**U.S. Department of Labor**

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 22-0416

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| TAKIAH SMITH | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| VECTRUS SYSTEMS CORPORATION (fka EXELIS SYSTEMS CORPORATION) | ) | |
| | ) | |
| and | ) | |
| | ) | |
| ZURICH AMERICAN INSURANCE COMPANY | ) | DATE ISSUED: 01/05/2024 |
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| Employer/Carrier-Respondents | ) | |
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| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Respondent | ) | DECISION and ORDER |

Appeal of the Decision and Order Denying Compensation and Granting Medical Benefits of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Lara D. Merrigan (Merrigan Legal), Sausalito, California, and Jeffrey Winter (Law Office of Jeffrey M. Winter), San Diego, California, for Claimant.

Alan G. Brackett and Ava M. Wolf (Mouledoux, Bland, Legrand & Brackett, LLC), New Orleans, Louisiana, for Employer/Carrier.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

GRESH, Chief Administrative Appeals Judge, and BUZZARD, Administrative Appeals Judge:

Claimant appeals Administrative Law Judge (ALJ) Richard M. Clark's Decision and Order Denying Compensation and Granting Medical Benefits (2019-LDA-01287) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (Act), as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq*. (DBA). We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant began working for Employer in Kuwait in July 2012 as an operations coordinator.[1] As part of her employment conditions, she lived in Employer-furnished housing. On November 5, 2013, an electrical fire started in her washer/dryer unit while she was sleeping. She woke to the smell of smoke and managed to escape; a security officer put out the fire before it destroyed the apartment, but she lost her belongings. Subsequently, she filed a claim for a work-related pulmonary condition caused by the fire, and on June 27, 2017, District Director R. Todd Bruininks approved the parties' Section 8(i) settlement, 33 U.S.C. §908(i). CXs 2-4; EX 4. The parties agreed to a lump sum payment of $300,000 allocated to future disability benefits and $45,000 allocated to attorney's fees; medical benefits remained open.[2] EX 4 at 9. In 2014, Claimant sought psychological treatment, and in November 2018, she filed a claim for benefits for a psychological condition arising from the 2013 fire. EX 2.

Claimant and Employer stipulated Claimant suffered "stress/psych" injuries as a result of the November 2013 fire, and the ALJ found her post-traumatic stress disorder (PTSD) and psychological injuries are work-related. D&O at 2, 24. In addressing

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because the district director who filed the ALJ's decision is in San Francisco, California. 33 U.S.C. §921(c); *McDonald v. Aecom Tech. Corp.*, 45 BRBS 45 (2011).

[2] Previously, Employer paid Claimant a total of $131,755.30 in disability compensation and paid $75,877.21 for her medical treatment. EX 4 at 8.

Employer's challenge to the timeliness of Claimant's claim, the ALJ found her condition is "traumatic in nature" because it was related to an apartment fire which is not "peculiar" to her employment with Employer. *Id.* at 24-25. As such, he found her claim was not timely filed because she became aware her psychological condition was work-related on June 25, 2014, and that it was disabling as of June 25, 2015, but did not file her claim until November 18, 2018, in excess of the one-year limit.[3] *Id.* at 31.[4] Thus, the ALJ found Claimant's claim for disability benefits for her psychological condition was time-barred, but because medical benefits are never time-barred, he awarded her medical benefits for her work-related PTSD and other psychological conditions. *Id.* at 32.

Claimant appeals the ALJ's denial of disability benefits, contending he erred in finding her psychological injury claim untimely. The Director, Office of Workers' Compensation Programs (Director), responds, urging the Benefits Review Board to vacate the ALJ's timeliness finding and remand the case for further consideration. Employer responds, urging affirmance.[5] Claimant has filed a reply brief.

We agree with Claimant and the Director that the ALJ's timeliness finding is not supported by substantial evidence. However, we agree with Claimant, and not the Director,

[3] Claimant also raised a psychological injury arising from the November 2013 fire at the informal conference on November 15, 2018. CX 9 at 24.

[4] The ALJ also found Claimant did not give Employer timely notice of her injury under Section 12, 33 U.S.C. §912, but excused the delay because Employer was not prejudiced by the untimely notice. D&O at 32.

[5] We reject Employer's assertion that Claimant first raised a tolling argument in her brief before the Board. To the contrary, whether the statute of limitations has been tolled is part and parcel of the issue of whether a claim was timely filed. Although Claimant originally argued a much later date of awareness, she raised timeliness in her opening statement at the hearing, TR at 11, and both parties addressed it in their closing briefs to the ALJ. The ALJ addressed the issue, concluding Employer's failure to file an LS-202 did not toll the time for filing because the time to file a claim had already expired before it received notice. D&O at 29, 31. Therefore, it is clear timeliness and tolling of the statute of limitations was at issue before the ALJ.

that the record establishes the claim was timely filed, so it need not be remanded for reconsideration of that issue.[6]

Relevant to this appeal, Section 13 of the Act sets forth two statutes of limitations for filing claims. The first, Section 13(a), 33 U.S.C. §913(a), applies to traumatic injuries. It states: "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[.]" The time for filing a claim does 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." *Id.* The second, Section 13(b)(2), 33 U.S.C. §913(b)(2), applies to occupational diseases which do not immediately result in death or disability. Such claims are "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[.]" *Id.*

In traumatic injury cases, "awareness" of the relationship between the injury or death and employment means an employee becomes aware of a work-related injury which will result in a likely impairment of 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. Director, OWCP*, 43 F.3d 1206 (8th Cir. 1994). "Awareness" in an occupational disease claim, however, means the filing period does not begin to run until the employee is disabled. 20 C.F.R. §702.222(c). In the absence of substantial evidence to the contrary, Section 20(b), 33 U.S.C. §920(b), presumes the claim is timely filed. Further, the time for filing does not begin to run until the employer complies with Section 30 of the Act, 33 U.S.C. §930, by filing a report of injury form. *Sabanosh v. Navy Exch. Serv. Command*, 54 BRBS 5 (2020); 20 C.F.R. §702.201-702.202.

Specifically, Section 30(f) requires the employer or carrier to file a Section 30(a) injury report (LS-202) when it has notice or knowledge of an injury. 33 U.S.C. §930(a), (f). If the employer has adequate knowledge of the possibility of a work-related injury that is sufficient to warrant further investigation, it must file the LS-202. *Sabanosh*, 54 BRBS at 7;[7] *see also Meehan Serv. Seaway Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS

[6] Contrary to the Director's assertions, the ALJ gave rational reasons for rejecting a date of awareness in December 2018 or early 2019, as Claimant filed her claim prior to those dates. D&O at 20.

[7] In *Sabanosh*, the ALJ found the employer had knowledge of the decedent's death in January 2015 but did not file a First Report of Injury until January 2018. The Board affirmed the ALJ's determination that the "ambiguous circumstances" surrounding decedent's death "on a restricted, isolated island base" should have "led a reasonable man

114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998). If it fails to file the report, the Section 13 statute of limitations is tolled until it does so. *Bustillo v. Sw. Marine, Inc.*, 33 BRBS 15 (1999) (information contained in a medical report and a letter from the claimant's counsel was sufficient to impute knowledge of a possible work-related injury to the employer); *Ryan v. Alaska Constructors, Inc.*, 24 BRBS 65 (1990) (Section 30(f) does not require an employer to have definite knowledge that the injury comes within the jurisdiction of the Act, only that there is a possibility).

Claimant contends the ALJ erred in failing to address several key pieces of evidence which demonstrate Employer had sufficient information to warrant investigation of her PTSD injury – and thus the filing of its LS-202 report of injury – prior to June 25, 2016, when her time to file a claim purportedly expired. First, at Employer's behest, Claimant saw Dr. Steven Brown on March 4, 2016, for a pulmonary examination related to her persistent cough following the fire. CX 13. In addition to some records Claimant brought with her, Dr. Brown identified 37 previously provided documents that he reviewed before her appointment. Following an examination, Dr. Brown opined Claimant has a severe and chronic cough which may have originated due to smoke inhalation, but he did not know why it was persisting after more than two years of treatment. He questioned her reported diagnosis of "restrictive airways disease" as unsupported by pulmonary function tests but concluded:

> There may be several causes of her cough which are undiagnosed and which fortunately may respond well to treatment. These diagnoses include: *vocal cord dysfunction, possibly related to post traumatic stress disorder after exposure to the fire*, habitual cough, uncontrolled gastroesophageal reflux, bronchiectasis, mycobacterial or fungal infections.

CX 13 at 256-257 (emphasis added). The ALJ did not consider this report's relevance to Employer's notice of a possible PTSD injury related to the fire. Instead, he gave Dr.

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to conclude that compensation liability is at least possible." *Sabanosh*, 54 BRBS at 7. Specifically, the Board concluded it was rational for the ALJ to find the employer "had adequate knowledge of the possible work-relatedness of [the] decedent's death to warrant further investigation and to require the filing of a Section 30(a) report." *Id.*; *Steed v. Container Stevedoring Co.*, 25 BRBS 210, 218 (1991) (an employer must file the notice of injury if it "knows of the injury and has facts that would lead a reasonable person to conclude that compensation liability is possible so that further investigation is warranted"); *Kulick v. Continental Baking Corp.*, 19 BRBS 115, 118 (1986) (knowledge of a fall, but not an injury, is insufficient "to conclude that compensation liability was possible and that it should investigate further").

Brown's opinion great weight as a pulmonary expert, but because Claimant's claim for a pulmonary injury had already been settled, he stated "Dr. Brown's opinion had little impact on the decision." D&O at 10 n.11.

Additionally, on June 10, 2016, Claimant testified in her deposition that she informed Employer of the fire the morning it occurred.[8] Next, she testified "I think my department manager, Mr. Fuller, he actually came to my apartment and he said oh, don't come to work today, you need to go to the hospital." Claimant stated she told him "I'm fine, I'm just kind of – I was a little bit shaken with the whole smoke … kind of thing[,]" and "[h]e is like you have to go to the hospital just to make sure."[9] CX 17 at 317-318 (Cl. Dep. at 28-29). Despite these statements, the ALJ's decision provided a limited summary of Claimant's 2016 deposition, noting it focused on her background, the circumstances of the fire, and her pulmonary symptoms. He surmised the questioning did not include much about her psychological condition because at the time of the deposition: "Claimant had only filed a claim for pulmonary injuries, and [Employer was] not aware of her psychological injury related to the fire." D&O at 11. The record also contains Veterans Administration medical reports of her psychological treatment.[10] CX 24 at 688-704, 714-716; EX 6.

[8] Claimant explained: after the apartment security officer put out the fire, she "called where I work which is the LMOC. They handle incident reports … I called the manager that I knew, and I said this is what happened, what do I need to do. File an incident report telling them, you know, what happened. I did that." CX 17 at 317-318 (Cl. Dep. at 28-29).

[9] In her brief before the Board, Claimant posits Mr. Fuller's knowledge was sufficient to warrant further investigation and filing the LS-202. It is unclear from the testimony what injury caused him to advise Claimant to go to the hospital, and the ALJ did not further address it. In any event, in light of our holding, we also need not address it.

[10] It is undisputed Claimant suffers from pre-existing PTSD and other psychological issues stemming from traumas and war-zone hazardous conditions during her time in the military in Iraq between October 2007 and December 2008. CX 24; TR at 16-19. She sought psychological treatment beginning in 2007, continued short-term treatment after returning home in 2009, and reinstated treatment in early 2014, a few months after the fire. EX 10 at 13; TR at 34. At the consultation on June 25, 2014, Claimant indicated she had suffered depression, irritability, and mood symptoms since November 2013, but she felt she had had everything under control until then. CX 24 at 714.

Claimant asserts Dr. Brown's report and her deposition testimony prompted Employer to have psychiatrist Dr. Michael Madow evaluate her. In his December 8, 2016 report, Dr. Madow diagnosed Claimant with PTSD, stating the condition is related to the fire and prior trauma experienced during her military service. CX 14 at 259, 265, 268. The ALJ considered this report to be Employer's first notice of a fire-related PTSD injury and he stated the time for filing a claim, had it not already expired, would be tolled "from the date [Employer] received Dr. Madow's 2016" report. D&O at 29. Because he found Claimant's time for filing her claim expired before the statute of limitations would have been tolled, he deemed any tolling irrelevant. *Id.* As a result, the ALJ found her November 2018 claim untimely filed.

We address this case by presuming, without deciding, the propriety of the ALJ's findings that Claimant's psychological injury is a traumatic injury and her date of awareness was June 25, 2015.

Describing the interplay between the presumption of timeliness under Section 20(b), and an employer's obligation to file an injury report under Section 30(a), the Board stated in *Sabanosh*:

> [F]or Section 30(a) to apply, the employer or its agent must have notice of the injury or death, or knowledge of the injury or death and its work-relatedness; the employer may overcome the Section 20(b) presumption by providing substantial evidence that it never gained knowledge or received notice of the injury or death for Section 30 purposes.

*Sabanosh*, 54 BRBS at 7. That is, an employer may overcome the Section 20(b) presumption by showing it had no knowledge of the injury and the proscriptive period expired (as the ALJ here found); or it must establish it complied with the requirements of Section 30(a) by filing a first report of injury (which it did not). *Sabanosh*, 54 BRBS at 7; *Bustillo*, 33 BRBS 15; *see also Blanding v. Director, OWCP*, 186 F.3d 232, 33 BRBS 114(CRT) (2d Cir. 1999). Knowledge of the injury's work-relatedness may be imputed where the employer knows of the injury and has facts that would lead a reasonable person to conclude it may be compensable, warranting further investigation. *Sabanosh*, 54 BRBS at 7; *see Stark v. Washington Star Co.*, 833 F.2d 1025, 20 BRBS 40(CRT) (D.C. Cir. 1987); *Steed v. Container Stevedoring Co.*, 25 BRBS 210, 218 (1991); n.7, *supra*.

In this case, the ALJ found:

> When [Employer] received Dr. Madow's report [on December 8, 2016,] concluding that Claimant suffered from PTSD resulting from the 2013 apartment fire, [it] had knowledge of Claimant's injury and [was] obligated

> to file a report under Section 30(a). Because [Employer] failed to do so, from December 8, 2016, the time for Claimant to file her claim is tolled.

D&O at 29 n.30. He further stated, however, "that even though [Employer] failed to file a notice under Section 30(a), [Claimant's] time to file had already expired and [] ultimately was not tolled." *Id.* at 29. There is no indication in the record that Employer filed an LS-202 in accordance with the Act for the psychological injury at any time.

The ALJ's finding that Employer first became aware of Claimant's work-related psychological condition in December 2016 is unsupported by the evidence. As previously discussed, Employer's own expert, Dr. Brown, advised Employer in March 2016 that Claimant's chronic coughing may be "vocal cord dysfunction, possibly related to post traumatic stress disorder after exposure to the fire." CX 13 at 256-257. This information, along with Claimant's treatment records and June 2016 deposition testimony, CXs 17, 24-25; EXs 6-7, was sufficient to impute knowledge of a potential work-related psychological injury needing further investigation before the proscriptive period expired. *Sabanosh*, 54 BRBS at 7; *Steed*, 25 BRBS at 218. As the record contains evidence of Employer's awareness as of March 2016, the ALJ erred in finding Employer first received notice of the psychological injury in Dr. Madow's December 2016 report.[11] Because Employer's March 2016 awareness, and thus obligation to file a report of injury, preceded Claimant's June 2016 deadline for filing her claim, the ALJ erred in finding the Section 20(b) presumption rebutted and the time for filing her claim was not tolled based on Employer's delayed knowledge of the injury. D&O at 29; *see Maddon v. W. Asbestos Corp.*, 23 BRBS 55 (1989).

Further, the ALJ made no findings, and Employer makes no argument on appeal, that Employer filed an LS-202 at any time prior to Claimant's filing her psychological injury claim on November 18, 2018. Consequently, as Employer has not rebutted the Section 20(b) presumption of timeliness, the time for filing Claimant's psychological injury claim was tolled, and her claim for benefits is timely. *Sabanosh*, 54 BRBS at 7; *Steed*, 25 BRBS at 218. We therefore reverse the ALJ's finding to the contrary and remand the case to him for further consideration of disability benefits for this injury.

Accordingly, we reverse the ALJ's finding that Claimant's psychological injury claim was untimely filed. We remand the case for consideration of her entitlement to disability benefits, including the nature and extent of any disability related to that injury.

[11] An employer's obligation to file a notice of injury report is triggered if it learns of the injury and information warranting investigation; Employer's notice in this case need not have been an explicit psychological diagnosis from a psychiatrist.

In all other respects, we affirm the ALJ's Decision and Order Denying Compensation and Granting Medical Benefits.[12]

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring and dissenting:

I concur with the majority's conclusion that the ALJ erred in not addressing the March 2016 doctor's report and the June 2016 deposition testimony which could have provided Employer with the information that the fire may have triggered work-related PTSD. However, I respectfully dissent from the decision to reverse the ALJ's timeliness finding. Instead, I would vacate the finding and remand for the ALJ to reconsider the report

[12] In light of our decision that the time for filing Claimant's psychological injury claim was tolled since March 2016, which was within one year of the date the ALJ found she became aware of the relationship between her injury, employment, and disability, we need not address the alternate and remaining issues Claimant raises, including whether this injury should be considered an occupational disease rather than a traumatic injury. Even were it deemed an occupational disease, in meeting the one-year time limit for traumatic injuries by virtue of the tolling provision, Claimant also would have met the two-year deadline for filing an occupational disease claim.

and whether it was sufficient to put Employer on notice to file its LS-202 form. It is for the ALJ, not the Board, to weigh the evidence, draw inferences, and make appropriate findings of fact. *Volpe v. Ne. Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982); *see also Sea-Land Services, Inc., v. Director, OWCP* [*Ceasar*], 949 F.3d 921, 54 BRBS 9(CRT) (5th Cir. 2020); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991).

JUDITH S. BOGGS
Administrative Appeals Judge