BRB No. 03-0345

FRANCIS E. REED	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BATH IRON WORKS CORPORATION	)	DATE ISSUED: Feb. 10, 2004
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Claim for Benefits and Decision and Order Denying Motion for Reconsideration of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Janmarie Tokar (McTeague, Higbee, Case, Cohen, Whitney & Tokar, P.A.), Topsham, Maine, for claimant.

Kevin M. Gillis (Troubh, Heisler & Piampiano), Portland, Maine, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Claim for Benefits and Decision and Order Denying Motion for Reconsideration (2001-LHC-01919) of Administrative Law Judge Daniel F. Sutton 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and

are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant injured his back on November 12, 1985, during the course of his employment for employer. He was unable to work for approximately two weeks. Claimant re-injured his back in 1990, for which employer paid compensation benefits. Claimant pursued a claim under the workers' compensation laws of Maine for his 1985 back injury. On July 9, 1992, he was awarded compensation for a five percent permanent partial back impairment. CX 1 at 1-3. Claimant retired in February 1996 at age 61 after working for employer over 44 years. He began receiving retirement benefits from employer and Social Security payments. Claimant drove a school bus during the fall of 1996. He has not since been employed.

In August 1999, claimant received $25,000 in settlement of a Maine workers' compensation claim against employer for an increase in his back impairment due to a work-related aggravation of his back condition in 1990. Claimant next sought compensation under the Maine workers' compensation statute for total disability due to his back condition subsequent to his February 1996 retirement. In this regard, claimant received treatment for back pain in 1996 and 1997, and he underwent back surgery in September 1998 and June 1999. In a decision issued in November 1999, the Maine hearing officer found that claimant's back surgery and subsequent disability are related to his November 1985 work injury. However, the hearing officer found that claimant is ineligible for compensation benefits for continuing total disability, as he failed to rebut the presumption under the Maine statute that a person receiving nondisability pension or retirement benefits has no loss of wage-earning capacity due to a work-related injury or disease. The hearing officer, however, found claimant entitled to compensation for total disability during the periods he was recuperating from his two back surgeries from April 1 to December 31, 1998, and from March 1 to July 21, 1999. Employer's last compensation payment pursuant to this award was on December 2, 1999. In April 2000, claimant filed a claim for compensation under the Act for total disability from the date of his retirement in February 1996.

In his decision, the administrative law judge found that claimant became aware that his back condition is related to his 1985 work injury on December 21, 1998. The administrative law judge found that the one-year limitations period for filing a claim pursuant to Section 13(a) of the Act, 33 U.S.C. §913(a), was not tolled until one year after employer's last payment of compensation to claimant on December 2, 1999, pursuant to the Maine award. Specifically, the administrative law judge reasoned that neither the plain language of Section 13(a) nor judicial interpretations thereof provides that a claim may be filed within one year after the date of the last payment made pursuant to a state workers' compensation award. The administrative law judge further found that the running of the limitations period was not tolled pursuant to Sections 13(d) and 30(f)

of the Act, 33 U.S.C. §§913(d), 930(f). As claimant's claim under the Act was filed more than one year after his date of awareness, the administrative law judge found that claimant's claim was untimely filed, and he denied benefits. Claimant's motion for reconsideration was denied.

On appeal, claimant challenges the administrative law judge's finding that his claim was not timely filed under Section 13(a). Employer responds, urging affirmance. Alternatively, employer asserts that the administrative law judge's denial of benefits may be affirmed on the basis that collateral estoppel effect should be given to the Maine hearing officer's finding that claimant voluntarily retired. Employer contends that a claimant who voluntarily retires is not entitled to compensation under the Act for total disability. *See generally Hoffman v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 148 (2001). Claimant replies that collateral estoppel is not applicable in this case.

We initially address employer's contention that claimant is not entitled to compensation under the Act because the Maine hearing officer found that claimant voluntarily retired. The Board may address an issue raised in a response brief that provides an alternate avenue of affirming the administrative law judge's decision. *See generally Dalle Tezze v. Director, OWCP*, 814 F.2d 129, 10 BLR 2-62 (3d Cir. 1987); *Farrell v. Norfolk Shipbuilding & Dry Dock Co.*, 32 BRBS 283 (1998); *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190 (1984). The hearing officer found that the presumption that claimant has no loss of wage-earning capacity, found in Section 223 of the Maine Workers' Compensation Act, Me. Rev. Stat. Ann. Tit. 39-A, §223 (West 2002), applies to this case because claimant terminated active employment and he receives nondisability benefits.[1] CX 1 at 6. The hearing officer next addressed

---

[1] Section 223 of the Maine Workers' Compensation Act of 1992 in pertinent part provides:

> 1. Presumption. An employee who terminates active employment and is receiving nondisability pension or retirement benefits under either a private or governmental pension or retirement program, including old-age benefits under the United States Social Security Act, 42 United States Code, Sections 301 to 1397f, that was paid by or on behalf of an employer from whom weekly benefits under this Act are sought is presumed not to have a loss of earnings or earning capacity as the result of a compensable injury or disease under this Act. This presumption may be rebutted only by a preponderance of evidence that the employee is unable, because of a work-related disability, to perform work suitable to the employee's qualifications, including training or experience. This standard of disability supersedes other applicable standards used to determine disability under this Act.

Me. Rev. Stat. Ann. Tit. 39-A, §223 (West 2002).

claimant's contention that the presumption is inapplicable because claimant did not voluntarily retire, and she concluded, "[A]ssuming, without deciding, that the voluntariness of his retirement is relevant, I find his retirement was voluntary and unrelated to his work injury." CX 1 at 7. Finally, the hearing officer applied the rebuttal standard explicitly enumerated in Section 223, which she found claimant failed to meet. *Id*.

Under the principle of collateral estoppel, a party is barred from relitigating an issue if: (1) the issue at stake is identical to the one alleged in the prior litigation; (2) the issue was actually litigated in the prior litigation; and (3) the determination of the issue in the prior litigation was a critical and necessary part of the judgment in the earlier action. *Figueroa v. Campbell Industries*, 45 F.3d 311 (9th Cir. 1995); *see generally Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971); *Plourde v. Bath Iron Works Corp.*, 34 BRBS 45 (2000). *Dictum* is not entitled to collateral estoppel effect because the finding was not essential to the prior judgment. *Bath Iron Works Corp. v. Coulombe*, 888 F.2d 179 (1st Cir. 1989).

In this case, the hearing officer's finding that claimant voluntarily retired is *dicta*, and, as such, her finding does not preclude claimant from litigating the issue of his entitlement to benefits under the Act. While the hearing officer summarily found that claimant voluntarily retired, she did not rely on this finding to conclude that claimant failed to rebut the presumption in Section 223 that he has no loss of wage-earning capacity. Moreover, her finding that claimant voluntarily retired also was irrelevant to her conclusion, as Section 223 does not distinguish between voluntary and involuntary retirement. *Bruce v. Delta Airlines, Inc.*, 661 A.2d 1128 (Me. 1998). Accordingly, collateral estoppel is inapplicable, and we reject employer's assertion that the administrative law judge's denial of benefits may be affirmed on the basis that claimant is not entitled to total disability benefits because the hearing officer found that claimant voluntarily retired.

We next address claimant's contention that the administrative law judge erred by finding that his claim was untimely filed under Section 13(a). Section 13(a) provides in pertinent part:

> 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.

33 U.S.C. §913(a). In this case, the administrative law judge found that claimant's date

of awareness for purposes of commencing the Section 13(a) limitations period was on December 21, 1998, when Dr. Mehalic wrote to claimant's attorney and expressed his opinion that that claimant's back condition was related to his November 1985 back injury with employer and that claimant's decision to retire in February 1996 due to his 1985 injury was reasonable. CX 11 at 58-59. Claimant filed a claim under the Maine workers' compensation scheme, and he obtained an award issued on November 24, 1999. CX 1 at 4. Within a year of employer's last compensation payment pursuant to the state award on December 2, 1999, claimant filed a claim for compensation under the Act on April 24, 2000. CXs 2,4. In his decision, the administrative law judge found that the claim is subject to denial on timeliness grounds since the April 2000 claim was filed more than one year after claimant's December 1998 date of awareness, unless claimant can establish a basis for tolling the running of the Section 13(a) limitations period. The administrative law judge rejected claimant's contention that his obtaining a state compensation award, pursuant to which employer last paid claimant compensation on December 2, 1999, served to toll the limitations period so that claimant had one year from employer's last payment to file a claim under the Act. The administrative law judge found that prior cases have held that *voluntary* payments by employer pursuant to a state act will toll the limitations period;[2] however, the administrative law judge found no legal authority for claimant's contention that employer's payments made pursuant to a state compensation award also serve to toll the running of the limitations period. The administrative law judge further reasoned that that the plain language of Section 13(a) limits the tolling of the statute to cases where employer's compensation payments are made "without an award."

Construction of the term "without an award" in Section 13(a) is an issue which has not been previously addressed by the Board.[3] The starting point for construing the

[2]*See, e.g., Smith v. Universal Fabricators, Inc.*, 21 BRBS 83, *aff'd*, 878 F.2d 843, 22 BRBS 104(CRT) (5th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990); *Saylor v. Ingalls Shipbuilding, Inc.*, 9 BRBS 561 (1979) (Smith, S., dissenting).

[3] Two pre-1972 decisions of U.S. District Courts addressed Section 13(a) where a Longshore claim was filed after a state award. The cases reached opposite results, and both holdings were affected by the exclusive jurisdiction of the state and federal systems in effect at that time. *See* discussion, *infra.* In *Great Lakes Dredge & Dock Co. v. Brown*, 47 F.2d 265 (N.D. Ill. 1930), the claimant filed a claim under Illinois law for a June 5, 1928 injury; this resulted in an award of $18 per week. The last payment was made on July 11, 1929. The claimant filed a claim under the Act on September 16, 1929, more than one year after the injury but less than one year after the last state payment. The court held that the claim under the Act was timely filed under Section 13(a). The court also held that the Illinois proceedings were void, as exclusive jurisdiction was under the Act and thus the state payments were viewed as satisfaction of employer's liability to claimant under the Act. The fact that the payments were made pursuant to a state award

phrase "without an award" in Section 13(a) is the plain meaning of the words of the statute. *Mallard v. U.S. Dist. Ct. for the Southern Dist. of Iowa*, 490 U.S. 296 (1989). If Congressional intent is clear from the plain meaning of the words, then the language is regarded as conclusive and the application of other means of construction is unnecessary and unwarranted. *North Dakota v. United States*, 460 U.S. 300 (1983); *Catholic Relief Services, Inc. v. Meese*, 664 F.Supp. 1378 (E.D. Cal. 1987). In this case, the meaning of the term "award" is not unambiguous, as it does not specify a particular kind of award. Nonetheless, in context, it is clear that "award" means an award under the Act. Thus, where payment is made without an award under the Act, a claim is timely if filed within one year of the last payment.

This construction is consistent with the history of the Act, which supports the conclusion that the word "award" can refer only to an award under the Act. In 1927 when the provision was originally drafted, the phrase "without an award" clearly referred to an award under the federal Act, as payments made pursuant to a state workers' compensation scheme led to an election of the state remedy, and federal and state remedies were exclusive. Congress did not provide for concurrent state and federal jurisdiction until 1972, as coverage under the prior provision was afforded only when a workers' compensation remedy was not available under state law. 33 U.S.C. §903(a) (1970) (amended 1972 and 1984); *see generally Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). *Cf. Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 12 BRBS 828(CRT) (1980); *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 12 BRBS 890 (1980) (cases together hold that there may be concurrent state and federal jurisdiction and that the full faith and credit doctrine does not prohibit successive workers' compensation recoveries from two jurisdictions). Thus, although concurrent jurisdiction under the Act and a state workers' compensation scheme is not today precluded under the amended Act, at the time the language "without an award" in Section 13(a) was adopted, it could refer only to federal payments. As Section 13(a) has never been amended in this respect, construction of this phrase requires that it refer to payments without an award under the Act. *See generally Southeastern Community College v. Davis*, 442 U.S. 397 (1979) (history of statute is a relevant consideration in statutory construction). Therefore, where an employer makes any payments without an award under the Act, the Section 13(a) limitations period is tolled until one year after employer's last payment.

---

did not prevent them from being made "without an award" pursuant to the Act. In *Windrem v. Bethlehem Steel Corp.*, 293 F.Supp. 1 (D.N.J. 1968), the district court reached a different result, holding that payments made pursuant to a state award are not compensation payments "without an award" so as to toll the running of Section 13(a). The court held that "The payment of compensation contemplated by the Act 'without an award' is a voluntary payment by the employer." *Id.* at 3-4. The *Windrem* court further held that claimant's longshore claim was barred by the doctrine of election of remedies as he prosecuted his state claim to final judgment.

It follows that employer's payment pursuant to the state compensation award constitutes a payment without an award under the Act, and that therefore the statute of limitations was tolled until one year after employer's last payment in December 1999. As employer's liability under the Longshore Act had not been determined at the time employer made its payments to claimant under the state award, those payments are considered advance payments of compensation with regard to employer's potential liability under the Act. Therefore, they are payments without an award for purposes of Section 13(a). Section 14(j) of the Act, 33 U.S.C. §914(j),[4] has been construed so that any payments by employer intended as compensation may be considered "voluntary" so as to permit employer a credit under the Act. In *Travelers Ins. Co. v. Belair*, 290 F.Supp. 221 (D. Mass. 1968), *aff'd*, 412 F.2d 300 (1st Cir. 1969), the court held that claimant's claim, filed within one year of the insurance carrier's payment of voluntary benefits under a contract clause, constituted compensation paid without an award for purposes of Section 13(a), because they were voluntary payments for which employer could take a Section 14(j) credit if benefits were later awarded under the Act. Prior to the enactment of Section 3(e), 33 U.S.C. §903(e), in 1984, which specifically provides a credit for state workers' compensation benefits received for the same injury or disability, Section 14(j) was interpreted to allow such a credit to employer where claimant received payment pursuant to a state award. *See Ferch v. Todd Shipyards Corp.*, 8 BRBS 316 (1978). Thus, whether paid purely voluntarily or as a result of an award under another compensation system, the status of payments made without a Longshore award is the same. Where no award under the Act has yet been entered, a payment by an employer intended as compensation for claimant's injury must be considered an advance, *i.e.*, voluntary, payment of compensation under the Act.

It is well-established that voluntary payments by an employer pursuant to a state workers' compensation act, like voluntary payments made by an employer under the Act, toll the one-year limitations period for filing a claim under the Act.[5] *Smith v. Universal Fabricators, Inc.*, 21 BRBS 83, *aff'd*, 878 F.2d 843, 22 BRBS 104(CRT) (5th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990); *Saylor v. Ingalls Shipbuilding, Inc.*, 9 BRBS 561 (1979) (Smith, S., dissenting). Treating payments pursuant to a state award in the same

---

[4] Section 14(j) states:

> If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.

33 U.S.C. §914(j).

[5] Contrary to claimant's assertion on appeal, the compensation payments at issue is *Smith* and *Saylor* were voluntary state payments. *See Smith*, 21 BRBS at 87; *Saylor*, 9 BRBS at 562-563.

manner is consistent not only with the credit provisions of the Act and its history, but also finds support in the policies underlying the interpretation of Section 13. An employer paying benefits pursuant to a state workers' compensation act is fully cognizant of claimant's injured condition; thus, barring claims where the payment without an award is made pursuant to a state act does not further the purpose of Section 13(a), which is to prevent the revival of stale claims. *See generally Jones Stevedoring Co. v. Director, OWCP [Taylor]*, 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997). This principle applies equally where employer's compensation payments are made voluntarily or pursuant to a state award. The purpose of preventing the revival of stale claims is not furthered by barring this claim as untimely, since employer was fully aware of claimant's back condition as a result of its active participation in the resolution of that claim before the Maine hearing examiner. CX 1 at 4.

Finally, a holding that the term "award" in Section 13(a) refers to an award under the Act is also consistent with Section 22 of the Act, 33 U.S.C. §922. Under Section 13(a), claimant may file a claim within one year of the last payment made without an award under the Act. Where an award has been entered, Section 22 applies, and claimant may file for modification within one year of the last payment of compensation made pursuant to the award. *See generally Intercounty Construction Corp. v. Walter,* 422 U.S. 1, 2 BRBS 3 (1975). A holding that the Section 13(a) provision for filing within one year of payment without an award is not met when a state award is entered would preclude claimant from filing under Section 13(a) while not affording him the complementary opportunity to file under Section 22. In effect, it would resurrect the election of remedies provisions of the pre-1972 Act by limiting claimant's ability to file in the federal forum once a state award is entered.

In view of the principles of statutory construction and the case law interpreting the concept of voluntary and/or advance payments of compensation under the Act, we hold that payments made by employer pursuant to a state award are payments "without an award" under the Act. Thus, we hold that employer's last payment of compensation on December 2, 1999, was a payment which served to toll the one-year statute of limitations in Section 13(a) until one year from that date. Accordingly, claimant's claim filed on April 24, 2000, is timely as a matter of law. We, therefore, reverse the administrative law judge's finding that the claim was untimely filed and remand the case to the administrative law judge to address the merits of the claim.

Accordingly, the administrative law judge's Decision and Order Denying Claim for Benefits and Decision and Order Denying Motion for Reconsideration are reversed insofar as the administrative law judge found the claim to be untimely under Section 13. The case is remanded for the administrative law judge to address the merits of the claim.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge