U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0042

PASQUALE CANTONE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: Sept. 21, 2015
	)	
ELECTRIC BOAT CORPORATION	)	
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Denying Benefits of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

Stephen C. Embry (Embry and Neusner), Groton, Connecticut, for claimant.

Edward W. Murphy (Morrison Mahoney LLP), Boston, Massachusetts, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand Denying Benefits (2011-LHC-00275, 2011-LHC-02074) of Administrative Law Judge Colleen A. Geraghty rendered on claims 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 rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case is before the Board for the second time. To recapitulate, claimant suffered a non-work-related heart attack for which he underwent coronary artery bypass surgery in 1989. Tr. at 33. Claimant was out of work for some time, but he subsequently returned with a 25-pound lifting restriction. Following his return to work, claimant testified he experienced shortness of breath, chest pains, anxiety, and nervousness. *Id*. at 33-34, 46. In 1991, he suffered an angina attack at work and was taken by ambulance to the hospital. *Id*. at 39-40. In 1993 or 1994, rumors spread that employer would not be receiving additional contracts and that lay-offs would occur; claimant became worried about losing his job. *Id.* at 50-51. Claimant's wife testified she frequently called claimant's supervisors to express concerns that claimant was going to have another heart attack and to explain how concerns over lay-offs were affecting her husband. *Id*. at 94. Employer laid off employees during this period; however, claimant was spared because of his seniority. On July 26, 1995, Dr. Fortunato diagnosed stress and anxiety and took claimant off work for one month. EX 3. Claimant never returned to work. Tr. at 63, 68, 85. Since leaving work in 1995, claimant has continued to have anxiety and cardiac symptoms. CXs 39, 40-42; Tr. at 66.

On May 13, 2009, claimant filed claims for disability commencing in 1995 caused by a work-provoked angina attack in 1991, and by depression and anxiety, which he attributed to "stress and overwork."[1] EXs 9, 11. Claimant filed his notice of injury forms on the same date. EXs 10, 12. On April 7, 2011, claimant filed a third claim for compensation, listing the nature of his injury as "heart, depression, anxiety," and the date of injury as "on or about July 29, 1991," the date of his angina attack at work. CX 13. Employer did not file any first report of injury forms pursuant to Section 30(a) of the Act, 33 U.S.C. §930(a), until after the claim forms had been filed.

The administrative law judge found that, although claimant did not give employer timely notice of his injuries pursuant to Section 12(a), 33 U.S.C. §912(a), such failure was excused pursuant to Section 12(d)(2), because employer was not prejudiced by the delayed filing. The administrative law judge further found that claimant's claims were not barred under Section 13(a), 33 U.S.C. §913(a), because employer was aware of claimant's injuries and had sufficient information to know they may be work-related, yet employer did not file first report of injury forms as required by Section 30(a). Thus, the

[1] Claimant contended that his disability "flowed from symptoms of depression and anxiety caused by the combined effect of work-related chest pains and cardiac symptoms, along with the mental effect that the rumors of layoffs caused [claimant.]" Cl.'s Post-Hearing Br. at 10.

administrative law judge found the statute of limitations had been tolled pursuant to Section 30(f), 33 U.S.C. §930(f), such that the claims were timely filed. On the merits, the administrative law judge found that claimant established a causal link between his cardiac and psychological injuries and his work, that claimant is disabled from returning to his usual employment, and that employer did not establish the availability of suitable alternate employment. The administrative law judge thus awarded claimant permanent total disability benefits commencing July 26, 1995. 33 U.S.C. §908(a). The administrative law judge also awarded employer Section 8(f), 33 U.S.C. §908(f), relief. Employer appealed the award of benefits.

The Board affirmed the administrative law judge's finding that claimant's 14-year delay in giving notice of his injuries was excused under Section 12(d) as employer did not establish it was prejudiced by the delay. *Cantone v. Electric Boat Corp.*, BRB No. 12-0642 (July 23, 2013). However, the Board vacated the administrative law judge's award of benefits and remanded the case. The Board vacated the finding that claimant's claims were timely filed, because the administrative law judge did not explain how employer knew claimant's injuries were work-related, and thus should have filed a first report of injury form pursuant to Section 30(a). The Board instructed the administrative law judge to ascertain claimant's date of awareness, and the extent of employer's knowledge, to determine whether the claims were timely filed. With respect to claimant's cardiac condition, the Board affirmed the finding that claimant's employment caused his cardiac condition to become symptomatic. However, the Board remanded on the issues of whether the disability that commenced in 1995 was due to the work-related cardiac symptoms, and whether claimant's work-related cardiac injury contributed to claimant's disabling psychological condition.[2] *Id.*, slip op. at 8-9.

On remand, the parties submitted additional evidence for the administrative law judge's consideration. *See* CX 42; EX 23. The administrative law judge found that claimant's cardiac condition and associated physical symptoms and limitations were

[2] Pursuant to *Pedroza v. Benefits Review Board*, 624 F.3d 926, 44 BRBS 67(CRT) (9th Cir. 2010) and *Marino v. Navy Exchange*, 20 BRBS 166 (1988), the Board held that claimant's anxiety over a potential layoff is not a compensable injury. *Cantone*, slip op. at 9-10. Claimant raises an objection to this holding, in order to preserve it for appeal, on the ground that employer did not take any "personnel action" against claimant and that his claim is based on generalized anxiety in the workplace. We decline to address this issue, as it is moot given our decision in this case, and because the Board's prior decision constitutes the law of the case. *See, e.g., Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003).

sources of anxiety, depression, and stress. Decision and Order on Remand at 8 n. 6. The administrative law judge also found claimant was aware that work had aggravated his underlying cardiac condition at least by 1993, and of the relationship among his cardiac condition, anxiety and stress, his employment, and his disability no later than January 1, 1996. *Id*. at 10. The administrative law judge found that employer did not have notice or knowledge before the claims were filed that claimant's cardiac or psychological symptoms were work-related, and thus that employer was not required to file a Section 30(a) report. The administrative law judge therefore concluded that the statute of limitations was not tolled under Section 30(f) and that claimant's claims were untimely filed. *Id.* at 12. Therefore, the administrative law judge denied the claims for disability benefits.[3] *Id*. at 13. Claimant appeals the denial of disability benefits, and employer responds, urging affirmance.

Claimant challenges the administrative law judge's finding that his claims were untimely filed. Section 13(a) of the Act provides that

> the right to compensation for disability or death under this chapter shall be barred unless a claim therefore [sic] is filed within one year after the injury or death . . . The time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment.

33 U.S.C. §913(a). This provision tolls the statute of limitations until the claimant is aware of the full character, extent and impact of the harm. *See, e.g., Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98(CRT) (4th Cir. 1991); *C&C Marine Maint. Co. v. Bellows*, 538 F.3d 293, 42 BRBS 37(CRT) (3d Cir. 2008); *Dyncorp Int'l v. Director, OWCP [Mechler]*, 658 F.3d 133, 45 BRBS 61(CRT) (2d Cir. 2011); *Bath Iron Works v. Galen*, 605 F.2d 583 (1st Cir. 1979) (same standard under Section 12). Section 20(b) of the Act, 33 U.S.C. §920(b), provides a presumption that a claim was timely filed, "in the absence of substantial evidence to the contrary." *See Stark v. Washington Star Co.*, 833 F.2d 1025, 20 BRBS 40(CRT) (D.C. Cir. 1987); *see generally Bath Iron Works Corp. v. U.S. Dept. of Labor [Knight]*, 336 F.3d 51, 37 BRBS 67(CRT) (1st Cir. 2003). Section 30(f) provides that where an employer has been given notice or has knowledge of a potentially work-related injury, and fails to file a timely first

[3] Pursuant to claimant's motion for reconsideration, the administrative law judge issued an Order clarifying that claimant is entitled to Section 7, 33 U.S.C. §907, medical benefits for his work-related cardiac and psychiatric injuries, as claims for medical benefits are never time-barred. *Alexander v. Avondale Industries, Inc.*, 36 BRBS 142 (2002). Neither party appealed this award, and it is affirmed.

report of injury under Section 30(a), the limitations period set forth in Section 13 does not begin to run until such report has been filed. 33 U.S.C. §930(f); *Blanding v. Director, OWCP*, 186 F.3d 232, 33 BRBS 114(CRT) (2d Cir. 1999); *Stark*, 833 F.2d 1025, 20 BRBS 40(CRT). Employer may overcome the Section 20(b) presumption of timeliness by presenting substantial evidence that it did not receive notice or have knowledge of the work-related injury. *Id*.

With respect to his date of awareness, claimant asserts the administrative law judge failed to consider whether his depression and anxiety impeded his ability to appreciate the work-related nature of his symptoms. Contrary to claimant's assertion, the administrative law judge addressed and rejected this argument. Decision and Order on Remand at 9-10. Although, in September 2013, Dr. Borden opined that claimant's depression impeded his cognition, CX 42, other evidence supports the administrative law judge's finding that claimant's ability to comprehend a relationship between his conditions and his work was not impaired within one year of the time he should have been aware of such a relationship. Specifically, the administrative law judge acknowledged Dr. Puerini's October 1995 opinion that, despite claimant's stress and anxiety, he was competent to endorse checks and direct the use of proceeds; Dr. DiZio's November 1995 report that claimant was aware his concentration was better at home when things were calm; and claimant's December 1995 credit account protection form, wherein he indicated he was retired due to a disability. Decision and Order on Remand at 9; CX 2 at 6; CXs 20, 25, 42. Moreover, the administrative law judge found that claimant was aware by 1993 that work had aggravated his cardiac condition,[4] had received doctors' reports in 1995 tying his disabling psychiatric condition to his cardiac condition, and had begun to receive Social Security disability benefits in January 1996.[5]

[4] The administrative law judge rationally found that, on remand, claimant did not address the issue of his date of awareness, instead contending that his condition impaired his comprehension of his situation and that the statute of limitations was tolled pursuant to Section 30(f). On appeal, claimant does not directly challenge the administrative law judge's finding that he was aware of the effect work had on his underlying cardiac condition "at least by 1993." Decision and Order on Remand at 8; *see Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007). However, to the extent claimant does challenge this finding, substantial evidence supports it. Specifically, the evidence establishes that claimant testified he experienced chest pains with exertion at work when his hours increased from eight to ten hours per day in 1993, and Dr. Puerini excused claimant from overtime work due to his cardiac condition on February 18, 1993. CX 8; EX 3; Tr. at 48-49; *see generally V. M. [Morgan] v. Cascade General, Inc.*, 42 BRBS 48 (2008), *aff'd mem*., 388 F.App'x 695 (9th Cir. 2010).

[5] On November 1, 1995, Dr. DiZio examined claimant in connection with his application for Social Security disability benefits and reported that claimant was limited

CX 2 at 4; CXs 22, 27, 29; Tr. at 68-70. Based on this evidence, the administrative law judge found claimant capable, at least as of January 1996, of appreciating a relationship between his injuries, his disability, and his employment. Decision and Order on Remand at 9-10.

It is well established that an administrative law judge has authority to weigh the evidence and to draw inferences from it, and that the Board's inquiry is limited to whether the administrative law judge's findings are supported by substantial evidence and in accordance with law. *Bath Iron Works Corp. v. Director, OWCP [Hutchins]*, 244 F.3d 222, 35 BRBS 35(CRT) (1st Cir. 2001); *Sprague v. Director, OWCP*, 688 F.2d 862, 15 BRBS 11(CRT) (1st Cir. 1982). The administrative law judge's finding that claimant was aware, or should have been aware, of the work-relatedness of his disabling conditions at least as of January 1996, is rational and supported by substantial evidence of record. Therefore, we affirm this finding. *Stark*, 833 F.2d 1025, 20 BRBS 40(CRT); *V.M. [Morgan] v. Cascade General, Inc.*, 42 BRBS 48 (2008), *aff'd mem.*, 388 F.App'x 695 (9th Cir. 2010); *see also Paducah Marine Ways v. Thompson*, 82 F.3d 130, 30 BRBS 33(CRT) (6th Cir. 1996); *Duluth, Missabe & Iron Range Ry. Co. v. Director, OWCP [Heskin]*, 43 F.3d 1206 (8th Cir. 1994). Claimant did not file his claims for benefits until 2009 and 2011; nevertheless, pursuant to Section 20(b), they are presumed timely filed unless employer overcomes the presumption by presenting substantial evidence that it did not receive notice or have knowledge of the work-related injury before the filing time prescribed. 33 U.S.C. §930(f); *Blanding*, 186 F.3d 232, 33 BRBS 114(CRT); *Stark*, 833 F.2d 1025, 20 BRBS 40(CRT); *Wendler v. American Red Cross*, 23 BRBS 408 (1990) (McGranery, J., dissenting).

Claimant contends that substantial evidence does not support the administrative law judge's finding that employer did not have notice or knowledge of claimant's work-related injuries before the claims were filed. In addressing whether employer received notice or had knowledge of a work-related injury, the administrative law judge accurately observed that claimant suffered a non-work-related heart attack in 1989 followed by coronary bypass surgery, and he returned to work with a 25-pound lifting restriction. Decision and Order on Remand at 11; Tr. at 33-38. The administrative law judge, therefore, found employer was aware claimant had a non-work-related underlying cardiac

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by his cardiac condition and depression associated with his poor health and financial concerns. CX 2. On July 26, 1995, Dr. Puerini opined that claimant's psychological condition was disabling and excused him from work, and claimant testified he understood at that time that Dr. Puerini took him out of work due to his stress. CX 26; Tr. at 67-70. The administrative law judge additionally found that by January 1, 1996, claimant had been out of work for six months and completed several forms for Social Security disability benefits. Decision and Order on Remand at 10; CXs 17-19.

condition. Decision and Order on Remand at 8. Although employer made accommodations for claimant's cardiac symptoms,[6] the administrative law judge rationally found, pursuant to *Stark*, 833 F.2d 1025, 20 BRBS 40(CRT), that notice of a causal connection between claimant's cardiac condition and his work could not be inferred from these accommodations because claimant's history of pre-existing cardiac problems could explain the cardiac symptoms and angina claimant experienced at work.[7] Decision and Order on Remand at 12. Further, the administrative law judge rationally found that employer demonstrated a lack of notice or knowledge of a causal relationship between claimant's cardiac condition and work because: (1) after suffering an angina attack at work on July 29, 1991, claimant returned to work with the same 25-pound lifting restriction, and none of claimant's treatment notes for this time period indicated that the angina attack or underlying cardiac condition was work-related;[8] (2) Dr. Puerini's 1993 letter, indicating there would be days claimant could not work 10 hours due to his underlying cardiac condition, did not attribute claimant's cardiac condition to work or state that work aggravated the underlying condition; (3) claimant testified he did not remember discussing his chest pains with his supervisors and coworkers; and, (4) although claimant's wife contacted employer to say she was afraid claimant would have another heart attack, there is no evidence she expressed a concern that claimant's work activities would contribute to another heart attack. *Id.* at 11-12; CX 8; Tr. at 49, 89, 94. Similarly, with respect to claimant's psychological injury claim, the administrative law judge found an absence of notice or knowledge of a causal relationship to work because: (1) Dr. Puerini's work-excuse slips, stating that claimant was unable to work due to stress and anxiety, do not attribute these conditions to claimant's employment; (2) claimant did

[6] Employer permitted claimant to take breaks and rest in the men's room, allowed coworkers to assist with heavy lifting, and excused claimant from working overtime in response to Dr. Puerini's 1993 letter.

[7] In *Stark*, the United States Court of Appeals for the District of Columbia Circuit held that an employer's adoption of health measures, coupled with information that the employee suffers the type of ailment against which the measures are aimed, cannot support an inference that an employer had notice of a causal connection between the employee's illness and work. *Stark*, 833 F.2d at 1028, 20 BRBS at 45(CRT).

[8] To the extent claimant argues employer knew the angina attack was work-related because it happened at work and employer took claimant to the hospital, we reject this argument. As the Board previously held, this fact alone is insufficient to put employer on notice of a possible connection between claimant's angina attack and work, given that claimant had a pre-existing, non-work-related cardiac condition. *Cantone*, slip op. at 5; *see Weber v. S.C. Loveland Co.*, 35 BRBS 75, 77 (2001), *aff'd on recon.*, 35 BRBS 190 (2002) (law of the case doctrine discussed).

not inform employer that the stress was work-related; and, (3) employer's records indicate that claimant's illness is not work-related. Decision and Order on Remand at 12; CX 22; EX 2; Tr. at 64. Based on this evidence, the administrative law judge found employer presented substantial evidence that it did not know claimant's injuries were work-related. Therefore, she found that employer was not obligated to file any Section 30(a) reports and that, consequently, claimant's claims were untimely filed because the Section 30(f) tolling provision does not apply. Decision and Order on Remand at 12.

In appealing this issue, claimant is asking the Board to reach the opposite conclusions from the evidence discussed by the administrative law judge, which is outside the Board's scope of review. *Hutchins,* 244 F.3d 222, 35 BRBS 35(CRT). Further, claimant has mischaracterized the evidence, as the record does not reflect that any of the communications to employer from claimant, his wife, or his doctors, connected claimant's cardiac injury to his work or the psychological injury to the cardiac condition. CX 8; Tr. at 49, 64, 88. Substantial evidence supports the administrative law judge's finding that employer did not have notice or knowledge that claimant's conditions were work-related until he filed his claims in 2009 and 2011.[9] Therefore, we affirm the administrative law judge's findings that employer was not obligated to file a Section 30(a) report of injury, that the Section 13 statute of limitations period was not tolled pursuant to Section 30(f), and that claimant's claims were untimely filed. *Stark*, 833 F.2d at 1028, 20 BRBS at 44(CRT). As claimant's claims were not filed in a timely manner, the administrative law judge properly denied the claims for disability benefits. *Id.*

[9] To the extent claimant argues that employer was privy to all of the information claimant had and, therefore, notice to claimant is notice to employer, we reject this argument. There is no evidence employer was privy to the same information that claimant was. Specifically, there is no evidence employer received Dr. DiZio's 1995 medical report, rendered with regard to claimant's claim for Social Security disability benefits, which the administrative law judge found put claimant on notice of the relationship between his psychological condition and cardiac condition. CX 2.

Accordingly, the administrative law judge's Decision and Order on Remand Denying Benefits is affirmed.

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