BRB No. 06-0322

JORGE SALDAÑA LÓPEZ	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NAVY EXCHANGE SERVICE COMMAND	)	DATE ISSUED: 12/14/2006
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Remand of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Richard L. Garelick (Flicker, Garelick & Associates, L.L.P.), New York, New York, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Remand (2002-LHC-0767) of Administrative Law Judge Thomas M. Burke 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 Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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).

This is the second time this case has been appealed to the Board. To reiterate: Claimant worked for employer as a maintenance carpenter at the United States Naval Base in Roosevelt Roads, Puerto Rico. On June 4, 1998, during the course of his employment, claimant came into contact with rotten meat juices from an old freezer and unspecified chemicals from an air conditioning unit. Tr. at 11. Claimant continued to work, and three days later, he noticed a rash on his nose and requested permission to go

to the clinic. Claimant initially was diagnosed with facial dermatitis, but the condition grew worse, and employer referred claimant to Dr. Cruz, who ordered a biopsy and diagnosed the skin condition as a rare and chronic autoimmune disease called pemphigus erythematosus.[1] Cl. Exs. 1-2; Tr. at 11-12. Although Dr. Cruz informed claimant that his condition would worsen with exposure to the sun, Cl. Exs. 1, 2 at 5, 18, 20, 22-23, claimant continued to work outdoors. Claimant treated with Dr. Cruz from July 1998 until September 1999 but he saw Dr. Cruz once again in May 2001.[2] Cl. Ex. 1; Tr. at 13. Claimant testified that, after his termination from employment in June 1999, he looked for work but no one would hire him because of his skin condition.[3] Tr. at 14-15. Claimant filed a claim for benefits on February 10, 2001. Emp. Ex. 4; Tr. at 28.

The administrative law judge found that claimant's notice of injury and claim for compensation were timely filed, and he found that claimant's skin condition is work-related. Decision and Order Denying M/SD at 5-8; Decision and Order Denying Recon. Because claimant established that he cannot return to his usual work and employer did not present evidence of suitable alternate employment, the administrative law judge awarded claimant permanent total disability benefits from the date of his injury. Decision and Order at 7-10. Employer appealed the administrative law judge's decisions.

The Board held, as a matter of law, that claimant's skin condition was not caused by his exposure to rotten meat and/or air conditioning chemicals. Because there was evidence that claimant's condition was aggravated by work-related sun exposure, the Board remanded the case for the administrative law judge to determine whether claimant had amended his claim to include the issue of aggravation with sufficient notice to employer. The Board also held that claimant's condition is a disease which had immediate effects; therefore, the extended statutes of limitation for occupational diseases do not apply. Consequently, the Board held that, on remand, the administrative law judge must make a specific finding as to the date claimant became aware of the relationship between his disease, his employment, and the effects on his wage-earning capacity, and he must reconsider the timeliness of claimant's notice of injury and claim for

[1]Dr. Cruz testified that in this form of pemphigus, the antibodies attack and destroy the superficial skin cells and not the deep tissue cells. Cl. Ex. 2 at 23.

[2]Claimant testified he was terminated from work on June 11, 1999, for disorderly conduct and that he could not afford the visits with Dr. Cruz after his termination. Emp. Exs. 5-7; Tr. at 13, 29.

[3]Claimant stated that he was not incapable of working, though he was advised to always wear a hat and sunscreen, but he was denied employment because he "looked sick." Tr. at 14-15.

compensation with reference to the 30-day and one-year statutes of limitation, 33 U.S.C. §§912(a), 913(a). *López v. Navy Exchange Service Command*, BRB No. 04-664 (May 16, 2005).

On remand, the administrative law judge found that claimant had amended his claim to include a claim for aggravation of his condition, giving employer sufficient notice thereof. He also found that claimant's condition was aggravated by work-related sun exposure and that claimant was aware of the relationship between his work, his disease and its effects on his wage-earning capacity as of June 11, 2000, making claimant's notice of injury and claim for compensation timely filed. Decision and Order at 2-3, 8. Employer appeals this decision, contending the administrative law judge erred in finding that claimant raised a claim for aggravation and that, if the claim was raised, it was not raised in a timely fashion.

Claim for Aggravation

Claimant filed a notice of injury on July 14, 1998, ten days after the exposure incidents. Emp. Ex. 1. Claimant's notice of injury form, and employer's first report of injury form, dated July 15, 1998, specifically referred to an accident involving exposure to air conditioning "stuff." Emp. Exs. 1, 3; *see also* Tr. at 27. On February 10, 2001, claimant filed a claim for compensation which described the accident involving the rotten meat exposure. Emp. Ex. 4. On February 7, 2002, in response to the administrative law judge's Notice of Hearing and Pre-Hearing Order dated January 25, 2002, claimant filed a document entitled "Claimant's Proposed Statement of Contested Issues" (hereinafter "Statement"). In that document, in addition to alleging that an injury occurred while disassembling old refrigeration equipment, claimant stated:

> [Claimant] developed a condition for which he was medically treated under the provisions of the Act; he was ruled to be suffering from a non-contagious skin condition that flourishes and cover (sic) extensive areas of his body if he comes in contact with sun rays.

Statement at 1. This document was filed with the administrative law judge more than one year prior to the hearing. The administrative law judge found that this Statement sufficiently asserted a claim for the aggravation of claimant's skin condition and served to amend claimant's original claim to include a claim based on exposure to the sun. In conjunction with this Statement, the administrative law judge found that employer's lack of objections to the Statement and the questions pertaining to sun exposure and use of sun block posed by employer at the hearing in May 2003 and the depositions thereafter established that employer was aware that aggravation of claimant's condition due to sun exposure was an issue. Decision and Order at 2-3; Tr. at 21-23.

Employer first argues that the Statement is insufficient to raise a claim for aggravation because it was overly broad and it merely put claimant's condition in to historical context. Well-established law permits the amendment of claims, and "'considerable liberality is usually shown in allowing amendment of pleadings to correct . . . defects,' unless the 'effect is one of undue surprise or prejudice to the opposing party.'" *U.S. Industries/Federal Sheet Metal, Inc., v. Director, OWCP*, 455 U.S. 608, 613 n.7, 14 BRBS 631, 633 n.7 (1982) (quoting 3 A. Larson, *The Law of Workmen's Compensation*, §78.11 (1976), currently 7 Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law*, §124.04[3] (2006)); *see also Meehan Seaway Service, Inc. v. Director, OWCP [Hizinski]*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998); *Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286 (1994); *Peterson v. Columbia Marine Lines*, 21 BRBS 299 (1988). The Larson treatise states that a wide variance is permitted between pleading and proof, unless the employer is prejudiced by having to defend at the hearing an injury completely different than the one pleaded. 7 Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law*, §124.04[5] (2006). Section 18.5(e) of the Office of Administrative Law Judge (OALJ) Rules states that amendments to complaints are permitted: once as a matter of right and thereafter if the administrative law judge "determines that the amendment is reasonably within the scope of the original complaint." 29 C.F.R. §18.5(e); *see Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001); *Jones v. Newport News & Dry Dock Co.*, 36 BRBS 105 (2002); *Mikell v. Savannah Shipyard*, 24 BRBS 100 (1990), *aff'd on recon.*, 26 BRBS 32 (1992), *aff'd mem. sub nom. Argonaut Ins. Co. v. Mikell*, 14 F.3d 58 (11th Cir. 1994). Thus, when a claimant raises a new theory of recovery which the administrative law judge finds is reasonably within the scope of the original claim, the new theory is an amendment to the original claim and is not a new claim. *Mikell*, 24 BRBS at 105 (where claimant presented one theory for death benefits under the 1972 Act and later added another theory for the same benefits, Board affirmed that new theory constituted amendment to original claim). Evidence presented at the formal hearing also, with notice, may warrant the consideration of a new issue not originally raised. 20 C.F.R. §702.336.

In this case, claimant's formal claim, filed in February 2001, mentioned only the "rotten meat" incident. The Statement, filed one year later, indicated that claimant's skin condition was affected by exposure to the sun, that he had been deprived of medical treatment, that he suffered a worsening condition and was unable to obtain alternate work because of his skin condition, and that he is entitled to benefits. In conjunction with the written Statement, the administrative law judge found that the testimony at the hearing also served to make employer aware that a claim for aggravation due to sun exposure was at issue. Claimant testified he was aware that his skin was extremely sensitive to sun exposure in 1998, but he continued to work for employer until he was terminated for disorderly

conduct in June 1999.[4] The administrative law judge found that employer specifically asked claimant questions about his use of sun block. Further, during the hearing, claimant testified that his "carpentry work is out in the sun" and "if I'm under sunlight, then I have rashes. I have boils, and I scratch. I itch." Tr. at 9. He stated that Dr. Cruz told him he could not work in the sun and that he needed to wear sun block for protection. Tr. at 13-14, 23. Additionally, in their post-hearing depositions, Drs. Cruz and Vallejo spoke of the sun's effects on claimant's skin. Both doctors testified that the sun aggravated claimant's skin condition, and employer was represented at both depositions.[5] Cl. Ex. 2; Emp. Ex. 9. Dr. Vallejo stated, in response to employer's question about any work restrictions claimant may have, that claimant should avoid the sun because it can activate the condition, and he should avoid stress and sweating because they can aggravate the condition. Emp. Ex. 9 at 11-12.

Based on the Statement and the totality of the testimony, the administrative law judge found that claimant had sufficiently raised the issue of aggravation and that employer was aware of the issue and was not unduly prejudiced or surprised by it. The Board is not permitted to reweigh the evidence, and it must accept the ultimate findings and inferences of the administrative law judge if they are reasonable and supported by substantial evidence. *O'Keeffe*, 380 U.S. 359; *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, No. 80-1870 (D.C. Cir. 1981). In this case, the Board remanded the case for the administrative law judge to consider the issue. His findings and inferences are reasonable, and they will not be disturbed. As it was not unreasonable for the administrative law judge to infer from the Statement and other evidence that a claim for aggravation had been made, we affirm his conclusion that claimant raised the issue of aggravation due to sun exposure with sufficient notice to employer.[6] *U.S. Industries*, 455 U.S. at 613, 14 BRBS at 632-633; *Vodanovich*, 27 BRBS 286; *Peterson*, 21 BRBS 299.

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[4]According to claimant, the reason for his behavior stemmed from a co-worker teasing him about his use of sun block to protect himself from the sun's rays. Tr. at 21-22.

[5]Dr. Cruz specifically stated that the activation of claimant's skin condition is related to the type of work he does in that exposure to sun aggravates the condition. Cl. Ex. 2 at 29.

[6]Employer argues that it was deprived of its due process rights because the administrative law judge determined that this claim was for aggravation without permitting employer to respond. Employer's argument is rejected. The administrative law judge specifically noted that, when the Statement was originally filed with him, employer opted not to file objections. Further, he stated that employer did not object to the contents in the Statement at the hearing.

As we affirm the administrative law judge's finding that claimant asserted a claim for aggravation in his Statement, we next address employer's assertion that claimant's 2002 Statement is insufficient to amend his original claim because aggravation must be considered a *new* claim. Alternatively employer argues that even if aggravation could be considered an amendment of the original claim, the Statement was not admitted into evidence and cannot be used to support a finding that the original claim was amended. We reject both arguments.

The administrative law judge found that the claim for aggravation in the Statement constitutes an amendment to claimant's original claim. Given the scope allowed for amendments to claims, this interpretation is reasonable. Both the traumatic injury and the aggravation theory relate to the same skin condition, and sufficient evidence was developed during the proceedings to support the aggravation theory. Therefore, we hold that the administrative law judge rationally determined that claimant's 2002 Statement amended his original claim to include a claim for aggravation.[7] *See Pool Co.*, 274 F.3d 173, 35 BRBS 109(CRT); *Mikell*, 24 BRBS at 105. Moreover, we reject employer's argument that the Statement was not admitted into evidence and, therefore, cannot be used to support a finding that the original claim was amended. Section 23 of the Act states that an administrative law judge is not bound by common law or statutory or formal rules of evidence or procedure and that he must make his inquiry so as to best ascertain the rights of the parties. 33 U.S.C. §923; 20 C.F.R. §702.339. Sections 556(d) of the Administrative Procedure Act and Section 18.57 of the OALJ Rules provide that the decision of the administrative law judge must be based on the "whole record."[8] 5 U.S.C. §556(d); 29 C.F.R. §18.57; *see Pacific Shores Subdivision v. United States Army Corps of Engineers*, 448 F.Supp.2d 1 (D.D.C. 2006) ("whole record" interpreted to include "all documents and materials that the agency 'directly or indirectly' considered"). Section 556(e) provides in pertinent part:

[7] Section 18.5(e) states: "When issues not raised by the pleadings are reasonably within the scope of the original complaint and are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. . . ." 29 C.F.R. §18.5(e).

[8] Section 556(d) provides in pertinent part: "a sanction may not be imposed or rule or order issued except on consideration of the whole record. . ." Section 18.57 states: "The decision of the administrative law judge shall include findings of fact and conclusions of law, with reasons therefor, upon each material issue of fact or law presented on the record. The decision of the administrative law judge shall be based upon the whole record."

> The transcript of testimony and exhibits, *together with all papers and requests filed in the proceeding*, constitutes the exclusive record for decision in accordance with Section 557 of this title. . . .

5 U.S.C. §556(e) (emphasis added). Although pleadings are not part of the formal record of "evidence," *i.e.*, proof of the facts alleged, they are statements and arguments regarding those facts, and they are properly considered a part of the "whole record." Thus, the 2002 Statement is part of the "whole record" before the administrative law judge, and he committed no error in relying on it.

Date of Awareness

Employer next contends the administrative law judge erred in finding June 11, 2000, to be the date on which claimant became aware of the relationship between his employment, his disease, and an impairment on his ability to earn wages. Section 13(a) states:

> Except as otherwise provided in this section, the right to compensation for disability or death under this chapter shall be barred unless a claim therefore [sic] is filed within one year after the injury or death. 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. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or death occurred. The time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment.

33 U.S.C. §913(a). Case law establishes that a claimant is not "aware" under this provision until he knows or should have known the full extent of his condition and that it will likely impair his wage-earning capacity. *See Paducah Marine Ways v. Thompson*, 82 F.3d 130, 30 BRBS 33(CRT) (6th Cir. 1996); *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98(CRT) (4th Cir. 1991); *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990); *Gregory v. Southeastern Maritime Co.*, 25 BRBS 188 (1991). The date of awareness is not necessarily the date of the accident or the date when the claimant first experiences pain. *Bath Iron Works Corp. v. Galen*, 605 F.2d 583, 10 BRBS 863 (1st Cir. 1979); *see*

also Parker, 935 F.2d 20, 24 BRBS 98(CRT); *Stancil v. Massey*, 436 F.2d 274 (D.C. Cir. 1970).[9]

The administrative law judge found that, "[a]s early as August 6, 1998, Claimant should have been aware that sun and heat aggravated his autoimmune skin condition." Decision and Order on Remand at 4. Continuing his analysis, he found that claimant worked until June 11, 1999, when he was fired for fighting, and that between that date and February 10, 2001, no doctor deemed claimant disabled from performing his regular job as a carpenter. Decision and Order at 4-6. Further, the administrative law judge found that, while claimant was working, he was unaware of any impact his disease might have had on his ability to earn wages, *id.* at 6, and it was only "logical that he would not fully appreciate the loss of wage earning capacity engendered by a non-contagious skin condition until he had been rejected for merely *looking sick* by multiple potential employers over time." *Id.* at 7-8 (emphasis in original). In light of claimant's testimony regarding his lack of success in finding alternate employment, the medical evidence advising claimant to use sun block, and the fact that Dr. Cruz reported claimant's condition to be "better" in September 1999 but significantly deteriorated in May 2001, the administrative law judge was persuaded that claimant was aware of the full effects of his disease by June 11, 2000, one year after his termination.[10]

There is no specific evidence demonstrating that June 11, 2000, is the date claimant became aware of the relationship between his employment, his disease and an impairment of his wage-earning capacity. Claimant did not submit proof or supply dates of his attempts to find work; however, he testified that he made these attempts after he was terminated in June 1999 and was turned down because he "looked sick." Tr. at 15. As is within his discretion, the administrative law judge credited claimant's testimony, Decision and Order at 7, and as the administrative law judge found, no doctor declared

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[9]The D.C. Circuit stated in *Stancil*, 436 F.2d at 276-277:

> [O]nce the man has been put on the alert . . . as to the likely impairment of his earning power, there is an 'injury;' before that time, while there may have been an accident, there is as yet no 'injury' for claim or filing purposes under this statute."

[10]We reject employer's assertion that the administrative law judge's use of the phrase "by June 11, 2000," could mean any time before this date, thereby potentially making the February 10, 2001, claim untimely, as the administrative law judge definitively stated elsewhere that the date of awareness was "on June 11, 2000[.]" Decision and Order at 8.

claimant disabled from outdoor carpentry work until after he filed a claim in February 2001. *See* Cl. Ex. 2 at 21, 31 (2003 Deposition: Dr. Cruz stated that, as of May 24, 2001, claimant can travel but cannot work outside in the sun). From this, the administrative law judge determined that claimant could not know his ability to work would be affected by his skin disease until he had been unsuccessfully looking for work for a "significant period of time following his termination." Decision and Order at 7. He determined that one year is a reasonable period of time within which to come to this realization. Decision and Order at 8. As the administrative law judge is charged with determining the credibility of the witnesses, weighing the evidence, and making necessary inferences therefrom, *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert.* denied, 372 U.S. 954 (1963); *John W. McGrath Corp. v.* Hughes, 289 F.2d 403 (2d Cir. 1961); *Perini Corp. v.* Heyde, 306 F.Supp. 1321 (D.R.I. 1969), it was reasonable for him to give claimant one year following his termination to gain the requisite awareness. *See Galen*, 605 F.2d at 584-585, 10 BRBS at 865; *see also Parker*, 935 F.2d 20, 24 BRBS 98(CRT); *see generally Paducah Marine Ways*, 82 F.3d 130, 30 BRBS 33(CRT); *Duluth, Missabe & Iron Range Ry. Co. v. Director, OWCP [Heskin]*, 43 F.3d 1206 (8th Cir. 1994); *Love v. Owens-Corning Fiberglas Co.*, 27 BRBS 148 (1993). Therefore, as it is supported by substantial evidence, we affirm the administrative law judge's finding that June 11, 2000, is the date on which claimant became aware of the relationship between his employment, his disease and the impact on his wage-earning capacity.

Timeliness

Next, employer argues that if June 11, 2000, constitutes the date of awareness, then the Statement filed on February 7, 2002, was untimely and improperly filed. As we have held that the 2002 Statement is an amendment to the original claim and not a new claim, then its timeliness is determined by that of the original claim filed in February 2001. Because the original claim filed in February 2001 was timely filed within one year of June 2000, the amendment filed in 2002 also is timely. *See Hizinski*, 125 F.3d at 1167-1168, 31 BRBS at 116(CRT); *Mikell*, 24 BRBS at 105. Moreover, claimant filed the Statement with the administrative law judge more than one year before the hearing in response to an order issued by the administrative law judge, and he simultaneously served employer with this document, giving employer sufficient notice that aggravation was at issue. *See* 20 C.F.R. §702.336. Because the Statement was properly and timely filed, we affirm the administrative law judge's rational determination that claimant amended his claim for benefits to include a claim for the work-related aggravation of his skin condition. As employer does not challenge the administrative law judge's finding that claimant sustained a work-related aggravation of his skin condition that affected his ability to work, we affirm the administrative law judge's award of total disability benefits.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Remand is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge