BRB No. 00-650

MELVIN C. MOORE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
VIRGINIA INTERNATIONAL TERMINALS, INCORPORATED	)	DATE ISSUED: March 26, 2001
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Order Granting Motion for Summary Decision of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna, Klein & Camden, L.L.P.), Norfolk, Virginia, for claimant.

F. Nash Bilisoly and Kelly O. Stokes (Vandeventer Black, L.L.P.), Norfolk, Virginia, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Order Granting Motion for Summary Decision (2000-LHC-331) of Administrative Law Judge Daniel A. Sarno, 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 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).

In 1986, claimant injured his wrists during the course of his employment. Employer voluntarily paid temporary total disability benefits for various periods between 1986 and 1988. In 1988, claimant filed a state claim for benefits. State benefits were awarded in 1994 and the award was affirmed in 1997. Meanwhile, in 1990, pursuant to an agreement of the

parties, the district director issued a compensation order awarding claimant temporary total, temporary partial and permanent partial disability benefits and medical benefits under the Act. Employer discharged its liability under this order as of September 4, 1990. In 1991, claimant filed medical reports with the district director's office which indicated his condition was deteriorating, and he filed a motion for modification of the district director's compensation order in 1992. The administrative law judge concluded that claimant's motion for modification was timely under Section 22 of the Act, 33 U.S.C. §922, relying on the medical reports filed in 1991, within one year of employer's last payment pursuant to the 1990 order. The administrative law judge awarded claimant continuing temporary total disability benefits.[1] On appeal, the United States Court of Appeals for the Fourth Circuit, citing *I.T.O. Corp. of Virginia v. Pettus*, 73 F.3d 523, 30 BRBS 6(CRT) (4th Cir. 1996), *cert. denied*, 519 U.S. 807 (1996), held that the reports did not establish a basis whereby a reasonable person could conclude that a request for modification had been made. *Virginia International Terminals, Inc. v. Moore*, 187 F.3d 633 (4th Cir. 1999) (Table). Accordingly, the court reversed the administrative law judge's 1994 award of benefits.

On August 20, 1999, within one month of the court's decision, claimant filed a letter with the Office of Workers' Compensation Programs which stated in pertinent part:

> I hereby request an informal conference on a *request for modification* of the Decision of the Court of Appeals for the Fourth Circuit *pursuant to Section 22*. . . . Claimant *requests modification* because payments under the State Workers' Compensation Act did not become due until after the Virginia Supreme Court's Decision issued on June 6, 1997. Thereafter payments for workers' compensation benefits were made by the employer under the State Act. *Based on those payments, Mr. Moore's earlier request for compensation must be considered timely*, coming as it does within one year of his last payment of compensation under the State law.

1999 M/Modif. (emphasis added). The administrative law judge analyzed the timeliness of this motion under Section 13 of the Act, 33 U.S.C. §913, as if it were a new claim based on the 1986 injury. He concentrated on the text of Section 13(a) of the Act, 33 U.S.C. §913(a), and held that claimant's state award of benefits does not toll the statute of limitations under the Act because the plain language of Section 13(a) requires action within one year of the last payment of compensation *without* an award. Order at 3. As the state

[1]The administrative law judge's decision was administratively affirmed by the Board on September 12, 1996, in accordance with Pub. L. No. 104-134, 110 Stat. 132.

award does not, by definition, result in a voluntary payment by employer, he found the claim to be untimely filed and he ordered summary decision in employer's favor due to the absence of a genuine issue of material fact. *Id.* Claimant appeals the administrative law judge's order.

Claimant contends his 1999 motion for modification should be allowed to proceed on the merits so that he can establish that his 1992 motion for modification was timely. He argues that the period of time employer was required to pay state compensation tolled the statute of limitations under the Act. Thus, pursuant to the purpose of fairness by which the Act is guided, and in accordance with Section 13(a), (d), 33 U.S.C. §913(a), (d), and *Ingalls Shipbuilding Div. v. Hollinhead*, 571 F.2d 272, 8 BRBS 159 (5th Cir. 1978), and its progeny, he contends his 1992 and 1999 motions were timely. Employer responds, first asserting that the 1999 motion for modification was filed out of time under Section 22, as the statute of limitations for such filing expired in 1991. Employer also argues that payment of benefits under the state act did not toll the time for filing a motion for modification under the Act, as no state payments were made before September 4, 1991, and as Section 13 and *Hollinhead* are not applicable in this case.

Initially, we hold that the administrative law judge erred in evaluating the timeliness of claimant's 1999 motion for modification under the provisions of Section 13. Section 13 applies to new claims or to those which have not been adjudicated. Section 22 of the Act, however, applies to permit modification of previously entered orders. *Intercounty Construction Corp. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975); *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988). In this case, claimant filed a claim for benefits for his 1986 back injury and this claim was the subject of a district director's compensation order in 1990, and modification proceedings thereafter, resulting in an administrative law judge's Decision and Order in 1994 and a court decision in 1999. Thus, his claim has been adjudicated, and claimant raises no argument that he has sustained a new injury which could give rise to a new claim. Moreover, claimant's 1999 filing was specifically termed a "motion for modification," and referenced Section 22 of the Act. Thus, Section 22, and not Section 13, is properly applied to determine whether claimant's 1999 motion is timely. *See Greathouse v. Newport News Shipbuilding & Dry Dock Co.*, 146 F.3d 224, 32 BRBS 102(CRT) (4th Cir. 1998); *Raimer*, 21 BRBS 98.

Section 22 provides in pertinent 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 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. . . .

33 U.S.C. §922 (emphasis added). Thus, a request for modification of an award under Section 22 must occur within one year of the last payment of compensation. If the payment was made in a lump sum, the time runs from the date of that payment and not from the date the last periodic payment would have been made. *Raimer*, 21 BRBS at 99; *House v. Southern Stevedoring Co.*, 14 BRBS 979 (1982), *aff'd*, 703 F.2d 87, 15 BRBS 114(CRT) (4th Cir. 1983). If a claim is denied, time begins to run on the date the decision becomes final; thus, modification may be requested within one year after the conclusion of the appellate process. *Black v. Bethlehem Steel Corp.*, 16 BRBS 138, 142 n.7 (1984), *appeal dismissed*, 760 F.2d 274 (9th Cir. 1985) (Table); *Dean v. Marine Terminals Corp.*, 7 BRBS 234 (1977). A denial of a previously filed motion for modification constitutes a "rejection of a claim" under Section 22, commencing a new statute of limitations for filing a motion for modification. *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491 (4th Cir. 1999).

In this case, the Fourth Circuit's reversal of the administrative law judge's award constitutes a rejection of claimant's claim, which, under *Betty B*, commences a new statute of limitations for filing additional motions for modification.[2] Claimant's 1999 motion raised the question of whether there was a mistake in the determination that his prior motion was untimely filed, as opposed to a new request for benefits, and this allegation properly raises an issue under Section 22. This motion was filed less than one month after the Fourth Circuit's decision and was well within the one-year time limit mandated by Section 22. Therefore, we hold that claimant's 1999 motion was filed in a timely manner, and we reverse the administrative law judge's conclusion to the contrary. 33 U.S.C. §922; *Betty B*, 194 F.3d at 497-498.

[2]*Betty B* discussed the legality of multiple motions for modification, but that case did not involve a rejection based on a question of timeliness. Section 22 does not distinguish types of "rejections." We note, moreover, that claimant seeks modification on the issue of timeliness, a mixed question of law and fact which can be raised under Section 22, and he does not argue that the timely 1999 filing in and of itself permits consideration of the merits of his claim for benefits.

We turn, then, to the basis for claimant's request for modification of the decision finding his prior filing was untimely. Claimant asserts there was a mistake in the determination that the 1992 motion for modification was untimely. He argues it was timely because the state award tolled the statute of limitations for filing a motion under the Act or, alternatively, because the 1992 motion was filed within one year of employer's voluntary payments in 1993. The latter issue is easily rejected, as a motion filed *prior* to payments made by a employer cannot be a motion filed within one year *after* the last payment. Claimant's primary assertion rests on the case law interpreting Section 13(d), *see Hollinhead,* 571 F.2d 272, 8 BRBS 159, seeking to extend this law to Section 22. In support of this assertion, however, claimant challenges no underlying facts but instead raises a legal theory not raised previously.[3] Section 22 permits a final decision to be re-evaluated upon a showing of a change in conditions or a mistake in the determination of a fact. While Section 22 extends to mixed questions of law and fact, *see, e.g., Jenkins v. Kaiser Aluminum & Chemical Sales, Inc.*, 17 BRBS 183 (1985), it cannot be used to raise issues involving only a new legal interpretation or to correct errors of law. *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971), *reh'g denied*, 404 U.S. 1053 (1972); *Ring v. I.T.O. Corp. of Virginia*, 31 BRBS 212 (1998); *Swain v. Todd Shipyards Corp.*, 17 BRBS 124 (1985). Legal errors may only be challenged by a timely motion for reconsideration or appeal. 33 U.S.C. §921; *see O'Keeffe*, 404 U.S. 254; *Maples v. Marine Disposal Co.*, 16 BRBS 241 (1984). Contrary to claimant's motion, he has not raised an issue involving any facts of the case. Rather, he has raised only new legal theories, and this is impermissible at this stage of the proceedings. *Ring*, 31 BRBS at 214-215. As claimant has not established a change in conditions or a mistake in the determination of a fact, we affirm the administrative law judge's denial of modification, albeit on grounds other than those expressed by the administrative law judge.

[3]When this case was first adjudicated, claimant argued that his motion was timely by virtue of the medical reports filed in 1991 or because it was filed within one year of the 1993 voluntary payments (in fact, it was filed before those voluntary payments). The former argument was rejected by the Fourth Circuit, and the latter was not addressed by either the administrative law judge or the court.

Accordingly, the administrative law judge's denial of modification is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge