merits of claimant's entitlement to modification.

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REGINA C. McGRANERY
Administrative Appeals Judge