BRB No. 97-0678

THOMAS RING	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
I.T.O. CORPORATION OF VIRGINIA	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

John H. Klein and Matthew H. Kraft (Rutter & Montagna, L.L.P.), Norfolk, Virginia, for claimant.

George E. W. Voyer and Donna White Kearney (Taylor & Walker, P.C.), Norfolk, Virginia, for self-insured employer.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (95-LHC-2668) of Administrative Law Judge Fletcher E. Campbell, Jr., denying benefits 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, working as a longshoreman for employer, sustained injuries to his right foot and leg on May 26, 1990.[1] Employer voluntarily paid temporary total disability benefits commencing May 26, 1990, and on July 12, 1990, filed its Notice of Controversion, explicitly objecting to the inclusion of container royalty and vacation/holiday pay in the calculation of claimant's average weekly wage. The Department of Labor (DOL), by letter

[1]Claimant's injuries ultimately resulted in the amputation of his right leg.

dated July 18, 1990, advised employer that container royalty and vacation/holiday pay is to be included in the calculation of the average weekly wage and provided a formula for determining any applicable credits/offsets and the amount of benefits payable to claimant.[2] On August 9, 1991, and September 11, 1991, employer filed Notices of Compensation, Form LS-208, with DOL showing the payment of benefits since May 27, 1990, and the credit/offset taken pursuant to the formula provided by DOL.

In his Compensation Order dated January 21, 1992, the district director ordered, pursuant to the parties' stipulations, the payment of permanent total disability benefits by employer at the rate of $450.71 through December 17, 1992, subject to any adjustments, and thereafter by the Special Fund pursuant to Section 8(f), 33 U.S.C. §908(f).

Claimant's counsel, by letter to the district director dated May 17, 1995, asserted that employer had improperly claimed a credit based upon container royalty and vacation/holiday pay claimant received during his post-injury period of disability and therefore requested modification of the district director's Compensation Order based upon the Board's decision in *Branch v. Ceres Corp.*, 29 BRBS 53 (1995), *aff'd mem.*, 96 F.3d 1438, 30 BRBS 74 (CRT) (4th Cir. 1996)(table).[3] Upon review, the district director notified

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[2]Employer was informed that such payments "also represent a wage-earning capacity to the extent that they are paid for time accrued on compensation." Employer's Exhibit 18.

[3]In *Branch*, the Board held that although payments of holiday/vacation pay may be properly included in the definition of "wages" at Section 2(13) of the Act, 33 U.S.C. §902(13), the post-injury receipt of such payments does not create a wage-earning capacity or establish that claimant is less than totally disabled where he is physically unable to work or earn such wages. *Branch*, 29 BRBS at 53. The Fourth Circuit, in an unpublished decision, similarly held that while the receipt of holiday/vacation payments are treated as "wages" when the employee is working, such payments are not "wages" when

the parties that there was no reason to change the prior Compensation Order. The case was thereafter transferred to the Office of Administrative Law Judges for a formal hearing.

In his Decision and Order dated January 23, 1997, the administrative law judge determined that he did not have any authority to modify the district director's Compensation Order. Specifically, the administrative law judge concluded first that claimant's petition for modification was untimely, and second that claimant's petition for modification was based on a mistaken application of law which could have been remedied only by the timely filing of a motion for reconsideration and/or appeal pursuant to Section 21, 33 U.S.C. §921. In addition, the administrative law judge determined that even if he could apply the decisions of the Board and the United States Court of Appeals for the Fourth Circuit in *Branch* to the instant case retroactively, its holding would not require the payment of additional monies to claimant. In particular, the administrative law judge held that the credit taken by employer for container royalty and holiday/vacation pay was proper because the payments were based upon actual work claimant performed prior to his injury, and were, in no way, based upon the crediting of time toward the requisite number of hours for receipt of such pay while claimant was on disability status.

On appeal, claimant challenges the administrative law judge's findings that his petition for modification is untimely, and that the decisions issued by the Board and Fourth Circuit in *Branch* are inapplicable to the instant case. Employer responds, urging affirmance.

Claimant initially contends that the administrative law judge incorrectly interpreted the language of Section 22 in denying his petition for modification as untimely. Specifically, claimant maintains that the time period for filing a Section 22 petition for modification is one year after "the date of last payment of compensation," 33 U.S.C. §922, and as claimant is still receiving payment of compensation, albeit through the Special Fund, the immediate proceedings are based on a timely petition and thus the administrative law judge erroneously denied claimant's request for modification.

The administrative law judge determined that claimant is, in effect, seeking modification of the credits taken by employer in 1990 and 1991 for the container royalty and holiday/vacation pay received by claimant during those periods of time. As such, the administrative law judge found that the one-year time limit for filing a petition for modification would commence either on the date employer's payments ceased due to the

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received post-injury, and thus, affirmed the Board's reversal of the administrative law judge's determination that employer is entitled to a credit for the holiday/vacation payments the claimant received while he was disabled. *Branch,* 30 BRBS at 78 (CRT).

assumption of payment of compensation by the Special Fund on December 17, 1992, or at the conclusion of the period for which the adjustment was made, which ended on July 17, 1991. The administrative law judge therefore determined that claimant's request for modification dated May 17, 1995, was well beyond the one-year limitation imposed by Section 22.

Section 22, in pertinent part, states that any party in interest may apply for modification of a decision "at any time prior to one year after the date of 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 the claim. . . (including a case under which payments are made pursuant to section 944(i) of this title [*i.e.*, the Special Fund])." 33 U.S.C. §922. Consequently, as claimant is still receiving compensation from the Special Fund, Section 22 specifically permits claimant's petition for modification in the instant case. We therefore reverse the administrative law judge's determination that claimant's petition for modification is barred by the time constraints set forth in Section 22. Therefore, we will now consider the administrative law judge's alternative findings regarding the propriety of claimant's petition.

Claimant next argues that the administrative law judge erred in finding that the only change that has occurred since the issuance of the district director's order was in the interpretation of the law, thus precluding reconsideration by way of modification. Claimant asserts that at the very least the pertinent issue in this case is predicated on the proper definition of "wages" as applied to the particular facts of this case, and thus is a mixed question of law and fact, clearly subject to a Section 22 petition.

The fact-finder's authority to reopen the proceedings extends to all mistaken determinations of fact, including mistaken determinations of mixed questions of law and fact. *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989). Section 22 vests the fact-finder with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection of the evidence initially submitted. *O'Keeffe v. Aerojet-General Shipyards, Inc.,* 404 U.S. 254 (1971). However, there must be some underlying facts which are mistaken. *See generally Swain v. Todd Shipyards Corp.*, 17 BRBS 124 (1985). In the instant case, the petition for modification offered no new or mistaken factual information;[4] the sole basis for the request

[4]In fact, claimant's petition for modification explicitly requests the district director to consider his award of benefits in light of the decisions issued in *Branch*. Employer's Exhibit 8. Moreover, the record indicates that there was some agreement, apart from the district director's Compensation Order, in which the parties recognized employer's entitlement to a credit prior to the entry of the Compensation Order. Specifically, subsequent to the filing of the Compensation Order, claimant's attorney unsuccessfully sought an attorney's fee for work performed before the district director. In his brief in support of the appeal to the Board, claimant's attorney readily recognized employer's credit, argued that he had helped claimant successfully obtain additional benefits by negotiating a reduced credit to be taken by employer, and acknowledged that the parties "were able to resolve [the issue of the credit to be taken] without litigating the case." Employer's Exhibit 13, p. 6.

is a mistake in an interpretation of law governing whether employer is entitled to a credit for claimant's post-injury receipt of container royalty and vacation/holiday pay.[5] Section 22 is unavailable to reopen a final award based upon a legal issue which is decided against a party. *McDonald v. Director, OWCP*, 897 F.2d 1510, 23 BRBS 56 (CRT)(9th Cir. 1990), *rev'g on other grounds McDonald v. Todd Shipyards Corp.*, 21 BRBS 184 (1988); *Ryan v. Lane & Co.*, 28 BRBS 132 (1994). Consequently, we affirm the administrative law judge's determination that the sole basis for claimant's petition for modification is an error in the interpretation of law, and thus, affirm his conclusion that he does not have the authority to modify the district director's award.[6]

Accordingly, the administrative law judge's determination that claimant's petition for modification is untimely is reversed. However, the administrative law judge's ultimate conclusion that he does not have the authority to modify the district director's award is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

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[5]In this regard, the instant case does not involve a change in the law but merely the first elucidation of the law. *See generally Reynolds v. Todd Pacific Shipyards Corp.,* 122 F.3d 37, 31 BRBS 71 (CRT)(9th Cir. 1997). As the administrative law judge correctly noted, the mistaken application of law could have been remedied only by the timely filing of a motion for reconsideration and/or appeal and not by means of filing a petition for modification. *See generally Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993)(Retroactive application of law applies to cases on direct review).

[6]Although not dispositive of the instant appeal, we note that the administrative law judge erred in interpreting *Branch* by overemphasizing facts in the instant case which are not dispositive of the issue of employer's entitlement to a credit. Specifically, contrary to the administrative law judge's determination, the fact that claimant received post-injury payments of container royalty pay because he worked the requisite 700 hours before his injury rather than having received the pay as a result of hours accrued while on disability by operation of the union contract, as is the case in *Branch,* does not entitle employer to a credit. Lost in the administrative law judge's analysis is the seminal issue as to whether the payments in question are actually indicative of claimant's true post-injury wage-earning capacity and thus do not merely represent a measure of pre-injury earning capacity. *See Eagle Marine Services v. Director, OWCP,* 115 F.3d 735 31 BRBS 49 (CRT) (9th Cir. 1997).

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge