

BRB No. 01-0687

RICHARD P. STEARNS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MWR, DEPARTMENT OF ARMY	)	
(NAF) FT. STEWART, GA	)	DATE ISSUED: <u>May 20, 2002</u>
	)	
and	)	
	)	
ALEXSIS, INCORPORATED	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Modification of Jeffrey Tureck,
Administrative Law Judge, United States Department of Labor.

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

Donovan A. Roper (Law Offices of Donovan A. Roper, P.A.), Altamonte
Springs, Florida, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Modification (1998-LHC-1758) of
Administrative Law Judge Jeffrey Tureck 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). 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 professional golfer and Director of Operations for Hunter Golf

Course at Fort Stewart, alleged that he injured his right foot at work. In developing his claim, claimant alleged three alternative theories of recovery: 1) that he injured his right foot on June 20, 1997, at work by falling; 2) that the June 20, 1997, fall at work aggravated a pre-existing right foot injury; or 3) that he aggravated any pre-existing right foot injury through general working conditions which required him to stand and walk constantly. Employer did not pay any disability benefits, but it paid some medical benefits.

In his initial decision, the administrative law judge found that claimant's first two theories of recovery were timely raised. The administrative law judge, based on the weight of the evidence, further found that the incident at work on June 20, 1997 did not cause the fractures in claimant's right foot, and that claimant failed to prove that he aggravated the pre-existing condition to his right foot in the June 20, 1997 fall at work. Consequently, benefits were denied with respect to claimant's first two theories. With respect to claimant's third theory of recovery, the administrative law judge found that notice of this claim was untimely given, pursuant to Section 12 of the Act, 33 U.S.C. §912, on January 18, 2000, fifteen months after the case was referred to the Office of Administrative Law Judges, and that employer was prejudiced by the late notice under Section 12(d)(2), 33 U.S.C. §912(d)(2). The administrative law judge thus did not consider the merits of claimant's general working conditions claim, and he denied benefits on this theory as well. Claimant appealed the administrative law judge's denial of benefits to the Board.

Before the Board addressed the appeal, claimant requested modification of the administrative law judge's denial of benefits. 33 U.S.C. §922. Consequently, the Board dismissed claimant's appeal and remanded the case to the administrative law judge for consideration of the modification request. *Stearns v. MWR, Dep't of Army (NAF) Ft. Stewart, GA*, BRB No. 01-429 (Apr. 11, 2001)(unpub. Order). Upon claimant's motion for modification, the administrative law judge again found that notice of claimant's general working conditions claim was untimely, although he found that notice was given on July 15, 1999, and not January 18, 2000, as he initially had found. The administrative law judge also found that whether notice was given on July 15, 1999, or January 18, 2000, was immaterial as employer was prejudiced by claimant's failure to give timely notice. 33 U.S.C. §912(a), (d). Moreover, the administrative law judge found that the claim based on claimant's general working conditions was untimely filed pursuant to Section 13, 33 U.S.C. §913. Consequently, the administrative law judge again denied benefits.

On appeal, claimant challenges the administrative law judge's denial of his request for modification. He did not seek reinstatement of his initial appeal. Claimant asserts that the administrative law judge erred in finding that notice of

claimant's claim based on his general working conditions was untimely given. Claimant also contends that the administrative law judge erred in finding that the fall at work on June 20, 1997, did not aggravate claimant's pre-existing foot problems. Employer responds in support of the administrative law judge's decision.

We first address claimant's contention that the administrative law judge erred in finding claimant's assertion that his injury was related to his general working conditions barred by the provisions of Sections 12 and 13 of the Act, 33 U.S.C. §§912, 913. These statutory provisions require that a notice of injury and a claim for compensation be filed within 30 days and one year, respectively, of the date of claimant's awareness of the relationship between his injury and his employment. In this case, employer stipulated that claimant's initial claim for benefits for his foot injury, which was based on the fall at work on June 20, 1997, was timely filed pursuant to Section 13(a). The administrative law judge also found that claimant "may have" provided oral notice of his injury to employer within 30 days of June 30, 1997, see 33 U.S.C. §912(d)(1) (failure to give written notice excused if employer had actual knowledge of the injury), and that claimant provided written notice to employer 45 days after the injury. The administrative law judge found that employer was not prejudiced by this late notice. Decision and Order at 8-9.

With regard to the "claim" based on claimant's general working conditions, the administrative law judge, by finding such a claim barred for failure to comply with Section 12 and 13, see Decision and Order on Modification at 3-4, obviously required a new separate, notice of injury and claim for compensation in order for claimant to raise this theory of causation for his foot injury. The administrative law judge erred in requiring separate notice and filing in order for claimant to raise a new theory of causation. In *U.S. Industries/Federal Sheet Metal, Inc., v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982), the Supreme Court held that the presumption of Section 20(a) of the Act, 33 U.S.C. §920(a), attaches only to the claim asserted by the claimant. Pertinent to the instant case, the court discussed the requirements for a claim under the Act, specifically addressing the fact that the claim may be amended, noting that "considerable liberality is usually shown in allowing the amendment of pleadings to correct. . . . defects," unless the "effect is one of undue surprise or prejudice to the opposing party." " *U.S. Industries*, 455 U.S. at 613 n. 7, 14 BRBS at 633 n. 7, *quoting* 3 A. Larson, *The Law of Workmen's Compensation*, §78.11 (1976), currently 7 Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law*, §124.04[3] (2001). In this regard, the Larson treatise states that a wide variance is permitted between pleading and proof, unless the employer is prejudiced by having to defend at the hearing an injury completely different than the one pleaded. 7 Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law*, §124.04[5] (2001).

In *Meehan Seaway Serv. Co. v. Director, OWCP [Hizinski]*, 125 F.3d 1163, 31 BRBS 114(CRT)(8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998), the United States Court of Appeals for the Eighth Circuit addressed a case in which the claimant filed a claim alleging a knee injury occurred at work on October 14, 1989, when he stepped in a hole while he was carrying heavy bags of wheat. The administrative law judge found that the evidence did not support a finding of a specific accident on that day, but that the evidence did support a finding that cumulative trauma aggravated claimant's pre-existing knee condition. *Id.*, 125 F.3d at 1167, 31 BRBS at 116(CRT). On appeal, the employer contended that it was denied due process because the administrative law judge awarded benefits on a theory that the claimant did not assert. In affirming the Board's decision, the Eighth Circuit quoted the language regarding the amendment of pleadings from the Supreme Court's decision in *U.S. Industries*, and proceeded to discuss whether employer was prejudiced by consideration of a cumulative trauma claim. The court held that employer was on notice of the possibility that claimant's injury was due to cumulative trauma sufficiently before the hearing so that it was not prejudiced by an award based on such a claim. Specifically, claimant's pre-trial pleading and a copy of a letter to the Department of Labor provided notice to employer of a cumulative trauma claim. In addition, medical reports generated prior to the alleged injury of October 1989 denoted progressive knee complaints. *Id.* The court thus denied the employer's challenge to the sufficiency of claimant's amended claim.

Similarly, in *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), *aff'd on recon.*, 26 BRBS 32 (1992), *aff'd mem. sub nom. Argonaut Ins. Co. v. Mikell*, 14 F.3d 58 (11th Cir. 1994), the claimant filed a timely claim for death benefits alleging that her husband's death was due to cancer caused by work-related asbestos exposure. Two and one-half years later, claimant filed an amended pre-hearing statement seeking death benefits based on her husband's being permanently totally disabled due to a back injury at the time of death, see 33 U.S.C. §909 (1982)(amended 1984). The administrative law judge allowed the amended claim, citing *U.S. Industries*, finding that employer was not prejudiced by the amendment of the claim and that it was aware of this theory of recovery prior to the hearing and had adequate opportunity to prepare its defense. The Board affirmed, specifically stating that the timeliness of "the claim" is determined by the date the original claim was filed. *Mikell*, 24 BRBS at 104-105, *citing* 29 C.F.R. §18.5(e)(allowing an amendment to a pleading if it is determined by the administrative law judge to be reasonably within the scope of the original claim).

Based on *U.S. Industries*, *Hizinski*, and *Mikell*, it is clear that claimant's theory of causation based on his general working conditions must be considered to be an

amendment of his timely claim for a work-related injury to his foot. Claimant, therefore, was not required to file a new notice of injury and claim for compensation pursuant to Sections 12 and 13 of the Act. As the administrative law judge found claimant's initial notice and claim for compensation were timely, we reverse his conclusion that claimant's amended claim is barred by Sections 12 and 13. *Hizinski*, 125 F.3d 1163, 31 BRBS 114(CRT); *Mikell*, 24 BRBS 100; see also *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94 (1988)(claimant need not file a separate notice of injury for sequela of original injury). We will review the administrative law judge's findings at Section 12(d)(2) regarding prejudice in order to ascertain whether claimant's amendment of his claim to raise general working conditions as a cause of his injury resulted in "undue prejudice or surprise" to employer. See *U.S. Industries*, 455 U.S. at 613 n. 7, 14 BRBS at 633 n. 7.

Initially, the administrative law judge found that employer established prejudice because it had deposed all of its doctors, with the exception of two, prior to the date claimant amended his claim in July 1999. Although this statement accurately reflects the record evidence, it is insufficient to establish prejudice because employer had ample opportunity after the theory was raised to either depose the doctors again or, to minimize expenses, supplement the doctors' depositions by propounding written questions to them.¹ See generally *Boyd v. Ceres Terminals*, 30 BRBS 218 (1987). Additionally, the administrative law judge found that employer established prejudice because had the hearing taken place earlier, when it was originally scheduled, the claim based on general working conditions would not have been raised. The administrative law judge also stated that employer was prejudiced because the delay was particularly troublesome where claimant's condition is longstanding and the cause of his condition is at issue. This is insufficient to establish prejudice. Regardless of what might have happened had an earlier hearing been held, the fact is that it was rescheduled on several occasions for varying reasons. Each side was granted one continuance, and employer was not voluntarily paying any disability benefits. Employer was equally responsible for the delay in holding the hearing and would have caused further delay in this case had its second request for a continuance of the hearing on February 14, 2000, been granted.² Moreover, the delay did not affect employer's ability to respond to

¹By the time claimant amended his claim on July 15, 1999, the depositions of Drs. Dewberry, Dulamal, Harvey, Needleman, Sheils, and Wilkes had been taken. Emp. Exs. 6, 8, 9, 11, 13, 15. Only the depositions of Drs. Collier and Deriso were taken after July 15, 1999, and both of these doctors relate claimant's right foot problems to his working conditions. Emp. Exs. 2 at 42-43; 29 at 55-56, 58.

²The first two hearings scheduled on November 19, 1998, and February 22, 1999, were canceled due to the unavailability of the administrative law judges

claimant's case. Employer had ample time to prepare for the new theory prior to the actual hearing, as Dr. Needleman, on August 12, 1997, opined that claimant's right foot problems were aggravated by a lot of standing and walking at work. Cl. Ex. 12 at 9. This opinion was stated on a LS-1 (Request for Examination) sent to employer's carrier.³ See *Hizinski*, 125 F.3d 1163, 31 BRBS 114(CRT); *Mikell*, 24 BRBS 100. Thus, employer had notice of a potential causal nexus between claimant's foot problems and his general working conditions well in advance of a hearing.

Lastly, the administrative law judge stated that the two years' late notice was prejudicial to employer because people's memories fade and become less reliable, witnesses become harder to locate, and documents get misplaced or discarded. Contrary to this conclusion, there were no assertions by employer that any of these concerns were actually present in this case.⁴ In any event, a mere allegation that such events occurred is insufficient to establish prejudice. See *I.T.O. Corp. v. Director, OWCP [Aples]*, 883 F.2d 422, 22 BRBS 126(CRT)(5th Cir. 1989); *Bustillo v. Southwest Marine, Inc.*, 33 BRBS 15 (1999); *Forlong v. American Sec. & Trust Co.*, 21 BRBS 155 (1988). In sum, the rationale used by the administrative law judge is insufficient to establish that employer was unduly prejudiced or surprised by

assigned to the case. Claimant's request for a continuance for the rescheduled March 3, 1999, hearing was granted. After claimant amended his claim on July 15, 1999, employer's request for a continuance was granted with respect to the October 8, 1999, rescheduled hearing date but denied with respect to the February 14, 2000, hearing date. Employer acknowledged at the hearing that it did not voluntarily pay any compensation. Tr. at 7.

³Drs. Baruch, Dewberry, Harvey, and Sheils examined claimant before the alleged work injury. See Cl. Exs. 7, 14, 15; Emp. Exs. 9, 12-16, 25. Drs. Collier, Deriso, Dulamal, Hanzel, Needleman, Shapiro, and Wilkes treated claimant after the alleged work injury. See Cl. Exs. 8, 10-13; Emp. Exs. 1, 2, 4-8, 10-11, 29. Drs. Dulamal and Wilkes related the cause of claimant's right foot condition to his diabetes. Emp. Ex. 6 at 31, 11 (Ex. B).

⁴In fact, employer presented two witnesses, Ms. Cooper and Mr. Tunkle, who both testified at the hearing that they did not recall much about claimant reporting the accident but knew by at least August 5, 1997, of claimant's injury. Tr. at 137-139, 149, 160-161. The closest to an eyewitness to the accident, Mr. Tipton, testified at the hearing. Tr. at 183-190. Employer did not assert that these witnesses were hard to locate or that their memories faded or that their testimony was less reliable because of the passage of time.

claimant's amendment of his claim in July 1999. Employer was aware of medical evidence, in existence prior to July 1999, relating claimant's foot condition to his general working conditions. *Hizinski*, 125 F.3d 1163, 31 BRBS 114(CRT). Moreover, employer had adequate time before the February 14, 2000, hearing to develop new evidence on the amended claim. *See id.*; *Mikell*, 24 BRBS 100. Therefore, we vacate the denial of benefits on the general working conditions claim, and we remand the case for the administrative law judge to address claimant's entitlement to benefits on this claim.

Claimant also contends that the administrative law judge erred, in his initial Decision and Order, in finding that invocation of the Section 20(a) presumption was not established based on Dr. Collier's opinion that claimant's June 20, 1997, fall at work may have exacerbated his pre-existing foot condition. Section 20(a) provides claimant with a presumption that the injury he sustained is causally related to his employment if he establishes a *prima facie* case by showing that he suffered an injury and that employment conditions existed or a work accident occurred which could have caused the injury. *See Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT)(11th Cir. 1990). Once claimant has invoked the Section 20(a) presumption, the burden shifts to employer to rebut it with substantial countervailing evidence that claimant's condition was not caused or aggravated by his employment. *See Brown*, 893 F.2d 294, 23 BRBS 22(CRT). If the administrative law judge finds that the Section 20(a) presumption is rebutted, then all relevant evidence must be weighed to determine if a causal relationship has been established with claimant bearing the burden of persuasion. *See id.*; *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT)(1994).

We hold that claimant's failure to request reinstatement of his initial appeal precludes the Board from considering this issue on appeal. In its Order dated April 11, 2001 dismissing claimant's initial appeal, the Board specifically instructed claimant that,

This case will be reinstated by the Board *only if* claimant requests reinstatement. The request for reinstatement must be filed with the Board within thirty (30) days of the date the Order on modification is filed and must be identified by the Board's docket number, BRB No. 01-429.

In the event the administrative law judge denies modification and claimant wishes the Board to consider not only the original appeal but also whether the administrative law judge erred in denying modification, a Notice of Appeal of the Order denying modification must be filed *in*

addition to the request for reinstatement.

Stearns, slip op. at 1-2 (emphasis added). As the administrative law judge's decision on modification does not address the Section 20(a) issue raised, and claimant did not request reinstatement of the administrative law judge's initial decision which did address this causation issue, the Board is precluded from addressing the issue.⁵

Accordingly, the administrative law judge's Decision and Order on Modification is vacated. Employer was not prejudiced by claimant's amendment of his claim for benefits to include a general working conditions theory of recovery. The case is remanded to the administrative law judge for consideration of all remaining issues on the general working conditions claim.

SO ORDERED.

⁵In any event, the administrative law judge's finding that claimant did not establish that the accident on June 20, 1997, aggravated a pre-existing foot condition is rational and supported by substantial evidence. Contrary to claimant's contention, the administrative law judge did invoke the Section 20(a) presumption. See Decision and Order at 11. He properly found it rebutted by the opinions of Drs. Needleman and Deriso that the fall did not aggravate claimant's pre-existing foot condition. See *O'Kelley v. Dept. of the Army, NAF*, 34 BRBS 39 (2002). Finally, he found Dr. Collier's opinion that claimant's June 20, 1997, fall at work *may* have exacerbated his pre-existing foot condition was insufficient to establish that it *did* aggravate claimant's pre-existing foot condition. Decision and Order at 11, 13; Cl. Ex. 9 at 2 Emp. Ex. 29 at 34. The administrative law judge rationally determined that claimant failed to satisfy his burden of establishing that the specific work injury in fact aggravated his condition based on the record as a whole. See *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996).

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, JR.
Administrative Appeals Judge