

BRB No. 01-0200

CORINE LEVY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JACKSONVILLE SHIPYARDS,	)	DATE ISSUED: <u>Sept. 28, 2001</u>
INCORPORATED	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Order Granting Director's Motion to Dismiss of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

L. Jack Gibney, Jacksonville, Florida, for claimant.

Scott Stephen Gallagher and Mary Nelson Morgan (Cole, Stone, Stoudemire, Morgan & Dore, P.A.), Jacksonville, Florida, for employer.

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

PER CURIAM:

Claimant appeals the Order Granting Director's Motion to Dismiss (2000-LHC-1536) of Administrative Law Judge of Fletcher E. Campbell, Jr., 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'Keefe 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 December 22, 1989, during the course of her employment as a second class mechanic. Employer voluntarily paid compensation for temporary total disability. 33 U.S.C. §908(b). In November 1995, Administrative Law Judge Schreter-Murray issued a Decision and Order denying benefits. She found that claimant was capable of performing the light and sedentary jobs enumerated in employer's labor market survey, which paid in excess of claimant's average weekly wage. Judge Schreter-Murray thus concluded that claimant is not entitled to further compensation or medical benefits, and she denied the claim. Claimant appealed Judge Schreter-Murray's decision to the Board, and the Board affirmed the decision in all respects in a decision issued on July 24, 1997. *Levy v. Jacksonville Shipyards, Inc.*, BRB No. 96-0534 (July 24, 1997). Claimant did not appeal the Board's decision, which thus became final 60 days after its issuance. See 33 U.S.C. §921(c).

On January 11, 1999, claimant's counsel wrote to the adjuster for employer's bond holder, informing it of his representation of claimant. On May 25, 1999, claimant filed a pre-hearing statement requesting modification of her back injury claim. See 33 U.S.C. §922. On June 4, 1999, claimant filed a petition for modification, in which she alleged that work-related pulmonary problems have worsened since the initial adjudication of her claim. On August 19, 1999, claimant amended her petition to include the alleged worsening of her work-related back condition. On May 12, 2000, the Director, Office of Workers' Compensation Programs (the Director), filed a motion to dismiss claimant's May 25, 1999, modification petition as untimely since the petition was filed more than one year after the Board's affirmance of the administrative law judge's denial of her claim. Claimant responded to the Director's motion, stating that medical records concerning the worsening of claimant's condition were not available from the treating physician until June 1999, despite attempts to obtain them earlier. Administrative Law Judge Campbell (the administrative law judge) subsequently issued an Order granting the Director's motion and dismissing claimant's petition for modification as untimely filed. The administrative law judge stated that there are no exceptions for hardship to the one-year statute of limitations of Section 22.

On appeal, claimant contends she personally went to the Department of Labor approximately six months after terminating the services of her former attorney and before retaining her current counsel in January 1999. She has attached her affidavit to this effect to her Petition for Review and brief, alleging that she verbally informed the Department of Labor of her intent to reopen her case. Claimant requests that the Board vacate the administrative law judge's Order and remand the case for the administrative law judge to determine, based on claimant's affidavit, whether she timely requested modification. Employer responds, contending claimant failed to raise the issue of her alleged visit to the Department of Labor in response to the Director's motion to dismiss, and asserting that claimant cannot raise this issue for the first time on appeal. Alternatively, employer contends that even if claimant did visit the Department of Labor, there is no written documentation

concerning her intent to seek further compensation.

Section 22 of the Act permits the modification of a final award if the party seeking modification demonstrates either a change in claimant's physical or economic condition or a mistake in a determination of fact. *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). 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; *Rambo I*, 521 U.S. at 129, 30 BRBS at 4(CRT). It is well-settled that an application for modification under Section 22 need not be formal in nature or on any particular form; rather, such a request need only be a writing, filed within the one-year period, which indicates an intention to seek further compensation. *I.T.O. Corp. of Virginia v. Pettus*, 73 F.3d 523, 30 BRBS 6(CRT)(4<sup>th</sup> Cir. 1996), *cert. denied*, 519 U.S. 807 (1996); *Fireman's Fund Ins. Co. v. Bergeron*, 493 F.2d 545 (5<sup>th</sup> Cir. 1974); *Madrid v. Coast Marine Constr. Co.*, 22 BRBS 148 (1989).

We affirm the administrative law judge's determination that claimant did not timely file a request for modification. The first writing of record indicating a request for modification is claimant's May 25, 1999, pre-hearing statement. As claimant's written request is more than one year after the Board's July 24, 1997, decision became final, the administrative law judge properly dismissed claimant's petition for modification as untimely. *See Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988). Moreover, claimant did not raise before the administrative law judge the allegation that she went to the Department of Labor to request that her claim be reopened, and the Board will not entertain issues raised for the first time on appeal. *See, e.g., Turk v. Eastern Shore Railroad, Inc.*, 34 BRBS 27 (2000). Assuming, *arguendo*, that claimant verbally requested modification at the Department of Labor, such evidence is insufficient to establish the timeliness of her request for modification, as a request for modification must be a *writing* filed within the one-year limitations period.<sup>1</sup> *See Bergeron*, 493 F.2d at 547; *Madrid*, 22 BRBS at 151-152. There is no writing memorializing claimant's alleged verbal request for modification.

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<sup>1</sup>There is evidence of an alleged pulmonary injury from the record developed before Administrative Law Judge Schreter-Murray, Cl. Dep. at 12-13, but no evidence that claimant formally alleged a work-related pulmonary injury at that hearing. *See* Decision and Order at 2, 4. In her decision, Administrative Law Judge Schreter-Murray found "frankly incredible" claimant's testimony of chronic asthma due to asbestos exposure, *id.* at 6, and claimant did not pursue any issues concerning this injury on appeal to the Board. We note that any claim for an injury due to an occupational disease must be made within two years of claimant's becoming aware of the relationship between her employment, the disease, and her disability. 33 U.S.C. §913(b)(2); *see generally Argonaut Insurance Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11<sup>th</sup> Cir. 1988).

Accordingly, the administrative law judge's Order Granting Director's Motion to Dismiss is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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NANCY S. DOLDER  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge