U.S. Department of Labor

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

BRB No. 17-0577

BILLY RAY WILSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: Apr. 5, 2018
	)	
THE BOEING COMPANY, AS SUCCESSOR TO MCDONNELL DOUGLAS SERVICES	)	
	)	
and	)	
	)	
AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Dismissing Untimely Claim of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Billy Ray Wilson, London, Kentucky.

Alan G. Brackett (Mouledoux, Bland, Legrand & Brackett LLC), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant, appearing without counsel, appeals the Decision and Order Dismissing Untimely Claim (2016-LDA-00936) of Administrative Law Judge Alice M. Craft 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 Defense Base Act, 42 U.S.C. §1641 *et seq*. (the Act). In an appeal by a claimant without legal

representation, we will review the administrative law judge's findings of fact and conclusions of law to determine if they are rational, supported by substantial evidence, and in accordance with law. If they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant was in the U.S. Air Force from 1960 until 1980. EX 1 at 15-16. Afterward, he worked intermittently for employer between 1983 and 1989.[1] *Id.* at 27-29. Claimant testified at his deposition that employer was a government contractor and that he worked in Saudi Arabia under the Peace Sun program, training Saudi officers in the operation of F-15s. *Id.* at 99-101. After leaving his employment with employer, he worked for the Department of Veterans Affairs (VA) as a civilian employee. *Id.* at 48-49. He retired from the VA in 1998 because of a diagnosis of post-traumatic stress disorder. *Id.* at 49.

Claimant asserted that before he was sent to Saudi Arabia, he received what he believed was an anthrax vaccine through three shots over the course of three months, although claimant acknowledged he was never officially told by employer it was an anthrax vaccine. EX 1 at 95-96. He was also told to take a number of bromide pills in case of exposure to nerve gas. *Id.* at 111-115. In 1993, claimant testified that he started suffering leg spasms, stiff muscles, and leg pain. *Id.* at 103-104. In March 2012, he was diagnosed with fibromyalgia, restless leg syndrome, and scattered muscle disease. *Id.* at 105.

Claimant testified that he started researching his medical problems and believed that the bromide pills and shots caused his medical conditions, referred to as Gulf War Syndrome. EX 1 at 116-117, 122-123. He filed a claim with the VA in 2012 for Gulf War Syndrome, which the VA rejected because it was not service-related. *Id.* at 122-23, 145.

Claimant filed the instant claim against employer on March 30, 2016. EX 3. The administrative law judge concluded that claimant became aware of the cause of his occupational disease on August 2, 2012.[2] Accordingly, the administrative law judge found that in order to be timely, claimant should have notified employer of his injury by August 2, 2013. 33 U.S.C. §912(a); Decision and Order at 6. The administrative law judge

[1] Employer, McDonnell Douglas, was bought by the Boeing Company in the 1990s.

[2] An occupational disease has been defined as "any disease arising out of exposure to harmful conditions of the employment, when those conditions are present in a peculiar or increased degree by comparison with employment generally." *LeBlanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157, 160, 31 BRBS 195, 197(CRT) (5th Cir. 1997); *see also Bunge Corp. v. Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000); *Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 23 BRBS 13(CRT) (2d Cir. 1989).

concluded that none of the exceptions in Section 12(d) applies. *Id.* The administrative law judge also concluded the claim should have been filed by August 2, 2014. 33 U.S.C. §913(b)(2). Accordingly, the administrative law judge granted employer's motion for summary decision because claimant's notice and claim were untimely. Decision and Order at 7.

Claimant appeals the administrative law judge's decision. Employer filed a response brief, urging affirmance.

In determining whether to grant a party's motion for summary decision, the administrative law judge must determine, after viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the moving party is entitled to summary decision as a matter of law. 29 C.F.R. §18.72; *see also Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006).

Section 20(b) of the Act provides a claimant with a presumption that his notice of injury and claim were timely filed. 33 U.S.C. §920(b).[3] Section 12(a) of the Act requires a notice of injury, in a case involving an occupational disease which does not immediately result in disability, to be filed within one year after the employee becomes aware or should have been aware of the relationship between the employment, the disease, and the disability. 33 U.S.C. §912(a). Section 13(b)(2), which governs the filing of claims, states that in an occupational disease case, a claim shall be timely "if filed within two years after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability, or within one year of the date of the last payment of compensation, whichever is later." 33 U.S.C. §913(b)(2).

The administrative law judge found that claimant's condition is an occupational disease, i.e., a disease caused by hazardous conditions of employment which are particular to employee's employment, because claimant alleged that his physical problems are caused

[3] In order to rebut the Section 20(b) presumption, employer must prove compliance with Section 30(a), or the time for filing a claim under Section 13 is tolled pursuant to Section 30(f). 33 U.S.C. §930(a), (f). Section 30(a) requires an employer to file a report of injury with the district director within 10 days of its knowledge of a claimant's injury. Employer did not file a Section 30(a) report in this case. It filed a notice of controversion on August 9, 2016, stating it first gained knowledge of the injury after the claim was served by the district director on June 22, 2016. If the statute of limitations expires before employer gains knowledge, Section 30(f) does not toll the statute of limitations. *Wendler v. American National Red Cross*, 23 BRBS 408 (1990); *see also Blanding v. Director, OWCP*, 186 F.3d 232, 33 BRBS 114(CRT) (2d Cir. 1999).

by the anthrax vaccine and the bromide pills he received prior to his employment in Saudi Arabia. In addition, claimant's LS-203 claim form specifically states that "no accident" occurred. EX 4. The administrative law judge found that claimant became aware of the relationship between his physical problems and his employment by August 2, 2012 at the latest, such that a notice of injury under Section 12(a) should have been filed by August 2, 2013 and a claim under Section 13(b)(2) should have been filed by August 2, 2014. Decision and Order at 6. Because claimant did not give notice and file his claim until March 30, 2016, the administrative law judge concluded that the notice and claim were untimely. Therefore, she granted employer's motion for summary decision. *Id.* at 7.

We conclude that the administrative law judge's granting of employer's motion for summary decision cannot be affirmed because the administrative law judge did not fully apply the law as to when the statutes of limitations begin to run. Where, as here, claimant voluntarily retired prior to the date of manifestation of his injury,[4] the filing period begins to run from the date claimant became permanently physically impaired due to his work injury and was aware of the relationship between the injury, the permanent physical impairment and his employment. *See Morin v. Bath Iron Works Corp.*, 28 BRBS 205 (1994); *Lombardi v. General Dynamics Corp.*, 22 BRBS 323 (1989); 20 C.F.R. §§702.212(b), 702.222(c).[5] Claimant has not worked since his retirement from the VA in 1998, testifying that he "can't work." EX 1 at 14. The administrative law judge found that claimant started suffering from spasms and cramps in his legs during the period in the 1990s that he worked for the VA. By 2010, claimant's medical records indicate that claimant was suffering from muscle pain that is the basis of the instant claim. Decision and Order at 5.

[4] Because claimant retired for reasons unrelated to the conditions that are at issue in this claim, he is considered to be a voluntary retiree for purposes of the Act. *See Manders v. Alabama Dry Dock & Shipbuilding Corp.*, 23 BRBS 19 (1989).

[5] These sections state that in retiree occupational disease cases, "the notice period does not begin to run . . . until a permanent impairment exists," 20 C.F.R. §702.212(b), and "the time limitation for filing a claim does not begin to run until the employee is disabled, or in the case of a retired employee, where a permanent impairment exists." 20 C.F.R. §702.222(c). The statute defines "disability" for a retiree as "permanent impairment, determined . . . under the guides to the evaluation of permanent impairment promulgated and modified from time to time by the American Medical Association . . . ." 33 U.S.C. §902(10).

The administrative law judge did not make a finding, however, as to when claimant became permanently physically impaired by his alleged work-related condition.[6] Because employer is not entitled to a decision in its favor as a matter of law without a finding as to when claimant became permanently physically impaired, the administrative law judge's grant of summary decision cannot be affirmed. We remand the case for a determination of when claimant became permanently physically impaired by the physical conditions at issue in this claim and to assess the timeliness of claimant's notice of injury and claim with respect to this date. If the evidence offered by employer in support of its motion for summary decision does not address this issue or if claimant's responsive evidence raises a genuine issue of material fact, the administrative law judge must hold a hearing on claimant's claim. *See generally Goff v. Huntington Ingalls Industries, Inc.*, 51 BRBS 35 (2017); *Walker v. Todd Pac. Shipyards*, 47 BRBS 11 (2013), *vacating in pert. part on recon.*, 46 BRBS 57 (2012).

Assuming, arguendo, that claimant's notice of injury was untimely filed, we next address the administrative law judge's finding that none of the Section 12 exceptions applies in this case.[7] Under Section 12(d), untimely notice will not bar the claim if: (1) the employer had actual knowledge of the injury or death; and (2) employer was not prejudiced by claimant's late notice.[8] *See* 33 U.S.C. §912(d); 20 C.F.R. §702.216. Pursuant to the Section 20(b) presumption, employer must establish it had no knowledge of the injury and was prejudiced by the late notice. *Bustillo v. Southwest Marine, Inc.*, 33 BRBS 15 (1999).

We affirm the administrative law judge's finding that employer established that it did not have knowledge under Section 12(d)(1). *See* n.2, *supra.* However, we cannot affirm the administrative law judge's finding that employer was prejudiced under Section 12(d)(2) as she did not cite any specific evidence supporting the conclusion as required by the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A). Employer bears the burden of proving by substantial evidence that it has been unable to effectively investigate some aspect of the claim by reason of claimant's failure to provide timely notice under Section 12. *Bukovi v. Albina Engine/Dillingham*, 22 BRBS 97 (1988). Employer argued that it

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[6] Claimant was deemed totally physically disabled by the VA in 2004 for his PTSD and his prostate and thyroid conditions. EX 1 at 81-82. These conditions, however, are not the subject of the instant claim and cannot be used as the basis for when claimant became physically impaired for purposes of timeliness under the Act.

[7] The Section 12 issues are moot if the claim was not timely filed pursuant to Section 13(b)(2), as there are no exceptions to that provision.

[8] The district director also can excuse the claimant's failure to file his notice. 33 U.S.C. §912(d)(3). She did not do so in this case.

has been significantly prejudiced in investigating and defending this claim because, aside from a five-page itemization of claimant's paychecks, it has no record of claimant's employment or the vaccinations that allegedly caused his disease. *See* Emp. Br. at 11; Emp. Motion for Summary Decision at 10. But a mere conclusory allegation of prejudice or of an inability to investigate the claim when it was fresh is insufficient. *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Kashuba v. Legion Ins. Co.*, 139 F.3d 1273, 32 BRBS 62(CRT) (9th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999); *ITO Corp. v. Director, OWCP*, 883 F.2d 422, 22 BRBS 126(CRT) (5th Cir. 1989); *Bustillo*, 33 BRBS at 16. Therefore, we vacate the administrative law judge's finding that the Section 12(d)(2) exception applies. We remand the case for further consideration of the issue of whether employer was prejudiced by claimant's failure to provide timely written notice such that the claim is barred by Section 12(a).

Accordingly, the administrative law judge's Decision and Order Dismissing Untimely Claim is vacated, and the case remanded for further proceedings consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge