BRB No. 97-911

NORMAN HARGROVE	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
STRACHAN SHIPPING COMPANY	)	
	)	
and	)	
	)	
GEORGE INSURANCE INSOLVENCY POOL	)	
	)	
Employer/Carrier	)	
Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Ralph R. Lorberbaum (Zipperer & Lorberbaum, P.C.), Savannah, Georgia, for claimant.

Edward T. Brennan (Brennan, Harris & Rominger), Savannah, Georgia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (96-LHC-1702) of Administrative Law Judge Ralph A. Romano 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 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 injured his back in a work-related accident on February 2, 1971. As a result of the injury, employer paid temporary total disability benefits for 19 weeks. Thereafter, a dispute arose and an informal conference was held on June 28, 1972, at which claimant contended that he was totally disabled and employer contended that there

was no employment-related disability after June 23, 1971. As a result of the informal conference, it was determined that the parties would discuss the possibility of a settlement and that if a settlement could not be achieved, a formal hearing would be held to adjudicate the claim. On April 2, 1973, claimant and his attorney wrote to the district director[1] asking that the claim be withdrawn; this request was confirmed by a follow-up letter after claimant was advised by the district director of the possible hazards of withdrawal. Cl. Ex. 1 at 22-26. James Todd, vice-president for insurance for employer, testified that claimant was paid $12,519.61 in compensation benefits, of which $1,267.67 represented temporary total disability compensation, and the balance, a "settlement" to conclude the case. Emp. Ex. 1; Tr. at 36. On April 17, 1973, the district director wrote to claimant advising he was closing the file. Cl. Ex. 1 at 21. On March 13, 1996, claimant's counsel requested an informal conference in this case, maintaining that claimant was and still is disabled. Cl. Ex. 1 at 7. Claimant also requested medical treatment. Cl. Ex. 1 at 8.

In his Decision and Order, the administrative law judge found that the "settlement" was never approved under Section 8(i) of the Act, 33 U.S.C. §908(i). Moreover, he found that claimant never stated in writing to the district director his reasons for requesting withdrawal of his claim as required by regulation, and that there is no reliable evidence that the district director approved claimant's request for withdrawal of his claim as being for a proper purpose or in claimant's best interest. *See* 20 C.F.R. §702.216 (1984) (renumbered as 20 C.F.R. §702.225).[2] Thus, the administrative law judge concluded that claimant's original claim should still be viable for adjudication. However, the administrative law judge found that the Board's decision in *Rodriguez v. California Stevedore & Ballast Co.*, 16 BRBS 371 (1984), is controlling in this case. In *Rodriguez*, the Board held that a 1967 claim, in which an attempted settlement had not been approved, could not be "reopened" in 1984 "as a matter of policy." The administrative law judge found the facts in the instant case virtually the same as those in *Rodriquez* and therefore stated that claimant's 1971 claim could not be "reopened" 25 years later. The administrative law judge also denied claimant medical benefits finding that "claimant had failed to establish a causal nexus between the subject work injury and psychiatric impairment and treatment...." Decision and Order at 8.

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[1]The title "district director" has been substituted for the title "deputy commissioner" used at that time. 20 C.F.R. §702.105.

[2]The administrative law judge properly found that Section 702.216 is the applicable regulation, rather than 20 C.F.R. §31.7 (1971) as the "withdrawal" attempt was made in 1973, after the regulation was amended.

On appeal, claimant contends that the administrative law judge erred in applying *Rodriguez* in light of the Supreme Court's decision in *Intercounty Construction Corp. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975), and Board case law post-dating *Rodriquez*. Claimant also appeals the administrative law judge's denial of medical benefits alleging error in the administrative law judge's failure to apply the Section 20(a), 33 U.S.C. §920(a), presumption to this issue. Employer responds, urging affirmance of the administrative law judge's Decision and Order. By Order dated October 2, 1997, the Board heard oral argument in this case in Jacksonville, Florida, on November 13, 1997.

Initially, we affirm the administrative law judge's findings that the claim was neither settled pursuant to Section 8(i) nor withdrawn pursuant to 20 C.F.R. §702.216. Withdrawals of claims are not dealt with in the Act, but are authorized by the regulations.[3] *See* 20 C.F.R. §702.216 (1984)(renumbered 702.225). The district director is authorized to approve a request for a withdrawal of a claim if the request is for a proper purpose and is in claimant's best interest. *Id.* However, a claim cannot be withdrawn in exchange for a sum of money absent compliance with Section 8(i), since Section 15(b) of the Act, 33 U.S.C. §915(b), explicitly provides that "an agreement by an employee to waive his right to compensation" is invalid. *O'Berry v. Jacksonville Shipyards, Inc.*, 21 BRBS 355 (1988), *aff'd in relevant part on recon.*, 22 BRBS 430 (1989). Thus, where claimant seeks to terminate his compensation claim for a sum of money, he must follow the Section 8(i) settlement procedures, and the district director or administrative law judge must treat withdrawal requests which are made in exchange for a sum of money as a request for approval of a settlement under Section 8(i). *See* 20 C.F.R. §§702.241, 702.242; *Gutierrez v. Metropolitan Stevedore* Co., 18 BRBS 62 (1986); *Jennings v. Lockheed Shipbuilding & Construction Co.*, 9 BRBS 212 (1978). In the present case, we reject employer's argument

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[3]Section 702.216(a) of the regulations provides:

(a) *Before adjudication of claim*. A claimant ... may withdraw his previously filed claim: *Provided*, That:

> (1) He files with the deputy commissioner with whom the claim was filed a written request stating the reasons for withdrawal;
>
> (2) The claimant is alive at the time his request for withdrawal is filed;
>
> (3) The deputy commissioner approves the request for withdrawal as being for a proper purpose and in the claimant's best interest; and
>
> (4) The request for withdrawal is filed, on or before the date the OWCP makes a determination on the claim.

20 C.F.R. §702.216(a)(1984). The renumbered regulation at Section 702.225 is identical except for the use of the term district director in place of deputy commissioner.

that the claim was properly withdrawn in 1973, inasmuch as the withdrawal request was made in exchange for a sum of money, an invalid purpose, *see Jennings*, 9 BRBS at 215, and employer does not contend that a proper settlement agreement was filed with the district director. Moreover, the administrative law judge rationally determined that the district director did not approve the "settlement" based on his finding that there is "no probative, reliable evidence that the Deputy Commissioner approved claimant's request for withdrawal of his claim as being for a proper purpose or in claimant's best interest." Decision and Order at 5.

Claimant contends that as a timely claim for compensation was filed, and that as there was neither a proper settlement nor a withdrawal of the claim, the claim was still open for resolution. We agree. In *Intercounty Construction Corp. v. Walter*, 442 U.S. 1, 2 BRBS 3 (1975), the Supreme Court addressed whether Section 22 of the Act, 33 U.S.C. §922, barred consideration of a claim which was timely filed and which had not been the subject of a formal compensation order within one year after the cessation of voluntary payments. The claimant in *Intercountry* timely filed a claim for benefits in 1960 and employer instituted voluntary payments while contesting the claim for total disability. A claims examiner adjourned a hearing on the claim in 1966 without resolution. Thereafter, employer stopped its payments to claimant upon reaching the statutory maximum amount of benefits for conditions other than permanent total disability or death. In 1970, two years after receiving the last voluntary payment, claimant requested a hearing on his previously filed claim. The district director determined that the claim was not time-barred under Section 22, and awarded claimant permanent total disability benefits. The district court held that Section 22 barred the claim, but the United States Court of Appeals for the District of Columbia Circuit reversed, holding that since the district director had not issued an order prior to the request for a hearing, Section 22 did not bar consideration of the claim. *Intercounty Construction Corp. v. Walter*, 500 F.2d 815 (D.C. Cir. 1974).

The Supreme Court agreed with the Court of Appeals,[4] and held that the one year limitations period contained in Section 22 applies only where a compensation order has been issued by the district director. *Intercounty*, 422 U.S. at 11-12, 2 BRBS at 9. Thus, as no compensation order had been entered in *Intercounty*, claimant's request for a hearing on his claim was not barred by the one year limit in Section 22. *Id*.

[4]In so doing, the Court rejected a contrary approach taken by the United States Court of Appeals for the Fifth Circuit in *Strachan Shipping Co. v. Hollis*, 460 F.2d 1108 (5th Cir. 1972), *cert. denied*, 409 U.S. 887 (1972).

The Board has consistently applied the rationale of *Intercounty* in recent cases involving a timely filed but unadjudicated claim. In *O'Berry*, the Board held an employer's payment to claimant in 1975 of $15,000 was not a "settlement" as it was never approved, and the claimant's purported withdrawal was without effect because claimant sought to terminate his compensation claim for a sum of money. Thus, the Board held that the claim remained open in 1982 when claimant sought benefits, as it had never been adjudicated.[5] *O'Berry*, 21 BRBS at 360; *see also Madrid v. Coast Marine Construction Co.*, 22 BRBS 148 (1989)(since claimant filed no written request with the district director to withdraw his claim, and the claim was never adjudicated, it remained open and pending); *Lewis v. Norfolk Shipbuilding & Dry Dock Corp*., 20 BRBS 126 (1987)(Brown, J., concurring on other grounds)(Board held that there was no attempt by either party to close a 1973 claim, the claim was never subject of a formal award, thus it remained open and pending).

[5]Although the district director had issued a Compensation Order in this case in 1973, the Board held that the order was not valid as the district director did not have the authority to issue a compensation order subsequent to November 26, 1972, the effective date of the 1972 Amendments to the Act. *O'Berry*, 21 BRBS at 359.

The Board also followed *Intercounty* in *Norton v. National Steel & Shipbuilding Co.*, 25 BRBS 79 (1991), *aff'd on recon. en banc*, 27 BRBS 33 (1993)(Brown, J., dissenting). In *Norton*, the Board held that a 1977 "agreement" between the parties, purportedly approved by a claims examiner, stating that claimant would withdraw his claim for a sum of money was not a valid Section 8(i) settlement, and, as the application was incomplete, the agreement was not automatically approved pursuant to the 1984 Amendments to Section 8(i). Moreover, the Board held that the attempted withdrawal of the claim for a sum of money was invalid. *Id.,* 25 BRBS at 83. The Board discussed the decision in *Rodriguez*, 16 BRBS at 371, and noted that the facts in *Rodriguez* were similar to those in *Norton*. However, the Board concluded that the holding in *Rodriguez* was not controlling as it did not discuss or attempt to distinguish the Supreme Court's decision in *Intercounty*. Moreover, the Board noted that it had since consistently applied *Intercounty* and stated it would do so in *Norton*, notwithstanding the decision in *Rodriguez*. *Norton*, 27 BRBS at 40. Inasmuch as there was no valid settlement, no valid withdrawal and no order entered, the Board held that pursuant to *Intercounty*, nothing prohibited claimant from pursuing his claim in 1986. *Norton*, 27 BRBS at 40-41. Thus, the Board concluded that as claimant's 1975 claim was timely filed, but never adjudicated, it remained viable and merged with the 1986 claim for disability arising from the same injury.[6] *See Norton*, 27 BRBS 40-41; *see also Krotsis v. General Dynamics Corp.*, 22 BRBS 128 (1989), *aff'd sub nom. Director, OWCP v. General Dynamics Corp.*, 900 F.2d 506, 23 BRBS 40 (CRT)(2d Cir. 1990).

In the instant case, as in *O'Berry* and *Norton*, claimant attempted to withdraw his claim for benefits after the parties seemingly reached an agreement as to the amount of compensation. The administrative law judge found, however, that no settlement agreement was submitted for approval, and no compensation order was issued approving the settlement or adjudicating claimant's claim. The administrative law judge also found that there was no probative, reliable evidence that the district director approved claimant's request for withdrawal of his claim as being for a proper purpose or in claimant's best interest. In any event, as noted earlier, employer's contention that the withdrawal request was based on the exchange of a sum of money is not a valid purpose for withdrawal. Subsequently, claimant sought additional compensation and medical benefits in 1995 for disability arising out of the 1971 injury. Pursuant to the Supreme Court's decision in *Intercounty*, and the subsequent Board decisions following *Intercounty*, we vacate the administrative law judge's finding that the decision in *Rodriguez* is controlling in the instant case, and hold that the administrative law judge erred in finding that he could not "reopen" the claim, and thus remand the case to the administrative law judge to address the merits

[6]Judge Brown dissented from the majority opinion in the decision on reconsideration *en banc* in *Norton*, and stated that he would have affirmed the administrative law judge's dismissal of the claim as the case "was settled in 1977 by reason of the informal conference, the letter of agreement, the approval by the claims examiner and payment." *Norton*, 27 BRBS at 44. In the instant case, at the informal conference the parties agreed only to discuss the possibility of settlement. Unlike *Norton*, there is no evidence that anyone "approved" the "settlement" reached between the parties in this case; rather, the district director summarily closed the file and returned claimant's papers. Cl. Ex. at 21. Thus, in the present case, there is no basis for finding an approved settlement.

of the instant claim as it was timely filed and never adjudicated.[7]

Claimant also contends on appeal that the administrative law judge erred in not awarding additional medical care, including psychiatric treatment. The administrative law judge found that claimant failed to establish a causal nexus between the work injury and the psychiatric impairment and treatment. In addition, he found that as the last treatment claimant received for his back injury occurred in 1972, claimant's request for treatment for this injury by Dr. Harvey is neither necessary nor reasonable.[8] Thus, the administrative law judge denied further medical benefits.

The administrative law judge here erred in placing the burden of proof on claimant to prove that his psychological condition is work-related. It is well-settled that a psychological

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[7]Claimant also contends that the administrative law judge erred by effectively finding the claim barred by the doctrine of laches. The doctrine of laches is an equitable defense barring litigation of a claim that the plaintiff neglectfully or by omission failed to file in a prompt manner, if the lapse of time resulted in prejudice to the other party. *See, e.g., White v. Daniel,* 909 F.2d 99 (4th Cir. 1990), *cert. denied,* 501 U.S. 1260 (1991). The Board has held that the doctrine of laches does not apply to cases arising under the Act in view of the specific statutes of limitations provided for in Sections 12 and 13 of the Act, 33 U.S.C. §§912, 913. *See, e.g., Madrid*, 22 BRBS 148 (1989); *Simpson v. Bath Iron Works Corp.*, 22 BRBS 25 (1989); *Lewis,*, 20 BRBS at 126. In this case, the administrative law judge did not explicitly apply this rationale, and employer does not contest the conclusion that the claim was filed within the time provisions of Section 13 of the Act.

[8]Although claimant contends that he has been treated for continuing pain in his back, the record does not contain any medical reports regarding claimant's back injury since 1972, and this visit was paid for by employer. Therefore, we affirm the administrative law judge's finding that claimant has not established that continued back treatment is reasonable and necessary.

impairment which is work-related is compensable under the Act, and that Section 20(a) applies to such injuries. *Sanders v. Alabama Dry Dock &Shipbuilding Co.*, 22 BRBS 340 (1989); *Turner v. The Potomac Electric Chesapeake & Potomac Telephone Co.*, 16 BRBS 255 (1984)(Ramsey, C.J., dissenting on other grounds). In order to invoke the Section 20(a) presumption, claimant must prove that he has a psychological impairment and that an accident occurred or working conditions existed which could have caused the impairment. *Sanders*, 22 BRBS at 342; *Marino v. Navy Exchange*, 20 BRBS 166 (1988). Once invoked, the presumption applies to link claimant's impairment to the work accident. *See Kubin v. Pro-Football, Inc.,* 29 BRBS 117 (1995).

In the instant case, the evidence shows that claimant has had ongoing psychiatric problems, including numerous stays in mental hospitals, suicide attempts, electroshock therapy and diagnoses of major depression and schizophrenic reaction since 1971. The record contains the reports of Dr. Pellicano, who stated that if claimant has had chronic pain as a result of his 1971 injury, such chronic pain would definitely have been a contributing factor to his depression. Cl. Ex. 6. In addition, Dr. Tillinger opined in a report dated August 22, 1996, that it is possible that "this was an emotionally damaged and vulnerable individual who was able to hold himself together until the combined blows of the loss of capacity to work and the death of his brother pushed him beyond his capacity to cope, thereby allowing a dormant psychotic and depressive process to erupt." Cl. Ex. 7. As there is evidence of record that claimant suffers from a psychiatric condition that could have been caused, at least in part, by the loss of working capacity due to his injury, we hold that the administrative law judge erred in failing to invoke the Section 20(a) presumption. Since this evidence proves claimant's *prima facie* case, Section 20(a) is invoked as a matter of law. *Brown v. I.T.T./Continental Baking Co.,* 921 F.2d 289, 24 BRBS 75 (CRT) (D.C. Cir. 1990).

Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial countervailing evidence that claimant's injury was not caused, aggravated, or contributed to by the work accident. *Bath Iron Works Corp. v. Director, OWCP*, 109 F.3d 53, 31 BRBS 19 (CRT) (1st Cir. 1997). If employer succeeds, the presumption no longer controls and the issue of causation must be resolved based on the record as a whole. *Universal Maritime Corp. v. Moore,* 126 F.3d 256, 262 (4th Cir. 1997). If the presumption is not rebutted, a causal relationship is established as a matter of law. *Id.* Thus, on remand, the administrative law judge is instructed to make a determination as to whether the presumption is rebutted and, if so, as to whether a causal

relationship is established based on the record as a whole.[9]

Accordingly, the administrative law judge's decision that the case may not be "reopened" is reversed, and the case is remanded to the administrative law judge to address the merits of the claim. In addition, the administrative law judge's denial of medical benefits for claimant's psychiatric condition is vacated, and the case is remanded for further consideration consistent with this decision. The denial of medical benefits for claimant's back injury is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

[9]Employer also contends in its response brief that the medical benefits were properly denied as the treatment was incurred without the knowledge or permission of employer, contrary to 33 U.S.C. §§907(c)(2), 907(d)(1). However, contrary to employer's contention, the administrative law judge found that claimant was not seeking reimbursement for past medical treatment, rather he sought future benefits. Thus, claimant's request for future medical benefits prior to the hearing may be construed as a request for treatment pursuant to Section 7(d). *See generally Maryland Shipbuilding & Dry Dock Co. v. Jenkins,* 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979). Moreover, claimant's treatment by a psychiatrist, in addition to the physician treating his back injury, is not a change in physician which required employer's discretionary consent, as the psychiatrist was a specialist who provided services necessary for claimant's mental condition. *See* 33 U.S.C. §907(c)(2).

NANCY S. DOLDER
Administrative Appeals Judge