BRB No. 22-0071

STEVE BUSSANICH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MARINE TERMINALS CORPORATION d/b/a PORTS AMERICA	)	
	)	
and	)	
	)	DATE ISSUED: 03/30/2023
PORTS INSURANCE COMPANY, INCORPORATED	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Order Granting Employer's Motion for Summary Decision of Stewart F. Alford, Administrative Law Judge, United States Department of Labor.

Lara D. Merrigan and Catherine J. Jones (Merrigan Legal), Sausalito, California, and Paul J. Delay (Thompson & Delay), Seattle, Washington, for Claimant.

Scott E. Holleman (Bauer Moynihan & Johnson LLP), Seattle, Washington, for Employer/Carrier.

Matthew W. Boyle (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore),

Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Stewart F. Alford's Order Granting Employer's Motion for Summary Decision (2021-LHC-00713) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act). We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and 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 was injured at work on December 1, 2013, when a metal turnbuckle fell on his head; he filed a claim for benefits. Employer originally voluntarily paid temporary total disability benefits. It later controverted the claim and, on April 27, 2017, ALJ Jennifer Gee awarded Claimant medical benefits from December 1, 2013, until December 2, 2014, temporary total disability benefits from December 1, 2013, until March 20, 2014, temporary partial disability benefits from March 21, 2014, until October 17, 2014, and interest on past due compensation; she also awarded Employer a credit for the temporary total disability benefits it had previously paid. *Bussanich v. Ports America*, 2015-LHC-00557 (April 27, 2017) (D&O). Claimant received Employer's last payment of benefits by check on June 16, 2017.[1]

Claimant appealed ALJ Gee's D&O, challenging her finding that his injury had resolved. The Benefits Review Board affirmed ALJ Gee's decision as supported by substantial evidence. *Bussanich v. Ports America*, BRB No. 17-0477 (Mar. 27, 2018). The United States Court of Appeals for the Ninth Circuit affirmed the Board's decision. *Bussanich v. Ports America*, 787 F. App'x 405, 406 (9th Cir. Dec. 10, 2019). On December 3, 2020, Claimant filed a motion for modification of Judge Gee's decision pursuant to Section 22 of the Act, 33 U.S.C. §922. Employer moved for summary decision, arguing Claimant's motion was untimely. On October 26, 2021, ALJ Alford (the ALJ) issued an

[1] Although Claimant received this check on June 16, 2017, he failed to cash it, and it became void in April 2018. Employer issued a replacement check on December 6, 2018, and Claimant cashed it on December 17, 2018. EX 4.

Order Granting Employer's Motion for Summary Decision (Order) and denying Claimant's Section 22 application as untimely.

On appeal, Claimant contends the ALJ erred in denying his motion for modification as untimely and in granting Employer's motion for summary decision.[2] The ALJ found the date of last payment of compensation was June 16, 2017, and the application for modification was filed on December 3, 2020, well after the Section 22 one-year statute of limitations had expired. Claimant argues the ALJ used the incorrect date to calculate timeliness. Instead of counting from the date of the last payment of compensation, he asserts the ALJ should have counted from the date of the final decision on appeal of the underlying claim: one year after the Ninth Circuit's December 10, 2019 decision became final.

Employer responds, arguing Section 22 must be read in conjunction with Section 19, 33 U.S.C. §919, which gives an ALJ only two options after a formal hearing: reject the claim or award benefits. Since Claimant was awarded benefits, albeit not the full amount he sought, it argues ALJ Gee's April 27, 2017 decision constitutes an "award." Therefore,

[2] In determining whether to grant a party's motion for summary decision, the ALJ must determine, after viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the moving party is entitled to summary decision as matter of law. *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006); *see also O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002); *Brockington v. Certified Elec., Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *R.V. [Villaverde] v. J. D'Annunzio & Sons*, 42 BRBS 63 (2008), *aff'd sub nom. Villaverde v. Director, OWCP*, 335 F. App'x 79 (2d Cir. 2009); *Buck v. General Dynamics Corp.*, 37 BRBS 53 (2003); *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990); 29 C.F.R. §18.72. A fact is "material" if it "might affect the outcome of the suit under the governing law." *O'Hara*, 294 F.3d at 61. An issue of fact is "genuine" where "the evidence is such that a reasonable [factfinder] could return a verdict for the nonmoving party." *Id.* To defeat a motion for summary decision, the non-moving party must present "specific facts" showing there exists "a genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd., v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). If the ALJ *could* find for the non-moving party, or if it is necessary to weigh evidence or make credibility determinations on the issue presented, summary decision is inappropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986); *Hall*, 24 BRBS 1. Orders granting summary decision are reviewed *de novo*. *See, e.g., Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 465 n.10 (1992).

Employer asserts the statute of limitations began to run on the date of the last compensation payment made pursuant to that award, June 13, 2017.

The Director, Office of Workers' Compensation Programs (Director), responds urging the Board to vacate the order and remand this matter to the ALJ for consideration of the merits of Claimant's modification request. The Director contends the ALJ erred in his application of Section 22, particularly in his analysis of the motion's timeliness and his reliance on *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001). The Director states, "[f]or purposes of Section 22, a partial rejection of a claim" implicates the "rejection branch of the statute[,]" and the ALJ should have followed the Board's holding in *Cobb v. Shirmer Stevedoring Co.*, 2 BRBS 132 (1975), *aff'd mem.*, 577 F.2d 750 (9th Cir. 1978) (table), because it presented the same factual scenario as the present case.

Section 22 states a party may seek modification of a previously entered compensation order "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…." 33 U.S.C. §922.[3] Thus, where benefits are awarded, the time runs from the date of the last payment of compensation. *See Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491 (4th Cir. 1999); *Hudson v. Sw. Barge Fleet Services, Inc.*, 16 BRBS 367 (1984). Where a claim has been rejected, however, the time runs from the date of the rejection, which means modification may be

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[3] The first sentence of Section 22 states:

> Upon his own initiative, or upon the application of any party in interest (including an employer or carrier which has been granted relief under section 908(f) of this title), 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 (including a case under which payments are made pursuant to section 944(i) of this title) 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.

requested within one year after the conclusion of the appellate process (one year after the rejection becomes final). *Betty B*, 194 F.3d 491; *Moore v. Virginia Int'l Terminals, Inc.*, 35 BRBS 28 (2001); *Black v. Bethlehem Steel Corp*., 16 BRBS 138, 142-43 n.7 (1984), *appeal dismissed*, 760 F.2d 274 (9th Cir. 1985) (table); *Dean v. Marine Terminals Corp.*, 7 BRBS 234 (1977). Here, ALJ Gee granted part of the claim, so there was a payment, and denied part of the claim, so there was a rejection subject to appeal. Because Claimant's appeal was still pending after the date of the last payment of compensation, the time for filing modification runs from the date of the final decision on the appeal rather than from the date of last payment. *Cobb*, 2 BRBS at 136.

In relying on *Pool Co.*'s definition of "claim" and applying it to the language of Section 22, ALJ Alford concluded there is "only a binary of possibilities: either payments were made or a claim was denied and the statute of limitations should be calculated accordingly." D&O at 4. Because ALJ Gee did not reject Claimant's claim in its entirety and awarded Claimant some compensation, ALJ Alford computed the modification statute of limitations from the date of the last payment of benefits. *Id.* at 5. However, he did not address *Cobb*.

In *Cobb*, the claimant was injured in 1954. Pursuant to a formal compensation order issued by the district director, the claimant received his last benefit payment from his employer on August 18, 1967. He also appealed the decision to the district court and then to the Ninth Circuit, whose affirmance of the lower court's decision became final when he did not apply to the Supreme Court of the United States for review. *Cobb*, 2 BRBS at 133-134, 137. Thereafter, the claimant filed a motion for modification seeking additional compensation; the ALJ found the claimant's motion for modification untimely because it was not filed within one year after the last payment of benefits. *Id.* at 135. On appeal, the Board held the ALJ incorrectly applied Section 22. It explained the ALJ should have read Sections 21 and 22 in conjunction to understand that the claimant's "claim for additional compensation was not 'rejected' within the meaning of Section 22 until the conclusion of appellate proceedings on November 21, 1969." *Id.* at 136; 33 U.S.C. §921 (compensation orders become final after 30 days unless they are appealed). Consequently, because the "rejected" portion of the claim was appealed, the ALJ erred in finding the statute of limitations began running from the date of the last payment of compensation of the successful portion of the claim. *Cobb*, 2 BRBS at 135. The Board concluded: "the claimant could apply for modification of the deputy commissioner's award of August 9, 1967, which did not become final until [the appellate proceedings concluded on] November 21, 1969, at any time prior to November 21, 1970." *Cobb*, 2 BRBS at 137. That is, the Board held a partially rejected claim is a rejection, and the rejection is not final until all appeals are exhausted.

In the instant case, we agree with Claimant and the Director that Claimant's request for modification was timely. The ALJ acknowledged "reality … can be more complex" than a claim resulting in either an "award" or a "rejection." He nevertheless determined he must choose from that dichotomy and found Claimant's initial claim had not been "rejected" because ALJ Gee awarded some benefits. D&O at 4-5. But as the Director succinctly states, "the ALJ overlooked [*Cobb's*] holding[] that [S]ection 22's 'rejection' provision applies where [only] some, but not all, requested compensation is awarded in the order under modification." Dir. Br. at 7.

The ALJ erred in applying *Pool Co*. to these facts, as it involved the separate question of whether a claimant was required to comply with formal regulatory procedures for withdrawing part, but not all, of a "claim."[4] The issue presented here, like the issue in *Cobb*, involves the timeliness of a motion for modification of a prior compensation order under Section 22 and the meaning of "rejection" of a claim. *See Moore*, 35 BRBS at 30. *Pool Co.'s* interpretation of the term "claim" in the regulations governing withdrawal neither addresses Section 22 nor precludes *Cobb's* holding that a "rejection" occurs when part of a claim has been denied and the modification statute of limitations is not triggered until all appeals have been exhausted on the claim. *Id.*

Additionally, Section 22 favors accuracy over finality and is meant to "render justice under the Act." *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 464 (1968); *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 276, 37 BRBS 99, 101(CRT) (2d Cir. 2003); *R.V.* [*Vina*] *v. Friede Goldman Halter*, 43 BRBS 22 (2009). The ALJ's narrow interpretation of "rejection," requiring a complete rejection of a claim before the Section 22 rejection provision could apply, defeats the statute's purpose because it would require a claimant to file a motion for modification while his appeal was still pending – before the appellate

[4] The court held a claimant was permitted to withdraw part of his claim at the hearing because the formal regulatory procedures for withdrawing a "claim" under 20 C.F.R. §702.225(a) apply when a claimant seeks to withdraw a claim "in its entirety," but not to "lesser modification[s]" which can be done "less formally." *Pool Co. v. Cooper*, 274 F.3d 173, 183, 35 BRBS 109, 116(CRT) (5th Cir. 2001). Relying on a "contextual reading" of the Act, including Section 13's statute of limitations for filing a "claim," *see* 33 U.S.C. §913, it concluded the term as used in 20 C.F.R. §702.225(a) refers to "the whole of the employee's demand for compensation rather than to specific categories of benefits" or to a "precise category of disability for a fixed period of time," allowing the claimant to liberally modify the dates or categories of disability for which he seeks benefits arising out of a single injury. *Pool Co.*, 274 F.3d at 183-184, 35 BRBS at 116-117(CRT).

courts have an opportunity to rectify any error or finalize the adverse decision.[5] Therefore, the ALJ improperly concluded the time for filing a motion to modify ALJ Gee's decision began to run from the date Claimant received his last payment of compensation.[6] *Cobb*, 2 BRBS at 136.

As *Cobb* held a claim is considered rejected if only partially awarded, and it is not finally rejected until all appeals have been exhausted, Claimant had one year after the Ninth Circuit's decision became final to file his motion for modification. *Id*. He filed his motion on December 2, 2020, less than one year after the Ninth Circuit's decision became final and, consequently, it was timely. We therefore reverse the ALJ's finding that Claimant's Section 22 modification request is untimely, vacate his grant of Employer's motion for summary decision, and remand the case for the ALJ to consider the merits of Claimant's request to modify ALJ Gee's decision.

[5] Section 13(a), on which the *Pool Co.* court relied to interpret the withdrawal regulations, provides: "the right to compensation for disability or death under this chapter shall be barred unless a claim therefore [sic] is filed within one year after the injury or death." 33 U.S.C. §913(a); *compare with* Section 22 language above. As the Director asserts, "the rationale underlying the *Pool* [*Co.*] court's interpretation of the term 'claim' was to save a worker from an overly technical application of the Act which would preclude a ruling on the merits." Dir. Brief at 8. Here, however, "the ALJ applied *Pool* [*Co.*] to the exact opposite effect – in a manner that unreasonably precludes the claimant from having the merits of his case heard on modification." *Id*.

[6] We reject Employer's assertion that Section 22's reference to Section 19 of the Act, 33 U.S.C. §919, somehow supports an interpretation of the term "rejection" as only a complete rejection of a claim. As Employer asserts, Section 22 neither addresses "degrees of an award or rejection" nor "partial rejections." Emp. Br. at 11-12. Given that the purpose of Section 22 is to "render justice under the Act," reducing the time for a party to file a motion for modification from that set forth in the statute or requiring him to file it during a period when an appellate court could render it moot, does not serve that purpose. Moreover, Section 22 gives an ALJ broad authority to reopen a claim to address any mistake in fact and allows him to issue a new order to "terminate, continue, reinstate, increase or decrease" compensation, thereby rendering justice under the Act. 33 U.S.C. §922.

Accordingly, we vacate the ALJ's Order Granting Employer's Motion for Summary Decision and remand the case for further consideration of Claimant's modification request.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge