BRB No. 02-0292

GREGORY ALEXANDER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
AVONDALE INDUSTRIES, INCORPORATED	)	DATE ISSUED: Dec. 23, 2002
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

William S. Vincent, Jr., New Orleans, Louisiana, for claimant.

Christopher M. Landry (Blue Williams, L.L.P.), Metairie, Louisiana, for self-insured employer.

Whitney R. Given (Eugene Scalia, Acting Solicitor of Labor; John F. Depenbrock, Jr., Associate Solicitor; Burke Wong, 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2001-LHC-1478) 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 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).

On January 18, 1990, and on June 4, 1990, during the course of his employment with employer, claimant suffered an injury and a re-injury to his back and neck. Claimant treated with Dr. Whitecloud and was diagnosed with a central disc herniation at C5-6 and disc disease and protrusion/herniation at L3-4, L4-5. ALJ Ex. 1. He underwent an anterior cervical fusion and diskectomy at C5-6 in 1992, and did not return to his usual work. After a formal hearing in 1996, Administrative Law Judge Avery (the administrative law judge) found that claimant is permanently impaired as a result of his neck and back injuries. He also found that employer established the availability of suitable alternate employment which claimant could perform at wages equal to or greater than his average weekly wage; therefore, the administrative law judge denied benefits. Decision and Order I at 3, 7-8; Decision and Order II at 3. No party sought reconsideration, nor was the decision appealed, so the award became final as of November 1, 1996.

As of April 30, 1996, the date of the initial hearing, claimant was working both as an evidence clerk at Municipal Court and as a security guard. After years of conservative treatment for his back, including three unsuccessful epidural injections, claimant ceased working as a security guard in June 1999 on the advice of Dr. Whitecloud because his back pain was worsening. He stopped working at the court on April 25, 2000, two days before he underwent a decompression laminectomy and fusion at L3-4 on April 27, 2000. Cl. Ex. 2 at 126. Claimant has not returned to work since the surgery in 2000. On June 5, 2000, claimant filed a claim for temporary total disability and medical benefits arising from the surgery. Cl. Ex. 1 at 21.

At the second hearing, held on September 11, 2001, employer agreed to pay claimant's medical expenses, including the cost of the 2000 surgery and related expenses thereafter. Tr. at 8-9. The administrative law judge determined, however, that claimant's claim for disability benefits in 2000 was not a new claim but, rather, was an attempt to modify the original decision pursuant to Section 22 of the Act, 33.U.S.C. §922. Decision and Order II at 6. Therefore, because claimant had not been awarded nominal benefits pursuant to *Hole v. Miami Shipyard Corp.*, 640 F.2d

[1]The administrative law judge awarded medical benefits, and at the time of the hearing, the parties stipulated that claimant's condition reached maximum medical improvement on June 11, 1993. Decision and Order I at 2, 8; Decision and Order II at 3.

769, 13 BRBS 237 (5th Cir. 1981), which would have kept the claim open, the administrative law judge found that the claim filed in 2000, almost four years after the denial of benefits, was barred by the one-year statute of limitations in Section 22. Claimant appeals the denial of disability benefits. Employer and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance.

On appeal, claimant argues his claim should be considered timely even though it was filed more than one year after the prior denial of benefits. Claimant contends Section 13, 33 U.S.C. §913, applies and that Section 22 should not bar his claim because he did not file a motion for modification but, rather, filed a new claim after he became aware of the temporary total disability related to the injuries caused by the 1990 accidents. Employer responds, arguing that claimant was fully aware that surgery has been an option since 1996, and that claimant should have filed a claim for a *de minimis* award to keep his claim open. Moreover, employer asserts that claimant is seeking modification of the 1996 decision and that he filed the motion in an untimely manner, and that even if the claim could be deemed timely, claimant did not establish a change in condition or a mistake in the determination of a fact. In the alternative, employer argues that, if the 2000 claim can be viewed as a new claim, then the doctrines of collateral estoppel and *res judicata* apply to bar the claim. The Director contends that claimant has shown, contrary to employer's argument, that there is a change in conditions warranting Section 22 modification; however, he agrees with employer that Section 22 applies in this case, and that claimant cannot recover disability benefits as his petition for modification was not timely filed.

Section 13(a) of the Act, 33 U.S.C. §913(a), provides that a claim for benefits for a traumatic injury must be filed within one year of the time the claimant was aware, or should have been aware, of the relationship between his injury and his employment. The time for filing does not begin to run until the claimant is aware of the full impact of his injury, *i.e.*, when he learns of an impairment to his wage-earning capacity. *Ceres Gulf, Inc. v. Director, OWCP [Fagan]*, 111 F.3d 17, 31 BRBS 21(CRT) (5th Cir. 1997); *Marathon Oil Co. v. Lunsford*, 733 F.2d 1139, 16 BRBS 100(CRT) (5th Cir. 1984). Where there has been no final compensation order issued, Section 13, rather than Section 22, is to be applied. *Intercounty Constr. Corp. v. Walter*, 500 F.2d 815 (D.C. Cir. 1974), *aff'd*, 422 U.S. 1, 2 BRBS 3 (1975); *Seguro v. Universal Maritime Service Corp.*, 36 BRBS 28 (2002). When a claim has

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[2]The record indicates that surgery, at the C3-4 and C4-5 levels, was an option in 1995, but it was an option claimant declined. ALJ Ex. 1. Claimant had surgery at the C5-6 level in 1992 and at the L3-4 level in 2000.

[3]A review of claimant's 1996 post-hearing brief reveals that claimant requested nominal benefits as an alternative to permanent partial disability benefits based on a current loss in wage-earning capacity. Cl. Brief (7/1/96) at 14-15. The administrative law judge did not address this claim in his 1996 decision, and he stated in his 2001 decision only that "no nominal award was made. . . ." Decision and Order II at 7. Claimant did not appeal the 1996 decision.

been previously adjudicated, however, the Board has held that Section 22, and not Section 13, determines whether a later filing is timely. *Moore v. Int'l Terminals, Inc.*, 35 BRBS 28 (2001). Relevant to the instant case, Section 22 requires a party to file a motion for modification within one year after the rejection of a claim. 33 U.S.C. §922; *Moore*, 35 BRBS 28. The Supreme Court has held that, under certain circumstances, a claimant may be entitled to an ongoing nominal award, and the effect of this award is to indefinitely prolong the time for filing a motion for modification. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *see also Hole*, 640 F.2d 769, 13 BRBS 237. If no disability benefits are awarded, motions for modification within one year of each successive denial are permitted pursuant to Section 22. *Old Ben Coal Co. v. Director, OWCP,* 292 F.3d 533 (7th Cir. 2002); *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491 (4th Cir. 1999).

In this case, there is no dispute that claimant's 2000 condition is related to his 1990 work injuries. Employer agreed to pay medical expenses, the herniation at the L3-4 disc level was initially diagnosed after the 1990 injuries and was revealed in MRIs performed in 1991, 1998 and 2000, and Dr. Whitehead testified that the surgery and disability arising in 2000 were related to the 1990 injuries. Cl. Ex. 7 at 42-43, 48. Additionally, there has been no allegation of claimant's having sustained a subsequent intervening injury. *See, e.g., Plappert v. Marine Corps Exchange*, 31 BRBS 13, *aff'd on recon. en banc*, 31 BRBS 109 (1997). Nevertheless, claimant tries to remove his case from Section 22 by arguing that, although the claim is based upon the injuries occurring in 1990, it is a new claim based on a new period of disability, as it is a claim for temporary total disability benefits and is not a reassertion of the claim for permanent partial disability benefits. This argument lacks merit.

Initially, we reject claimant's assertion that the claim filed in 2000 is a "new" claim which implicates Section 13 instead of Section 22. Claimant filed a timely claim based on his 1990 injuries, and his claim for permanent partial disability

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[4] Section 22 states, in relevant 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 [administrative law judge], the [administrative law judge] 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 . . . and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. . . .

[5] Both employer and the Director mistakenly state that the instant claim was filed on February 14, 2001. The February 14, 2001 filing was claimant's LS-18 Pre-Hearing Statement. Cl. Ex. 1 at 6. His actual claim, requesting temporary total disability and medical benefits, was made in a letter dated June 5, 2000. Cl. Ex. 1 at 21.

benefits was denied by an administrative law judge in a formal Decision and Order. Under the plain language of Section 22, the administrative law judge was authorized to review this case "at any time prior to one year after the rejection of the claim." 33 U.S.C. §922. As claimant does not allege a new injury, but bases his assertion of a new claim only on a new period and type of disability, the prior adjudication of his claim for the 1990 injuries results in application of the limitations period of Section 22 rather than Section 13.

A review of the Section 13 cases cited by claimant reveals that none involved a previously adjudicated claim. *See Paducah Marine Ways v. Thompson*, 82 F.3d 130, 30 BRBS 33(CRT) (6th Cir. 1996); *Marathon Oil Co. v. Lunsford*, 733 F.2d 1139, 16 BRBS 100(CRT) (5th Cir. 1984); *see also Plappert*, 31 BRBS 13. Rather, in those cases, the claimants filed their initial claims more than one year after the occurrence of their work accidents, and the timeliness of their claims depended upon their respective dates of awareness of the relationship between their disabling injuries and employment. In *Intercounty Constr. Corp. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975), the employee was injured in 1960, and he filed a claim for permanent total disability benefits within the one-year period pursuant to Section 13 of the Act. The employer's carrier voluntarily paid the claimant benefits in the amount equal to a total disability award. These payments continued until 1968 when the carrier reached its maximum liability under the Act for conditions other than permanent total disability or death. Over two years later, in February 1970, the claimant requested a hearing on his previously filed claim. Although the claim had been pending since it was filed, no action by the Department of Labor had ever been taken on it. *Id.,* 422 U.S. at 3-5, 2 BRBS at 4-5. The employer contended that the 1970 claim was untimely, as it occurred more than one year after the last payment of benefits. The Supreme Court held that the phrase "whether or not a compensation order has been issued" means only that the Section 22 one-year statute of limitations runs from the date of the last payment of benefits "even if the order sought to be modified is actually entered only after such date." *Id.,* 422 U.S. at 11, 2 BRBS at 9. It concluded that the 1960 claim, which had never been adjudicated, was controlled by Section 13 of the Act and not by Section 22; thus, the claim filed in 1970 was not time-barred. Accordingly, where there has been no prior adjudication, Section 13 properly applies. *Id.; see also Norton v. Nat'l Steel & Shipbuilding Co.,* 27 BRBS 33 (1993) (Brown, J., dissenting), *aff'g on recon. en banc* 25 BRBS 79 (1991); *Morales v. General Dynamics Corp.,* 16 BRBS 293 (1984), *rev'd on other grounds sub nom. Director, OWCP v. General Dynamics Corp.,* 769 F.2d 66, 17 BRBS 130(CRT) (2d Cir 1985). The case currently before the Board does not present such a situation.

Rather, the instant case is better compared to *Greathouse v. Newport News*

[6]The Director states that, even assuming, *arguendo,* claimant's condition can be considered a new injury under Section 13, the "claim" filed in "February 2001" was untimely, as claimant was aware of a loss of wage-earning capacity due to the work-related condition at least as of when he was forced to quit one of his jobs in June 1999. As noted, the Director is in error with regard to the actual filing date of claimant's claim.

Shipbuilding & Dry Dock Co., 146 F.3d 224, 32 BRBS 102(CRT) (4th Cir. 1998). In *Greathouse*, the claimant suffered a work-related leg injury in 1978. He filed a claim for benefits, and the district director issued a compensation order in October 1981 based on the parties' stipulations. The claimant's leg condition gradually worsened, and the employer voluntarily paid additional benefits. On October 1, 1987, the employer made its last payment of benefits under the October 1981 award, and the Office of Workers' Compensation Programs notified the claimant that he had until October 1, 1988, to file a claim for additional compensation. The claimant took no action until November 4, 1991, when, following surgery in August 1991, he requested additional compensation for the continuing effects of his original leg injury. The United States Court of Appeals for the Fourth Circuit stated that Section 22 applied and the claimant's 1991 claim could be addressed only if a doctor's report made in September 1987 constituted a valid motion for modification, as no other filing was made within one year of October 1, 1987. The court concluded the doctor's letter did not constitute a valid motion for modification, and, as the 1991 claim letter was untimely with regard to the last payment of benefits, the court held that the claimant had not complied with the Section 22 statute of limitations and was not entitled to additional benefits for his leg injury. *Greathouse*, 146 F.3d 224, 32 BRBS 102(CRT). Because there had been a previous adjudication of the claim for benefits for the injury to the claimant's leg, there was no question but that the provisions of Section 22 were invoked. As in *Greathouse*, claimant here is seeking to obtain benefits for the same injury for which a claim has already been adjudicated. Therefore, we must reject claimant's assertion that the 2000 claim is "new" and invokes the provisions of Section 13.

Neither can we accept claimant's argument that the claim for *temporary total* disability benefits in his 2000 claim distinguishes it from his earlier claim for *permanent partial* disability benefits. The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has defined the term "claim" in determining that a claimant need not abide by the formal requirements set forth in 20 C.F.R. §702.225(a) for withdrawing a part, as opposed to the whole, of his claim. The Fifth Circuit stated: "a claim is an assertion of a 'right to compensation for disability or death under [the] Act.'" *Pool Co. v. Cooper*, 274 F.3d 173, 183, 35 BRBS 109, 116(CRT) (5th Cir. 2001) (quoting 33 U.S.C. §913(a)). Thus, the court held that a claim "refers to the whole of the employee's demand for compensation, rather than to specific categories of benefits. . . ." *Id.* The Fifth Circuit explained:

> the fluid nature of the categorization of disabilities militates against their treatment as discrete claims. A single injury can and usually does give rise to several different disabilities, since the LHWCA conceives of disabilities not merely in a medical sense, but an economic one as well. * * * A static definition of "claim," as pertaining only to a precise category of disability for a fixed period of time, would deny the claimant the ability to modify his claim informally in response to such a situation.

Pool Co., 274 F.3d at 183, 35 BRBS at 116(CRT). Therefore, it held that claimants

remain free to modify either the dates or the categories of their disabilities without following the steps set forth in the regulation at 20 C.F.R. §702.225 unless they are withdrawing their claim in its entirety. The court opted for this interpretation despite the fact that "in some cases, including this one, our interpretation of 'claim' may run counter to public policy insofar as it makes it easier for an injured employee to waive his rights to disability benefits to which he might otherwise be entitled." *Id.*, 274 F.3d at 184, 35 BRBS at 117(CRT). The Fifth Circuit's decision in *Pool Co.*, therefore, provides that one "claim" may consist of requests for multiple types of benefits for an injury. Thus, claimant's filing here cannot be categorized as a "new claim" merely because it requests benefits for a different type of disability from the type originally sought in the claim previously adjudicated for the same injury.

As the claim for benefits for claimant's injuries resulting from the 1990 accidents was adjudicated in 1996, and as claimant seeks additional benefits for the same back conditions addressed in that adjudication, his claim is governed by Section 22. Because benefits were denied, and claimant did not appeal the decision or obtain a *de minimis* award, the time for filing a motion for modification expired on November 1, 1997, one year after the rejection of his claim became final. *See Moore*, 35 BRBS 28; *Black v. Bethlehem Steel Corp.*, 16 BRBS 138, 142 n.7 (1984), *appeal dismissed*, 760 F.2d 274 (9th Cir. 1985) (table). As claimant did not file a timely motion for modification in this case, we affirm the administrative law judge's decision and hold that claimant is not entitled to additional disability benefits for this back condition. *See Greathouse*, 146 F.3d 224, 32 BRBS 102(CRT); *House v. Southern Stevedoring Co.*, 14 BRBS 979 (1982), *aff'd*, 703 F.2d 87, 15 BRBS 114(CRT) (4th Cir. 1983). However, as a claim for medical benefits is never time-barred, the administrative law judge properly awarded claimant medical benefits. *Ryan v. Alaska Constructors, Inc.*, 24 BRBS 65 (1990). As the administrative law judge's decision is legally sound, we affirm it for the aforementioned reasons.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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[7]Thus, whether claimant's claim would have been timely filed had he requested and obtained nominal benefits or had he filed a motion for modification following successive denials of benefits is moot as neither contingency occurred in this case.

[8] While this disposition results in claimant's receiving no disability benefits for his current work-related condition, we agree with the administrative law judge that the statutory requirements cannot be set aside merely because a different result appears more equitable. Similarly, claimant argues that he is being penalized for working rather than undergoing surgery sooner. Nonetheless, the Act limits the period in which a prior adjudication may be altered, and in this case, claimant did not comply with this statutory mandate.

[9]In light of our decision, we need not address the remaining issues raised by the parties.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge