BRB No. 99-0531

HOWARD T. MEEKINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: Feb. 18, 2000
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Granting Employer's Motion for Summary Decision and Denying Claimant's Modification Request of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Robert D. Walsh and Chanda L. Wilson (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason & Mason, P.C.), Newport News, Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Granting Employer's Motion for Summary Decision and Denying Claimant's Modification Request (94-LHC-2670) of Administrative Law Judge Daniel A. Sarno, Jr., 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 if they 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 sustained a work-related knee injury in 1979. In 1983, claimant was awarded benefits for temporary total disability and permanent partial disability under the schedule, 33 U.S.C. §908(c)(2), for a 15 percent impairment to the leg. In 1989, employer voluntarily paid claimant for an additional 15 percent impairment as claimant's condition had deteriorated. In 1994, claimant was laid off from his light-duty job at the shipyard and filed a claim for temporary total disability benefits. In a decision issued in 1995, the administrative law judge awarded claimant temporary total disability benefits for the period between April 11 and September 14, 1994. It is undisputed that employer paid the amount owed on October 10, 1995.

On February 7, 1996, well within one year of the last payment of benefits, *see* 33 U.S.C. §922, claimant's counsel wrote the following letter to the district director:

> Claim is hereby made on behalf of my client, Howard T. Meekins, for additional (temporary total, permanent total, permanent partial, temporary partial) benefits in addition to those previously paid and pursuant to Order filed in your office on October 4, 1995. Please consider this a request for additional compensation in modification of the previous award and <u>not</u> a request for the scheduling of an informal conference.

Letter dated February 7, 1996 (parenthetical and emphasis in original). Apparently, nothing further happened in the case until March 1998, when claimant's counsel wrote to the district director and specified periods starting in October 1997 for which claimant sought additional temporary total disability benefits. At this time, claimant asked that an informal conference be scheduled on the matter.

Upon referral of the case to the administrative law judge, employer filed a motion for summary decision. Employer contended that although claimant filed a letter requesting modification within one year of the last payment of benefits, he did not specify the benefits to which he believed he was entitled at that time, and in fact had no cognizable claim until October 1997. Employer cited *Greathouse v. Newport News Shipbuilding & Dry Dock*, 146 F.3d 224, 32 BRBS 102 (CRT) (4th Cir. 1998), and *I.T.O. Corp. of Virginia v. Pettus*, 74 F.3d 523, 30 BRBS 6 (CRT) (4th Cir. 1996), *cert. denied*, 117 S.Ct. 49 (1996), in support of its position. Claimant opposed employer's motion, contending his case is distinguishable from the cited cases.

The administrative law judge granted employer's motion for summary decision. He agreed with employer that claimant's February 7, 1996, letter does not constitute a valid claim for Section 22 modification, inasmuch as claimant did not have such a claim until October 1997. He found that the letter was merely an attempt to preserve indefinitely the right to seek modification, and that such protective filings are not permissible.

Claimant appeals, contending that the February 1996 letter was a timely and valid claim for modification of the prior award. Employer responds that the administrative law judge properly found that claimant did not have a cognizable claim for modification within one year of the last payment of benefits.

A motion for modification pursuant to Section 22 must be filed within one year of the denial of the claim or of the last payment of benefits. 33 U.S.C. §922. It is well-settled that an application for modification under Section 22 need not be formal in nature or on any particular form, as long as it can be discerned that a claim for additional compensation is being made. *Pettus*, 73 F.3d at 526, 30 BRBS at 8 (CRT); *Fireman's Fund Ins. Co. v. Bergeron*, 493 F.2d 545 (5th Cir. 1974); *see also Youghiogheny & Ohio Coal Co. v. Milliken*, F.3d , 1999 WL 1260157 (6th Cir. Dec. 29, 1999). Although the administrative law judge does not cite any cases in his decision, the parties correctly note that the controlling cases on whether a filing is sufficient to constitute an application for modification are the decisions of the United States Court of Appeals for the Fourth Circuit in *Pettus* and *Greathouse*.[1]

In *Pettus*, the last payment of compensation was made to the claimant on August 28, 1989. In early September 1989, claimant's counsel sent a letter to the Office of Workers' Compensation Programs (OWCP) stating, "Please be advised that I herewith make demand for any and all benefits that may be due the above claimant pursuant to the [Act]." *Pettus*, 73 F.3d at 525, 30 BRBS at 7 (CRT). OWCP did not take any action in response. In October and November 1989, the claimant was temporarily totally disabled. In December 1989, counsel sent another letter to OWCP stating, "[p]lease be advised that we herewith make claim for any and all benefits my client may be entitled to pursuant to the [Act]." *Id.* OWCP did not respond to this letter either. In November 1990, claimant obtained a disability slip from his doctor covering the 1989 period of disability. This was filed with OWCP in January 1991 along with a request for an informal conference. The administrative law judge found that the September and December 1989 letters were not valid requests for modification, and he found the January 1991 request to be untimely. The Board reversed the determination that the December 1989 letter was not a timely and valid request for modification.

[1]This case arises in the Fourth Circuit.

On appeal to the Fourth Circuit, the court reversed the Board. The court held that the letters were insufficient for "a reasonable person to conclude that a modification request has been made." *Id.*, 73 F.3d at 527, 30 BRBS at 9 (CRT). Specifically, the letters made no reference to a change in condition, to a mistake in fact in an earlier decision, to additional evidence concerning claimant's disability, or to dissatisfaction with earlier decisions. *Id*. The court concluded that the letters failed to indicate any actual intention on claimant's part to seek compensation for a particular loss, "a factor that is critical in assessing their sufficiency." *Id.*[2] Moreover, the court reasoned that the September 1989 letter could not state such an intention, as the claimant did not sustain further disability until October 1989, and that the December 1989 letter did not note the period of disability, and observed that neither letter spurred any action on the part of the district director.

In *Greathouse*, the claimant injured his leg in 1978. In 1981, the parties stipulated to periods of temporary total disability and to a 10 percent permanent partial disability award under the schedule. At this time, claimant was aware that his injury would require surgery every few years to remove scar tissue. Employer subsequently paid additional temporary total and permanent partial disability benefits. The last payment was made on October 1, 1987. In February 1988, the Department of Labor informed claimant that he would have to request modification by October 1, 1988. Claimant did not request additional benefits until 1991, after another surgical procedure.

Claimant claimed that doctors' reports submitted by employer to OWCP within one year of October 1, 1987, constituted a timely request for modification. The Fourth Circuit disagreed. It stated that the reports in question were submitted by employer, and did not "facially indicate [claimant's] intent to request a modification of the original order." *Greathouse*, 146 F.3d at 226, 32 BRBS at 104 (CRT). The reports also stated the doctor anticipated that claimant's impairment would increase to 20 percent, but the court noted that claimant had already been paid for a 20 percent impairment, and that anticipatory filings cannot manifest the necessary intent to seek modification, citing *Pettus*. The court thus concluded that neither employer nor OWCP reasonably could have concluded that a claim for modification was being made within the one-year period following the last payment of

[2]The court contrasted the letters with the request for modification in *Fireman's Fund Ins. Co. v. Bergeron*, 493 F.2d 545, 546 (5th Cir. 1974), wherein the claimant wrote, "The claimant is permanently totally disabled and will file for a review under §22 of the Act."

compensation. *Id.*

In both *Pettus* and *Greathouse*, the court pointed out that OWCP had not taken any action on the filings alleged to be motions for modifications, as the documents did not reasonably put OWCP on notice that a claim for additional benefits was being made. In *Consolidation Coal Co. v. Borda*, 171 F.3d 174 (4th Cir. 1999), however, the court stated that this inaction alone is not dispositive of the issue of whether a filing constitutes a request for modification. In *Borda*, the black lung claimant filed a document with OWCP within one year of the denial of benefits stating his disagreement with the finding that he had not worked in a coal mine and did not have pneumoconiosis. He submitted his employment records and some medical reports with his letter. OWCP did not take any action on claimant's 1981 letter until claimant filed a duplicate claim in 1988.

The Fourth Circuit rejected the employer's contention that the 1981 filing was not a request for modification because OWCP had not acted on it. The court again turned to the reasonable person standard it stated in *Pettus*. The court held that a reasonable person would view this filing, with additional documentation, as a request that the denial be reopened. The court stated, "The content and the context of the letter itself, and not the Director's reaction to it, must govern whether it was a request for modification." 171 F.3d at 181. *See also Milliken*, F.3d , 1999 WL at *9-11 (holding that a letter stating the claimant "was advised to consider requesting a modification under 20 C.F.R. [§]725.310 on grounds of a mistake in both the original adjudication and the appeals thereof" and that the grounds for modification "will be more fully set forth in a modification request I am preparing to file shortly" was a sufficient motion for modification).

We affirm the administrative law judge's determination that claimant's February 7, 1996, letter does not constitute a valid claim for modification. Unlike the filings in *Pettus* and *Greathouse*, the letter sent to the district director by claimant's counsel requests "additional compensation" and "modification of the previous award." On its face, therefore, the letter might seem to suffice as a request for additional compensation. Nonetheless, the administrative law judge properly found that the letter was an anticipatory filing inasmuch it does not identify a particular disability. Indeed, the letter merely references all four types of disability awards, and does not make a claim for a specific type of benefits for a specific time period. In this regard, the letter is akin to the filing in *Pettus*, wherein the claimant claimed "any and all benefits" to which he may be entitled. *Pettus*, 73 F.3d at 525, 30 BRBS at 7(CRT). Moreover, as the administrative law judge found, claimant had no disability to claim at the time the letter was filed, as it was not until March 1998 that claimant identified a period of disability that allegedly occurred in November 1997. Thus, contrary to claimant's contention, this case is distinguishable from *Fireman's Fund Ins. Co. v. Bergeron*, 493 F.2d 545, 546 (5th Cir. 1974), wherein the claimant wrote, "The claimant is permanently totally disabled and will file for a review under §22 of the Act." As the

Fourth Circuit noted in *Pettus*, the claimant in *Fireman's Fund* was claiming an actual disability, unlike the claimant herein. *Pettus*, 73 F.3d at 527, 30 BRBS at 9 (CRT).

Furthermore, as the Fourth Circuit stated in *Borda*, 171 F.3d at 181, the context of the filing must be examined. In this case, the February 1996 letter requested that the district director *not* schedule an informal conference. Claims for modification are to be processed in the same manner as initial claims for compensation. 33 U.S.C. §§919, 922;[3] 20 C.F.R. §702.373; *See Pettus*, 73 F.3d at 526-527, 30 BRBS at 8-9 (CRT). This requires the district director to investigate the claim, 20 C.F.R. §§702.301, 702.311, to hold an informal conference if necessary, 20 C.F.R. §§702.312-702.315, and to refer the case to the Office of Administrative Law Judges upon the request of a party. 20 C.F.R. §702.316. Since claimant requested that the district director not process the claim, the administrative law judge rationally found that claimant's letter was merely an attempt to preserve the right to seek modification until such time as claimant had a loss to claim.[4] Indeed, in the March 1998 letter, claimant specifically requested that an informal conference be scheduled. Inasmuch as the February 1996 letter does not claim a particular disability and as, in context, it is clear that claimant did not intend that the claim be processed in accordance with the Act, we affirm the administrative law judge's determination that claimant did not timely file a valid claim for modification.

Accordingly, the administrative law judge's Decision and Order Granting Employer's Motion for Summary Decision and Denying Claimant's Modification Request is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

[3]Section 22 of the Act states that a claim for modification should be processed "in accordance with the procedure prescribed in respect of claims in section 19." 33 U.S.C. §922. *See also* 20 C.F.R. §702.373.

[4]If the district director had taken action on the February 1996 letter and the claim ultimately were denied, claimant could have filed a request for modification within one year of that denial. *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491 (4th Cir. 1999). Contrary to the administrative law judge's statement, modification requests may be filed *ad infinitum*, and as the Fourth Circuit stated in *Betty B Coal* in the context of modification based on a change in condition, "Even a tiresome repeater should receive his benefits if and when he becomes entitled to them." *Id.* at 500 n.4.

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge