BRB No. 93-0435

LUTHER FAGAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CERES GULF, INCORPORATED	)	
	)	DATE ISSUED:
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Supplemental Decision and Order Awarding Attorney's Fees of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

William S. Vincent, Jr., New Orleans, Louisiana, for claimant.

Kathleen K. Charvet and Susan S. Harper (McGlinchey Stafford Lang), New Orleans, Louisiana, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and the Supplemental Decision and Order Awarding Attorney's Fees (91-LHC-2896) of Administrative Law Judge James W. Kerr, 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.* (the Act). We must affirm the findings of fact and 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 will not be set aside unless shown by the challenging party 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 was employed by Ceres Gulf as a longshoreman, winch operator, flagman, lift operator and signalman. On Friday, June 10, 1988, while loading cotton onto a vessel with the aid of winches and hooks, he was struck on the right side of his head by one of the hooks; the impact dislodged his hard hat. Although claimant continued to be paid for that day, he felt dizzy and sat out the rest of the shift. On the following day, claimant worked for four hours, and then, feeling dizzy, again sat out the day. Claimant "blacked out" while at home on Monday, June 13. Later that evening, he was taken to the hospital, complaining of dizziness, blurred vision, headache and nausea. Claimant was diagnosed with a cerebral hemorrhage.

On October 9, 1990, employer was served by the district director with a Form LS-215a notice that a claim had been filed by claimant. Cl. Ex. 1 at 42.[1] Employer controverted liability, and also applied for relief from continuing compensation liability pursuant to Section 8(f), 33 U.S.C. §908(f). On October 6, 1992, the administrative law judge issued the Decision and Order awarding temporary total disability, permanent partial disability and medical benefits for claimant's cerebrovascular impairment, along with interest. The administrative law judge also denied employer's application for Section 8(f) relief. On March 12, 1993, the administrative law judge issued a Supplemental Decision and Order awarding attorney's fees. Employer has appealed both decisions.[2]

On appeal, employer initially asserts that the administrative law judge erred in concluding that this claim was not barred pursuant to Section 13(a) of the Act, 33 U.S.C. §913(a). Employer also contests the administrative law judge's finding of a causal relationship between the work accident and claimant's cerebrovascular impairment, as well as his refusal to grant it relief under Section 8(f). Employer lastly challenges the attorney's fee award in this case. For the reasons that follow, we affirm the Decision and Order and Supplemental Decision and Order in all respects.

We disagree with employer that the administrative law judge erred in finding that the instant claim is not time-barred. In cases involving traumatic injuries, Section 13(a) requires that a claimant file a claim for benefits within one year of the time he becomes aware, or with the exercise of reasonable diligence should have been aware, of "the full character, extent and impact of the harm done to him." *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 296, 23 BRBS 22, 24 (CRT)(11th Cir. 1990); *accord Newport News Shipbuilding and Dry Dock Co. v. Parker*, 935 F.2d

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[1]The record contains a LS-203 claim form, dated "3/21/88" -- prior to the accident. Cl. Ex. 1 at 20. The record also contains a notice of controversion, LS-207, as well as a Section 30(a) notice, LS-202, each dated June 30, 1988. Emp. Ex. 1 at 158, 160.

[2]Employer has filed a Supplemental Memorandum in support of its Petition for Review, citing the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries*, ___ U.S. ___, 114 S.Ct. 2251, 28 BRBS 43 (CRT) (1994) and urging that the administrative law judge erred in applying the true doubt rule. Claimant has moved to strike the supplemental memorandum. Although we deny claimant's Motion to Strike and will accept employer's memorandum, we conclude that *Greenwich Collieries* does not affect the disposition of this case, inasmuch as the administrative law judge weighed the relevant evidence and did not rely on "true doubt."

20, 24 BRBS 98 (CRT)(4th Cir. 1991); *see also Marathon Oil Co. v. Lunsford*, 733 F.2d 1139, 16 BRBS 100 (CRT)(5th Cir. 1984). In this instance the administrative law judge rationally determined that claimant could not have been aware that his injury would likely impair his earning capacity until he received Dr. Paddison's July 20, 1990, hand-written review of his medical records in which he concluded that claimant still suffered from residuals of his "accelerated head trauma." Decision and Order at 15; *see* Cl. Ex. 1 at 51-52. The administrative law judge also implied that Dr. Lupin's original opinion, dated November 3, 1988, Emp. Ex. 1, that claimant's accident played no role in the development of any cerebral problems, constitutes a misdiagnosis that would toll the beginning of the limitations period. *See Gregory v. Southeastern Maritime Co.*, 25 BRBS 188, 191 (1991); *Caudill v. Sec Tac Alaska Shipbuilding*, 22 BRBS 10, 14 (1988), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993). We conclude that, in light of Dr. Paddison's July 20, 1990 medical opinion, the initial conclusions of claimant's treating physicians who did not make the connection between claimant's enduring cerebral problems and his accident, and the effect of the Section 20(b) presumption of timely filing, *see* 33 U.S.C. §920(b); *Horton v. General Dynamics Corp.*, 20 BRBS 99, 102 (1987), the administrative law judge reasonably found this claim timely. We therefore affirm the administrative law judge's finding under Section 13(a) that the claim was timely filed.

Employer next challenges the administrative law judge's determination that claimant's disability is caused by his work accident. Employer first asserts that the administrative law judge erred in invoking the Section 20(a) presumption that claimant's cerebral vascular impairment is caused by the accident, and next claims that, in any event, it has rebutted the presumption and demonstrated that claimant's injury is not derived from the work-related blow to the head. These arguments are without merit.

In establishing that an injury arises out of his employment, claimant is aided by the Section 20(a), 33 U.S.C. §920(a), presumption which applies to the issue of whether an injury is causally related to his employment. *See Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987). To invoke this presumption, claimant must establish two elements of his *prima facie* case, *i.e.*, that he sustained some harm and that working conditions existed which could have caused the harm or pain. *See Bolden v. G.A.T.X. Terminals Corp.*, BRBS , BRB No. 93-0204, slip op. 2-3 (Apr. 25, 1996); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). The administrative law judge properly invoked the presumption in this case, citing a blow to the head at work which could have caused claimant's cerebral vascular injury.

Upon invocation, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment, *see Sam v. Loffland Brothers Co.*, 19 BRBS 228 (1987), *i.e.*, by presenting specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 820 (1976). In this case, employer produced the testimony of Dr. Applebaum, who concluded that there was no relation between the accident and claimant's posterior circulation infarct. Tr. at 253-54;

Emp. Ex. 25.

The administrative law judge, weighing the record as a whole, found that employer failed to offer substantial rebuttal evidence, and thus found causation established. Decision and Order at 12. In so doing, he discounted the medical opinions of Dr. Applebaum because that physician left open the possibility that claimant's work-related accident could have hastened claimant's stroke. The administrative law judge also accorded less weight to Dr. Adams' testimony that the accident played no part in claimant's condition in part because this physician based his conclusion on what the administrative law judge termed as the incorrect assumption that claimant suffered only a "mild" blow to the head at work. Decision and Order at 11-12.[3]

We need not determine whether the administrative law judge erred in determining that employer failed to rebut the Section 20(a) presumption, as any error is harmless in view of the administrative law judge's rational finding of causation after weighing the record evidence as a whole. *See Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157, 161 (1990). Because the medical opinions of Drs. Lupin, Cook and Paddison, *see* Cl. Exs. 5, 7 and 15, all provide substantial evidence to support the administrative law judge's finding of a causal relationship between claimant's impairment and the work accident, and the administrative law judge reasonably evaluated the medical opinion evidence as a whole, we affirm the administrative law judge's finding.

Employer also contests the administrative law judge's determination that it is not entitled to relief under Section 8(f), 33 U.S.C. §908(f). This provision acts to relieve employers from full compensation liability in certain situations where the consequences of an employee's work-related injury are exacerbated because of that employee's pre-existing permanent partial disability. *Bechtel Associates, P.C. v. Sweeney*, 834 F.2d 1029, 20 BRBS 49 (CRT) (D.C. Cir. 1987). The administrative law judge found that employer established that claimant is afflicted with a manifest pre-existing permanent partial disability -- diabetes -- but then ruled that this impairment did not contribute to claimant's current permanent disability, finding that claimant's "stroke/brain hemorrhage, brought about by a blow to the head at Employer's place of business, is the direct and major cause of Claimant's disability." Decision and Order at 17.

We disagree with employer that the administrative law judge erred in denying relief under Section 8(f). The application of Section 8(f) requires a showing of three distinct factual predicates: claimant must suffer from a pre-existing permanent partial disability in fact which would motivate a cautious employer either not to retain or to hire him for fear of increased compensation liability. *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977). Second, claimant's preexisting permanent partial disability must be manifest to employer. *Eymard & Sons*

[3]In deferring to the medical opinions supportive of causation in this case, the administrative law judge is entitled to discount medical opinions that may lack a proper foundation or are not adequately reasoned, *see Sinclair v. United Food and Commercial Workers*, 23 BRBS 148, 154-55 (1989), and reject conclusions which are based on an incorrect assumption regarding the severity of claimant's work-related accident.

Shipyard v. Smith, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir. 1989). Finally, in a case where the claimant is permanently partially disabled, the preexisting permanent partial disability must render the compensable disability "materially and substantially" greater than it would have been absent the pre-existing condition. *See Readel v. Foss Launch and Tug*, 20 BRBS 229, 232 (1988). Section 8(f) does not apply if the employee's disability is due solely to the work injury alone. *See* 33 U.S.C. §908(f)(1); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 737 F.2d 1295, 16 BRBS 107 (4th Cir. 1984).

The administrative law judge properly reasoned that, while claimant's diabetes constituted a statistical risk factor for stroke, there was no evidence that such was the case here, and, in any event, "[p]otential risk factors are plainly insufficient to satisfy the [contribution] requirement ... ." Decision and Order at 17. Further, the administrative law judge found that, while Dr. Lupin opined that claimant currently has restrictions due to his diabetes, he was not under such restrictions prior to the stroke and thus employer failed to attribute any of claimant's compensable disability to those restrictions. *Id.* Because the administrative law judge's evaluation of these medical opinions is not patently unreasonable, *see Cordero v. Triple A Machine Shop*, 580 F.2d 1335, 8 BRBS 744 (9th Cir. 1978), *cert. denied* 440 U.S. 911 (1979), and substantial evidence supports the administrative law judge's findings that claimant's pre-existing condition did not contribute to claimant's disability in this instance and that claimant's disability is due to his stroke, we affirm the administrative law judge's finding that employer has failed to prove entitlement to relief under Section 8(f).

We now turn to employer's appeal challenging the attorney's fee award. The administrative law judge granted counsel an attorney's fee award of $14,695.50 for fees and an award of expenses totalling $2,702.14. Employer avers that the administrative law judge erred in finding that the fee petition was adequately specific; that charges for a post-hearing conference should have been disallowed; that the administrative law judge should have determined that certain charges were excessive and that employer should not be liable for fees for two attorneys who represented claimant at the hearing.

Employer's contentions are without merit. The administrative law judge acted within his discretion in finding that counsel's fee petition was sufficiently specific and complied with the standards for adequate petitions as set forth in 20 C.F.R. §702.132 "in all material respects." Supplemental Decision and Order at 2; *see Forlong v. American Security & Trust Co.*, 21 BRBS 155, 163 (1988). The administrative law judge also reasonably allowed hours claimed for post-hearing conferences. The record was held open for post-hearing briefs and depositions. *See Morris v. California Stevedore & Ballast Co.*, 10 BRBS 375 (1979).

Lastly, the administrative law judge considered and rejected employer's objections to the number of hour requested and fees for two attorneys. Supplemental Decision and Order at 2. Employer has not met its burden of showing that the administrative law judge abused his discretion in awarding the fees in question in this case. *See generally Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS 434 (1989); *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94 (1988). We therefore affirm the Supplemental

Decision and Order awarding attorney's fees.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Supplemental Decision and Order Awarding Attorneys' Fees are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge