BRB No. 98-1635

ANDREW T. GALLE, DECEASED	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED: 9/20/99
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Medical Expenses and the Order Denying Claimant's Motion for Reconsideration of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Margaret M. Galle, D'Iberville, Mississippi, *pro se*, on behalf of claimant.

Traci M. Castille (Franke, Rainey & Salloum, P.L.L.C.), Gulfport, Mississippi, for self-insured employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order on Remand Awarding Medical Expenses and the Order Denying Claimant's Motion for Reconsideration (88-LHC-3223) of Administrative Law Judge Richard D. Mills 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).

This is the second time this case has come before the Board.[1] The facts are not in

[1]Decedent was the claimant at the time of the Board's initial review in 1992.

dispute. Decedent worked for employer and injured his right knee and shoulder on November 12, 1984. The administrative law judge awarded permanent partial disability benefits commencing on October 15, 1985, and medical benefits, but he denied the claim for the cost of services provided by Dr. Whitecloud, as he found that decedent failed to request authorization for that treatment. In 1992, the Board held employer liable for medical expenses related to decedent's second visit to Dr. Whitecloud, as employer requested that treatment. In all other respects, the Board affirmed the administrative law judge's decision. On reconsideration of its decision in 1993, the Board modified the date on which permanent partial disability benefits were to commence and affirmed all other aspects. On second reconsideration, in 1994, the Board modified the two prior decisions to reflect an order of remand for the administrative law judge to reconsider the issue of whether the medical evaluations and treatment by Drs. Andrews and Jackson were compensable. Finally, in 1995, the Board denied any further reconsideration and declared its review of the administrative law judge's decision to be final. *Galle v. Ingalls Shipbuilding, Inc.*, BRB Nos. 90-1830/A (July 27, 1992; Nov. 12, 1993; Oct. 5, 1994; Dec. 18, 1995).

Decedent died on January 15, 1993, and his widow was substituted on his behalf. *Galle v. Ingalls Shipbuilding, Inc.*, BRB Nos. 90-1830/A (Nov. 12, 1993). Claimant's claim on her own behalf for benefits under Section 9, 33 U.S.C. §909, is now pending before the United States Court of Appeals for the Fifth Circuit. *Galle v. Ingalls Shipbuilding, Inc.*, No. 98-60291 (5th Cir.).

On remand, the administrative law judge permitted the parties to file briefs on the issue of authorization and the compensability of the treatment rendered by Drs. Andrews and Jackson. He admitted the new evidence and determined that the treatment in question was necessary, reasonable and compensable, except for the initial visit to Dr. Jackson which occurred prior to the request for authorization of treatment. Further, the administrative law judge held that claimant is entitled to reimbursement for travel to the doctors' offices. Decision and Order on Remand at 6-8. The administrative law judge also held that claimant may not submit a petition for a lay-representative fee, but she may submit a petition to recover necessary costs. *Id.* at 9. The administrative law judge's decision was filed in the district director's office on Friday, June 19, 1998. On Wednesday, July 1, 1998, claimant moved for reconsideration of the compensability of the initial visit with Dr. Jackson as well as the request for a lay-representative fee. The administrative law judge held that claimant's motion for reconsideration was untimely, but stated that he would "allow some leeway" based on her *pro se* status, and he addressed her motion on the merits. On reconsideration, he found that claimant, who is proceeding *pro se* on behalf of her deceased husband, is not a lay-representative and is not entitled to a fee. He also reaffirmed his conclusion that claimant is not entitled to reimbursement for the initial visit to Dr. Jackson's office, as that visit pre-dated the written request for authorization of treatment. The administrative law judge's Order Denying Claimant's Motion for Reconsideration was filed in the district director's office on August 28, 1998. Claimant filed a notice of appeal with the Board on September 21, 1998.[2]

On appeal, claimant contends that the administrative law judge erred in failing to order employer to reimburse the cost of the initial visit to Dr. Jackson and in failing to award a lay-representative's fee. Employer responds with two arguments. First, employer moves to strike or dismiss the appeal, asserting that it was not filed in a timely manner. Alternatively, employer maintains that the administrative law judge's decision on remand is correct on the merits and should be affirmed. In reply, claimant avers that, incorporating Rules 6(a) and 59(e) of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 6(a), 59(e) (FRCP), with the Rules of Practice and Procedure before the Office of Administrative Law Judges, 29 C.F.R. Part 18, her motion for reconsideration of the administrative law judge's decision was timely; therefore, her appeal is timely.

[2]In the first of many documents filed by the parties, claimant requested reconsideration of the extent of decedent's disability, contending that decedent was permanently totally disabled prior to his death. Employer correctly argues in response that there is currently no decision before the Board to be reconsidered. The Board's decision which affirmed the administrative law judge's determination that decedent was permanently partially disabled prior to his death was rendered in 1992 and was final in 1995. Claimant's motion, therefore, is denied. 20 C.F.R. §802.409.

Before reaching the merits of the case, we must first address the procedural issue. The administrative law judge's Decision and Order on Remand was filed in the district director's office on Friday, June 19, 1998. Claimant filed a motion for reconsideration on Wednesday, July 1, 1998. In his Order denying reconsideration, the administrative law judge found that claimant's motion for reconsideration was not filed within 10 days of the filing of the decision on remand but that he would "allow some leeway" because of her *pro se* status. He then addressed the merits of her motion. This Order was filed in the district director's office on August 28, 1998. Claimant appealed the decisions on September 21, 1998.

Employer asserts that a motion for reconsideration of an administrative law judge's decision must be filed within 10 calendar days of the filing of the decision to be considered timely and to toll the time for appeal pursuant to Section 802.206(a) of the Board's regulations. 20 C.F.R. §802.206(a).[3] Thus, employer argues that claimant's motion should have been filed by June 29, 1998, and as it was not, claimant's appeal was not timely. In response, claimant contends that, despite the administrative law judge's finding to the contrary, her motion was timely. She contends that Rule 6(a) of the FRCP applies to extend the time for filing and that her motion was filed with two days to spare.[4]

The issue before the Board, therefore, is whether Rule 6(a) applies to the filing of motions for reconsideration before the administrative law judge such that claimant's motion for reconsideration was timely and thus the time for appealing the administrative law judge's June 19, 1998, decision was tolled until after he issued a decision on claimant's motion. Rule 6(a) of the FRCP provides in part:

> [i]n computing any period of time prescribed or allowed by these rules, . . . or

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[3]20 C.F.R. §802.206(a) states:

> A timely motion for reconsideration of a decision or order of an administrative law judge . . . shall suspend the running of the time for filing a notice of appeal.

Section 802.206(b)(1), 20 C.F.R. §802.206(b)(1), provides that a motion for reconsideration is timely if it is filed within 10 days of the date the administrative law judge's decision is filed in the district director's office.

[4]Claimant also raises the argument that her motion was delayed because delivery of the decision on remand to her was delayed by the mail. We reject this argument as the time for filing a motion for reconsideration or an appeal under the Act is conditioned upon the date of *filing* and not the date of *service*. 20 C.F.R. §§802.205, 802.206.

> by any applicable statute, . . . [if] the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

Fed. R. Civ. P. 6(a). Thus, if applicable, claimant's motion was timely, as the 10-day period would not have expired until Friday, July 3, 1998.

The general rules for proceedings before an administrative law judge at 29 C.F.R. Part 18 do not provide for motions for reconsideration, nor do the Longshore regulations at 20 C.F.R. Part 702; only the Board's regulation addresses this issue in the context of what constitutes a timely appeal to the Board.[5] Prior to the time the Board's regulation at 20 C.F.R. §802.206 was enacted in 1987, the authority for the 10-day filing requirement was based on Rule 59(e) of the FRCP. Rule 59(e) states: "Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment." In *General Dynamics Corp. v. Hines*, 1 BRBS 3 (1974), the Board held that inasmuch as neither the Act nor the regulations had a provision for motions for reconsideration, the Board "did not deem it improper to apply Rule 59 of the Federal Rules of Civil Procedure (which does provide for such a procedure) to the Act." *Hines*, 1 BRBS at 5 (parenthetical in original). Thus, the Board held that a timely motion for reconsideration, which is one filed within 10 days of the filing of the administrative law judge's decision, tolled the time for filing a notice of appeal, whereas an untimely motion for reconsideration did not. *Id.*; *see also Kuhn v. Associated Press*, 16 BRBS 46 (1983); *McCabe v. Sun Shipbuilding & Dry Dock Co.*, 7 BRBS 923 (1978), *rev'd on other grounds*, 593 F.2d 234 (3d Cir. 1979); *McCabe v. Ball Builders, Inc.*, 1 BRBS 290 (1975). None of these decisions, however, discusses the applicability of that portion of Rule 6(a) which excludes intermediate Saturdays, Sundays and holidays.[6]

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[5]*But see* 20 C.F.R. §725.479(b) (provision for motions for reconsideration under the Black Lung Act).

[6]The Board has relied on Rule 6(a) to discern the timeliness of appeals prior to the time its regulation at 20 C.F.R. §802.220 (now 802.221) was promulgated in 1978. *See*

Sebben v. Director, OWCP, 10 BRBS 136 (1979) (addressing use of Rule 6(a) in the event the final day falls on a Saturday or Sunday). Rule 6(a) provides that if the final day of a period provided in a statute falls on a Saturday, Sunday or holiday, the period runs until the end of the next day that is not a Saturday, Sunday or holiday. Rule 6(a) also states that the day of the act is excluded such that counting begins the day following the action.

Federal cases, including one involving an enforcement proceeding under Section 21(d) of the Act, 33 U.S.C. §921(d), *Vincent v. Consolidated Operating Co.*, 17 F.3d 782, 28 BRBS 18(CRT) (5th Cir. 1994), make it clear that Rule 6(a) applies to the filing of motions under Rule 59(e).[7] *See also Adams v. Trustees of the New Jersey Brewery Employees' Pension Trust Fund*, 29 F.3d 863 (3d Cir. 1994); *Acevedo-Villalobos v. Hernandez*, 22 F.3d 384 (1st Cir. 1994), *cert. denied*, 513 U.S. 1015 (1994), *pet. for reh'g denied*, 513 U.S. 1122 (1995); *Richardson v. Oldham*, 12 F.3d 1373 (5th Cir. 1994). As Rule 6(a) applies to motions filed pursuant to Rule 59(e), and as Rule 59(e) is the basis for the Board's rule regarding the 10-day filing period permitted for filing a motion for reconsideration of an administrative law judge's decision, it follows that Rule 6(a) should apply in calculating the period under Section 802.206. This holding is not inconsistent with the administrative law judge regulations at 20 C.F.R. Part 702 or 29 C.F.R. Part 18. Section 18.1, 29 C.F.R. §18.1, states in pertinent part, that the FRCP apply in any situation not provided for or controlled by the Part 18 Regulations, or by any statute, executive order or regulation. Thus, provisions of the FRCP which fall within these parameters may apply to administrative law judge proceedings. *See generally Harrison v. Barrett Smith, Inc.*, 24 BRBS 257 (1991).

As neither the Act, nor the regulations at 20 C.F.R. Part 702 or at 29 C.F.R. Part 18 address motions for reconsideration, consistent with Section 18.1, the Federal Rules govern the filing of these motions.[8] Moreover, as Rule 6(a) applies to Rule 59(e), which is the

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[7]Prior to its amendment in 1995, Rule 59(e) counted time from the date of service as opposed to the date of filing. The advisory committee notes concurrent with the amendment state that, regardless of the change, Rule 6(a) still applies to Rule 59 motions. Fed. R. Civ. P. 6(a) advisory committee's note.

[8]We note that the administrative law judge rules do contain a general provision on computation of time. The regulation at 29 C.F.R. §18.4(a) states:

> Generally. In computing any period of time under these rules or in an order issued hereunder the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday or legal holiday observed by the Federal Government in which case the time period includes the next business day. When the period of time prescribed is seven (7) days or less, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation.

At the time Section 18.4 was promulgated, Rule 6(a) also provided for the exclusion of intermediate Saturdays, Sundays, and holidays when the applicable time period was seven days or less. Thus, the two rules were consistent until the FRCP were amended in 1985, and Rule 6(a) changed to expand the time frame from seven days or less to less than 11 days. In

basis for the 10-day filing time limit for motions for reconsideration contained in the Board's regulation at 20 C.F.R. §802.206, we hold that Rule 6(a) applies to the filing of motions for reconsideration before the administrative law judge for purposes of determining whether the tolling provision of Section 802.206(a) applies.

By applying our holding to the facts of this case, we can ascertain whether claimant's motion for reconsideration of the administrative law judge's decision was timely and, consequently, whether the appeal before us was filed in a timely manner. Initially, pursuant to Rule 6(a), we start counting on the day following the June 19, 1998, filing date. Thus, we begin counting on Saturday the 20th of June. However, Rule 6(a) requires that intermediate Saturdays, Sundays and holidays be excluded. Therefore, excluding Saturday and Sunday, the 20th and 21st of June, we begin counting on Monday, June 22, 1998. We exclude the following Saturday and Sunday, June 27 and 28, and continue counting on Monday, June 29, 1998. Accordingly, under Rule 6(a), the 10-day filing period expired on Friday, July 3, 1998. As claimant filed her motion for reconsideration in the administrative law judge's office on Wednesday, July 1, 1998, it was filed in a timely manner, and the timely motion for reconsideration tolled the time for filing the appeal to the Board. *Hines*, 1 BRBS at 5; 20 C.F.R. §802.206(a).

Although the administrative law judge deemed claimant's motion to be untimely, he addressed the merits of her case but denied the relief sought. Pursuant to either Section 802.206(d) or 802.206(e), the time for filing an appeal begins to run on the date the reconsideration order is filed. Therefore, claimant had 30 days from August 28, 1998, to file her appeal which she filed on September 21, 1998. 20 C.F.R. §§802.205(a), 802.206(d), (e). Consequently, claimant's appeal of both the Decision and Order on Remand and the Order Denying Claimant's Motion for Reconsideration was timely filed, and the merits of her appeal shall be addressed. Employer's motion to strike and/or dismiss the appeal is denied.

Claimant next contends the administrative law judge erred in failing to award

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any event, Section 18.4 specifically states "[i]n computing any period of time *under these rules* . . . ." 29 C.F.R. §18.4 (emphasis added). As there is no rule regarding motions for reconsideration under the Part 18 Regulations, Section 18.4 is not applicable on its face. Accordingly, as motions for reconsideration are governed by the Federal Rules through Section 18.1, the computation of time is similarly governed by those rules.

reimbursement of the cost of the initial visit with Dr. Jackson. The administrative law judge denied reimbursement of this cost because the visit occurred prior to the request for authorization of treatment. Under Section 7(d) of the Act, 33 U.S.C. §907(d), there can be no reimbursement for medical expenses unless authorization for such treatment is first requested or treatment has been refused. *See Lustig v. Todd Shipyards Corp.*, 20 BRBS 207 (1988), *aff'd in part and rev'd in part on other grounds sub nom. Lustig v. U.S. Dept. of Labor*, 881 F.2d 593, 22 BRBS 159(CRT) (9th Cir. 1989); *McQuillen v. Horne Brothers, Inc.*, 16 BRBS 10 (1983). In this case, decedent's initial visit with Dr. Jackson occurred on November 14, 1988, and he requested treatment on November 16, 1988. Because the request post-dated the visit, the cost of the visit is not compensable. *Id.* Similarly, although the costs incurred for transportation for medical purposes are generally recoverable under Section 7, 33 U.S.C. §907; *Day v. Ship Shape Maintenance Co.*, 16 BRBS 38 (1983), here, the determination that the cost of the initial visit is not compensable means that the travel expenses for that visit are not reimbursable. The remaining medical expenses for both Drs. Jackson and Andrews, which were incurred following the request for authorization for treatment, are compensable, as the administrative law judge found. Therefore, we affirm the administrative law judge's award of medical benefits. *Anderson v. Todd Shipyards Corp.*, 22 BRBS 70 (1989).

Next, claimant contends she is entitled to a fee as a lay-representative. Although she disputes the administrative law judge's determination that she assumed her husband's claim and is acting *pro se* on his behalf, and she claims she is a lay-representative, we need not dally in semantics. Claimant is not an attorney and, consequently, is not entitled to a fee payable by employer, as there is no provision in the Act for holding employer liable for such a fee. 33 U.S.C. §928; *Todd Shipyards Corp. v. Director, OWCP [Hilton]*, 545 F.2d 1176, 5 BRBS 23 (9th Cir. 1976). Awarding claimant a fee out of her own benefits would involve a meaningless exercise.

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Medical Expenses and the Order Denying Claimant's Motion for Reconsideration are affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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JAMES F. BROWN

Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge