BRB No. 01-531

HENRY WILLIAM GAUGER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WALTER KIDDE CONSTRUCTORS, INCORPORATED	)	DATE ISSUED: Feb. 15, 2002
	)	
and	)	
	)	
COMMERCIAL INSURANCE COMPANY OF NEW JERSEY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Order Granting Employer's Motion for Summary Judgment of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

John M. Schwartz (Blumenthal, Schwartz & Garfinkel, P.A.), Titusville, Florida, for claimant.

Richard L. Garelick (Flicker, Garelick & Associates), New York, New York, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Order Granting Employer's Motion for Summary Judgment (2000-LHC-1288) of Administrative Law Judge Paul H. Teitler 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 *et seq.* (the Act). 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).

Claimant worked as a civilian iron worker and supervisor for employer in Vietnam from September 1966 to June 1967. In a deposition, claimant testified he was exposed to Agent Orange during the course of his employment. Exh. A at 38-50. According to his testimony, he developed symptoms in his legs and feet as a result of that exposure: numbness, "itchy bones," and periodic shooting pain. Claimant also stated he ceased working as an iron worker in 1985 because of this disability. *Id.* at 51-55. In 1994, claimant underwent testing through the Department of Veterans Affairs. Test results revealed he has neuropathy in his legs and feet related to his exposure to Agent Orange. *Id.* at 63; Exh. B. Claimant filed a claim for benefits under the Act. Employer, which has been out of business for many years, filed a motion for summary judgment, and claimant responded, opposing the motion.

The administrative law judge found that neither claimant's claim for compensation nor his notice of injury was filed in a timely manner. Therefore, he found claimant's entitlement to compensation is barred by both Sections 12 and 13 of the Act, 33 U.S.C. §§912, 913, and he granted employer's motion for summary judgment.[1] Order at 6-7. Claimant appeals the decision to grant employer's motion for summary judgment and the findings involving Sections 12 and 13, and employer responds, urging affirmance.[2]

Claimant contends the motion for summary judgment should have been denied

[1]The administrative law judge stated that the claim for medical benefits is still viable. Accordingly, he granted employer's motions to compel claimant to provide medical releases allowing employer to obtain medical records, to submit to an examination by a physician of employer's choosing, and to continue the hearing on medical benefits until the next docket. Order at 8. Pursuant to the administrative law judge's order, the case is to be returned to the general docket for proceedings on the issue of claimant's entitlement to medical benefits.

[2]Claimant attached a post-hearing medical report to his brief on appeal. New evidence will not be considered by the Board. 20 C.F.R. §802.301(b).

because there are disputed factual matters remaining. Specifically, claimant asserts that he should have been permitted the opportunity to conduct discovery to ascertain whether employer or carrier had notice of his injury or of other cases involving exposure to Agent Orange or whether employer or carrier filed a First Report of Injury pursuant to Section 30(a) of the Act, 33 U.S.C. §930(a). In this regard, he also argues that he should have been excused for failing to comply with Sections 12 and 13 in light of the circumstances of his case. Employer argues that, as there are no disputed facts, summary judgment was proper. Moreover, it argues that the administrative law judge correctly found that claimant's failure to comply with Sections 12 and 13 bars his claim for compensation.

The party opposing a motion for summary judgment must "set forth specific facts showing that there is a genuine issue of fact for the hearing" in order to defeat the motion. 29 C.F.R. §18.40(c). The administrative law judge may grant the motion for summary decision if there are no factual disputes, when all reasonable inferences are made in favor of the non-moving party. *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990); 29 C.F.R. §18.41(a). Contrary to claimant's assertion, his speculation that additional facts, supportive of his case, may come to light in litigation, is insufficient to prevent a grant of summary judgment.[3] The administrative law judge is bound to decide the case based on the evidence before him, 5 U.S.C. §551 *et seq.*, and he cannot deny a motion for summary judgment based on what might be discovered. As claimant has not presented specific facts to demonstrate the existence of a genuine issue of fact, the administrative law judge correctly determined there are no disputed facts in this case. We, therefore, hold that summary judgment is a proper means for resolving this claim. *Brockington*, 903 F.2d 1523; 29 C.F.R. §18.40(c).

We next address claimant's challenge to the administrative law judge's conclusion that his entitlement to compensation is precluded by his failure to comply with Sections 12(a) and 13(b)(2) of the Act, 33 U.S.C. §§912(a), 913(b)(2). Initially, claimant contends the

[3]Even if claimant could demonstrate that employer or carrier knew of injuries to other employees related to exposure to Agent Orange, the information would not establish that it knew of claimant's injury. *See Stark v. Washington Star Co.*, 833 F.2d 1025, 20 BRBS 40(CRT) (D.C. Cir. 1987) (general awareness of work-place hazards insufficient to impute knowledge to the employer of link between a particular claimant's work and his injury).

administrative law erred in finding that his claim for compensation was not filed in a timely manner, as the administrative law judge failed to discuss whether Section 30(f) of the Act, 33 U.S.C. §930(f), tolls the period for filing the claim. A claim for compensation for an occupational disease must be filed within two years of the date the claimant becomes aware, or should have become aware, of the relationship between his employment, his

disease and his disability. 33 U.S.C. §913(b)(2).[4] However, the time for such filing is tolled:

> Where the employer or the carrier has been given notice, or the employer (or his agent in charge of the business in the place where the injury occurred) or the carrier has knowledge, of any injury or death of any employee and fails, neglects, or refuses to file report thereof as required by the provisions of subdivision (a) of this section, the limitations in subdivision (a) of section 913 of this title shall not begin to run against the claim of the injured employee or his dependents entitled to compensation, or in favor of either the employer or the carrier, until such report shall have been furnished as required by the provisions of subdivision (a) of this section.

33 U.S.C. §930(f). Section 20(b) of the Act, 33 U.S.C. §920(b), presumes that the claimant's claim was timely filed unless the employer presents substantial evidence to the contrary. *See Stevenson v. Linens of the Week*, 688 F.2d 93 (D.C. Cir. 1982); *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989). In order to rebut the Section 20(b) presumption that the claim was timely, an employer must establish that it complied with Section 30(a) or that it never gained knowledge of the claimant's injury. *Blanding v. Director, OWCP*, 186 F.3d 232, 33 BRBS 114(CRT) (2[d] Cir. 1999); *Stark v. Washington*

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[4]Section 13(b)(2), 33 U.S.C. §913(b)(2), provides:

> Notwithstanding the provisions of subsection (a) of this section, a claim for compensation for death or disability due to an occupational disease which does not immediately result in such death or disability shall be timely if filed within two years after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability, or within one year of the date of the last payment of compensation, whichever is later.

Star Co., 833 F.2d 1025, 20 BRBS 40(CRT) (D.C. Cir. 1987). In this case, the administrative law judge did not discuss either Section 20(b) or Section 30(a), (f) in addressing whether claimant filed a timely claim. However, in light of the evidence herein, we hold that his error is harmless and that he correctly determined the claim was not filed in a timely manner.

In assessing the record evidence, the administrative law judge first found that claimant became aware of the relationship between his disease, his disability and his employment on October 11, 1994, and that pursuant to Section 13(b)(2), claimant had until October 11, 1996, to file a claim for compensation. Decision and Order at 5-6. He also found that the claim was not filed until 1999, the date it was received by the Office of Workers' Compensation Programs (OWCP) in Jacksonville, Florida.[5] However, giving claimant the benefit of the doubt with regard to his deposition testimony that he filed his claim in 1997, Exh. A at 93, 96,[6] and the fact that the claim for compensation form contains a handwritten date of August 26, 1997, the administrative law judge found that the earliest claimant's claim could have been filed was August 26, 1997. Nevertheless, this was still outside the requisite period of time for filing the claim. Decision and Order at 3, 6. Accordingly, the administrative law judge concluded that claimant's claim is barred for failing to comply with Section 13(b)(2). *Id.* at 6.

In addition to the evidence addressed above, the record contains an affidavit which the administrative law judge mentioned as having been submitted but did not discuss, and which supports his decision. The affiant is carrier's manager of compensation claims, Ms. Stas. She stated that she created claimant's file in late October 1999 in response to the letter dated October 20, 1999, from OWCP advising carrier of claimant's claim for compensation. She also attested that this was the first notice she had of claimant's claim, and it was the first document carrier received regarding claimant's claim. There is no other evidence of record

[5]This case arises under the Defense Base Act because the injury occurred in Vietnam, and jurisdiction properly lies with the United States Court of Appeals for the Ninth Circuit. Therefore, the claim should have been filed in the compensation district in Hawaii, and OWCP notified claimant of such in a letter dated September 2, 1999. District 15, in Hawaii, received claimant's claim on September 14, 1999, and that is the "received" date stamped on the claim form. Once the file was created in Hawaii, the case was transferred to Florida. Exh.C-D.

[6]Claimant testified that he did not file his claim until 1997 because he "did not know where to go." Exh. A at 96.

concerning when claimant filed his claim or gave notice to employer/carrier.[7]

Section 30(f) tolls the period for filing the claim only if employer or carrier had notice of the injury and failed to file the form required by Section 30(a) of the Act. In this case, there is no evidence that employer or carrier filed a First Report of Injury as required by Section 30(a). However, employer and/or carrier first gained knowledge of claimant's injury when he filed his claim for compensation, and the record evidence supports the administrative law judge's finding that claimant did not file his claim until 1999 or, at the earliest, 1997. As the administrative law judge found that the Section 13(b)(2) statute of limitations expired on October 11, 1996, the time for filing the claim for compensation expired before employer or carrier received notice or knowledge of the claim. Thus, Section 30(f) does not toll the time for filing the claim. *Wendler v. American Red Cross*, 23 BRBS 408 (1990) (McGranery, J., dissenting); *Keatts v. Horne Brothers, Inc.*, 14 BRBS 605 (1982). Therefore, it was harmless error for the administrative law judge to omit Section 30 from his discussion of this case.

As the record contains only evidence that this claim was filed in 1999 or, at the earliest, in 1997, and as the time for filing a claim for compensation expired on October 11, 1996, the record contains substantial evidence rebutting the Section 20(b) presumption. Further, the same uncontradicted evidence leads to but one conclusion, as the administrative law judge found: claimant's claim was not filed within the prescribed time period. Consequently, we hold that the administrative law judge's failure to apply the Section 20(b) presumption to this case was harmless, and the record supports his rational determination that the claim was untimely. *See generally Bingham v. General Dynamics Corp.*, 20 BRBS 198 (1988) (failure to apply Section 20(a), 33 U.S.C. §920(a), presumption harmless where

[7]There is a notice of controversion filed on November 3, 1999, which states that the date employer first had knowledge of claimant's injury was "unknown." However, pursuant to *Blanding*, 186 F.3d 232, 33 BRBS 114(CRT), such evidence neither supports nor contradicts the position that employer did not know of claimant's injury. As the notice of controversion is not the only evidence on which carrier relies to show that the notice and claim were untimely, this case is distinguishable from *Blanding*, wherein the United States Court of Appeals for the Second Circuit held that evidence of an "unknown" date of knowledge alone was insufficient to overcome the Section 20(b) presumption. *Blanding*, 186 F.3d at 236, 33 BRBS at 116-117(CRT).

evidence supports finding of no causation). Claimant's claim is barred by his non-compliance with Section 13(b)(2). *See generally Maes v. Barrett & Hilp*, 27 BRBS 128 (1993).

Accordingly, the administrative law judge's Order is affirmed.[8]

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[8]In light of our decision, we need not address claimant's contentions concerning Section 12(a).