BRB No. 05-0332

GRADY T. REDDICK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	DATE ISSUED: 11/30/2005
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Eugene C. Brooks, IV, Savannah, Georgia, for claimant.

Shari S. Miltiades (Miltiades & Steffen), Savannah, Georgia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2004-LHC-01327) of Administrative Law Judge Richard K. Malamphy 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).

Claimant was injured on February 1, 1996, during the course of his employment as a longshoreman, when a piece of plywood fell on his foot, injuring his second metatarsal. Claimant was treated in the emergency room on the day of the injury, and subsequently

began treatment with Dr. Sheils, an orthopedic surgeon. Claimant returned to work on April 17, 1996, without restrictions. Employer voluntarily paid temporary total disability benefits from February 2, 1996 to April 15, 1996. Claimant requested authorization to return to Dr. Sheils in November 1998, which was granted. However, Dr. Sheils did not believe that claimant needed further medical treatment and opined that claimant's continued foot pain was not related to the 1996 injury. Thereafter, claimant sought treatment with his personal physician, Dr. Geffen, who referred him to a podiatrist, Dr. Spector. Claimant began treatment with Dr. Spector in March 1999. After attempting conservative treatment, including the prescription of an orthotic and medication, Dr. Spector recommended surgery, which employer has refused to authorize. Claimant filed a claim on June 12, 2001, seeking permanent partial disability benefits under the Act and continued medical treatment by Dr. Spector, including the recommended surgery. Cl. Ex. 2.

In his decision, the administrative law judge found that the claim was not timely filed, pursuant to either Section 13, 33 U.S.C. §913, or Section 22, 33 U.S.C. §922, of the Act. The administrative law judge also found that claimant invoked the Section 20(a), 33 U.S.C. §920(a), presumption that his current foot condition is work-related based on Dr. Spector's opinion, and that employer established rebuttal of the presumption with Dr. Sheils's opinion. After weighing the evidence as a whole, the administrative law judge accorded greater weight to Dr. Spector's opinion, and thus found that claimant's current foot condition is related to his 1996 work injury. However, the administrative law judge found that claimant was not authorized to change physicians, and thus employer is not liable for Dr. Spector's treatment. Therefore, the administrative law judge denied claimant permanent partial disability benefits and continuing medical treatment by Dr. Spector.

On appeal, claimant contends that the 1996 claim was effectively left open because there was no order entered prior to the filing of his LS-203 claim form in 2001. Moreover, claimant contends that as there was no prior disability award, application of Section 22 is not appropriate. Alternatively, claimant contends that his current foot condition is a result of an aggravation of the 1996 injury, and that as he was not aware of a permanent impairment until 2004, the claim filed in 2001 was timely. In addition, claimant contends that the administrative law judge erred in finding that employer is not liable for continuing treatment by Dr. Spector, including the recommended surgery, as Dr. Spector is a specialist and thus is better able to treat claimant's foot condition. Employer responds, urging affirmance of the administrative law judge's decision that the claim is time-barred and that employer is not liable for treatment by Dr. Spector as claimant did not seek proper authorization for a change in physicians.

Claimant first contends that as he filed a timely claim for compensation in 1996, and that as there was neither a settlement nor a withdrawal of this claim, it was still open

for resolution at the time he filed his claim in 2001. Section 13(a) of the Act, 33 U.S.C. §913(a), states that the right to compensation for disability shall be barred unless the claim is filed within one year from the time the claimant becomes aware, or in the exercise of reasonable diligence should have been aware, of the relationship between the injury and the employment. If voluntary payments of compensation have been made, a claim may be filed within one year of the last payment. *See generally Daigle v. Scully Bros. Boat Builders, Inc.*, 19 BRBS 74 (1986).

We cannot ascertain from the present record whether a claim was filed in 1996 as claimant alleges. The record contains employer's first report of injury dated February 5, 1996, Cl. Ex. 1 at 10, as well as notices of payment without an award and of a termination of benefits filed with the district director, dated in February, March and April 1996. *Id.* at 7-9. These documents were assigned a case number by OWCP and were administered by a claims examiner. The district director administratively closed the case in 1996, but did not issue an order disposing of the claim. *See* Cl. Ex. 1; Emp. Ex. E/I 2. The administrative law judge summarily stated that claimant "filed a claim for compensation and benefits were granted." Decision and Order at 9. No prior compensation order was entered in this case,[1] and he cited no evidence in support of his finding that a claim was filed in 1996. Therefore, we vacate the administrative law judge's finding that the claim filed in 2001 was not timely filed in reference to the last voluntary payment of compensation, and we remand the case for findings regarding whether claimant filed a timely, formal claim in 1996 or provided written information to the district director that is sufficient to establish an intent to seek compensation. *See Fireman's Fund Ins. Co. v. Bergeron*, 493 F.2d 545 (5th Cir. 1974). If there was a claim filed in 1996, claimant correctly contends that as he did not file a written request with the district director to withdraw his claim, *see* 20 C.F.R. §702.225, and the claim was not adjudicated, it would be open and pending. *See Intercounty Constr. Co. v. Walter*, 442 U.S. 1, 2 BRBS 3 (1975); *Hargrove v. Strachan Shipping Co.*, 32 BRBS 11 (1998), *aff'd on recon.*, 32 BRBS 224 (1998). Consequently, if the administrative law judge finds on remand that a timely claim was filed in 1996, he must address the extent of claimant's disability due to his work-related foot injury.

Claimant also argues, as he did before the administrative law judge, that the 2001 claim was timely as claimant was not aware of the true nature of his condition prior to his treatment with Dr. Spector. Cl. Post-hearing Br. at 12. The "awareness" component of

[1] As claimant correctly asserts, the absence of a final compensation order precludes the application of Section 22 in this case. *See Intercounty Constr. Co. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975); *Seguro v. Universal Maritime Service Corp.*, 36 BRBS 28 (2002); *O'Berry v. Jacksonville Shipyards, Inc.*, 21 BRBS 355 (1988), *aff'd in pert. part on recon.*, 22 BRBS 430 (1989).

Section 13(a) supersedes the requirement that a claim be filed within one year of the last voluntary payment of compensation. *Morales v. General Dynamics Corp.*, 16 BRBS 293 (1984), *rev'd on other grounds sub nom. Director, OWCP v. General Dynamics Corp.*, 769 F.2d 66, 17 BRBS 130(CRT) (2d Cir. 1985). The United States Court of Appeals for the Eleventh Circuit, in whose jurisdiction the present case arises, has held that the test for applicability of the statute of limitations under Section 13(a) is claimant's awareness that he has suffered a compensable injury and not that he has suffered an accident *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990). The court rejected the employer's assertion that the statute of limitations is tolled only where there has been an initial misdiagnosis and held that the statute of limitations begins to run when claimant is aware of the full character, extent and impact of the injury. *Id.*, 893 F.2d at 296-297, 23 BRBS at 24(CRT). As the administrative law judge did not address claimant's contention regarding the date he became aware of full character, extent and impact of the harm he suffered in the 1996 work accident and the timeliness of his claim with reference to this date, on remand, the administrative law judge must address this issue. *See Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98(CRT) (4th Cir. 1991) (claimant recovered from 1962 injury with no disability after three months; claim filed in 1988 timely because claimant not aware of the full effect the injury would have on wage-earning capacity); *Gregory v. Southeastern Maritime Co.*, 25 BRBS 188 (1991) (where claimant's condition improved for awhile and claimant missed no time from work until surgery was later recommended, the Board affirmed the administrative law judge's finding that the claim was timely based on the later date that claimant learned of a likely loss in wage-earning capacity).

Claimant also contends that the 2001 claim is for an aggravation of his earlier foot injury, which is a distinct, new injury, and thus was timely filed. Claimant raised this contention before the administrative law judge, but the administrative law judge did not address it. Cl. Post-hearing Br. at 10. If the conditions of a claimant's employment cause him to become symptomatic, the claimant has sustained an injury within the meaning of the Act. *See Crum v. General Adjustment Bureau* , 738 F.2d 474, 16 BRBS 115(CRT) (D.C. Cir. 1984); *Gardner v. Director, OWCP* , 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). In other words, the work-related manifestation of symptoms of an underlying condition constitutes an injury under the Act. *Crum*, 738 F.2d at 478, 16 BRBS at 120-121(CRT); *Gardner*, 640 F.2d 1385, 13 BRBS 101; *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986). Moreover, relevant to the present case, an aggravation constitutes a new injury to which a new statute of limitations applies. *See Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998); *Spear v. General Dynamics Corp.*, 25 BRBS 254 (1991) (continued exposure resulting in increased hearing loss demonstrates aggravation and thus a new injury for purposes of determining claimant's awareness of injury).

In the present case, claimant recovered from his foot injury and returned to work without restrictions or an impairment rating, and the administrative law judge has found that claimant's current foot condition is related to the work injury in 1996. Dr. Spector opined that claimant's foot deformities are increased with weight bearing and that claimant was not rated with a permanent impairment until 2004. Cl. Ex. 6. Therefore, on remand the administrative law judge must also address whether claimant suffered a work-related aggravation of his 1996 foot injury, and whether a claim based on the aggravation was timely filed. *See Hodges v. Caliper, Inc.*, 36 BRBS 73 (2002).

Claimant next contends that the administrative law judge erred in finding that employer is not liable for the medical treatment by Dr. Spector as claimant did not seek authorization for this treatment. A claim for medical benefits under 33 U.S.C. §907 is never time-barred. *Ryan v. Alaska Constructors, Inc.*, 24 BRBS 65 (1990). Once claimant has made his initial, free choice of a physician, he may change physicians if he obtains prior written approval of the employer, carrier or district director. 33 U.S.C. §907(c)(2); 20 C.F.R. §702.406. However, where claimant seeks authorization and the request for treatment is refused by employer, claimant is released from the obligation to continue to seek approval for subsequent treatment and thereafter need only establish that the treatment he subsequently procured on his own initiative was reasonable and necessary in order for employer to be liable for such treatment. *Anderson v. Todd Shipyard Corp.*, 22 BRBS 20 (1989); *see Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986).

Claimant does not dispute that he did not seek authorization to treat with Dr. Spector prior to requesting in June 2001 that employer pay for the surgery recommended by Dr. Spector. As claimant did not seek authorization, and thus employer did not deny treatment, we affirm the administrative law judge's finding that employer is not liable for claimant's treatment with Dr. Spector prior to June 12, 2001. *See Galle v. Ingalls Shipbuilding Inc.*, 33 BRBS 141 (1999), *aff'd sub nom. Galle v. Director, OWCP*, 246 F.3d 440, 35 BRBS 17(CRT) (5th Cir.), *cert. denied*, 534 U.S. 1002 (2001); *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301 (1989).

However, the claim for benefits in 2001 notified employer of a request for treatment with Dr. Spector. Employer denied the request for a change in physician. *See* Cl. Exs. 2, 3. Moreover, it is not contested that Dr. Sheils, in 1996, stated there was no further medical treatment he can provide and suggested only that claimant buy "proper footwear." Cl. Ex. 4. Nonetheless, the administrative law judge denied the requested medical benefits because claimant did not establish that Dr. Sheils refused further treatment. The administrative law judge further reasoned that if it were shown that "Dr. Spector was more of a specialist in foot impairments, then a change in treating physician would be in order." Decision and Order at 10.

We cannot affirm the denial of medical benefits. Because employer explicitly refused to authorize the medical treatment by Dr. Spector, employer is liable for reasonable and necessary treatment. *Anderson,* 20 BRBS 22. The inquiry at this juncture therefore concerns only the reasonableness and necessity of the care proposed by Dr. Spector. *Schoen v. U.S. Chamber of Commerce,* 30 BRBS 112 (1996). Contrary to the administrative law judge's statement, Dr. Spector is an appropriate specialist for claimant's condition, as he is a podiatric surgeon, a fact which the administrative law judge noted in his causation discussion. Decision and Order at 10*;* Cl. Ex. 6. Thus, the administrative law judge cannot find the proposed treatment inappropriate on this basis. As the administrative law judge did not otherwise address whether the proposed treatment is reasonable and necessary for the care of claimant's work-related injury, we remand the case for the administrative law judge to address this issue. 33 U.S.C. §907(a); *see Buckland v. Dep't of the Army/NAF/CPO,* 32 BRBS 99 (1997).

Accordingly, the Decision and Order of the administrative law judge denying disability and medical benefits under the Act is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge