BRB No. 99-1292

WILLIAM E. CHANCE, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BETHLEHEM STEEL CORPORATION	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Michael C. Eisenstein, Baltimore, Maryland, for claimant.

Richard W. Scheiner and Stuart M. Lesser (Semmes, Bowen & Semmes), Baltimore, Maryland, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (1998-LHC-476) of Administrative Law Judge Linda S. Chapman 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 administrative law judge's findings of fact and conclusions of law if they 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).

Claimant worked as a crane operator for employer. On January 31, 1994, he sustained an injury to his neck. Thereafter, claimant underwent treatment and surgery, and he returned to his usual work in October 1994. He performed this work without difficulty until April 30, 1996. On that date, claimant was working in the crane when he turned his neck suddenly in reaction to someone's calling his name. Claimant felt immediate sharp pain in his neck and back. Tr. at 85-88, 90-97, 102-104. Claimant worked in a light duty capacity for employer

for approximately 11 weeks following this incident. Dr. Folgueras released claimant to return to his crane operator job on July 2, 1996. Claimant refused to return to this position, and quit his job with employer. On September 6, 1996, claimant underwent a diskectomy and fusion at levels C5-6 and C6-7. Cl. Ex. 5; Tr. at 105. Dr. Jamaris, claimant's authorized treating physician, released claimant to return to light duty work in March 1997. Claimant did not return to work for employer. He filed a claim for benefits for each injury.[1]

The administrative law judge found that the claim for disability benefits for the 1996 injury was untimely filed and, accordingly, denied those benefits. Decision and Order at 18. She found, however, that, as a claim for medical benefits is never time-barred, claimant is entitled to medical benefits related to the treatment of the 1996 injury. Nevertheless, the administrative law judge denied claimant's request for reimbursement for the cost of services rendered by Drs. Zakai and Martinez, as claimant failed to request and obtain authorization from employer for treatment from those doctors. She further denied claimant's request to hold employer liable for an operation previously recommended by Dr. Jamaris, as she found there is no evidence of claimant's current need for such a procedure. Decision and Order at 19-20. Claimant appeals the administrative law judge's decision, and employer responds, urging affirmance.

Claimant contends the administrative law judge erred in finding his claim for benefits untimely. In this regard, he argues both that the administrative law judge erred in failing to consolidate his claim for the 1994 and 1996 injuries, as the 1996 incident was the natural and unavoidable result of the 1994 injury, and that he was unaware of the true extent of his disability related to the 1996 incident until Dr. Jamaris testified in his deposition in 1999 that the 1996 incident caused significant additional harm. We reject claimant's arguments and hold that the administrative law judge properly found claimant's claim for compensation for his 1996 injury was untimely filed.

[1]The administrative law judge found that only the 1996 injury is at issue in this case, as Administrative Law Judge Mollie W. Neal issued a decision awarding claimant temporary total disability benefits in connection with the 1994 injury. Decision and Order at 13 n.11, 16 at n.15; Decision and Order on Remand (April 14, 1998).

Initially, claimant's contention that the administrative law judge erred in failing to consolidate his claims is meritless. The claim for benefits for the 1994 injury was resolved in a Decision and Order issued by Administrative Law Judge Mollie W. Neal on April 14, 1998, nine months before Judge Chapman heard this claim. According to the correspondence on this matter, after Judge Neal issued her decision, she advised claimant to consolidate the claims for permanent total and temporary total disability benefits at the district director level.[2] Based on Judge Neal's letter, claimant requested a postponement of the hearing on the 1996 claim to allow the district director to set dates for informal conferences. He also stated his intent to renew his motion for consolidation if no resolution could be reached informally. *See* Letter dated May 18, 1998. In June 1998, the district director set the conference dates and the Office of Administrative Law Judges granted the requested continuance. *See* Letters dated June 10 and June 23, 1998. Although the district director recommended consolidating the claims, claimant apparently abandoned any claim for additional benefits related to the 1994 injury. Claimant's December 28, 1998, Pre-Hearing Statement of Issues and his July 8, 1999, Post-Hearing Brief, both state that claimant sought only temporary total disability benefits from April 30, 1996, and continuing. Moreover, claimant stipulated at the hearing before Judge Chapman that the proceedings concerned only benefits for the 1996 injury, as a causal connection between claimant's work and the 1996 injury was agreed upon and as the 1994 claim had been adjudicated. Jt. Ex. 1; Tr. at 66-69, 73, 76. Based on the stipulation and the statements filed by claimant, the administrative law judge found that entitlement to temporary total disability benefits related to the 1996 injury was the only issue before her and, consequently, she did not address any issues related to the 1994 injury. Decision and Order at 13 n.11-12. As this finding is supported by the record, claimant may not raise on appeal issues concerning the failure to consolidate the claims or that the 1996 injury is the natural progression of the 1994 injury. *See generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Lobus v. I.T.O. Corp. of Baltimore, Inc.*, 24 BRBS 137 (1990). Therefore, we reject claimant's belated attempt to link the two injuries. *Id.*; *see generally Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 182 (1984); *Martinez v. St. John Stevedoring Co., Inc.*, 15 BRBS 436 (1983); 20 C.F.R. §702.336.

We also reject claimant's assertion that the administrative law judge erred in finding the claim for benefits for the 1996 injury was untimely filed because he first became aware of the true extent of his disability only at the deposition of Dr. Jamaris in 1999. Section 13(a) of

[2]At that point, claimant sought both permanent total and temporary total disability benefits in connection with his 1994 and 1996 injuries. *See* May 18, 1998, LS-18 Pre-Hearing Statement.

the Act provides:

> Except as otherwise provided in this section, the right to compensation for disability or death under this chapter shall be barred unless a claim therefore [sic] is filed within one year after the injury or death. * * * The time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment.

33 U.S.C. §913(a). The Section 13 limitations period does not commence until the employee is aware or should be aware of the relationship between his employment and his injury and knows or should know that the injury will impair his capacity to work. *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98(CRT) (4th Cir. 1991); *Marathon Oil Co. v. Lunsford*, 733 F.2d 1139, 16 BRBS 100(CRT) (5th Cir. 1984); *see also Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 23 BRBS 13(CRT) (2d Cir. 1989); 20 C.F.R. §702.221(a).

In this case, claimant clearly testified that he sustained an injury to his neck on April 30, 1996. He stated "it felt like everything ripped up the right side of my neck" and it felt "like a 16 inch spike in the back of my neck. . . ." Tr. at 102-103. In fact, claimant testified there was "no doubt" that he had injured his neck on that date. Tr. at 129. The administrative law judge credited this testimony and used the date of injury to commence the running of the statute of limitations for filing a claim.[3] Decision and Order at 17-18. She found that employer filed its first report of injury on June 19, 1996, *see* 33 U.S.C. §930(a), (f), and that the district director notified claimant of his rights under the Act and of employer's objection to his right to compensation by letters dated July 11 and July 12, 1996. Decision and Order at 15; Emp. Exs. 1-2, 4-5. Further, the administrative law judge determined that, despite being released to return to his crane work by Dr. Folgueras, employer's expert, on July 2, 1996, Emp. Ex. 101, claimant did not return; thus, she concluded he knew the injury would affect his wage-earning power by that date. Decision and Order at 17. The evidence also reveals that a comparison of claimant's March 1994 and May 1996 MRIs showed significant worsening in 1996 which Dr. Jamaris concluded warranted additional treatment and surgery. Decision and Order at 17 n.16; Cl. Exs. 6 (Letters dated May 20, 1996, and April 16, 1997), 13 at 28. Even giving claimant the benefit of the doubt that he may not have become aware

[3]Technically, this is incorrect pursuant to Section 30(f) of the Act which provides that the statute of limitations begins to run only when employer files its first report of injury pursuant to Section 30(a). 33 U.S.C. §930(a), (f). *See also* 33 U.S.C. §920(b). In light of the administrative law judge's also using a later date, the date claimant last worked, as the date on which the time limitations commenced, *see* discussion *infra*, her error is harmless.

of the injury's effect on his ability to work until the last day he worked in a light duty capacity in the dispensary, July 7, 1996, the administrative law judge found that the claim filed on August 20, 1997, was untimely. Decision and Order at 18. The administrative law judge's findings are supported by substantial evidence of record, and it was rational for her to conclude that claimant was fully aware of his condition and the effect it would have on his ability to work in excess of one year prior to the date he filed the claim. *Ceres Gulf, Inc. v. Director, OWCP [Fagan]*, 111 F.3d 17, 31 BRBS 21(CRT) (5th Cir. 1997); *Gencarelle*, 892 F.2d at 173, 23 BRBS at 13(CRT). Therefore, we affirm the administrative law judge's denial of disability benefits for the 1996 injury for failure to file a timely claim for compensation.[4]

Next, claimant contends the administrative law judge erred in denying him reimbursement for the cost of services provided by Drs. Zakai and Martinez and for the surgery recommended by Dr. Jamaris. Under Section 7(d) of the Act, 33 U.S.C. '907(d), employer is not liable for medical expenses unless authorization for such treatment is first requested or treatment has been refused. *See Lustig v. Todd Shipyards Corp.*, 20 BRBS 207 (1988), *aff'd in part and rev'd in part on other grounds sub nom. Lustig v. U.S. Dept. of Labor*, 881 F.2d 593, 22 BRBS 159(CRT) (9th Cir. 1989); *Galle v. Ingalls Shipbuilding, Inc.*, 33 BRBS 141 (1999), *recon. denied* Dec. 7, 1999; *McQuillen v. Horne Brothers, Inc.*, 16 BRBS 10 (1983); 20 C.F.R. §702.406. As the administrative law judge found, claimant was referred to Dr. Zakai by his attorney. In turn, Dr. Zakai referred claimant to Dr. Martinez. Decision and Order at 19. The administrative law judge found that there is no evidence of record that claimant sought employer's authorization prior to visiting these physicians for a second opinion, and there is no evidence that employer refused treatment from Dr. Jamaris. *Id.* Consequently, as the administrative law judge's finding is supported by substantial evidence, we affirm the denial of reimbursement for unauthorized services provided by Drs. Zakai and Martinez. *Maryland Shipbuilding & Drydock Co. v. Jenkins,* 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979); 33 U.S.C. §907(d).

We also affirm the denial of medical benefits for the surgery Dr. Jamaris is alleged to have recommended. As the administrative law judge found, Dr. Jamaris's suggestion for a posterior foraminotomy at C5-6 and C6-7 followed by a wire fusion in 1997 was contingent upon claimant's September 1996 fusion having failed. Cl. Exs. 6, 13 at 27. The

[4]In light of our affirmance of the administrative law judge's denial of benefits, we need not address claimant's contentions regarding the nature and extent of disability.

administrative law judge found that there is no indication that such event occurred. Rather, Dr. Cohen, whom the administrative law judge credited, determined in December 1997 that the 1996 fusion was successful and that claimant needed no further surgery. Decision and Order at 20; Emp. Ex. 114. Moreover, Dr. Jamaris testified that he last saw claimant on June 12, 1997, and he would not perform surgery on claimant without first performing an evaluation to assess his current condition. Cl. Ex. 13 at 25, 30-31, 39. The administrative law judge rationally found that claimant is not currently in need of surgery and, unless and until claimant's condition related to his 1996 injury worsens and requires some further invasive treatment which is shown to be necessary, the expense of surgery is not compensable. We affirm the administrative law judge's finding, as it is supported by substantial evidence. 33 U.S.C. §907(a); *see generally Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988).

Accordingly, the administrative law judge's decision is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge