U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB Nos. 15-0534
and 15-0534A

SANTOS D. SUAREZ	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	DATE ISSUED: Aug. 11, 2016
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Respondents Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order and the Order Granting in Part and Denying in Part Motion for Reconsideration of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Joel S. Mills (Pitts & Mills), Houston, Texas, for claimant.

Tally R. P. Perez and Kimberly W. Hibbard (Schouest, Bamdas, Soshea & BenMaier, P.L.L.C.), Houston, Texas, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order and the Order Granting in Part and Denying in Part Motion for Reconsideration (2014-LDA-00492) of Administrative Law Judge Lee J. Romero, 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq*. (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and 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 began working for employer in Iraq as a heavy truck driver in January 2005 and later became a convoy commander. In January 2007, he visited the medical clinic because of nausea, gas, body aches, and diarrhea. He was diagnosed with gastroenteritis of unknown etiology. He reported to the clinic for the same symptoms in April 2007. CX 1 at 2, 4. The medical records do not report any 2008 visits, but claimant reported the same symptoms on the following dates in 2009: January 4, 5, 6, 7; June 9, 10; November 4. *Id.* at 8-22. Claimant commenced a scheduled R&R at home on December 13, 2009, which was to end on December 28; however, he saw his family physician, Dr. Berry, that day due to gastroenteritis symptoms and vomiting. *Id.* at 27-28. Claimant requested medical leave to extend his home stay, and on January 5, 2010, learned that cultures from January 4 tests were positive for an active infection: *H. pylori*. *Id.* at 29, 31; EX 13. By January 18, 2010, claimant's infection had resolved and, on January 25, 2010, Dr. Berry cleared claimant to fly and to return to work with no restrictions. CX 1 at 35, 37. Employer filed a first report of injury on January 14, 2010. It also filed a notice of controversion on February 3, 2010. CXs 3-4; EX 1.

In June and July 2010, claimant visited the clinic in Iraq with gastric symptoms. After each recovery, claimant returned to work with no restrictions. CX 1 at 38-57. He reported more of the same symptoms in August 2010 and returned to work after each episode, but, on August 22, claimant was deemed non-compliant with the instructions for controlling this condition. On August 24, he was released to return to work but was advised to be seen in Dubai because the clinic was unable to help further. *Id.* at 58-72. According to employer, claimant's employment was terminated on August 27, 2010, for breach of safety standards, and he was deemed ineligible for rehire. EX 4 at 5-8.

After his employment was terminated, claimant returned to the United States. He worked for a trucking company from January until March 2011 when the company went bankrupt. EX 11 at 11, 24. Claimant testified that, during this period, he continued to have episodes of stomach upset which caused delays in delivering his cargo. Tr. at 43. On April 17, 2011, claimant filled out an LS-203 claim form seeking benefits under the Act, alleging that he suffered from a work-related "bacteria stomach infection" and that the date of injury was December 29, 2009. On the form, claimant stated that his pay

stopped in "Jan. 2010" and resumed "Jan. 30, 2010." EX 1 at 5.[1] Employer filed a second notice of controversion on June 4, 2011. CX 4.

From May to July 2011, claimant worked for Wiley Sanders Trucking. EX 14 at 7. He claimed the same gastroenteritis issues inhibited his job performance. Tr. at 44. The record contains evidence of two additional jobs claimant obtained from August 2011 to March 2012 and from March to October 2012. EXs 11-12. The record contains medical reports dated February 2012, September 2013, and December 2013 involving complaints of gastric symptoms similar to the previous episodes. CX 1 at 74-88. On December 27, 2013, claimant saw Dr. Randall, the gastroenterologist to whom Dr. Berry referred claimant. Dr. Randall determined that there was scattered diverticulitis and that claimant could have a small intestinal bacteria overgrowth, post-infectious irritable bowel syndrome (IBS), or fructose or lactose intolerance. *Id.* at 90; CX 5.

In March 2014, claimant saw Dr. McHorse for an independent gastroenterology consultation. Dr. McHorse, having reviewed records and examined claimant, opined that both the *H. pylori* infection and the IBS are work-related, but separate, conditions. He stated that claimant had few symptoms related to *H. pylori*, but had on-going gastrointestinal (GI) symptoms and that claimant is unable to return to work. CX 9. In September 2014, claimant saw Dr. Raijman, also a gastroenterology specialist. He also reviewed claimant's records, and he diagnosed claimant with functional bowel disease, possibly post-infectious diarrhea, indicating there is a somatic component to claimant's condition. Dr. Raijman concluded that claimant's condition is not related to his employment, is not at maximum medical improvement, and is not curable, but is controllable, and that claimant is capable of returning to work. EX 23.

The administrative law judge found claimant was not a credible witness because, while the description he gave of his symptoms has been consistent, his testimony and reporting regarding the onset, duration, and history of his condition were not. Decision and Order at 34-36; *see also* EX 31 (psychiatrist felt claimant was exaggerating his symptoms and was malingering). Nevertheless, based on the undisputed medical evidence of gastrointestinal illness and conditions in Iraq that could have caused such illness, the administrative law judge found that claimant established a prima facie case of a compensable injury, and he invoked the Section 20(a), 33 U.S.C. §920(a), presumption.

[1] With his claim form, claimant also filed a pleading, dated May 24, 2011, wherein he requested "payment of disability or the properly calculated AWW/CR and in the proper classification from date of disability onward" and "loss of WEC from MMI onward if Employer refuses to rehire Claimant." EX 1 at 3-4. In his Post-Hearing Brief, claimant asserted entitlement to temporary total disability benefits for the following periods: January 7-18, 2010; August 21-23, 2010; and commencing March 4, 2014. Cl. Post-H. Br. at 33, 40; *see* Decision and Order at 31.

Decision and Order at 38-40. The administrative law judge found that employer failed to rebut the presumption, as he found speculative the opinions of Drs. McHorse and Raijman that the cause of the infection/condition was the well water at claimant's Texas home. However, assuming there is substantial evidence to rebut the Section 20(a) presumption, the administrative law judge found that, in weighing the evidence as a whole, there is sufficient evidence to establish that claimant sustained a work-related injury. *Id.* at 40-44.

In categorizing the work-related injury, the administrative law judge rejected claimant's assertion that the condition he suffers is an "occupational" disease for which the timeliness of the filing of the claim is subject to Section 13(b)(2) of the Act, 33 U.S.C. §913(b)(2). Rather, the administrative law judge found that claimant's condition is not an occupational disease, and the appropriate section for determining timeliness of the claim is Section 13(a), 33 U.S.C. §913(a). Decision and Order at 47. As the parties stipulated that the date of injury was December 29, 2009, the day before claimant requested medical leave due to his condition, and as employer filed its first report of injury on January 14, 2010, the administrative law judge found that the tolling ended and the one-year time for filing a claim began to run on that date, pursuant to 33 U.S.C. §§913(a), 930(a), (f). He found that claimant filed his claim for compensation on May 27, 2011, and that such claim was untimely.[2] Decision and Order at 51. The administrative law judge, therefore, dismissed the claim. *Id.* at 51-52.

Claimant filed a motion for reconsideration, contending the administrative law judge found a compensable injury but failed to award medical benefits, which are never time-barred, and that the administrative law judge erred in finding the condition to be a traumatic injury instead of an occupational disease. On reconsideration, the administrative law judge agreed that claimant is entitled to medical benefits for his gastric condition. However, he declined to revisit the traumatic injury/occupational disease issue and restated his conclusions that the injury was not an "occupational disease" and the claim was not timely filed. Recon. at 2-4.

Claimant appeals the decisions, challenging the findings that his condition is not an occupational disease, that Section 13(a) applies to this case, and that the claim was untimely filed. Employer responds, urging affirmance of the finding that the claim for

[2] The administrative law judge acknowledged that the date of the LS-203 claim form is April 17, 2011; however, he found that the Office of Workers' Compensation Programs did not receive the form until May 27, 2011, and that this is the date of filing. The administrative law judge stated that, even if the filing date was April 17, 2011, the claim would still be untimely filed. Decision and Order at 51 n.9; EX 2 at 16; *c.f. Ceres Gulf, Inc. v. Director, OWCP* [*Fagan*], 111 F.3d 17, 31 BRBS 21(CRT) (5th Cir. 1997).

disability benefits is time-barred. Claimant filed a reply brief. BRB No. 15-0534. Employer cross-appeals the administrative law judge's decisions, asserting: 1) the administrative law judge erred in finding employer failed to rebut the Section 20(a) presumption as to the *H. pylori* infection; 2) the Section 20(a) presumption does not apply to the IBS – a secondary condition for which claimant did not file a claim; 3) IBS is not the natural and unavoidable result of the *H. pylori* infection; and 4) if the Section 20(a) presumption applies to the IBS/current symptoms, employer rebutted the presumption. Claimant responds that employer's contentions are without merit, and employer filed a reply brief. BRB No. 15-0534A.

Injury

Initially, employer contends the administrative law judge erred in considering claimant's stomach ailments as one condition for which claimant filed a claim and, in doing so, impermissibly applied the Section 20(a) presumption to them rather than assessing whether they are the natural and unavoidable result of the December 2009 *H. pylori* infection. Specifically, employer asserts that claimant filed a claim only for a "bacteria stomach infection" with a December 2009 date of injury and only that condition is entitled to the Section 20(a) presumption under the law of the United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises. *See Ins. Co. of the State of Pennsylvania v. Director, OWCP* [*Vickers*], 713 F.3d 779, 47 BRBS 19(CRT) (5th Cir. 2013) (arm injury was claimed; chronic polyneuropathy was not and was, therefore, a secondary injury which was not entitled to Section 20(a) presumption); *Amerada Hess Corp. v. Director, OWCP*, 543 F.3d 755, 42 BRBS 41(CRT) (5th Cir. 2008) (heart condition allegedly due to treatment for claimed back injury must be shown to have "naturally or unavoidably" resulted from claimed injury without reference to the Section 20(a) presumption). While employer concedes for the purposes of the appeal that claimant established a prima facie case for the *H. pylori* infection of December 29, 2009, Emp. Br. at 9 n.9, employer asserts that this condition resolved and that the true condition which ails claimant, his chronic IBS, is not entitled to the Section 20(a) presumption because it is not a claimed injury. Claimant responds that the parties stipulated to a "gastrointestinal" injury and that his claim was not vague and was sufficient to put employer on notice, such that the condition in its entirety is entitled to the Section 20(a) presumption.

We reject employer's contention. Not only did employer not raise this argument before the administrative law judge, *see Turk v. Eastern Shore Railroad, Inc.*, 34 BRBS 27 (2000); *Boyd v. Ceres Terminals*, 30 BRBS 218 (1997); Emp. Post-H. Br. at 9-20, 24-27, but the parties stipulated prior to the hearing that claimant's injury was

"gastrointestinal," and the administrative law judge accepted this stipulation.[3] Decision and Order at 2; JX 1. As a general rule, stipulations are binding upon those who enter into them. *Littrell v. Oregon Shipbuilding Co.*, 17 BRBS 84 (1985). Stipulations are offered in lieu of evidence and may be relied upon to establish an element of the claim. *Mitri v. Global Linguist Solutions*, 48 BRBS 41 (2014); *Ramos v. Global Terminal & Container Services, Inc.*, 34 BRBS 83 (1999). As the parties stipulated to claimant's injury and employer did not contend before the administrative law judge that the Section 20(a) presumption is not applicable, the administrative law judge properly applied Section 20(a) to claimant's GI condition in its entirety.

Employer next contends the administrative law judge erred in finding it did not rebut the Section 20(a) presumption linking claimant's GI condition to his employment in Iraq. The administrative law judge found that employer did not rebut the Section 20(a) presumption because: 1) employer's assertion that claimant's episodes of illness coincided with his trips home ignored the many symptoms and clinic visits in Iraq that did not follow R&R trips; 2) the opinions of Drs. McHorse and Raijman do not rise to the level of substantial evidence necessary for rebuttal because their notions that claimant's home well water could have been the cause of the original infection were merely speculation; 3) claimant's lack of credibility does not overcome the objective medical reports; and 4) even if the original infection was not work-related, employer's arguments ignore the various IBS aggravations that occurred while claimant was in Iraq. Decision and Order at 41-43. Nevertheless, the administrative law judge stated that even if employer's evidence rose to the level necessary for rebuttal, on the record as a whole, the opinions of Drs. Berry and McHorse constitute substantial evidence that claimant established a compensable injury. *Id.* at 43-44.

Once the claimant establishes a prima facie case, as here, Section 20(a) applies to relate the injury to the working conditions alleged to be the cause of the injury, and the employer can rebut this presumption by producing substantial evidence that the injury is

[3] Claimant was diagnosed with multiple stomach ailments including gastroenteritis, chronic gastritis, diverticulosis, diverticulitis, post-infectious diarrhea, IBS, functional bowel disease, and *H. pylori* infection. CXs 1, 9; EXs 17-19, 23. The parties and the administrative law judge referred to claimant's condition in many ways. Indeed, employer's first report of injury, filed January 14, 2010, identified claimant's injury as "nausea and/or vomiting/illness no specific body part gastroenteritis w/nausea and fever." Its first notice of controversion, dated February 3, 2010, challenged claimant's treatment for gastroenteritis. Employer's notice of controversion following the May 2011 claim identified the alleged injury as a "stomach infection," and its Pre-Hearing Statement, dated July 19, 2011, acknowledged that claimant alleged his injury was "gastrointestinal disease." EX 1 at 1-2, 6, 8; *see also* CX 10.

not related to the working conditions. *Ceres Gulf, Inc. v. Director, OWCP* [*Plaisance*], 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *see also American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999) (*en banc*), *cert. denied*, 528 U.S. 1187 (2000). If the employer rebuts the presumption, it no longer controls and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

Dr. Raijman's opinion arguably constitutes substantial evidence rebutting the Section 20(a) presumption.[4] Dr. Raijman stated that claimant's most likely diagnosis is "functional bowel disease," although he could possibly have "post-infectious diarrhea." He opined there is a "somatic component" to claimant's condition, and that, to a reasonable degree of medical certainty, claimant's condition is "[m]ost likely not related to previous employment." EX 23. Irrespective of the cause, Dr. Raijman acknowledged that claimant has a GI condition that is not at maximum medical improvement and needs chronic management. *Id.* In his October 2014 deposition, Dr. Raijman reiterated his opinion that claimant's condition was neither caused nor aggravated by his employment in Iraq because there is no evidence he contracted an infection while in Iraq. EX 46 at 16-23, 30, 34. He also felt that claimant's condition was not brought on by the food, travel to, or stress in Iraq. *Id.* at 47-48. As Dr. Raijman was unequivocal in his opinion that claimant's GI condition is not related to his employment in Iraq, the administrative law judge erred in finding that employer did not rebut the Section 20(a) presumption. *Cline v. Huntington Ingalls, Inc.*, 48 BRBS 5 (2013); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000).

However, any error is harmless, as the administrative law judge addressed the record as a whole and rationally credited Dr. McHorse's opinion that claimant's GI condition is work-related. Decision and Order at 40-44; CX 9; EX 44; *see Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 125 (1984) (failing to find the presumption rebutted is harmless where there is substantial evidence to support a causal connection); *see also Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S.

[4] Employer's burden on rebuttal is a burden of production only. *Conoco, Inc.*, 194 F.3d 684, 33 BRBS 187(CRT). Thus, it was erroneous for the administrative law judge to dismiss Dr. Raijman's opinion based on his "speculation" that the well water may have caused claimant's infection. An employer need not prove an alternate cause of a claimant's injury in order to rebut the Section 20(a) presumption. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000).

954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Dr. McHorse's opinion constitutes substantial evidence on the record as a whole supporting the administrative law judge's finding that claimant established by a preponderance of the evidence that he sustained a work-related injury. CX 9; EX 44. Therefore, we affirm this finding and, accordingly, we affirm the award of medical benefits. *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989).

Timeliness of Claim

Traumatic Injury or Occupational Disease?

Claimant contends the administrative law judge erred in finding his GI condition to be a traumatic injury, subject to the provisions of Section 13(a), and not an occupational disease, subject to the provisions of Section 13(b)(2). 33 U.S.C. §913(a), (b)(2); Decision and Order at 47. Claimant argues that his condition is a "disease" and that the administrative law judge erred in failing to characterize it as such given his finding that claimant had multiple bouts of illness. Therefore, claimant contends his condition is an "occupational disease," which has a two-year statute of limitations, and his claim for compensation was timely filed.

Section 13 provides in pertinent part:

> (a) 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*. . . . 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.
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> * * *
>
> (b)(2) Notwithstanding the provisions of subsection (a) of this section, a claim for compensation for death or disability due to *an occupational disease which does not immediately result in such death or disability shall be timely if filed within two years after the employee or claimant becomes aware*, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability, or within one year of the date of the last payment of compensation, whichever is later.

33 U.S.C. §913(a), (b)(2) (emphasis added). "Occupational disease" has been defined as a disease caused by the hazardous conditions of employment, which are peculiar to the employee's employment as opposed to other employment generally. Hazardous activity need not be exclusive to the particular employment, but it must be sufficiently distinct

from hazardous conditions associated with other types of employment or with everyday life. *Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999), *aff'd*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000); *LeBlanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d. 157, 31 BRBS 195(CRT) (5th Cir. 1997); *Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 23 BRBS 13(CRT) (2d Cir. 1989); 4 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law, §52.00 *et seq.* (2015).[5] Typically, the onset of an occupational disease is gradual, not sudden. 33 U.S.C. §913(b)(2) (time for filing claim when disease *does not immediately result* in disability or death); *but see* Larson's §52.04[3] (as both types of injuries may be work-related, gradual onset is no longer necessary to distinguish "disease" from "accident").

Although claimant has a "disease" that was caused or aggravated by his work, the administrative law judge found that claimant's gastroenteritis episodes occurred suddenly and were immediately disabling and cannot be compared to the gradual development of an occupational disease like asbestosis. Specifically, he stated:

> Whether the injury is viewed as the individual alleged infections Claimant sustained in Iraq or the accumulation of those infections manifesting in alleged irritable bowel syndrome, the result cannot be that Claimant is suffering from an occupational disease. Unlike asbestosis, the harmful substance ailing Claimant, presumably the undetermined bacteria infecting Claimant's GI tract, manifested itself in an injury each time Claimant was infected. The testimonial and medical evidence clearly supports that Claimant suffered from diarrhea, vomiting, and abdominal pains each time he was infected, likely resulting in the irritable bowel syndrome Claimant suffers from today.

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[5] Larson's states: "The common element running through all [definitions of occupational disease] is that of the distinctive relation of the particular disease to the nature of the employment, as contrasted with diseases which might just as readily be contracted in other occupations or in everyday life apart from employment." 4 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law, §52.03[2] at 52-7 (2015). For example, New York, which has defined occupational disease by case law and not by statute, specified: "An ailment does not become an occupational disease simply because it is contracted on the employer's premises. It must be one which is commonly regarded as natural to, inhering in, an incident and concomitant of, the work in question. There must be a recognizable link between the disease and some distinctive feature of the claimant's job, common to all jobs of that sort." *Id.* at 52-9 (citing *In re Leventer*, 257 A.D. 903, 684 N.Y.S.2d 658 (1999)).

Decision and Order at 47. The administrative law judge analogized claimant's GI condition to hearing loss, *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151(CRT) (1993), and to sun exposure injury, *Lopez v. Navy Exchange Service Command*, BRB No. 04-0664 (May 16, 2005).[6] That is, like the noise exposures and the sun which caused immediately disabling conditions, the sudden onsets of GI symptoms caused claimant's immediate inability to work. Decision and Order at 47. The administrative law judge's conclusion that claimant's GI condition is not an "occupational disease" under the Act because it immediately resulted in disability is rational, as claimant's episodes of gastric symptoms rendered him immediately temporarily disabled.[7] Because claimant does not suffer from an "occupational disease which does not immediately result" in disability, the time for filing his claim under the Act is governed by Section 13(a). *Bath Iron Works Corp.*, 506 U.S. 153, 26 BRBS 151(CRT); *Gencarelle*, 892 F.2d 173, 23 BRBS 13(CRT). Therefore, we affirm the administrative law judge's use of the Section 13(a) one-year statute of limitations to determine the timeliness of claimant's claim.

Was Claim Timely Filed?

As Section 13(a) is applicable, claimant contends the administrative law judge incorrectly determined his date of awareness to be December 29, 2009, as claimant continued to work and to suffer GI symptoms after that date. He asserts that these additional episodes, and the first diagnosis of IBS in August 2010, move the date of awareness to a later date, making his 2011 claim for compensation timely. Employer asserts claimant had GI problems prior to December 29, 2009, that rendered him unable to work for periods of time and that Dr. Berry told him in December 2009 that his infection could recur and lead to a chronic condition; therefore, claimant had the necessary awareness as of December 29, 2009.

[6] In *Bath Iron Works*, the Supreme Court held that the symptoms of occupational hearing loss occur simultaneously with exposure to injurious noise, so hearing loss is not "an occupational disease which does not result in immediate disability." 506 U.S. 153, 26 BRBS 151(CRT). In *Lopez*, the Board held that the claimant's skin condition was aggravated with each exposure to sunlight; therefore, it was one that had immediate results and did not warrant use of the extended statute of limitations. BRB No. 04-0664, slip op. at 8-9.

[7] The administrative law judge's conclusion that claimant does not suffer from an "occupational" disease is also rational because a GI condition is not "peculiar" to being a truck driver in Iraq. *See Gencarelle*, 892 F.2d 173, 23 BRBS 13(CRT) (chronic synovitis does not meet the characteristics of "occupational disease").

The administrative law judge applied the Section 20(b), 33 U.S.C. §920(b), presumption that the claim was timely filed, and addressed the tolling provision of Section 30(f), 33 U.S.C. §930(f). He found, based on claimant's deposition testimony, that claimant told Dr. Berry in December 2009 that he drank water that was kept outside in Iraq and that he believed the cause of his GI problems was his employment because his wife and children were not getting sick. The administrative law judge also stated claimant testified that he knew his illness would recur. Decision and Order at 28-30, 51; EXs 36, 38. The administrative law judge found that claimant should have been aware as of December 28, 2009, that his condition was related to his employment based on claimant's personal knowledge, in conjunction with his need for sick leave in December 2009-January 2010.[8] As the tolling ended upon employer's filing its first report of injury on January 14, 2010, and as claimant did not file a claim for compensation until May 2011, the administrative law judge found the claim untimely filed. Decision and Order at 51.

Under Section 13(a), the time for filing a claim for compensation does 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). A claimant is not "aware" until he knows the likely impairment to his wage-earning capacity due to his work injury. *Paducah Marine Ways v. Thompson*, 82 F.3d 130, 30 BRBS 33(CRT) (6th Cir. 1996); *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). In *Stancil*, the United States Court of Appeals for the D.C. Circuit discussed the term "injury" within the meaning of the pre-1972 Section 13(a), which had not yet added the awareness language. 33 U.S.C. §913(a) (1970); *compare with* 33 U.S.C. §913(a) (2014). The court stated:

> The general theory of the limitations provision is, as we understand it, that the workman should not dawdle too much in filing a claim once he knows (or should know) that there is something wrong with him of a nature which will potentially affect his ability to earn his preexisting wage (whether or not it has already had that effect). . . . In short, once the man has been put

[8] The administrative law judge acknowledged that the stipulated date of injury was December 29, 2009, and that claimant requested medical leave on December 30, 2009, yet he found that claimant should have been aware by December 28, 2009, "because he sought and obtained sick leave from work." Decision and Order at 51. In light of the previous acknowledgments, the December 28 date is likely a typographical error. The parties seem to agree that the administrative law judge found the date of awareness to be December 29, 2009. In any event, the difference of one or two days at the end of December 2009 is irrelevant in this case.

> on the alert (i.e., once he knows or has reason to know) as to the likely impairment of his earning power, there is an 'injury'; before that time, while there may have been an accident, there is as yet no 'injury' for claim or filing purposes under this statute.

Stancil, 436 F.2d at 277; *Ceres Gulf, Inc. v. Director, OWCP* [*Fagan*], 111 F.3d 17, 31 BRBS 21(CRT) (5th Cir. 1997);[9] *Paducah Marine*, 82 F.3d 130, 30 BRBS 33(CRT); *Parker*, 935 F.2d 20, 24 BRBS 98(CRT); *Marathon Oil Co. v. Lunsford*, 733 F.2d 1139, 16 BRBS 100(CRT) (5th Cir. 1984).[10] The date a claimant becomes aware of the relationship between his work and his disabling injury is often the date a doctor states there is a connection. However, a doctor's opinion relating the condition to the employment is not necessarily controlling; the administrative law judge may consider other facts as to when the claimant should have been aware of that relationship. *See V.M.* [*Morgan*] *v. Cascade General, Inc.*, 42 BRBS 48 (2008), *aff'd mem.*, 388 F.App'x 695 (9th Cir. 2010).

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[9] In *Fagan*, the Fifth Circuit held that, where a claimant had a head injury at work in June 1988, his claim filed in 1991 was not timely filed. The court stated that, because the claimant claimed to have filled out and filed a claim for his injury in May 1989, he could not claim awareness based on a July 1990 doctor's opinion. Although the court affirmed the finding that there was insufficient evidence to show that the March 1989 claim form had actually been filed, the form itself was sufficient to show the claimant's knowledge of the relationship between his accident and his injury.

[10] In *Lunsford*, the claimant sustained a back injury in 1976 which kept him off work for three months. In mid-1978, the claimant began feeling neck pain and was diagnosed with a herniated disc that likely resulted from his 1976 fall. The claim filed in May 1979, less than one year after the herniation diagnosis, was held to be timely filed. The Fifth Circuit rejected the argument that the claim was untimely because it was filed more than one year after the 1976 accident. The court stated:

> Under the [1972] amendment [to Section 13(a),] we look to the employee's appreciation of the relation between his injury and his employment. For prescription to run against him, he 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.

Lunsford, 733 F.2d at 1141, 16 BRBS at 101(CRT).

Claimant contends substantial evidence does not support the administrative law judge's finding that he became aware, or should have been aware, of any likely relationship between his GI injury, his work, and the impairment to his earnings by December 29, 2009. He contends he was not aware of the full effects of his injury by December 2009 because he recovered and returned to work. Specifically, he asserts he did not have "*Stancil* awareness" until August 19, 2010, when he was diagnosed with IBS. He states that it was at this point he understood the full character of his disability and that it would impair his wage-earning capacity, making his May 2011 claim timely.

In addressing this issue and finding that claimant's date of awareness was in December 2009, the administrative law judge relied heavily on claimant's own testimony to establish his date of awareness. Claimant saw Dr. Berry on December 28, 2009, due to having a fever, chills, vomiting, and nausea for four days. Dr. Berry diagnosed gastroenteritis and claimant had a positive test for *H. pylori*. CX 1 at 27. Because claimant was sick, he was not cleared to fly or to return to work; he missed several weeks of work and had to request medical leave. In his depositions in October 2013 and August 2014, claimant testified that he told Dr. Berry about the drinking water conditions, EX 36 at 117, and the unsanitary food preparations, EX 38 at 79, in Iraq. He also testified that he had experienced other GI issues in Iraq beginning in 2007, EX 38 at 73, and that he told Dr. Berry he thought his working in Iraq was the cause of his illness because his family was not getting sick, *id.* at 97-98. Further, claimant testified that Dr. Berry informed him that the GI symptoms could recur and cause more problems. *Id.* at 101. On December 28, 2009, Dr. Berry precluded claimant from returning to work until his condition cleared up; claimant was able to return to Iraq on January 25, 2010.

Nonetheless, claimant asserts he was not aware of the "full character" of his injuries, "*Stancil* awareness," until August 2010, when he was diagnosed with the chronic condition IBS. In *Stancil*, the D.C. Circuit held that a claim for a back injury filed in 1962 was timely filed because the claimant was unaware after his 1959 accident that he suffered a herniated disc that would impair his wage-earning capacity. He was told originally it was a strain that would heal, and he continued to work, albeit sometimes in a light-duty capacity. When different pain recurred three years later and forced the claimant to cease working altogether, and he underwent surgery that revealed a herniation the doctor determined resulted from the 1959 accident, the court affirmed the finding that the claim filed six months later was timely filed. Thus, in *Stancil*, the claimant suffered a work-related injury, of which he was unaware until he was forced to stop working and had surgery in December 1962. Claimant's case, however, is distinguishable from *Stancil*.

In this case, claimant was aware he suffered incapacitating gastric episodes in 2007, 2009, and 2010, which had similar symptoms and had been diagnosed under a number of names. *See* n.3, *supra*. That his GI injury was not identified as IBS until

August 2010 did not make it an "unknown" injury similar to the situation in *Stancil* or prevent him from knowing the "full character" of his injuries until that diagnosis. In this respect, it must be emphasized that, in May 2011, claimant filed a claim for benefits for the period he missed work in January 2010. CX 2. Therefore, he need not have been "aware" of any particular diagnosis of a permanent condition (like IBS) or know the likelihood of any permanent effect on his wage-earning capacity before filing his claim. *Compare with Dyncorp Int'l v. Director, OWCP* [*Mechler*], 658 F.3d 133, 45 BRBS 61(CRT) (2d Cir. 2011) (the claimant was not aware of a permanent loss to her wage-earning capacity within one year before she filed her claims for permanent benefits; she became aware of a permanent psychological impairment only after she returned to her former job in the United States over one year after she was shot when she was not permitted to return to being a prison guard and carry a gun, and she was relegated to a desk job). Claimant's awareness of a temporary loss of his ability to work due to a work-related injury, in a claim for a specific period of temporary disability benefits, is sufficient to commence the running of the statute of limitations. *See generally Fagan*, 111 F.3d 17, 31 BRBS 21(CRT); *Paducah Marine*, 82 F.3d 130, 30 BRBS 33(CRT) (court recognized the difference between a claim for temporary disability and for permanent disability). Accordingly, based on claimant's testimony concerning his awareness of the work-related nature of his symptoms and Dr. Berry's precluding claimant from work beginning December 28, 2009, the administrative law judge's finding that claimant's date of awareness was December 29, 2009, is supported by substantial evidence of record. *Fagan*, 111 F.3d 17, 31 BRBS 21(CRT) (unfiled claim form was substantial evidence of the requisite knowledge); *Gencarelle*, 892 F.2d 173, 23 BRBS 13(CRT). Because the claim for disability benefits was not timely filed within one year of the date of employer's first report of injury on January 14, 2010, the claim cannot be amended to include claims for benefits for the August 2010 and post-March 2014 periods, and those periods cannot be used to render claimant's May 2011 claim

timely.[11] On the facts of this case, the administrative law judge correctly found claimant's claim was untimely filed.[12]

[11] We reject claimant's assertion that the claim filed in May 2011 was timely as to the gastric episodes in August 2010. Although a May 2011 claim would be timely for an August 2010 injury, claimant did not allege entitlement to benefits for an August 2010 injury in the May 2011 claim. Indeed, he did not mention entitlement to benefits for any period other than January 2010 until he did so in his January 2015 Post-Hearing Brief following the October 2014 hearing. CX 10; EX 1. Amendments to claims may only be made to timely filed claims. *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001). As claimant's claim, wherein he sought benefits for only the initial period of disability in January 2010, was untimely filed, he cannot amend it to include requests for benefits for other/later periods of disability.

[12] As the claim for benefits was not filed in a timely manner, the administrative law judge properly denied disability benefits. Thus, we need not address claimant's contentions concerning the nature and extent of his disability.

Accordingly, the administrative law judge's Decision and Order and Order Granting in Part and Denying in Part Motion for Reconsideration are affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge