

BRB No. 97-983

THERESA M. KENFIELD)
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 Claimant-Petitioner) DATE ISSUED:
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 v.)
)
 CONSOLIDATED OPEN MESS MWR)
 FUND, WESTOVER AIR FORCE BASE)
)
 and)
)
 AIR FORCE INSURANCE FUND)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order Granting Respondents' Motion for Summary Decision of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Craig D. Robinson (Brousseau & Robinson), Springfield, Massachusetts, for claimant.

Peter Gedraitis, San Antonio, Texas, for employer/carrier.

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

PER CURIUM:

Claimant appeals the Decision and Order Granting Respondents' Motion for Summary Decision (97-LHC-273) of Administrative Law Judge David W. Di Nardi 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 Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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 suffered an injury to her lower back on October 5, 1985, when she lifted beer cases in the course and scope of her employment. She was diagnosed as suffering from a ruptured disc at L4-5, which was surgically excised on January 28, 1986. Employer voluntarily paid temporary total disability benefits from November 5 to November 11, 1985, and from December 13, 1985, to September 4, 1986, with the final payment made on September 8, 1986. Claimant returned to work on September 9, 1986, but resigned from her position with employer on October 20, 1986, due to “personal/medical” reasons; she has not returned to work since. Claimant alleges that she has undergone several more lumbar disc surgical procedures since that time. *See* Claimant’s Opposition to Motion for Summary Decision. On February 1, 1992, claimant submitted a claim for compensation under the Act for the injury incurred on October 5, 1985. Employer filed a motion for summary decision, asserting that claimant failed to file the claim within the time limitations prescribed in Section 13 of the Act, 33 U.S.C. §913(a).

In his Decision and Order Granting Respondents’ Motion for Summary Decision, the administrative law judge found that in opposing employer’s motion, claimant did not submit any evidence of a timely filed claim, and thus the administrative law judge found that no material issue of fact remained with regard to Section 13. In addition, the administrative law judge found that there was no affidavit attesting that there remained any unpaid medical bills which were causally related to claimant’s work-related injury, and thus granted employer’s motion for summary decision on the issue of its liability for medical treatment.

On appeal, claimant contends that the administrative law judge erred in granting summary decision on the grounds that claimant failed to comply with the requirements of Section 13(a). In addition, claimant contends that the administrative law judge erred in dismissing claimant’s claim for medical benefits. Employer responds, urging affirmance of the administrative law judge’s decision.

Initially, claimant contends that the administrative law judge erred in granting summary decision on the issue of whether the claim for compensation is time-barred. The purpose of summary decision is to promptly dispose of actions in which there is no genuine issue as to any material fact. *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990). Under the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. §§18.40, 18.41, an administrative law judge may enter summary decision for either party if the pleadings, affidavits, material obtained through discovery or otherwise, or matters officially noticed show that there is no genuine issue of material fact. *Green v. Ingalls Shipbuilding, Inc.*, 29 BRBS 81 (1995). In determining if summary decision is appropriate, the court must look at the record in the light most favorable to the party opposing the motion. *Hahan v. Sergeant*, 523 F.2d 461, 464 (1st

Cir.1975), *cert. denied*, 425 U.S. 904 (1976).

In the present case, claimant filed a claim for compensation for her October 1985 back injury on February 1, 1992, seeking benefits from the date she left work in October 1986 and continuing. There is no allegation of a reinjury to or aggravation of claimant's back condition during her period of employment post-injury. Section 13(a) provides 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. 33 U.S.C. §913(a). If voluntary payments have been made, a claim must be filed within one year of the last payment in order for the claim to be timely. *Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286 (1994). In addition, the claim must be in writing and filed with the district director in the compensation district in which the injury occurred. *See* 20 C.F.R. §702.221. In the present case, employer made its last voluntary payment on September 8, 1986.

The administrative law judge reviewed the pleadings and noted that claimant alleged before him, and at the informal conference before the district director, that she gave employer a claim for compensation on the day she left work, October 20, 1986. However, as employer filed an affidavit that it never received any type of claim from claimant and there was no documentation for this claim, the administrative law judge rationally found that claimant's allegation did not raise a material issue of fact. The administrative law judge also discussed claimant's contention that the medical reports of her subsequent surgeries constitute a claim under the Act, but found that the reports are dated from December 1987 and later, and thus could not have been filed within one year of the last voluntary payment.

Claimant also contended before the administrative law judge, and alleges on appeal, that the subsequent disc herniation in 1987 was an "injury" which was the natural progression of the original accidental injury, and that therefore the time limitation begins anew from the date of this herniation. Claimant states, however, that she first knew in December 1987 that her medical condition diagnosed in December 1987 and 1988 as "Failed Back Syndrome," was related to the original injury. *See* Claimant's Opposition to Motion for Summary Decision at 2; Claimant's Brief at 4. Thus, as claimant admitted that she had the requisite awareness in December 1987 of the full relationship between her injury, disability and employment, at the latest, a timely claim under Section 13(a) would have to be filed within one year of this date. *See Ceres Gulf, Inc. v. Director, OWCP*, 111 F.3d 17, 31 BRBS 21 (CRT)(5th Cir. 1997); *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). Inasmuch as a claim was not filed until February 1, 1992, the administrative law judge properly found the claim time-barred. Although claimant correctly asserts that an attending physician's report which indicates the possibility of a continuing disability may be considered adequate compliance with the

filing requirements of Section 13(a), see *Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990), there is no allegation that the medical reports dated from October 1987 through 1988 were filed with the district director, and the district director noted at the informal conference that the administrative file did not contain any reports or claims filed before February 1992. Therefore, as the administrative law judge's findings are rational, we affirm the administrative law judge's conclusion that there are no genuine issues of material fact regarding Section 13(a), and thus affirm the granting of summary decision in employer's favor on the Section 13 issue.

Claimant also contends on appeal that the administrative law judge erred in granting summary decision on the claim for medical benefits. Employer is liable for medical expenses incurred as a result of a work-related injury, 33 U.S.C. §907, and a claim for medical benefits is never time-barred. *Ryan v. Alaska Constructors, Inc.*, 24 BRBS 65 (1990); see generally *Marshall v. Pletz*, 317 U.S. 383 (1943)(medical benefits not "compensation" under Section 13). The administrative law judge in the instant case found that there was no evidence of medical bills submitted to employer that remain unpaid or that employer has denied payment of any medical benefits causally related to the 1985 work-related injury. The administrative law judge also noted that claimant submitted no reports affirmatively establishing a causal relationship between her continuing medical treatment and her work injury, and that there is evidence that claimant's later back problems may have been due to intervening causes. Thus, the administrative law judge summarily denied claimant additional medical benefits.

Section 7 of the Act, 33 U.S.C. §907, entitles claimant to medical benefits for reasonable and necessary treatment of a work-related injury. While it is true that at present the record contains no medical evidence affirmatively linking claimant's ongoing medical treatment and the work injury, the administrative law judge did not take into account the effect of the Section 20(a), 33 U.S.C. §920(a), presumption. See *Colburn v. General Dynamics Corp.*, 21 BRBS 219 (1988). Section 20(a) aids a claimant in proving that her injury arises out of and in the course of employment. See *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989). Before the presumption may properly be applied, claimant must establish a *prima facie* case by showing that she suffered some harm or pain and that working conditions existed or an accident occurred which could have caused the harm or pain; claimant need not prove that the accident at work in fact caused the harm alleged in order to invoke the presumption. See *Sinclair v. United Food and Commercial Workers*, 23 BRBS 148 (1989). The possibility of an intervening cause does not affect invocation of the Section 20(a) presumption, although evidence a condition is due to such a cause is grounds for rebuttal. *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989).

In her response to employer's motion for summary decision, claimant alleged that employer had ceased paying medical bills in 1989, but that she had undergone several more lumbar disc surgical procedures since that time. Moreover, claimant included medical notes indicating she continued to suffer from back problems. As it is undisputed that claimant suffered a work-related injury to her back in 1985, we hold that the evidence is sufficient to establish invocation of the presumption that the medical treatment for claimant's back is causally related to her employment injury. *See generally Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988). Inasmuch as the administrative law judge did not give claimant the benefit of the Section 20(a) presumption in determining whether claimant is entitled to further medical benefits for her work injury, we vacate the administrative law judge's finding that claimant has not raised a genuine issue material of fact as to whether she is entitled to continued medical benefits and remand for consideration of this issue.

On remand, the administrative law judge must address causation consistent with Section 20(a), which places the burden on employer to go forward with substantial evidence rebutting the presumption that claimant's condition is due to the work injury. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990). If employer succeeds, the presumption no longer controls and the issue of causation must be resolved based on the record as a whole with claimant bearing the burden of proof. *See generally Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT) (4th Cir. 1997); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996). Employer remains liable for medical treatment for the natural progression of claimant's injury. *See generally James*, 22 BRBS at 273. Inasmuch as the administrative law judge did not give claimant the benefit of the Section 20(a) presumption in determining whether claimant is entitled to further medical benefits for her work injury, and Section 20(a) places the burden of proof on employer to rebut the presumed causal nexus with substantial evidence, the summary denial of medical benefits is vacated, and the case is remanded for further consideration of claimant's entitlement to medical benefits under Section 7.

Accordingly, the administrative law judge's Decision and Order Granting Respondents' Motion for Summary Decision finding that the compensation claim is time-barred is affirmed. However, the administrative law judge's finding that claimant is not entitled to continuing medical benefits is vacated, and the case is remanded to the administrative law judge for further findings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge