

BRB Nos. 08-0637
and 09-0319

HENRY HANSON)
)
 Claimant-Petitioner)
)
 v.)
)
 MARINE TERMINALS) DATE ISSUED: 08/26/2010
 CORPORATION)
)
 and)
)
 SIGNAL MUTUAL INDEMNITY)
 ASSOCIATION)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeals of the Order Denying Reconsideration and the Decision and Order Denying Modification of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

Henry Hanson, California City, California, *pro se*.

James P. Aleccia (Aleccia, Conner & Socha), Long Beach, California, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Order Denying Reconsideration and the Decision and Order Denying Modification (2006-LHC-00983) of Administrative Law Judge Steven B. Berlin 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). In reviewing an appeal where claimant is not represented by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law in order to determine whether they are rational, supported by

substantial evidence, and in accordance with law; if they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sought benefits under the Act for injuries allegedly sustained on August 18, 2005, when he slipped and fell during the course of his employment with employer.¹ The case was forwarded to the Office of Administrative Law Judges (OALJ) on March 15, 2006, and was originally assigned to Administrative Law Judge William Dorsey. While the case was continued twice on the parties’ joint motion, conflicts between the parties subsequently arose regarding the discovery process.² On October 19, 2007, the case was reassigned to Administrative Law Judge Steven B. Berlin (the administrative law judge), and set for a calendar call on March 3, 2008. On November 6, 2007, employer moved to dismiss the claim with prejudice based on claimant’s failure to comply with the discovery orders issued by the administrative law judge, as well as claimant’s failure to respond to other discovery requests. The administrative law judge issued an Order to Show Cause on November 30, 2007, directing claimant to respond by December 20, 2007, as to why the case should not be dismissed with prejudice. In an Order issued on January 18, 2008 (Dismissal Order), the administrative law judge

¹ Employer accepted the claim for an injury to claimant’s left knee and voluntarily paid claimant temporary total disability and medical benefits for a period of time. Employer, however, controverted claimant’s claim for benefits for injuries to other parts of his body allegedly sustained in the August 18, 2005, work incident.

² The discovery-related conflicts between the parties primarily involved employer’s repeated attempts to take claimant’s videotaped deposition and to have claimant re-examined by Dr. London, employer’s orthopedic specialist. *See* Order Denying Reconsideration at 2-3. On September 7, 2007, Administrative Law Judge Dorsey issued an Order Requiring Claimant to Attend Medical Examination and Video Deposition. Employer also asserted that claimant failed to respond to employer’s interrogatories, request for admissions and request for production of documents. *See id.* at 3.

Claimant was represented by counsel through July 30, 2007, on which date his counsel withdrew. Claimant’s attempts to retain new counsel were unsuccessful, and he has been without legal representation since July 30, 2007. *See* Order Denying Reconsideration at 2, 4, 6, 8-9.

dismissed the claim with prejudice on the basis of his determination that claimant had failed to comply with discovery orders and to prosecute his claim.³

Claimant appeared at the scheduled calendar call on March 3, 2008, and requested reconsideration of the administrative law judge's Dismissal Order. In an Order Denying Reconsideration issued on May 16, 2008, the administrative law judge denied claimant's request as untimely filed; alternatively, the administrative law judge found that even if he were to reach the merits of claimant's motion for reconsideration, he would reaffirm his decision to dismiss the claim.

After appealing the administrative law judge's Dismissal Order and Order Denying Reconsideration to the Board, BRB No. 08-0637, claimant filed a modification request accompanied by additional documents. By Order dated September 26, 2008, the Board dismissed claimant's appeal and remanded the case to the administrative law judge for modification proceedings pursuant to Section 22 of the Act, 33 U.S.C. §922. In a Decision and Order Denying Modification issued on December 12, 2008, the administrative law judge found that claimant failed to demonstrate that grounds exist for modification of the administrative law judge's previous decisions.⁴

Claimant appealed the administrative law judge's denial of modification to the Board, and additionally requested that his prior appeal be reinstated. By Order dated February 6, 2009, the Board reinstated claimant's previous appeal, BRB No. 08-0637, acknowledged claimant's appeal of the administrative law judge's denial of his request for modification, BRB No. 09-0319, and consolidated the two appeals for purposes of decision. Employer subsequently filed a motion to dismiss claimant's appeals, contending that as claimant's motion for reconsideration of the original Dismissal Order issued on January 18, 2008 was untimely, the Board is without jurisdiction to consider claimant's appeals. By Order dated April 27, 2009, the Board granted employer's motion in part, stating that as claimant's motion for reconsideration of the original Dismissal

³ In his Dismissal Order, the administrative law judge stated that claimant had not responded to the Order to Show Cause or to a telephone message left on January 18, 2008, by an OALJ staff member at claimant's last known telephone number. *See* Dismissal Order at 1, 3.

⁴ In response to claimant's December 22, 2008 letter, the administrative law judge issued an Order Denying Reconsideration or Striking Notice of Appeal on January 9, 2009, stating that if claimant's letter was construed as a motion for reconsideration, it was denied as untimely filed. He further indicated that if the letter was intended as a notice of appeal, it needed to be filed with the Board.

Order was denied by the administrative law judge as untimely filed and as claimant did not timely appeal the Dismissal Order, the Board had no jurisdiction to consider claimant's appeal of that order. *See* 20 C.F.R. §802.206. Noting that claimant timely appealed the administrative law judge's Order Denying Reconsideration, the Board stated that its consideration of claimant's appeal in BRB No. 08-0637 will be limited to a review of that order. The Board further stated that as claimant filed a timely appeal of the administrative law judge's Decision and Order Denying Modification, claimant's appeal of that decision, BRB No. 09-0319, is properly before the Board. Thus, claimant's present appeals challenge the administrative law judge's Order Denying Reconsideration, BRB No. 08-0637, and the administrative law judge's Decision and Order Denying Modification, BRB No. 09-0319. Employer responds, urging affirmance of the administrative law judge's decisions.

BRB No. 08-0637

We first address claimant's appeal of the administrative law judge's finding that his motion for reconsideration was not timely filed.⁵ The general rules for proceedings before an administrative law judge set forth 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 at 20 C.F.R. §802.206 addresses this issue in the context of what constitutes a timely appeal to the Board. Thus, the Board has applied the tolling provision contained at Section 802.206(b)(1), 20 C.F.R. §802.206(b)(1), which provides that a timely motion for reconsideration to an administrative law judge is one that is filed within ten days of the date of filing of the Decision and Order. *Galle v. Ingalls Shipbuilding, Inc.*, 33 BRBS 141, 143-144 (1999), *aff'd sub nom. Galle v. Director, OWCP*, 246 F.3d 440, 35 BRBS 17(CRT) (5th Cir.), *cert. denied*, 534 U.S. 1002 (2001); *Bogdis v. Marine Terminals Corp.*, 23 BRBS 136, 138 (1989). The administrative law judge found that his January 18, 2008, Dismissal Order was filed in the district director's office on January 23, 2008, and that claimant did not request reconsideration of that order until he appeared at a calendar call on March 3, 2008, after the ten-day period for filing a timely motion for reconsideration had expired. *See* Order Denying Reconsideration at 7. Having rejected claimant's assertion that he did not receive either the administrative law judge's Order to Show Cause or the administrative law judge's Dismissal Order, the

⁵ At the time the Board issued its April 27, 2009 Order stating that claimant's motion for reconsideration of the administrative law judge's Dismissal Order was denied as untimely, the appeal was not yet in a posture for the Board's consideration of the issue of whether claimant's motion was, in fact, untimely. As briefing has now been completed and the record has been received, the Board may now review the administrative law judge's determination that claimant's motion for reconsideration was not timely filed.

administrative law judge denied claimant's motion for reconsideration on the basis that claimant's request was untimely. *See id.* at 4-8.

The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction the present case arises, has held that service on the parties by certified mail must be effected before a compensation order is deemed to be "filed" pursuant to the relevant provisions of the Act and implementing regulations, 33 U.S.C. §§919(e), 921(a); 20 C.F.R. §703.349.⁶ *Nealon v. California Stevedore & Ballast Co.*, 996 F.2d 966, 27

⁶ Section 19(e) of the Act states,

The order rejecting the claim or making the award (referred to in this chapter as a compensation order) shall be filed in the office of the [district director], and a copy thereof shall be sent by registered mail or by certified mail to the claimant and to the employer at the last known address of each.

33 U.S.C. §919(e). Section 21(a) of the Act states,

A compensation order shall become effective when filed in the office of the [district director] as provided in section 919 of this title, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

33 U.S.C. §921(a). Section 702.349 of the regulations states,

The administrative law judge shall, within 20 days after the official termination of the hearing, deliver by mail, or otherwise, to the office of the district director having original jurisdiction, the transcript of the hearing, other documents or pleadings filed with him with respect to the claim, together with his signed compensation order. Upon receipt thereof, the district director, being the official custodian of all records with respect to such claims within his jurisdiction, shall formally date and file the transcript, pleadings, and compensation order (original) in his office. Such filing shall be accomplished by the close of business on the next succeeding working day, and the district director shall, on the same day as the filing was accomplished, send by certified mail a copy of the compensation order to the parties and to representatives of the parties, if any. Appended to each such copy shall be a paragraph entitled "proof of service" containing the certification of the district director that the copies were mailed on the date

BRBS 31(CRT) (9th Cir. 1993). Pursuant to *Nealon*, the administrative law judge's Dismissal Order cannot be deemed "filed" unless the district director served claimant with that order by registered or certified mail at his last known address. Here, the documents forwarded to the Board by the OALJ reflect that the administrative law judge's November 30, 2007 Order to Show Cause was sent by the OALJ by regular mail to claimant at P.O. Box 1903, Wilmington, California, and was returned to the OALJ, stamped "Return to Sender – Not Deliverable as Addressed – Unable to Forward." On January 18, 2008, the administrative law judge's Dismissal Order was sent by the OALJ by regular mail to claimant at the same post office box, and was returned to the OALJ stamped "Return to Sender – Refused – Unable to Forward." The Certificate of Filing and Service indicates that the Dismissal Order was filed in the Office of the District Director on January 23, 2008, and on the same date a copy thereof was sent to claimant by certified mail to the same post office box. The documents forwarded to the Board, however, do not include a certified mail return receipt for the Dismissal Order mailed by the district director.

In addressing claimant's assertion that he did not receive the administrative law judge's mailed Order to Show Cause or Dismissal Order, the administrative law judge considered only the copy of the Dismissal Order that was sent to claimant by the OALJ on January 18, 2008, by regular mail and was stamped "Refused" by the Postal Service and returned to the OALJ.⁷ The relevant inquiry, however, is whether the district director served claimant with the Dismissal Order in accordance with the applicable statutory and regulatory provisions. See 33 U.S.C. §§919(e), 921(a); 20 C.F.R. §702.349; *Nealon*, 996 F.2d 966, 27 BRBS 31(CRT). As the administrative law judge neither addressed the controlling case precedent of the Ninth Circuit in *Nealon* nor determined whether claimant was properly served with the administrative law judge's Dismissal Order by the district director, we must vacate the administrative law judge's dismissal of claimant's motion for reconsideration and remand the case for further consideration of this issue.

stated, to each of the parties and their representatives, as shown in such paragraph.

20 C.F.R. §702.349.

⁷ Based on the fact that the copy of the Dismissal Order sent by the OALJ was marked "Refused," the administrative law judge inferred that this document reached claimant and that he refused it; the administrative law judge made no mention of the fact that the Order to Show Cause previously mailed to claimant at the same post office box was stamped "Not Deliverable as Addressed." This document may lend support to claimant's assertion that his post office box had been closed due to non-payment of the rental fee. See Cl. letter brief dated March 16, 2008.

Specifically, the administrative law judge must determine whether claimant was properly served with the administrative law judge's Dismissal Order by the district director and, if so, on what date that service was made. *See Nealon*, 996 F.2d at 973, 27 BRBS at 40(CRT). Only when these findings have been made can the administrative law judge determine whether claimant's motion for reconsideration was timely filed.

The administrative law judge found, in the alternative, that he would also deny reconsideration on the merits of claimant's request. *See Order Denying Reconsideration* at 9-10. If, on remand, the administrative law judge finds that claimant's motion for reconsideration was timely, he must reconsider that determination as well as his original Dismissal Order. Neither the administrative law judge's original Dismissal Order nor his Order Denying Reconsideration addresses the Board's decision in *Goicochea v. Wards Cove Packing Co.*, 37 BRBS 4 (2003), wherein the Board held that an administrative law judge may not dismiss a claim with prejudice due to the claimant's failure to comply with the administrative law judge's discovery orders since the Act contains a specific sanction for the failure to comply with a lawful order of the administrative law judge in Section 27(b), 33 U.S.C. §927(b).⁸ Accordingly, should the administrative law judge find claimant's motion for reconsideration to have been timely filed, the administrative law judge must reconsider his dismissal of claimant's claim for benefits under the Act in light of the Board's decision in *Goicochea*.

⁸ In *Goicochea*, 37 BRBS at 6-7, the Board explained that Section 27(b) of the Act provides that if any person disobeys or resists a lawful order of the administrative law judge or neglects to produce documents after having been ordered to do so, the administrative law judge may certify to the district court the facts concerning the misbehavior. Under Section 27(b), the district court may punish as contempt of court any disobedience or resistance to a lawful order or process issued in the course of administrative proceedings under the Act. *See A-Z Int'l v. Phillips*, 179 F.3d 1187, 33 BRBS 59(CRT) (9th Cir. 1999), *citing Stevedoring Services of America v. Eggert*, 953 F.2d 552, 25 BRBS 92(CRT) (9th Cir.), *cert. denied*, 505 U.S. 1230 (1992). Thus, the Board held in *Goicochea* that as the Act contains a specific provision governing the manner in which to sanction the failure to comply with a lawful discovery order, neither the general Rules of Practice and Procedure before the Office of Administrative Law Judges, 29 C.F.R. Part 18, nor the Federal Rules of Civil Procedure apply to permit the administrative law judge to dismiss the claim with prejudice on this basis. *Id.*; *see Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887, 27 BRBS 132(CRT) (9th Cir. 1993); 29 U.S.C. §18.1(a); *see also* 33 U.S.C. §923(a). The Board therefore vacated the administrative law judge's dismissal, pursuant to Fed. R. Civ. P. 37(b)(2) and 41(b), of the claimant's claim due to his failure to respond to the administrative law judge's orders. *Goicochea*, 37 BRBS at 7.

BRB No. 09-0319

Claimant challenges the administrative law judge's decision to deny his request for modification. BRB No. 09-0319. Section 22 of the Act provides the only means for changing otherwise final decisions. Modification pursuant to Section 22 is permitted if the petitioning party demonstrates a mistake in a determination of fact, *see Banks v Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968), or a change in the claimant's physical or economic condition. *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). While Section 22 extends to mixed questions of law and fact, it cannot be used to correct purely legal errors. *Moore v. Virginia Int'l Terminals, Inc.*, 35 BRBS 28, 31 (2001); *Ring v. I.T.O. Corp. of Virginia*, 31 BRBS 212, 214 (1998); *Swain v. Todd Shipyards Corp.*, 17 BRBS 124 (1985); *see also O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). Legal errors may be challenged only by a timely motion for reconsideration or appeal. 33 U.S.C. §921; *Moore*, 35 BRBS at 31.

In this case, claimant timely filed a motion for modification within one year of the administrative law judge's January 18, 2008 Dismissal Order. The administrative law judge addressed each of the assertions made by claimant in support of his request for modification and concluded that they do not support modification of his dismissal of the claim.⁹ *See* Decision and Order Denying Modification at 7-9. Claimant has not alleged or established a mistake in a determination of fact regarding the basis for the administrative law judge's dismissal of his claim. Specifically, the assertions and evidence offered by claimant on modification do not establish that a mistake in fact was made by the administrative law judge in his determination that claimant failed to cooperate with the discovery process or to comply with the administrative law judge's discovery orders. *See id.* at 9-11. Section 22 cannot be used to correct purely legal errors in the absence of any mistake in a determination of fact. Thus, any legal error that the administrative law judge may have made in dismissing the claim based on claimant's conduct in the discovery process, *see Goicochea*, 37 BRBS 4, may not be raised in a Section 22 proceeding. We therefore must affirm the administrative law judge's denial of modification.¹⁰ *See Moore*, 35 BRBS at 31.

⁹ The administrative law judge specifically addressed new factual allegations and new medical evidence offered by claimant on modification that related to the merits of claimant's entitlement to benefits under the Act. *See* Decision and Order Denying Modification at 2-3, 7-8.

¹⁰ In contesting the administrative law judge's denial of modification, claimant states that he requested that the administrative law judge appoint counsel for him. As correctly found by the administrative law judge, *see* Decision and Order Denying

Accordingly, the administrative law judge's Order Denying Reconsideration is vacated and the case is remanded for further consideration in accordance with this opinion. The administrative law judge's Decision and Order Denying Modification is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

Modification at 8, neither the Act nor its implementing regulations authorizes an administrative law judge to appoint counsel on behalf of a claimant. Although the Secretary of Labor has the discretion, upon request, to provide a claimant with legal assistance in processing a claim, *see* 33 U.S.C. §939(c)(1); 20 C.F.R. §702.136(b), the Secretary is not obligated to appoint counsel to represent claimant in proceedings under the Act.