

BRB Nos. 00-0392
and 00-0392A

RALPH CAMARDELLE)
)
 Claimant-Petitioner)
 Cross-Respondent)
)
 v.)
)
 GULF BEST ELECTRIC COMPANY) DATE ISSUED: Dec. 28, 2000
)
 and)
)
 HIGHLANDS INSURANCE COMPANY)
)
 Employer/Carrier-)
 Respondents)
 Cross-Petitioners) DECISION and ORDER

Appeals of the Decision and Order-Awarding Benefits of Larry W. Price,
Administrative Law Judge, United States Department of Labor.

J. Arthur Smith, III, Baton Rouge, Louisiana, for claimant.

Douglass M. Moragas, Harahan, Louisiana, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY,
Administrative Appeals Judge, and NELSON, Acting Administrative
Appeals Judge.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order-Awarding Benefits (99-LHC-482) of Administrative Law Judge Larry W. Price 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 if they 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 injured his right knee during the course of his employment for employer as an electrician on March 8, 1988. Claimant continued working until September 20, 1988, when he underwent arthroscopic surgery on his right knee. Employer voluntarily paid compensation for temporary total disability, 33 U.S.C. §908(b), until claimant returned to work on October 26, 1988. Thereafter, claimant's treating physician, Dr. Williams, opined that claimant's knee sustained a 15 percent permanent impairment as a result of the work injury. Employer voluntarily paid claimant additional compensation under the Act, 33 U.S.C. §908(c)(2), (19). Employer's final payment of compensation was on November 22, 1989. Claimant was not reexamined for his right knee condition until April 15, 1994, when he complained to Dr. Williams of swelling and pain. Claimant was laid off by employer on May 6, 1994, and he has not since been employed. Claimant underwent a second arthroscopy on September 12, 1995. Employer voluntarily paid claimant compensation for temporary total disability from May 10, 1994, to July 17, 1995, and from September 1, 1995, to May 31, 1996. Thereafter, employer voluntarily paid claimant for an additional five percent impairment of his right knee. Employer's final compensation payment to claimant was on July 8, 1996. Claimant filed a claim for benefits under the Act on July 1, 1997, alleging he is permanently totally disabled due to his work-related right knee injury. The parties stipulated, *inter alia*, that claimant has a 37 percent permanent partial disability of the right knee.

In his decision, the administrative law judge initially rejected employer's assertion that claimant did not file a timely claim for compensation under the Act pursuant to Section 13(a), 33 U.S.C. §913(a). Employer contended that the claim was time-barred because claimant did not file a claim within one year of its last payment of compensation on November 22, 1989. The administrative law judge found that, based on a literal reading of Section 13(a), employer's voluntary payments from May 1994 to July 8, 1996, tolled the statute's one year limitations period, and that claimant therefore timely filed for benefits under the Act on July 1, 1997. Alternatively, the administrative law judge found that Dr. Williams's February 21, 1989, report, in which he opined that claimant sustained a 15 percent impairment of the right knee, constitutes a timely filed claim under Section 13(a).

The administrative law judge next found that claimant is unable to return to his usual employment as an electrician, but that employer established the availability of suitable alternate employment based on employer's May 9, 1996, labor market survey and the testimony of Mr. Stokes, its vocational consultant. The administrative law judge rejected claimant's assertion of a disabling psychological injury related to claimant's permanent knee impairment. He credited the testimony of Dr. Roniger that the psychological effects from claimant's knee condition do not effect claimant's ability to work, that claimant is not depressed, and that work would improve claimant's mental

health. The administrative law judge concluded that claimant is limited to a recovery under the schedule for a 37 percent knee impairment.

On appeal, claimant challenges the administrative law judge's finding that employer established the availability of suitable alternate employment. Claimant also alleges error in that the administrative law judge's failure to award him benefits for temporary total disability from September 1, 1995 to October 11, 1995, which employer voluntarily paid. On cross-appeal, employer argues that the administrative law judge erred by finding timely claimant's July 1, 1997, claim for benefits. Employer contends that the claim is time-barred because no compensation was paid by employer for claimant's right knee injury from November 22, 1989, to May 10, 1994.

Addressing first employer's cross-appeal, Section 13(a) of the Act provides that the right to compensation for disability under the Act is barred unless a claim is filed within a year after the injury. Additionally, "[i]f payment of compensation has been made without an award, . . . a claim may be filed within one year after the date of the last payment." 33 U.S.C. §913(a). Section 13(a) limits the period in which a claimant may file a claim in order to insure fairness to employers by preventing the revival of stale claims in cases in which evidence has been lost, memories have faded, and witnesses have disappeared. *See, e.g., Colburn v. General Dynamics Corp.*, 21 BRBS 219 (1988). However, where an employer has voluntarily paid compensation, Section 13(a) provides that such payments toll the running of the statute of limitations because employer is fully aware of claimant's injured condition. *See generally Smith v. Universal Fabricators, Inc.*, 21 BRBS 83 (1988), *aff'd* 878 F.2d 843, 22 BRBS 104(CRT) (5th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990).

In the instant case, we hold that the administrative law judge rationally found timely the July 1, 1997, claim because employer's last voluntary payment was on July 8, 1996, when employer compensated claimant for an additional five percent knee impairment under the schedule. CX 11. We reject employer's contention that the claim is time-barred under Section 13(a) because employer did not pay claimant any compensation for his right knee injury from November 22, 1989, to May 10, 1994. The administrative law judge rationally determined that under the plain language of Section 13(a), the time for filing is tolled by the very last voluntary payment of compensation, rather than by the expiration of one year following the termination of prior payments of compensation. Furthermore, claimant's condition deteriorated during the period between the two sets of payments, *see generally Morales v. General Dynamics Corp.*, 16 BRBS 293 (1984), *aff'd in part, part, 769 F.2d 66*, 17 BRBS 130(CRT) (2d Cir. 1985), and employer was fully aware of this additional deterioration as evidenced by its resumption of voluntary compensation payments to claimant from May 1994 to July 1996. The administrative law judge's finding that the claim was timely filed therefore is not

inconsistent with the purpose of Section 13(a) to prevent the revival of stale claims. *See, e.g., Smith*, 21 BRBS at 83. Accordingly, we affirm the administrative law judge's finding that claimant's claim for compensation was timely filed. *See generally Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286 (1994).

In his appeal, claimant challenges the administrative law judge's finding that employer established the availability of suitable alternate employment. Specifically, claimant avers that employer did not establish that suitable alternate employment is realistically available because Mr. Stokes failed to disclose to prospective employers all of the psychological and physical limitations caused by claimant's work-related knee impairment. Once claimant established that he is unable to return to his usual employment as an electrician, the burden shifted to employer to demonstrate the availability of realistic job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience and physical or psychological restrictions, is capable of performing. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). The administrative law judge may rely on labor market surveys and the testimony of vocational counselors that job openings exist to establish the availability of suitable jobs. *See Meehan Seaway Service, Inc. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998); *Jones v. Genco, Inc.*, 21 BRBS 12 (1985). Moreover, contrary to claimant's contention, employer need not contact prospective employers directly to determine if they will hire a claimant. *See generally Universal Maritime v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290 (1990); *see also Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992).

We affirm the administrative law judge's finding that employer established the availability of suitable alternate employment based on Mr. Stokes's testimony and labor market survey. Mr. Stokes stated that the prospective jobs identified in his labor market survey are within Dr. Williams's work restrictions limiting claimant to sedentary work; the administrative law judge credited Dr. Williams's restrictions, as well as a May 1996 functional capacities evaluation. CX 1 at 29-33; EX 4. Moreover, Mr. Stokes testified that pursuant to the factors enunciated in *Turner*, claimant's prognosis for employment is good and that the jobs he identified in his labor market survey are within claimant's

¹Thus, we need not address the administrative law judge's alternative finding that Dr. Williams's 1989 report constitutes a timely filed claim.

²We note that claimant does not challenge the administrative law judge's finding that he does not have a disabling psychological condition.

limitations and abilities. Tr. at 216-217, 225-226. The administrative law judge found that several of the jobs identified by Mr. Stokes are within the claimant's restrictions. Accordingly, as the administrative law judge's finding that employer established the availability of suitable alternate employment is supported by substantial evidence, we affirm it, as well as his award of benefits to claimant under the schedule. *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Sketoe v. Dolphin Titan Int'l*, 28 BRBS 212 (1994) (Smith, J., dissenting on other grounds); *see generally Pool Co. v. Director, OWCP [White]*, 206 F.3d 543, 34 BRBS 19(CRT) (5th Cir. 2000).

Finally, claimant contends that the administrative law judge erred by failing to award claimant compensation for temporary total disability from September 1, 1995, to October 11, 1995. The parties stipulated that employer voluntarily paid claimant compensation for these six weeks; however, the Decision and Order inexplicably does not correspondingly award claimant compensation for the period, although the administrative law judge's award otherwise tracks the parties' stipulations regarding temporary total disability benefits. *Compare* Decision and Order at 3 stipulation 9 *with* Decision and Order at 15. Moreover, Dr. Williams's medical records establish that claimant attempted but was unable to work on September 1, 1995, that he underwent arthroscopic surgery on September 12, 1995, and that he thereafter received continuing physical therapy. EX 34-39. Accordingly, we modify the administrative law judge's Decision and Order to award claimant temporary total disability benefits for the period in question to correct this apparent clerical error. *See generally Phillips v. Marine Concrete Structures, Inc.*, 21 BRBS 233 (1988), *aff'd*, 877 F.2d 1231, 22 BRBS 83(CRT) (5th Cir. 1989), *vacated on other grounds*, 895 F.2d 1033, 23 BRBS 36(CRT) (5th Cir. 1990) (*en banc*).

³Specifically, the administrative law judge found suitable the positions of cage cashier, communications officer, automobile service writer, and dispatcher. Decision and Order at 13.

Accordingly, the administrative law judge's Decision and Order-Awarding Benefits is modified to award claimant temporary total disability compensation from September 1, 1995, to October 11, 1995. In all other respects, the administrative law judge's decision is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge