U.S. Department of Labor

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

BRB No. 21-0545

DURAND L. TURNER, SR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 5/31/2022
ELECTRIC BOAT CORPORATION	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Medical Benefits of Timothy J. McGrath, Administrative Law Judge, United States Department of Labor.

Robert B. Keville (Suisman, Shapiro, Wool, Brennan, Gray & Greenberg, P.C.), New London, Connecticut, for Claimant.

Edward W. Murphy (Morrison Mahoney LLP), Boston, Massachusetts, for Self-Insured Employer.

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

BUZZARD and ROLFE, Administrative Appeals Judges:

Claimant appeals Administrative Law Judge (ALJ) Timothy J. McGrath's Decision and Order Awarding Medical Benefits (2020-LHC-00044) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act). 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 struck his left knee on a piece of exposed steel while descending a ladder into a submarine during his work shift with Employer on November 1, 2017, at its Groton, Connecticut, facility. HT at 19-20, 48. He experienced immediate pain, prompting him, and a co-worker, Mike Pereira, who had witnessed the accident, to climb out of the submarine and return to the shop. *Id.* at 67-68.

While in route to the shop, they first encountered the ship supervisor, Charlie Martin, and then a "safety guy," Calvin McCoy, who each asked Claimant why he was limping. *Id.*, at 21-22, 23, 69-71. Claimant explained what had happened, prompting both Mr. Martin and Mr. McCoy to state they would each "look into it." *Id.* Once at the shop, Claimant spoke with a co-worker, Ada Strickland, who advised him to go to the yard hospital. *Id.* at 24, 25, 27, 56-57. He also encountered his general foreman, Keith Thompson, who was "looking at [his] wound," but apparently left the shop without saying anything. *Id.* at 24. Claimant spent the rest of his shift sitting in the shop, then went home, and returned the following day to work his regular shift. *Id.* at 28-29. Claimant has not missed any work time because of the 2017 work accident. *Id.* at 29.

Claimant stated he continued to experience significant pain, swelling, and other limitations, including while going up and down stairs, ladders, and hills. HT at 29-30. Nevertheless, he did not seek any treatment for his left knee until October 29, 2018, when he first reported the work incident to Employer's yard hospital.[1] *Id.* At that time, he was diagnosed with an abrasion and "unspecified knee" injury to his left knee with a notation "refer to ortho" for follow-up "as needed." EX 5. Employer thereafter issued its first report of injury, LS-202, on October 31, 2018. Claimant filed his claim on February 12, 2019, which Employer controverted as untimely filed under Sections 12 and 13 of the Act, 33 U.S.C. §§912, 13.

In March 2019, Claimant saw his primary care physician, Dr. Jitesh Vachhani, for his left knee. CX 5; HT at 32. Dr. Vachhani diagnosed chronic left knee pain and referred Claimant to an orthopedist, Dr. Christopher Hutchins. *Id.* Following an examination of Claimant on April 16, 2019, Dr. Hutchins, in a letter dated May 17, 2019, opined Claimant's ongoing knee discomfort, diagnosed as mild chronic peripatellar bursitis, is a consequence of his work-related injury. CX 6. He opined Claimant's ongoing peripatellar condition has resulted in a five percent lower left leg impairment rating based on the Fifth

[1] Claimant stated he did not become aware of Employer's injury reporting procedures until he attended a safety meeting, which occurred well after the date of his accident. HT at 30-31. Once mindful of the requirements, he reported the incident to Employer's yard hospital. *Id.*

Edition of the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*). *Id.*

Claimant was also examined by orthopedic surgeon, Dr. Joseph Lifrak, on July 23, 2019, who diagnosed Claimant with left patellar tendinitis. EX 1. He opined Claimant's current complaints and condition are not causally related to the November 2017 work incident, assigned Claimant a zero percent impairment of his lower left leg under the Sixth Edition of the AMA *Guides*, and stated Claimant can continue working in a full-duty capacity. *Id.* In a report dated February 1, 2020, Dr. John Froehlich, based on a review of materials sent him by Employer, agreed with Dr. Lifrak that Claimant's left knee complaints are not related to November 2017 work incident, he has no permanent impairment, and Claimant can work in a full and regular capacity. EX 3.

Following an informal conference before the district director, the case was referred to the Office of Administrative Law Judges and a formal hearing was held on March 13, 2020, in New London, Connecticut. In his decision, the ALJ found Claimant's current pain symptoms and left knee injury are work-related.[2] The ALJ next found that although Claimant timely notified Employer of his work injury under Section 12, he did not timely file his claim under Section 13. Accordingly, he denied Claimant's claim for disability benefits, but awarded him medical benefits, payable by Employer, under Section 7 of the Act, 33 U.S.C. §907.

On appeal, Claimant challenges the ALJ's determination that his claim for disability benefits was untimely filed. Employer responds, urging affirmance.

Claimant contends the time limitation for filing a claim was tolled pursuant to Section 30(f), 33 U.S.C. §930(f), because Employer did not file its LS-202 First Report of Injury until October 31, 2018. In addition, Claimant asserts the ALJ did not adequately address the awareness component of Section 13(a). He maintains the record establishes he did not become aware of the full character, extent, and impact of the injury until May 17, 2019, when Dr. Hutchins assigned him an impairment rating relating to that injury, so he timely filed his claim pursuant to Section 13 of the Act.

Employer states it was not required to file a report under Section 30(a), 33 U.S.C. §930(a), because Claimant missed no time from work because of his work injury. It

[2] The ALJ's finding that Claimant's left knee injury and current pain symptoms are work-related, Decision and Order at 9-12, and corresponding conclusion that Claimant is entitled to medical benefits, payable by Employer, are affirmed as unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

therefore asserts Section 30(f) is inapplicable. Employer also contends Claimant knew, or should have known, of the full extent of his injury as of the date of the accident or at the very least shortly thereafter. Consequently, Employer maintains the ALJ properly denied Claimant's claim for disability benefits as untimely filed.

Section 13(a) of the Act provides a claimant with one year after he becomes aware, or with the exercise of reasonable diligence should be aware, of the relationship between his traumatic injury and his employment, within which he must file a claim for compensation for the injury. 33 U.S.C. §913(a).[3] Following the decision of the United States Court of Appeals for the District of Columbia Circuit in *Stancil v. Massey*, 436 F.2d 274 (D.C. Cir. 1970), the courts of appeals have held the statute of limitations begins to run only after the employee becomes aware or reasonably should have been aware of the full character, extent, and impact of the injury. Generally, the courts have held the employee is aware of the full character, extent, and impact of the injury when he knows or should know the injury is work-related and will impair his earning power. *Dyncorp Int'l v. Director, OWCP* [*Mechler*], 658 F.3d 133, 45 BRBS 61(CRT) (2d Cir. 2011); *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* [*Heskin*], 43 F.3d 1206 (8th Cir. 1994); *Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130(CRT) (9th Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98(CRT) (4th Cir. 1991); *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, 6 BRBS 100(CRT) (5th Cir. 1984); *see Suarez v. Service Employees Int'l, Inc.*, 50 BRBS 33 (2016).

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[3]Section 13(a) provides:

> 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).

In the absence of substantial evidence to the contrary, Section 20(b) of the Act, 33 U.S.C. §920(b), presumes the claim for benefits was timely filed. *Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991). To rebut the Section 20(b) presumption,[4] the employer must establish either the claimant gained "awareness" of the work-relatedness of the injury before employer did and the one-year period for filing a claim for a traumatic injury has expired, or the employer complied with the requirements of Section 30(a) by filing a first report of injury.[5] *See Bustillo v. Southwest Marine, Inc.*, 33 BRBS 15 (1999); 20 C.F.R. §§702.201-702.205. Knowledge of the work-relatedness of an injury or death may be imputed where the employer knows of the injury or death and has facts that would lead a reasonable person to conclude compensation liability is possible and further investigation is warranted. *Stark v. Washington Star Co*., 833 F.2d 1025, 20 BRBS 40(CRT) (D.C. Cir. 1987).

Based on the relevant evidence of record, Employer is correct, and Claimant incorrect, in interpreting the applicability of Section 30 for purposes of the timeliness of Claimant's claim in this case. The statute as amended in 1984 explicitly requires a Section 30(f) report only when a claimant loses one or more shifts of work due to his work-related injury. *See* 33 U.S.C. §930(a); *Nelson v. Stevens Shipping and Terminal Co.*, 25 BRBS 277 (1992) (Dolder, J., dissenting on other grounds). In this case, as the parties concede and the ALJ found, Claimant missed no time from work because of his 2017 work accident. Decision and Order at 4, 11; HT at 29; Cl's Br. at 7; Emp's Br. at 1, 2, and 3. As the Benefits Review Board held, in *Nelson*, because Claimant missed no time from work "he is not required to file a claim under Section 13 and [his] employer is not required to file a report under Section 30." *Nelson*, 25 BRBS at 284. Consequently, although the ALJ failed to discuss Section 30 when addressing the timeliness of Claimant's claim, his error is

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[4] Section 20(b) provides:

> In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary--
>
> ***
>
> (b) That sufficient notice of such claim has been given.

33 U.S.C. §920(b).

[5] Based on the effect of the Section 20(b) presumption, the employer has the initial burden to produce substantial evidence of its lack of knowledge, then the claimant must show when he attained the requisite awareness for purposes of Section 13(a). *Blanding v. Director, OWCP*, 186 F.3d 232, 237, 33 BRBS 114, 117(CRT) (2d Cir. 1999).

harmless, as Employer was not required to file that report, and we reject Claimant's contention that this tolled the time for filing his claim.

The same cannot be said, however, for the ALJ's failure to discuss the Section 13 factors for assessing the timeliness of Claimant's claim, and we conclude he erred in finding Claimant was required to file his claim within one year of his 2017 work injury.

The ALJ's finding that Claimant had the requisite awareness to commence the Section 13(a) time limitation as of the date of the November 1, 2017, accident is not consistent with applicable law. The United States Court of Appeals for the Second Circuit, within whose jurisdiction this case arises, has held the Section 13(a) statute of limitations does not begin to run until the claimant is aware of the full character, extent, and impact of the harm done to him. *Mechler*, 658 F.3d at 137, 45 BRBS at 63(CRT). The court stated, "the appropriate standard for measuring the timeliness of claims filed under the Act," involves determining when the claimant knows or should know the injury is work-related and will impair his earning power. *Id.* (citing *Paducah Marine Ways v. Thompson*, 82 F.3d 130, 30 BRBS 33(CRT) (6th Cir. 1996)). Absent from the ALJ's timeliness discussion is any consideration of the latter element – when did Claimant know or when should he have known his work injury impaired his earning power?

Although Claimant was aware he sustained a work-related injury in November 2017, as the ALJ found, it is undisputed he did not lose any time from work. Further, he did not seek any treatment for that injury until he reported the accident to Employer's yard hospital on October 29, 2018, and he did not become aware he had suffered any actual impairment until April 16, 2019,[6] when Dr. Hutchins opined he had sustained a five percent permanent impairment of his left lower leg as a consequence of the 2017 work injury.[7] *Mechler*, 658 F.3d at 137, 45 BRBS at 63(CRT). Claimant's claim, filed with the district

[6] Although Dr. Hutchins did not articulate his impairment rating until the May 17, 2019, letter, it may be presumed that rating relates back to his April 16, 2019, examination of Claimant. CX 6.

[7] Any compensation to which Claimant might be entitled for his knee injury would be calculated under Section 8(c)(2) of the Act, 33 U.S.C. §908(c)(2). A loss of wage-earning capacity is presumed in cases arising under the schedule. 33 U.S.C. §908(c)(1)-(20); *see generally Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955); *Burson v. T. Smith & Son, Inc.*, 22 BRBS 124 (1989). Consequently, Dr. Hutchins's assignment of an impairment rating represents the first time Claimant was informed he had an actual loss in wage-earning capacity associated with his work-related left knee injury.

director on February 12, 2019, is timely as a matter of law regardless of which of these two dates Claimant gained awareness.[8] 33 U.S.C. §913(a); *Mechler*, 658 F.3d at 137, 45 BRBS at 63(CRT). In light of this, we reverse the ALJ's finding that Claimant's claim is untimely filed and remand the case for a determination of Claimant's entitlement, if any, to an award of permanent partial disability benefits pursuant to Section 8(c)(2) of the Act, 33 U.S.C. §908(c)(2), (19).

Accordingly, we reverse the ALJ's finding that Claimant's claim for disability benefits is untimely and remand this case for further consideration consistent with this opinion. In all other regards, we affirm the ALJ's Decision and Order Awarding Medical Benefits.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge, concurring:

I concur with my colleagues' opinion that the ALJ erred in finding Claimant's claim untimely filed under 33 U.S.C. §913(a) because he applied an inappropriate awareness standard in reaching that conclusion. *Dyncorp Int'l v. Director, OWCP* [*Mechler*], 658 F.3d 133, 45 BRBS 61(CRT) (2d Cir. 2011). I also concur with their decision to vacate the ALJ's denial of Claimant's disability claim and remand this case for further consideration. However, I depart from the majority's decision to hold that Claimant's claim is timely as a matter of law. Rather than the Board's specifying a date that constitutes Claimant's date of awareness, the ALJ, in the first instance, should make his own awareness finding following a full consideration of the relevant evidence in light of the

[8] The "awareness" standard involves the determination of when Claimant *first* knew or should have known of the relationship between the injury, his work, and any corresponding impairment of his wage-earning capacity. *Mechler*, 658 F.3d 133, 45 BRBS 61(CRT). As such, we reject Employer's position that the issuance of each impairment rating report in a case would conceivably reset the clock on the limitations period and effectively write Section 13(a) out of the statute.

appropriate criteria established by the United States Court of Appeals for the Second Circuit. *Id*. Such determinations of fact are the province of the ALJ, not the Board. *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982) (The Board is not authorized to make findings of fact, and thus may not supplement an inadequate decision with its own findings and citations to the record). For this reason, I would vacate, rather than reverse, the ALJ's finding that Claimant's claim is untimely and remand the case for further consideration of this issue. On remand, I would instruct the ALJ to make a finding as to the date upon which Claimant knew or should have known that the injury would impair his earning power and from there determine whether Claimant filed a timely claim. If the ALJ finds Claimant's claim timely, he must then address any remaining issues pertaining to Claimant's entitlement to disability benefits. I concur with the majority decision in all other regards.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge