BRB No. 09-0570

STEPHANIE H. WHEELER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: 01/26/2010
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Modification of Kenneth A. Krantz, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Modification (2008-LHC-0794) of Administrative Law Judge Kenneth A. Krantz 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 findings of fact and conclusions of law of the administrative law judge which 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).

This case, which has previously been before the Board, has a lengthy procedural history. To briefly reiterate the background, claimant sustained injuries to both of her knees on May 26, 1992, while in the course of her employment as a shipfitter for employer. Employer voluntarily paid claimant scheduled permanent partial disability compensation for a 15 percent disability to her right lower extremity and a 25 percent

disability to her left lower extremity, as well as temporary total disability compensation for a period of time. 33 U.S.C. §908(b), (c)(2). Claimant sought continuing benefits for permanent total disability, and a formal hearing was held on September 17, 1998. In a Decision and Order issued on March 29, 1999, Administrative Law Judge Campbell found that claimant established a *prima facie* case of total disability and that employer failed to establish the availability of suitable alternate employment; he accordingly awarded claimant compensation for permanent total disability. Employer thereafter appealed this decision to the Board. In a Decision and Order issued on April 18, 2000, the Board affirmed Judge Campbell's finding that employer did not establish the availability of suitable alternate employment. *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 99-0745 (Apr. 18, 2000)(unpub.).

Subsequently, employer requested modification pursuant to Section 22 of the Act, 33 U.S.C. §922, and a second formal hearing was held on November 30, 2001, at which time new evidence was admitted into the record. In a Decision and Order issued on May 24, 2002, Judge Campbell granted employer's modification request, and found that employer established the availability of suitable alternate employment; accordingly, Judge Campbell modified claimant's award from ongoing permanent total disability benefits to permanent partial disability benefits. Subsequently, in an Order Granting Employer's Motion for Reconsideration, Judge Campbell noted that claimant is limited to a scheduled award of permanent partial disability benefits and amended his May 24, 2002 Decision and Order to deny the claim for permanent total disability benefits. Claimant appealed to the Board, and in a Decision and Order issued on September 12, 2003, the Board affirmed Judge Campbell's finding that claimant was limited to the scheduled awards previously paid for her knee injuries. *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 107 (2003). The Board's decision was not appealed and thus became final.

On June 21, 2006, claimant underwent a right total knee anthroplasty, CX 6 at 179, and, on October 5, 2006, she underwent an additional surgical procedure on her right knee. CX 2 at 4. On September 13, 2007, claimant filed a request for Section 22 modification, claiming that she was entitled to temporary total disability benefits commencing June 21, 2006, due to her work-related knee condition.[1] EX 2. Claimant subsequently underwent a total left knee anthroplasty on January 30, 2008. CX 6 at 103. At the formal hearing, the parties stipulated that employer voluntarily paid claimant's medical providers for all the treatment she has received for her work-related bilateral

[1] At the formal hearing, claimant asserted entitlement to compensation for temporary total disability from June 20, 2006, through June 13, 2007, temporary partial disability from June 14, 2007 through September 5, 2007, and temporary total disability from September 6, 2007 to the present and continuing. Tr. at 6.

knee injury, including the 2006 and 2008 surgeries, pursuant to Section 7(a) of the Act, 33 U.S.C. §907(a). *See* Tr. at 8-9, 13. Claimant argued that her September 13, 2007 modification request, which was filed four years after the issuance of the Board's September 12, 2003 decision affirming the denial of her claim for total disability benefits, was timely since employer's continuing voluntary payment of claimant's medical expenses constituted the "payment of compensation" pursuant to Section 22, thus tolling the one-year statute of limitations for requesting modification. Tr. at 9-10; Cl. Post-Hearing Brief at 5-10. In his Decision and Order Denying Modification, Administrative Law Judge Krantz (the administrative law judge) rejected claimant's argument that the term "compensation," as used in Section 22, includes the voluntary payment by employer of claimant's medical expenses to her medical providers. The administrative law judge concluded that, as claimant's modification request was filed more than one year following the date on which the Board's affirmance of the denial of her claim became final, claimant's modification request was untimely, and he consequently denied claimant's request for modification.

On appeal, claimant contends that the administrative law judge erred in finding that employer's voluntary payments of medical benefits did not toll the Section 22 statute of limitations. Employer responds, urging affirmance.

Section 22 of the Act provides 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. . . .

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. *Moore v. Int'l Terminals, Inc.*, 35 BRBS 28 (2001). If a claim is denied, time begins to run on the date the decision becomes final; thus, a modification request must be filed within one year after the conclusion of the appellate process. *Id.; see also Alexander v. Avondale Industries, Inc.*, 36 BRBS 142 (2002).

In the instant case, the issue of whether the administrative law judge properly found that claimant's modification request was untimely turns on the question of whether employer's payment of Section 7(a) medical benefits directly to claimant's health care providers constitutes the payment of "compensation" for purposes of tolling the Section 22 statute of limitations.[2] Section 2(12) of the Act defines "compensation" as "the money allowance payable to an employee or to his dependents as provided for in this chapter, and includes funeral benefits provided therein." 33 U.S.C. §902(12). Medical benefits are not explicitly included in this definition of "compensation."

In *Marshall v. Pletz*, 317 U.S. 383 (1943), the United States Supreme Court held that the employer's provision of Section 7 medical care is not payment of "compensation" within the meaning of Section 13(a) of the Act, 33 U.S.C. §913(a),[3] and therefore does not toll the limitations period for filing a claim. The Court observed in this regard that the term "compensation" used in Sections 2(12), 6, 8, 10 and 14 of the Act, 33 U.S.C. §§902(12), 906, 908, 910, 914, refers to periodic money payments made to the claimant and does not refer to the expense of medical care. *Id.* at 390-391. After acknowledging that Section 4 of the Act[4] could be construed as including medical treatment in the term "compensation," the Court stated that:

> In the normal case, however, the insurer defrays the expense of medical care but does not pay the injured employe anything on account of such care. Only if the employer and the insurer omit to furnish such care can the employe procure it for himself and then obtain from the deputy commissioner an award to reimburse him for what he has spent.

Id. at 391. The Court then concluded that "[i]n the *light of all the provisions of the Act*, we are persuaded that the terms 'payment' and 'compensation' used in §13(a) refer to the periodic money payments to be made to the employe," and, thus, held that the furnishing

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[2] Section 7(a) of the Act provides in relevant part that "[t]he employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. §907(a).

[3] Section 13(a) provides in pertinent part that "[i]f payment of compensation has been made without an award on account of such injury or death, a claim may be filed within one year after the date of the last payment." 33 U.S.C. §913(a).

[4] Section 4 states in relevant part that "[e]very employer shall be liable for and shall secure the payment to his employees of the *compensation payable under Sections 907, 908, and 909 of this title. . . .*" 33 U.S.C. §904 (emphasis added).

of medical care does not constitute payment of compensation within the meaning of Section 13(a). *Id.* (emphasis added); *see Bingham v. General Dynamics Corp.*, 14 BRBS 614, 617 (1982).

Consistent with the Supreme Court's decision in *Pletz,* the United States Courts of Appeals for the Fourth and Ninth Circuits have stated that compensation and medical benefits are distinct terms under the Act. *See Brown & Root, Inc. v. Sain*, 162 F.3d 813, 818-819, 32 BRBS 205, 209(CRT) (4th Cir. 1998); *Bethlehem Steel Corp. v. Mobley*, 920 F.2d 558, 560-561, 24 BRBS 49, 52-53(CRT) (9th Cir. 1990). *Cf. Maryland Shipbuilding & Drydock Co. v. Jenkins*, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979).[5] Furthermore, in a line of cases construing the term "compensation" as used in several sections of the Act, the Board has held, in accordance with the Supreme Court's reasoning in *Pletz,* that medical benefits *generally* are not considered to be compensation because, in the normal case, the insurer defrays the expense of medical care but does not pay the injured employee anything on account of such care. *See Gladney v. Ingalls Shipbuilding, Inc.*, 33 BRBS 103, 109 (1999); *Aurelio v. Louisiana Stevedores, Inc.*, 22 BRBS 418, 423 (1989), *aff'd mem.*, 924 F.2d 1055 (5th Cir. 1991); *Caudill v. Sea-Tac Alaska Shipbuilding*, 22 BRBS 10, 16 (1988), *aff'd mem.*, 8 F.3d 29 (9th Cir. 1993).

Similarly, the United States Court of Appeals for the Fifth Circuit has emphasized the importance of the distinction drawn by the Supreme Court in *Pletz,* 317 U.S. at 391, between the normal case in which the employer voluntarily pays the medical provider directly and the case in which the employer refuses or neglects to provide medical benefits and the claimant subsequently is awarded reimbursement for expenses he incurred in obtaining medical treatment. *Lazarus v. Chevron USA, Inc.*, 958 F.2d 1297,

[5] In *Jenkins*, 594 F.2d 404, 10 BRBS 1, the Fourth Circuit addressed the term "compensation" as used in Section 7(d) of the Act, 33 U.S.C. §907(d). Citing Section 4(a) of the Act, *see* n.4, *supra*, the court concluded that "compensation" must be interpreted to apply to all benefits provided by the three sections of the Act enumerated in Section 4(a), and, thus, the court held that suspension of compensation pursuant to Section 7(d) includes medical benefits. *Id.*, 594 F.2d at 406-407, 10 BRBS at 7. The Fourth Circuit, however, based its holding in *Jenkins* solely on Section 4(a) of the Act, without reference to the statutory definition of the term "compensation" provided at Section 2(12) of the Act; moreover, the court did not cite the Supreme Court's decision in *Pletz.* In its subsequent decision in *Sain*, 162 F.3d 813, 32 BRBS 205(CRT), in which the Fourth Circuit held that the term "compensation," as used in Section 33(g)(1) of the Act, 33 U.S.C. §933(g)(1), does not include medical benefits, the court did not cite its earlier decision in *Jenkins.* Under these circumstances, we reject claimant's contention that the Fourth Circuit's holding in *Jenkins* controls the disposition of the issue raised in this case.

1301, 25 BRBS 145, 148(CRT) (5th Cir. 1992). The question before the Fifth Circuit in *Lazarus* was whether medical benefits are included in the term "compensation" for purposes of the enforcement procedures under Section 18(a) of the Act, 33 U.S.C. §918(a). *Lazarus*, 958 F.2d at 1300, 25 BRBS at 147(CRT). The court held that where a claimant is awarded reimbursement for amounts he expended for medical treatment, such award constitutes "monies payable to an employee or to his dependents" pursuant to the Section 2(12) definition of "compensation," and therefore the award may be enforced under Section 18(a).[6] *Id.* The Fifth Circuit expressly limited its holding in *Lazarus* to cases in which the employer refuses or neglects to furnish medical services, and the employee incurs expenses or debt in obtaining such services; in such a case, an award of medical expenses obtained by the employee against the employer was held to be "compensation" within the meaning of Section 2(12). *Id.*, 948 F.2d at 1301, 25 BRBS at 148(CRT). In underscoring the limits of its holding, the court stated:

> If an employer furnishes medical services voluntarily, by paying a health care provider for its services, it does not pay "compensation" within the meaning of the Act. Compensation includes only money payable to an employee or his dependents, 33 U.S.C. §902(12), not payments to health care providers on an employee's behalf.

Id.; see also Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker], 991 F.2d 163, 166 n.6, 27 BRBS 14, 15 n.6(CRT) (5th Cir. 1993); *Estate of C.H. [Heavin] v. Chevron USA, Inc.*, 43 BRBS 9, 14-15 (2009).

In this case, it is undisputed that employer voluntarily furnished medical benefits by directly paying claimant's health care providers for all of the medical treatment she received for her work-related injury. *See Lazarus*, 958 F.2d at 1301, 25 BRBS at 148(CRT). Thus, this case does not present facts involving the payment of medical benefits to a claimant as reimbursement for expenses or debts incurred in obtaining medical treatment. Accordingly, contrary to claimant's arguments on appeal, *see* Cl. Petition for Review and brief at 13-15, the Fifth Circuit's decision in *Lazarus* does not support her position that the medical benefits paid by employer in this case are "compensation" within the meaning of Section 22.

[6] The Fifth Circuit found support for its interpretation of the Section 2(12) definition of "compensation" in the structure of the Act, specifically in Sections 4(a), 6(a), and 7(d), 33 U.S.C. §§904(a), 906(a), 907(d). *Lazarus*, 948 F.2d at 1300, 25 BRBS at 147(CRT).

The Supreme Court's decision in *Pletz* compels the conclusion that employer's payment of medical benefits in this case is not the payment of "compensation" for purposes of Section 22. *See Pletz*, 317 U.S. at 391. We are unable to discern any basis for adopting a different construction of the term "compensation" for purposes of the Section 22 limitations period than that adopted by the Supreme Court in *Pletz* in the context of the Section 13(a) statute of limitations. As the administrative law judge rationally found in his decision in this case, the Section 22 language regarding the time limitation for requesting modification "is strikingly similar to the language of Section 13(a), . . . and both sections refer to 'payment of compensation' as events which toll the one year time limitation for filing." Decision and Order at 9. Thus, as the decision of the United States Supreme Court in *Pletz* constitutes controlling precedent, we affirm the administrative law judge's determination that employer's voluntary provision of medical benefits in this case does not constitute the payment of "compensation" under Section 22. *Pletz*, 317 U.S. at 391; *Lazarus*, 958 F.2d at 1301, 25 BRBS at 148(CRT). The administrative law judge properly found that the one-year period for requesting modification commenced on November 11, 2003, when the Board's decision affirming the denial of the claim for permanent total disability compensation became final. We therefore affirm the administrative law judge's denial of claimant's September 13, 2007, modification request as untimely filed.

Accordingly, the administrative law judge's Decision and Order Denying Modification 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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REGINA C. McGRANERY
Administrative Appeals Judge