BRB No. 02-0447

DONALD A. CYR	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	DATE ISSUED: MAR 20, 2003
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order-Denying the Claim of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Scott N. Roberts, Groton, Connecticut, for claimant.

Conrad M. Cutliffe (Cutliffe Glavin & Archetto), Providence, Rhode Island, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order-Denying the Claim (01-LHC-1383) of Administrative Law Judge Robert D. Kaplan rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.,* 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.,* 12 BRBS 272 (1980).

Claimant, an insulation mechanic, worked for employer from 1980 until June 1, 1996, when he was permanently laid off by employer. Following his layoff, claimant has worked intermittently as a courier. On November 10, 1998, claimant filed a claim for disability compensation under the Act for injuries allegedly sustained to

both of his hands and arms as a result of his repetitive use of air-fed vibratory tools while working for employer prior to June 1, 1996. *See* CX 1. In a letter dated May 1, 2000, Dr. Browning diagnosed claimant with bilateral hand/arm vibration syndrome. *See* CXs 2, 6. Thereafter, employer's expert, Dr. Willetts, concurred that claimant probably has bilateral hand/arm vibration syndrome. *See* EXs 27, 28, 41; CX 8.

At the formal hearing in this case, claimant stated that he was seeking permanent partial disability compensation for a fifty percent loss of use of his right, upper extremity and for a fifteen percent loss of use of the left, upper extremity caused by hand/arm vibration syndrome. In response, employer asserted at the hearing that the claim for benefits with respect to claimant's *right* upper extremity was not timely filed.[1]

In his Decision and Order, the administrative law judge denied the claim for permanent partial disability benefits for both claimant's right and left, upper extremities on the basis that the claim was time-barred by Section 13(b)(2) of the Act, 33 U.S.C. §913(b)(2). In making this finding, the administrative law judge first determined that claimant's diagnosed hand/arm vibration syndrome is an occupational disease and thus, the two-year statute of limitations period for disability due to an occupational disease provided in Section 13(b)(2) of the Act is applicable to the instant claim.[2] The administrative law judge next found that claimant knew of the permanent disability to both of his hands, and that this disability was causally related to his use of vibratory tools in his work for employer, well before the statute of limitations cut-off date of November 10, 1996. The administrative law judge concluded, on this basis, that the claim filed by claimant on November 10, 1998 was untimely and, accordingly, he denied the claim for compensation. Lastly, the administrative law judge found that as there had not been a successful prosecution

[1] Employer's counsel explicitly stated that he was not contesting the timeliness of the claim for benefits with respect to claimant's *left* upper extremity. *See* Tr. at 17. Rather, employer contested the claim for compensation for the left upper extremity on the basis that any injury is not causally related to claimant's employment. *See* Tr. at 7-9.

[2] The administrative law judge's finding that claimant's hand/arm vibration syndrome is an occupational disease subject to Section 13(b)(2) is not contested on appeal.

of the claim, claimant's attorney is not entitled to a fee pursuant to Section 28 of the Act, 33 U.S.C. §928.

On appeal, claimant contends that the administrative law judge erred by finding his claim barred by Section 13 of the Act, arguing that the time limitation of Section 13 did not begin to run until claimant became aware of the full character, extent and impact of his work-related occupational disease. Claimant additionally assigns error to the administrative law judge's failure to award his counsel an attorney's fee. Employer responds, urging affirmance of the administrative law judge's decision.

Section 13(b)(2) of the Act provides that an occupational disease claim shall be timely if filed within two years after 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 . . . disability . . . ." 33 U.S.C. §913(b)(2). The regulations provide that the time limitations do not begin to run until the employee is disabled. 20 C.F.R. §§702.212(b), 702.222(c). *See Love v. Owens-Corning Fiberglas Co.,* 27 BRBS 148, 150 (1993); *Lombardi v. General Dynamics Corp.,* 22 BRBS 323, 326 (1989); *Curit v. Bath Iron Works Corp.,* 22 BRBS 100, 102 (1988). In addition, pursuant to Section 20(b) of the Act, 33 U.S.C. §920(b), claimant is entitled to a presumption that his claim was timely filed. *See Stark v. Washington Star Co.,* 833 F.2d 1025, 20 BRBS 40(CRT) (D.C. Cir. 1987). Thus, employer has the burden of establishing that the claim was filed more than two years after the date of awareness of the relationship between the employment, the disease and the disability. *See Horton v. General Dynamics Corp.,* 20 BRBS 99, 102 (1987). Where there is no credible evidence of record to establish a claimant's date of awareness, the claim is considered to be timely filed. *Id.,* 20 BRBS at 102.

The United States Court of Appeals for the First Circuit, within whose jurisdiction the present case arises, has not directly addressed when the Section 13(b)(2) statute of limitations period commences to run. In construing the Section 12(a), 33 U.S.C. §912(a), period for notice of traumatic injury to be given, which turns on claimant's awareness of the relationship between his injury and his employment, the court has held that an employee does not possess the requisite awareness merely because he experiences symptoms or pain; rather, he must be aware that his work-related injury will decrease his earning capacity.[3] *Bath Iron*

[3] Similarly, all of the courts of appeals that have considered the issue of when the statute of limitations begins to run in the context of construing Section 13(a), which contains the same language as Section 12(a) for traumatic injury cases, have held that the limitations

Works Corp. v. Galen, 605 F.2d 583, 10 BRBS 863 (1st Cir. 1979). Unlike "awareness" for purposes of the traumatic injury provisions, the time period for occupational diseases explicitly states it does not commence until the employee is aware of a disability and its relationship to his work and his disease, which necessarily requires that he be disabled before he can be found to be "aware." Thus, in considering the question of when the Section 13(b)(2) limitations period begins to run in *Argonaut Ins. Co. v. Patterson,* 846 F.2d 715, 21 BRBS 51(CRT)(11th Cir. 1988), the United States Court of Appeals for the Eleventh Circuit held that it commences when the employee knew or should have known that his work-related disease has impaired his wage-earning capacity.[4] *Accord Bechtel*

---

period does not run until the employee is aware or should be aware that the injury will impair his earning capacity. *See Paducah Marine Ways v. Thompson,* 82 F.3d 130, 30 BRBS 33(CRT) (6th Cir. 1996); *Duluth, Missabe & Iron Range Ry. Co. v. Heskin,* 43 F.3d 1206 (8th Cir. 1994); *Newport News Shipbuilding & Dry Dock Co. v. Parker,* 935 F.2d 20, 24 BRBS 98(CRT) (4th Cir. 1991); *Abel v. Director, OWCP,* 932 F.2d 819, 24 BRBS 130(CRT) (9th Cir. 1991); *Brown v. I.T.T./Continental Baking Co.,* 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990); *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *Marathon Oil Co. v. Lunsford,* 733 F.2d 1139, 16 BRBS 100(CRT) (5th Cir. 1984). *See also Hodges v. Caliper, Inc.*, 36 BRBS 73 (2002); *Gregory v. Southeastern Maritime Co.*, 25 BRBS 188 (1991).

[4] Under the circumstances presented in *Patterson,* the court held that the employee ". . . should have become aware of the connection between his disability, his disease, and his

Associates, P.C. v. Sweeney, 834 F.2d 1029, 20 BRBS 49(CRT)(D.C. Cir. 1987); *Love,* 27 BRBS 148.

---

employment when he first missed work because of his disease." 846 F.2d at 721, 21 BRBS at 57(CRT). The court noted it was essential to its holding that the employee have prior knowledge of the relationship between his disease and his employment. *Id.* at n. 11. *See also Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988).

After finding that there is no record evidence that claimant was informed by a physician that he had a disability due to hand/arm vibration syndrome more than two years prior to the filing of the claim, the administrative law judge in the instant case stated that he must consider claimant's testimony relevant to the issue of the date of awareness.[5] *See* Decision and Order at 6. The administrative law judge then determined, on the basis of claimant's testimony, that claimant began to experience symptoms of numbness, sensitivity to cold temperatures, and loss of coloration in both hands sometime between 1992 and 1994, and that his current symptoms are the same as the symptoms he had prior to 1995. *See id.* at 8-9. The administrative law judge further found, based on claimant's testimony that he believed that the numbness in the fingers of his left hand was probably due to his use of an air-fed chisel, *see* Tr. at 38-39, that claimant knew that his hand problems were causally related to his use of vibratory tools in his employment with employer. *See* Decision and Order at 9. The administrative law judge concluded that claimant became aware of the permanent nature of the disability to both of his hands caused by employment-related hand/arm vibration syndrome "well before the statute of limitations cut-off date of November 10, 1996, and most likely in 1993 or 1994, as he initially testified." *Id.* at 9.

We agree with claimant that the administrative law judge's determination that claimant possessed the requisite awareness for purposes of Section 13(b)(2) before the statute of limitations cut-off date cannot be affirmed. While the administrative law judge found that claimant first experienced the symptoms characteristic of

---

[5] An administrative law judge may rely on a claimant's testimony in determining the date of a claimant's awareness of the relationship between his disease, his disability and his employment. *See Wendler v. American Nat'l Red Cross*, 23 BRBS 408 (1990). Thus, while the date on which a claimant is informed by a physician of the relationship between his disease, disability and employment is significant, it is not always controlling, especially where there is other evidence that the claimant was aware of the relationship at an earlier date. *Id.*, 23 BRBS at 411; *Pryor v. James McHugh Constr. Co.*, 18 BRBS 273, 277 (1986); *see also Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Jenkins]*, 583 F.2d 1273, 8 BRBS 723(4th Cir. 1978), *cert. denied,* 440 U.S. 915 (1979). In this regard, the Board has held that an administrative law judge may rationally find that a claimant became aware of the relationship between his occupational disease, his disability and his employment on the date on which he filed his compensation claim notwithstanding that he did not receive a definitive diagnosis of his occupational disease until after the claim was filed. *See Love v. Owens-Corning Fiberglas Co.*, 27 BRBS 148, 152 (1993). Thus, we reject claimant's suggestion on appeal that the date of his awareness for purposes of Section 13(b)(2) could be no earlier than May 1, 2000, when he first received the diagnosis of hand/arm vibration syndrome caused by the use of vibratory tools at work from Dr. Browning. *See Love,* 27 BRBS at 152; *Wendler,* 23 BRBS at 411; *Pryor*, 18 BRBS at 277.

hand/arm vibration syndrome between 1992 and 1994 and that claimant believed these symptoms were probably related to his employment, this finding could, at most, support a conclusion that at that point in time claimant was aware that he had a condition related to his employment. The administrative law judge did not address the essential question of when claimant became disabled by his disease, a necessary prerequisite under the applicable regulation, 20 C.F.R. §702.212(b), to the determination of when claimant became aware that his disability was related to his disease, *i.e.,* hand/arm vibration syndrome, and to his employment. This inquiry is required by the specific language of Section 13(b)(2).

In this regard, the fact that claimant began to experience symptoms characteristic of hand/arm vibration syndrome between 1992 and 1994 is insufficient to establish that claimant sustained an actual disability at that time. In cases involving employees who experienced pain or other symptoms caused by their work-related diseases or injuries but nonetheless continued to perform their work duties, the employees have been held not to be aware of a disability until their employment-related diseases or injuries caused them to miss time from work. *See Patterson,* 846 F.2d at 721, 21 BRBS at 56-57(CRT); *Love,* 27 BRBS at 152; *Curit,* 22 BRBS at 102. In the present case, the administrative law judge did not determine when claimant's hand-arm vibration syndrome resulted in an inability to perform his work. Moreover, as claimant seeks benefits under the schedule, 33 U.S.C. §908(c)(1), the date he became aware of a permanent impairment must also be determined. With regard to his employment, claimant testified that he rotated between full and restricted employment during the 1990s.[6] The administrative law judge found only that claimant continued to use air-fed vibratory tools in his employment with employer until late 1995 and continued to work for employer until being laid off on June 1, 1996. *See* Decision and Order at 9 n.5. Claimant's continued employment after first experiencing symptoms consistent with his subsequently diagnosed hand/arm vibration syndrome is evidence which the administrative law judge must

[6] Claimant sustained prior injuries to his right wrist on December 15, 1987, and to his left shoulder on January 17, 1995, for which he received compensation.

consider when ascertaining at what point in time claimant sustained a disability due to that condition and became aware of the relationship of his disability to his disease and his employment.[7]

[7] In contrast to cases where the employees' employment ended when, as a result of their work-related injuries, they were no longer able to perform their employment duties, claimant's employment with employer in the instant case terminated when he was laid off. Thus, the date claimant in the case at bar stopped working for employer is not, in and of itself, dispositive of when he knew or should have known that his condition would diminish his earning capacity. *See generally Love*, 27 BRBS 148.

As the administrative law judge did not apply the correct standard under Section 13(b)(2), the case must be remanded for him to do so. On remand, the administrative law judge must consider all of the relevant evidence of record regarding when claimant became aware or should have been aware of the relationship between his employment, his disease and his disability. As claimant is entitled to a presumption that his claim was timely filed, employer bears the burden of producing evidence that the claim was not timely filed.[8] 33 U.S.C. §920(b).

On appeal, claimant also argues that the administrative law judge erred in failing to award an attorney's fee for services performed before him; claimant avers, in this regard, that his counsel was successful in obtaining payment of medical expenses on behalf of claimant. As the administrative law judge did not consider the issue of claimant's entitlement to an attorney's fee premised on his attorney's success in obtaining medical benefits, the issue raised by claimant on appeal is not properly before us at this point in time.[9] On remand, the administrative law judge

[8] As noted *infra* at n.1, employer did not contest the timeliness of the claim with respect to claimant's *left* upper extremity. *See* Tr. at 17. The administrative law judge nonetheless found the claims for both hands barred by Section 13. However, Section 13(b)(1) provides that the failure to file a claim within the specified period shall not be a bar to recovery unless this defense is raised at the first hearing on the claim. 33 U.S.C. §913(b)(1). As employer did not raise a Section 13 defense with respect to the left extremity, the administrative law judge erred in finding this claim time-barred.

[9] The administrative law judge indicated that the parties stipulated that employer has provided claimant with medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907, and continues to be obligated to do so. *See* Decision and Order at 2. A claim for Section 7 medical benefits is never time-barred. *See Siler v. Dillingham Ship Repair*, 28 BRBS 38 (1994).

may consider whether, in fact, claimant's counsel was successful in obtaining medical benefits and, if so, whether claimant's counsel is entitled to an attorney's fee based on that success, as well as upon any successful prosecution on remand of the claim for disability benefits.

Accordingly, the administrative law judge's determination that the claim was untimely is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge