BRB No. 99-1132

ANTHONY R. GRAYER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KELLY AIR FORCE BASE	)	DATE ISSUED: 7/27/2000
	)	
and	)	
	)	
AIR FORCE INSURANCE FUND	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Anthony R. Grayer, San Antonio, Texas, *pro se*.

David J. Christenson (Office of Legal Counsel Air Force Services Agency), San Antonio, Texas, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (98-LHC-1018) of Administrative Law Judge James W. Kerr, Jr., 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act). In an appeal by a claimant without representation, we will review the administrative law judge's decision to determine if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 20 C.F.R. §§802.211(e), 802.220. If they are, they must be affirmed.

Claimant sustained injuries to his left knee and lower back on November 18, 1994,

while working as a purchasing agent for employer at Kelly Air Force Base, San Antonio, Texas. On November 24, 1994, Dr. Smith diagnosed a left knee strain with joint effusion and a lumbar spine strain, prescribed medicine, removed claimant from work with an anticipated return of December 5, 1994, and referred him for physiotherapy. Dr. Wilson, on April 26, 1995, diagnosed a lumbar strain and symptoms of a medial meniscal tear in the left knee. Arthroscopic surgery on claimant's left knee was performed on May 23, 1995. On October 4, 1995, Dr. Wilson assigned claimant a five percent whole person impairment rating based solely on his left knee, and released him to return to light duty work for two months and to regular duty thereafter.

Dr. Wilson subsequently diagnosed a herniated disc at L5-S1, and on January 31, 1996, opined that claimant reached maximum medical improvement with regard to his back, assigned a seven percent permanent impairment for that condition, fitted claimant with a back brace and released claimant to return to light duty work with restrictions. Claimant next saw Dr. Wilson on May 8, 1997, with continued complaints of pain in his left knee and back. Dr. Wilson opined that if the knee complaints persisted he would perform another arthroscopic procedure of the left knee. As for claimant's back, the doctor recommended continued conservative treatment and referred claimant to physical therapy.

Meanwhile, claimant returned to light duty work in October 1995, but was terminated in March 1996, as a result of downsizing. Claimant remained unemployed until April 1997, when he began part-time work as a convenience store clerk, working about 20 hours a week. He stated that full-time work was available there, but that he could not work the required split schedule. He also testified that he owns a catering business and a neighborhood bar, Club Supreme, where he works about 40 hours a week in the evenings. Additionally, claimant noted that he has obtained seasonal employment at Christmas time, as a mail carrier.

Employer paid periods of temporary total disability benefits and a scheduled permanent partial disability award as a result of claimant's left knee injury.[1] In April 1997, claimant sought additional permanent partial disability benefits after his lay-off since he has not returned to full duty work and thus is unable to earn wages at his pre-injury level.

[1]Specifically, employer paid temporary total disability benefits from November 21, 1994, to December 4, 1994, and from May 22, 1995, to October 9, 1995, and permanent partial disability for a 5 percent scheduled left knee injury from October 10, 1995, to January 18, 1996.

In his decision, the administrative law judge determined that claimant's claim was untimely filed pursuant to Section 13 of the Act, 33 U.S.C. §913.[2] Alternatively, he determined that claimant did not sustain any loss in wage-earning capacity following his termination from employer. Lastly, the administrative law judge determined that claimant is entitled to continued medical benefits for his work-related injuries.

On appeal, claimant, representing himself, challenges the administrative law judge's denial of benefits. Employer has not responded to this appeal.

Section 13(a) applies in cases involving traumatic injuries and requires that a claimant file his claim for benefits within one year of the time he becomes aware, or with the exercise of reasonable diligence should be aware, of the relationship between his injury and his employment. 33 U.S.C. §913(a). *See Welch v. Pennzoil Co.*, 23 BRBS 395 (1990); *Gregory v. Southeastern Maritime Co.*, 25 BRBS 188 (1991). For purposes of Section 13, claimant is not "aware" until he knows, or has reason to know, that he has sustained a permanent injury which is likely to impair his wage-earning capacity. *See Ceres Gulf, Inc. v. Director, OWCP [Fagan]*, 111 F.3d 17, 31 BRBS 21 (CRT)(5th Cir. 1997); *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98 (CRT)(4th Cir. 1991); *J.M. Martinac Shipbuilding v. Director, OWCP [Grage]*, 900 F.2d 180, 23 BRBS 127 (CRT) (9th Cir. 1990); *Marathon Oil Co. v. Lunsford*, 733 F.2d 1139, 16 BRBS 100 (CRT) (5th Cir. 1984); *see also Bath Iron Works Corp. v. Galen*, 605 F.2d 583, 10 BRBS 863 (1st Cir. 1979). Under Section 20(b), 33 U.S.C. §920(b), there is a presumption that the claim for benefits was timely filed. *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989). In order to rebut the Section 20(b) presumption, employer must establish that it complied with the requirements of Section 30(a) of the Act, 33 U.S.C. §930(a). *See Nelson v. Stevens Shipping & Terminal Co.*, 25 BRBS 277 (1992)(Dolder, J., dissenting).

In the instant case, the administrative law judge initially reviewed the relevant dates in this case, noting that claimant sustained his work-related injuries on November 18, 1994, that employer last paid benefits, a scheduled award for permanent partial disability for claimant's knee, on January 18, 1996, and that claimant's undated LS-203 claim form was received by the district director and forwarded to employer on April 4, 1997. He then concluded that there is no evidence which could toll the statute of limitations. Specifically, he found that while Dr. Wilson's report, dated January 31, 1996, might arguably toll the statute of limitations and extend the filing deadline to January 31, 1997, one year from the date of that

[2]Claimant appeared before the administrative law judge without representation.

report, it did not make claimant's claim, filed on April 4, 1997, timely.

Dr. Wilson's report represents the first time that claimant was assigned a permanent impairment rating for his back condition. Given that opinion and claimant's subsequent termination from his light duty work with employer on March 12, 1996, claimant knew, or had reason to know, that he had sustained a permanent injury which is likely to impair his wage-earning capacity by that date, at the latest. *Grage*, 900 F.2d at 180, 23 BRBS at 127 (CRT); *Lunsford*, 733 F.2d at 1139, 16 BRBS at 100 (CRT). Thus, claimant was aware of the true nature of his condition by March 12, 1996, *Fagan*, 111 F.3d at 17, 31 BRBS at 21 (CRT), but did not file his claim for additional benefits until April 4, 1997, more than one year after this "awareness." *Lunsford*, 733 F.2d 1139, 16 BRBS 100 (CRT). On these facts, and as employer has complied with the requirements of Section 30(a), Employer's Exhibit 1, we affirm the administrative law judge's finding that the claim for additional compensation benefits is barred pursuant to Section 13(a) of the Act.[3]

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[3]In light of our disposition, we need not consider the administrative law judge's alternative findings regarding claimant's disability.

REGINA C. McGRANERY
Administrative Appeals Judge