

W.D.)
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 Claimant-Petitioner)
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 v.)
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 SHELL OFFSHORE, INCORPORATED) DATE ISSUED: 11/25/2008
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 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of the Decision and Order and Supplemental Decision and Order Ruling on Motion for Reconsideration of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Kenneth M. Henke (Oats & Hudson), Lafayette, Louisiana, for claimant.

John Rabalais, Janice B. Unland, Robert T. Lorio and Matthew D. Crumhorn (Rabalais, Unland & Lorio), Covington, Louisiana, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order and Supplemental Decision and Order Ruling on Motion for Reconsideration (2005-LHC-1442) of Administrative Law Judge Patrick M. Rosenow 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 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, a specialist operator, was injured on September 2, 1977, when a hose burst on a chemical sprayer resulting in highly pressurized carbon tetrachloride being sprayed up his nose; he has suffered chronic sinus problems since that time. In 1992, claimant took a regular retirement from employer and has been self-employed since that

time.¹ Employer paid claimant's medical bills associated with this injury, but suspended such payments in 2004. Claimant filed a claim for benefits on August 12, 2004, seeking resumption of medical benefits and a *de minimis* disability award. Employer thereafter resumed paying medical benefits.

In his Decision and Order, the administrative law judge found claimant's claim for disability benefits time-barred pursuant to Section 13 of the Act, 33 U.S.C. §913. The administrative law judge denied claimant's motion for reconsideration.

Claimant appeals, contending the administrative law judge erred in finding his claim untimely filed. Employer responds, urging affirmance of the administrative law judge's decision.

Section 13(a) of the Act states:

Except as otherwise provided in this section, 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. If payment of compensation has been made without an award on account of such injury or death, a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or death occurred. 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). The statute of limitations does not begin to run until the claimant is aware or reasonably should have been aware of the full character, extent, and impact of the work-related injury. *See, e.g., C&C Marine Maintenance Co. v. Bellows*, 538 F.3d 293 (3^d Cir. 2008); *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98(CRT) (4th Cir. 1991); *Stancil v. Massey*, 436 F.2d 274 (D.C. Cir. 1970). The Fifth Circuit, within whose jurisdiction this case arises, has stated, "For prescription to run against [claimant], [claimant] must know (or should know) the true nature of his condition, i.e., that it interferes with his employment by impairing his capacity to work, and its causal connection with his employment." *Marathon Oil Co. v. Lunsford*, 733 F.2d 1139, 1141, 16 BRBS 100, 101(CRT) (5th Cir. 1984). Section 20(b) of the Act, 33 U.S.C. §920(b), contains a presumption that the claim was timely filed. Thus, the burden is on

¹ Claimant initially worked as a dog breeder and trainer but currently works as an independent oil field consultant, individually contracting for the oil and gas industry.

employer to produce substantial evidence that the claim was untimely filed.² *See, e.g., E.M. v. Dyncorp*, ___ BRBS ___, BRB No. 08-0208 (July 30, 2008). Claims for *de minimis* awards are subject to the same timeliness standard as any other claim. *Hodges v. Caliper, Inc.*, 36 BRBS 73 (2002).

The administrative law judge found that claimant knew or should have known that his sinus problems would result in a decrease in his earning capacity as early as 1992 when he retired from employer, but at the very latest by 1999 when claimant noticed a marked increase in his physical symptoms that caused him to decline more lucrative offshore work. Decision and Order at 9. Accordingly, the administrative law judge found the 2004 claim untimely filed.

Claimant suffers from chronic sinusitis, persistent problems with headaches, and vertigo as a result of his work injury. EXs 3, 4. Claimant testified that while he was still employed by employer, he missed several shifts a year because of sinus infections,³ HT at 45, but, as these periods were covered by his sick leave, he suffered no loss in wages. EX 1 at 16. Claimant testified that it became harder to work in the offshore environment due to his sinus problems, and he took a regular retirement from employer when it was offered in 1992. Claimant underwent surgery in 1994, which was unsuccessful and resulted in an increase in physical problems. HT at 51. As a result, claimant's work as an independent contractor became primarily limited to land-based work, which pays less than offshore work, as he could no longer endure helicopter rides and suffered increased symptoms working on offshore facilities.⁴ HT at 78, 81-82. Claimant noticed another increase in the frequency of his sinus problems in 1999. EX 1 at 19.

We affirm the administrative law judge's finding that the claim is time-barred as it is supported by substantial evidence. Claimant's testimony supports the finding that he was aware by the time he retired in 1992 that his sinus problems caused by the work accident were impairing his ability to work as much as he previously had. Claimant also testified that as his condition worsened in 1994 and 1999 he turned down offshore work in favor of land-based employment, which paid less than offshore jobs. Finally, Dr. Tarpy, claimant's treating physician, stated in 2001 that claimant can return to work in an

² Employer met its initial burden in this regard by filing a first report of injury form on September 8, 1977. *See* 33 U.S.C. §930(a), (f); EX 7.

³ At that time, claimant's work involved working seven day shifts followed by seven days off work. HT at 42.

⁴ Claimant testified that riding in helicopters aggravates his sinus condition and results in ear pain and popping. HT at 77.

employment environment free of exposure to fumes, odors, chemicals, gases, or dust. EX 14 at 196. Claimant has not identified any error in the administrative law judge's consideration of the evidence or in his application of the law. *See Wendler v. American National Red Cross*, 23 BRBS 408 (1990) (McGranery, J., dissenting). As claimant was aware of the relationship between his loss in wage-earning capacity and his work injury more than one year prior to August 12, 2004, the administrative law judge properly found the claim time-barred. *See generally Ceres Gulf, Inc. v. Director, OWCP*, 111 F.3d 17, 31 BRBS 21(CRT) (5th Cir. 1997); *Stark v. Washington Star Co.*, 833 F.2d 1025, 20 BRBS 40(CRT) (D.C. Cir. 1987).

Accordingly, the administrative law judge's Decision and Order and Supplemental Decision and Order Ruling on Motion for Reconsideration are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge