BRB No. 08-0208

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| E.M. | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| DYNCORP INTERNATIONAL | ) | DATE ISSUED: 07/30/2008 |
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| and | ) | |
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| FIDELITY AND CASUALTY COMPANY OF NEW YORK/CNA INTERNATIONAL | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | DECISION and ORDER |

Appeal of the Decision and Order and the Amended Decision and Order of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

David C. Barnett (Barnett & Lerner, P.A.), Dania Beach, Florida, for claimant.

Michael W. Thomas and Michael T. Quinn (Laughlin, Falbo, Levy & Moresi LLP), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order and the Amended Decision and Order (2006-LDA-147) of Administrative Law Judge Janice K. Bullard 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *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).

During various periods of time prior to 1993, claimant worked for the state of Kansas as a prison guard and a parole officer. In 1993, claimant began working for the state as a special enforcement officer; in this capacity, claimant's primary duties involved the apprehension of fugitive parolees for the Kansas Department of Corrections. On March 26, 2004, claimant commenced employment with employer as a correctional officer trainer with the understanding that she would be deployed to Iraq. Claimant's employment duties were described as including the training of local staff in penal management and working on the floors of a prison. Prior to her deployment, claimant's employment destination was changed so that, following a two-week training period in Virginia, claimant was sent by employer to Kosovo, where she arrived on April 9, 2004.

On April 17, 2004, claimant participated in an orientation program at Kosovo's Mitrovica Detention Center. Following the completion of her shift, claimant was preparing to leave this facility in a vehicle when, while awaiting clearance to exit the facility, a Jordanian security officer opened fire on the vehicle with his rifle. During this assault, which resulted in the death of a number of claimant's colleagues as well as claimant's attacker, claimant was shot in her left femoral artery. Claimant was transported by helicopter to a United States Army facility for treatment.

Upon claimant's release from the hospital, she returned to light-duty work with employer. Although claimant remained on light duty until January 2005, she testified that she was capable of completing a full shift of work within three weeks of returning to work. Claimant received continued treatment for her physical injuries and she sought psychiatric treatment on her own initiative from United States Army personnel. At employer's request, claimant and her colleagues who were injured in the April 17, 2004, attack were evaluated by Dr. Brand, a psychologist, in June 2004. Employer did not, however, provide treatment to claimant for her psychiatric condition, and claimant was never informed of Dr. Brand's findings. In April 2005, claimant was informed by her then employer, Civilian Police International (CPI), that she would be sent back to the United States in May 2005.[1] Upon her return to Kansas, claimant was not permitted to return to her prior employment duties as a special enforcement officer because she could no longer carry a firearm. Tr. at 81-82. Claimant subsequently commenced employment with the Kansas Department of Corrections interstate contact office.

[1] Employer's contract to provide security personnel expired on September 1, 2004. At that time, Civilian Police International took over employer's contract in Kosovo. This change did not affect claimant's employment duties. Claimant testified that she was sent back to the United States because the State Department thought it necessary for her "mental well-being." Tr. at 82-83.

Claimant filed a claim under the Act on April 16, 2006, asserting her entitlement to benefits for the physical and psychological injuries that resulted from the April 17, 2004, incident. Before the administrative law judge, claimant averred that she did not realize that her work-related conditions would result in a loss of wage-earning capacity until she attempted to resume her former employment duties as a special enforcement officer with the state of Kansas in June 2005. Employer, in response, argued that claimant was aware of such a loss as the date of the April 17, 2004, shooting incident. In her Decision and Order, the administrative law judge denied claimant's claim, finding that claimant should have been aware that her work-related injuries would likely result in an impairment of her earning capacity at the time of her evaluation by Dr. Hough on October 17, 2004. Thus, the administrative law judge found that claimant's April 16, 2006, claim was untimely pursuant to Section 13(a) of the Act, 33 U.S.C. §913(a), as it was filed more than one year after October 17, 2004. Claimant sought reconsideration of the administrative law judge's decision, and in an Amended Decision and Order, the administrative law judge found employer responsible for claimant's medical care, as it relates to both her physical and psychological injuries, resulting from her April 17, 2004, injury.

On appeal, claimant contends the administrative law judge erred in finding her claim for disability benefits was untimely filed. Employer responds, urging the Board to affirm the administrative law judge's decision in its entirety. Claimant has filed a reply brief.

Section 13(a) of the Act provides that a claim for compensation must be filed within one year after the claimant is aware, or with the exercise of reasonable diligence should have been aware, of the relationship between her traumatic injury and her employment.[2] The courts of appeals have uniformly held that the statute of limitations begins to run only after the employee is aware or reasonably should have been aware of the full character, extent, and impact of the work-related injury. This inquiry encompasses the claimant's awareness that she sustained a permanent work-related injury

[2] Section 13(a) states, in relevant part, that:

> Except as otherwise provided in this section, the right to compensation for disability or death benefits under this chapter shall be barred unless a claim therefore is filed within one year after the injury or death. . . . 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).

that causes a loss in earning capacity. *See 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); *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98(CRT) (4th 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, 6 BRBS 100(CRT) (5th Cir. 1984); *Stancil v. Massey*, 436 F.2d 274 (D.C. Cir. 1970); *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). The purpose of requiring the claimant's awareness of an impairment of earning capacity is to avoid claimants' having to "to protect their rights by filing claims for aches and pains that are not disabling and thus not compensable." *Paducah Marine Ways*, 82 F.3d at 134, 30 BRBS at 36(CRT). Indeed, the Ninth Circuit has stated that, "Public policy is served by not discouraging workers' attempts to return to work and by not encouraging premature claims of permanent disability." *J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 184, 23 BRBS 127, 130(CRT) (9th Cir. 1990). Thus, in this case, the statute of limitations commenced only when claimant knew or should have known that she had a permanent psychological condition related to the shooting that impaired her earning capacity.[3] *See Bechtel Associates v. Sweeney*, 834 F.2d 1029, 20 BRBS 49(CRT) (D.C. Cir. 1987).

Claimant contends the administrative law judge erred in relying on Dr. Hough's October 17, 2004, evaluation to conclude that as of that date she should have known that she had a permanent psychological condition that would impair her earning capacity.[4] Claimant contends the administrative law judge erred, as a matter of law, in finding that she should have known of any impairment of earning capacity prior to May 2005 when she was sent back to the United States by CPI and she unsuccessfully attempted to resume her prior employment as a special enforcement officer with the state of Kansas. We agree with claimant that the administrative law judge's finding that her claim was untimely filed cannot be affirmed. The administrative law judge's finding is not supported by substantial evidence or in accordance with law, and, therefore, must be reversed.

[3] The administrative law judge thus properly rejected employer's contention that the statute of limitations commenced on the day of the shooting. *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98(CRT) (4th Cir. 1991).

[4] Claimant does not contend she was unaware of a work-related psychological impairment.

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 employer to produce substantial evidence that the claim was untimely filed. *Bath Iron Works Corp. v. U. S. Dep't of Labor [Knight]*, 336 F.3d 51, 37 BRBS 67(CRT) (1st Cir. 2003); *Blanding v. Director, OWCP*, 186 F.3d 232, 33 BRBS 114(CRT) (2d Cir. 1999). The administrative law judge did not apply the Section 20(b) presumption in this case. The administrative law judge's reliance on certain inferences because, "The record does not clearly establish the exact date that Claimant was aware of the full character, extent and impact of her injury," Decision and Order at 14, does not constitute substantial evidence that the claim was untimely filed.[5]

The administrative law judge also erred in relying on claimant's loss of sick time and subsistence and hazard pay as a result of the April 17, 2004, incident to find claimant aware of the likelihood that she would incur a loss of wage-earning capacity in the future. Any losses in this regard were merely temporary and due to the physical injuries claimant sustained, not the psychological condition that forms the basis for her claim. A temporary inability to work does not put an employee on notice that her earning power has been permanently impaired, particularly when the employee subsequently returns to work. *Paducah Marine Ways*, 82 F.3d at 135, 30 BRBS at 36(CRT); *J.M. Martinac Shipbuilding*, 900 F.2d at 183-184, 23 BRBS at 130(CRT) (stating that the administrative law judge "erroneously viewed the time for filing as triggered when the employee knew that he was temporarily unable to work"); *see also Parker*, 935 F.2d 20, 24 BRBS 98(CRT); *Hodges v. Caliper, Inc.*, 36 BRBS 73 (2002).

Furthermore, the administrative law judge erroneously found that Dr. Hough's October 17, 2004, evaluation establishes that claimant should have known at that time that her work-related psychological condition would impair her earning capacity. Dr. Hough examined claimant and the other victims of the shooting on behalf of an attorney, Kurt Kerns, who was retained by the victims to pursue any claims they might have against employer, with the United Nations, or against the Jordanian government. Tr. at

[5] In this regard, the record does not support the administrative law judge's inference that claimant was aware of a loss of wage-earning capacity due to her psychological injury based on employer's retention of Dr. Brand to evaluate the victims mental health and the victims' retention of an attorney. The administrative law judge merely speculated as to Dr. Brand's opinion regarding claimant's condition, and claimant testified at her deposition that the attorney was not involved with her filing any workers' compensation claims. Decision and Order at 13-14; CX 11 at 89-90; *see* discussion, *infra*.

75-79; CX 1 at 12-13.[6] Following his evaluations of claimant in October and December 2004, Dr. Hough diagnosed claimant with acute and chronic post-traumatic stress disorder and major depression. CX 1 at 28; CX 2 at 14. The administrative law judge referred to this as a "disabling" diagnosis. Decision and Order at 14. The administrative law judge, however, did not address Dr. Hough's subsequent statements regarding claimant's ongoing employment in Kosovo with CPI. In his initial report, Dr. Hough stated that claimant was functioning at her work, although she was just getting by and going through the motions. CX 2 at 15. In a subsequent report following his April 19, 2005, evaluation of claimant in Kosovo, Dr. Hough stated that claimant had been redeployed and that, while her overall symptom picture had not improved, claimant's acceptance of her condition had changed for the better and she was "continuing to function adequately on her [job] assignment." *Id.* at 16. Contrary to the administrative law judge's conclusion, therefore, Dr. Hough's reports cannot support a finding that claimant should have known by October 2004 that her psychological condition would cause a loss of wage-earning capacity. Rather, his reports demonstrate claimant's desire to keep working in Kosovo despite her condition.

Claimant testified at her deposition that she returned to light-duty work with employer following her release from the hospital, that she was working a full-shift within three weeks of her return to work, and that she ultimately resumed in January 2005 the employment duties for which she was hired by employer and remained in that position until her dismissal by CPI and her return to the United States in May 2005. CX 11 at 57-58. Significantly, there is no evidence in the record that claimant actually lost any work time due to her psychological condition or was informed by a medical professional or her employer at any time prior to her dismissal by CPI in May 2005 that her psychological condition would likely cause a loss of employment or reduction in earning capacity. The mere diagnosis of a work-related condition and treatment therefor does not commence the running of the statute of limitations. *Paducah Marine Ways*, 82 F.3d 130, 30 BRBS at

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[6] The administrative law judge erred in stating that "Dr. Hough's evaluation in October 2004 was completed in an effort to rebut Dr. Brand's findings that Claimant was not mentally fit to complete her mission." Decision and Order at 14. The record contains no reports, evaluations, or testimony from Dr. Brand, and thus it is mere speculation as to his opinion regarding claimant's condition. Claimant testified that it was her understanding that Dr. Brand came to Kosovo to perform evaluations in order to determine whether she and her colleagues were fit to continue their missions, but that she was never informed of Dr. Brand's findings, Tr. at 78, nor did she receive any recommendations or suggestions from him. CX 11 at 79. Rather, claimant recalled that Dr. Brand informed her that she was "doing as well as could be expected." Tr. at 78.

33(CRT); *Parker*, 935 F.2d 20, 24 BRBS 98(CRT). The record supports only the conclusion that the earliest date claimant could have been aware of a loss in wage-earning capacity due to her condition occurred in May 2005 when CPI terminated claimant's employment. At this time, claimant was aware of the "full character, extent, and impact" of her injury. *Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130(CRT) (9th Cir. 1991). As claimant's claim was filed in April 2006, within one year of this time, her claim is timely as a matter of law. *Bechtel Associates*, 834 F.2d 1029, 20 BRBS 49(CRT). The administrative law judge's finding to the contrary is reversed.[7] *Welch v. Pennzoil Co*., 23 BRBS 395 (1990).

Accordingly, the administrative law judge's finding that claimant's claim for disability benefits was untimely filed is reversed. The case is remanded for findings regarding the remaining issues raised by the parties. The administrative law judge's award of medical benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

[7] Thus, we need not address claimant's contentions concerning her alleged filing of state workers' compensation claims that would toll the Section 13(a) statute of limitations or that employer should be estopped from raising a Section 13(a) defense.