

| | | |
|-------------------------------|---|-------------------------|
| JAMES A. KEA |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| NEWPORT NEWS SHIPBUILDING AND |) | DATE ISSUED: 01/30/2006 |
| DRY DOCK COMPANY |) | |
| |) | |
| Self-Insured |) | |
| Employer-Respondent |) | DECISION and ORDER |

Appeal of the Decision and Order and Order Denying Claimant’s Petition for Reconsideration of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (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.

Before: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

Claimant appeals the Decision and Order and Order Denying Claimant’s Petition for Reconsideration (2004-LHC-1430) of Administrative Law Judge Larry W. Price 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 to his right leg while working for employer on April 6, 1995. Employer voluntarily paid temporary total disability benefits from April 7, 1995, through August 27, 1995, as well as all related medical benefits. On September 10, 1999, the district director awarded claimant, pursuant to the parties’ stipulations, temporary partial disability benefits in the amount of \$1,000 for the period from August

28, 1995, until December 31, 1998, as well as a continuation of appropriate medical care under Section 7(a) of the Act, 33 U.S.C. §907(a). Employer made its last compensation payment on September 15, 1999.

On September 17, 1999, claimant's counsel wrote a letter to the Department of Labor, Office of Workers' Compensation Programs (OWCP), alleging that claimant sustained a permanent loss of wage-earning capacity as a result of his work injury. In particular, counsel requested that his letter be considered "a request for additional compensation and modification of the previous award and not a request for the scheduling of an informal conference." Claimant's Exhibit (CX) 5. On September 27, 1999, the district director identified claimant's request as a claim for compensation and provided notification to employer and its carrier. CX 6.

On April 7, 2003, Dr. Bryant assigned a 35 percent permanent disability rating to claimant's right lower leg thereby prompting claimant to seek the payment of permanent partial disability benefits from employer. CX 2 at 36. Employer refused on the ground that claimant's request was not filed within one year of its last payment of compensation benefits. On August 20, 2003, the claims examiner informed the parties of her belief that claimant's 2003 request for additional benefits was not time-barred, thereby leading employer to request a formal hearing before the Office of Administrative Law Judges. CXs 7, 10.

In his Decision and Order, the administrative law judge found that claimant's September 17, 1999, letter to OWCP was not a valid motion for modification that tolled the statute of limitations on claimant's later claim for scheduled permanent partial disability benefits. He thus concluded that claimant's request for modification, prompted by the April 7, 2003, impairment rating of Dr. Bryant, was untimely pursuant to Section 22 of the Act, 33 U.S.C. §922, as it was filed more than one year from the date of employer's last payment of compensation. Accordingly, the administrative law judge denied claimant's request for modification, as well as his subsequent request for reconsideration.

On appeal, claimant challenges the administrative law judge's denial of his petition for modification. Employer responds, urging affirmance.

Claimant argues that the administrative law judge erred in finding that his letter dated September 17, 1999, did not toll the statute of limitations under Section 22, for it represents a timely filed, but unadjudicated, claim. Claimant thus avers that, as recognized by Board case law,¹ most notably in the recent decision in *Bailey v. Newport News Shipbuilding and Dry Dock Co.*, 39 BRBS 11 (2005), the letter stands as a valid and timely request for modification of the district director's September 10, 1999, compensation order, rather than a mere protective filing.

Section 22 of the Act 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 needs only to be a writing from which a reasonable person would conclude that a modification request has been made. *I.T.O. Corp. of Virginia v. Pettus*, 73 F.3d 523, 30 BRBS 6(CRT) (4th Cir. 1995), *cert. denied*, 519 U.S. 807 (1996). The Fourth Circuit, within whose jurisdiction this case arises, has stated that the modification application

¹ In support of his position, claimant cites to the Board's unpublished decision in *Lassiter v. Newport News Shipbuilding and Dry Dock Co.*, BRB No. 04-0654 (April 26, 2005) (unpub.), wherein the Board vacated the administrative law judge's denial of claimant's request for modification and remanded the case for further consideration because the administrative law judge did not sufficiently discuss the relevant case law on the issue. Unpublished decisions of the Board have no precedential value. *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990). In any event, the instant case is distinguished from *Lassiter*, in that, as shall be discussed *infra*, the administrative law judge herein has thoroughly considered, discussed, and analyzed the relevant case law in deciding the modification issue.

“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 v. Newport News Shipbuilding & Dry Dock Co.*, 146 F.3d 224, 226, 32 BRBS 102, 103(CRT) (4th Cir. 1998) (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 (2000), *aff’d mem.*, 238 F.3d 413 (4th Cir. 2000) (table); *but see Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001) (Fifth Circuit states that to the extent that *Pettus* stands for the proposition that a claim may seek compensation only for an antecedent period of disability, it is in direct conflict with the Supreme Court’s holding in *Rambo I*, and must be disregarded). 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) (the content and context of letter determines whether it is a request for modification not OWCP’s reaction to it); *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).

As the administrative law judge found, the instant case presents a fact pattern similar to that in *Meekins*, 34 BRBS 5, and *Porter*, 36 BRBS 113. In *Meekins*, claimant injured his knee and was awarded benefits under the schedule, as well as temporary total disability benefits, pursuant to an administrative law judge’s decision, which the employer paid on October 10, 1995. On February 7, 1996, Meekins filed a motion for modification seeking “additional (temporary total, permanent total, permanent partial, temporary partial) benefits....” Meekins’s letter asked OWCP to “consider this a request for additional compensation in modification of the previous award and not a request for the scheduling of an informal conference.” *Meekins*, 34 BRBS at 6 (parenthetical and emphasis in original). No further action was taken on this case until March 1998 when Meekins sought benefits for periods of disability in 1997 and requested an informal conference. As the 1996 letter did not claim a particular disability and as Meekins did not intend, at the time it was filed, to have the claim processed, by virtue of his request that an informal conference not be scheduled, the Board affirmed the administrative law judge’s determination that the letter was not a valid motion for modification. *Id.* at 9.

In *Porter*, 36 BRBS 113, the claimant sustained an injury to her arm, and received permanent partial disability benefits pursuant to a stipulated compensation order. Within one year of the last payment of benefits, the claimant submitted a letter to OWCP requesting a nominal award. The Board held that as the letter sought a specific type of compensation, *i.e.*, a nominal award, which claimant would be able to receive immediately if she could prove entitlement, the content of the letter was sufficient to constitute a valid motion for modification under Section 22. However, the Board also

concluded that the context of the letter established that claimant lacked the intent to pursue an actual claim for nominal benefits at the time she filed the petition for modification, for the letter was filed “only 18 days after the last payment of benefits,” well in advance of the evidence of any deterioration of claimant’s condition, and the claimant, by stating that she did not want OWCP to schedule an informal conference, “deliberately halted the administrative process.” *Id.* at 117. The Board thus affirmed the administrative law judge’s finding that the letter constituted an anticipatory filing, and thus was not a valid request for modification.

In contrast, in *Bailey*, 39 BRBS 11, the claimant was initially awarded temporary partial disability benefits, pursuant to the parties' stipulations, by an administrative law judge's decision issued on November 14, 2000. On February 20, 2001, claimant submitted a letter to OWCP, wherein, referencing her earlier claim, she sought additional compensation in the form of permanent partial disability benefits, advised that she was arranging a meeting with a physician, Dr. Gilbert, to obtain a disability rating, and informed OWCP that she would forward Dr. Gilbert's report upon receipt. Claimant, however, did not see Dr. Gilbert until January 23, 2002, at which time he sent claimant to a hand specialist, Gretchen Maurer, who, by report dated February 13, 2002, opined that claimant had a five percent impairment of her right upper extremity. Claimant thereafter pursued her claim for permanent partial disability benefits which employer challenged based on the timeliness of the request for modification.

In his decision, the administrative law judge concluded that Bailey's February 20, 2001, letter was a "valid" motion for modification as, in contrast to the letters in *Pettus* and *Meekins*, it sought a specific type of benefits, *i.e.*, permanent partial disability benefits, and evinced an actual intent to seek benefits. *See also Gilliam v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 69 (2001). With regard to intent, the administrative law judge found that the time gap from the February 20, 2001, letter and the February 13, 2002, receipt of the permanent disability rating, did not negate Bailey's intention to seek modification since the parties later stipulated that her condition reached maximum medical improvement on August 4, 2000, which was before she sought modification and actually before the initial compensation order was entered. Inasmuch as the scheduled award of benefits would run from the date of maximum medical improvement, the administrative law judge concluded that Bailey's request for permanent partial disability benefits was current. The Board affirmed the administrative law judge's finding that Bailey's motion for modification was valid as the content of the filing clearly stated a present claim, and, in context, it was for a disability purportedly, and in fact, in existence at the time of the timely filing. *Bailey*, 39 BRBS 11.

Applying these decisions to the instant case, we now look to the administrative law judge's finding concerning the content and context of claimant's September 17, 1999, letter. That correspondence, in pertinent part, reads:

Enclosed is an original and two copies of the LS-203 for the above captioned matter. The claimant alleges that he has sustained a permanent loss of wage earning capacity as a result of this injury.

Please consider this a request for additional compensation in modification of the previous award and not a request for the scheduling of an informal conference.

CX 5. As in *Porter*, 36 BRBS 113, and *Bailey*, 39 BRBS 11, this letter states a valid basis for modification, as claimant sought a specific type of compensation, *i.e.*, permanent partial disability benefits. However, as the administrative law judge determined, the relevant facts otherwise establish that this letter constitutes an anticipatory filing. First, claimant's statement that the letter is "not a request for the scheduling of an informal conference," belies his intent to seek additional compensation as in so doing, he "deliberately halted the administrative process." *See Porter*, 36 BRBS at 117; *Meekins*, 34 BRBS at 9. Second, it is significant that claimant did not take any further action with regard to this claim until he received the report of Dr. Bryant in April 2003, over three years from the date of his letter. *Id.* Thus, the circumstances surrounding the filing of claimant's September 17, 1999, letter establish the absence of any actual intent to pursue modification at that time.

Moreover, in contrast to claimant's assertion, the overall circumstances surrounding this claim are distinguishable from *Bailey* on three key points. First, while it may be implied by the cessation of temporary partial benefits as of September 15, 1999, that employer conceded that claimant reached maximum medical improvement at that time, employer has not, in actuality, stipulated to maximum medical improvement at any time during this case. Second, claimant *Bailey*, unlike claimant herein, explicitly acknowledged in her letter that she was actively seeking specific evidence to support her claim and that she would forward that relevant evidence to OWCP upon its receipt. In contrast, claimant herein did not make any such statement and in fact, took no further action regarding his September 17, 1999, request until he received Dr. Bryant's assessment in April 2003. As the administrative law judge concluded, the three plus year gap between these two events indicates that the September 1999 letter was merely an anticipatory filing. Third, and perhaps most importantly, claimant, in this case, specifically indicated that he did not want an informal conference scheduled at the time of his September 17, 1999, which the Board has held demonstrated an intent to "deliberately halt" the adjudication process. *See Porter*, 36 BRBS at 117; *Meekins*, 34 BRBS at 9.

Thus, in light of Fourth Circuit precedent on this issue, *see Pettus*, 73 F.3d at 527, 30 BRBS at 9(CRT), and as the fact pattern herein is akin to *Porter*, 36 BRBS 113, and *Meekins*, 34 BRBS 5, and distinguishable from *Bailey*, 39 BRBS 11, we must affirm the administrative law judge's finding that claimant's September 17, 1999, letter does not represent a valid request for modification. Consequently, his denial of claimant's request for modification is affirmed as it is rational, supported by substantial evidence, and is in accordance with law.

Accordingly, the administrative law judge's Decision and Order denying benefits and Order Denying Claimant's Petition for Reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge