



Issue Date: 17 April 2009

CASE NO.: 2008-LHC-00794

OWCP NO.: 5-085207

In the matter of:

S.H.W.,
Claimant,

v.

NEWPORT NEWS SHIPBUILDING
& DRY DOCK COMPANY,
Employer,

Appearances: Gregory Camden, Esq.
For Claimant

Jonathan Walker, Esq.
For Employer

Before: Kenneth A. Krantz
Administrative Law Judge

DECISION AND ORDER DENYING MODIFICATION

This proceeding arose upon the filing of a claim for disability compensation under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§ 901-950 (2000) ("Act" or "LHWCA"). A formal hearing was held on July 16, 2008, in Newport News, Virginia. The Claimant submitted Exhibits 1 through 7, the Employer submitted Exhibits 1 through 8, and the Administrative Law Judge submitted Exhibits 1 through 5.¹ All exhibits were received into evidence without objection.

¹ The following abbreviations will be used as citations to the record:

CX – Claimant's Exhibit
EX – Employer's Exhibit
JX – Joint Claimant/Employer Exhibit
AX – Administrative Law Judge's Exhibit
TR – Transcript of July 16, 2008, hearing

On September 4, 2008, the Employer requested an extension for the filing of post-hearing briefs with the new deadline of September 15, 2008. This request was granted and both parties timely filed post-hearing briefs. The findings and conclusions which follow are based on a complete review of the entire record in light of the argument of the parties, applicable statutory provisions, regulations, and pertinent precedent.

ISSUES

1. Determine whether the Claimant's request for modification is timely.
2. If the request for modification is timely, determine whether the Claimant is entitled to temporary total disability (TTD) compensation under the Act from June 20, 2006, through June 13, 2007, temporary partial disability (TPD) compensation from June 14, 2007, through September 5, 2007, and TTD compensation from September 6, 2007, through the present and continuing.

STIPULATIONS

1. The Employer has voluntarily paid for the Claimant's medical treatment since her injury in 1992, including her 2006 and 2008 knee surgeries.

(TR at 13, Claimant's Brief at 2, 10-11)

BACKGROUND AND PROCEDURAL HISTORY

The Claimant worked for the Employer as a shipfitter. On May 26, 1992, the Claimant sustained an injury to both of her knees. The Employer voluntarily paid the Claimant scheduled permanent partial disability benefits for a 15 percent disability to the right lower extremity and a 25 percent disability to the left lower extremity, as well as temporary total disability compensation for a period of time. The Claimant sought continuing benefits for permanent total disability, which the Employer contested, and a formal hearing was held on September 17, 1998. (EX 8 at 1-2)

In a Decision and Order issued on March 29, 1999, Administrative Law Judge Campbell found that the Claimant had established a *prima facie* case of total disability by showing that she was unable to return to her usual employment with the Employer, and that the Employer had failed to establish the availability of suitable alternative employment. Accordingly, Judge Campbell awarded the Claimant permanent total disability benefits. The Employer appealed Judge Campbell's decision to the Benefits Review Board (the Board), which affirmed the decision on April 18, 2000, but noted that, given the Claimant's lack of cooperation with the Employer's vocational expert, the Employer might elect to submit a petition for modification along with a new labor market survey under Section 22 of the Act. (EX 8 at 2)

The Employer submitted a request for modification, and in a Decision and Order issued on May 24, 2002, Judge Campbell granted the Employer's request for modification, finding that the Employer had established a mistake in a determination of fact in the initial decision by

establishing the availability of suitable alternative employment. As a result, Judge Campbell modified the Claimant's award from permanent total disability benefits to permanent partial disability benefits. On August 14, 2002, Judge Campbell issued an Order Granting Employer's Motion for Reconsideration, finding that because the Claimant's injury fell under the schedule, the Claimant was limited to a scheduled award of permanent partial disability benefits. Accordingly, Judge Campbell amended his May 24, 2002, Decision and Order to simply deny the claim for permanent total disability benefits. (EX 8 at 2-3) The Claimant appealed the decision to the Board, which affirmed the decision on September 12, 2003. (EX 8)

The Claimant underwent a right total knee arthroplasty on June 21, 2006, and had additional surgery on the knee on October 5, 2006. (CX 1, CX 2, EX 2) On September 13, 2007, the Claimant submitted a request for modification seeking temporary total disability benefits. (EX 2) The Claimant had a left total knee arthroplasty in January 2008. (CX 1, CX 2) The Employer has voluntarily paid for the Claimant's medical treatment since she sustained her injury in 1992, including the 2006 and 2008 surgeries. (TR at 13, Claimant's Brief at 2, 10-11)

DISCUSSION

Section 22

Section 22 of the Act 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 8(f) [33 USC § 908(f)]), 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 44(i) [33 USC § 944(i)]) in accordance with the procedure prescribed in respect of claims in section 19 [33 USC § 919], and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary. This section does not authorize the modification of settlements.

33 U.S.C. § 922 (2000). Thus, Section 22 permits any party to request modification for mistake of fact or change in physical or economic condition. *See Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291 (1995). Congress intended Section 22 to displace traditional notions of

res judicata, and to allow the factfinder, within the proper time frame after a final decision or order, to consider newly submitted evidence or to further reflect on the evidence initially submitted. *Hudson v. Southwestern Barge Fleet Services*, 16 BRBS 367 (1984). However, a request for modification must be filed “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; see *Metropolitan Stevedore Company v. Rambo [Rambo II]*, 521 U.S. 121 (1997); *Intercounty Constr. Corp. v. Walter*, 422 U.S. 1 (1975), *aff’g* 500 F.2d 815 (D.C. Cir. 1974).

The Claimant contends that her request for modification was timely. The Claimant acknowledged that her request for modification was not made until September 13, 2007, more than four years after the Board’s September 12, 2003, decision denying total disability benefits. The Claimant does not assert that any disability compensation was paid to her by the Employer after that September 12, 2003, decision, nor does she allege that she filed a modification request prior to September 13, 2007. (Claimant’s Brief at 2, 10) However, the Claimant argues that each payment for medical treatment furnished by the Employer constituted “compensation” as referred to in Section 22, thus tolling the one year statute of limitations for requesting modification. (Claimant’s Brief at 10-11) Specifically, the Claimant cites to cases decided in the Fourth and Fifth Circuit Courts of Appeals holding that the term “compensation”, as used in other sections of the Act, includes payment of medical expenses. The Claimant argues that the same meaning of the term “compensation” must be applied throughout the Act. Therefore, because courts have held that, under certain sections of the Act, the term “compensation” includes payment of medical expenses, that meaning must apply to the term as it is used in Section 22. (Claimant’s Brief at 5-10)

The Employer counters that the Claimant made no request for modification within one year of the Board’s decision, and, therefore, the Claimant’s request is untimely. (Employer’s Brief at 4-5) The Employer further argues that the term “compensation” in Section 22 refers to Section 8 disability benefits and not Section 7 medical benefits, and, thus, the Employer’s voluntary payment of the Claimant’s medical expenses did not toll the statute of limitations. Although acknowledging that in some parts of the Act the term “compensation” refers to the payment of any money of any kind, the Employer argues that, given the statutory language and the fact that medical benefits are never time-barred, Congress did not intend for the term to be given such a broad meaning when used with respect to the time limitations for filing claims and modification requests under Section 13 and Section 22 of the Act. (Employer’s Brief at 6-11)

Section 2(12) of the Act defines “compensation” as, “the money allowance payable to an employee or to his dependents as provided for in this Act, and includes funeral benefits provided therein.” 33 U.S.C. § 902(12) (2000). Section 7(a) of the Act provides that, “[t]he employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.” 33 U.S.C. § 907(a) (2000). The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979).

The term “compensation” is used throughout the Act, but the statute is inconsistent in its usage as to whether “compensation” includes medical benefits provided by Section 7. Some sections of the Act specifically include medical benefits when describing the various elements of “compensation” while other sections explicitly refer to medical benefits as separate from “compensation.” *Compare* 33 U.S.C. § 904(a) (2000) (“Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 7, 8, and 9 [33 USC §§ 907, 908, 909]”) *and* 33 U.S.C. § 906(a) (“No compensation shall be allowed for the first three days of the disability, except the benefits provided for in section 7”) *with* 33 U.S.C. § 907(c)(1)(B)(i) (“has knowingly and willfully made, or caused to be made, any false statement or misrepresentation of a material fact for use in a claim for compensation or claim for reimbursement of medical expenses under this Act”) *and* 33 U.S.C. § 933(g)(2) (“ . . . all rights to compensation and medical benefits under this Act shall be terminated . . .”).

The Supreme Court squarely addressed this issue in the context of Section 13(a) of the Act in *Marshall v. Pletz*, 317 U.S. 383 (1943). Section 13(a) states that a claim must be filed within one year after the injury or, if “payment of compensation has been made without an award on account of such injury or death, a claim may be filed within one year after the date of the last payment.” 33 U.S.C. § 913(a).² In *Pletz*, the claimant argued that the furnishing of medical care constituted “payment of compensation within the meaning of § 13(a),” and thus tolled the one year period within which his claim had to be filed. *Id.* at 389. After quoting the definition of “compensation” provided by Section 2(12), the Court reviewed various sections of the Act in which the term is used, including Sections 4, 6(a), 7, 8, 10, 14, and noted that, as used in Sections 8, 10 and 14, the term “compensation” clearly refers to periodic money payments to the claimant. *Id.* at 390-91.

The Court noted that Section 6(a), quoted above, referred to the “benefits covered in § 7” which the Court defined as “the medical services which the employer is bound to furnish,” but noted that Section 7 also provides that if the claimant refused to submit to medical treatment, the deputy commissioner (now the Secretary or administrative law judge) may “suspend the payment of further compensation during such time as such refusal continues, and no compensation shall be paid at any time during the period of such suspension, unless the circumstances justified the refusal,” and stated that “[h]ere compensation is contrasted with medical aid.” *Id.* at 390 (quoting 33 U.S.C. § 907). The Court further acknowledged that Section 4 of the Act refers to “compensation payable under §§ 7, 8, and 9,” and that given such language, “[i]t may be argued that as 7 is the section dealing with medical care, Congress meant to include such care within the term ‘compensation’.” *Id.* at 391. However, the Court noted that, normally, the employer pays the claimant’s medical expenses but does not pay the claimant anything, and only if the employer fails to furnish such care can the employee procure it for himself and obtain an award providing for the reimbursement of such medical expenses. *Id.* at 391. The Court concluded, “In the light of all the provisions of the Act, we are persuaded that the terms ‘payment’ and ‘compensation’ used in § 13(a) refer to the periodic money payments to be made to the employe,” and held that “the furnishing of medical aid is not the ‘payment of compensation’ mentioned in § 13.” *Id.* at 390-91.

² With the exception of the comma, the quoted language has not been changed since the Act was first enacted in 1927 and is identical to the language interpreted by the Court in *Pletz*. See 44 Stat. 1424 (1927); *Pletz*, 317 U.S. at 384 n.3.

Since *Pletz*, the Courts of Appeals have wrestled with the meaning of “compensation” as it is used in other sections of the Act. In particular, the Fourth Circuit has analyzed the issue of whether medical benefits are included in “compensation” in the context of Sections 7(d) and Section 33(g). In *Maryland Shipbuilding and Dry Dock, Co. v. Jenkins*, 594 F.2d 404 (4th Cir. 1979), the court rejected the Board’s interpretation of Section 7(d) and reversed the claimant’s award of medical expenses. The employer contended that the claimant had not complied with the requirements of Section 7(d) and was therefore not entitled to medical benefits. Specifically, the employer contended that the claimant incurred expenses for medical treatment without first requesting that the employer provide or authorize such medical care, that the physicians failed to submit required reports to the Secretary, and that the claimant unreasonably refused to submit to a physical examination during his treatment. *Id.* at 405.

The Board rejected each of these arguments in turn. First, the Board held that the prior request requirement only applied when an employee is seeking reimbursement for medical expenses for which he had already paid. Second, holding that the Section 20 presumption placed the burden of proffering substantial evidence of non-compliance on the employer, the Board found no evidence of when the physicians’ reports had been filed and held that the employer had failed to meet its burden. Finally, the Board held that the sanction for unreasonable refusal to submit to an examination is the suspension of compensation, but where the employer is paying no disability compensation, the Act imposes no sanction. *Jenkins v. Maryland Shipbuilding & Dry Dock Co.*, 6 BRBS 550, 553-57 (1977)

On appeal, the Fourth Circuit found all three of these holdings to be misinterpretations of the statute. *Jenkins*, 594 F.2d at 407. In addition to holding that liability for medical expenses is incurred when service is rendered, not when payment is tendered, and that the Section 20 presumption does not relieve the claimant of his burden of proving the elements of his claim, the court addressed the meaning of “compensation” in Section 7(d). *Id.* at 406-07. Section 7(d) states, in pertinent part:

If at any time the employee unreasonably refuses to submit to medical or surgical treatment, or to an examination by a physician selected by the employer, the Secretary or administrative law judge may, by order, suspend the payment of further compensation during such time as such refusal continues, and no compensation shall be paid at any time during the period of such suspension, unless the circumstances justified the refusal.

33 U.S.C. § 907(d) (2000).³ The court cited Section 4 and its provision that the employer is liable for “compensation payable under sections 907, 908, and 909,” and noted that Section 907 pertains entirely to medical services and supplies. The court reasoned, therefore, that “[t]he term ‘compensation’ must be read to apply to all benefits provided by these three sections,” and that “[t]he suspension of compensation mentioned in § 907(d) logically refers to amounts expended for medical treatment or services as provided in that subsection.” *Jenkins*, 594 F.2d at 407.

³ Other than the addition of “or administrative law judge,” the language of the section has not changed since *Jenkins*. *Jenkins* 594 F.2d at 406.

The Fourth Circuit has also upheld the Board's interpretation of Section 28(b) of the Act, which provides for the award of attorney fees following a "successful prosecution for additional compensation," when the employer voluntarily pays compensation without an award and "thereafter a controversy develops over the amount of additional compensation." 33 U.S.C. § 928(b) (2000). The Board has held that such "additional compensation" includes payment of medical expenses, *see e.g. Morgan v. General Dynamics Corp.* 16 BRBS 336 (1984); *Hernandez v. National Steel & Shipbuilding Co.*, 13 BRBS 147 (1980); *Simeone v. Universal Terminal & Stevedoring Corp.*, 5 BRBS 249 (1976), and the Fourth Circuit has upheld the award of an attorney's fee where the claimant used the services of an attorney to successfully obtain medical benefits. *See Walker v. Newport News Shipbuilding & Dry Dock Co.*, No. 07-1604 (4th Cir. Jan. 22, 2008).

However, in contrast to *Jenkins* and *Walker*, the Fourth Circuit held in *Brown & Root v. Sain*, 162 F.3d 813 (4th Cir. 1998) that the term "compensation" did not include medical benefits in the context of Section 33(g)(1). Section 33(g) provides that if a "person entitled to compensation" enters into a third party settlement "for an amount less than the compensation to which the person . . . would be entitled under this Act, the employer shall be liable for compensation" under the offset provision of subsection (f) "only if written approval of the settlement is obtained from the employer and the employer's carrier . . . and by the person entitled to compensation." 33 U.S.C. § 933(g)(1). If no written approval is obtained or if the employee fails to notify the employer of the settlement, "all rights to compensation and medical benefits under this Act shall be terminated . . ." § 933(g)(2).

In *Brown & Root*, the claimant had entered into a settlement with a third party and provided notice to the employer, but the employer had not consented to the settlement. *Brown & Root*, 162 F.3d at 815. The employer argued that the "compensation to which the person . . . would be entitled under the Act," referred to in Section 33(g)(1) includes medical benefits, which would render the claimant's settlement in the case less than the amount of such entitled "compensation", thus terminating the claimant's rights to compensation and medical benefits under Section 33(g)(2). *Id.* at 818.

The court rejected the employer's argument, citing to the fact that Section 33(g)(1) refers only to "compensation" while Section 33(g)(2) refers to both "compensation and medical benefits." *Id.* at 818-19; *see* § 933(g)(1), (g)(2). Applying the "canon of construction that inclusion of particular language in one section of a statute suggests that the omission of such language in another section was intentional," the court found that "compensation" as used in Section 33(g) does not include medical benefits and affirmed the Board's award. *Brown & Root*, 162 F.3d at 818-19, 821. In support of its interpretation, the court cited to *Bethlehem Steel Corp. v. Mobley*, 920 F.2d 558 (9th Cir. 1990), in which the Ninth Circuit also held that "compensation" as used in Section 33(g) does not include medical benefits. The court also distinguished the case from *Lazarus v. Chevron USA, Inc.*, 958 F.2d 1297 (5th Cir. 1992), in which the Fifth Circuit held that, in the context of Section 18(a), the term "compensation" includes medical benefits. The court noted that, unlike Section 18(a), Section 33(g) includes the phrases "compensation" and "compensation and medical benefits" in close proximity. *Id.* at 819 n.4.

As noted above, the Fifth Circuit has also addressed the issue of whether “compensation” includes medical benefits. In *Lazarus*, the court held that, in the context of Section 18(a) of the Act, the term “compensation” includes medical benefits. Section 18(a) provides:

In case of default by the employer in the payment of compensation due under any award of compensation for a period of thirty days after the compensation is due and payable, the person to whom such compensation is payable may, within one year after such default, make application to the deputy commissioner making the compensation order or [for] a supplementary order declaring the amount of the default.

33 U.S.C. § 918(a) (2000). In *Lazarus*, the claimant had been awarded disability compensation as well as past medical expenses and future medical care related to the injury. The employer paid all past due disability benefits but did not pay any of the claimant’s medical bills. The deputy commissioner issued a supplementary order under Section 18(a), declaring the employer in default on unpaid medical expenses. The claimant then petitioned for enforcement of the order in district court, where the employer argued that Section 18(a) “provides for immediate enforcement only of compensation awards, not awards of medical benefits.” *Lazarus*, 958 F.2d at 1299.

Like the Supreme Court in *Pletz*, the court in *Lazarus* began with the definition of “compensation” in Section 2(12) as “the money allowance payable to an employee or to his dependents,” and stated that “[m]edical benefits can constitute monies payable to an employee or his dependents.” *Id.* at 1300 (quoting 33 U.S.C. § 902(12)). The court described the current practice regarding the employer’s obligation to furnish medical services, stating:

[E]mployers remain directly liable to health care providers for the medical expenses of their injured workers when they consent to the provision of medical care. If an employer refuses or neglects to provide or authorize medical care, however, the employee must procure medical services independently then file a claim with the Secretary to recover his expenses.

Id. at 1301 (citing 33 U.S.C. § 907(d)). The court emphasized the distinction between the employer voluntarily paying a health care provider for the claimant’s treatment and paying the claimant directly for medical expenses incurred when the employer refuses or neglects to furnish medical services, with only the latter constituting “compensation” under the Act. Specifically, the court stated:

If an employer furnishes medical services voluntarily, by paying a health care provider for its services, it does not pay ‘compensation’ within the meaning of the Act. Compensation includes only money payable to an employee or his dependents, not payments to health care providers on an employee’s behalf. If, however, the employer refuses or neglects to furnish medical services, and the employee incurs expense or debt in obtaining such services, an award of medical

expenses obtained by the employee in a suit against the employer is ‘compensation’ within the meaning of § 2. It is money payable to the employee.

Id. at 1301 (internal citations omitted). Thus, the court distinguished the case from *Pletz*, noting that the Supreme Court had held that “the furnishing of medical care to an employee was not payment of compensation” under the Act but had not held that “money paid to the employee for debts incurred in obtaining medical care could not constitute compensation.” *Id.*

The court also noted the inclusion of medical benefits within the term “compensation” in Sections 4 and 6(a) in support of its interpretation, finding that “Congress must have intended the term ‘compensation’ to encompass the provision of medical benefits, at least in some circumstances.” *Id.* Acknowledging that “it is clear that Congress used the term ‘compensation’ to refer to disability benefits” in some sections of the Act, the court stated that “[t]he same word can be used to describe different kinds of benefits that fall within the Act’s broad definition of compensation as ‘the money allowance payable to an employee.’” *Id.* at 1301 (quoting 33 U.S.C. § 902(12)). The court then held that medical benefits are included in “compensation” in the context of Section 18(a). *Id.* at 1303.

Examining the case law on the issue, it is clear that, despite the “basic canon of statutory construction that identical terms within an Act bear the same meaning,” *see Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992), the courts have not interpreted the term “compensation” uniformly throughout the Act. The Fourth Circuit, in particular, has found the term’s meaning to differ across sections, finding “compensation” as used in Section 7(d) to include medical benefits, while reaching the opposite conclusion when interpreting the term under Section 33(g). *Compare Jenkins*, 594 F.2d at 407 *and Walker*, No. 07-1604, *with Brown & Root*, 162 F.3d at 818-19, 821. Additionally, in *Lazarus*, the Fifth Circuit explicitly stated that “[t]he same word can be used to describe different kinds of benefits that fall within the Act’s broad definition of compensation as ‘the money allowance payable to an employee.’” *Lazarus*, 958 F.2d at 1301 (quoting 33 U.S.C. § 902(12)). Therefore, the case law does not support the Claimant’s argument that the term “compensation” should be interpreted uniformly throughout the Act. Moreover, even if the Claimant’s argument had merit, the Supreme Court’s holding in *Pletz* that “compensation” does not include medical benefits, rather than the Fourth Circuit’s interpretation in *Jenkins*, would be binding.

Thus, the term “compensation” must be examined within the context of Section 22, specifically the portion concerning the time limitation within which a modification request can be filed. *See id.*; *Brown & Root*, 162 F.3d at 818 n.4. A modification request must be filed “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 language is strikingly similar to the language of Section 13(a), “If payment of compensation has been made without an award on account of such injury or death, a claim may be filed within one year after the date of the last payment,” and both sections refer to “payment of compensation” as events which toll the one year time limitation for filing. 33 U.S.C. § 913(a); *see* § 922. Moreover, the Board has upheld the applicability of *Pletz* to Section 22, holding that payment of medical benefits is not “compensation” under Section 22 and does not toll the one year time limitation. *See Wiggins v.*

Newport News Shipbuilding & Dry Dock Co., BRB No. 99-1227 (Aug. 25, 2000) (unpub.). Thus, given the holding in *Pletz* that furnishing medical care does not constitute “payment of compensation” for the purposes of tolling the time limitation under Section 13(a), I find that medical benefits are not included in the phrase “payment of compensation” for the purposes of tolling the one year time limitation under Section 22. See *Pletz*, 317 U.S. at 390-91; *Wiggins*, slip op. at 3-4. Therefore, the Employer’s voluntary payment of medical benefits did not toll the statute of limitations.

This interpretation is supported by *Lazarus*. Specifically, the Fifth Circuit distinguished between the voluntary payment of medical benefits and the reimbursement of medical expenses incurred because the employer neglects or refuses to pay for such treatment, stating that “[i]f an employer furnishes medical services voluntarily, by paying a health care provider for its services, it does not pay ‘compensation’ within the meaning of the Act,” because “[c]ompensation includes only money payable to an employee or his dependents.” *Lazarus*, 958 F.2d at 1301 (quoting 33 U.S.C. § 902(12)). In this case, both parties have agreed that the Employer has voluntarily paid for the Claimant’s medical treatment since her injury in 1992. (TR at 13, Claimant’s Brief at 2, 10-11) Therefore, even under the reasoning of *Lazarus*, the Employer’s payment of medical benefits would not constitute “compensation” under the Act.

Finally, this interpretation is also supported by a number of Section 22 cases which, although not specifically addressing the meaning of “compensation”, found the claimants’ requests for modification to be untimely despite the continuing provision of medical treatment by their employers. See e.g. *Greathouse v. Newport News Shipbuilding & Dry Dock Co.*, 146 F.3d 224, 32 BRBS 102 (CRT) (4th Cir. 1998); *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988).

Under Section 22, a request for modification must be made within one year of the last payment of compensation or within one year of the rejection of a claim. 33 U.S.C. § 922 (2000). In the case of a rejection of a claim, the one year time period begins to run on the date the decision denying the claim becomes final, not the date of the decision. Thus, modification may be requested within one year after the conclusion of the appellate process or rejection of appeal. See *Black v. Bethlehem Steel Corp.*, 16 BRBS 138, 142-43 n.7 (1984); *Dean v. Marine Terminals Corp.*, 7 BRBS 234 (1977); *Cobb v. Schirmer Stevedoring Co.*, 2 BRBS 132 (1975), *aff’d*, 577 F.2d 750, 8 BRBS 562 (9th Cir. 1978). A decision by the Board becomes final 60 days after the date of issuance unless a party appeals the decision or files a motion for reconsideration. 20 C.F.R. § 802.406 (2008).

In this case, the denial of the Claimant’s claim for permanent total disability compensation was affirmed by the Board on September 12, 2003. (EX 8) The Claimant does not assert that disability payments were made after that date, and I have found that the Employer’s payment of medical benefits did not constitute “compensation” under Section 22. Because there was no “payment of compensation” after the issuance of the Board decision, the one year time period for filing a request for modification began on November 11, 2003, the date on which the Board’s decision became final. Thus, the Claimant had to file her request for modification prior to November 11, 2004, for it to have been considered timely. The Claimant does not allege that she made a request for modification prior to her counsel’s September 13,

2007, letter. (Claimant's Brief at 2, 10) This letter was submitted almost three years after the time period for modification had expired. Therefore, I find that the Claimant's request for modification was not timely filed.

CONCLUSION

I have determined the following based on a complete review of the record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent. The term "compensation", as used in Section 22 in reference to the time limitation for filing a modification request, does not include the payment of medical benefits. Therefore, because the Claimant submitted her request for modification on September 13, 2007, more than one year after the rejection of her claim, I find her request for modification to be untimely.

ORDER

It is hereby **ORDERED** that the Claimant's request for modification is **DENIED**.

A

KENNETH A. KRANTZ
Administrative Law Judge

Newport News, Virginia
KAK/whs/mrc