BRB No. 12-0612

TIMOTHY FROMER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GLOBAL TERMINAL AND CONTAINER SERVICES, INCORPORATED	)	DATE ISSUED: 04/09/2013
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Order Granting Employer's Motion for Summary Judgment of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Robert J. DeGroot, Newark, New Jersey, for claimant.

Francis M. Womack (Field Womack & Kawczynski), South Amboy, New Jersey, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Order Granting Employer's Motion for Summary Judgment (2012-LHC-00253) of Administrative Law Judge Theresa C. Timlin 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*. (the Longshore 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).

On July 18, 2003, claimant sustained an injury to his right knee during the course of his employment with employer. EX 1. Employer voluntarily paid claimant temporary total disability benefits from July 19 through August 3, 2003, and from August 12 through September 7, 2003. EXs 2-5. By cover letter dated September 6, 2003, Judy Yamin, a claims examiner for employer's insurance carrier, forwarded the September 2, 2003 report of Dr. Faccone, claimant's treating orthopedist, to the Office of Workers' Compensation Programs (OWCP).[1] EXs 9, 10. Employer also filed a Notice of Final Payment or Suspension of Compensation Payments (LS-208) dated September 8, 2003 with the OWCP indicating that the reason for the termination of claimant's benefits was claimant's return to work on September 8, 2003. EX 5. Employer paid no additional compensation or medical benefits to claimant after September 8, 2003. CX 6; Emp. Aff.-No. 6. Over five years later, lay representative Sonnie Mignano filed a Notice of Retainer dated October 22, 2008, with the OWCP with respect to claimant's July 18, 2003 work-related injury. EX 8.

Employer subsequently moved for summary decision, contending that the claim for compensation was not timely filed and therefore should be dismissed.[2] In response, claimant asserted that Dr. Faccone's September 2, 2003 report, which was received by the OWCP on September 15, 2003, constituted a timely claim for compensation.

In her order granting employer's motion, the administrative law judge rejected claimant's contention that Dr. Faccone's September 2, 2003 report constitutes a timely-filed claim for compensation, and consequently dismissed the claim as untimely. Claimant, who is presently represented by counsel, appeals the administrative law judge's decision, and employer responds, urging affirmance of the dismissal of the claim.

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[1]Dr. Faccone's September 2, 2003 report included the following recommendation:

> Plan: I do think that the patient should continue physical therapy, but at this point in time, after six to seven weeks he can probably be returned to work. I would like to check him back in about three weeks' time to assess his progress.

EX 10. According to employer's Affidavit in Support of Motion for Summary Judgment, claimant failed to appear for a follow-up appointment with Dr. Faccone scheduled for September 23, 2003. Emp. Aff.-No. 4f.

[2]Employer stated that although no formal Claim for Compensation (Form LS-203) was ever filed by claimant with the OWCP, the filing of the Notice of Retainer by Mr. Mignano constitutes the filing of a claim albeit not a timely-filed claim.

In determining whether to grant a party's motion for summary decision, the administrative law judge must determine, after 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. *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006); *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. §§18.40(c), 18.41(a). For the reasons below, we conclude that the administrative law judge properly granted employer's motion for summary decision.

Section 13(a) of the Act provides a claimant with one year after he becomes aware of the relationship between his traumatic injury and his employment within which he may file a claim for compensation for the injury with the district director.[3] 33 U.S.C. §913(a); 20 C.F.R. §702.221; *C & C Marine Maint. Co. v. Bellows*, 538 F.3d 293, 42 BRBS 37(CRT) (3d Cir. 2008); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998). The courts have liberally construed the Longshore Act when determining whether a valid claim for compensation has been filed, and have held that any writing produced by or on behalf of the claimant which discloses an intention to assert a right to compensation under the Act may suffice as a claim. *See, e.g., Jones Stevedoring Co. v. Director, OWCP [Taylor]*, 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997); *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); *Fireman's Fund Ins. Co. v. Bergeron*, 493 F.2d 545 (5th Cir. 1974); *McKnight*, 32 BRBS at 169; *see also U.S. Industries/Federal Sheet Metal, Inc., v. Director, OWCP*, 455 U.S. 608, 613 n.7, 14 BRBS 631, 633 n.7 (1982). In the absence of substantial evidence to the contrary, Section 20(b) of the Act, 33 U.S.C. §920(b), presumes that the claim was timely filed.[4] *See DynCorp Int'l v. Director, OWCP*, 658 F.3d 133, 45 BRBS 61(CRT) (2d Cir. 2011), *aff'g E.M. [Mechler] v. DynCorp Int'l*, 42 BRBS 73 (2008); *Bath Iron Works Corp. v. U.S. Dep't of Labor [Knight]*, 336 F.3d 51, 37 BRBS 67(CRT) (1st Cir. 2003).

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[3]If voluntary payments were made, as here, claimant has one year from the last payment to file, unless he was unaware of the true nature, extent and impact of his injury. *C & C Marine Maint. Co. v. Bellows*, 538 F.3d 293, 42 BRBS 37(CRT) (3d Cir. 2008). In the case before us, claimant does not contend that he did not possess the requisite awareness at the time employer made its last voluntary payment of compensation.

[4]In this case, we note that employer filed a First Report of Injury (LS-202) pursuant to Section 30(a) of the Act, 33 U.S.C. §930(a), and, thus, the Section 13(a) limitations period was not tolled pursuant to Section 30(f), 33 U.S.C. §930(f). EX A. *See Blanding v. Director, OWCP*, 186 F.3d 232, 33 BRBS 114(CRT) (2d Cir. 1999).

Before the administrative law judge, claimant argued that employer's filing of Dr. Faccone's reports with the OWCP satisfied the filing requirements of Section 13(a). In her decision, the administrative law judge acknowledged that, under appropriate circumstances, an attending physician's report indicating the possibility of a continuing disability that is filed with the OWCP within the requisite time period may meet the filing requirements of Section 13(a). Order at 3; *see Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990); *Peterson v. Washington Metro. Transit Auth.*, 17 BRBS 114 (1984); *see also Walker v. Rothschild Int'l Stevedoring Co.*, 526 F.2d 1137, 3 BRBS 6 (9th Cir. 1975). As correctly found by the administrative law judge, however, in order to constitute a claim pursuant to Section 13(a), such a report also must satisfy the basic requirement applicable to all informal substitutes for a formal claim; that is, the writing must disclose the claimant's intent to assert a right to compensation under the Act. Order at 3. Thus, we reject claimant's contention that the mere filing of an attending physician's report with the OWCP, within the requisite time period, is sufficient, in and of itself, to meet the Section 13(a) filing requirements. Claimant's argument ignores the law that "any letter or notice from which it may be inferred reasonably that a claim for compensation is being made is sufficient" to constitute a claim.[5] *Peterson*, 17 BRBS at 116. *See also Taylor*, 133 F.3d at 691, 31 BRBS at 184(CRT); *Hizinski*, 125 F.3d at 1167, 31 BRBS at 115-16(CRT); *Fireman's Fund Ins. Co.*, 493 F.2d at 547; *McKnight*, 32 BRBS at 169.

In this case, the administrative law judge found that *employer* filed Dr. Faccone's reports in conjunction with its filing of its LS-208 form advising the OWCP of employer's final payment of compensation benefits to claimant. Order at 3. The administrative law judge further found that claimant took no action for over five years following employer's termination of his benefits. *Id.* at 3-4. The administrative law judge therefore rationally concluded that, as employer's filing of Dr. Faccone's reports with the OWCP did not evince an intention by claimant to file a claim, the filing of these reports does not satisfy the filing requirements of Section 13(a). *Id.*

[5]In *Peterson*, the claimant argued on appeal that his submission of various medical reports constituted a timely filed claim. The Board held that the reports submitted by the claimant were insufficient to satisfy the filing requirements of Section 13(a) as they did not indicate the existence of any disability for work nor did they anticipate any permanent effects. 17 BRBS at 116. In *Chong*, 22 BRBS 242, the claimant's submission of the reports of her attending physician which indicated the existence of permanent disability was held to satisfy the Section 13(a) filing requirements. Implicit in the Board's decision was that the filing of these reports by the claimant signified her intention to assert a right to compensation. In this case, Dr. Faccone's report states that claimant can return to work and it does not give a permanent impairment rating. EX 10.

Claimant's assignment of error to the administrative law judge's grant of summary decision is without merit; contrary to claimant's assertions on appeal, no genuine issue of material fact exists with respect to whether the requirements of Section 13(a) were satisfied. The law is clear that the writing filed with the OWCP must disclose the claimant's intention to assert a right to compensation. *See Taylor*, 133 F.3d at 691, 31 BRBS at 184(CRT); *Hizinski*, 125 F.3d at 1167, 31 BRBS at 115-16(CRT); *Fireman's Fund Ins. Co.*, 493 F.2d at 547; *McKnight*, 32 BRBS at 169; *Peterson*, 17 BRBS at 116. In this case, it is undisputed that employer filed Dr. Faccone's reports in conjunction with its notice of final payment of compensation. As it is not possible to reasonably infer that a claim was being made by claimant from employer's filing of these documents with the OWCP, nor is it reasonable to infer that claimant intended to file a claim, the administrative law judge properly found that employer is entitled to summary decision regarding the issue of whether claimant filed a timely claim for compensation. We therefore affirm the administrative law judge's dismissal of the claim as untimely filed.

Accordingly, the administrative law judge's Order Granting Employer's Motion for Summary Judgment 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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JUDITH S. BOGGS
Administrative Appeals Judge