U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 20-0435

TODD O. BROWN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GLOBAL INTEGRATED SECURITY, INCORPORATED	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, c/o AIG CLAIMS, INCORPORATED	)	
	)	DATE ISSUED: 09/24/2021
Employer/Carrier-Respondents	)	
	)	
AMERICAN HOME ASSURANCE COMPANY	)	
	)	
Carrier-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Monica Markley, Administrative Law Judge, United States Department of Labor.

Lara D. Merrigan (Merrigan Legal), Sausalito, California, and Jeffrey Winter, San Diego, California, for Claimant.

John F. Karpousis and Matthew J. Pallay (Freehill, Hogan & Mahar, LLP), New York, New York, for Employer/Carrier.

Before: BOGGS, Chief Administrative Appeals Judge, ROLFE and JONES Administrative Appeals Judges.

ROLFE, Administrative Appeals Judge:

Claimant appeals Administrative Law Judge Monica Markley's Decision and Order (2017-LDA-00592, 00945) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act (DBA), 42 U.S.C. §1651 *et seq.* (Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked for Employer in Iraq from 2011 until Employer's contract was terminated in April 2015. Tr. at 31-32. He injured his back lifting weights on August 23, 2013. CX 1. Claimant continued in his usual employment and was promoted to Deputy Project Manager in February 2014. Tr. at 46-47; CX 26 at 255. He sought treatment for back pain in June 2014 when on regularly scheduled leave in the United States. CX 10 at 92-94. An MRI showed a herniated disc at L5-S1. CX 11 at 117. On July 8, 2014, Claimant agreed to undergo surgery in August 2014. CX 23 at 177-179. Prior to surgery, however, he received two epidural steroid injections and cancelled the procedure. CX 17 at 153-159.

He returned to work for Employer in December 2014 after passing Employer's redeployment physical examination. CX 19 at 166-167. After his contract ended in April 2015, Claimant applied for work with the Columbia, South Carolina, police department in May 2015, passed their physical, and was employed there when he next sought treatment for back pain in May 2016. CX 10 at 105-107; EXs J, K.

Claimant underwent a left lumbar fusion on October 17, 2016. CXs 13 at 126-128, 29. He filed an LS-201 Notice of Injury on October 14, 2016, for the August 2013 weightlifting injury. CX 1. Employer filed its LS-202 First Report of Injury on October 13, 2016. EX X at 2. On October 27, 2016, Claimant filed an LS-203 Claim for Compensation, which included a cumulative trauma injury with Employer through April 2015.[1] CX 3. Employer controverted the claims. CX 4.

[1] The administrative law judge found the LS-203 Claim for Compensation encompassed both injuries since it referred to the 2013 weightlifting injury and repetitive trauma through April 2015. Decision and Order at 25 n.11.

In her decision, the administrative law judge determined the October 2016 claim for the 2013 weightlifting injury was untimely as Claimant had one year to file his claim after July 8, 2014, when he scheduled back surgery.[2] Decision and Order at 24-25. The administrative law judge rejected Claimant's assertion that the claim filing period was tolled pursuant to 33 U.S.C. §930(f). *Id*. at 25. She determined Claimant's allegation that he provided Employer with oral notice of a work-related injury is not creditable and that his reliance on written notifications were too vague to impute knowledge of a work injury. *Id*. at 28-29. The administrative law judge rejected Employer's contention that Claimant's back symptoms after he left its employ are due to an intervening injury, and she determined, based on the record as a whole, that Claimant's lower back condition is related to the 2013 weightlifting injury. Because that injury was time-barred, she denied disability compensation but Claimant was awarded medical benefits as these benefits are never time barred.[3] *See generally Siler v. Dillingham Ship Repair*, 28 BRBS 38 (1994) (decision on recon. en banc).

Regarding the claim for the 2015 cumulative trauma injury, the administrative law judge found Claimant's notice and the claim timely as he filed for this alleged injury within a year from September 21, 2016, when Dr. Brett Gunter completed a short-term disability form stating that Claimant had elected to undergo back surgery. Decision and Order at 29; CXs 1, 3, 18 at 164. She further found Claimant did not establish a prima facie case of a work-related cumulative trauma injury, finding "the evidence generally shows a timeline of Claimant reporting complete relief of symptoms in late 2014, and several normal examinations with no complaints in mid-2015, followed by a return of Claimant's back pain in mid-2016." *Id*. at 36.

Claimant appeals the administrative law judge's finding that the 2013 claim was untimely filed, that the time for filing was not tolled under Section 30(f), and that he is not entitled the Section 20(a) presumption for a work-related cumulative trauma injury.

[2] The administrative law judge found the injuries should be classified as traumatic injuries, rather than occupational diseases. Decision and Order at 22; 33 U.S.C. §913(a), (b).

[3] She concluded Claimant is entitled to medical treatment for his 2013 back injury only after November 3, 2016, since he did not request Employer's authorization for treatment prior to that date. Decision and Order at 39; 33 U.S.C. §907(d).

Employer and its Carrier AIG respond, urging affirmance.[4] Claimant has filed a reply brief.

SECTION 30

Claimant avers the administrative law judge erred by placing on him the burden of showing Employer knew of his injury as the Section 20(b) presumption instead imposes on Employer the burden of disproving it knew, or should have known, of Claimant's back injury such that it was not required to file a Section 30(a) report. Claimant also contends he gave Employer notice from which a work-injury could be inferred. In this regard, Claimant relies on his visiting the medical clinic at the American consulate approximately five days after the weightlifting injury, and on his deposition testimony that he missed a day or two from work after the clinic visit because he was given medication, that prohibited him from carrying a firearm. CXs 8, 26 at 257. Claimant contends this is sufficient notice for Employer to have investigated his injury since almost all injuries in a war zone are compensable.

Section 20(b) of the Act, 33 U.S.C. §920(b), provides a presumption a claim is timely filed where a claimant alleges he suffered a harm and working conditions that could have caused or aggravated it. In cases where Section 30(a), 33 U.S.C. §930(a), applies, the employer must preliminarily establish its compliance to overcome the Section 20(b) presumption.[5] *Blanding v. Director, OWCP*, 186 F.3d 232, 33 BRBS 114(CRT) (2d Cir.

[4] American Home Assurance Company, which was on the risk after Claimant returned to work in December 2014, did not participate before the administrative law judge or on appeal.

[5] Section 30(a) states:

> Within ten days from the date of any injury, which causes loss of one or more shifts of work, or death or from the date that the employer has knowledge of a disease or infection in respect of such injury, the employer shall send to the Secretary a report setting forth (1) the name, address, and business of the employer; (2) the name, address, and occupation of the employee; (3) the cause and nature of the injury or death; (4) the year, month, day, and hour when and the particular locality where the injury or death occurred; and (5) such other information as the Secretary may require. A copy of such report shall be sent at the same time to the deputy commissioner in the compensation district in which the injury occurred. Notwithstanding the requirements of this subsection, each employer shall keep a record of each

1999). Section 30(f) provides that where the employer has been given notice or has knowledge of any injury and fails to file the Section 30(a) report, the statute of limitations provided in Section 13 does not begin to run until it is filed. 33 U.S.C. §§913, 930(f). *See Blanding*, 186 F.3d 232, 33 BRBS 114(CRT); *Sabanosh v. Navy Exch. Serv. Command*, 54 BRBS 5 (2020); 20 C.F.R. §§702.201-702.202.

In order to rebut the Section 20(b) presumption, the employer must prove it never gained knowledge of the injury to require it to file a Section 30(a) report. *Blanding*, 186 F.3d 232, 33 BRBS 114(CRT). Knowledge of the work-relatedness of an injury may be imputed where the employer has facts that would lead a reasonable person to conclude compensation liability is possible and further investigation is warranted. *See Steed v. Container Stevedoring Co*., 25 BRBS 210, 218 (1991); *Wendler v. Am. Red Cross*, 23 BRBS 408 (1990) (McGranery, J., dissenting); *Kulick v. Continental Baking Corp*., 19 BRBS 115 (1986).

The administrative law judge addressed in great detail Claimant's assertion that Employer did not timely file a Section 30(a) report. Decision and Order at 25-29. She rejected Claimant's reliance on the Incident Report he completed on September 14, 2013, after his visit to the medical clinic.[6] Decision and Order at 25. She found no evidence corroborating Claimant's allegation that Employer's policy was to omit specific medical details from incident reports, which she contrasted with a detailed memorandum Claimant wrote, when he was a manager, for another employee describing a similar weightlifting injury. *Id*. at 25-26; EX RR. The administrative law judge also found no evidence supporting Claimant's testimony that he notified two program managers of his injury. Decision and Order at 26. She rejected his assertion that his August 2014 email exchanges with Employer's U.S.-based program manager constituted notice as there is no indication the reported back condition was work-related, had occurred in Iraq, or that Employer was previously apprised of the work injury. Decision and Order at 27. Finally, the administrative law judge relied on the report of Claimant's December 21, 2014 medical

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> and every injury regardless of whether such injury results in the loss of one or more shifts of work.

33 U.S.C. §930(a).

[6] The report states only, "I responded to the [Diplomatic Support Hospital] for sick call. I have returned to full duty status." CX 20. The administrative law judge determined the "scanty information … is plainly insufficient to provide notice of an injury," and "any person reading the report could just as easily conclude that Claimant had a stomach bug." Decision and Order at 25.

examination wherein he denied debilitating back pain or back injury and his back examination was normal. *Id.*; CX 19 at 166-167. The administrative law judge concluded "Employer has established" it did not have notice of a work-related injury prior to October 6, 2016, and that the Section 30(f) tolling provision does not apply. Decision and Order at 29.

We affirm this finding as it is supported by substantial evidence. The administrative law judge properly stated Employer had the burden to show compliance with Section 30(a), and she rationally concluded Employer met its burden to show it did not have knowledge of Claimant's work injury. Decision and Order at 24, 29. The administrative law judge rationally determined the September 2013 incident report was too vague to put Employer on notice of a work injury, as there was no indication of lost time from work. *See Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d 750, 759-760, 14 BRBS 373, 380 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982) (administrative law judge is entitled to draw "the inferences he deems most reasonable in light of the evidence as a whole and the common sense of the situation"). In the absence of corroborating evidence, she permissibly found not credible Claimant's testimony that Employer's policy was to omit details from incident reports and that he verbally informed two managers of the injury. Credibility determinations and the resolution of conflicting evidence are the prerogative of the administrative law judge. *Del Monte Fresh Produce v. Director, OWCP [Gates]*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009). Finally, the administrative law judge rationally drew a negative inference from Claimant's emails to Employer that failed to mention his back condition was work-related, CX 51, notwithstanding he had been diagnosed with a herniated disc for which surgery was recommended, had received epidural steroid injections, and was placed on leave-without-pay status. *See Stark v. Washington Star Co.*, 833 F.2d 1025, 20 BRBS 40(CRT) (D.C. Cir. 1987) (employer knowledge of injury insufficient; must be aware the injury is work-related); *Kulick*, 19 BRBS 118 (claimant's informing employer two weeks after injury insufficient for employer to infer injury was work-related). Accordingly, we affirm the administrative law judge's finding that the Section 30(f) tolling provision is not applicable.

SECTION 13

Claimant avers the administrative law judge erred in finding he should have filed a claim for the 2013 weightlifting injury within a year of scheduling surgery for his back condition on July 8, 2014. He contends, as a matter of law, he was not aware of the full nature and extent of his back condition until undergoing surgery in 2016 following which he sustained a permanent loss in earning capacity. He asserts he was on temporary medical leave from June to December 2014 during which time he received epidural steroid injections, and was then able to return to work at full duty. We agree.

The courts of appeals have uniformly held the Section 13 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. *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990);[7] *see also J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 23 BRBS 127(CRT) (9th Cir. 1990); *Bechtel Associates, P.C. v. Sweeney*, 834 F.2d 1029, 20 BRBS 49(CRT) (D.C. Cir. 1987). In this case, the administrative law judge found:

> . . . the medical evidence shows that Claimant returned to Dr. Roberts with complaints of back pain and leg pain again in June 2014, and his MRI on June 20, 2014 showed the L5-S1 disc herniation that was purportedly causing his pain. (CX-10 at 92-94; CX-11 at 117.) Shortly thereafter, on July 8, 2014, Claimant saw neurosurgeon Dr. Toussaint, and scheduled surgery to address the disc herniation for August 2014. (CX-23 at 177-179.) As such, July 8, 2014 is a reasonable date on which to conclude Claimant should have been aware either (1) that he had sustained a work-related injury resulting in the likely impairment of his earning capacity, or (2) of the full character, extent, and impact of the harm resulting from his work injury.

Decision and Order at 24.

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[7] In *Brown*, the court stated:

> The case of *Todd Shipyards Corporation v. Allen*, 666 F.2d 399 (9th Cir. 1982); *Stancil v. Massey*, 436 F.2d 274 (D.C. Cir.1970); and *Bath Iron Works v. Galen*, 605 F.2d 583 (1st Cir. 1979), all make it clear that the statute of limitations does not begin to run until the claimant is aware of the full character, extent and impact of the harm done to him. *Todd Shipyards Corporation v. Allen, supra*, at 401. They also make it clear that the claimant must know that there was an injury which constituted an impairment of earning power. The fact that the claimant has suffered an accident and is aware that he is injured is not the test; the test is the awareness of the suffering of a compensable injury. In the instant case, Brown did not realize that he had suffered an injury which would impair his earning power until at least some time in 1982 when his back problems became worse. He did not miss any time from work until early 1983, and therefore, the ALJ and the Board erred in holding that Brown should have filed his claim within one year after the date of the accident.

893 F.2d at 296, 23 BRBS at 23-24(CRT).

The administrative law judge erred in relying on Claimant's scheduling back surgery in July 2014 to commence the running of the limitations period in view of subsequent events. Claimant canceled the surgery after receiving epidural steroid injections, he passed Employer's requisite physical examination before returning to work, doing so without physical restrictions from December 2014 to April 2015, and he then passed the physical examination for the Columbia police department, where he did not report any back complaints until May 2016. Tr. at 51-53, 57, 89; CXs 10 at 95-99, 105-107; 14 at 136-142; 17; 19 at 166-167.

As a matter of law, the administrative law judge's reliance on the MRI showing a disc herniation and Claimant's canceled surgery is insufficient to infer an awareness of the "full impact and extent" of his work injury in July 2014. *Brown*, 893 F.2d at 296, 23 BRBS at 23-24(CRT); *see also Dyncorp Int'l v. Director, OWCP [Mechler]*, 658 F.3d 133, 137, 45 BRBS 61, 63(CRT) (2d Cir. 2011); *Paducah Marine Ways v. Thompson*, 82 F.3d 130, 30 BRBS 33(CRT) (6th Cir. 1996) (the claimant continued to work for several years following recuperation from work-related back injuries, and although he missed work temporarily and regularly experienced back pain, it was not until his herniated discs were diagnosed and he was unable to work that he was put on notice of a likely permanent impairment of his long-term earning capacity); *J.M. Martinac Shipbuilding, OWCP*, 900 F.2d 180, 23 BRBS 127(CRT) (the administrative law judge erred in finding the time for filing was triggered when the employee knew he was temporarily unable to work; instead, period tolled until he knew his disability was permanent and knew the full character, extent and impact of his injury). Likewise, given Claimant's successful return to work for Employer and the Columbia police department, Claimant was not and could not have been aware of the full nature and extent of his injury until after he resumed treatment in May 2016, after which he required surgery for his work injury and alleged ongoing disability. *See* CX 10 at 95-97, 109-111; Cl. Post-Hearing Br. at 52. As these undisputed facts permit only one outcome under the law, we reverse the administrative law judge's finding that the October 27, 2016 claim was not timely filed. *Mechler*, 658 F.3d 133, 137, 45 BRBS 61, 63(CRT); *C&C Marine Maint. Co. v. Bellows*, 538 F.3d 293, 42 BRBS 37(CRT) (3d Cir. 2008); *Thompson*, 82 F.3d 130, 30 BRBS 33(CRT); *Hodges v. Caliper, Inc.*, 36 BRBS 73 (2002).

The administrative law judge found, based on the record as a whole, that Claimant's back condition is due to the 2013 weightlifting injury and not cumulative trauma. Decision and Order at 35; *see* discussion, *infra*. Accordingly, as the 2016 claim for the 2013 injury was timely filed, the case is remanded for the administrative law judge to address any remaining issues concerning this injury.

SECTION 20(a)

Claimant contends he is entitled to compensation for his cumulative trauma claim. He avers the administrative law judge erred as a matter of law by applying too high a bar for invoking the Section 20(a) presumption, 33 U.S.C. §920(a), by weighing the evidence as to the elements of his prima facie case. Claimant contends the plain language of Section 20(a) does not impose on him any burden to establish a prima facie case. Claimant avers it is sufficient merely to allege a work-related injury, and that, in this case, the administrative law judge erred by requiring him to show on invocation evidence of causation of a cumulative trauma back injury, which denied him the benefit of the Section 20(a) presumption.

The administrative law judge found nothing in the record suggests Claimant suffered an injury with Employer in 2015.[8] Decision and Order at 36. She relied on the timeline of Claimant's reporting complete relief of symptoms in late 2014, several normal physical examinations with no complaints in mid-2015, followed by a return of back pain in May 2016 after Claimant left Employer's employ, and the absence of any supporting medical or other evidence to conclude Claimant did not establish a prima facie case of cumulative trauma injury through the end of his employment in April 2015.[9] *Id*. at 36-37.

[8] The administrative law judge found "extremely significant that in both his post-hearing brief and his reply brief, Claimant essentially abandoned his claim for a 2015 cumulative trauma injury." Decision and Order at 35. Claimant noted the claim for the cumulative trauma injury but stated the injury is best characterized as naturally progressing from the 2013 injury. Cl. Post-Hearing Br. at 4 n.8.

[9] Specifically, the administrative law judge relied on Claimant's informing his primary care physician, Dr. Douglas Roberts, in October 2014 that he was pain-free and had started running again, and his denial of debilitating back pain or back injury at his redeployment physical in December 2014. Decision and Order at 36-37; *see* CXs 10 at 95-97, 19 at 166-167. Claimant was reexamined by Dr. Roberts in May 2015 for a pre-employment physical for the Columbia police department. The administrative law judge relied on Claimant again not complaining of back pain and the normal examination. CX 10 at 98-99. Additionally, Claimant underwent another physical in July 2015 by Dr. A. Weldon as a prerequisite to attending the police academy. The administrative law judge gave weight to Claimant's informing Dr. Weldon that his current activities included CrossFit, paddle boarding, and running, and the normal examination. Decision and Order at 36; CX 14 at 136-142. She additionally gave weight to Claimant's not seeking further back treatment until May 2016. Decision and Order at 36; CX 10 at 105-107. The administrative law judge found "significant" that the evidence shows "some healing" in the disc herniation from the June 2014 MRI to the May 2016 MRI. Decision and Order at

It is well established that in order to be entitled to the Section 20(a) presumption Claimant must establish a prima facie case by showing that he suffered a harm and that either a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. *See Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6(CRT) (5th Cir. 1986); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Claimant's theory as to how the injury arose must go beyond "mere fancy." *Champion v. S & M Traylor Bros.*, 690 F.2d 285, 295 (D.C. Cir. 1982); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990).

In *U.S. Industries*, the Supreme Court stated, "[T]he coverage of the (Section 20(a)) presumption is debatable." *U.S. Industries*, 455 U.S. at 612, 14 BRBS at 632. However, the Court noted in dicta, "[W]e need not resolve that debate in this case. It seems fair to assume that the §20(a) presumption is of the same nature as the presumption created by Section 20(d) . . . as construed in *Del Vecchio v. Bowers*, 296 U. S. 280, 285-287, and the presumption defined in Rule 301 of the Federal Rules of Evidence. *See also Texas Dept. of Community Affairs v. Burdine*, 450 U.S. [2]48."[10] *Id*. at n.5. Thus, the law is well-established that the claimant must establish the elements of his prima facie case in order to invoke the Section 20(a) presumption. *See, e.g., Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). That is, the claimant must adduce creditable evidence of a harm and an accident at work or working conditions that could have caused the harm. Courts have recognized this is a light burden, *see, e.g., Ramsay Scarlett & Co. v. Director, OWCP*, 806 F.3d 327, 49 BRBS 87(CRT) (5th Cir.

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36. She determined no physician opined Claimant's symptoms or treatment were related to cumulative trauma with Employer but instead related them to the September 2013 weightlifting injury. *Id*. at 37; *see* CXs 37 at 326; 38; 49; 50 at 421. Lastly, the administrative law judge relied on the forms completed in November 2016 by Drs. Gunter and Roberts that Claimant's condition was related to the weightlifting injury because Claimant should have informed his treating primary care physician and treating neurosurgeon of a subsequent cumulative trauma injury. Decision and Order at 37; CXs 13 at 125, 130; 25 at 221.

[10] In *Burdine*, 450 U.S. at 252-253, a Title VII case alleging discriminatory treatment, the Court stated "the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination." In *Del Vecchio*, the Court held the Section 20(d) presumption does not have the quality of affirmative evidence and "[I]ts only office is to control the result where there is an entire lack of competent evidence . . . Where the claimant offers substantial evidence in opposition [on the issue of suicide versus accident] … the issue must be resolved upon the whole body of proof pro and con." *Del Vecchio*, 296 U.S. at 286-287.

2015); *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990), but it is not "no burden." *See* *Bis Salamis, Inc. v. Director, OWCP [Meeks]*, 819 F.3d 116, 50 BRBS 29(CRT) (5th Cir. 2016). Accordingly, we reject Claimant's contention that, as a matter of law, the presumption automatically attached to his cumulative trauma claim such that he did not have the burden to produce some evidence supporting the claim.

Claimant established a harm to his back. On appeal, Claimant does not allege there is any evidence stating his back condition could be due to conditions of his employment in Iraq after December 2014, such as wearing protective gear, physical training, or lifting and carrying during the course of his employment with Employer. Cl. Pet for Rev. at 18-30. Indeed, Claimant did not testify to *any* incidents or working conditions that could have caused or aggravated his back condition. The administrative law judge, therefore, permissibly concluded that no incidents occurred or working conditions existed from December 2014 to April 2015 that could have caused or aggravated an injury. *Carroll*, 650 F.2d at 759-760, 14 BRBS at 380. Accordingly, we affirm her finding that Claimant did not invoke the Section 20(a) presumption with regard to his alleged cumulative trauma claim. *Young & Co. v. Shea*, 397 F.2d 185, 188 (5th Cir. 1968), *cert. denied*, 395 U.S. 920 (1969) (Section 20 does not presume an injury; a claimant must prove its existence); *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 22 BRBS 340 (1989) (administrative law judge permissibly rejected claimant's uncorroborated and contradicted testimony of working conditions).

Accordingly, we reverse the administrative law judge's finding that Claimant's October 27, 2016 claim was not timely filed under Section 13(a), and we remand the case

for her to address any remaining issues concerning the 2013 injury. In all other respects, we affirm the administrative law judge's Decision and Order.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

I concur.

MELISSA LIN JONES
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge, concurring in part and dissenting in part:

I concur with my colleagues that the Section 30(f) tolling provision is inapplicable in this case. I also concur that the Section 20(a) presumption does not automatically attach to Claimant's cumulative trauma claim and that the administrative law judge permissibly concluded Claimant did not establish a prima facie case of a cumulative trauma injury.

I respectfully dissent, however, from my colleagues' decision to reverse outright the administrative law judge's conclusion that the October 2016 claim for the September 2013 weightlifting injury was untimely under Section 13(a). Although I agree that the administrative law judge's reliance on the 2014 MRI showing a disc herniation and Claimant's scheduling surgery is insufficient evidence from which she could infer an awareness of impairment of earning power, or the "full impact and extent" of his work injury in July 2014, I would vacate the administrative law judge's finding of untimeliness under this section and remand the case. The Board is not permitted to engage in fact-finding. *See Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110, 14 BRBS 716 (4th Cir. 1982). Thus, remand is required for the administrative law judge to discuss other relevant evidence of record in the first instance and to reassess the timeliness

of the weightlifting claim in accordance with applicable law. *See Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990).

JUDITH S. BOGGS, Chief
Administrative Appeals Judge