BRB No. 99-1169

SALVADOR ALCANTARA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CADDELL DRY DOCK AND REPAIR COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Order of Dismissal of Claim of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Philip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Christopher J. Field (Weber Goldstein Greenberg & Galllagher), Jersey City, New Jersey, for employer/carrier.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Order of Dismissal of Claim (98-LHC-2964) of Administrative Law Judge Ralph A. Romano 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 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).

Claimant, a burner/welder, filed a claim seeking permanent total disability benefits

commencing March 28, 1996, for his work-related asthma, after he was temporarily laid off from his job at employer's facility.[1] The administrative law judge found that claimant's claim was untimely as it was filed on June 10, 1998, after the requisite two-year period from the date of claimant's awareness of the relationship between his disability, disease, and employment in April 1996. *See* 33 U.S.C. §913(b)(2). The administrative law judge found that there was no question that claimant was aware, as early as 1992, that his asthma was work-related, and he found that claimant became aware that his work-related asthma resulted in disability in April 1996 when Dr. Capatolo advised claimant that his shortness of breath disabled him. Thus, the administrative law judge granted employer's motion to dismiss claimant's claim.

On appeal, claimant challenges the administrative law judge's order dismissing his claim as untimely filed. Employer responds in support of the administrative law judge's dismissal of the claim, but asserts that if the Board vacates the administrative law judge's dismissal order, it should remand this case for further development of the evidence on all issues.

Claimant contends that the administrative law judge erred in finding his claim untimely filed by inferring that because claimant knew in 1992 that he had work-related asthma, and in April 1996 that his asthma was disabling, he therefore was aware that his work-related asthma was disabling in April 1996. Claimant asserts that, contrary to the administrative law judge's finding, he was first aware of the work-relatedness of his disabling asthma on June 2, 1998, when so told by Dr. Greenfield, and that his claim was timely filed on June 10, 1998, just eight days later. Consequently, claimant requests that the Board hold his claim timely filed, and vacate the administrative law judge's dismissal of his claim.

[1]Claimant was told to report back to work on April 4, 1996, but did not return, alleging he is unable to work due to his injury.

Section 13(b)(2) of the Act provides that in the case of a disability due to an occupational disease, in this case asthma, the claim for benefits must be filed within two years after 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 disability. 33 U.S.C. §913(b)(2); 20 C.F.R. §702.222(c). In the instant case, the administrative law judge found that claimant was aware in 1992 that he had occupational asthma and in April 1996 that he was disabled due to his asthma. Thus, the administrative law judge found that by April 1996, claimant was aware that his work-related asthma was disabling. The administrative law judge's finding that claimant was aware as early as 1992 that his asthma was work-related is supported by claimant's testimony that he went to see Dr. Sacony in 1992 for shortness of breath, which the physician diagnosed as asthma related to claimant's work, which required claimant to inhale smoke, paint, dust, dirt, and fumes.[2] Tr. at 28, 47-48. Furthermore, the administrative law judge's finding that claimant was aware that his asthma was disabling in April 1996 is supported by claimant's admission that Dr. Capatolo told him in April 1996 that his shortness of breath rendered him unable to work.[3] Tr. at 34, 66. Indeed, claimant never returned to work after his hospitalization in April 1996 for shortness of breath. Tr. at 62-63. Despite claimant's assertions before the administrative law judge and on appeal, the administrative law judge rationally inferred from this evidence that claimant also was aware of the work-relatedness of his disabling asthma in April 1996. *See Stark v. Washington Star Co.*, 833 F.2d 1025, 20 BRBS 40 (CRT)(D.C. Cir. 1987); *see generally Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); Order of Dismissal of Claim at 2-3. Thus, we affirm the administrative law judge's finding that claimant was aware or should have been aware in April 1996 that his work-related asthma was disabling, as it is rational and supported by substantial evidence.

Although we affirm the administrative law judge's finding that claimant was aware of the relationship between his disability, disease, and employment in April 1996, we cannot affirm the administrative law judge's Order of Dismissal, as he did not address Section 30(a) of the Act, 33 U.S.C. §930(a), which tolls the Section 13 filing period under specified circumstances, nor did he apply the Section 20(b), 33 U.S.C. §920(b), presumption that the claim is timely filed in the absence of substantial evidence to the contrary.[4] *See Shaller v.*

[2]Claimant concedes on appeal that he was told in 1992 that he had occupational asthma. Cl. Br. at 9.

[3]Claimant's testimony is supported by his hospital records from April 1996 wherein Dr. Capatolo indicates that claimant was disabled on March 28, 1996, and that the physician first treated claimant on April 4, 1996. Cl. Ex. 2 at 34.

[4]Claimant did not raise this issue on appeal; however, the presumption of timeliness is at issue in all cases involving Section 13. Thus, we reject employer's contention that the issue is waived because claimant did not raise it.

Cramp Shipbuilding & Dry Dock Co., 23 BRBS 140 (1989). In order to rebut the Section 20(b) presumption, employer must first establish that it complied with the requirements of Section 30(a). Section 30(a) provides in pertinent part:

> Within ten days from the date of an injury which causes loss of one or more shifts of work, or death or from the date that the employer has knowledge of a disease of infection in respect of such injury, the employer shall send to the Secretary a report setting forth (1) the name, address, and business of the employer; (2) the name, address, and occupation of the employee; (3) the cause and nature of the injury or death; (4) the year, month, day, and hour when and the particular locality where the injury or death occurred; and (5) such other information as the Secretary may require.

33 U.S.C. §930(a); *see also* 20 C.F.R. §§702.201-702.205. Section 30(f), 33 U.S.C. §930(f), provides that where employer has been given notice or has knowledge of any injury and fails to file the Section 30(a) report, the statute of limitations provided in Section 13(a) does not begin to run until such report has been filed. *See Blanding v. Director, OWCP*, 186 F.3d 232, 33 BRBS 114 (CRT)(2d Cir. 1999); *Nelson v. Stevens Shipping & Terminal Co.*, 25 BRBS 277 (1992); *Ryan v. Alaska Constructors, Inc.*, 24 BRBS 65 (1990). Thus, for Section 30(a) to apply, the employer must have notice of the injury or knowledge of the injury and its work-relatedness; the employer may overcome the Section 20(b) presumption by proving .it never gained knowledge or received notice of the injury for Section 30 purposes. *See Stevenson v. Linens of the Week*; 688 F.2d 93, 14 BRBS 304 (D.C. Cir. 1982); *Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991); s*ee also Stark*, 833 F.2d at 1025, 20 BRBS at 40 (CRT). Knowledge of the work-relatedness of an injury may be imputed where employer knows of the injury and has facts that would lead a reasonable person to conclude that compensation liability is possible so that further investigation is warranted. *See Steed*, 25 BRBS at 218; *Kulick v. Continental Baking Corp.*, 19 BRBS 115 (1986)(same standard as under Section 12(d)(1) of the Act, 33 U.S.C. §912(d)(1)).

While employer argues that the administrative law judge's failure to apply the Section 20(b) presumption is harmless, this is not the case. The administrative law judge granted employer's Motion for Summary Decision and ordered the dismissal of claimant's claim in this case, even though there remains a genuine issue of material fact as to whether employer rebutted the Section 20(b) presumption.[5] *See Dunn v. Lockheed Martin Corp.*, 33 BRBS 204

[5]The fact that neither party agreed that the Section 13 issue was fully developed and that neither party waived its right to offer additional proof on the Section 13 issue if the Motion for Summary Decision were denied or if the appellate process resulted in remand supports a holding that there exists a genuine issue of material fact on this issue. *See* Emp. Br. at 17.

(1999); 29 C.F.R. §§18.40-18.41. Thus, we remand the case to the administrative law judge to determine whether employer rebutted the Section 20(b) presumption that claimant timely filed his claim. *See Blanding*, 186 F.3d at 232, 33 BRBS at 114 (CRT); *Bustillo v. Southwest Marine, Inc.*, 33 BRBS 15 (1999). On remand, the administrative law judge may reopen the record so that the parties may complete the evidentiary development of the record in this case.[6] *See Wayland v. Moore Dry Dock*, 21 BRBS 177 (1988); 20 C.F.R. §§702.338, 702.339; 29 C.F.R. §18.54. If, on remand, the administrative law judge finds the claim timely filed, he must consider all remaining issues raised by the parties.

Accordingly, the administrative law judge's finding that claimant's date of awareness of the relationship between his disability, disease, and employment is April 1996 is affirmed. Nonetheless, the administrative law judge's Order of Dismissal of Claim is vacated, and the case is remanded for further consideration consistent with this decision.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting

[6]The administrative law judge's Order of Dismissal was issued before Employer's Exhibit 6 (a more extensive set of claimant's records from St. Vincent's Hospital found at Claimant's Exhibit 2) and the deposition of Dr. Capatalo were admitted into the record. Moreover, at the hearing the parties requested that the record be held open for the admission of the depositions of Drs. Burke, Karetzky, and Greenfield, as well as for Dr. Burke's report. Tr. at 14. The administrative law judge granted the parties' request. However, this evidence was never submitted post-hearing by the parties. Dr. Burke's March 23, 1999, examination was rescheduled for April 1999, and his report was to be forwarded upon employer's receipt of it; however, it is not contained in the record. *See* Emp. Ex. 4.

Administrative Appeals Judge