BRB No. 01-0836

STEVE MALLORY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: July 24, 2002
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

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

Gregory E. Camden (Montagna, Klein & Camden), Norfolk, Virginia, for claimant.

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

PER CURIAM:

Claimant appeals the Decision and Order (2000-LHC-3042) of Administrative Law Judge Fletcher E. Campbell, Jr., denying benefits 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). The Board 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 law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b).

Claimant sustained a back injury while working as a longshoreman for employer on August 20, 1990. Dr. Rinaldi diagnosed a ruptured disc and thereafter performed corrective surgery. Claimant subsequently returned to work, first at his usual employment and then at suitable alternate employment in employer's facility. Claimant worked regularly for employer except for a period where work within his physical restrictions was not available.

Employer voluntarily paid periods of temporary total disability benefits to claimant,[1] the last of which ended on October 14, 1997. Claimant subsequently sought benefits under the Act for the period between October 6, 1996, and May 18, 1997, alleging he was disabled as a result of his 1990 work-related back injury.

In his decision dated November 30, 1998, Administrative Law Judge Daniel A. Sarno, Jr., denied the claim for permanent total and/or permanent partial disability benefits as claimant did not establish a causal link between his back pain and his working conditions. Judge Sarno also found that claimant has not established the existence of any disability since he testified that he has never had to miss work, or experienced reduced pay or hours, as a result of his back pain. Claimant did not appeal this decision and it became final when the appeal period lapsed in December 1998.

In June 2000, more than one year after Judge Sarno's denial of benefits, claimant filed the present petition for modification, arguing that his request is timely as it was filed within one year of the last payment of compensation, *i.e.*, employer's payment of "compensation" for claimant's two-day absence from work (June 19-20, 2000) for purposes of undergoing a nerve blockage procedure recommended by his present treating physician, Dr. Kerner. In his Decision and Order, Administrative Law Judge Fletcher E. Campbell, Jr., (the administrative law judge) found that employer's payments to claimant for the days in question were not compensation. As such, the administrative law judge concluded that as claimant's petition for modification was filed more than one year following the denial of claimant's original claim and more than one year after the last voluntary payment of true compensation, the petition must be denied as untimely.

On appeal, claimant's sole contention is that the administrative law judge erred in finding that the salary payments were not intended as compensation, and thus, in finding that his petition for modification was not timely filed. Employer has not responded to this appeal.

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[1]Employer paid temporary total disability benefits for the following periods: August 21, 1990, through January 14, 1991; January 29, 1991, through June 14, 1992, and May 19, 1997, through October 14, 1997. Employer's Exhibit 12. The payment of benefits includes the period for which employer was not able to provide claimant with suitable alternate employment.

Section 22 of the Act states that a compensation case may be reviewed "at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim. . . . " 33 U.S.C. §922. *See also* 20 C.F.R. §702.373(b). Section 2(12) of the Act, 33 U.S.C. §902(12), states that "'compensation' means the money allowance payable to an employee . . . as provided for in this chapter. . . ." The Board has held that the filing period under Section 13 is not tolled by an employer's paying claimant's full salary when he was hospitalized due to a work-related injury in the absence of evidence that employer intended the payments as "compensation." *Taylor v. Security Storage of Washington*, 19 BRBS 30 (1986); *see Welch v. Pennzoil Co.*, 23 BRBS 395 (1990)(payments made under the employer's short-term disability and vacation plans not intended as compensation); *see also Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998) (salary payments to be credited against compensation due pursuant to Section 14(j), 33 U.S.C. §914(j), if payments were intended as compensation); *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 282 (1984), *aff'd*, 776 F.2d 1225, 18 BRBS 12(CRT) (4th Cir. 1985) (same with salary continuance plan).

The administrative law judge found that employer did not intend the salary payments it made to claimant as a result of his absence from work on June 19-20, 2000, in order to undergo medical testing, to be payments of compensation. Specifically, he found, as dispositive of employer's intent, the fact that employer paid claimant his *full* wages on the days in question, rather than two-thirds of his wages as is proper for compensation payments. The administrative law judge's finding that if the payments were intended as compensation, they would have been made at two-thirds of average weekly wage and not as full salary payments is supported by the plain language of the Act. The various subsections of Section 8 require that compensation payments be made based on two-thirds of the claimant's average weekly wage or on two-thirds of the difference between the claimant's average weekly wage and his post-injury wage-earning capacity. *See* 33 U.S.C. §908(a), (b), (c), (e). Thus, as the administrative law judge's conclusion is rational and supported by substantial evidence, we affirm the finding that the payments of claimant's salary while he underwent medical testing on June 19-20, 2000, were not intended as payments of compensation. Consequently, inasmuch as claimant's petition for modification, filed in June 2000, was filed more than one year following the final denial of his original claim in December 1998, and more than one year after the last voluntary payment of compensation by employer on October 14, 1997, the administrative law judge's denial of that petition as untimely is affirmed.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge