BRB No. 98-282A

JOHN L. SPENCER	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Jonathan H. Walker (Mason & Mason, P.C.), Newport News, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (96-LHC-2276) of Administrative Law Judge Fletcher E. Campbell, 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*. (the Act).[1] 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 first sustained an injury to his back in 1963, and had surgery for a herniated disc in 1975. After the 1975 surgery, claimant was placed on light duty. He underwent neck surgery in 1983, and again sprained his back in 1986. Dr. Rinaldi placed claimant on lifting,

[1]By Order dated September 2, 1998, claimant's appeal, BRB No. 98-282, was dismissed as abandoned. 20 C.F.R. §802.402(a).

climbing, pulling and bending restrictions, and claimant returned to light duty work. Claimant testified that he did not have any further back problems until 1994. Emp. Ex. 19 at 10. Claimant alleged at the hearing that on a Friday in January 1994, he felt a sting in his lower back when he was lifting and tugging heater bars. He did not report his work-related injury to a medical doctor. In August 1994, claimant reported to employer's clinic that he was having problems with his back and that he had been experiencing "constant pain for the last month." Emp. Ex. 2 at 14. He sought medical treatment, but was not able to get an appointment with Dr. Peach until October 1994, when he told the doctor he experienced a sudden pain while lifting. In November 1994, claimant reported to Dr. Prillaman that his present problems had persisted for about a year. Subsequently, claimant underwent surgery to fuse his L3-4, L4-5, and L5-S1 discs. Claimant did not return to work after the surgery, and has retired. Claimant sought permanent total disability benefits under the Act.

In his Decision and Order, the administrative law judge found the evidence sufficient to invoke the Section 20(a), 33 U.S.C. §920(a), presumption of causation, and that employer established rebuttal of the presumption. However, after weighing the evidence as a whole, the administrative law judge concluded that claimant established that he suffered a new injury or aggravated an old injury while on the job for employer. The administrative law judge also found that employer had knowledge of the injury as of August 19, 1994, when claimant visited the shipyard clinic, and that, moreover, employer did not demonstrate prejudice by claimant's failure to file written notice of his injury. 33 U.S.C. §912(d); Decision and Order at 11. In considering the timeliness of the claim filed in February 1995, the administrative law judge rejected claimant's uncorroborated contention that he first felt pain in January 1994, and found that there is no evidence that claimant knew that he suffered from a disabling work-related injury until he reported to the shipyard clinic on August 19, 1994. Thus, the administrative law judge found the claim timely filed under Section 13, 33 U.S.C. §913. However, the administrative law judge also found that claimant did not demonstrate that he cannot return to his former duties, and that he has voluntarily retired. Thus, the administrative law judge denied continuing permanent total disability benefits, but awarded claimant temporary total disability benefits for the periods November 12 and 13, 1994, and March 25 through December 3, 1995. 33 U.S.C. §908(b).

On appeal, employer contends that the administrative law judge erred in finding that the evidence establishes that claimant suffered a work-related injury on August 19, 1994, and thus erred in awarding temporary total disability benefits. Claimant has not responded to this appeal.

Initially, we reject employer's contention that the administrative law judge erred in considering whether claimant suffered a single traumatic injury on August 19, 1994, when claimant did not file a claim for an injury occurring on this date. In fact, the finding of a compensable claim is not based on a specific injury on this date. In his decision, the

administrative law judge considered the evidence to determine whether claimant's claim was timely filed pursuant to Section 13(a), 33 U.S.C. §913(a). The time limitation of Section 13(a) does not begin to run until the injured employee becomes aware of the full character, extent, and impact of the harm done to him as a result of the employment-related injury. *See Newport News Shipbuilding & Dry Dock Co. v. Parker,* 935 F.2d 20, 24 BRBS 98 (CRT) (4th Cir. 1991). Thus, claimant is not "aware," for Section 13 purposes, until he knows or has reason to know that he has sustained a permanent injury which is likely to impair his wage-earning capacity. *Id*. In the instant case, the administrative law judge found that August 19, 1994, was the first date of record that claimant sought medical treatment for back pain in 1994 and thus was "aware" for purposes of Section 13.[2] This date is of no other significance. Contrary to employer's contention, it was not required to defend against a claim for a traumatic injury that had not been made by claimant, as the administrative law judge considered only the claim filed for a cumulative injury to claimant's back. *U.S. Industries/Federal Sheet Metal v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). This claim was filed in February 1995, and averred that the back injury occurred as a result of continuous lifting. Emp. Ex. 18.

Moreover, we reject employer's contention that the administrative law judge erred in finding claimant's disabling back condition to be work-related. An "injury" includes one occurring gradually as a result of continuing exposure to conditions of employment, and it is sufficient if employment "aggravates the symptoms of the process." *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986). The Section 20(a) presumption applies to the issue of whether a disabling injury is causally related to employment. *See Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989). Once invoked, Section 20(a) places the burden on employer to go forward with substantial countervailing evidence rebutting the presumption that claimant's disability was caused or aggravated by his employment. If employer succeeds, the presumption no longer controls and the issue of causation must be resolved based on the record as a whole. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997).

Employer contends that inasmuch as Drs. Peach and Mathews conclude that

[2]The administrative law judge rationally rejected claimant's testimony that he had suffered an injury in January 1994, as it was not corroborated by any other evidence of record. *See generally John W. McGrath Corp. v. Hughes,* 289 F.2d 403 (2d Cir. 1961).

claimant's disabling back condition is consistent with degenerative changes, a causal relationship between claimant's 1994 employment and his disability is not established on the record as a whole. We reject this contention as Dr. Mathews opined that claimant's history of surgery, the aging and degenerative process, and his continued work in manual labor combined to form a new and more pervasive condition than he was treated for initially. Cl. Ex. 1 at 126. Dr. Peach testified that the type of work claimant performed would certainly aggravate his pre-existing disc problem. Cl. Ex. 2 at 14.

Where an employment-related injury aggravates, accelerates or combines with a prior condition, the entire resultant disability is compensable. *Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52 (CRT) (4th Cir. 1982). Therefore, as the credited medical evidence of record establishes that claimant's work duties contributed to his back condition diagnosed in 1994, which resulted in surgery, we affirm the administrative law judge's finding that claimant established that his back condition was due, at least in part, to his continued employment, and thus affirm the award of temporary total disability benefits.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge