

BRB Nos. 08-0699 and 09-0240
OWCP No. 02-140404

J.S.)
)
 Claimant-Petitioner)
)
 v.)
)
 SERVICE EMPLOYEES)
 INTERNATIONAL)
)
 and)
)
 INSURANCE COMPANY OF THE STATE) DATE ISSUED: 06/18/2009
 OF PENNSYLVANIA/AIG)
 WORLDSOURCE)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) ORDER

Claimant has filed a Notice of Appeal dated December 9, 2008, of the administrative law judge's Decision and Order on Modification (2007-LDA-00023), which was filed by the district director on November 7, 2008. This appeal is assigned BRB No. 09-0240. All correspondence pertaining to this appeal must bear this number. In addition, claimant seeks reinstatement of his appeal, BRB No. 08-0699, of the administrative law judge's Decision and Order on Modification dated April 24, 2008. The Board dismissed this appeal at claimant's request on October 30, 2008, so that he could pursue modification proceedings.

Claimant's notice of appeal is untimely with regard to the filing of the compensation order by the district director. The Decision and Order on Modification dated November 5, 2008, was filed by the district director on November 7, 2008. Thus,

in order to be timely, claimant's appeal had to be filed by December 8, 2008. 20 C.F.R. §§802.205, 802.221. The appeal was filed on December 9. Claimant has filed a Motion in Support of Appeal in which he explains that the administrative law judge issued his decision on modification without a hearing. Moreover, the service sheet indicates that the district director did not serve the decision on counsel for claimant. Counsel states he learned of the decision on December 9 when discussing another case with defense counsel, and immediately filed an appeal upon receiving a faxed copy of the decision from the district director.

Claimant contends that the Board should accept the appeal as timely due to the lack of service on counsel. Claimant notes that Section 702.349 of the regulations, 20 C.F.R. §702.349, requires the district director to serve a copy of the decision on the parties and the parties' representatives. Claimant avers that, pursuant to *Grant v. Director, OWCP*, 502 F.3d 361, 41 BRBS 49(CRT) (5th Cir. 2007), the decision is not properly "filed" until the district director performs all the duties associated therewith, including mailing the decision to the parties and their representatives.

We dismiss claimant's appeal and deny the motion to reinstate the prior appeal, as the district director's failure to serve the decision on counsel does not toll the time for filing an appeal. Section 19(e) of the Longshore Act states that,

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 that,

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

20 C.F.R. §702.349. The Fifth Circuit, in *Grant*, reserved the question of whether “filing” under Section 19(e) requires proper mailing of the decision to the parties, as, in *Grant*, the district director had not taken the required action “to formally date and file” the administrative law judge’s decision as required by Section 19(e) and Section 702.349. *Grant*, 502 F.3d at 365, 41 BRBS at 51-52(CRT). Thus, the court reversed the Board’s finding that the claimant’s appeal was untimely filed.

Recently, however, the Fifth Circuit addressed the issue reserved in *Grant*. In *Carillo v. Louisiana Ins. Guaranty Ass’n*, 559 F.3d 377 (5th Cir. 2009), LIGA argued that, for purposes of the district director’s imposition of a Section 14(f) assessment for the late payment of benefits, the compensation order was not “filed” until the district director mailed the decision to the parties. The court rejected LIGA’s contention, stating that “filing” encompasses only the formal dating of the compensation order and its filing in the district director’s office. The court stated, “[W]hether a document is filed does not depend on whether others are informed.” *Id.* at 382. The court stated that Section 19(e) of the Act and Section 702.349 of the regulations indicate that *after* the compensation order is filed, *then* the district director is to mail copies to the interested parties. *Id.* at 381; *see also Sea-Land Service, Inc. v. Barry*, 41 F.3d 903, 908, 29 BRBS 1, 7(CRT) (3^d Cir. 1994) (it “is clear that filing and mailing are two distinct procedures”). Thus, in this case which arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, claimant’s contention that the district director’s act of filing the compensation order encompasses “mailing” the order must be rejected. *See Beach v. Noble Drilling Corp.*, 29 BRBS 22 (1995) (order on reconsideration *en banc*) (Brown and McGranery, JJ., dissenting).

Moreover, in addressing whether mailing is a component of “filing,” no court has held that service on counsel is a required element thereof. In *Ins. Co. of North America v. Gee*, 702 F.2d 411, 15 BRBS 107(CRT) (2^d Cir. 1983), the Second Circuit held that

service of the compensation order on counsel is not a requirement of “filing” under Section 19(e) of the Act.¹ In *Jeffboat, Inc. v. Mann*, 875 F.2d 660, 22 BRBS 79(CRT) (7th Cir. 1989), the Seventh Circuit allowed that Section 19(e) might require the mailing of the decision to the parties in order for “filing” to be effected, but that Section 702.349 does not require the mailing of the decision to the parties’ representatives in order for “filing” to have occurred. See also *Nealon v. California Stevedore & Ballast Co.*, 996 F.2d 966, 27 BRBS 31(CRT) (9th Cir. 1993) (court addressed only whether service on parties is required part of “filing” and held that it is).

The Seventh Circuit, in *Jeffboat, Inc. v. Mann*, noted that had the district director failed to notify both a party and its counsel of the administrative law judge’s decision, one might question whether that party’s loss of appeal rights deprived it of due process of law. 875 F.2d at 664 n. 6, 22 BRBS at 82 n.6(CRT). Claimant argues that the district director’s failure to serve counsel will result in a due process deprivation if his appeal is dismissed. We cannot accept this interpretation on the facts of this case. The district director indeed failed to serve the decision on claimant’s counsel, but claimant was served with the administrative law judge’s decision denying modification. Under such circumstances, claimant’s due process rights were not infringed. Therefore, as claimant’s appeal was filed more than 30 days after the district director filed the administrative law judge’s decision and order, his appeal must be dismissed. *Beach*, 29 BRBS 22. Similarly, we deny the motion to reinstate the appeal in BRB No. 08-0699, as the motion was not filed within 30 days of the date the decision on modification was filed. 20 C.F.R. §802.301(c).

Although claimant’s appeal must be dismissed, he is not without a remedy in this case as he may file another petition for modification based on a change in condition or a mistake in a determination of fact within one year of the denial of his previous motion for modification. 33 U.S.C. §922; *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002); *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491 (4th Cir. 1999). A party need not establish that evidence on which he now relies was unavailable during the prior proceedings in order to obtain modification. *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2^d Cir. 2003). Modification may be based on any mistaken fact, provided modification will “render justice under the Act,” *Banks v. Chicago Grain Trimmers Ass’n, Inc.*, 390 U.S. 459 (1968); *Old Ben Coal Co.*, 292 F.3d 533, 36 BRBS 35(CRT), or on a change in claimant’s physical or economic condition. *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995).

¹ The court also stated that if Section 702.349 of the regulations mandates such as a part of “filing,” then the regulation impermissibly exceeds the requirement of the statute. *Gee*, 702 F.2d at 414, 15 BRBS at 112(CRT).

Accordingly, claimant's appeal in BRB No. 09-0240 is dismissed. Claimant's motion to reinstate his appeal in BRB No. 08-699 is denied.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge