BRB No. 05-0465

TIMOTHY J. ADAMS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIP SYSTEMS, INCORPORATED	)	DATE ISSUED: 02/21/2006
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

John D. Gibbons (Gardner, Middlebrooks, Gibbons, Kittrell, Olsen, Walker & Hill, P.C.), Mobile, Alabama, for claimant.

Paul B. Howell (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits (2004-LHC-1006) of Administrative Law Judge C. Richard Avery 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 shipfitter, has long-standing problems with his feet, including bunions, hammer toe, and metatarsal deformities. Claimant was off work from June 18, 2002, through January 13, 2003, due to his foot problems. He returned to work from January 14 through April 30, 2003. Claimant did not return to work after May 1, 2003, and was terminated from employment on June 14, 2004, after using one year of medical leave. Claimant has

undergone 14 surgeries on his feet since June 18, 2002. Claimant gave employer a notice of his injury on October 24, 2003, and filed a claim for compensation on November 24, 2003, alleging that his employment, which required that he wear steel-toed boots and walk on uneven surfaces, aggravated his foot condition. Emp. Exs. 3, 7.

The administrative law judge found that claimant's claim was barred because he did not give employer timely notice of his injury pursuant to Section 12 of the Act, 33 U.S.C. §912. The administrative law judge found that claimant was aware on July 1, 2002, of a work injury that would impair his wage-earning capacity, but did not give employer notice until October 24, 2003. The administrative law judge found that claimant's failure to give timely notice was not excused because employer did not have knowledge of the work injury pursuant to Section 12(d)(1), 33 U.S.C. §912(d)(1), until October 24, 2003, and employer was prejudiced by claimant's failure to give timely notice pursuant to Section 12(d)(2), 33 U.S.C. §912(d)(2). Consequently, the administrative law judge denied the claim for disability benefits. However, the administrative law judge awarded claimant certain medical benefits pursuant to Section 7, 33 U.S.C. §907, finding that claimant's foot condition is work-related and that a claim for medical benefits is never time-barred.

On appeal, claimant challenges the administrative law judge's findings that he was aware on July 1, 2002, that he had a work injury that would impair his wage-earning capacity and that employer did not have knowledge of his work injury until October 24, 2003. Employer responds in support of the administrative law judge's findings to which claimant replies. For the reasons that follow, we vacate the administrative law judge's finding that claimant's claim is barred for non-compliance with Section 12 and remand for further findings.

Claimant first challenges the administrative law judge's finding that he was aware on July 1, 2002, that he had a work injury that would impair his wage-earning capacity. Section 12(a) provides that in cases of traumatic injury, as here, notice of the injury must be given within 30 days after claimant is aware, or in the exercise of reasonable diligence or by reason of medical advice, should have been aware of the relationship between his injury and his employment. 33 U.S.C. §912(a). The 30-day period for giving notice does not begin to run until claimant is aware that his injury is causally related to his employment and is impairing his earning capacity. *See, e.g., Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *see also Marathon Oil Co. v. Lunsford*, 733 F.2d 1139, 16 BRBS 100(CRT) (5th Cir. 1984) (same standard under Section 13). Pursuant to Section 20(b) of the Act, 33 U.S.C. §920(b), there is a presumption that the notice of injury was timely filed. *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989).

The administrative law judge found that claimant was aware on July 1, 2002, of a work-related injury that impaired his wage-earning capacity. Decision and Order Awarding

Benefits at 16-19. With regard to claimant's awareness of the work-relatedness of his foot condition, the administrative law judge relied on claimant's deposition testimony that he told Dr. Borcicky in June 2002 that his feet were "killing [him], being on the steel," Emp. Ex. 26 at 22, and a note written by claimant in Dr. Borcicky's records stating that walking in steel toe boots hurt his feet.[1] Emp. Ex. 20 at 13. The administrative law judge found that claimant stated that Dr. Borcicky told him his feet problems were "because of my job duties" involving carry heavy objects while wearing boots. Emp. Ex. 25 at 16-17. The administrative law judge further relied on claimant's testimony that he told employer's "unemployment office" and his supervisors of his belief that his boots were causing him trouble. Tr. at 24, 37, 55; Emp. Ex. 25 at 23. As Dr. Borcicky took him off work because of his foot problems as of July 1, 2002, the administrative law judge concluded that this was the date claimant was aware that his work injury caused a loss in wage-earning capacity. Because claimant's notice of injury was not filed within 30 days of July 1, 2002, the administrative law judge found the claim for disability benefits barred.

We cannot affirm the administrative law judge's finding that claimant was aware on July 1, 2002, of a work-related injury that would impair his wage-earning capacity. In crediting portions of claimant's deposition and hearing testimony to find that claimant was aware that his foot condition was related to his employment, the administrative law judge did not address the evidence detracting from such a finding. Although the administrative law judge identified statements which claimant made to employer's personnel officer which the administrative law judge interpreted as showing claimant's awareness that his feet problems were caused by his work, the administrative law judge did not discuss the personnel officer's response to those statements: she selected the medical insurance form for a non-industrial injury and filled it out for claimant, whereupon he signed it. Emp. Ex. 25 at 23. The administrative law judge also did not address the significance of Dr. Borcicky's repeatedly checking the "no" box on claimant's disability forms indicating that the injury was not work-related, and the absence of any notation in Dr. Borcicky's notes of indicating that he discussed with claimant the alleged work-relatedness of his condition. Emp. Exs. 2 at 1-11, 14, 15, 17, 18, 20, 22, 24; 20 at 13. As a result of employer's designating claimant's injury as non-industrial and Dr. Borcicky's characterizing it as non-work-related, claimant received non-industrial disability benefits. Emp. Ex. 25 at 23. Dr. Borcicky's notes first state on November 4, 2003, that claimant's condition is related to his "weight bearing in steel toed boots." Cl. Ex. 2 at 21. Finally, the administrative law judge did not discuss that part of claimant's deposition and hearing testimony denying his awareness of a work-related connection to his foot problem, which runs counter to the administrative law judge's finding.[2]

[1] Dr. Borcicky, a board-certified podiatrist, treated claimant beginning in the late eighties for a variety of foot problems, including corns, calluses and hammer toes.

[2] While the deposition pages cited by the administrative law judge support the

Because the administrative law judge did not fully discuss the aforementioned evidence, we vacate the administrative law judge's finding that claimant was aware of a work-related injury that would impair his wage-earning capacity on July 1, 2002, and we remand this case. *H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000) (administrative law judge need not discuss rejection of certain evidence only if it is not material to the outcome of the case). A claimant may indeed be "aware" that he has a work-related condition before he is so informed by his physician. *See Stark v. Washington Star Co.*, 833 F.2d 1025, 20 BRBS 40(CRT) (D.C. Cir. 1987); *Pryor v. James McHugh Constr. Co.*, 18 BRBS 273 (1986). The administrative law judge should address whether claimant comprehended the significance of his apparent belief in June 2002 that his "weight bearing" and "work boots" hurt his feet, particularly in the context of his long-standing foot problems and treatment for them. *See Horton v. General Dynamics Corp.*, 20 BRBS 99 (1987) (widow's deposition testimony too vague and confusing to establish date of awareness). Moreover, if claimant is informed that his condition is not work-related, he cannot be held to have the requisite awareness. *See Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Jenkins]*, 583 F.2d 1273, 8 BRBS 723 (4th Cir. 1978), *cert. denied*, 440 U.S. 915 (1979); *Cooper Stevedoring, Inc. v. Washington*, 556 F.2d 268, 6 BRBS 324 (5th Cir. 1977) *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990); *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986). On remand, the administrative law judge must discuss and weigh all the relevant evidence as to the date claimant was aware that his foot condition was related to his employment, placing the burden on employer to produce substantial evidence that claimant had the requisite awareness such that his notice of injury was untimely filed. 33 U.S.C. §920(b); *Stancil v. Massey*, 436 F.2d 274 (D.C. Cir. 1970); *Shaller*, 23 BRBS 140.

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conclusion that claimant related his foot problems to his boots, the testimony often immediately after the cited portions, does not support this conclusion . When pressed as to what he told employer, claimant responded, "I ain't told nobody nothing . . . . I just said, weight bearing on the boots." Emp. Ex. 26 at 18. Claimant then stated that he was told that his problems with his feet were not work-related by an employee of employer's hospital. Emp. Ex. 26 at 18-19. When pressed for a final time as to whether he ever told employer that his problems with his feet were work-related, claimant replied, "I cannot say, sir. I believe I had to tell somebody like my supervisor because of the job I do, climbing on the steel, up and down. . . ." Emp. Ex. 26 at 47. Claimant further replied, "I don't recall. I can't remember all the stuff been going on, sir. I don't know what I said. But I know one thing, I ain't lying. I might have said it." Emp. Ex. 26 at 48. At the hearing, claimant testified that he did not recall if he ever told employer that his problems with his feet were work-related but someone had to know. Tr. at 65-67.

Claimant also challenges the administrative law judge's finding that his failure to give timely notice was not excused because employer did not have knowledge of the work injury until October 24, 2003. Claimant's failure to give timely notice of his injury is excused if employer had knowledge of the injury or if employer was not prejudiced by the failure to give proper notice.[3] 33 U.S.C. §912(d)(1), (2). Knowledge under Section 12(d)(1) requires that employer have knowledge of the work-relatedness of the injury, or sufficient facts such that a reasonable person would conclude that compensation liability was possible. *Strachan Shipping Co. v. Davis*, 571 F.2d 968, 8 BRBS 161 (5th Cir. 1978); *Boyd v. Ceres Terminals*, 30 BRBS 218 (1997); *Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991). An employer may have knowledge of a claimant's work injury despite the disability forms indicating that the claimant's disability was not work-related if the administrative law judge finds that the employer had knowledge of the claimant's work-related injury prior to receiving the claim forms. *See Pilkington v. Sun Shipbuilding & Dry Dock Co.*, 14 BRBS 119 (1981); *but see Sun Shipbuilding & Dry Dock Co. v. Walker*, 590 F.2d 73, 9 BRBS 399 (3d Cir. 1978) (court held employer did not have knowledge of the claimant's work injury under Section 12(d)(1) where both the claimant and his doctor certified on disability claim forms that the origin of the injury was non-occupational).

The administrative law judge found that employer did not have knowledge of the work injury until October 24, 2003, when claimant provided formal notice of his injury. Decision and Order Awarding Benefits at 19-20. The administrative law judge found that Dr. Borcicky's notes taking claimant off work gave employer knowledge of an injury but not that it was work-related. The administrative law judge also found that the group disability claim forms signed by claimant and Dr. Borcicky precluded employer's knowledge of a work injury because the forms indicated the disability was not work-related. Additionally, the administrative law judge relied on the testimony of claimant's foreman, Mr. Stewart, and employer's general foreman, Mr. Rushing, that although they knew claimant had problems with his feet, they did not know they were work-related.

We cannot affirm the administrative law judge's finding that employer did not have knowledge of the work injury until October 24, 2003. The fundamental flaw in the administrative law judge's reasoning in this regard is his inconsistent treatment of the evidence. In finding that claimant had awareness of a work-related injury, the administrative law judge relied on claimant's testimony that he told employer's "unemployment office" and his supervisors that his work was bothering his feet, yet the administrative law judge did not discuss this evidence in finding that employer lacked knowledge of the work-relatedness of

[3] Claimant does not challenge on appeal the administrative law judge's finding, pursuant to Section 12(d)(2), 33 U.S.C. §912(d)(2), that employer was prejudiced by claimant's failure to give timely notice. Thus, we will not address the administrative law judge's finding in this regard.

claimant's injury. Moreover, in relying on the non-industrial disability forms to find that employer did not have knowledge, the administrative law judge failed to address the significance of the fact that it was employer's representative who gave claimant the forms despite having relied upon claimant's testimony that he told her his foot problems were related to working in his boots. If claimant's telling employer in June 2002 that the problems with his feet were related to his boots is sufficient to establish claimant's awareness, it would be irrational to find that this evidence is insufficient to establish employer's knowledge of a work-related injury at the same time. *See* Decision and Order at 18, citing Emp. Ex. 25 at 23, Tr. at 21. *See also Vinson v. Resolve Marine Services*, 37 BRBS 103 (2003); *Boyd*, 30 BRBS 218.

Since the administrative law judge did not fully discuss and weigh all of the relevant evidence, we vacate the administrative law judge's finding that employer did not have knowledge of claimant's injury pursuant to Section 12(d)(1). *H.B. Zachry Co.*, 206 F.3d 474, 34 BRBS 23(CRT). We remand this case to the administrative law judge to further address all relevant evidence regarding the date employer acquired knowledge of claimant's work injury. If, on remand, the administrative law judge again finds, based in part on claimant's testimony that he told employer his foot problems were work-related on June 18, 2002, the administrative law judge must conclude that this same evidence precludes a finding that employer did not have knowledge of claimant's work injury until October 24, 2003. *See generally Preston*, 380 F.3d 597, 38 BRBS 60(CRT); *Avondale Shipyards, Inc. v. Vinson*, 623 F.2d 1117, 12 BRBS 478 (5th Cir. 1980); *Matthews v. Jeffboat, Inc.*, 18 BRBS 185 (1986).

Accordingly, the administrative law judge's finding that claimant's untimely notice of injury bars his claim for disability compensation is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.[4] In all other respects, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[4] On remand, the administrative law judge also must address any remaining issues, such as the timeliness of claimant's claim pursuant to Section 13, 33 U.S.C. §913, the extent of claimant's disability, and employer's entitlement to Section 8(f) relief. *See* Decision and Order at 2-3.