BRB No. 01-0742

GERRY HODGES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CALIPER, INCORPORATED	)	DATE ISSUED: June 17, 2002
	)	
and	)	
	)	
THE TRAVELERS INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

F. Nash Bilisoly and Kimberly Herson Timms (Vandeventer Black LLP), Norfolk, Virginia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (00-LHC-2507) of Administrative Law Judge Fletcher E. Campbell, 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).

On September 26, 1995, claimant's right eye was injured by a welding spark during the course of his employment as a welder. Claimant was examined by Dr. Kerner on October 3, 1995, who noted that claimant exhibited mild inflamation of the right eye with an area of superficial corneal scar tissue of unknown etiology, and she diagnosed post-traumatic iritis.

Claimant returned to Dr. Kerner on October 10, 1995, with decreased vision of 20/40 in his right eye from an overdose of eye medication. Dr. Kerner restricted claimant from returning to work until October 13, 1995, and employer voluntarily paid compensation for temporary total disability, 33 U.S.C. §908(b), from October 8 to October 12, 1995. Claimant returned to Dr. Kerner on December 11, 1995, to remove a metallic foreign body from his left eye. Claimant's vision tested at 20/20 in both eyes and no right eye complaints were recorded. Claimant's right eye was reexamined by Dr. Kerner on February13, 1996. Claimant's vision tested at 20/25 in both eyes, and Dr. Kerner discharged claimant from further treatment.

Claimant continued working for employer as a welder. He noticed a cloud in his field of vision while welding sheet metal during 1999. Employer authorized an examination on July 27, 1999, by Dr. Frankel. Dr. Frankel attributed claimant's vision problem to a corneal scar that could be removed or reduced by laser surgery; this procedure was authorized by employer. Claimant underwent laser surgery on August 6, 1999, and he was released to return to work by Dr. Frankel on October 12, 1999. Claimant, however, asserted that he has been unable to return to work as a welder since the surgery due to blurred vision in his right eye. Claimant filed a claim for compensation under the Act on September 9, 1999. Prior to the hearing, the parties stipulated that, if the claim was filed timely, claimant would be entitled to compensation for temporary total disability from August 6, to October 12, 1999. The sole issue before the administrative law judge was the timeliness of claimant's claim for compensation.

In his decision, the administrative law judge found that claimant was not aware that his eye injury would affect his wage-earning capacity until the onset of his vision clouding in 1999 and, therefore, that the September 9, 1999, claim was timely filed pursuant to Section 13(a) of the Act. 33 U.S.C. §913(a). The administrative law judge credited claimant's testimony, Dr. Kerner's advising claimant in October 1995 that his eye condition should resolve in a few days, and that in 1996 Dr. Kerner considered claimant healthy with no underlying eye disease. The administrative law rejected employer's contention that *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997), required that claimant file a claim for a *de minimis* award within one year from the September 26, 1995, date of claimant's eye accident. The administrative law judge found it to be unclear whether *Rambo II* imposes such a requirement and that, in any case, claimant had no reason to believe before 1999 that his eye injury had a significant potential to diminish his future wage-earning capacity. Accordingly, claimant was awarded compensation for the stipulated period of temporary total disability.

On appeal, employer argues that the administrative law judge erred by finding timely claimant's claim for compensation. Claimant has not responded to employer's appeal.

Section 13(a) of the Act provides a claimant with one year after he becomes aware, or with the exercise of reasonable diligence should be aware, of the relationship between his traumatic injury and his employment, within which he may file a claim for compensation for the injury. In *Stancil v. Massey*, 436 F.2d 274 (D.C. Cir. 1970), the United States Court of Appeals for the District of Columbia Circuit held that the one-year limitations period does not commence to run until the employee reasonably believes that he has "suffered a work-related harm which would probably diminish his capacity to earn his living." *Stancil*, 436 F.2d at 279. Following *Stancil*, the United States Court of Appeals for the Fourth Circuit, in whose jurisdiction the instant case arises, held that the limitations period in cases of traumatic injury does not commence running until the employee is aware or should be aware of the likely impairment of his earning capacity. *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98(CRT) (4th Cir. 1991); *accord Paducah Marine Ways v. Thompson*, 82 F.3d 130, 30 BRBS 33(CRT) (6th Cir. 1996); *Duluth, Missabe & Iron Range Ry. Co. v. Heskin*, 43 F.3d 1206 (8th Cir. 1994); *Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130(CRT) (9th Cir. 1991); *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *Marathon Oil Co. v. Lunsford*, 733 F.2d 1139, 16 BRBS 100(CRT) (5th Cir. 1984); *see also Bath Iron Works Corp. v. Galen*, 605 F.2d 583, 10 BRBS 863 (1st Cir. 1979) (applying a similar standard to construe identical language in Section 12 of the Act, 33 U.S.C. §912).

Employer initially argues that, pursuant to *Parker*, claimant was aware that his eye injury could affect his wage-earning capacity for purposes of commencing the limitations period in Section 13(a), either on October 12, 1995, when claimant last received compensation for his injury, or on February 13, 1996, when claimant was informed that he had a permanent corneal scar that could be removed only by laser surgery, which could worsen his vision. The administrative law judge found that claimant first became aware that his eye injury would affect his wage-earning capacity in 1999. The administrative law judge credited claimant's testimony that he noticed vision clouding sometime in 1999 when he was welding sheet metal. Tr. at 21-23. The administrative law judge also credited Dr. Kerner's medical records stating in October 1995 that claimant's eye injury should resolve and her testimony that claimant had no underlying eye disease when she examined him on February 13, 1996. CX 1e; EX 3 at 28. The administrative law judge further reasoned that claimant was able to work as a welder during 1997 and 1998 without any vision difficulties. *See* Tr. at 20-21. Accordingly, the administrative law judge concluded that the filing of the claim on September 9, 1999, was timely as claimant filed within one year of the onset of his vision clouding.

We affirm the administrative law judge's determination that claimant was unaware until 1999 of the likely impairment of his wage-earning capacity due to his September 26, 1995, right eye accident as it is supported by substantial evidence. Employer's payment of

compensation for temporary total disability from October 8 to 12, 1995, establishes only that claimant was temporarily unable to work due to an overdose of eye medication. CX 1e. This is insufficient to establish that claimant was aware of the full extent of the harm resulting from the work injury. *See Parker*, 935 F.2d at 27, 24 BRBS at 113-114(CRT); *see also Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14 BRBS 427 (9th Cir.), *cert. denied*, 459 U.S. 1034 (1982). Employer does not challenge the administrative law judge's finding that claimant was otherwise able to perform as a welder without any right eye difficulties until he underwent laser eye surgery in 1999. Moreover, we reject employer's contention that claimant became aware of a loss of wage-earning capacity in February 1996 when Dr. Kerner advised claimant that laser surgery to remove the corneal scar would probably worsen his vision. Dr. Kerner opined that in February 1996 claimant's vision at 20/25 was essentially normal and she would not have recommended that claimant undergo the risks of laser surgery to remove the corneal scar. EX 3 at 15-19; 34-37. Since the uncontradicted evidence fails to show that laser surgery was recommended in February 1996, and claimant did not have the surgery until 1999, he could not have been aware of a likely loss of wage-earning capacity from undergoing a procedure that Dr. Kerner opined in February 1996 was medically unnecessary.[1] The administrative law judge rationally determined from claimant's testimony concerning the onset of his vision clouding, claimant's ability to work as a welder during the preceding years, and Dr. Kerner's notes and testimony, that claimant did not become aware of the full extent of his eye injury in 1999, at which time the one year period for filing a claim based on this injury began to run. 33 U.S.C. §913; *Parker*, 935 F.2d 20, 24 BRBS 98(CRT); *see also Gregory v. Southeastern Maritime Co.*, 25 BRBS 188 (1991). Thus, pursuant to *Parker*, claimant's claim, filed on September 9, 1999, is timely.

Employer also argues, based on Dr. Kerner's informing claimant in February 1996 that his corneal scar could be removed only by risky laser surgery, that claimant was aware of a significant potential for a future loss of wage-earning capacity at that time. Employer contends that, pursuant to *Rambo II*, claimant was therefore required to file a claim for a *de*

[1]Employer also contends that, since claimant's cloudy vision was due to the corneal scar and the scar was initially diagnosed shortly after the work injury, claimant's vision was cloudy from the date of injury. The administrative law judge, however, credited claimant's testimony to find that claimant first noticed his vision clouding in 1999, Tr. at 21-22, and thus his finding is supported by substantial evidence.

minimis award within one year from the date of employer's last compensation payment on October 12, 1995. The administrative law judge determined that he need not address employer's contention because he found there is no evidence to suggest that claimant had any reason before 1999 to believe that his injury presented the significant potential to affect his wage-earning capacity.

In *Rambo II*, the Supreme Court held that a *de minimis* award is proper pursuant to Section 8(h), 33 U.S.C. §908(h), to indefinitely hold open the possibility for modification under Section 22 of the Act, 33 U.S.C. §922, until such time as the claimant has an actual loss of wage-earning capacity.[2] The Court reasoned that *de minimis* awards are consistent with the wait-and-see approach the Act adopts with respect to modification questions, and are the best way to reconcile the mandate in Section 8(h) that "wage-earning capacity" incorporate the effects of a disability as it may extend into the future, with the limitations periods of Section 13(a) for filing a claim and of Section 22 for requesting modification. *Rambo II*, 521 U.S. at 128-136, 31 BRBS at 57-60(CRT). The Court declined to determine how high the potential for disability need be to qualify as "nominal," since that issue was not addressed by the parties. Instead, the Court adopted the standard of circuit courts which had addressed this issue by requiring the claimant to establish a "significant possibility" of a future loss of wage-earning capacity in order to be entitled to a *de minimis* award. *Id*., 521 U.S. at 136-137, 31 BRBS at 60-61(CRT).

[2]Section 22 states, in pertinent part, that an administrative law judge may, "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, review a compensation case ... in accordance with the procedure prescribed in respect of claims in Section 19, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation." 33 U.S.C. §922.

Pertinent to employer's contention in this case, the Court in *Rambo II* relied in part on the limitations period for traumatic injuries in Section 13(a) as grounds for its approving *de minimis* awards. *Rambo II*, 521 U.S. at 128-129, 139, 31 BRBS at 57, 61(CRT). The Court stated that Section 13(a) **"**bars an injured worker from waiting for adverse economic effects to occur in the future before bringing his disability claim, which generally must be filed within a year of injury,**"** *Rambo II*, 521 U.S. at 129, 31 BRBS at 57(CRT), *citing Pillsbury v. United Engineering Co.*, 342 U.S. 197 (1952).[3] However, statements by the *Rambo II* Court regarding Section 13(a) are not directly material to the actual Section 22 issue before the Court and, consequently, are *dicta*.[4] Accordingly, the administrative law judge was not required to apply *Rambo II* to determine whether the claim herein was time-barred. Moreover, based on claimant's testimony and the medical records and testimony of Dr. Kerner credited by the administrative law judge in finding the claim timely filed, the administrative law judge's finding there is no evidence to suggest that claimant had any reason before 1999 to believe that his injury presented a significant potential to affect his future earning capacity is rational and supported by substantial evidence.

Furthermore, employer's contention that *Rambo II* required claimant to file a claim for a nominal award at an earlier time yields a result directly contrary to *Rambo II*. We have affirmed the administrative law judge's finding that claimant could not have foreseen before 1999 a loss of wage-earning capacity from his September 1995 eye injury. Thus, had claimant filed a claim for a *de minimis* award in 1996, such a claim would have been denied, and, in all likelihood, a claim for modification in 1999 based on actual lost wages would

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[3]At the time *Pillsbury* was decided, the Section 13(a) statute of limitations stated only that, "The right to compensation for disability under this Act shall be barred unless a claim therefor is filed within one year after the injury..." 33 U.S.C. §913(a) (1970) (amended 1972). As amended in 1972, Section 13(a) states: "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) (1982). In discussing Section 13(a), the Supreme Court did not discuss the currently applicable version of Section 13(a), nor the considerable jurisprudence discussing the validity of *Pillsbury* under the 1972 version of Section 13(a). *See, e.g., Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98(CRT) (4th Cir. 1991); *Marathon Oil Co. v. Lunsford*, 733 F.2d 1139, 16 BRBS 100(CRT) (5th Cir. 1984)*; Stancil v. Massey*, 436 F.2d 274 (D.C. Cir. 1970).

[4]*Dicta* includes statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to the determination of the case in hand. Black's Law Dictionary 408-409 (5th ed. 1979).

therefore have been filed more than one year after the denial and would not have been timely. This result is in direct opposition to the Supreme Court's holding in *Rambo II*, which approved *de minimis* awards to, in effect, indefinitely extend the one year limitations period in Section 22. The Court stated that *de minimis* awards promote accuracy in compensating claimants for the actual economic effects of their injuries over finality. *Rambo II*, 521 U.S. at 133, 31 BRBS at 59(CRT).

Finally, the standard for establishing entitlement to a *de minimis* award and for filing a claim under Section 13(a) are actually quite similar. As enunciated in *Stancil* and its progeny, the Section 13(a) limitations period does not commence until a claimant becomes aware of the full effect of his injury, *i.e.*, the likely impairment of his wage-earning capacity. *Rambo II* requires the significant likelihood of a future loss of wage-earning capacity in order to be entitled to a *de minimis* award. The statement in *Rambo II* that claims generally must be filed within one year from the date of injury does not denote that the Section 13 statute of limitations commences on the date of the traumatic event or accident. *See Stancil*, 436 F.2d at 276-277; *see also* n. 3, *supra*.[5] Cases construing Section 13(a) have reasoned that the 1972 Amendments to Section 13 indicated Congressional intent to not exclude as untimely cases of latent traumatic injury, such as claimant's eye injury in this case. *See, e.g.*, *Lunsford*, 733 F.2d 1139, 16 BRBS 100(CRT); *see also Parker*, 935 F.2d at 25-27, 109-112(CRT). *Paducah Marine Ways v. Thompson*, 82 F.3d 130, 30 BRBS 33(CRT) (6th Cir. 1996), is the most recent circuit court decision following *Stancil*. In *Paducah*, the Sixth Circuit stated that the *Stancil* rule is consistent with the Act's public policy goals in that employees are not required to protect their rights by filing claims for aches and pains that are not disabling, and that requiring earlier filing of claims could lead to a flood of eventually

[5]In *Rambo II*, the Supreme Court implied, by way of noting the absence of Congressional intent to allow the filing of protective claims, that a claim may not be filed until all the elements entitling a claimant to compensation are present, *i.e.,* including disability, such as a significant potential for a future loss a wage-earning capacity. *Rambo II*, 521 U.S. at 129 n.2, 31 BRBS at 57 n.2(CRT). Absent the awareness of a likely decline of future wage-earning capacity, the occurrence of a work accident does not trigger the Section 13(a) statute of limitations period. Similarly, the Board has rejected the contention that a claimant with an occupational disease which has not caused permanent impairment or affected earning capacity is a "person entitled to compensation" under Section 33(g), 33 U.S.C. §933(g), because the claimant could file for a nominal award at that time under *Rambo II*. *Gladney v. Ingalls Shipbuilding, Inc.*, 33 BRBS 103 (1999). The mere diagnosis of an occupational disease does not entitle claimant to a nominal award, nor, as in this case, did Dr. Kerner's diagnosis in October 1995 of corneal scaring. *See also Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205(CRT) (4th Cir. 1998).

meritless claims understandably prompted by the fear that delay in filing would make the claim untimely. The court further reasoned that employees who attempt to return to work after apparently recovering from an injury, even though they experience some pain, are not penalized. *Paducah Marine Ways*, 82 F.3d at 134, 30 BRBS at 35-36(CRT). Thus, we reject employer's contention that, under *Rambo II*, claimant's September 1999 claim was untimely, as the administrative law judge rationally found that claimant first became aware in 1999 that a future loss of wage-earning capacity was likely.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge