BRB Nos. 06-0804
and 07-0251

MARIE G. KANESHIRO (Widow of CALVIN T. KANESHIRO) Claimant-Petitioner v. HOLMES & NARVER, INCORPORATED and WAUSAU INSURANCE COMPANIES Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/25/2007 DECISION and ORDER

Appeals of the Decision and Order Denying Attorney's Fees and the Order Denying Claim for Medical Expenses of Anne Beytin Torkington, Administrative Law Judge, United States Department of Labor.

Grant K. Kidani and Alan L. Wong (Kidani Law Center), Honolulu, Hawaii, for claimant.

Robert C. Kessner, James N. Duca and Cori Ann Takamiya (Kessner Duca Umebayashi Bain & Matsunaga), Honolulu, Hawaii, for employer/carrier.

Mark A. Reinhalter (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Attorney's Fees and the Order Denying Claim for Medical Expenses (2005-LHC-01353) of Administrative Law Judge Anne Beytin Torkington 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.* (LHWCA), as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq*. (DBA). 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 fourth time that this case has been before the Board. To briefly summarize, claimant's husband, the decedent, was employed by employer as a waiter/cook from 1954 to 1956, on the Enewetok and Bikini Atolls. At that time, employer was a civilian contractor providing support personnel to the Atomic Energy Commission (the predecessor of the U.S. Department of Energy) and the Joint Chiefs of Staff in connection with the United States government's atomic weapons testing program. In January 1989, decedent was diagnosed with chronic granulocyctic leukemia (CGL). Decedent filed a claim seeking total disability benefits under the LHWCA/DBA, alleging that his exposure to radiation during the course of his employment with employer resulted in his CGL.

In the initial Decision and Order issued on March 11, 1993, Administrative Law Judge Bober found decedent entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption of causation based upon his exposure to radiation and the diagnosis of CGL, and that employer failed to rebut the presumption. Accordingly, Judge Bober awarded decedent temporary total disability compensation commencing January 17, 1989, and continuing, and medical benefits. On appeal, the Board affirmed the administrative law judge's invocation of the Section 20(a) presumption, vacated the administrative law judge's finding that employer failed to establish rebuttal thereof, and remanded the case for the administrative law judge to address the relevant medical evidence of record to determine if employer established rebuttal of the Section 20(a) presumption. *Kaneshiro v. Holmes & Narver, Inc.*, BRB No. 93-1370 (March 14, 1996)(unpublished).

On remand, the case was transferred to Administrative Law Judge Di Nardi. In his decision on remand, Judge Di Nardi found that employer established rebuttal of the Section

20(a) presumption and, after weighing all the evidence of record, he found that decedent failed to establish that his condition arose out of his employment. Accordingly, the claim for benefits was denied. Decedent appealed to the Board; while the appeal was pending before the Board, decedent died on May 25, 1997 as a result of his CGL. The Board affirmed Judge Di Nardi's finding that employer rebutted the Section 20(a) presumption as well as the unchallenged finding, based on the record as a whole, that decedent's CGL was not related to his employment. *Kaneshiro v. Holmes & Narver, Inc.*, BRB No. 97-0596 (November 17, 1997)(unpublished).[1] On August 14, 1998, claimant filed a petition for Section 22, 33 U.S.C. §922, modification, alleging a mistake in fact with respect to the issue of the causal relationship between decedent's CGL and his employment. In an Order Granting Motion for Modification, Judge Di Nardi found claimant was entitled to a new hearing as she proposed offering additional expert testimony on the cause of decedent's CGL; thereafter, the case was reassigned to Administrative Law Judge Mosser. Judge Mosser admitted the parties' new evidence into the record and found that the weight of this new evidence did not establish a mistake in the ultimate determination that decedent's CGL was not caused by his work-related exposure to ionizing radiation. On appeal, the Board affirmed the administrative law judge's determination on modification, based on the record as a whole, that decedent's CGL was not related to his employment. *Kaneshiro v. Holmes & Narver, Inc.*, BRB No. 01-0216 (Sept. 28, 2001)(unpublished).

Claimant subsequently appealed to the United States Court of Appeals for the Ninth Circuit, which upheld the Board's affirmance of the administrative law judge's finding that decedent's CGL was not related to his employment. *Kaneshiro v. Holmes & Narver, Inc.*, 60 Fed. Appx. 79 (9th Cir. 2003). On October 6, 2003, the United States Supreme Court denied claimant's petition for a writ of certiorari. 540 U.S. 825 (2003).

While claimant's appeals were pending, the Energy Employees Occupational Illness Compensation Program Act (EEOICPA), 42 U.S.C. §7384 *et seq*., was enacted on October 30, 2000. Relevant to the instant appeal is Part D of the EEOICPA, 42 U.S.C. §7385o, under which a Department of Energy (DOE) contractor employee, or the employee's survivor, may seek assistance from DOE in filing a claim for state workers' compensation benefits for illness or death arising out of exposure to a toxic substance

[1]Claimant's appeal of the Board's November 1997 decision to the United States Court of Appeals for the Ninth Circuit was dismissed as untimely. *See* 33 U.S.C. §921(c).

during the course of employment at a DOE facility.[2] Under the pertinent provisions of Part D, applications are submitted by DOE to a physician panel to determine the validity of the applicant's claim that the illness or death arose out of exposure to a toxic substance during the course of employment at a DOE facility. 42 U.S.C. §7385o(b)-(d). DOE then reviews the panel's determination and accepts such determination in the absence of significant evidence to the contrary. 42 U.S.C. §7385o(e)(1)-(2). If DOE accepts a positive determination of a physician panel, DOE may direct the DOE contractor who employed the applicant not to contest the applicant's claim filed under the applicable state workers' compensation system. 42 U.S.C. §7385o(e)(3).[3]

In the instant case, a DOE physician panel, which was convened under Part D of the EEOICPA, 42 U.S.C. §7385o, determined in April 2004, that decedent's leukemia was caused by exposure to a toxic substance in the course of his employment with employer. CM 11 at 181-183. DOE accepted the physician panel's determination. *See* Dir. Resp. Br.-Attachment B. A Notice of Positive Physician Panel Determination & Transmittal dated August 20, 2004, states that the DOE contractor (employer) is to be notified "to accept primary liability for this workers' compensation claim and not raise any affirmative defense against this claim or award in any administrative or judicial forum with respect to the same health condition for which the applicant received a favorable Physician Panel determination." *Id.* In a letter dated September 10, 2004, the district director advised the parties that his office had received a copy of the DOE Notice of Positive Physician Panel Determination & Transmittal, stating that it appeared that DOE was instructing employer to no longer contest claimant's LHWCA/DBA claim. CM 12 at 184. The district director further stated that "there is certainly sufficient new information for us to administratively reopen our case file for modification proceedings under Section 22 of the Longshore Act." *Id.* On the same date, the claims examiner sent employer's longshore carrier a letter providing benefit calculations and instructing employer to pay temporary total disability benefits from March 28, 1996 through May 24, 1997, and death benefits from May 25, 1997 and continuing, with interest.

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[2] Although Part D of the EEOICPA, 42 U.S.C. §7385o, makes reference to claims filed under the appropriate *state* workers' compensation system, the provisions of Part D also are applicable to those DOE contractor employees whose compensation claims for illness or death arising from exposure to a toxic substance come within the provisions of the LHWCA, as extended by the DBA. Under the LHWCA/DBA scheme, when an injured worker falls within the jurisdiction of the DBA, any entitlement to compensation under a state workers' compensation statute is displaced by the provisions of the LHWCA. 42 U.S.C. §1651(a), (c).

[3] Part D of the EEOICPA, 42 U.S.C. §7385o, was repealed effective October 28, 2004, and a new Part E was enacted. Pub. L. No. 108-375, Div. C, Title XXXI, §3162(i), 118 Stat. 2186. The new legislation, however, leaves undisturbed any previous acceptance by DOE of a positive determination by a physician panel. 42 U.S.C. §7385s-4(b).

CM-13 at 186. Employer has paid compensation to claimant in the amount specified by the claims examiner. CM-20, 21.

Subsequently, claimant's counsel filed a petition for an attorney's fee for work performed in the LHWCA/DBA claim dating from 1989. In addition, claimant sought reimbursement of decedent's medical expenses. Claimant maintained that Section 22 should be utilized to formalize the benefits which employer has been ordered to pay. Employer responded that it is not liable for any attorney's fee under the LHWCA/DBA because claimant did not successfully prosecute a claim under this Act. The case was referred to the Office of Administrative Law Judges (OALJ) for a formal hearing on the issues of Section 22 modification and attorney's fees, and the case was assigned to Administrative Law Judge Torkington (the administrative law judge). Thereafter, the parties determined that the matter could be resolved without a hearing by means of written pleadings. *See* Decision and Order Denying Attorney's Fees at 1.

In a Decision and Order Denying Attorney's Fees issued on June 28, 2006, the administrative law judge determined that she lacked jurisdiction under the Act to award attorney's fees and costs to claimant. In this regard, she found, first, that she lacked authority to adjudicate any claims arising from the EEOICPA; second, that claimant's attorney's fee petition does not meet the requirements of a Section 22 modification request under the LHWCA in that there was no mistake of fact or change in condition; and, third, that claimant's award of benefits under the EEOICPA does not constitute a successful prosecution within the meaning of Section 28 of the LHWCA, 33 U.S.C. §928. Decision and Order Denying Attorney's Fees at 3-5. Thereafter, in an Order Denying Claim for Medical Expenses issued on October 3, 2006, the administrative law judge stated that she had not been presented with the medical expenses issue prior to issuance of her June 28, 2006 Decision and Order and, moreover, that she would have denied the claim for the same reasons as she denied the attorney's fee request. In denying claimant's claim for reimbursement of medical expenses, the administrative law judge reasoned that there was no valid claim before her as claimant's LHWCA claim was denied after exhaustion of all appeals and there are no grounds for Section 22 modification. Order Denying Claim for Medical Expenses at 2.

Claimant appeals the administrative law judge's Decision and Order Denying Attorney's Fees, BRB No. 06-0804, and the Order Denying Claim for Medical Expenses, BRB No. 07-0251.[4] Employer has filed response briefs, urging affirmance of the administrative law judge's decisions. The Director, Office of Workers' Compensation

[4] By Order dated December 15, 2006, the Board consolidated claimant's appeals for purposes of decision.

Programs (OWCP), has filed a response brief,[5] urging the Board to vacate the administrative law judge's decisions and remand the case for further adjudication pursuant to Section 22, 33 U.S.C. §922.

We need not reach the substantive arguments presented by claimant in these appeals in view of our agreement with the Director's position that this case is the subject of a timely Section 22 modification claim, which has not been adjudicated. Section 22 provides in pertinent part as follows:

> Upon his own initiative, or upon the application of any party in interest, . . . on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, 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, or at any time prior to one year after the rejection of a claim, review a compensation case. . . in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. . . .

33 U.S.C. §922.[6] As correctly urged by the Director, Section 22 expressly provides that the district director may initiate modification proceedings "upon his own initiative." *See* Dir. Resp. Br. at 8-9. Moreover, a denial of a previously filed request for modification constitutes a "rejection of a claim" under Section 22, commencing a new statute of limitations for initiating a new modification proceeding. *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 540, 36 BRBS 35, 39-40(CRT) (7th Cir. 2002); *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491, 498 (4th Cir. 1999); *Moore v. Virginia Int'l Terminals, Inc.*, 35 BRBS 28, 30 (2001). Furthermore, the one-year time limit for Section 22 modification commences with the date on which the claim becomes final; thus, modification may be requested within one year after the conclusion of the appellate process. *See, e.g., Moore*, 35 BRBS at 30.

In this case, the appellate process with respect to claimant's initial Section 22 modification request concluded on October 6, 2003, when claimant's petition for a writ of

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[5] By Order dated May 11, 2007, the Board granted the Director's initial request for an enlargement of time in which to file a response brief; thereafter, the Director requested a second extension of time. The Board grants the Director's request for leave to submit his response brief which is hereby accepted as part of the record. 20 C.F.R. §§802.212, 802.217.

[6] Pursuant to Section 702.105 of the regulations, 20 C.F.R. §702.105, the term "district director" has replaced "deputy commissioner" used in the statute.

certiorari was denied by the Supreme Court. Thus, any new modification proceeding could be initiated within one year of that date. *Betty B Coal Co.*, 194 F.3d at 498. In his September 10, 2004, letter to the parties, the district director stated that he had received sufficient information on which to reopen the case file for Section 22 modification proceedings. *See* Dir. Resp. Br.-Attachment. A. We agree with the Director that the district director's letter represents a timely exercise of his authority under Section 22 to commence modification proceedings "upon his own initiative."[7] *See* Dir. Resp. Br. at 8-9. Thus, contrary to the administrative law judge's finding, upon referral to the OALJ, the administrative law judge had before her a timely motion for modification of the denial of benefits under the Act.

We further agree with the Director that the administrative law judge erred in determining that no grounds exist for reopening the claim under Section 22. *See* Dir. Resp. Br. at 9-12; Decision and Order Denying Attorney's Fees at 5; Order Denying Claim for Medical Expenses at 2. Section 22 provides that a decision may be modified based on either a change in conditions or a mistake in a determination of fact. 33 U.S.C. §922; *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995); *see generally Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). The administrative law judge has broad discretion to correct any mistakes of fact and may consider wholly new evidence, cumulative evidence, or may further reflect on evidence initially submitted. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, (1968). Generally, Section 22 is aimed at serving "justice under the Act," which overcomes notions of finality in decision-making. *Old Ben Coal Co.*, 292 F.3d 533, 36 BRBS 35(CRT); *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2d Cir. 2003); *Betty B Coal Co*., 194 F.3d 491; *Jessee v. Director, OWCP*, 5 F.3d 723 (4th Cir. 1993); *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 107 (2003). As the Director correctly argues, the Supreme Court's decisions in *O'Keeffe* and *Banks* make clear that the scope of modification based on a mistake in a determination of fact is not limited to any particular kind of factual errors; any mistake in fact, including the ultimate fact of entitlement to benefits, may be corrected on modification. *See Rambo I*, 515 U.S. at 295-296, 30 BRBS at 2-3(CRT); *Old Ben Coal Co.*, 292 F.3d at 541, 545, 36 BRBS at 40, 43-44(CRT); *Betty B Coal Co*., 194 F.3d at 497; *Jessee*, 5 F.3d at 725; *Wheeler*, 37 BRBS at 109.

[7] In view of our agreement with the Director's position that the district director initiated Section 22 modification proceedings "upon his own initiative," we need not consider the issue of whether any communications received by the district director in August 2004 constitute proper requests for modification under Section 22. *See* Dir. Resp. Br. at 8-9. Furthermore, we need not consider the Director's additional argument that in light of employer's commencement in September 2004 of the payment of benefits to claimant under the LHWCA, the one-year time limit of Section 22 can be considered to have not yet begun to run. *See id*. at 9.

In this case, the DOE's determination that decedent's leukemia was work-related provides a starting point from which the administrative law judge may determine whether modification is warranted in this case as it relates to claimant's claim for reimbursement of medical benefits.[8] As correctly stated by the Director, a claim for Section 7, 33 U.S.C. §907, medical benefits is never time-barred, *see, e.g., Siler v. Dillingham Ship Repair,* 28 BRBS 38 (1994) (decision on recon. *en banc),* but is contingent upon a finding of a causal relationship between the injury and the employment, *see, e.g., Weikert v. Universal Maritime Serv. Corp.,* 36 BRBS 38 (2002). If, on modification, such a causal relationship is established, the administrative law judge must determine employer's liability for reasonable and necessary medical expenses related to decedent's work-related injury. *See, e.g., id.,* 36 BRBS 38. In addition, a claimant who is ultimately found to be entitled to receive compensation pursuant to the LHWCA/DBA may be entitled to attorney's fees under Section 28 of the LHWCA, 33 U.S.C. §928. Thus, if, on modification, claimant is found entitled to compensation pursuant to the LHWCA/DBA, the administrative law judge must address claimant's entitlement to attorney's fees and costs for services performed at the OALJ level. We, therefore, vacate the administrative law judge's Decision and Order Denying Attorney's Fees and her Order Denying Claim for Medical Expenses, and we remand the case to the administrative law judge to address the parties' contentions pursuant to Section 22.

[8] The administrative law judge should address the effect, if any, of the DOE's instructions to employer that it should not raise any affirmative defenses to the worker's compensation claim with respect to the same health condition for which the applicant received a favorable decision under the EEOICPA.

Accordingly, the administrative law judge's Decision and Order Denying Attorney's Fees and the Order Denying Claim for Medical Expenses of the administrative law judge are vacated. The case is remanded to the administrative law judge for modification proceedings.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge