

BRB Nos. 93-622
and 93-622A

JUDY K. FERGUSON)	
)	
Claimant-Petitioner)	
Cross-Respondent)	
)	
v.)	
)	
TODD PACIFIC SHIPYARDS)	DATE ISSUED:
CORPORATION)	
)	
and)	
)	
AETNA CASUALTY & SURETY)	
COMPANY)	
)	
Employer/Carrier-)	
Respondents)	
Cross-Petitioners)	DECISION AND ORDER

Appeal of the Decision and Order of James J. Butler, Administrative Law Judge, United States Department of Labor.

Mary Alice Theiler (Theiler, Douglas, Drachler & McKee), Seattle, Washington, for claimant.

Thomas G. Hall (Hall & Keehn), Seattle, Washington, for employer/carrier.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order (89-LHC-2814; 89-LHC-2815) of Administrative Law Judge James J. Butler denying benefits 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 sustained two injuries to her lower back in the course of her employment with Todd Pacific Shipyards. The first occurred in 1981, while carrying a fifty pound tool box. Claimant was diagnosed as suffering from a lumbosacral sprain and was off work for approximately two months following this injury, during which time employer paid temporary total disability benefits. The second injury occurred on February 23, 1984, while claimant was lifting and installing a heavy steel bunk into a ship. Again, claimant was diagnosed with lumbosacral sprain, she was off work for approximately two months and employer voluntarily paid temporary total disability benefits. Claimant was released for work without restrictions, but was subsequently laid off due to a reduction in force on December 7, 1984.

While working in her garden, claimant suffered acute back pain on April 8, 1985, for which she was hospitalized. A myelogram taken at that time indicated a central ventral defect at L4-5 with nerve root edema on the left side. Cl. Ex. 1. Following the hospitalization, claimant sought the care of a chiropractor, and received regular treatment for two years. Emp. Ex. 27.

Claimant sustained an injury to her lower back while employed at Boeing Company on March 6, 1987, while lifting rolls of graphite tape up to racks and rolling them out onto tables. Claimant was admitted to the hospital and referred to an orthopedic surgeon. She was diagnosed as suffering from a herniated lumbar disc at L5-S1 on the left, and surgery was performed on March 18, 1987, and again on May 13, 1987. Cl. Ex. 1, 5. Claimant continued to suffer pain, and was examined by Dr. Leung, who again recommended surgery. However, while performing surgery, Dr. Leung found that claimant did not have a recurrent herniated disc at the L5-S1 level, only scarring from the previous surgeries. Cl. Ex. 4. Subsequently, he recommended vocational counseling and retraining, and continues to treat her occasionally. Claimant has not worked since the injury in 1987, and sought benefits under the Act from Todd Pacific Shipyards.

In determining whether the claim, filed on March 7, 1988, was timely under the Act, the administrative law judge found that although claimant's pain never went away after the 1984 injury and her co-workers assisted her with her job duties, her treating physician found no permanent disability and authorized her to return to work. Moreover, claimant testified that she did not realize the full extent of her injury until after her surgeries in 1987 when she was told she would not improve. Therefore, the administrative law judge found that claimant did not become aware of the full extent of her injury until May 1987, and that her claim was timely filed. 33 U.S.C. §913(a).

The administrative law judge also found that it is undisputed that claimant sustained two compensable injuries to her lower back in 1981 and 1984. Therefore, claimant has established a *prima facie* case under Section 20(a) of the Act, 33 U.S.C. §920(a). However, he found there is substantial countervailing evidence of intervening causes, most significantly, two subsequent disabling injuries in 1985 and 1987, while at home and while working for Boeing respectively. The administrative law judge noted that Dr. Leung opined that the 1987 injury was the independent cause of claimant's condition; thus, employer established rebuttal of the Section 20(a) presumption. Lastly, the administrative law judge found that the weight of the evidence supports a finding that claimant's condition is the result of an intervening cause, namely one of her post-1984 injuries, and

that this is not an aggravation of the original injury, as it involves distinctly different areas of her lower back.

On appeal, claimant contends that the administrative law judge erred in finding that her current back condition was not caused, at least in part, by her employment at Todd Pacific Shipyards as none of the doctors of record eliminated the 1981 and 1984 injuries as at least a contributing cause to her current problems. Employer responds, urging affirmance of the administrative law judge's finding that claimant's condition is not a result of her back injuries suffered in 1981 and 1984 while employed at Todd Pacific Shipyards. On cross-appeal, employer contends that claimant's testimony, along with the representations attributed to her in the medical records, demonstrates that she knew that her low back condition was disabling long before May 1987; thus, the administrative law judge erred in finding that the claim was timely filed under Section 13. Claimant responds, urging affirmance of the administrative law judge's Section 13 finding.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we hold that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error. Contrary to claimant's contentions, the administrative law judge carefully considered the physicians' opinions and found that the record contains substantial countervailing evidence of intervening causes, most significantly, two subsequent disabling injuries in 1985 and 1987. Specifically, the administrative law judge found that claimant's treating physician, Dr. Leung, opined that the 1987 injury was the independent cause of claimant's condition. It is the function of the administrative law judge to make credibility determinations and the unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption of causation pursuant to Section 20(a). See *Holmes v. Universal Maritime Service Corp.*, 29 BRBS 18 (1995)(*decision on recon.*); *Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991), *aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor*, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1264 (1993). We therefore affirm the finding that Dr. Leung's opinion is sufficient to rebut the Section 20(a) presumption, and to support a finding that claimant's disabling condition is not due to her 1981 and 1984 injuries based on the record as a whole. See generally *Wright v. Connolly Pacific Co.*, 25 BRBS 161 (1991),

aff'd mem. sub nom. Wright v. Director, OWCP, 8 F.3d 34 (9th Cir. 1993). Thus, we affirm the denial of benefits.¹

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

¹As we have affirmed the administrative law judge's denial of benefits, we need not address employer's contention on cross-appeal that the administrative law judge erred in finding that the claim was timely filed pursuant to Section 13(a) of the Act, 33 U.S.C. §913(a). However, we note that the fact claimant continued to experience pain is insufficient to establish claimant's awareness of a likely impairment of earning power. *Gregory v. Southeastern Maritime Co.*, 25 BRBS 188, 191 (1991). Although claimant continued to have pain, she was receiving treatment from various physicians and chiropractors with the view towards recovery and was not told until after the surgeries in 1987 that she would likely not improve. Therefore, the administrative law judge's finding that the claim filed on March 7, 1988 was timely under Section 13(a) of the Act is supported by substantial evidence and in accordance with law. *See Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 30 (CRT)(9th Cir. 1991).