

BRB Nos. 07-0798
and 07-0798A

V.M.)	
(Widow of D.M.))	
)	
Claimant-Petitioner)	
Cross-Respondent)	
)	
)	
v.)	
)	
CASCADE GENERAL,)	DATE ISSUED: 06/26/2008
INCORPORATED)	
)	
and)	
)	
LIBERTY NORTHWEST INSURANCE)	
GROUP)	
)	
Employer/Carrier-)	
Respondents)	
Cross-Petitioners)	DECISION and ORDER

Appeals of the Decision and Order of William Dorsey, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

John Dudrey (Williams Fredrickson, LLC), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order (2004-LHC-01656) of Administrative Law Judge William Dorsey 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).

This is the second time that this case has been before the Board. To briefly summarize, claimant's husband, the decedent, sustained a knee injury while in the course of his employment on April 5, 2000, and, as a result of that injury, was unable to resume his former employment duties as a boilermaker/superintendent for employer. Following his knee injury, decedent intermittently worked for employer in a light-duty position until he was laid off for lack of work on July 21, 2001. Employer voluntarily paid decedent temporary partial and temporary total disability benefits for various periods of time, and permanent partial disability benefits for a 10 percent leg impairment under the schedule. 33 U.S.C. §908(b), (c)(2). On April 10, 2002, decedent died in a car crash caused by his own inebriation. After decedent's death, claimant pursued additional temporary total disability benefits up to the date of the decedent's death. Thereafter, on June 6, 2003, she filed a claim for death benefits under the Act, asserting that decedent's inability to return to work because of his work-related knee injury led to excessive drinking which culminated in his alcohol-related fatal car accident.

Employer filed a motion for summary decision with the administrative law judge, requesting that the claim for death benefits be dismissed as time-barred under Section 13(a) of the Act, 33 U.S.C. §913(a), on the basis that claimant had knowledge of the alleged work-relatedness of decedent's death as of the date of his death, but did not file a claim for more than one year thereafter. Claimant opposed employer's motion on the basis that remaining issues of fact required a hearing. In an Order dated February 10, 2005, the administrative law judge granted employer's motion and dismissed the death claim as untimely filed. On appeal, the Board vacated the administrative law judge's summary dismissal of the death claim and remanded the case for an evidentiary hearing on the issue of the timeliness of the claim as well as any other issues raised by the parties. *[V.M.] v. Cascade General, Inc.*, 40 BRBS 9 (2006).

While claimant's appeal of the administrative law judge's dismissal of the death claim was pending before the Board, a hearing was held on the disability claim on June 10, 2005, and the record closed on September 7, 2005. Following remand from the Board, a hearing on the death claim was held on May 5, 2006, and the record closed on that claim on February 8, 2007. On March 6, 2007, claimant requested that the administrative law judge issue a separate decision on the disability claim; the administrative law judge did not specifically respond to claimant's request, but issued a single Decision and Order on both claims on May 31, 2007.

In his Decision and Order, the administrative law judge found, with respect to the claim for additional disability benefits, that employer met its burden of establishing the availability of suitable alternate employment with the retrospective labor market survey of vocational expert Roy Katzen, and he therefore denied the claim for additional total disability benefits.¹ Decision and Order at 17-23. With respect to the claim for death benefits, the administrative law judge first determined that claimant was a widow pursuant to Section 2(16) of the Act, 33 U.S.C. §902(16). *Id.* at 6-7. Next, the administrative law judge found that claimant was aware of the alleged relationship between decedent's knee injury and his death as of April 10, 2002, when she learned of his fatal alcohol-related car crash earlier that day. As the claim for death benefits was not filed until 14 months after that date, the administrative law judge found the claim to be time-barred under Section 13(a) of the Act. *Id.* at 7-10. In this regard, the administrative law judge also found that claimant was not mentally incompetent during any part of the year following decedent's death and, thus, that Section 13(c), 33 U.S.C. §913(c), does not toll the statute of limitations. *Id.* at 11.

The administrative law judge next made alternate findings in the event that the claim for death benefits should be considered to have been timely filed. He found that claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption, but found the presumption rebutted by the opinions of Drs. Turco and Burton. *Id.* at 13-14. He then evaluated the evidence as a whole, concluding that decedent's death was not causally related to his work-related knee injury. *Id.* at 14-16. Lastly, the administrative law judge observed that in light of his findings that the claim was time-barred and that a causal relationship was not established, the Section 3(c), 33 U.S.C. §903(c), intoxication defense was unnecessary; nonetheless, he concluded that employer established that intoxication was the sole cause of decedent's death. *Id.* at 16-17. Accordingly, the administrative law judge denied the claim for death benefits.

On appeal, claimant contends that the delay in the administrative law judge's issuance of the Decision and Order requires that a new hearing be held on the claim for disability benefits. With regard to this claim, claimant also challenges the administrative law judge's finding that employer established the availability of suitable alternate

¹ In addition, the administrative law judge rejected employer's assertion that decedent's scheduled benefits should have been based on a 7 percent leg impairment rather than on the 10 percent rating which was the basis for employer's voluntary payment of the scheduled award. Decision and Order at 25. Moreover, the administrative law judge accepted the parties' stipulation that claimant is entitled to additional temporary total and temporary partial disability benefits for various periods following decedent's Hyalgan injections and, accordingly, awarded those benefits. *Id.* at 3, 25-26.

employment. With respect to the claim for death benefits, claimant avers that the administrative law judge erred in finding that the claim is time-barred, in finding that there is no causal relationship between decedent's knee injury and his death, and in finding that the claim is barred by the Section 3(c) intoxication defense. Employer responds, urging affirmance of the administrative law judge's findings on these issues. On cross-appeal, employer contends that the administrative law judge erred in finding that claimant is a "widow" pursuant to Section 2(16) of the Act; claimant responds, urging affirmance of this finding.

Claimant initially asserts that the delay in the issuance of the administrative law judge's Decision and Order with respect to her claim for additional disability benefits requires that the case be remanded for a new hearing. The hearings were held on June 10, 2005, and May 5, 2006, and the administrative law judge's Decision and Order was issued on May 31, 2007. While the Act states that decisions shall be issued within 20 days after the close of the record, 33 U.S.C. §919(c), failure to issue a decision within 20 days requires remand only where the aggrieved party shows prejudice resulting from the delay. *Welding v. Bath Iron Works Corp.*, 13 BRBS 812 (1981); *see also* 20 C.F.R. §702.349. In this case, claimant asserts that she was prejudiced because the administrative law judge allegedly forgot much of the testimony of claimant and another lay witness, Shirley Weisgerber, regarding the effect of the loss of decedent's job on his emotional state. Claimant avers that this testimony is relevant to the question of decedent's ability, from an emotional standpoint, to perform the jobs found by the administrative law judge to constitute suitable alternate employment.² Contrary to claimant's assertions, the administrative law judge specifically referenced the testimony of claimant and Ms. Weisgerber that decedent was a "workaholic" whose identity was based on his job and that he became depressed after he could no longer work. *See* Decision and Order at 4; Hearing Tr. (6/10/05) at 65-67, 80-85; *see also* Hearing Tr. (5/5/06) at 154-158. Moreover, the administrative law judge addressed the effect of decedent's depressive symptoms on his ability to perform the jobs found to constitute suitable alternate employment. *See* Decision and Order at 18-21. Thus, we reject claimant's contention that the administrative law judge's decision should be vacated and a new hearing ordered based upon the delay between the date of the first hearing and the issuance of the administrative law judge's Decision and Order, as claimant has not shown

² Claimant additionally asserts prejudice on the basis that the administrative law judge allegedly misinterpreted the testimony of Andy Huckfeldt, claimant's vocational expert, and misstated the testimony of Roy Katzen, employer's vocational expert. As claimant does not explain how any alleged errors in the administrative law judge's interpretation of the testimony of these two vocational experts is related to the delay in the issuance of the Decision and Order, these allegations do not demonstrate that claimant was prejudiced by the delay. *See Welding*, 13 BRBS 812.

prejudice as a result of the delay. *See Garvey Grain Co. v. Director, OWCP*, 639 F.2d 366, 12 BRBS 821 (7th Cir. 1981); *Dean v. Marine Terminals Corp.*, 15 BRBS 394 (1983).

Claimant next challenges the administrative law judge's finding that employer established the availability of suitable alternate employment. Where, as here, it is uncontroverted that decedent was unable to return to his usual employment duties with employer as a result of his work injury, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98 (2005). In order to meet this burden, employer must establish the existence of realistically available job opportunities within the geographic area in which decedent resided, which he was capable of performing, considering his age, education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. *See General Constr. Co. v. Castro*, 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006); *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Wilson v. Crowley Maritime*, 30 BRBS 199 (1996).

In his decision, the administrative law judge addressed each of the positions identified in the retrospective labor market survey conducted by employer's vocational expert, Roy Katzen, and compared the requirements of those positions with decedent's physical and other vocational limitations. Decision and Order at 18-25. He found that the parking lot cashier jobs with City Center Parking and Ace Parking were available at the relevant time and were suitable for decedent. Decision and Order at 21-23; EX 51; Hearing Tr. (6/10/05) at 45-60. In this regard, the administrative law judge rejected the opinion of claimant's vocational expert, Andy Huckfeldt, that because of decedent's chronic pain, alcohol use and depressive symptoms, decedent could not have successfully performed the jobs identified by employer's expert without first having received vocational assistance and counseling. Decision and Order at 19-21; CX 34 (6/10/05 Hearing Exhibits); Hearing Tr. (6/10/05) at 93-130.

Claimant contends that the administrative law judge erred in failing to appropriately consider decedent's alcohol abuse and emotional suitability for the parking lot cashier jobs that were found to constitute suitable alternate employment.³ We reject claimant's contentions of error. Specifically, claimant's assertion that the administrative law judge mischaracterized Mr. Katzen's testimony regarding decedent's alcohol use is

³ Claimant concedes that decedent was physically able to perform work as a parking lot cashier and that these jobs are regularly available. *See* Cl. brief at 11.

without merit. The administrative law judge rationally determined, based on the totality of Mr. Katzen's report and hearing testimony, that Mr. Katzen took into account decedent's alcohol use in rendering his opinion that decedent's use of alcohol did not affect his ability to perform the jobs identified as suitable alternate employment. *See* Decision and Order at 21; EX 51; Hearing Tr. (6/10/05) at 47, 49. Moreover, contrary to claimant's assignment of error, it was reasonable for the administrative law judge to find that evidence that decedent successfully performed light-duty work for employer without any sign of alcohol use or abuse supports the conclusion that decedent's alcohol use did not render him unemployable. *See* Decision and Order at 21; Hearing Tr. (6/10/05) at 30-31. Furthermore, the administrative law judge appropriately considered the issue of decedent's emotional ability to perform suitable alternate employment; specifically, the administrative law judge addressed Mr. Huckfeldt's testimony regarding the effect of decedent's depressive symptoms on his employability, but, observing that no medical report addresses this issue, he rejected Mr. Huckfeldt's opinion. *See* Decision and Order at 20-21; CX 34 (6/10/05 Hearing Exhibit); Hearing Tr. (6/10/05) at 100-102, 120-127.

It is axiomatic that the Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge which are supported by the record. *See, e.g., Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988). In this case, the administrative law judge drew reasonable inferences from the evidence and his finding that decedent's alcohol use and emotional condition would not have precluded him from performing the parking lot cashier jobs identified by employer's vocational expert is supported by substantial evidence. *See generally Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT). We therefore affirm the administrative law judge's finding that employer established the availability of suitable alternate employment for the period from July 18, 2001 to April 4, 2002. *See Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991). Therefore, we affirm his consequent determination that as decedent was only partially disabled during that period, he was limited to a scheduled award for his knee injury. *See, e.g., Seguro v. Universal Maritime Serv. Corp.*, 36 BRBS 28, 32 (2002).

Claimant next contends that the administrative law judge erred in finding that her claim for death benefits was not timely filed. Section 13(a), 33 U.S.C. §913(a), requires that a claim for death benefits be filed within one year after the death of the employee. The time for filing does not begin until the claimant is "aware, or by the exercise of reasonable diligence should have been aware, of the relationship between" the death and the employment. Section 20(b) of the Act, 33 U.S.C. §920(b), provides a presumption that a claim was timely filed, "in the absence of substantial evidence to the contrary." *See Stark v. Washington Star Co.*, 833 F.2d 1025, 20 BRBS 40(CRT) (D.C. Cir. 1987).

In this case, the administrative law judge first afforded claimant the benefit of the Section 20(b) presumption that the death claim was timely filed. He found the presumption rebutted, however, by statements made by claimant in her hearing and deposition testimony and in a January 17, 2005, affidavit. The administrative law judge found this evidence reflected claimant's personal opinion, as of the time of decedent's death, that there was a relationship between decedent's knee injury that caused his loss of employment, his subsequent drinking problem, and his alcohol-related fatal car accident. *See* Decision and Order at 8-9; Hearing Tr. (6/10/05) at 86-87, 92-93; Hearing Tr. (5/5/06) at 155-158, 163-165; claimant's 1/17/05 affidavit (appended to Claimant's Opposition to Employer's Motion for Summary Decision); Claimant's 12/9/04 deposition at 56-59 (appended to Employer's Motion for Summary Decision). The administrative law judge then considered all the evidence relevant to claimant's date of awareness and concluded that she possessed the requisite awareness as of the date of decedent's death. Decision and Order at 9-10. In this regard, the administrative law judge rejected both claimant's assertion that the statement in her affidavit, that she was not surprised by the manner of decedent's death, was made only in hindsight, and her assertion that as a result of emotional upheaval following decedent's death she was unable to make the connection between decedent's knee injury, his drinking problem and his death until several months after his death. *Id.* at 9-10; Hearing Tr. (5/5/06) at 163-169, 173, 183-188, 197-198. *See also* Hearing Tr. (5/5/06) at 23-25, 30, 33, 35, 39-42, 52-53, 55-56, 60, 72-73. The administrative law judge thus found that because the claim was filed more than one year after claimant's date of awareness, it was time-barred under Section 13(a) unless it could be preserved by statutory or equitable tolling.⁴ Decision and Order at 10. The administrative law judge next determined that claimant was not mentally incompetent and, thus, Section 13(c), 33 U.S.C. §913(c), does not toll the statute of limitations. *Id.* at 11. Lastly, the administrative law judge found that equitable tolling does not excuse the late filing of the claim. *Id.* at 11-12.

While claimant acknowledges that at the time of decedent's death, she was aware of the relationship between his knee injury and his drinking problem, she argues that she could not be found to have been aware of the relationship between decedent's work-related knee injury and his alcohol-related death without having legal or medical knowledge of such relationship. *See* Cl. brief at 18-22; Reply brief at 7-10. We reject claimant's contention that she could not be found to have possessed the requisite awareness until she consulted her current attorney and was advised of the potential compensability of decedent's death under the Act. *See Perkins v. Marine Terminals*

⁴ Claimant does not challenge on appeal the administrative law judge's finding that the statute of limitations was not tolled by Section 30(f), 33 U.S.C. §930(f), because employer did not have knowledge or notice of the alleged work-relatedness of decedent's death until June 6, 2003, when the claim was filed. Decision and Order at 10-11.

Corp., 16 BRBS 84, 86 (1984). The plain language of Section 13(a) provides that the limitations period commences when the claimant is aware, or should have been aware, of the relationship between the death and the employment, and there is no additional requirement that the claimant must also recognize that this relationship supports a potential claim for death benefits under the Act.⁵ Furthermore, we reject claimant's contention that she could not be found to have the requisite awareness of the relationship between decedent's knee injury and his death until she had obtained medical evidence of such a relationship. Contrary to claimant's argument, the administrative law judge could properly base his finding regarding claimant's date of awareness on her personal knowledge that a relationship existed between decedent's work-related knee injury, his subsequent drinking problem, and his alcohol-related fatal car crash. *See Wendler v. American Nat'l Red Cross*, 23 BRBS 408 (1990) (McGranery, J., concurring and dissenting). Accordingly, as it is supported by substantial evidence, we affirm the administrative law judge's finding that the claim for death benefits was not timely filed under Section 13(a).

Claimant next assigns error to the administrative law judge's finding that claimant was not mentally incompetent at any time during the year following decedent's death, and, thus, the statute of limitations was not tolled by Section 13(c).⁶ The administrative law judge acknowledged the testimony regarding claimant's grief following decedent's death, but accorded greater weight to the absence of evidence that claimant was

⁵ We reject claimant's assignment of error to the administrative law judge's finding that the doctrine of equitable tolling does not excuse the late filing of the claim for death benefits in this case. Decision and Order at 11-12. As the Act contains a specific statutory period for filing a claim at Section 13, and includes specific grounds for tolling the limitations period pursuant to Section 13(c), 33 U.S.C. §913(c), on the basis of mental incompetence and minority, the doctrine of equitable tolling is not applicable to claims under the Act. *See generally Simpson v. Bath Iron Works Corp.*, 22 BRBS 25, 28 (1989); *Lewis v. Norfolk Shipbuilding & Dry Dock Corp.*, 20 BRBS 126, 130 (1987).

⁶ Section 13(c) states:

If a person who is entitled to compensation under this chapter is mentally incompetent . . . , the provisions of subdivision (a) of this section shall not be applicable so long as such person has no guardian or other authorized representative, but shall be applicable in the case of a person who is mentally incompetent . . . from the date of appointment of such guardian or other representative, . . .

33 U.S.C. §913(c).

diagnosed with or received medical treatment for any mental impairment and to the fact that a guardian was not appointed for her person or property. Decision and Order at 11; *see also id.* at 5, 9-10; Hearing Tr. (5/5/06) at 23-30, 33-35, 39-44, 51-57, 60, 72-74, 163-168, 171-178, 189-190. The administrative law judge concluded that there is no evidence that claimant lost the ability to engage in rational thought and was therefore incompetent. In this regard, the administrative law judge properly exercised his discretion as the trier-of-fact in according greater weight to the absence of a medical diagnosis or any treatment for a mental disorder and the absence of an appointment of a guardian for claimant than to the lay testimony regarding claimant's emotional state in the months after decedent's death. *Cf. Hoage v. Terminal Refrigerating & Warehousing Co.*, 78 F.2d 1009 (D.C. Cir. 1935) (court held that the claimant was incompetent under Section 13(c) because evidence demonstrated his conduct was abnormal, he had a serious mental disturbance, he had lost control of his mental faculties, and he had been adjudged of unsound mind); *see generally Duhagon*, 169 F.3d at 618, 33 BRBS at 2-3(CRT). Therefore, we affirm the administrative law judge's determination that claimant was not mentally incompetent during any part of the year following decedent's death and, thus, is not entitled to tolling under Section 13(c). *Id.* Accordingly, the administrative law judge's finding that the claim for death benefits was not timely filed is affirmed.

Because our affirmance of the administrative law judge's conclusion that the claim for death benefits is time-barred is dispositive of claimant's claim, we need not address claimant's arguments with respect to the causal relationship between decedent's work-related injury and his death or the applicability of the Section 3(c), 33 U.S.C. §903(c), bar to compensation. Moreover, we need not address employer's challenge on cross-appeal to the administrative law judge's finding that claimant is decedent's widow within the meaning of Section 2(16), 33 U.S.C. §902(16).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge