

TIMOTHY P. PASTELLA)	
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Claimant-Petitioner)	
)	
v.)	
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NEWPORT NEWS SHIPBUILDING AND)	DATE ISSUED: 07/19/2006
DRY DOCK COMPANY)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Klein Camden L.L.P.), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order (2004-LHC-0555) of Administrative Law Judge Larry W. Price 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).

Claimant suffered an injury to his back in a work-related accident on January 13, 1997. In a Compensation Order issued by the district director on June 5, 2001, pursuant to the parties' stipulations, claimant was awarded temporary total disability benefits from January 14, 1997 to March 25, 1997, from January 6, 1998 to June 14, 1998, from October 18, 1999 to April 23, 2000, from May 17, 2000 to July 2, 2000, and for various

periods between July 3, 2000 and December 17, 2000. Employer, however, continued to pay benefits until July 8, 2001. Claimant alleged he was again unable to work due to his back injury for the period from July 27, 2004 to August 8, 2004. Employer agreed that claimant was disabled during this period, but alleged that any compensation benefits owed were offset by a credit for the overpayment of benefits in 2001. Claimant responded by filing a request for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, seeking temporary total disability benefits for the period from July 9, 2001 to November 8, 2001. Employer contended that claimant's modification claim for benefits in 2001 was untimely filed.

In his decision, the administrative law judge found that the claim for benefits in 2001 is time-barred pursuant to Section 22, and that employer's "voluntary agreement" in 2004 that claimant was disabled did not revive the already-stale claim. Therefore, the administrative law judge denied the request for modification.

On appeal, claimant contends that the administrative law judge erred in finding that the claim is time-barred as the request for modification was filed within one year of the last voluntary payment in 2004. Employer responds, urging affirmance of the administrative law judge's decision.

Section 22 provides the only means for changing otherwise final compensation orders. Under Section 22, any party-in-interest, "at any time prior to one year after the date of the last payment of compensation," or within one year of the rejection of a claim, may request modification because of a mistake in fact or change in condition. 33 U.S.C. §922; *see Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995); *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, *reh'g denied*, 391 U.S. 929 (1968); *see also Alexander v. Avondale Industries, Inc.*, 36 BRBS 142 (2002).

In the present case, claimant originally sought temporary total disability benefits for his work-related back injury for the period from July 20, 2000 to December 15, 2000. A compensation order was entered by the district director on June 5, 2001, based on the parties' stipulations. This order required employer to pay temporary total disability benefits for various periods concluding on December 17, 2000, in the amount of \$40,697.46. Cl. Ex. 1-142-145. The order also granted employer a credit in the amount of \$33,472.55 to reflect the amount of temporary total disability benefits that had been voluntarily paid. *Id.* Employer's last actual payment of compensation was on July 8, 2001.

In July 2004, Dr. Wardell reported that claimant's work activity caused him increasing back pain. Cl. Ex. 1-58. Claimant sought an additional period of temporary total disability benefits from July 27, 2004 to August 8, 2004, which employer initially

controverted. At an informal conference on October 13, 2004, however, employer agreed that claimant was disabled during this period. However, the parties did not agree to the issuance of a compensation order. Employer filed an LS-206 Form, Payment of Compensation Without Award, on October 19, 2004. Cl. Ex. 1-55. Subsequently, employer filed an LS-208 Form, Notice of Final Payment of Compensation Payments, indicating that, due to the previous overpayment in 2001, no actual payment was required for the additional period of temporary total disability in 2004. Cl. Ex. 1-40. In response, claimant notified employer of his intention to seek additional temporary total disability benefits for the period from July 9, 2001 to November 8, 2001, *i.e.*, his claim for Section 22 modification of the prior award of benefits.

Section 22 of the Act states that a modification petition may be filed “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...” 33 U.S.C. §922. The Supreme Court stated in *Intercounty Constr. Corp. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975):

Taken in historical and statutory context, the phrase ‘whether or not a compensation order has been entered’ is properly interpreted to mean merely that the one year time limit imposed on the power of the deputy commissioner to modify existing orders runs from date of final payment of compensation even if the order sought to be modified is actually entered only after such date.

Intercounty, 422 U.S. at 9, 2 BRBS at 9. The only compensation order in this case awarded benefits ending on December 17, 2000, but employer paid benefits until July 2001. The administrative law judge found that claimant in this case should have filed a petition for modification by July 2002, or one year from the date of last payment on July 8, 2001. Decision and Order at 3. The issue thus is whether employer’s “agreement” that claimant was entitled to benefits in 2004 is tantamount to a payment of compensation such that claimant had one year from October 2004 to file for modification.

We reject this construction of Section 22, as it is inconsistent with law. The Board and the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has addressed the meaning of the phrase “last payment of compensation” in Section 22. In *House v. Southern Stevedoring Co.*, 14 BRBS 979 (1982) (Miller, J., dissenting), *aff’d*, 703 F.2d 87, 15 BRBS 114(CRT) (4th Cir. 1983), the issue concerned the timeliness of claimant’s request for modification in a case in which an employer was ordered to pay scheduled compensation benefits and it paid those benefits in a lump sum rather than in periodic payments. The Board held that the plain meaning of the statute requires that a request for modification be made prior to one year after the date of the last actual payment of compensation, rather than from the date the last periodic payment would have been made. *House*, 14 BRBS at 982-982.1. In affirming the Board’s

decision, the Fourth Circuit similarly held that the plain meaning of Section 22 requires that modification claims be filed within one year of the date of the last actual payment of compensation. *House*, 703 F.2d at 89, 15 BRBS at 120(CRT); *see also Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988). In this case, the last actual payment of compensation was on July 8, 2001, and the administrative law judge properly found, therefore, that claimant had until July 2002 to seek modification of the district director's compensation order. As there was no actual payment of benefits in 2004, claimant's claim for modification was untimely filed.¹ *House*, 14 BRBS at 982.1, *aff'd*, 703 F.2d at 89, 15 BRBS at 120(CRT); *Raimer*, 21 BRBS 98.

¹ Thus, we reject claimant's contention that this case is similar to *Camardelle v. Gulf Best Electric Co.*, BRB Nos. 00-0392/A (Dec. 28, 2000)(unpub.). That case addressed the issue of employer's voluntary payments on the application of the time limitations in Section 13 of the Act, 33 U.S.C. §913, and, unlike in the present case, employer made an additional, actual voluntary payment several years after the initial voluntary payments ceased.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring in the result:

I concur with the majority's decision to affirm the administrative law judge's finding that the request for modification for benefits during a period of disability in 2001 is untimely, but disagree with the rationale on which it is based. The scope of the statutory language of Section 22 was not raised or briefed by the parties on appeal or discussed by the administrative law judge. I would affirm the administrative law judge's decision on the grounds he enunciated. The administrative law judge acted within his discretion in determining that claimant did not file a request for modification for additional benefits within one year following termination of compensation in 2001, and that even assuming *arguendo* that modification can be sought in the instant case it would not render justice under the Act to grant it. *See generally O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971) (modification must render justice under the Act).

JUDITH S. BOGGS
Administrative Appeals Judge