U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 18-0188

MELVIN L. COPELAND, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: Sept. 13, 2018
	)	
CERES MARINE TERMINALS, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Order Not Approving Lay Representative and the Decision and Order Granting Employer's Motion to Dismiss Claim for Not Being Timely Filed of Dana Rosen, Administrative Law Judge, United States Department of Labor.

Lamarr Brown, Princess Anne, Maryland, lay representative, for claimant.

Lauren M. Bridenbaugh (Postol Law Firm, P.C.), McLean, Virginia, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judges, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Not Approving Lay Representative and the Decision and Order Granting Employer's Motion to Dismiss Claim for Not Being Timely Filed (2017-LHC-01657) of Administrative Law Judge Dana Rosen 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 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 August 22, 2013, claimant injured his right knee while working for employer. Employer voluntarily paid benefits. A dispute subsequently arose over the extent of claimant's permanent partial disability under the schedule, 33 U.S.C. §908(c)(2).[1] Before the scheduled hearing, however, the parties resolved the dispute, stipulating that claimant had a seven percent permanent impairment of the right leg. In a Decision and Order issued in March 2015, the administrative law judge awarded claimant benefits for a seven percent leg impairment, pursuant to the parties' stipulation.[2] Employer made its last disability payment on April 23, 2015. Claimant continued to work for employer; however, Dr. Wardell removed claimant from work on June 5, 2017, due to a progression/flare up of claimant's 2013 knee injury.

By letter dated June 2, 2017, claimant's lay representative, Lamarr Brown, requested an informal conference regarding claimant's entitlement to additional compensation and medical benefits "due to the reoccurrence of medical complications to the right knee" and/or "[d]ue to the reoccurrence of injurious stimuli to the right knee." EX D. Mr. Brown noted that employer disputed liability for additional compensation. Claimant subsequently requested a formal hearing before an administrative law judge.

In a letter dated November 10, 2017, Mr. Brown requested approval to serve as claimant's lay representative in the proceedings before the Office of Administrative Law Judges. On November 24, 2017, the administrative law judge denied Mr. Brown's request, summarily finding that he "has not demonstrated sufficient knowledge and qualifications to represent the Claimant under the Longshore and Harbor Workers' Compensation Act." Lay Rep. Order at 2. Claimant thereafter decided to pursue his claim without representation.

On December 6, 2017, employer filed a Motion for Summary Decision, asserting that claimant's June 2017 request for modification was untimely pursuant to 33 U.S.C. §922 because the request was made more than one year after April 23, 2015, the date of employer's last compensation payment for the August 2013 injury.[3] Claimant responded

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[1] Dr. Wardell, claimant's treating physician, opined that claimant's knee condition reached maximum medical improvement on March 27, 2014. He released claimant to full-duty work, but subsequently restricted him from driving a shuttle car in April 2014.

[2] At this time, claimant was represented by his attorney, Gregory Camden.

[3] Employer supported its motion by submitting the administrative law judge's March 2015 Decision and Order awarding benefits for a seven percent leg impairment; its

to employer's motion on December 21, 2017, asserting that an administrative law judge is not bound by the time limitations of Section 22[4] and is authorized, thereunder, to modify a scheduled permanent partial disability award where the disability becomes total. In support of his entitlement to modification, claimant submitted Dr. Wardell's June 2017 report, wherein Dr. Wardell removed claimant from work and recommended further treatment for the August 2013 knee injury, and time records showing that claimant's inability to work resulted in economic loss. Claimant additionally submitted correspondence from Dr. Wardell indicating that the permanent restrictions he issued in April 2014 were due to the August 2013 work injury.

By Order dated December 29, 2017, the administrative law judge granted employer's motion to dismiss. The administrative law judge found claimant's request for modification was untimely because it was made more than one year after employer's last payment of compensation pursuant to the March 2015 award for a seven percent permanent partial disability to the right leg.

On appeal, claimant contends the administrative law judge erred in rejecting Mr. Brown's request to serve as claimant's lay representative. Claimant asserts that the disapproval resulted in his being denied opportunity to present evidence of a change in condition and in the granting of employer's motion for summary decision. Employer responds, asserting that: the administrative law judge properly rejected Mr. Brown's request; claimant had the opportunity to respond to employer's motion for summary decision and, in fact, did respond and submit modification evidence; and the administrative law judge properly granted summary decision in this matter because claimant's modification request was untimely. Claimant filed a reply brief.[5]

Initially, we reject claimant's assertion that he was denied the opportunity to respond to employer's motion for summary judgment. Claimant responded to employer's motion for summary decision and, in so doing, presented evidence that his work-related knee condition rendered him totally disabled as of June 2017. The administrative law judge

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April 2015 LS-208, "Notice of Final Payment or Suspension of Compensation Payments;" and claimant's June 2017 letter requesting an informal conference.

[4] Claimant asserted that the one-year time limitation applies only to the district director's authority to modify awards.

[5] Employer filed a brief in response to claimant's reply brief, which it is not entitled to do as a matter of right. *See* 20 C.F.R. §§802.211-213. Nonetheless, we accept employer's brief. 20 C.F.R. §802.215.

did not reach the merits of claimant's request for modification, however, because she found it was not timely filed pursuant to Section 22.

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.[6] *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); *Intercounty Construction Corp. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975). 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

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[6] Section 22 of the Act states:

> Upon his own initiative, or upon the application of any party in interest (including an employer or carrier which has been granted relief under section 908(f) of this title), on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner 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 (including a case under which payments are made pursuant to section 944(i) of this title) in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary. This section does not authorize the modification of settlements.

The term "deputy commissioner" as used in the statute has been replaced by the term "district director." 20 C.F.R. §701.301(a)(7). *See* discussion, *infra*.

F.3d 523, 30 BRBS 6(CRT) (4th Cir. 1996), *cert. denied*, 519 U.S. 807 (1996); *Fireman's Fund Ins. Co. v. Bergeron*, 493 F.2d 545 (5th Cir. 1974); *Madrid v. Coast Marine Constr. Co.*, 22 BRBS 148 (1989).

We affirm the administrative law judge's determinations that claimant did not timely file a request for modification and that employer is entitled to summary decision. Although the statute refers to the district director's authority to modify prior decisions, *see* n.6, *supra*, the statute also transferred adjudicatory functions to administrative law judges. 33 U.S.C. §919(d).[7] Thus, in contested cases, including those arising under Section 22, only an administrative law judge can modify a prior order and her authority to do so requires that a party's modification request be timely filed within one year of the denial of the claim or of the last payment of benefits.[8] *Carter v. Merritt Ship Repair*, 19 BRBS 94 (1986); *Maine v. Brady-Hamilton Stevedore Co.*, 18 BRBS 129 (1986).

The first writing of record indicating a request for modification is Mr. Brown's June 2017 letter requesting an informal conference. As this request is dated more than one year after employer's last compensation payment on April 23, 2015, the administrative law judge properly found claimant's request for modification was untimely.[9] *See Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988). As the assertions made by claimant in his response to employer's motion for summary decision do not give rise to a genuine issue

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[7] Section 19(d) states:

> Notwithstanding any other provisions of this chapter, any hearing held under this chapter shall be conducted in accordance with the provisions of section 554 of title 5. Any such hearing shall be conducted by an administrative law judge qualified under section 3105 of that title. All powers, duties, and responsibilities vested by this chapter, on October 27, 1972, in the deputy commissioners with respect to such hearings shall be vested in such administrative law judges.

[8] In a case where a party's modification request is timely, and the parties agree to the issuance of a modifying order, the district director has the authority to issue a new compensation order. 20 C.F.R. §802.315.

[9] Claimant's appellate pleadings refer to the 2017 worsening of his knee condition as an "aggravation;" however, they consistently refer to the cause of action as "modification" and link claimant's condition to his employment via the August 2013 injury only. To the extent claimant asserts an aggravation injury as a cause of action, we decline to address this issue as claimant did not raise it below. *See, e.g., Turk v. Eastern Shore Railroad, Inc.*, 34 BRBS 27 (2000).

of material fact with respect to the timeliness of his modification request, the administrative law judge properly granted employer's motion for summary decision and dismissed claimant's claim.[10] 29 C.F.R. §18.72; *see generally Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006).

Accordingly, the administrative law judge's Decision and Order Granting Employer's Motion to Dismiss Claim for Not Being Timely Filed is affirmed.[11]

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[10] Employer remains liable for reasonable and necessary medical expenses for claimant's 2013 injury, provided claimant complies with the requirements of Section 7 of the Act, 33 U.S.C. §907. *See* 20 C.F.R. §§702.402, 702.407.

[11] As claimant does not have a viable cause of action, we need not reach his assertion that the administrative law judge erred in denying Mr. Brown's request to serve as his lay representative.