BRB Nos. 93-0746
and 93-1518

ROZLYN BROOKS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ARMY & AIR FORCE EXCHANGE SERVICE	)	DATE ISSUED:
	)	
and	)	
	)	
EMPLOYERS SELF INSURANCE SERVICE	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and Supplemental Decision and Order Awarding Attorney Fees of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Tony B. Jobe (Law Office of Tony B. Jobe, P.C.), New Orleans, Louisiana, for claimant.

L. Lee Bennett, Jr. (Drew, Eckl & Farham), Atlanta, Georgia, for employer/ carrier.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Supplemental Decision and Order Awarding Attorney Fees (92-LHC-103) of Administrative Law Judge Richard D. Mills 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 Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act). We must affirm the findings of fact and the conclusions of law of the administrative law judge which 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). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant worked as a manager of food service facilities located on military installations for employer. Claimant testified that in March 1988, while she was escorting General Kahla on a tour of one of her facilities, Ron Wulff, one of her supervisors, grabbed her arm, turned her around, and questioned one of her professional decisions in front of the general in what claimant perceived as a hostile tone of voice. Tr. at 237 -239. Claimant further testified that thereafter, after she and the general went to another facility, she was again approached by Mr. Wulff. According to claimant, after this incident a number of things happened to her at her workplace which led her to believe that there was a conspiracy against her; she was assigned a malfunctioning company car which nobody else wanted, she was moved from desirable office space to space with "a lot of walk through traffic," she was subject to a dramatic increase in the number of management inspections of the facilities she managed, and an unusually large number of these facilities were closed down on short notice. Tr. at 242 - 250. In January 1990, when another employee with less seniority was selected over her to become a manager of a mini-mall, claimant testified that the stress and anxiety of her job became too much for her to handle. After threatening to harm herself and others, including Mr. Wulff, claimant was involuntarily committed at the Humana Hospital from February 6-13, 1990, where she received treatment for depression and anxiety from Dr. Frank E. Gill, a board-certified psychiatrist. On July 25, 1990, claimant, who had not worked since February 1990, sought temporary total disability compensation under the Act, contending that she suffered a stress-related psychological injury as a result of working conditions in her employment commencing with the incident with Mr. Wulff in March 1988. Employer denied that the March 1988 incident with Mr. Wulff ever occurred, denied claimant's allegation of a conspiracy, and asserted that any psychological disability claimant has is not compensable under the Act because it resulted solely from employer's legitimate personnel decision not to choose her to become the manager of the mini-mall.

Relying on the medical opinions of Drs. Gill and DeSonnier, the administrative law judge found that claimant's psychological problems did not arise solely because of her failure to obtain the management position at the mini-mall, but rather are the result of a culmination of factors occurring at her place of employment since March 1988. Accordingly, he awarded claimant temporary total disability compensation commencing February 6, 1990, interest and medical benefits.

Subsequently, claimant's counsel sought an attorney's fee of $19,391.50 for 150.3 hours at $125 per hour and 15.10 hours at $40 per hour, plus $11,311.56 in expenses.[1] In a Supplemental Decision and Order, the administrative law judge awarded claimant's counsel the entire requested fee. Employer appeals the administrative law judge's finding that claimant sustained a compensable psychological injury, BRB No. 93-0746, as well as his award of attorney's fees, BRB No. 93-1518.[2]

[1]Claimant's counsel filed his fee petition, dated January 12, 1993, with the Department of Labor Employment Standards Administration (ESA). Employer filed a response to the fee petition, also with ESA, dated February 19, 1996.

[2]By Order dated May 21, 1996, the Board dismissed employer's appeals due to its inability to obtain the record below and remanded these cases for reconstruction of the record. On July 29, 1996, the Board received the record. By Order dated August 1, 1996, the Board granted employer's motion

In its appeal on the merits, employer reiterates the argument it made below that pursuant to *Marino v. Navy Exchange*, 20 BRBS 166 (1988), claimant's psychological problems are not compensable because they resulted solely from employer's legitimate personnel decision not to select her as the new manager of the mini-mall in January 1990. Employer maintains that it introduced lay testimony which refutes claimant's testimony regarding the incident with Mr. Wulff and the allegation of a subsequent conspiracy, and which establishes that the sole precipitating cause of claimant's psychological problems is the fact she was not selected to be the manager of the mini-mall. Alternatively, employer asserts that because the gist of claimant's testimony is that she sustained a compensable injury dating back to the March 1988 incident with Mr. Wulff, her July 25, 1990 claim, filed more than one year thereafter, is time-barred under Section 13 of the Act, 33 U.S.C. §913.

Initially, we reject employer's argument that claimant's July 25, 1990, claim is untimely under Section 13 of the Act because it was not filed within one year of the alleged March 1988 incident with Mr. Wiluff. We note initially that in the present case the parties stipulated that the date of claimant's injury was February 6, 1990. As this stipulation was accepted by the administrative law judge, we hold that employer is bound by this stipulation. *Thompson v. Northwest Enviro Services*, 26 BRBS 53 (1992). Moreover, as employer did not argue that the claim was untimely while the case was before the administrative law judge, it is, in any event, precluded from raising this argument for the first time on appeal as Section 13(b)(1), 33 U.S.C. §913(b)(1), requires that the allegation that a claim was not timely filed must be raised at the first hearing on the claim.

Directing our attention to the issue of the compensability of claimant's psychological injury, it is well-settled that a psychological impairment which is work-related is compensable under the Act. *See Konno v. Young Brothers, Ltd.*, 28 BRBS 57 (1994); *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 22 BRBS 340 (1989) (decision on remand). In establishing that an injury is causally related to employment, claimant is aided by the Section 20(a) presumption, which provides a presumed causal nexus between the injury and employment. 33 U.S.C. §920(a). In order to be entitled to the Section 20(a) presumption, however, claimant must establish a *prima facie* case by showing not only that she has a psychological condition but also that a work-related accident occurred or that working conditions existed which could have caused the condition. *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989). A legitimate personnel action alone does not constitute a working condition that can form the basis for a compensable psychological injury. *Marino*, 20 BRBS at 166.

In the present case, after considering the record evidence regarding the occurrence of the March 1988 incident with Mr. Wulff and the alleged subsequent conspiracy, the administrative law judge noted that the parties had stipulated that claimant's injury occurred on February 6, 1990. The

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to reinstate its appeals. Inasmuch as employer's appeals were reactivated after September 12, 1995, they were not administratively affirmed under the provisions of Public Law 104-134, as the one year period for review did not commence until the appeals were reinstated.

administrative law judge found that claimant had established the working conditions element of her *prima facie* case based on the testimony of Dr. Gill and Dr. Desonnier and, accordingly, was entitled to the benefit of the Section 20(a) presumption. The administrative law judge further determined that inasmuch as employer had not introduced any evidence establishing that claimant's psychological problems were not caused or aggravated by her employment, claimant's psychological disability is compensable.

After review of the administrative law judge's Decision and Order in light of the record evidence and employer's arguments on appeal, we affirm his finding that claimant sustained a compensable psychological injury because it is rational, is in accordance with law, and is supported by the medical opinions of Drs. Gill and DeSonnier. *O'Keeffe*, 380 U.S. at 359. Dr. Gill, claimant's treating psychiatrist, diagnosed claimant as having a major depressive disorder, obsessive compulsive disorder, and post-traumatic stress disorder. Dr. Gill opined that the failure to receive the management position merely was the "straw that broke the camel's back," and that claimant's psychological injury was based on her perception of a series of incidents that claimant suffered in the workplace from the March 1988 incident until January 1990. Tr. at 57 - 71. Dr. DeSonnier, an independent medical examiner, opined that claimant was suffering from a major depression, anxiety disorder, obsessive compulsive disorder, and an undifferentiated somatiform disorder due to job-related stress. CX-1. Inasmuch as these medical opinions support the conclusion that claimant's psychological condition stemmed from general stress in her employment, and not solely from employer's business decision not to make her the mini-mall manager in January 1990, the administrative law judge properly found that claimant established a *prima facie* case irrespective of *Marino*.[3] *See Konno*, 28 BRBS at 61. As employer does not dispute the administrative law judge's finding that it failed to introduce any medical evidence sufficient to rebut the presumption afforded claimant under Section 20(a) and has failed to establish that his crediting of the medical opinions of Drs. Gill and DeSonnier is either inherently incredible or patently unreasonable, the administrative law judge's determination that claimant's psychological injury is compensable is affirmed. *See generally Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990).

Lastly, we address employer's appeal of the administrative law judge's award of attorney's fees. On appeal, employer argues that this fee award was premature, as there has not yet been a successful prosecution of the claim because the underlying award of benefits is currently on appeal. Employer maintains that since claimant should not have been awarded worker's compensation benefits, her counsel should be precluded as a matter of law from being awarded an attorney's fee. Employer's arguments are rejected in view of our affirmance of the administrative law judge's award on the merits. In addition, we note that it is well-established that an administrative law judge may award an attorney's fee during the pendency of an appeal; the fee award is not enforceable, however, until the compensation order becomes final. *Lewis v. Bethlehem Steel Corp.*, 19 BRBS 90 (1986). As employer has not challenged the fee award on any other basis, it is affirmed.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits, BRB

[3]The fact that some of the work-related stress may seem relatively mild is irrelevant since the issue is the effect of these incidents on claimant. *See Cairns v. Mason Terminal, Inc.*, 21 BRBS 248, 256 (1988)(working conditions need not be unusually stressful).

No. 93-0746, and Supplemental Decision and Order Awarding Attorney Fees, BRB No. 93-1518 are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge