BRB No. 99-1227

WESLEY A. WIGGINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: 08/25/2000
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Modification of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

Christopher A. Taggi (Mason, Cowardin & Mason), Newport News, Virginia, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Modification (92-LHC-0069) of Administrative Law Judge Daniel A. Sarno, Jr., 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 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)(3).

Claimant sustained a work-related left knee injury in 1991. On June 22, 1995, the district director entered a compensation order awarding claimant various periods of temporary total and temporary partial disability benefits, 33 U.S.C. §908(b), (e), from February 28, 1991, to October 18, 1992, and for a 30 percent permanent impairment of the left leg pursuant to 33 U.S.C. §908(c)(2). On June 26, 1995, claimant filed a claim for

additional compensation "in modification" of the recently issued Compensation Order, which the district director construed as a protective filing. *See* Emp. Exs. 3, 4. Employer's last compensation payment was on June 28, 1995. Emp. Ex. 2. On October 30, 1996, claimant was examined by Dr. Nichols for bilateral knee pain. At this time, claimant reported greater right than left knee pain. Dr. Nichols stated that the need for right knee surgery is a direct result of the chronic shifting of weight to that leg in compensation for the 1991 left knee injury. Cl. Ex. 2. Claimant underwent right knee surgery on November 4, 1997. He was unable to work from November 3, 1997, to January 12, 1998. Claimant sought temporary total disability benefits under the Act for this period, alleging that he had timely requested modification of the district director's compensation order pursuant to Section 22 of the Act, 33 U.S.C. §922.

The sole issue before the administrative law judge was the timeliness of claimant's modification request, as employer agreed that claimant is otherwise entitled to temporary total disability compensation from November 3, 1997, to January 12, 1998, for his right knee injury. The administrative law judge found that claimant's protective filing on June 26, 1995, did not constitute a timely modification request as it did not reference a change in condition or a mistake in a determination of fact. *See I.T.O. Corp. of Virginia v. Pettus*, 73 F.3d 523, 30 BRBS 6 (CRT)(4th Cir. 1996), *cert. denied*, 519 U.S. 807 (1996); *see also Greathouse v. Newport News Shipbuilding & Dry Dock Co.*, 146 F.3d 224, 32 BRBS 102 (CRT)(4th Cir. 1998); *Meekins v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 5 (2000). The administrative law judge also rejected claimant's contention that employer's voluntary payment of his regular wages when he signed out early from work in 1996 and 1997 to see Dr. Nichols for his knee condition tolled the one year statute of limitations for requesting modification. The administrative law judge reasoned that if employer's payments tolled the statute of limitations, then the statute would be indefinitely tolled. Moreover, he construed these payments as medical benefits, which do not toll the time period for filing a claim. Finally, the administrative law judge reasoned that, if employer's voluntary payment of claimant's regular wages while he was receiving medical treatment for a work-related knee injury is construed as compensation, employer's payments would necessarily be compensation payments for permanent partial disability based on a loss of wage-earning capacity, *see* 33 U.S.C. §908(c)(21), which is precluded in the case of a scheduled injury pursuant to the decision of the Supreme Court in *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980). Accordingly, the administrative law judge concluded that claimant failed to timely petition for modification, and he denied benefits for the right knee injury.

On appeal, claimant contends that the administrative law judge erroneously found that the time limitation for requesting Section 22 modification under the Act was not tolled by employer's voluntary payment to claimant of his regular wages during the time he was off work receiving treatment for his work-related knee injury. Claimant contends that these

payments constitute "compensation" such that his request for modification was timely filed. Employer responds, urging affirmance of the administrative law judge's decision.

We hold that the administrative law judge properly concluded, based on the evidence of record, that employer's payment of claimant's regular wages while he received medical treatment does not toll the one year statute of limitations for requesting modification.[1] Claims for modification are processed in the same manner as initial claims for compensation. 33 U.S.C. §§919, 922.[2] Cases construing the sufficiency of a writing as a claim under Section 13 of the Act, 33 U.S.C. §913, as well as cases construing whether various payments toll the one year statute of limitations for filing a timely claim under that section, therefore, are instructive in cases concerning the timeliness of modification under Section 22 of the Act. *See generally Pettus*, 73 F.3d at 528 n.3, 30 BRBS at 10 n.3 (CRT); *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988).

[1]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).

[2]Section 22 of the Act states that a claim for modification should be processed "in accordance with the procedure prescribed in respect of claims in section 19. . . " 33 U.S.C. §922. *See also* 20 C.F.R. §702.373(a).

In a case under Section 13 of the Act, the Supreme Court held in *Marshall v. Pletz*, 317 U.S. 383 (1943), that the payment of medical benefits is not "compensation" which will toll the Section 13(a) filing provisions.[3] Similarly, the Board has held that the filing period under Section 13 is not tolled by an employer's paying the 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 benefits. *Taylor v. Security Storage of Washington*, 19 BRBS 30 (1986); *see also Welch v. Pennzoil Co.*, 23 BRBS 395 (1990)(payments made under the employer's short-term disability and vacation plans not intended as compensation). In the instant case, the administrative law judge found that, if the payments of claimant's salary were to be construed as anything other than salary, they would have to be construed as medical benefits which cannot be considered compensation for purposes of tolling the statute of limitations under Section 22. *See Marshall*, 317 U.S. at 383. He found, moreover, that there is no evidence of record that employer intended the payment of claimant's regular salary during times when claimant was off work receiving medical treatment from Dr. Nichols for his work injury to be the payment of compensation under the Act. Employer submitted into evidence a computer-generated lost time inquiry documenting claimant's work absences from January 1990 to January 1998 for, *inter alia*, vacation, workers' compensation injury, tardiness, and funeral leave. There are no lost time entries in 1996 and 1997 on the days claimant worked part of the day and then sought medical treatment from Dr. Nichols for his work injuries the rest of the day, which further supports the administrative law judge's finding that employer did not intend as compensation payments its payment to claimant of a full day's regular salary for these partial days worked. Accordingly, as the administrative law judge's finding is rational, supported by substantial evidence, and in accordance with law, we affirm the administrative law judge's denial of claimant's request for modification under Section 22 of the Act as it was not timely filed.

[3]Section 13(a) states, *inter alia*, that a timely claim may be filed within one year of the last payment of compensation.

Nevertheless, we must remand this case to the administrative law judge for further consideration, inasmuch as the timeliness issues raised in the context of Section 22 raise issues concerning whether claimant filed a timely claim for his new work-related right knee injury pursuant to Section 13. The prior order addresses claimant's left knee, and claimant's claim here is for a new harm to a different body part, claimant's right knee. It is well-established that a subsequent work-related aggravation of a prior injury is a new injury for purposes of obtaining compensation under the Act. *See generally Newport New Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52 (CRT)(4th Cir. 1982); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Abbott v. Dillingham Marine & Manufacturing Co.*, 14 BRBS 453 (1981), *aff'd* 698 F.2d 1235 (9th Cir. 1982) (table). In the instant case, the medical evidence establishes that claimant sustained an injury to a different body part, the right knee, as a result of the work injury to his left knee, and employer does not contest the work-relatedness of the right knee condition. The fact that the new injury may be a sequelae of the earlier injury is not dispositive, as the time limitation under Section 13 runs from the date when claimant became aware, or should have been aware, that he sustained a compensable injury to his right knee. *See Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98 (CRT)(4th Cir. 1991). *See generally Morales v. General Dynamics Corp.*, 16 BRBS 293 (1984), *remanded on other grounds sub nom. Director, OWCP v. General Dynamics Corp.*, 769 F.2d 66, 17 BRBS 130 (CRT)(2d Cir. 1985).[4] On remand, therefore, the administrative law judge should determine, after giving employer the opportunity to respond, whether claimant timely asserted a right to compensation for this new right knee injury pursuant to the provisions of Section 13 of the Act, 33 U.S.C. §913. *See Parker*, 935 F.2d at 20, 24 BRBS at 98 (CRT)*; see also Pettus*, 73 F.3d at 523, 30 BRBS at 6 (CRT); 33 U.S.C. §920(b).

Accordingly, the administrative law judge's finding that claimant did not timely file a petition for modification is affirmed. The denial of benefits, however, is vacated, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

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[4]In *Morales*, claimant filed a new claim for deterioration of a prior knee condition from a 10 percent to a 20 percent impairment. The Board found the new claim timely based on claimant's date of awareness of the new injury and affirmed the administrative law judge's use of the date the increased disability was manifest for calculating average weekly wage. On appeal, the court addressed only the average weekly wage issue, holding that it must be based on earnings at the time of initial injury and noting that claimant's "awareness" is relevant only to timeliness. The court thus remanded the average weekly wage issue, but affirmed the Board's decision in other respects.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge