BRB No. 97-763

RONALD LEE	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
PUERTO RICO MARINE, INCORPORATED	)	
	)	
and	)	
	)	
AIG CLAIMS SERVICES	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Robert G. Mahony, Administrative Law Judge, United States Department of Labor.

John E. Houser, Thomasville, Georgia, for claimant.

Benford L. Samuels, Jr. (Boyd & Jenerette, P.A.), Jacksonville, Florida, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (95-LHC-2716) of Administrative Law Judge Robert G. Mahony denying benefits 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.* (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).

Claimant injured his lower back on February 20, 1991, while working as a refrigeration mechanic for employer. Claimant subsequently had back surgery. Employer voluntarily paid claimant temporary total disability benefits from February 21, 1991, through January 31, 1993. Claimant returned to his usual work in February 1993 and worked for over two years before back and leg pain prevented him from returning to work on March 2,

1995. He filed his formal claim in April 1995, seeking additional temporary total disability benefits from March 1995 and continuing. Employer asserted that his claim for benefits was time-barred. The administrative law judge found that the district director's memorandum of telephone call of May 21, 1991, is insufficient to constitute a "claim" within the meaning of Section 13(a) of the Act, 33 U.S.C. §913(a), and as the 1995 filing was more than one year after employer's last payment of compensation, the administrative law judge found the claim time-barred. Consequently, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's denial of benefits, contending that the administrative law judge erred in finding that the May 21, 1991, memorandum of telephone call was insufficient to constitute a claim under Section 13(a). Additionally, claimant asserts that there are medical reports sufficient to constitute a timely claim. Employer responds in support of the administrative law judge's decision. Claimant filed a reply brief.

Section 13(a) provides that a claim must be filed within one year after the date claimant is aware, or should have been aware, of the relationship between his injury and his employment. In cases in which compensation is paid without an award, a claim may also be filed within one year of the date of the last voluntary payment. 33 U.S.C. §913(a). A claim need not be filed on a particular form; thus any writing will suffice so long as it is sufficient to assert a right to compensation. *See Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990). Claimant's failure to file a formal written claim within one year does not bar consideration of his claim if a sufficient memorandum of a telephone call indicating that claimant is seeking additional compensation is placed on file by the district director's office. *McKinney v. O'Leary*, 460 F.2d 371 (9th Cir. 1972). Additionally, a timely filed physician's report which indicates the possibility of a continuing disability may meet the filing requirement of Section 13(a). *See Peterson v. Washington Metropolitan Area Transit Authority*, 17 BRBS 114 (1984).

Claimant initially contends that the administrative law judge erred in determining that the May 21, 1991, memorandum of telephone call between the Department of Labor claims examiner and claimant's wife did not constitute a claim under Section 13(a). A Report of Telephone Call from the Office of Workers' Compensation Programs dated May 21, 1991, states that, "Mrs. Lee called to ask what future benefits her husband would be entitled to. We discussed LWEC [loss of wage-earning capacity] and possible rehab[ilitation] services. Her husband may face surgery soon. I agreed to mail her the L/S [longshore] brochure." Cl. Ex. 2. In determining that this May 21, 1991, memorandum of telephone call did not constitute a claim within the meaning of Section 13(a), the administrative law judge found that the telephone call was prompted by the receipt of employer's controversion of certain medical services and was a general inquiry about future benefits with no indication that a claim was being made. Decision and Order at 6.

This finding is supported by the testimony in the record of both claimant and his wife,

who testified that the May 21, 1991, telephone call to the district director was made seeking general information upon claimant's receipt of employer's controversion of Dr. Smith's medical bills.[1] *See I.T.O. Corp. of Virginia v. Pettus*, 73 F.3d 523, 30 BRBS 6 (CRT)(4th Cir.), *cert. denied*, U.S. , 117 S.Ct. 49 (1996); Decision and Order at 6; Cl. Ex. 1; Emp. Ex. 4 at 7-10; Tr. at 55-61, 70. In *Pettus*, 73 F.3d at 523, 30 BRBS at 6 (CRT), the court held that two letters drafted by the claimant's attorney demanding "any and all benefits" due the claimant were insufficient to constitute a request for modification pursuant to 33 U.S.C. §922 in that they did not disclose an intention on the part of the claimant to seek compensation for a particular loss or refer to circumstances warranting modification of the prior order, factors which the court held critical in assessing their sufficiency. Contrary to claimant's contention, the administrative law judge rationally relied on *Pettus* in determining that claimant did not disclose an intention to seek benefits by virtue of the telephone call on May 21, 1991. Moreover, the holding in *Fireman's Fund Ins. Co. v. Bergeron*, 493 F.2d 545 (5th Cir. 1974), a case involving the issue of whether a memorandum of telephone call constituted a request for modification, does not aid claimant here where the memorandum of telephone call in that case stating "will file for a review under §22 of the Act" indicated a specific intent to seek compensation.[2] Consequently, we affirm the administrative law judge's finding that the May 21, 1991, memorandum of telephone call does not constitute a claim pursuant to Section 13 as it is supported by substantial evidence.

Claimant also contends that there are medical reports of record which made employer aware of claimant's physical condition and which, if filed with the district director, could have been construed as a claim for compensation. In determining that claimant's claim is time-barred, the administrative law judge did not consider whether any of the medical reports of record constituted a claim under Section 13(a). An attending physician's

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[1]On May 15, 1991, employer controverted medical treatment by Dr. Smith for claimant's hematuria after Dr. Smith stated that claimant's hematuria was unrelated to his work injury. Cl. Ex. 1.

[2]Although claimant relies on the court's holding in *McKinney*, 460 F.2d at 371, to support his position that the May 21, 1991, memorandum of telephone call constituted a claim, the *McKinney* case is distinguished from the instant case as in *McKinney* the parties agreed on appeal that the memorandum of telephone call constituted a claim. There was no such agreement in the instant case.

report indicating the possibility of a continuing disability filed within the requisite time period may be sufficient to satisfy the filling requirements of Section 13(a). *Grant v. Interocean Stevedoring, Inc.*, 22 BRBS 294 (1989)(G. Lawrence, J., concurring in part and dissenting in part); *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988). However, where a medical report does not indicate the existence of any disability from work or anticipate any permanent effects, it will not be sufficient to constitute a claim. *See Peterson*, 17 BRBS at 116; *Bezanson v. General Dynamics Corp.*, 13 BRBS 928 (1981)(Miller, dissenting). The administrative law judge did not address the issue of whether medical reports which could constitute a timely claim were filed.

As the administrative law judge did not consider this issue, we remand this case to the administrative law judge for further consideration of whether the medical reports are sufficient to constitute a claim.[3] In this regard, the administrative law judge's findings regarding the medical reports must be consistent with the analysis of claimant's awareness of his injury; thus, if he finds that the medical reports of record are insufficient to constitute a claim because they do not indicate an ongoing disability, the administrative law judge must reconsider his finding regarding the date of awareness. In his decision, the administrative law judge summarily concluded that claimant's date of awareness was in 1991, when claimant began receiving voluntary temporary total disability benefits. Decision and Order at 4. The administrative law judge cited *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990), for the proposition that claimant's "awareness" occurs when he is aware that he suffers a compensable disability. The administrative law judge found that claimant was "aware" of his compensable disability due to his receipt of compensation for two years prior to his return to work. The court in *Brown*, however, also cited *Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14 BRBS 427 (9th Cir.), *cert. denied*, 459 U.S. 1034 (1982), which holds that the limitations period under Section 13(a) does not begin to run until the employee is aware of the "full character, extent and impact of the harm" done to him. *See also Abel v. Director, OWCP*, 932 F.2d 819, 821-822, 24 BRBS 130, 134-135 (CRT)(9th Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 27, 24 BRBS 98, 112 (CRT)(4th Cir. 1991). The Board has held that the requirement that a claim be filed within one year of the last voluntary payment of compensation does not supersede the awareness requirement. *Morales v. General Dynamics Corp.*, 16 BRBS 293 (1984), *rev'd on other grounds sub nom. Director, OWCP v.*

[3]In determining whether the medical reports of record constitute a claim, the administrative law judge must also address claimant's argument that employer is estopped from asserting the statute of limitations as a defense based on its failure to forward medical reports to the district director. *See Paquin v. General Dynamics/Electric Boat Division*, 4 BRBS 383 (1976). Claimant's counsel argued at the hearing that employer is estopped from alleging that the claim is time-barred based upon its failure to timely submit medical reports to the district director. Tr. at 10. Employer responded that it was irrelevant to the statute of limitations as to whether the medical records were provided by the carrier since the question was whether the claimant or his representative filed the reports which could constitute a written claim for benefits. Tr. at 15-16.

General Dynamics Corp. [Morales], 769 F.2d 66, 17 BRBS 130 (CRT)(2d Cir. 1985). On remand, the administrative law judge must also accord claimant the benefit of the presumption under Section 20(b) of the Act, 33 U.S.C. §920(b), that his 1995 claim for benefits is timely filed. *Stark v. Washington Star* Co., 833 F.2d 1025, 20 BRBS 40 (CRT) (D.C. Cir. 1987); *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989).

Accordingly, the administrative law judge's finding that the May 21, 1991, memorandum of telephone call is insufficient to constitute a claim is affirmed. The denial of benefits, however, is vacated, and the case is remanded for further consideration.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge