

BRB No. 97-1054

OTIS F. DUFFEY, JR.)
)
 Claimant-Petitioner)) DATE ISSUED: _____
)
 v.)
)
 NEWPORT NEWS SHIPBUILDING)
 AND DRY DOCK COMPANY)
)
 Self-insured)
 Employer-Respondent)) DECISION and ORDER

Appeal of the Order on Remand of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Matthew H. Kraft (Rutter and Montagna, L.L.P.), Norfolk, Virginia, for claimant.

James M. Mesnard (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order on Remand (88-LHC-3533, 88-LHC-3534) of Administrative Law Judge Michael P. Lesniak 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 Act). We must affirm the findings of fact and the conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This case is before the Board for the second time. To briefly reiterate the facts, claimant suffered a cervical disc injury on August 12, 1975, and a lower back injury on September 27, 1982, while working for employer as a material supply clerk. After each injury, claimant was unable to work for a period of time, but returned to

light duty work as a material supply clerk.¹ Employer voluntarily paid temporary total disability compensation for the periods of disability immediately following the two injuries. It is undisputed that claimant filed a timely claim for benefits for the 1975 injury.

Claimant lost additional time from work due to his back condition, beginning in July 1984, but returned in February 1985 to his previous work as a material supply clerk. He did not receive compensation for time lost during this period. Claimant continued working in his supply clerk job regularly from February 1985 until September 15, 1987, when he was fired allegedly for insubordination in failing to follow a supervisor's order. At that time, claimant filed an informal claim for his 1982 injury and, shortly thereafter, a grievance in an effort to get his job back. In December 1987, claimant relocated to Hudson, North Carolina. In March 1988, after claimant prevailed on his grievance, employer offered claimant the opportunity to return to his former employment at the shipyard, which claimant declined. On March 7, 1988, claimant obtained a job with Siecor Corporation (Siecor) as a machine operator helper, and continued to perform this job on a full-time basis until he was laid off on May 24, 1988, due to a lack of work. EX-25. Claimant sought permanent total disability compensation commencing September 15, 1987, based upon his average weekly wage at the time of the 1982 injury.

In his initial Decision and Order, the administrative law judge determined that claimant's claim for the September 1982 back injury was time-barred pursuant to Section 13(a) of the Act, 33 U.S.C. §913(a), because claimant was aware of the September 1982 injury and its relation to his employment contemporaneous with its occurrence and did not file his claim within one year of March 23, 1983, when employer made its last voluntary payment of compensation. The administrative law judge, however, awarded claimant permanent total disability compensation commencing September 15, 1987, based on his average weekly wage at the time of the 1975 work injury, \$263.97. In a Supplemental Decision and Order, the administrative law judge granted employer relief pursuant to Section 8(f), 33 U.S.C. 908(f). The Director, Office of Workers' Compensation Programs, filed a motion for reconsideration which was denied by Order dated June 19, 1992. On appeal, employer challenged the administrative law judge's award of total disability

¹In the initial period of disability after the 1982 injury, claimant underwent lower back surgery. Following the 1975 cervical injury, he underwent a hemilaminectomy at C7-T1. In August 1984, Dr. Sahni performed a laminectomy and foraminectomy at T1-T2, and on August 1, 1985, a right anterior interosseous peripheral nerve and right carpal tunnel release. The latter surgeries were related to the 1975 rather than the 1982 injury.

compensation while claimant cross-appealed the administrative law judge's finding that the claim for the 1982 injury was time-barred pursuant to Section 13(a).

In its decision, the Board affirmed the award of permanent total disability compensation for the 1975 injury. In addition, the Board vacated the administrative law judge's finding that the claim for the 1982 injury was time-barred under Section 13(a) and remanded for him to reconsider this issue, holding that his analysis did not comport with the controlling legal standard in that he did not consider when claimant became aware of a permanent injury likely to impair his wage-earning capacity. *Duffey v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 92-1962/A (June 13, 1993)(unpublished).

In his Order on Remand, the administrative law judge determined that claimant knew or should have known that his 1982 injury had impaired his earning capacity by no later than June 13, 1986, because on that date Dr. Singh Sahni advised him that his right arm was never going to be the same as his left arm and told him to return to work with his current restrictions, which the administrative law judge characterized as severe in that they limited his lifting to no more than five pounds with his right hand and no more than fifteen with his left, and precluded his sitting for extended periods. Order on Remand at 2; EX-21, p.8. Inasmuch as the September 15, 1987, claim was not filed within one year of this date, he reaffirmed his prior determination that the claim for the 1982 back injury was time-barred under Section 13(a). Claimant now appeals the administrative law judge's finding that the claim for the 1982 injury is time-barred. Employer responds, requesting affirmance of the decision below.

Section 13(a) applies in cases involving traumatic injuries and requires that a claimant file his claim for benefits within one year of the time he becomes aware, or with the exercise of reasonable diligence should be aware, of the relationship between his injury and his employment. 33 U.S.C. §913(a). See *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990); *Gregory v. Southeastern Maritime Co.*, 25 BRBS 188 (1991). In addition, the United States Courts of Appeals to address this issue have uniformly held that the time for filing a claim under Section 13(a) does not begin to run until the injured employee becomes aware of the full character, extent, and impact of the harm done to him as a result of the employment-related injury. See *Duluth, Missabe & Iron Range Ry. Co. v. Director, OWCP*, 43 F.3d 1206 (8th Cir. 1994); *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98 (CRT) (4th Cir. 1991); *Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130 (CRT) (9th Cir. 1991); *Brown v. ITT/Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75 (CRT) (D.C. Cir. 1990); *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990). Thus, claimant is not "aware" for Section 13

purposes, until he knows, or has reason to know, that he has sustained a permanent injury which is likely to impair his wage-earning capacity. See *J.M. Martinac Shipbuilding v. Director, OWCP [Grage]*, 900 F.2d 180, 23 BRBS 127 (CRT) (9th Cir. 1990); *Marathon Oil Co. v. Lunsford*, 733 F.2d 1139, 16 BRBS 100 (CRT) (5th Cir. 1984); see also *Bath Iron Works Corp. v. Galen*, 605 F.2d 583, 10 BRBS 863 (1st Cir. 1979). The Section 20(b), 33 U.S.C. §920(b), presumption applies to Section 13, placing the burden of proof on employer to produce substantial evidence that the claim was not timely filed. *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989).

We initially agree with claimant that the administrative law judge erred in finding that Dr. Sahni's June 13, 1986, report to Dr. Bobbit, employer's company doctor, was sufficient to establish claimant's date of awareness for his September 27, 1982, back injury under Section 13(a). EX-21, p. 8. As claimant avers, in determining that his date of awareness occurred no later than June 13, 1986, the administrative law judge erred in relying on statements contained in Dr. Sahni's report of that date which refer to claimant's right and upper left extremity and the restrictions relating to those injuries to find claimant's date of awareness for his 1982 back injury. Although in discussing the condition of claimant's back later in this report, Dr. Sahni does note that if claimant's symptoms worsened, he might eventually need some kind of decompression surgery, he also described claimant as doing well with conservative treatment, stated that he was extremely cooperative and eager to continue his present job, and noted that he did not foresee any problems in his future management. Thus, the portions of Dr. Sahni's June 13, 1986, report which actually refer to claimant's back condition, while not explicitly addressed by the administrative law judge, are clearly insufficient as a matter of law to establish that claimant was aware or should have been aware that his 1982 work-related back injury had caused, or was likely to cause, an impairment of his earning power as of that date. That claimant remained unaware of a compensable injury for purposes of commencing the Section 13(a) statute of limitations running as of June 13, 1986, is further buttressed by Dr. Sahni's subsequent March 13, 1987, report which states that claimant "has continued working in his present occupation and seems quite happy with the same," and that while he considers claimant to be right hand disabled, it does not affect his ability to perform his present job. EX-21, p. 10.

In determining that claimant was aware of his 1982 back injury for purposes of commencing the Section 13(a) statute of limitations running as of June 13, 1986, the administrative law judge also noted that permanent restrictions had been imposed upon claimant regarding his back which precluded him from sitting for

extended periods of time. Order on Remand at 2.² In order for the Section 13(a) statute of limitations to commence, however, claimant must be aware that he has suffered a compensable injury. *Bechtel Associates, P.C. v. Sweeney*, 834 F.2d 1029, 20 BRBS 49 (CRT)(D.C. Cir. 1987). The Section 13 limitation period begins to run only when the employee knows, or should know, the true nature of his condition, *i.e.*, that it interferes with his employment by impairing his capacity to work, and that it is causally related to his employment. *Parker*, 935 F.2d at 25, 24 BRBS at 110 (CRT). In the present case, the record reflects that despite the imposition of the aforementioned restrictions, claimant continued to perform his supply clerk job for employer regularly from February 1985 up until the time he was fired on September 15, 1987. Inasmuch as there is no evidence of record which establishes that claimant was aware, or should have been aware, of the disabling effects of the 1982 back injury, at any time prior to his September 15, 1987, termination, we reverse the administrative law judge's finding that the claim filed that same date was untimely and hold that the claim for the September 27, 1982 back injury is timely as a matter of law. See *Gregory*, 25 BRBS at 188; see also generally *Paducah Marine Ways v. Thompson*, 82 F.3d 130, 30 BRBS 130 (CRT) (6th Cir. 1996). The case is accordingly remanded for consideration of all remaining issues with regard to claimant's 1982 back injury claim.

²In addition, claimant's restrictions mandated that he be able to change his position frequently and get off his feet periodically. See EX-18, pp. 59-62.

Accordingly, the Order on Remand is reversed, and this case is remanded for further proceedings in accordance with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge