BRB No. 00-0249

ERNEST WILLIAMS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: Oct. 31, 2000
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order-Denying Benefits of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

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

Jonathan H. Walker (Mason, Cowardin & Mason), Newport News, Virginia, for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (98-LHC-0117) of Administrative Law Judge Richard E. Huddleston 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 "hook-on" man, was injured on July 12, 1993, when he was jerked off the ground by a guide line while attempting to lift long steel plates. Claimant felt pain in his back and was referred by the shipyard clinic to Dr. Persons, an orthopedic surgeon. Dr. Persons prescribed medicine for the pain, and physical therapy. After his return to work with no restrictions on September 26, 1993, claimant continued working at his regular duties, but

also continued to seek treatment with Dr. Persons for the pain in his lower back. In August 1997, claimant was referred to Dr. Kerner, who arranged for him to receive injections in his back to block the pain. Claimant received the injections on August 5, 1997, and returned to his regular duties on August 8, 1997. He sought temporary total disability benefits under the Act for August 5, 6, and 7, 1997.

In his Decision and Order, the administrative law judge found that claimant knew he had degenerative disc disease and that it was likely to impair his capacity to earn wages by July 22, 1996, based on the reports of Dr. Persons. Thus, as claimant filed his claim on August 26, 1997, the administrative law judge found it was untimely, and he denied benefits.

Claimant contends on appeal that the administrative law judge erred in finding that claimant was aware of the full extent of his injury by July 22, 1996. Thus, claimant contends that the administrative law judge erred in finding that the claim was untimely filed. Employer responds, urging affirmance of the administrative law judge's decision.

Claimant contends that the administrative law judge erred in finding his claim untimely filed pursuant to Section 13(a) of the Act, 33 U.S.C. §913(a), as he was not aware that the work-related injury would impair his earning capacity until August 1997. We agree, as the administrative law judge's conclusion that claimant was "aware" in July 1996, which required him to file his claim before he sustained any compensable harm from his injury, is not in accordance with law.

Section 13(a) provides, in part, that the right to compensation for disability shall be barred unless a claim is filed within one year after the injury. 33 U.S.C. §913(a). Claimant is entitled to a presumption that his claim was timely filed. 33 U.S.C. §920(b); *see Stark v. Washington Star Co.*, 833 F.2d 1025, 20 BRBS 40(CRT) (D.C. Cir. 1987). The United States Court of Appeals for the Fourth Circuit, in whose jurisdiction the present case arises, has held that the standard for determining whether the statute of limitations begins to run is whether the claimant is aware or should have been aware that his injury is likely to impair his earning capacity. *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98(CRT) (4th Cir. 1991); *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*, 43 F.3d 1206 (8th Cir. 1994); *Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130(CRT) (9th Cir. 1991); *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990); *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990).

In *Parker*, the claimant was able to work for 25 years after his knee injury, even though he had continuing pain and had sought treatment over the years. In 1987, claimant

underwent surgery and first missed work due to his knee injury; claimant filed a claim in 1988 for a seven-week period of temporary total disability commencing with the surgery and ending upon his return to light work. The administrative law judge denied the claim, finding it was untimely because claimant had the requisite awareness under Section 13 in 1978, when a physician stated to the employer that arthroscopic surgery might be necessary. The Board reversed, holding this decision did not follow applicable law, and the Fourth Circuit affirmed this decision. The court noted that the possibility of surgery was not conveyed to the claimant in 1978, and moreover, the claimant was able to work for another nine years before the surgery actually was required. In view of these facts, the court affirmed the Board's holding that the claimant did not have reason to know of the likely impairment of his earning capacity until 1987, when surgery actually was scheduled. *Parker*, 935 F.2d at 27, 24 BRBS at 114(CRT). Similarly, the Board has held that where a claimant suffered a work-related injury but continued to perform his usual work for several years until his condition deteriorated to the point of requiring surgery, the time for filing a claim under Section 13(a) did not commence to run until he became aware of the true nature of the condition, *i.e.*, that the condition interfered with his employment by impairing his capacity to work. *Gregory v. Southeastern Maritime Co.*, 25 BRBS 188 (1991). The Board stressed that it would be incongruous to hold that claimant was required to file a claim earlier, as he had no loss to claim until surgery was required. *Id.* at 191.

In the instant case, the administrative law judge reviewed the treatment reports of Dr. Persons and found that "claimant knew or should have known that he had degenerative disc disease and that it is likely to impair his capacity to earn wages, as least as of July 22, 1996."[1] Decision and Order at 4. In addition, he found that "claimant's own testimony indicates that

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[1]The administrative law judge found the following reports by Dr. Persons to be relevant:

- June 25, 1996: Dr. Persons noted that claimant "declines to stay out of work at this time and...[I] will place him on some Lodine and advise him to be careful." Emp. Ex. 9.
- July 8, 1996: Dr. Persons reported "degenerative disc disease of the lumbar spine with recurrent irritation of the right lumbar nerve roots, probably L5. He seems to work in spite of the pain, though it would be nice to get him feeling more comfortable." Emp. Ex. 7.
- July 22, 1996: Dr. Persons reported an impression of "lumbar spine degenerative disc disease with multiple level involvement." He also opined that claimant's "symptoms will be variable but will probably get progressively worse over the years. He does not warrant any surgical intervention at this time." Emp. Ex. 8.

he is uncertain of when Dr. Persons told him that his degenerative disc disease would get progressively worse." *Id.* We agree with claimant that the administrative law judge's finding that claimant was "aware" by July 22, 1996, for purposes of Section 13, cannot be affirmed. As in *Parker* and *Gregory*, claimant continued to work at his regular duties with no restrictions until August 5, 1997. The fact that claimant experienced pain after an accident is insufficient as a matter of law to establish an awareness of a likely impairment of earning power. *Parker*, 935 F.2d at 26, 24 BRBS at 113(CRT). Similarly, that claimant continued to seek treatment for the pain in his back, or that his doctor believed the symptoms would probably worsen in the future, does not establish that claimant was aware at that time that his earning capacity would be impaired. *Id.; Gregory,* 25 BRBS at 191.

On the facts presented claimant had no reason to be aware of a likely impairment of his earning power until July 30, 1997, at the earliest, when Dr. Kerner scheduled claimant for nerve blocks, which were administered on August 5, 1997. EX 5A, 18. Claimant was off work on August 5, 6, 7, 1997, due to the medical procedure. *See* EX 19. He filed his claim on August 27, 1997. EX 1. His claim, therefore, is timely as a matter of law, as it was filed within one year of his date of awareness of the likely impairment of his earning capacity. Prior to the scheduling of the nerve blocks, claimant had no disability to claim; claimant filed his claim properly once he became aware his injury would cause him to miss time from work. *See Gregory,* 25 BRBS at 191; *see also Meekins v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 5 (2000)(discussing Fourth Circuit holdings that claimant may not file an anticipatory claim for modification).[2] Therefore, we reverse the administrative law judge's

[2]The Fourth Circuit's decisions regarding timely petitions for modification are instructive, as similar standards apply in determining whether a filed document is a proper claim for benefits in the first instance or on modification. Particularly relevant to this case, the court has held that a letter filed prior to claimant's sustaining an additional impairment cannot suffice as a claim for modification as it did not, and could not, state the disability claimed. *I.T.O. Corp. of Virginia v. Pettus*, 74 F.3d 523, 30 BRBS 6(CRT) (4th Cir. 1996), *cert. denied,* 519 U.S. 807 (1996). Similarly, in this case, a claim filed in July 1996 could not have stated the benefits sought as claimant did not sustain the claimed loss in earning capacity until August 1997.

finding that claimant had the requisite knowledge under Section 13(a) as of July 22, 1996, and hold that, pursuant to *Parker,* his claim was timely filed. The case is remanded to the administrative law judge for consideration of any outstanding issues.

Accordingly, the Decision and Order of the administrative law judge finding that the claim was untimely filed is reversed. The case is remanded for further consideration of any outstanding issues.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge