BRB No. 92-1464

LOUIE HOLMES	)	
	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CAROLINA SHIPPING COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order-Awarding Benefits and the Decision and Order Denying Petition for Reconsideration of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Ralph R. Lorberbaum (Zipperer & Lorberbaum, P.C.), Savannah, Georgia, for claimant.

M. Dawes Cooke, Jr. (Barnwell, Whaley, Patterson & Helms), Charleston, South Carolina, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, DOLDER and McGranery, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits and the Decision and Order Denying Petition for Reconsideration (90-LHC-879) of Administrative Law Judge Thomas M. Burke 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, who worked as a longshoreman for 37 years out of the Port of Charleston union hall, injured his low back on October 5, 1984.[1] Claimant returned to work 10 days later but on his first day back, October 18, 1984, injured his back again in a similar manner. Employer voluntarily paid claimant temporary total disability benefits from October 18, 1984, until March 27, 1986. Claimant returned to work on March 28, 1986, but was hit in the head by a "shoe peg," a metal object weighing about 25 pounds, on December 2, 1986, while working for Maresk Container Services, suffering injury to his head, upper back and shoulder. After he recovered from that injury, claimant worked continuously until September 28, 1988, when he was hospitalized for gastrointestinal bleeding,[2] which he believed was caused by medication he had been taking for his back problem. Employer refused to pay claimant's medical expenses related to the bleeding. When claimant was released from the hospital, he was advised by his treating physician, Dr. Brilliant, not to return to work because of his back problems. Although claimant did not return to work initially, he did return to work in April 1989, allegedly because employer refused to pay him compensation. Thereafter, he continued to work until he hurt his back at work again on October 25, 1989, while working for Southeastern Atlantic Cargo Operators (SEACO) and has not worked since. On October 3, 1987, claimant filed a formal claim under the Act against employer, seeking compensation for the October 5 and October 18, 1984, work injuries.

The administrative law judge found that the formal claim filed on October 3, 1987, was not timely because it was not filed within one year of employer's last voluntary payment on March 27, 1986. The administrative law judge nonetheless determined that the Section 13(a), 33 U.S.C. §913(a), statute of limitations was satisfied because on December 29, 1986, claimant's former counsel sent to the district director a letter which could reasonably be construed as a request for compensation. The administrative law judge also determined that employer was liable for the medical costs associated with claimant's September 1988 hospitalization for gastro-intestinal bleeding, based on hospital records which attributed this condition to the non-steroidal, anti-inflammatory drugs which he had been taking for his back condition. He also awarded claimant temporary total disability compensation for the period between August 1, 1988 and April 1, 1989 and permanent total disability compensation thereafter, despite the fact that claimant had actually worked on a full-time basis between April 1, 1989 and October 25, 1989. Finally, the administrative law judge denied employer's request for relief under Section 8(f), 33 U.S.C. §908(f), based on claimant's pre-existing heart disease and prior May 1984 back injury. Employer appeals the administrative law judge's finding that the claim was timely, his decision awarding permanent total disability compensation as of April 1, 1989, and his order denying Section 8(f) relief. Claimant responds, urging that employer's appeal be dismissed as untimely and that the administrative law judge's Decision and Order be affirmed.

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[1]Claimant previously hurt his back in May 1984 while working for Harrington & Company and as a result missed about two months of work.

[2]At the time of his hospitalization, claimant was also suffering from coronary artery disease, hypertension, chronic low back pain, and gout. CX. 16.

TIMELINESS OF APPEAL

We must at the outset address claimant's contention that employer's appeal should be dismissed as untimely filed. The statute governing appeals to the Board provides that:

> [a] compensation order shall become effective when filed in the office of the deputy commissioner ..., and, unless proceedings for the suspension or setting aside of such order are instituted ..., shall become final at the expiration of the thirtieth day thereafter.

33 U.S.C.A. §921(a). This statute is jurisdictional and there is no equitable relief available if a party fails to appeal within the prescribed time period. *Townsend v. Director, Office of Workers' Compensation Programs*, 743 F.2d 880 (11th Cir. 1984); *Tideland Welding Service v. Sawyer*, 881 F.2d 157, 22 BRBS 122 (CRT) (5th Cir. 1989), *cert. denied*, 495 U.S. 904 (1990). A motion for reconsideration addressed to the administrative law judge must be timely in order to stay the running of the period for appeal to the Board. 20 C.F.R. §802.206. *See Jones v. Illinois Cent. Gulf R.R.*, 846 F.2d 1099 (7th Cir. 1988); *Bogdis v. Marine Terminals Corp.*, 23 BRBS 136 (1989); *General Dynamics Corp. v. Hines*, 1 BRBS 3 (1974). Section 802.206(b)(1) defines a timely motion for reconsideration as one filed within 10 days of the date of filing of the administrative law judge's Decision and Order.[3] *Bogdis*, 23 BRBS at 138.

In his response brief, claimant argues that employer's appeal should be dismissed as untimely because its motion for reconsideration filed on December 4, 1991, was not filed within 10 days of July 12, 1991, the date the administrative law judge's initial Decision and Order was filed in the office of the district director. Employer responds that on the facts presented in this case the 10-day period for filing its motion for reconsideration did not commence until November 25, 1991, when, after repeated requests, it was finally served with a complete copy of the administrative law judge's Decision and Order. Accordingly, employer asserts that its December 4, 1991, petition for reconsideration was timely resulting in its April 15, 1992, appeal of the administrative law judge's March 16, 1992, Decision on reconsideration also being timely.

We reject claimant's argument that the Board lacks jurisdiction over employer's appeal because it was not timely filed. The United States Court of Appeals for the Fourth Circuit Court, within whose jurisdiction this case arises, has held that filing under Section 921(a) includes service on the parties. *See Jewell Smokeless Coal Corp. v. Looney*, 892 F.2d 366, 396, 13 BLR 2-177, 2-183 (4th Cir. 1989). Service is accomplished upon the mailing of a decision by certified or registered mail. *See Dominion Coal Co. v. Honaker*, 33 F.3d 401, 404 (4th Cir. 1994). In this case,

[3]The regulations establishing procedures for hearings under the Act do not address the timeliness of a motion for reconsideration, *see* 20 C.F.R. §§702.331-351, nor do the general regulations applicable to Department of Labor administrative law judges. 29 C.F.R. Part 18. In determining the timeliness of an appeal, we are is guided by the Rules of Practice and Procedure, 20 C.F.R. Part 802.

while the service sheet reflects that the Decision and Order was mailed to employer's carrier by certified mail on the day the decision was filed in the office of the district director, the record supports employer's assertion that a complete copy of the administrative law judge's initial Decision and Order was never mailed to employer until November 25, 1991.[4] The administrative law judge recognized this fact in his decision on reconsideration, referring to employer's petition as a request for "reconsideration of the June 26, 1991, Decision and Order served November 25, 1991." Thus as the time for filing employer's motion for reconsideration did not begin until November 25, 1991, employer's December 4, 1991, petition for reconsideration was timely. Thus, employer's appeal was also timely.

TIMELINESS OF CLAIM

We reject employer's assertion that the administrative law judge erred in concluding that a letter from claimant's former attorney, Lynn Small, constituted a timely filed claim under Section 13. A claim need not be on a particular form to satisfy the requirements of Section 13, and any writing will suffice so long as it discloses an intention to assert a right to compensation. *Peterson v. Columbia Marine Lines*, 21 BRBS 299, 301 (1988). Ms. Small's December 29, 1986, letter states, "I would appreciate your forwarding to me a copy of all medicals and other related information you have in your file on this claim. Also, please advise me of the current status of this claim." Attached to this letter is in a retainer agreement from claimant stating that Ms. Small has been retained as his attorney to represent him in his claim for benefits under the Longshore Act. Cl. Ex. 18. Inasmuch as it was not irrational for the administrative law judge to infer from the correspondence that a claim for compensation was being made, we affirm the administrative law judge's finding that the December 29, 1986, letter, filed within one year of the last voluntary payment of compensation on March 27, 1986, was the functional equivalent of a timely filed claim.[5] Employer's assertion that *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP [Riley]*, 455 U.S. 608, 14 BRBS 631 (1982), mandates a contrary result is rejected. In *U.S. Industries*, the United States Supreme Court quoted 3 A. Larson, *The Law of Workmen's Compensation*, §78.11 (1976), for the proposition

[4]The record reflects that three requests were made by employer on July 26, 1991, September 13, 1991, and October 2, 1991, to be provided with a complete copy of the administrative law judge's initial Decision and Order.

[5]In his post-hearing brief, claimant argued that in addition to Ms. Small's letter there is also medical evidence in the district director's file which could suffice to establish a claim for purposes of Section 13(a). An attending physician's report indicating the possibility of a continuing disability which is filed within one year after the termination of voluntary payments or which is filed while voluntary payments are being made, meets the filing requirement of Section 13(a). *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). Although not addressed by the administrative law judge, we note that there is, in fact, medical evidence in the record, filed within the permissible time frame, which could arguably establish the possibility of a continuing disability. *See, e.g.*, reports of Dr. Brilliant of August 28, 1985, November 4, 1985, June 9, 1986, and Dr. Thompson, March 14, 1986.

that an informal substitute for a claim may be acceptable provided it "identif[ies] the claimant, indicate[s] that a compensable injury has occurred and convey[s] the idea that compensation is expected," *Id.* at n. 7, consistent with the administrative law judge's factual findings in the present case.

EXTENT OF DISABILITY

We next address employer's argument that the administrative law judge erred in awarding claimant permanent total disability compensation. Employer contends that claimant is able to perform his former job of gang foreman, which is an easy job physically, or another comparable position which claimant could usually obtain due to his superior seniority in the union. Employer alleges that in finding that claimant could not perform his former work as of April 1, 1989, the administrative law judge erred in crediting the opinion of Dr. Brilliant, who was unaware of the physical requirements of claimant's former job, over Dr. Thompson's opinion that claimant could return to his regular work provided he avoid lifting over 30 pounds, which was based on his review of claimant's actual job description. Employer further maintains that it was error for the administrative law judge to find claimant totally disabled as a result of his October 1984 injuries because, with the exception of his head and neck injury in December 1986 and his hospitalization in September 1988, claimant worked at his regular job for as many hours as were available between March 1986 and the October 25, 1989. Employer also argues that in awarding claimant permanent total disability, the administrative law judge ignored the uncontroverted testimony of its vocational expert, who considered claimant's physical restrictions and identified numerous jobs which she found claimant could perform.

To establish a *prima facie* case of total disability, the claimant must show that he cannot return to his regular or usual work due to his work-related injury. *See Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). Once a claimant establishes that he is unable to do his usual work, he has established a *prima facie* case of total disability, and the burden shifts to employer to establish the availability of suitable alternate employment which the claimant is capable of performing. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988); *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT) (4th Cir. 1988).

In concluding that claimant established a *prima facie* case of total disability, the administrative law judge found Dr. Brilliant's opinion that claimant was unable to return to his prior employment more persuasive than Dr. Thompson's contrary opinion. In so concluding, the administrative law judge fully considered both doctor's opinions and addressed employer's arguments. As claimant's usual work as a gang foreman required climbing ladders into and out of the ship's hold and walking and standing for significant periods, the administrative law judge's finding that this work was incompatible with Dr. Brilliant's work restrictions and that claimant accordingly cannot perform his prior work is affirmed. *See Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991). Contrary to employer's assertions, the fact that claimant continued to work after April 1989, does not preclude the administrative law judge from finding that claimant was unable to perform his usual work duties, where, as here, the administrative law judge credited

claimant's testimony that he continued to perform this work in pain only through extraordinary effort and with the help of other employees. *See Houghton Elevator Co. v. Lewis*, 572 F.2d 447, 7 BRBS 838 (4th Cir. 1978), *aff'g* 5 BRBS 62 1976); *see also Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991), *rev'g in pert. part*, 19 BRBS 15 (1986).

We also affirm the administrative law judge's finding that employer failed to establish the existence of suitable alternate employment based on the testimony provided by its vocational expert, Patricia Bell. Ms. Bell identified 18 job opportunities which she felt claimant could perform based on the medical reports of Drs. Thompson, Marzluff, Brilliant, and Rowe, Dr. Holmes's April 2, 1990, deposition and Dr. Thompson's statement of claimant's work restrictions. Ex. 21. The administrative law judge, however, acted within his discretion in finding Ms. Bell's opinion deficient because she did not consider the separate, more detailed, working capacity evaluation performed by Dr. Brilliant. The administrative law judge rationally viewed Dr. Brilliant's working capacity evaluation, which he credited, as more restrictive than the medical restrictions on which Ms. Bell's survey was based. In addition, the administrative law judge reasonably discredited Ms. Bell's testimony regarding the availability of suitable alternate employment based on her failure to identify the specific requirements of the available job opportunities. *See generally Thompson v. Lockheed Shipbuilding and Construction Co.*, 21 BRBS 94,97 (1988). Inasmuch as the administrative law judge's discrediting of employer's vocational evidence was neither inherently incredible nor patently unreasonable, his finding that employer failed to meets its burden of establishing suitable alternate employment is also affirmed as is his award of permanent total disability compensation. *See Uglesich*, 24 BRBS at 184.

SECTION 8(f)

Employer also appeals the administrative law judge's denial of Section 8(f) relief. Section 8(f) relief is available if employer establishes the following three prerequisites: (1) the claimant had an existing permanent partial disability prior to the employment injury; (2) the disability was manifest to the employer prior to the employment injury; and (3) that the current disability is not due solely to the most recent injury. *See generally Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 25 BRBS 85 (CRT) (9th Cir. 1991). On appeal, employer contends that in denying Section 8(f) relief the administrative law judge erred in finding that employer did not meet its burden of establishing that claimant's pre-existing heart condition and prior May 1984 back injury were permanently disabling.

Initially, we reject employer's argument that the administrative law judge erred in finding that claimant's prior May 1984 back injury did not constitute a pre-existing permanent partial disability for Section 8(f) purposes. Inasmuch as the evidence relied upon by the administrative law judge establishes that the May 1984 injury did not result in a serious lasting physical condition, his finding that this injury does not constitute a pre-existing permanent partial disability under Section 8(f) is affirmed.

We agree with employer, however, that the administrative law judge erred in finding that

claimant's pre-existing heart condition did not constitute a pre-existing permanent partial disability under Section 8(f). Relying on claimant's testimony that other than taking medication for hypertension, he has no problems with his heart, the administrative law judge found that there was no proof that this condition resulted in a permanent disability. However, the record reflects that claimant had a heart attack in 1975, and continued to have high blood pressure for which he took medication; thus, claimant's heart condition may be serious lasting physical condition. *See, e.g., Director, OWCP v. General Dynamics Corp.*, 787 F.2d 723, 18 BRBS 88 (CRT)(1st Cir. 1986); *Dugan v. Todd Shipyards, Inc.*, 22 BRBS 42, 44-45 (1989). Nonetheless, as the record lacks evidence sufficient to establish that but for his preexisting heart condition, claimant would not be totally disabled from the subject work injury alone, as is necessary to establish the contribution element of Section 8(f), his denial of Section 8(f) relief based on this condition is affirmed. *See Director, Office of Workers Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110, 114 (4th Cir. 1982); *Pino v. Int'l Terminal Operating Co., Inc.*, 26 BRBS 81 (1992).

CONSOLIDATION

On Petition for Reconsideration to the administrative law judge, employer requested that he reconsider his finding that claimant was permanently totally disabled prior to October 25, 1989 in light of the fact that claimant had filed a new claim against SEACO for disability resulting from an October 25, 1989, injury and that the claims be consolidated for purpose of decision. In his Decision and Order denying reconsideration, the administrative law judge found that employer's petition does not allege any facts which would contradict his finding of permanent total disability as of April 1, 1989. On appeal, employer reiterates the arguments made below and requests that the instant case be consolidated with claimant's claim based on the October 25, 1989, accident. Inasmuch, however, as the administrative law judge, with knowledge of the subsequent October 1989 accident, rationally concluded that claimant has been permanently totally disabled since April 1, 1989, as a result of the 1984 work injuries with employer, we affirm his denial of employer's motion to consolidate. Because the claim for the October 25, 1989, accident is not currently pending before the Board, employer's motion to consolidate these cases on appeal is also denied. 20 C.F.R. §802.104.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and his Decision Denying Petition for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge