BRB No. 07-0372

L. L.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: 09/26/2007
	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMNET OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand and the Decision and Order Denying Employer's Motion for Reconsideration 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.

Richard A. Seid (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand and the Decision and Order Denying Employer's Motion for Reconsideration (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).

This case has previously been before the Board. To briefly recapitulate the facts, 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 use of each arm. 33 U.S.C. §908(c)(1). Employer's final payment of compensation occurred on September 27, 1999. On July 28, 2000, claimant wrote a letter to the district director requesting compensation for additional permanent partial disability in addition to that previously awarded and for temporary total disability for any additional time he will need to be out of work for further treatment of his work-related condition. On March 1, 2001, claimant saw his physician, Dr. Davlin, complaining of right elbow pain of a "long standing period of time." Claimant underwent a lateral release of the elbow on May 30, 2001, and was released to light-duty work on July 9, 2001. On November 29, 2001, Dr. Davlin stated claimant has an additional two percent impairment of the elbow and that claimant should avoid pneumatic equipment.

Before the administrative law judge, employer did not dispute the additional impairment rating rendered by Dr. Davlin, but contended that claimant's July 28, 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.), *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. In the initial Decision and Order, the administrative law judge found that while claimant's July 28, 2000, letter to the district director manifested an intent to seek additional compensation, 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. Thus, the administrative law judge found that the July 2000 filing was anticipatory in nature and denied claimant's claim for additional benefits.

On claimant's appeal, the Board determined that the administrative law judge did not discuss all of the pertinent law or fully discuss the relevant standard for determining whether claimant had filed a valid motion for modification in July 2000. Accordingly, the Board vacated the administrative law judge's denial of claimant's claim for

modification, and remanded the case for the administrative law judge to fully analyze the validity of claimant's motion for modification in light of all relevant case law. *[L.L.] v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 04-0654 (Apr. 26, 2005)(unpub.).

On remand, the administrative law judge found that claimant's July 28, 2000, letter to the district director was sufficiently specific to constitute a valid motion for modification. Accordingly, the administrative law judge awarded claimant temporary total disability benefits for the period of May 30, 2001 through July 8, 2001, and permanent partial disability benefits for a two-percent impairment rating to claimant's right upper extremity. 33 U.S.C. §908(b), (c)(1). In denying employer's motion for reconsideration, the administrative law judge stated that he had previously considered both the content and context of claimant's July 28, 2000, letter to the district director in determining that the letter met the requirements for a valid motion for modification pursuant to Section 22 of the Act. 33 U.S.C. §922.

On appeal, employer contends that the administrative law judge on remand erred in finding that claimant's July 28, 2000, letter was a valid request for modification under the precedent established by the United States Court of Appeals for the Fourth Circuit. Specifically, employer avers that claimant's letter was an anticipatory request since the letter was filed eleven months after the date of the district director's compensation order, contemporaneous evidence did not support claimant's July 2000 letter, and claimant did not thereafter seek medical treatment until March 1, 2001. Claimant and the Director, Office of Workers' Compensation Programs, respond, urging affirmance.

Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing otherwise final decisions; modification pursuant to this section may be granted based on a mistake of fact in the initial decision or on a change in claimant's physical or economic condition where a request is filed within one year of employer's last payment of compensation. *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, *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 reject employer's contentions and affirm the administrative law judge's finding that claimant's July 28, 2000, letter to the district director constituted a valid motion for modification, as it is rational, supported by substantial evidence, and in accordance with law. Employer argues that, in context, claimant's July 28, 2000, "protective" letter to the district director filed just prior to the expiration of the one-year filing period constituted an anticipatory claim. Specifically, employer asserts that the lack of contemporaneous medical or economic evidence as well as claimant's delay in seeking additional medical treatment until March 2001 can result in no conclusion other than that claimant's communication with the district director was an attempt to protect and preserve his right to seek modification until he had a basis to make such a claim. We disagree.

Claimant's July 28, 2000, letter stated that he had noted a worsening of his condition and requested "additional permanent partial disability" benefits as well as "temporary total disability which will be due for the additional time that he will now need to be out of work to undergo additional treatment." CX 8. The administrative law judge on remand found that claimant's July 28, 2000, request for modification was not an anticipatory filing since, although it was not well defined, it sought specific benefits under the Act. In a case with similar facts, the Fourth Circuit recently addressed the issue of the validity of a request for modification in *Kea v. Newport News Shipbuilding & Dry Dock Co.*, 488 F.3d 606, 41 BRBS 23(CRT) (4th Cir. 2007), *rev'g* 39 BRBS 113 (2006). In *Kea*, claimant, after receiving temporary disability benefits, filed a motion for modification seeking additional compensation for a permanent loss of wage-earning capacity. While acknowledging a lack of diligence on the part of claimant's counsel in obtaining medical evidence contemporaneous to the filing of claimant's modification request, the court concluded that claimant's filing was sufficient to request modification under Section 22 since that filing clearly provided a basis for a reasonable person to conclude that a modification request had been made. 488 F.3d at 611, 41 BRBS at 27(CRT). Similarly, in the present case, claimant's letter sought specific additional disability benefits and thus placed the OWCP and employer on notice of a claim for additional permanent partial and temporary total disability benefits. The administrative law judge's decision in the instant case is therefore consistent with the most recent decision of the Fourth Circuit, which establishes that the fact that a claimant's request for modification does not contain evidence supportive of his claim is not dispositive of the

validity of claimant's motion.[1] *Id. See Bailey v. Newport News Shipbuilding & Dry Dock Co.,* 39 BRBS 11 (2005), *citing Pettus,* 73 F.3d at 527, 30 BRBS at 9(CRT) (court, while requiring that claimant seek compensation for a "particular loss," does not require that the full extent of that loss be quantified in the pleading).

Employer's contention that claimant's failure to request an informal conference in his letter to the district director supports the conclusion that the letter was anticipatory in nature must also be rejected based on *Kea.* Rejecting the Board's emphasis on the fact that claimant requested that an informal conference not be scheduled, the Fourth Circuit stated that the Act does not require that an informal conference be sought or scheduled in conjunction with a request for modification. *Kea,* 488 F.3d at 612, 41 BRBS at 27(CRT). Rather, citing *Pettus*, 73 F.3d at 527, 30 BRBS at 9(CRT), the court stated that the Act contemplates that the Director will notify the employer that a claim has been filed and "make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon." 33 U.S.C. §919(c). Thus , that claimant's request for modification did not formally seek the scheduling of an informal conference does not mandate a finding that the request was an anticipatory pleading. As in *Kea,* claimant here sought specific additional benefits in a request filed within the time frame specified in Section 22. We therefore affirm the administrative law judge's finding that claimant's motion for modification was timely. *Kea*, 488 F.3d 606, 41 BRBS 23(CRT); *Bailey*, 39 BRBS 11; *Gilliam v. Newport News Shipbuilding & Dry Dock Co.,* 35 BRBS 69 (2001).

[1] Specifically, the Fourth Circuit in *Kea*, 488 F.3d 606, 612, 41 BRBS 23, 28(CRT), stated that a claimant's lack of diligence in obtaining a medical opinion contemporaneous with his request for modification was not fatal to his claim. Thus, employer's contention that claimant's delay in seeking treatment in this case established the invalidity of claimant's request for modification must be rejected. Claimant's July 28, 2000, letter references a change in his condition, and employer has presented no evidence supportive of its contention that claimant's subsequent surgery and disability rating are unrelated to his complaints at that time.

Accordingly, the administrative law judge's Decision and Order on Remand and Decision and Order Denying Employer's Motion for Reconsideration are affirmed.

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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BETTY JEAN HALL
Administrative Appeals Judge