BRB No. 12-0413

ANALIDIO J. COSTA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TRI-UNION SEA FOODS, LIMTED LIABILITY CORPORATION	)	DATE ISSUED: 03/27/2013
	)	
and	)	
	)	
STATE COMPENSATION INSURANCE FUND	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Granting Summary Decision of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

Analidio J. Costa, Chula Vista, California, *pro se*.

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

McGRANERY, Administrative Appeals Judge:

Claimant, without the assistance of counsel, appeals the Decision and Order Granting Summary Decision (2011-LHC-01377) of Administrative Law Judge Steven B. Berlin 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). In an appeal by a claimant without representation by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law to determine if they are rational, supported by substantial evidence, and in accordance with law. If they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant was injured on February 15, 1982, while working as a fisherman aboard one of employer's tuna boats. A metal rod hit him in the head and wounded him, leading to headaches, dizziness, neck pain; claimant later reported that the injury led to

depression, anxiety, and heart and stomach problems. CX 1; Cl. S.D. Cal. Complaint. On March 18, 1983, claimant filed a Jones Act suit in California Superior Court naming employer and the vessel as defendants. EX 1. Claimant argued that the injury occurred because the vessel was unseaworthy and because employer negligently operated it. On August 1, 1986, the trial jury denied claimant's claim, rejecting both contentions. *Id*. The California Court of Appeals affirmed the decision on April 27, 1988. *Id*. Claimant filed another Jones Act suit for the same injuries on December 16, 2002, in U.S. District Court. EX 2. On defendant's motion, the district court dismissed the claim on July 25, 2003, holding that the claim was time-barred and also barred under the doctrine of *res judicata* in view of the prior litigation in the California courts. EX 4.

Claimant filed this Longshore claim on February 26, 2009, identifying February 19, 1982, as the earliest date employer was aware of the accident, describing his injury as "1982- Head Surgery," "1985-Open Hear[t] Surgery," and "1987- stomach surgery," and listing his occupation at the time of injury as "fisherman" and the location of the injury as aboard the vessel *Constellation*, a tuna seiner. EX 7. Employer moved to dismiss the case before the administrative law judge, arguing that the claim was untimely filed and is barred under the doctrine of *res judicata*, having been previously litigated to conclusion under the Jones Act. Employer also argued that claimant could not meet the coverage requirements of the Act, 33 U.S.C. §902(3), 903(a), as he was a member of the crew of a vessel and not a longshore or harbor worker engaged in the repair, loading, or unloading of ships. The administrative law judge found that claimant's claim under the Act was untimely filed pursuant to Section 13(a), 33 U.S.C. §913(a). The administrate law judge, therefore, granted employer's motion for summary decision and dismissed claimant's claim as time-barred. Claimant, representing himself, appeals the decision. Employer did not file a response brief.

Summary decision is proper when there are no genuine issues of material fact and no controversy concerning inferences to be drawn from the facts, and the moving party is entitled to judgment as a matter of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Dunn v. Lockheed Martin Corp.*, 33 BRBS 204 (1999); 29 C.F.R. §18.41. The administrative law judge must look at the facts in the light most favorable to the party opposing summary decision to determine whether there is an absence of a genuine issue of fact. *See Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991).

Section 13(a) of the Act provides that in a case involving a traumatic injury, a claim must be filed within one year of the date the claimant was aware, or in the exercise of reasonable diligence, should have been aware, of the relationship between the employment and the injury. 33 U.S.C. §913(a). The statute of limitations begins to run only after the employee is aware or reasonably should have been aware of the full character, extent, and impact of the work-related injury. This inquiry encompasses the claimant's awareness that he sustained a permanent work-related injury that causes a loss

in earning capacity. *See Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130(CRT) (9th Cir. 1991). In the absence of substantial evidence to the contrary, it is presumed, pursuant to Section 20(b) of the Act, 33 U.S.C. §920(b), that the claim was timely filed. *DynCorp Int'l v. Director, OWCP*, 658 F.3d 133, 45 BRBS 61(CRT) (2d Cir. 2011). In order to rebut the Section 20(b) presumption, the employer must establish that it complied with the requirements of Section 30(a) of the Act, 33 U.S.C. §930(a). *See Blanding v. Director, OWCP*, 186 F.3d 232, 33 BRBS 114(CRT) (2d Cir. 1999); *Bustillo v. Southwest Marine, Inc.*, 33 BRBS 15 (1999); 20 C.F.R. §§702.201-205. Section 30(f), 33 U.S.C. §930(f), provides that where the employer has been given notice or has knowledge of any injury and fails to file a Section 30(a) report, the statute of limitations provided in Section 13 does not begin to run until such report has been filed.[1] *Blanding*, 186 F.3d 232, 33 BRBS 114(CRT); *Ryan v. Alaska Constructors, Inc.*, 24 BRBS 65 (1990). Application of Section 30(f) does not require that an employer have definite knowledge that the injury is covered by the Act, *Cooper v. John T. Clark & Sons of Maryland, Inc.*, 11 BRBS 453 (1979), *aff'd*, 687 F.2d 39, 15 BRBS 5(CRT) (4th Cir. 1982), and the fact that the case may arise under a different statute does not excuse an employer's failure to file the Section 30(a) report. *Ryan*, 24 BRBS 65. Thus, for Section 30(a) to toll the period for filing, the employer must have notice or knowledge of the injury and its work-relatedness; the employer may overcome the presumption of timeliness by providing substantial evidence that it never gained knowledge or received notice of the injury for Section 30 purposes. *See Blanding*, 186 F.3d 232, 33 BRBS 114(CRT); *Bustillo*, 33 BRBS 15; *see also Stark v. Washington Star Co.*, 833 F.2d 1025, 20 BRBS 40(CRT) (D.C. Cir. 1987).

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[1]Section 30(f) states:

> Where the employer or the carrier has been given notice, or the employer (or his agent in charge of the business in the place where the injury occurred) or the carrier has knowledge, of any injury or death of any employee and fails, neglects, or refuses to file report thereof as required by the provisions of subdivision (a) of this section, the limitations in subdivision (a) of section 913 of this title shall not begin to run against the claim of the injured employee or his dependents entitled to compensation, or in favor of either the employer or the carrier, until such report shall have been furnished as required by the provisions of subdivision (a) of this section.

33 U.S.C. §930(f).

In this case, the administrative law judge found that claimant offered no facts or arguments to suggest that he was unaware, until some later date, that his symptoms beginning in February 1982 were associated with his work accident. Decision and Order at 4. The administrative law judge further found that claimant was aware of the full character and extent of the harm done to him by February 2000 when Dr. Capizzi stated that claimant has vascular headaches, a ligamentous cervical injury, dizziness and anxious depression as a result of the 1982 injury. As claimant did not file his claim until 2009, the administrative law judge found it time-barred. The administrative law judge further found that if Section 13(d) tolled the statute of limitations, the 2009 Longshore claim was still untimely because the initial Jones Act claim was finalized on April 27, 1988, and the Act's statute of limitations expired prior to the filing of the second Jones Act claim in December 2002.[2] Thus, the administrative law judge found claimant's claim to be time-barred, and he granted employer's motion for summary decision and dismissed the claim.

We must vacate the administrative law judge's finding that claimant's claim was untimely filed as his analysis is incomplete. Although the administrative law judge found that claimant became aware of the full nature and impact of his injury in February 2000, he did not give claimant the benefit of the Section 20(b) presumption or address whether the statute of limitations was tolled by employer's failure to file a Section 30(a) notice of injury form.[3] 33 U.S.C. §930(f); *Blanding*, 186 F.3d 232, 33 BRBS 114(CRT); *Ryan*, 24 BRBS 65. Without these findings, it cannot be said that employer is entitled to summary

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[2]The tolling provision of Section 13(d) states:

> Where recovery is denied to any person, in a suit brought at law or in admiralty to recover damages in respect of injury death on the ground that such person was an employee and that the defendant was an employer within the meaning of this Act and that such employer had secured compensation to such employee under this Act, the limitation of time prescribed in subdivision (a) shall begin to run only from the date of termination of such suit.

33 U.S.C. §913(d). We affirm the administrative law judge's finding that Section 13(d) does not apply to toll the Section 13(a) statute of limitations as claimant did not file his claim within one year of the conclusion of the Jones Act suits. *See, e.g., C & C Marine Maintenance Co. v. Bellows*, 538 F.3d 293, 42 BRBS 37(CRT) (3d Cir. 2008).

[3]As claimant filed his first claim under the Jones Act in March 1983, employer cannot defend against the tolling provision by claiming it did not know of claimant's work injury until some later time.

decision as a matter of law.[4] *See generally B.E. [Ellis] v. Electric Boat Co.*, 42 BRBS 35 (2008); *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006). Therefore, we vacate the dismissal of claimant's claim and remand the case for findings on these issues.[5]

Accordingly, the administrative law judge's Decision and Order Granting Summary Decision is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

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BETTY JEAN HALL
Administrative Appeals Judge

[4]Moreover, we note that a finding that claimant's claim is time-barred under Section 13 does not preclude claimant from obtaining medical benefits for a covered injury. *See, e.g., Siler v. Dillingham Ship Repair*, 28 BRBS 38 (1994)(en banc). Thus, the dismissal of claimant's entire claim on this ground is incorrect.

[5]In addition, or alternatively, the administrative law judge may opt to address employer's motion for summary decision on the ground that claimant is excluded from the Act's coverage as a member of a crew. 33 U.S.C. §902(3)(G); *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 26 BRBS 75(CRT) (1991). A finding that claimant is excluded would preclude entitlement to all benefits.

BOGGS, Administrative Appeals Judge, concurring:

Although I agree with my colleagues' decision to remand this case, I would first have the administrative law judge determine if claimant conceded he was a member of the crew of a vessel, and thus excluded from the Act's definition of "employee." *See* 33 U.S.C. §902(3)(G); *McDermott, Int'l v. Wilander,* 498 U.S. 337, 26 BRBS 75(CRT) (1991). Such concession would render Section 30(a) inapplicable because employer need only file a report of injury for an "employee." 33 U.S.C. §930(a), (f). Moreover, the applicability of an exclusion from coverage renders moot any claim for medical benefits.

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JUDITH S. BOGGS
Administrative Appeals Judge