U.S. Department of Labor

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

BRB No. 19-0041

BRENDA BRIGHAM-BEASLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
METRO CRUISE SERVICES	)	
	)	DATE ISSUED: 08/06/2019
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Granting Summary Decision of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

Derrick H. Muhammad (Law Office of Derrick H. Muhammad), Oakland, California, and Amanda F. Benedict (Law Office of Amanda F. Benedict), San Diego, California, for claimant.

Laura G. Bruyneel (Bruyneel Law Firm, L.L.P.), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Granting Summary Decision (2018-LHC-00344) of Administrative Law Judge Steven B. Berlin rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33

U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant injured the middle finger on her left hand on April 6, 2014, while working for employer when she put up her hand to stop a laundry cage that was tipping or rolling toward her. She stopped working immediately. In August 2014, she noticed shoulder symptoms and pain with increased use of her left upper extremity. Dr. Gonzales, claimant's treating physician, believed the pain was consistent with a shoulder injury from the work incident and that claimant was fit only for modified duty.[1] CX 5.[2] On August 9, 2014, having received Dr. Gonzales's report, employer filed a notice of controversion, disputing any shoulder injury and questioning whether claimant could return to work in light of the improvement in her finger. CX(2) 1. Employer paid claimant temporary total disability benefits until August 15, 2014. CXs 9-10; CX(2)s 1, 10.

Between late August 2014 and March 2015, Dr. Gonzales and Dr. Schwartz, an orthopedic specialist, suspected, and then diagnosed, carpal tunnel syndrome (CTS) in claimant's finger and possible rotator cuff syndrome in her shoulder with concern there might be a tear. CXs 5-6; CX(2) 6. In January 2015, employer requested an informal conference, and in February 2015, the claims examiner postponed the conference after speaking with claimant, who was not then represented by counsel. CXs 1-3; Emp. Reply to Opp. Br. at exh. 1. Claimant returned to work on September 10, 2015, and filed a claim on October 2, 2015. Amended M/SD at exhs. 4, 6.

Employer filed a motion for summary decision, asserting claimant's claim was not timely filed. The administrative law judge addressed the facts in the light most favorable

[1] Claimant informed the doctor, and the administrative law judge accepted the statement as true, that she could not return to work with employer until she could return to full duty. Decision and Order at 3, 10; CX 5.

[2] The exhibits are documents attached to the parties' various pleadings before the administrative law judge. CX refers to the exhibits attached to claimant's opposition to employer's motion for summary decision (M/SD). CX(2) refers to those attached to her opposition to the amended motion. Employer's exhibits are identified by the name of the pleading filed.

to claimant and granted employer's motion.[3] Claimant appeals, and employer responds, urging affirmance.[4]

Claimant contends the administrative law judge erred in granting employer's motion for summary decision because there is a genuine issue of fact concerning her date of awareness of the work-relatedness of her disability. Further, she contends her claim for compensation was timely filed. Alternatively, claimant asserts that the medical records submitted to employer, coupled with the memorialized communications with the district director's office, satisfied the Section 13, 33 U.S.C. §913, filing requirement. We reject claimant's contentions.

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 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); *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990); 29 C.F.R. §18.72.

Section 13(a) of the Act, 33 U.S.C. §913(a), requires a claim for compensation to be filed within one year of the injury. It provides in pertinent part:

> 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. * * * The time for filing a claim shall not begin to run

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[3] Employer filed its original motion for summary decision on May 7, 2018, claimant filed a response in opposition on May 16, and employer filed a reply on May 25. The administrative law judge denied employer's motion without prejudice because of an issue involving claimant's date of awareness. Order (July 31, 2018); Errata (Aug. 3, 2018). On August 13, 2018, employer filed an Amended Motion for Summary Decision to which claimant filed a response on September 4, 2018. The administrative law judge issued his decision on September 19, 2018.

[4] We reject employer's contention that claimant's appeal should be dismissed because her Petition for Review and supporting brief were not timely filed. 20 C.F.R. §802.205. Assuming, arguendo, claimant's pleading was late, we exercise our discretion to accept the pleading. 20 C.F.R. §§802.211, 802.217.

> 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.

Awareness of an injury cannot occur until the claimant is, or should have been, aware of a work-related injury and the likely impairment of her earning capacity, or the full character, nature and extent of her work injury. *J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 23 BRBS 127(CRT) (9th Cir. 1990); *Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130(CRT) (9th Cir. 1991); *Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14 BRBS 427 (9th Cir. 1982). Section 20(b) of the Act presumes in the absence of substantial evidence to the contrary that "sufficient notice of such claim has been given."[5] 33 U.S.C. §920(b); *Bath Iron Works Corp. v. U.S. Dept. of Labor [Knight]*, 336 F.3d 51, 37 BRBS 67(CRT) (1st Cir. 2003); *Martin v. Kaiser Co., Inc*., 24 BRBS 112 (1990) (Dolder, J., concurring in the result only).

Claimant contends the administrative law judge erred in determining that she was aware, or should have been aware, of the relationship between her injury and employment by August 5, 2014. She asserts she learned of the full extent of her finger injury on October 8, 2014, when she was told she might have carpal tunnel syndrome, and of her shoulder injury on January 21, 2015, when she was told she might have a torn rotator cuff. CX 6; CX(2) 3. Claimant contends the administrative law judge erred because she had not yet undergone any diagnostic testing as of August 5, 2014, and the "mere fact" that she knew she sustained work injuries did not trigger the time for filing. Instead, she contends a "diagnosis of her actual condition" is required. Cl. Br. at 14-15. Therefore, she asserts the claim filed on October 2, 2015, was filed in a timely fashion.

[5] Claimant does not dispute the finding that employer presented substantial evidence rebutting the Section 20(b) presumption. Employer filed its first report of injury on April 8, 2014, pursuant to Section 30(a) of the Act, 33 U.S.C. §930(a); thus, the tolling provision of Section 30(f), 33 U.S.C. §930(f), does not apply. *Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 23 BRBS 13(CRT) (2d Cir. 1989); *Nelson v. Stevens Shipping & Terminal Co.*, 25 BRBS 277 (1992) (Dolder, J., dissenting). Further, employer established it voluntarily paid claimant benefits until August 15, 2014, and claimant did not file a claim for compensation until October 2, 2015, more than one year later. Decision and Order at 8-9.

The administrative law judge found claimant's date of awareness to be August 5, 2014, because, at that time, Dr. Gonzales informed claimant her finger and shoulder injuries were work-related and her conditions would prevent her from working temporarily. Decision and Order at 10; CX 5. He found that, as of that date, claimant already knew she had injured her finger at work and had been unable to work due to the injury since it occurred. Additionally, he found that, as claimant's finger improved and she became aware of shoulder pain, Dr. Gonzales informed her that her shoulder injury also was work-related and disabling. Decision and Order at 9-11. Therefore, the administrative law judge found that claimant's October 2015 claim was not timely filed.

This finding is supported by substantial evidence and comports with law. The statute of limitations begins to run when claimant is "aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury . . . and the employment." 33 U.S.C. §913(a). While the courts have explained this phrase as meaning that the claimant understands the full character, nature and extent of her injury, *J.M. Martinac*, 900 F.2d 180, 23 BRBS 127(CRT); *Abel*, 932 F.2d 819, 24 BRBS 130(CRT); *Allan*, 666 F.2d 399, 14 BRBS 427, it has not been interpreted to mean that a final diagnosis is required. Rather, it means that the claimant can, or should be able to, determine from the information given that her ability to earn wages will be affected by her work injury. *Suarez v. Service Employees Int'l, Inc.*, 50 BRBS 33 (2016) (in a claim for a finite period of temporary total disability, claimant should have been aware when he knew his injury was work-related and missed work due to that condition); *Grant v. Interocean Stevedoring, Inc.*, 22 BRBS 294 (1989) (G. Lawrence, J., dissenting) (the claimant should have filed for benefits as soon as he was aware his work injury would affect his wage-earning capacity; misdiagnosis is not a basis for tolling the statute of limitations where the claimant's wage-earning capacity is continuously affected as a result of the work injury).[6] Thus, the absence of objective diagnostic studies or a final definitive diagnosis does not preclude a finding of the date a claimant is, or should be, aware of the requisite relationship.

Dr. Gonzales's August 5, 2014 report is medical evidence linking claimant's disabling finger and shoulder injuries to her employment as of that date. CX 5. As the

[6] Misdiagnosis is not an issue in this case. *Cf. Caudill v. Sea Tac Alaska Shipbuilding*, 22 BRBS 10 (1988), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993) (where a claimant receives a misdiagnosis or incorrect prognosis which reasonably leads him to believe his condition is not work-related or will not affect his wage-earning capacity, claimant is not "aware" until he secures a correct diagnosis); *Lunsford v. Marathon Oil Co.*, 15 BRBS 204 (1982), *aff'd*, 733 F.2d 1139, 16 BRBS 100(CRT) (5th Cir. 1984).

administrative law judge found, claimant was out of work at the time "due to activity restrictions," informed Dr. Gonzales she could return to work only when she was cleared for full-duty, and therefore should have been aware that the injury affected her ability to earn wages. CX 5. Although claimant had not undergone diagnostic testing as of August 5, 2014, the administrative law judge permissibly found she was, or should have been, aware her work injuries were preventing her return to work.[7] *Suarez*, 50 BRBS 33; *Grant*, 22 BRBS 294; *see also Ceres Gulf, Inc. v. Director, OWCP [Fagan]*, 111 F.3d 17, 31 BRBS 21(CRT) (5th Cir. 1997); *V.M. [Morgan] v. Cascade General, Inc.*, 42 BRBS 48 (2008), *aff'd mem.*, 388 F. App'x 695 (9th Cir. 2010); *Aurelio v. Louisiana Stevedores, Inc.*, 22 BRBS 418 (1984), *aff'd mem.*, 924 F.2d 1055 (5th Cir. 1991). Accordingly, as claimant was aware or should have been aware of her work-related disability on August 5, 2014, we affirm the administrative law judge's finding that the period for filing a claim began on August 15, 2014, when employer last paid claimant benefits. 33 U.S.C. §913(a).

We also reject claimant's alternate contention that the administrative law judge erred in finding that the medical reports her providers sent to employer and the memorialized phone calls to/from the district director's office, either individually or in conjunction, did not suffice to satisfy the Section 13(a) requirement. A claim under the Act must be a writing filed with the district director indicating or implying the intent to file a claim for benefits. 33 U.S.C. §913(a); *Bingham v. General Dynamics Corp.*, 14 BRBS 614 (1982); 20 C.F.R. §702.221. An attending physician's report indicating the possibility of continuing disability filed within one year after the termination of benefits is sufficient to satisfy the Section 13(a) requirements. *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); *Walker v. Rothschild Int'l Stevedoring Co.*, 526 F.2d 1137, 3 BRBS 6 (9th Cir. 1975). Indeed, any writing to the district director from which the intent to claim benefits under the Act can be inferred is sufficient. *Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286 (1994); *Conde v. Interocean Stevedoring, Inc.*, 11 BRBS 850 (1980) (Miller, concurring and dissenting). However, the writings must be filed with the district director's office to constitute a claim. *Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175 (1996). A district director's or claims examiner's memorandum of a conversation with a claimant may be sufficient for the filing of a claim if it indicates the claimant's intent to seek benefits. *McKinney v. O'Leary*, 460 F.2d 371, 372-373 (9th Cir. 1972); *Grant*, 22 BRBS 294.

[7] This case involves a claim for a finite period of temporary total disability benefits, so the absence of a diagnosis of a permanent condition is irrelevant. *Suarez v. Service Employees Int'l, Inc.*, 50 BRBS 33 (2016).

The reports from Drs. Gonzales and Schwartz, indicating claimant's inability to return to work, were sent to employer and were not filed with the district director's office. Decision and Order at 13. Therefore, they cannot constitute the filing of a claim under Section 13. *Manship*, 30 BRBS 175. Considering the doctors' reports in conjunction with the claims examiner's notes also does not suffice, as the administrative law judge reasonably found that nothing in the notes could be construed as conveying claimant's intent to file a claim for compensation under the Act. Decision and Order at 12-13; *see Grant*, 22 BRBS 294; *Conde*, 11 BRBS 850.

The claims examiner made two notations to the file based on phone communications with claimant. On February 19, 2015, she wrote: "call from clmt – cannot make IFC – fire in building and is displaced right now. called and left clmt message at [phone number] – will reschedule IFC but asked her to please call me back." CX 1. The next day, she noted:

> long conversation with clmt re: IFC. She said that she cannot be available for the scheduled IFC as her apartment complex suffered a fire and she is displaced. We discussed her case a bit and she indicated that she was mainly confused as to why she had to see Dr. Lundy [employer's expert] as her benefits were already cut off. She is currently receiving state disability and is still having issues with her hand/arm/finger. She mentioned the possibility of getting an attorney to deal with this for her as this is all stressful and she just wants to return to work. Said I would send her a list and that I would call her next week to see what she decides.
>
> Also called and spoke to [employer's representative] – IFC was postponed and would contact her [the representative] if/when claimant decided to get an attorney.

CX 2; *see also* CX 3. The administrative law judge determined that, at best, this conversation indicates claimant is "giving some thought to taking a step toward learning about her rights and potentially pursuing a claim: namely, she is considering hiring a lawyer." Decision and Order at 12. He found, "This is not an oral filing of a claim. To the contrary, the claims examiner understood that Claimant was being tentative" and that she would need to follow up with claimant "to see what she decides." *Id.* The administrative law judge's conclusion that these notations do not convey the intent to file a claim is rational and within his discretion.[8] *Conde*, 11 BRBS 850.

[8] In addition to the lack of written intent, the administrative law judge permissibly found that neither employer nor the district director's office behaved in a way suggesting they understood a claim had been filed. Decision and Order at 12-13. The district

Because claimant did not submit any writing to the district director that could be construed as a claim for compensation under the Act within one year after the last payment by employer, and because her claim for compensation was filed on October 2, 2015, more than one year after employer's last payment of temporary total disability benefits, claimant's claim for compensation was untimely filed. *See Daigle v. Scully Bros. Boat Builders, Inc.*, 19 BRBS 74 (1986). As claimant did not identify any genuine issue of material fact, and employer is entitled to summary decision as a matter of law, we affirm the administrative law judge's decision to grant employer's motion for summary decision and to dismiss claimant's claim for compensation. *Buck*, 37 BRBS 53.

Accordingly, the administrative law judge's Decision and Order Granting Summary Decision is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

director's office, after not having heard from claimant following the February phone calls, sent her a letter dated April 17, 2015, M/SD at exh. 3, telling her to notify it if she disagreed with employer's notice of controversion and to file a claim within one year after the injury or the date of last payment. On April 23, 2015, employer sent claimant a letter asking about her work status and whether she believed herself entitled to compensation, as it had not been receiving recent medical updates. Employer advised claimant to talk to the claims examiner for assistance. Emp. Reply to Opp. Br. at exh. 2.