BRB No. 04-0603

SHARON D. BAILEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: 3/30/2005
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

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

Gregory E. Camden and Charlene Parker Brown (Montagna Breit Klein Camden, LLP), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2003-LHC-2181) of Administrative Law Judge Richard E. Huddleston 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).

Claimant sustained an injury arising out of her employment to both hands. Employer filed a timely notice of controversion. The parties stipulated that claimant was temporarily partially disabled from December 1, 1999 to August 3, 2000, inclusive. 33 U.S.C. §908(e). Dr. Gilbert released claimant to full-duty work on August 3, 2000. CX

1 at 84. Pursuant to the parties' stipulations, the administrative law judge issued a Decision and Order on November 14, 2000, awarding claimant temporary partial disability benefits for the referenced period.

On February 20, 2001, claimant sent a letter to the Office of Workers' Compensation Programs (OWCP), which references the earlier claim and states, in its entirety,

> Please consider this correspondence the claimant's request for permanent partial disability benefits. She will be scheduling an appointment to meet with Dr. Gilbert for this purpose and I will forward the medical report to your attention upon receipt.

CX 1 at 62. Claimant, however, did not see Dr. Gilbert until January 23, 2002, at which time he sent claimant to Gretchen Maurer, a certified hand specialist. CX 1 at 81. Ms. Maurer provided a report dated February 13, 2002, stating that claimant has a five percent impairment of the right upper extremity. CX 1 at 77-80. On June 11, 2002, claimant's counsel forwarded Ms. Maurer's report to employer and the OWCP, stating, *inter alia*, "I am advising [OWCP] of our claim in this matter for permanent partial disability benefits." CX 1 at 76. Dr. Gilbert sent a letter to claimant's counsel on September 16, 2002, concurring with the five percent arm rating. CX 1 at 75. An informal conference was held on May 27, 2003; the claims examiner noted that the parties could not agree on the issue of the sufficiency of claimant's letter as a motion for modification and that the case would be forwarded to the Office of Administrative Law Judges. CX 1 at 57-58.

The administrative law judge found that claimant's February 2001 letter was sent to the OWCP within one year of the last payment of benefits, so it was timely as a motion for modification pursuant to Section 22 of the Act, 33 U.S.C. §922. Employer contended that, 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), claimant's filing was anticipatory, and therefore, "invalid," because she was not claiming benefits for a specific disability at the time she filed the letter. The administrative law judge extensively discussed the case law addressing this issue and concluded that claimant's motion for modification was "valid." He therefore awarded her benefits for a five percent arm impairment, to which the parties stipulated if the administrative law judge found that claimant filed a valid motion.

The administrative law judge also held employer liable for an additional 10 percent assessment pursuant to Section 14(e) of the Act, 33 U.S.C. §914(e). The administrative law judge rejected employer's contention that it need not file a notice of controversion when claimant files a petition for modification. The administrative law judge found that, on the facts of this case, employer became obligated to pay benefits or

to file a notice of controversion as of October 3, 2002, when it received Dr. Gilbert's concurrence in the five percent rating. As employer did not file a notice of controversion until December 5, 2002, the administrative law judge held employer liable for a Section 14(e) assessment.

On appeal, employer contends that the administrative law judge erred in finding that claimant's request for modification was valid under the precedent established by the United States Court of Appeals for the Fourth Circuit. Employer contends claimant's February 2001 letter was an anticipatory request, as claimant did not have a disability to claim until her hand impairment was rated in January 2002, more than one year after the last payment of benefits. Employer also contends that, as it timely filed a notice of controversion after claimant sustained her original injury, it was not required to file an additional notice of controversion vis-à-vis the motion for modification. Thus, employer contends that the administrative law judge erred in finding it liable for a Section 14(e) assessment. Claimant responds, urging affirmance of the administrative law judge's decision in its entirety.

Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing otherwise final decisions; modification pursuant to this section is permitted based on a mistake of fact in the initial decision or on a change in claimant's physical or economic condition. *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.[1]

[1] In *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491 (4th Cir. 1999), the Fourth Circuit stated, "In short, the modification procedure is flexible, potent, easily invoked, and intended to secure 'justice under the act.'" *Id*. at 497-498. The court held that parties are free to file petitions for modification after every denial, even when success is very unlikely. The court stated, in a footnote,

> It is worth noting that a change in conditions will always support de novo reconsideration, . . . "[t]he health of a human being is not susceptible to once-in-a-lifetime adjudication." *Lisa Lee Mines* [*v. Director, OWCP*], 86

Pettus, 73 F.3d at 527, 30 BRBS at 9(CRT); *see also Meekins v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 5 (2000), *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). For the reasons that follow, we affirm the administrative law judge's finding that claimant's February 2001 letter is a valid motion for modification.

In *Pettus* and *Meekins*, the letters which were held to be invalid, anticipatory motions for modification essentially sought "any and all" benefits to which the claimants might be entitled. The letters did not reference any specific disability or worsening of the claimants' conditions or a mistake in fact in the prior decisions. *Pettus*, 73 F.3d at 527, 30 BRBS at 9(CRT); *Meekins*, 34 BRBS at 6, 8. Moreover, in these two cases, the letters purportedly seeking modification were filed prior to the time that the claimants alleged they actually sustained an additional period of disability.[2] *Id.* In contrast, in *Gilliam v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 69 (2001), within one year of a denial of benefits, the claimant wrote to the district director:

> F.3d [1358,] at 1362 [4th Cir. 1996]. Even a tiresome repeat filer should receive his benefits if and when he becomes entitled to them.

Betty B Coal, 194 F.3d at 500 n.4.

[2] *Cf. Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001), wherein the Fifth Circuit, addressing an argument that a timely LS-203 was nonetheless invalid because at the time of filing no benefits were due, distinguished *Pettus* on its facts as it involved filings that were too vague to state a claim. The court acknowledged the *Pettus* language regarding "anticipatory filings," but stated,

> We do not read that observation as forming a cornerstone of the court's analysis. To the extent that *Pettus* does stand for the proposition that a claim may only seek compensation for an antecedent period of disability, it is in direct conflict with the Supreme Court's holding in *Metropolitan Stevedore [Co. v. Rambo*, 521 U.S. 121, 31 BRBS 54(CRT) (1997)], and we must disregard it.

Pool Co, 274 F.3d at 181, 35 BRBS at 115(CRT).

> Kindly accept this letter as a request for modification in the decision previously filed in the Office of the District Director on January 31, 1997. Mr. Gilliam believes his condition has deteriorated and that he is now further disabled. He has been back to see Dr. Byrd since the administrative law judge's decision. Apparently it is now being considered that Mr. Gilliam may need further surgery. In light of this change in medical circumstances, claimant now requests compensation for additional temporary total disability as of the date he needs surgery and for permanent partial disability as of the current date and continuing.

Gilliam, 35 BRBS at 74. The Board held that this request for modification was "valid" pursuant to *Pettus* because it showed a clear intent to seek modification for a deteriorating condition, it made a claim for a specific type of benefits, and it referenced a specific period for which claimant sought permanent partial disability benefits. *Id.*; *see also Gillus v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 93 (2003), *aff'd mem.*, 84 Fed.Appx. 333 (4th Cir. 2004); *Jones*, 36 BRBS at 108-109 (motions for modification seeking *de minimis* award are not anticipatory, as such compensates a current disability nominal in extent, and as claimants referenced a deteriorating condition).

The administrative law judge discussed all relevant cases in detail and summarized the inquiry as follows: (1) looking at the content and context of the letter, does claimant exhibit a clear intent to request modification; (2) has claimant requested a claim for a specific type of benefits for a particular loss; (3) is the disability for which benefits are sought in existence at the time the request for modification is made; and (4) would a reasonable person conclude that the claimant is making a modification request. Decision and Order at 10.

The administrative law judge found that claimant's February 2001 letter constituted a valid request for modification. The administrative law judge found that since the stipulated compensation order was for a closed period of temporary partial disability, employer could reasonably expect a claim for additional compensation. He stated that the letter to the OWCP evinces an actual intent to seek benefits, and that employer so conceded. Unlike *Pettus* and *Meekins*, where the claimants sought "any and all benefits to which they might be entitled," claimant here specified that she sought permanent partial disability benefits. The administrative law judge further reasoned that because claimant's injury was to her hands, and she referenced an impairment rating, her request was for scheduled permanent partial disability benefits. The administrative law judge addressed the time gap between the modification request and claimant's obtaining an impairment rating. He stated that this gap does not negate claimant's intention to seek modification, since the parties later stipulated that claimant's condition reached maximum medical improvement on August 4, 2000, which was before she sought

modification and actually before the initial compensation order was entered. In this regard, the administrative law judge observed that the scheduled permanent partial disability award runs from the date of maximum medical improvement. Decision and Order at 11. Thus, the administrative law judge found the case to be most like *Gilliam*, wherein the claimant requested, *inter alia*, current permanent partial disability benefits.

Employer contends that although claimant's letter to the OWCP manifested an actual intent to seek compensation, the letter is nonetheless "anticipatory" pursuant to *Pettus* because claimant did not have any disability, *i.e.* permanent impairment, to claim at the time she filed her letter. By the time claimant obtained evidence of a permanent impairment, it was more than one year after the last payment of compensation. Employer also avers that the administrative law judge erred in relying on the parties' stipulation as to the dated of maximum medical improvement to find that claimant was claiming an actual disability at the time her February 2001 letter was filed, as the stipulation does not signify that claimant's condition would worsen, but only that it would not improve.

We reject employer's contentions and affirm the administrative law judge's finding that claimant's motion for modification was valid, as it is rational, supported by substantial evidence, and in accordance with law. Employer has conceded that claimant manifested an intent to seek additional compensation for a specific type of benefits. Moreover, the administrative law judge rationally found that the context of this case demonstrates that claimant's claim was not anticipatory. Although claimant had not yet received an impairment rating at the time she sought modification, the administrative law judge correctly relied on the fact that her schedule award runs from the date of maximum medical improvement given the circumstances in this case, *i.e.*, where claimant is working or suitable alternate employment has been identified. *See generally Rinaldi v. General Dynamics Corp.*, 25 BRBS 129 (1991); *see also Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90(CRT) (5th Cir. 1991); *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69(CRT) (D.C. Cir. 1990); *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991). Unlike the claimants in *Pettus* and *Meekins*, claimant herein had an additional disability under the Act, which pre-dated the filing for modification. The fact that the impairment was not yet quantified when claimant filed for modification therefore does not establish the invalidity of her modification request.[3]

[3] Employer's attempt to recharacterize the parties' stipulation as to the date of maximum medical improvement is unavailing. "Maximum medical improvement" may mean any one of several things. For example, it may mean, as employer suggests, that claimant is completely healed and no longer disabled. It also may mean that claimant has healed to the fullest extent possible and now has a permanent impairment. *See, e.g., Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999), *aff'd*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000). In addition, it could mean that claimant has not only healed to the fullest

In this regard, the administrative law judge rationally found that this case is most like *Gilliam*, 35 BRBS 69. In *Gilliam*, the claimant sustained a back injury for which compensation initially was denied. In timely seeking modification, the claimant referenced a deteriorating condition and made a claim for current permanent partial disability benefits. As his injury was to an unscheduled body part, any permanent partial disability award would be payable pursuant to Section 8(c)(21), (h) of the Act, 33 U.S.C. §908(c)(21), (h). The Board held that as the letter seeking modification referenced a "disability purportedly in existence at the time that the request was made," the filing was not anticipatory. *Gilliam*, 35 BRBS at 74. Significantly, as in this case, the letter seeking modification in *Gilliam* did not attempt to quantify the extent of the claimant's permanent partial disability, *i.e.*, his alleged loss in wage-earning capacity.

Pettus requires that the claimant seek compensation for a "particular loss." *Pettus*, 73 F.3d at 527, 30 BRBS at 9(CRT). The court did not require that the full extent of that loss be quantified in the pleading, as employer suggests is necessary. It is sufficient that claimant references a current claim for permanent partial disability benefits, which, in the context of this case, is a claim under schedule, as the administrative law judge correctly found. Moreover, a clear distinction exists between the information required to file a claim and the evidence necessary to prove it. Indeed, in the context of the filing of a new claim pursuant to Section 13 of the Act, 33 U.S.C. §913,[4] the Board and the Fifth Circuit addressed a similar argument, holding that a claim for hearing loss need not be accompanied by an interpreted audiogram in order to trigger employer's duty to pay benefits for purposes of avoiding fee liability under Section 28(a), 33 U.S.C. §928(a). *Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003), *aff'g Craig v. Avondale Industries, Inc.*, 35 BRBS 164 (2001) (*en banc*), *aff'd on reconsideration en banc*, 36 BRBS 65 (2002). The Fifth Circuit held that merely filing a

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extent possible, but that the condition is, in fact, deteriorating. *See, e.g., SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996). In this case, the salient point is that the schedule award, *i.e.*, claimant's disability, commenced on the stipulated dated of maximum medical improvement.

[4] Generally, the issue of what constitutes a valid filing is analyzed the same whether the case arises under Section 13 or under Section 22. *See, e.g., Fireman's Fund Ins. Co. v. Bergeron*, 493 F.2d 545 (5th Cir. 1974) (discussing the sufficiency of various filings); *see also Pettus*, 73 F.3d at 528 n.3, 30 BRBS at 10 n.3(CRT).

claim form, LS-203, is sufficient to constitute a validly filed claim.[5] *Avondale Industries*, 355 F.3d at 852, 37 BRBS at 118(CRT), *citing Bergeron*, 493 F.2d 545. In this case, claimant filed a timely request for permanent partial disability benefits, and the administrative law judge properly concluded that the claim was not invalid merely because he did not have evidence of the degree of impairment at the time of filing. The content of the filing clearly states a present claim, and, in context, it was for a disability purportedly, and in fact, in existence at the time of the timely filing. We therefore affirm the administrative law judge's finding that claimant's motion was "valid." *Gillus*, 37 BRBS 93; *Gilliam*, 35 BRBS 69; *see also Avondale Industries*, 355 F.3d 848, 37 BRBS 116(CRT). As a result, we also affirm the award of benefits for a five percent arm impairment.

Employer next contends that the administrative law judge erred in finding it liable for a Section 14(e) assessment. Employer contends that as it timely controverted the initial claim for benefits, it was not required to controvert again when claimant filed for modification. The administrative law judge found that a claim for modification is a new claim for benefits and that the provisions of Section 14 are applicable thereto. The administrative law judge found that employer did not timely controvert the claim for modification and is liable for a Section 14(e) assessment.

Section 14(d) of the Act states that:

> If the employer controverts the right to compensation he shall file with the deputy commissioner on or before the fourteenth day after he has knowledge of the alleged injury or death, a notice, in accordance with a form prescribed by the Secretary stating that the right to compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury or death, and the grounds upon which the right to compensation is controverted.

33 U.S.C. §914(d) (emphasis added). Section 14(e) of the Act states that employer is liable for an additional 10 percent assessment unless employer timely pays benefits, *see* 33 U.S.C. §914(b), or timely files a notice of controversion, 33 U.S.C. §914(d). Employer contends that because Section 14(d) requires that a notice of controversion be filed after employer has knowledge of the *injury*, it is not required to file a new notice of controversion every time claimant files a claim for a new period of *disability*. The parties

[5] An LS-203 claim form states only, "I hereby make claim for compensation benefits, monetary and medical, under the [Act]." There is no requirement in the Act or its regulations that claimant submit evidence at the time he files his claim. *See* 33 U.S.C. §§913, 914; 20 C.F.R. §702.221.

stipulated that employer timely filed a notice of controversion after claimant's injury occurred. Decision and Order at 2.

The administrative law judge correctly stated that a modification claim is to be processed as if it were an original claim. *See* 33 U.S.C. §922; 20 C.F.R. §702.373. In assessing additional compensation pursuant to Section 14(e), the administrative law judge also relied on the purpose of a notice of controversion, which is to bring the parties' dispute to the attention of the Department of Labor (DOL). *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley],* 898 F.2d 1088, 23 BRBS 61(CRT) (5th Cir. 1990). The administrative law judge found that, on the facts of this case, employer became obligated to pay or controvert the claim as of October 3, 2002, when it received Dr. Gilbert's concurrence in the five percent rating. As employer did not file a notice of controversion until December 5, 2002, the administrative law judge held employer liable for a Section 14(e) assessment.

We reverse the administrative law judge's assessment of additional compensation. Long-standing precedent establishes, pursuant to the plain language of the Act, that employer's duty to pay benefits or to file a notice of controversion pursuant to Section 14(b) and/or (d) arises upon its obtaining notice or knowledge of claimant's *injury*, not knowledge of a claim for benefits.[6] *See Newport News Shipbuilding & Dry Dock Co. v. Graham,* 573 F.2d 167, 8 BRBS 241 (4th Cir.), *cert. denied*, 439 U.S. 979 (1978); *see, e.g., Prolerized New England Co. v. Benefits Review Board*, 637 F.2d 30, 12 BRBS 808 (1st Cir. 1980), *aff'g McNeil v. Prolerized New England Co.*, 11 BRBS 576 (1979), *cert. denied*, 452 U.S. 938 (1981); *Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998); *Spear v. General Dynamics Corp.*, 25 BRBS 132 (1991); *Spencer v. Baker Agricultural Co.*, 16 BRBS 205 (1984); *Pilkington v. Sun Shipbuilding & Dry Dock Co.*, 14 BRBS 119 (1981) As a request for modification is a new claim based upon an existing injury, it follows from this precedent that a new notice of controversion is not required upon the filing of the modification request.

The plain language of the statute requires only that employer controvert the claim after obtaining knowledge or notice of claimant's injury. *See generally Newport News Shipbuilding & Dry Dock Co. v. Brown,* 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2004). The parties stipulated that employer's notice of controversion was timely as to its

[6] Where employer pays voluntary benefits after an injury, employer also has a duty to controvert the claim upon its suspension of benefits because a controversy arises between the parties at that time. *National Steel & Shipbuilding Co. v. United States Department of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979); *National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979).

knowledge or receipt of notice of claimant's injury. Therefore, employer cannot be held liable for a Section 14(e) assessment, and we reverse the administrative law judge's imposition of such. *See generally Holland v. Holt Cargo Systems, Inc.*, 32 BRBS 179 (1998).

Accordingly, the administrative law judge's finding that employer is liable for a Section 14(e) assessment is reversed. In all other respects, the administrative law judge's Decision and Order is 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