

BRB No. 97-393

VONCILLE M. BOND (widow of)
SHELLY M. BOND))
)
Claimant-Petitioner)
)
v.)
) DATE ISSUED: _____
AVONDALE INDUSTRIES,)
INCORPORATED)
)
Self-Insured Employer-)
Respondent) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Rebecca J. Ainsworth (Maples & Lomax, P.A.), Pascagoula, Mississippi, for claimant.

Richard S. Vale (Blue Williams, L.L.P.), Metairie, Louisiana, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (95-LHC-1453) of Administrative Law Judge Richard D. Mills 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).

Decedent worked as a pipefitter/welder for Ingalls Shipbuilding for various periods between 1941 and 1959 and during the second quarter of 1962, and he worked for Avondale Industries during the second and third quarters of 1962. Cl. Ex. 9; Emp. Ex. 4. Twenty-five years later, on June 2, 1987, he underwent an audiometric evaluation which revealed a 36.3 percent binaural impairment. Cl. Ex. 1; Emp. Ex. 3. The parties stipulated that he became aware of the work-relatedness of his hearing loss on June 21, 1987.

Decedent filed a notice of injury and a claim for compensation against Ingalls on January 4, 1988. Cl. Exs. 2-3. He died on September 29, 1988, and on January 17, 1992, his widow was appointed executrix by court order. Cl. Ex. 11.

At some point during the investigation of the claim, decedent's attorney obtained Social Security records and discovered that Avondale was decedent's last maritime employer. Cl. Ex. 9. On July 13, 1992, counsel subpoenaed decedent's employment records from Avondale, but there was no response to this request. Cl. Ex. 6. On February 1, 1993, claimant filed a notice of injury and a claim for compensation against Avondale and moved to dismiss the claim against Ingalls without prejudice. Cl. Exs. 4, 7-8. Avondale filed its First Report of Injury on February 4, 1993. Emp. Ex. 1. Claimant filed a Motion for Substitution with the district director on October 24, 1994, requesting that the estate and executrix-widow be substituted for decedent as claimant herein. Cl. Ex. 11. On March 13, 1995, the claim against Avondale was transferred to the Office of Administrative Law Judges, and on August 16, 1995, the claim against Ingalls was dismissed by the district director without prejudice. Cl. Exs. 5, 10.

At the hearing on the claim against Avondale, the administrative law judge granted counsel's motion to substitute the estate/executrix as claimant. Tr. at 3. In his Decision and Order, the administrative law judge determined that decedent failed to file a claim against Avondale within one year of his awareness of his work-related hearing loss, and he therefore denied benefits. Decision and Order at 4. Claimant appeals the decision, and employer responds, urging affirmance.

Claimant contends the administrative law judge erred in finding that the claim against Avondale was untimely. She asserts *Smith v. Aerojet-General Shipyards, Inc.*, 647 F.2d 518, 13 BRBS 391 (5th Cir. 1981), and *Osmundsen v. Todd Pacific Shipyard*, 18 BRBS 112 (1986), as support for her contention that decedent's timely claim against Ingalls is sufficient to toll the time for the filing of a claim against Avondale. Specifically, she avers that the claim against Avondale is timely, as this case is analogous to *Osmundsen*. Employer argues that *Smith* and *Osmundsen* are distinguishable and that the claim for hearing loss benefits is untimely. Additionally, it argues that decedent's Social Security records were easily attainable and clearly identified it as the last maritime employer; thus, it alleges that decedent's mistaken filing against Ingalls should not result in the tolling of the statute of limitations.

In a claim for loss of hearing, an employee has one year to file a claim for compensation, and the time for filing a hearing loss claim begins to run when the employee receives an audiogram with an accompanying report indicating the existence of a work-related hearing loss. 33 U.S.C. §§908(c)(13)(D), 913(a) (1994); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995). If a claim was timely filed against a later employer, the time limits do not begin to run against a prior employer until the employee is aware or should have been aware that liability could be asserted against that prior employer. *Smith*, 647 F.2d at 524, 13 BRBS at 396. Similarly, if a claim is timely filed against a prior employer, the time limits do not begin to run against a later employer until

the employee is aware or should have been aware that liability could be asserted against that later employer. *Osmundsen*, 18 BRBS at 115. Pursuant to Section 20(b), it is presumed in the absence of substantial evidence to the contrary that the claim has been filed in a timely fashion. 33 U.S.C. §920(b); *Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991); *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989); *Forlong v. American Security & Trust Co.*, 21 BRBS 155 (1988).

In the case at bar, decedent filed a claim against Ingalls within one year after receiving an audiogram and report indicating he sustained a work-related hearing loss; however, he died before the case was adjudicated. Four years after his death, his widow was appointed executrix, and, at some point, counsel obtained Social Security records which revealed Avondale was decedent's last maritime employer. The claim against Avondale was filed on February 1, 1993. In finding that the 1993 claim was not filed in a timely manner, the administrative law judge distinguished both *Smith* and *Osmundsen*. He found that *Smith* concerned the liability of a prior employer, and this case involves the liability of a later employer.¹ Decision and Order at 3. Likewise, he distinguished *Osmundsen*, stating that under its holding, the time for filing is tolled only when there is a judicial determination that a later employer is potentially liable. Decision and Order at 3-4. Although the administrative law judge is correct that *Smith* involved a potentially liable later employer,² the administrative law judge erred in dismissing the claim on that basis given

¹The administrative law judge also stated that applying *Smith* would circumvent Section 13 because the only information decedent needed to file against the last employer was readily available. The administrative law judge does not state how this observation is limited to the *Smith* decision.

²In *Smith*, the employee filed a claim against his last two maritime employers for disability due to work-related scoliosis, and at the formal hearing, he moved to add Aerojet-General (his next most recent maritime employer). The United States Court of Appeals for the Fifth Circuit determined that Section 13 of the Act should be read as requiring the filing of a claim against a previous employer within one year of the date the employee becomes

the Board's decision in *Osmundsen*; moreover, the administrative law judge's basis for distinguishing *Osmundsen* is not valid.

aware, or should have been aware, of a particular employer's potential liability, *i.e.*, a claim should not be time-barred against a prior employer just because the claimant failed to file a claim against that employer before he was aware it could be held liable. *Smith*, 647 F.2d at 524, 13 BRBS at 395-396.

In *Osmundsen*, the claimant filed a claim under the Act alleging that his breathing difficulties arose out of his employment with Todd Shipyards. In an informal conference, the district director determined that Foss Launch and Tug, with whom the claimant was employed for two weeks, was the claimant's last employer and should be joined to the action. *Osmundsen*, 18 BRBS at 113. On the second appeal, the Board applied the rationale of *Smith*. The Board stated that claimant logically filed against Todd Shipyards, his "main employer," and as this claim was timely, it tolled the time against Foss Launch against whom claimant promptly filed upon learning of its potential liability. *Osmundsen*, 18 BRBS at 115. Thus, pursuant to *Smith* and *Osmundsen*, the time for filing a claim against either a prior or a later employer may be tolled where a claim has been timely filed against one of the claimant's employers. See *Shaller*, 23 BRBS at 145; *Derocher v. Crescent Wharf & Warehouse*, 17 BRBS 249 (1985).

We hold that the administrative law judge erred in distinguishing *Osmundsen* on the basis that it involved a "judicial" determination that a more recent employer is liable. That the district director in *Osmundsen* determined the potential liability of a more recent employer does not render the case inapposite. The salient point of *Smith* and *Osmundsen* is that when claimant has timely filed against one employer, the time for filing a claim against an earlier or later employer commences on the date the claimant became aware or should have been aware that a prior or later employer could be liable as the responsible employer, by whatever means that knowledge is obtained. The administrative law judge did not make this finding, and thus we must vacate the finding that the claim against Avondale is time-barred. Moreover, we note that the administrative law judge did not consider the Section 20(b) presumption and its applicability to this claim. On remand, the administrative law judge must determine when decedent or claimant became aware or should have been aware of Avondale's potential liability, as this date commences the time for filing against Avondale. Furthermore, we note that claimant was appointed executrix of the estate four years after her husband's death. The administrative law judge must determine whether this delay affected counsel's ability to act on behalf of the estate, and if so, in what manner.

Accordingly, the administrative law judge's Decision and Order is vacated, and the case is remanded for further consideration.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge