U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0064
Case Nos. 2015-LDA-00322, 00323
OWCP Nos. 02-235449, 02-220679

JEANNIE POWELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: Dec. 15, 2015
	)	
DYNCORP INTERNATIONAL	)	
	)	
and	)	
	)	
CONTINENTAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	ORDER

Claimant appeals the Order Regarding Motion for Summary Decision of Administrative Law Judge Paul C. Johnson, Jr. (the administrative law judge) 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*., as extended by the Defense Base Act, 42 U.S.C. §1651 (the Act). Employer has filed a motion to dismiss claimant's appeal. 20 C.F.R. §802.219(a). Claimant responds that employer's motion to dismiss should be denied and that the Board should decide her appeal. 20 C.F.R. §802.219(e).

In a Decision and Order dated December 16, 2014, Administrative Law Judge Krantz awarded claimant ongoing temporary total disability benefits, commencing September 20, 2011, at a weekly compensation rate of $1,725.73. This decision was not

appealed. On February 5, 2015, employer filed a motion for modification on the ground of a mistake in the awarded compensation rate. 33 U.S.C. §922. Employer contended that the awarded rate is in excess of the maximum rate permitted by Section

6(b) of the Act, 33 U.S.C. §906(b). Employer filed with the administrative law judge a motion for summary decision, which claimant opposed on the ground that employer was raising an issue of mistaken application of law to which Section 22 does not apply.

The administrative law judge found that employer raised a mistake in a determination of a fact regarding the correct compensation rate, that there are no genuine issues of material fact, and that "Employer is entitled to summary decision in its favor." Order at 2[1]. However, the administrative law judge did not modify the prior award of benefits. Rather, he stated that "Employer's motion [for modification] will be granted in a future order, after consideration of" the manner in which employer's overpayment should be recouped.[2] *Id.* The administrative law judge ordered the parties to submit within 30 days all relevant information concerning claimant's financial status so that a plan for structuring employer's credit could be formulated. *Id.* at 3-4. Claimant appeals the administrative law judge's Order.

Employer moves to dismiss this appeal on the grounds that the administrative law judge's order is interlocutory and claimant's appeal is premature. Claimant responds that the Board should decide her appeal because the administrative law judge's decision is conclusive on the issue of the applicability of Section 22, leaving only the recoupment issue unsettled. Claimant also contends that the Board's regulations do not contain a "finality" requirement and that the regulation at 20 C.F.R. §802.205(c) states that the failure to file an appeal within 30 days of the filing of a decision or order "shall foreclose all rights to review by the Board with respect to the case or matter in question." For the reasons discussed below, we agree with employer that claimant's appeal must be dismissed.

The administrative law judge's order is interlocutory, as the administrative law judge did not take final action on employer's motion for modification, that is, the administrative law judge neither modified the prior award of benefits nor denied the motion for modification. *See generally Gupton v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 94 (1999) (administrative law judge must award or deny benefits). The administrative law judge stated his intention to modify the award in a subsequent order. Although the Board has the authority to decide interlocutory appeals, *see* 33

[1] The administrative law judge stated there is no dispute that the maximum compensation rate in effect in September 2011 was $1,256.84. Order at 3.

[2] Section 22 provides that if the modifying order decreases the award of compensation, employer is entitled to deduct its overpayment from unpaid compensation. 33 U.S.C. §922; *see, e.g., Universal Maritime Service Corp. v. Spitalieri*, 226 F.3d 167, 34 BRBS 85(CRT) (2d Cir. 2000), *cert. denied*, 532 U.S. 1007 (2001).

U.S.C. §923(a); *Pensado v. L-3 Communications Corp.*, 48 BRBS 37 (2014), we decline to do so in this case.

First, contrary to claimant's contention, the administrative law judge's order does not fall under the "collateral order doctrine," as the scope of modification issue claimant raises is not "collateral;" it is the primary issue and, moreover, it is reviewable upon the issuance of a final order.[3] *See, e.g., Beach TV Cable Co., Inc. v. Comcast of Florida/Georgia, LLC,* ___ F.3d ___, 2015 WL 8116515, No. 15–10246 (11th Cir. Dec. 8, 2015). Further, the regulation at 20 C.F.R. §802.201(a) states that only "a party or a party-in-interest adversely affected or aggrieved" by a decision or order may file an appeal to the Board. Because Judge Krantz's award of benefits based on the higher compensation rate remains in effect, claimant has not been adversely affected or aggrieved by the administrative law judge's interlocutory order. *See generally Briskie v. Weeks Marine, Inc.*, 38 BRBS 61 (2004), *aff'd mem.,* 161 F.App'x 178 (2d Cir. 2006); *Hymel v. McDermott, Inc.*, 37 BRBS 160 (2003), *aff'd mem. sub nom. Bailey v. Hymel*, 104 F.App'x 415 (5th Cir. 2004). Thus, claimant's appeal is premature.

[3] Notwithstanding Section 802.205(c), quoted in part, *supra*, the Board may review interlocutory orders after an aggrieved party timely appeals the administrative law judge's final decision or order. *J.T. [Tracy] v. Global Int'l Offshore, Ltd*., 43 BRBS 92 (2009), *aff'd sub nom. Keller Found./Case Found. v. Tracy*, 696 F.3d 835, 46 BRBS 69(CRT) (9th Cir. 2012), *cert. denied*, 133 S.Ct. 2825 (2013). *Weber v. S.C. Loveland Co*., 35 BRBS 190 (2002), *aff'g and modifying on recon*. 35 BRBS 75 (2001); *Rochester v. George Washington Univ.*, 30 BRBS 233 (1997).

Accordingly, we grant employer's motion to dismiss claimant's appeal.[4] 20 C.F.R. §802.219(h).

SO ORDERED.

_____

JUDITH S. BOGGS
Administrative Appeals Judge

_____

GREG J. BUZZARD
Administrative Appeals Judge

_____

JONATHAN ROLFE
Administrative Appeals Judge

[4] We deny as moot claimant's motion for an enlargement of time in which to file her Petition for Review and brief. 20 C.F.R. §§802.211, 802.217.