U.S. Department of Labor

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

BRB No. 20-0525

MENTOR GASHI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FLUOR CONOPS, LIMITED	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	DATE ISSUED: 06/28/2021
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Order Granting Employer's Motion for Partial Summary Decision of Jerry R. DeMaio, Administrative Law Judge, United States Department of Labor.

Lara D. Merrigan (Merrigan Legal), Sausalito, California, and Carolyn F. Frank (Friedman, Rodman & Frank, P.A.), Miami, Florida, for Claimant.

James M. Mesnard (Postol Law Firm, P.C.), McLean, Virginia, for Employer/Carrier.

Ann Marie Scarpino (Elena S. Goldstein, Deputy Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore),

Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals Administrative Law Judge Jerry R. DeMaio's Order Granting Employer's Motion for Partial Summary Decision (2019-LDA-01462) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act (DBA), 42 U.S.C. §1651 *et seq.* (Act). We must affirm the administrative law judge'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 worked for Employer as a food warehouseman in Afghanistan from March 2010 to June 2015, when he returned to his residence in Kosovo. Claimant experienced numerous traumatic events in Afghanistan, such as rocket and mortar attacks, car bombings, and the death of fellow employees. CX A.[1] He sought psychiatric treatment from Dr. Shaban Jashari on October 5, 2015. CX C. Dr. Jashari diagnosed anxiety-depressive disorder. *Id*. Dr. Jashari noted at Claimant's visit on February 15, 2016, that Claimant was "still unable to work." EX 4. On April 25, 2016, Dr. Jashari linked Claimant's psychiatric condition to his employment in Afghanistan and again noted that he is unable to work. EX 5. Claimant filed his claim under the Act for a work-related psychological injury on March 7, 2019. CX A. Employer filed for partial summary decision on the basis that Claimant failed to file a timely claim and, therefore, is not entitled to disability compensation. Claimant opposed Employer's motion.

In his Order Granting Employer's Motion for Partial Summary Decision (Order), the administrative law judge concluded that, based on Claimant's interactions with Dr. Jashari, Claimant should have known by April 25, 2016, that his psychological symptoms and his diminished working capacity were related to his employment in Afghanistan. Order at 4. The administrative law judge thus found the claim untimely under either the

[1] The exhibits are documents attached to the parties' summary decision pleadings filed with the administrative law judge. "EX" refers to exhibits Employer attached to its motion for summary decision. "CX" refers to exhibits Claimant attached to his response to Employer's motion.

one-year or two-year statutes of limitations of Section 13(a) and Section 13(b)(2), respectively. 33 U.S.C. §913(a), (b)(2). Accordingly, the administrative law judge granted Employer's motion for partial summary decision.[2] Order at 4.

On appeal, Claimant contends the administrative law judge erred in granting Employer's motion for partial summary decision because he was not aware of the full nature and extent of his condition until Dr. Jashari diagnosed him with post-traumatic stress disorder (PTSD) in September 2018, as Dr. Jashari opined his PTSD symptomatology did not commence until around that time.[3] EX 6 at 15. Alternatively, Claimant avers summary decision was inappropriate because there is a genuine issue of material fact whether he knew the full nature and extent of his condition prior to September 2018. The Director, Office of Workers' Compensation Programs (the Director), contends summary decision was inappropriate because the administrative law judge failed to determine, in a light most favorable to Claimant, when he should have been aware that his psychological injury resulted in a permanent impairment of his earning capacity.[4] Employer responds to the briefs of Claimant and the Director, urging affirmance because the administrative law judge applied the correct summary decision standard and there is no genuine issue of material fact.

In determining whether to grant a party's motion for summary decision, the administrative law judge must determine, viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the moving party is entitled to summary decision as a matter of law. *Wilson v. Boeing Co*., 52 BRBS 7 (2018); *see also O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002); *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Buck v. General Dynamics Corp.*, 37 BRBS 53 (2003); 29 C.F.R.

[2] In his subsequent August 20, 2020 Decision and Order Awarding Benefits, the administrative law judge awarded Claimant medical benefits for past and future treatment for his work-related psychological condition per his findings of fact and the parties' stipulations. 33 U.S.C. §907.

[3] On September 13, 2018, Dr. Jashari noted "the patient has gone through a horror and now has started to experience the symptoms of post traumatic stress." EX 6 at 17.

[4] The Director also contends the two-year statute of limitations for occupational diseases applies, 33 U.S.C. 9 §913(b)(2), to determine the timeliness of Claimant's March 7, 2019 claim. We agree. *See Gindo v. Aecom Nat'l Security Programs, Inc.*, 52 BRBS 51 (2018).

§18.72. The trier-of-fact must draw all inferences in favor of the non-moving party. *O'Hara*, 294 F.3d at 61; *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006). If a trier-of-fact could resolve the issue in favor of the non-moving party, summary decision must be denied. *Matsushita Elec. Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Wilson*, 52 BRBS 7.

The courts of appeals have uniformly held the Section 13 statute of limitations begins to run only after the employee is aware or reasonably should have been aware of the full character, extent, and impact of the employee's work-related injury.[5] The United States Court of Appeals for the Second Circuit, within whose jurisdiction this case arises, has held the statute of limitation commences "when the employee knows or should know that the injury is work related, and knows or should know that the injury will impair the employee's earning power."[6] *Dyncorp Int'l v. Director, OWCP [Mechler]*, 658 F.3d 133, 137, 45 BRBS 61, 63(CRT) (2d Cir. 2011), *aff'g E.M. (Mechler) v. Dyncorp Int'l*, 42 BRBS 73 (2008).

In *Mechler*, the United States Court of Appeals for the Second Circuit, within whose jurisdiction this case arises, stated:

> we have no trouble concluding that the evidence in this case is not of the quantity or character that would allow a reasonable (reasoning) mind to conclude that Mechler had enough information—either from Dyncorp, her healthcare providers, or other sources—to realize more than one year before she filed her claims that her psychological problems would result in a permanent loss in earning capacity.[7]

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[5] Section 13(b)(2) states that in an occupational disease case that does not immediately result in death or disability, a claim 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 . . . ." 33 U.S.C. §913(b)(2).

[6] Thus, the mere diagnosis of a work-related condition and treatment for it does not commence the running of the statute of limitations. *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). The claimant must have "awareness" of a work-related injury and a loss of wage-earning capacity.

[7] In *Mechler*, the claimant worked as a security guard under a government contract at a detention center in Kosovo. She and five other employees were shot by a detainee; three of the employees died. The claimant returned to work, at light-duty, but had trouble

Mechler, 658 F.3d at 138, 45 BRBS at 64(CRT). In this case, the administrative law judge did not apply *Mechler* in determining the timeliness of the claim.

Moreover, we agree with Claimant and the Director that the administrative law judge failed to draw inferences in Claimant's favor as required and erroneously weighed evidence in favor of Employer without applying the Section 20(b) presumption, 33 U.S.C. §920(b).[8] *Blanding v. Director, OWCP*, 186 F.3d 232, 235, 33 BRBS 114, 116(CRT) (2d

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completing her shifts due to her physical injury. She also began having psychological symptoms for which she was prescribed medication. She underwent limited counseling, but was not informed of any diagnosis. The security contract was awarded to another company and the claimant and other survivors of the attack were sent back to the United States. She tried to obtain her former job with the Kansas Department of Corrections but "they believed she was mentally unfit to carry a weapon and assigned her to a desk job that paid less than what [claimant] would have made if she had been able to continue on as special enforcement officer."

The administrative law judge determined the claimant's claim was untimely filed in 2006 because the claimant had the requisite awareness in 2004 while working for her overseas employer in a reduced capacity. The claimant appealed averring she was not aware of a loss of wage-earning capacity due to a psychological condition until she started working for lower pay stateside. The Board reversed the administrative law judge's finding the claim untimely as the claimant was unaware of a loss of wage-earning capacity until the employer terminated her, "[a]t which time, claimant was aware of the 'full character, extent, and impact' of her injury." *Mechler*, 42 BRBS at 76.

The Second Circuit affirmed the Board's reversal. The court agreed with the "conventional interpretation" the administrative law judge and the Board relied on that the timeliness of claims should be measured by when the employee knows, or should know, the injury is work-related and knows, or should know, the injury will impair the employee's earning power. *Mechler*, 658 F.3d at 137, 45 BRBS at 63(CRT). The court held the record evidence as a whole showed the claimant's overseas work was largely unaffected by whatever psychological problems she experienced from her work injury, notwithstanding her receiving treatment and medication, and that she should not have known she had "a permanent impairment of earning power" before her overseas employer terminated her. *Id*., 658 F.3d at 140, 45 BRBS at 65(CRT).

[8] Section 20(b) provides a claimant with a presumption that his notice of injury and claim were timely filed, in the absence of substantial evidence to the contrary. 33 U.S.C. §920(b). Moreover, Section 30(f), 33 U.S.C. §930(f), provides that if an employer has notice or knowledge of the claimant's work injury, the time for filing a claim is tolled until

Cir. 1999); *O'Hara*, 294 F.3d at 61. Specifically, although Dr. Jashari diagnosed Claimant with a work-related psychological condition in April 2016, there was no evidence presented to the administrative law judge of when Claimant was aware of this diagnosis or of the relationship of his psychological injury to his working conditions in Afghanistan. Additionally, there is evidence Claimant obtained part-time employment from December 2016 to January 2018, which if construed in a light most favorable to him, could defer his awareness of a permanent loss of wage-earning capacity from his psychological condition. "Awareness" means the claimant can, or should be able to, determine from the information given that his ability to earn wages has been affected by his work injury. *See, e.g., Suarez v. Service Employees Int'l, Inc.*, 50 BRBS 33 (2016) (in a claim for a finite period of temporary total disability, claimant should have been aware when he knew his injury was work-related and missed work due to that condition).

As the trier-of-fact could conclude that, based on this limited record and application of the Section 20(b) presumption, Claimant did not have the requisite awareness in April 2016 of a work-related injury that impaired his earning power, *Mechler*, 658 F.3d at 138, 45 BRBS at 64(CRT), the administrative law judge erred by granting Employer's motion for summary decision. *See Wilson*, 52 BRBS 7. Consequently, we vacate the administrative law judge's grant of summary decision to Employer. *See Morgan*, 40 BRBS 9. We remand the case for an evidentiary hearing on this issue of the timeliness of Claimant's claim. 33 U.S.C. §919(d); 20 C.F.R. §702.331 *et seq.*; *see* n.2, *supra.* In addressing the parties' Section 13 contentions, the administrative law judge must apply the Section 20(b) presumption. *See* n. 8, *supra.*

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the employer complies with Section 30(a), 33 U.S.C. §930(a). In order to rebut the Section 20(b) presumption, an employer must establish it complied with Section 30(a), if applicable. *Blanding v. Director, OWCP*, 186 F.3d 232, 235, 33 BRBS 114, 116(CRT) (2d Cir. 1999).

Accordingly, we vacate the administrative law judge's Order Granting Employer's Motion for Partial Summary Decision and remand the case for further proceedings in accordance with this decision.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge