BRB No. 90-2005

MARVIN E. VAUGHN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER on MOTION for RECONSIDERATION *EN BANC*

Appeal of the Decision and Order Awarding Medical Benefits Only of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

John L. Hunter (Cumbest, Cumbest, Hunter and McCormick), Pascagoula, Mississippi, for claimant.

Traci M. Castille (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer has timely filed a Motion for Reconsideration *En Banc* of the Board's Decision and Order in *Vaughn v. Ingalls Shipbuilding, Inc.*, 26 BRBS 27 (1992). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407(b). In its decision, the Board reversed the administrative law judge's determination that claimant's claim was not timely filed under Section 13 of the Act, 33 U.S.C. §913, and remanded the case to the administrative law judge for disposition of the remaining issues. We hereby grant employer's request to reconsider this case *en banc*, but deny the relief requested.

To recapitulate, claimant sought benefits under the Longshore and Harbor Workers' Compensation Act (the Act), for a work-related hearing loss based on an audiometric evaluation performed on December 6, 1986. Prior to this procedure, claimant had undergone an audiometric evaluation on January 21, 1975. Claimant did not receive the 1975

audiogram or its accompanying letter; rather, in 1978, the results of that evaluation were sent to claimant's attorney at that time. In his Decision and Order, the administrative law judge found that the receipt of the 1975 audiogram and report by claimant's attorney in 1978 commenced the period for filing a timely claim and that, therefore, claimant failed to timely file his claim for compensation. Accordingly, the administrative law judge denied claimant's request for compensation but found employer liable for the medical expenses arising out of claimant's injury.

On appeal, claimant challenged the administrative law judge's denial of his claim. The Board, in its decision, reversed the administrative law judge's determination that claimant's attorney's receipt of the 1975 test results commenced the period for filing a timely claim, holding that the running of the limitations period begins only upon claimant's actual physical receipt of an audiogram, with its accompanying report, which indicates that claimant has suffered a loss of hearing.

In its motion for reconsideration, employer contends that the Board erred in not finding that receipt of an audiogram and report by claimant's attorney constitutes constructive receipt by claimant. Specifically, although acknowledging the plain language of the Act and its accompanying regulations, employer asserts that the Act does not set aside the principles of agency.

We reject employer's contention of error. As the Board set forth in its decision, the unequivocal language of the Act provides that the time for filing a claim for a work-related hearing loss under Section 13, 33 U.S.C. §913, shall not commence until *the employee* has received a copy of the audiogram with accompanying report. Section 8(c)(13)(D) of the Act, 33 U.S.C. §913(c)(13)(D), requires receipt of specific documents by a specific person, the employee; nothing in the statute or regulations states that receipt by a representative is equivalent to receipt by the employee. *See Vaughn*, 26 BRBS at 29; *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301 (1989); *Grace v. Bath Iron Works Corp.*, 21 BRBS 245 (1988).

Employer asserts that it is generally held that notice given by an attorney is the act of the party represented and that notice to an attorney is effective as notice to the client when the notice is received in the course of the transaction in which the attorney is acting. *See Link v. Wabash R. Co.*, 370 U.S. 626 (1962). Nonetheless, the courts have found that notice to, or knowledge by, the attorney is not notice to the client where there is a clear intent by Congress to the contrary. *See Decker v. Anheuser-Busch*, 632 F.2d 1221 (5th Cir. 1980). Such Congressional intent regarding the commencement date of the statute of limitations period in hearing loss cases is clearly evidenced, both in the Act itself, which provides only for receipt by the employee, and the legislative history accompanying this provision. The conference report accompanying the Act as amended in 1984 states that the amendment provides, with regard to hearing loss, that the "time period for filing a claim does not begin running until an employee is *given a copy* of the audiogram." H.R. Rep. No. 98-1027, 98th Cong., 2d Sess. 28 (1984)(emphasis added). *See Ranks*, 22 BRBS at 301; *Swain v. Bath Iron Works Corp.*, 18 BRBS 148 (1986). Thus, employer's arguments regarding the doctrine of constructive receipt in other circumstances are simply inapplicable, as Congress, in amending the Act, specifically provided that the employee must physically receive a copy of the audiogram and accompanying report. This requirement is consistent with Sections 12 and 13 in general, which

provide that the time periods for giving notice and filing a claim commence when the *employee or claimant* is aware or should have been aware of the relationship between the injury and employment. The plain language of the Act manifests clear Congressional intent that in a hearing loss claim these periods do not commence until the employee's actual physical receipt of the audiogram and report linking his hearing impairment to his employment. Accordingly, as employer has failed to make any persuasive argument as to why the Board's initial determination is in error, and based on the clear and unequivocal language of Section 8(c)(13)(D), its promulgating regulation at 20 C.F.R. §702.221(b), and its accompanying legislative history, the panel's determination is affirmed.

While we reaffirm the Board's prior decision in this case regarding receipt of an audiogram, we note that the decision also stated that hearing loss due to long-term exposure to noise is an occupational disease and that, as such, a claim for compensation as a result of a loss of hearing shall be timely if filed within the time period set forth in Section 13(b)(2) of the Act, 33 U.S.C. §913(b)(2)(1988). Subsequent to the issuance of the Board's decision in this case, however, the United States Supreme Court issued its decision in *Bath Iron Works Corp. v. Director, OWCP*, U.S. , 113 S.Ct. 692, 26 BRBS 151 (CRT)(1993), in which the Court stated that a worker who sustains a work-related hearing loss suffers disability simultaneously with his or her exposure to excessive noise. The Court concluded therefore, that hearing loss cannot be considered "an occupational disease which does not immediately result in disability" under Section 10(i), 33 U.S.C. §910(i). As Section 13(b)(2) of the Act contains language similar to Section 10(i), applying to claims "for compensation for death or disability due to an occupational disease or disability which does not immediately result in such death or disability," we hereby modify the Board's decision to reflect the inapplicability of Section 13(b)(2) to the case at bar.

Accordingly, employer's motion for reconsideration *en banc* is granted, but the relief requested is denied. 20 C.F.R. §802.409.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge