BRB No. 12-0642

PASQUALE CANTONE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	DATE ISSUED: 07/23/2013
	)	
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 Special Fund Relief of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

Stephen C. Embry (Embry and Neusner), Groton, Connecticut, for claimant.

Edward W. Murphy (Morrison Mahoney LLP), Boston, Massachusetts, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Special Fund Relief (2011-LHC-00275 and 2011-LHC-02074) of Administrative Law Judge Colleen A. Geraghty rendered on claims 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).

Claimant worked for employer from 1975 until July 25, 1995. Tr. at 31-32. For the last ten years of his employment, claimant worked as an inside inspector, inspecting material that went on submarines to ensure that it met various criteria. In 1989, claimant suffered a non-work-related heart attack and underwent coronary artery bypass surgery as a result. *Id*. at 33. Claimant was out of work for some time, but he subsequently returned to work with a 25-pound lifting restriction. *Id*. at 35-36, 38. Following his return to work, claimant testified he experienced shortness of breath, chest pains, anxiety, and nervousness. *Id*. at 33-34, 46. In 1991, upon suffering an angina attack at work, claimant was taken by ambulance to the hospital. *Id*. at 39-40. In 1993 or 1994, rumors spread that employer would not be receiving additional contracts and that lay-offs would occur; claimant became worried about losing his job. *Id.* at 50-51. Claimant's wife testified that she frequently called claimant's supervisors to check on claimant and express concerns that he was going to have another heart attack; she also explained to claimant's supervisors how concerns over lay-offs were affecting claimant. *Id*. at 94. Employer laid off employees during this period; however, claimant was spared because of his seniority. On July 26, 1995, Dr. Fortunato diagnosed stress and anxiety and took claimant off work for one month. EX 3. Claimant never returned to work. Tr. at 63, 68, 85. Since leaving work in 1995, claimant has continued to have anxiety and cardiac symptoms. The record reflects that between 2000 and 2011, claimant underwent six cardiac procedures and suffered a second myocardial infarction in 2004. CXs 39, 40-2. In May 2011, claimant had a nervous breakdown. Tr. at 66.

On May 13, 2009, claimant filed claims for compensation for a work-provoked angina attack in 1991 and for depression and anxiety in 1995, which he attributed to "stress and overwork."[1] EXs 9, 11. Claimant filed his notice of injury forms on the same date. EXs 10, 12. On April 7, 2011, claimant filed a third claim for compensation, listing the nature of his injury as "heart, depression, anxiety" and the date of injury as "on or about July 29, 1991." CX 13. It is undisputed that employer did not file notice of injury forms, pursuant to Section 30(a) of the Act, 33 U.S.C. §930(a), until after the claims had been filed.

The administrative law judge found that, although claimant did not give employer timely notice of his injuries pursuant to Section 12(a), 33 U.S.C. §912(a), such failure was excused pursuant to Section 12(d)(2) of the Act, 33 U.S.C. §912(d)(2), because

[1]Claimant argued that his disability "flowed from symptoms of depression and anxiety caused by the combined effect of work-related chest pains and cardiac symptoms, along with the mental effect that the rumors of layoffs caused [claimant.]" Cl.'s Post Hr. Br. at 10.

employer was not prejudiced. The administrative law judge further found that claimant's claims were not barred as untimely under Section 13(a), 33 U.S.C. §913(a), because employer was aware of claimant's injuries and had sufficient information to know they may be work-related, yet employer did not file notice of injury forms as required by Section 30(a). Thus, the administrative law judge found the statute of limitations had been tolled pursuant to Section 30(f), 33 U.S.C. §930(f). On the merits, the administrative law judge found that claimant established a causal link between his cardiac and psychological injuries and his work, that claimant is disabled from returning to his usual employment, and that employer did not establish the availability of suitable alternate employment. The administrative law judge thus awarded claimant permanent total disability benefits commencing July 26, 1995. 33 U.S.C. §908(a). The administrative law judge awarded employer Section 8(f), 33 U.S.C. §908(f), relief. Employer appeals the administrative law judge's award of benefits, and claimant responds, urging affirmance.

Employer first contends the administrative law judge erred in finding it was not prejudiced by claimant's fourteen-year delay in giving notice of his injuries such that claimant's late notice was not excused. Section 12(a) states that a claimant must provide his employer with notice of his injury "within thirty days after the date of such injury . . . or thirty days after the employee . . . is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of a relationship between the injury . . . and the employment." 33 U.S.C §912(a). Failure to provide timely notice under Section 12(a) bars a claim unless the untimely filing is excused under Section 12(d), 33 U.S.C. §912(d). *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004). Claimant's failure to provide timely notice of injury may be excused for any of three reasons: the employer had knowledge of the injury, or the employer was not prejudiced by the claimant's failure to file a timely notice of injury, or the district director excused the failure to file. *Boyd v. Ceres Terminals*, 30 BRBS 218 (1997). In order to rebut the Section 20(b) presumption that timely notice was given, employer must produce substantial evidence that it did not have knowledge of the injury and that it was prejudiced by the late notice. 33 U.S.C. §920(b); *Bechtel v. Associates, P.C. v. Sweeney*, 834 F.2d 1029, 20 BRBS 49(CRT) (D.C. Cir. 1987); *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989).

In support of its allegations of prejudice, employer referenced the testimony of its vocational consultant, Mr. Calandra, that it was not "ideal" to look to old newspapers to conduct a labor market survey, that he would have "preferred" to have conducted the survey earlier, and that it was difficult to establish the wages for positions in 1995. The administrative law judge rejected this as evidence of prejudice, properly noting that a conclusory allegation of an inability to investigate the claim when it was fresh is insufficient to establish prejudice. *See Kashuba v. Legion Ins. Co.*, 139 F.3d 1273, 32 BRBS 62(CRT) (9th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999); *ITO Corp. v. Director, OWCP [Aples]*, 883 F.2d 422, 22 BRBS 126(CRT) (5th Cir. 1989); *Vinson v.*

Resolve Marine Services, 37 BRBS 103 (2003); *Bustillo v. Southwest Marine, Inc.*, 33 BRBS 15 (1999). The administrative law judge relied on Mr. Calandra's testimony that he did not have any difficulty locating the information needed for the retroactive survey and that the time lapse did not prevent him from conducting an investigation and concluding that claimant is "a less than favorable candidate for employment" to find that employer was not prejudiced by claimant's delay in providing notice of his injuries.[2] As the administrative law judge's finding is rational, supported by substantial evidence, and in accordance with law, we affirm that claimant's failure to comply with Section 12(a) did not bar his claims. *Williams v. Nicole Enterprises*, 21 BRBS 164 (1988), *aff'd mem. sub nom. Jones v. Director, OWCP*, 915 F.2d 1557 (1st Cir. 1990); *see also Preston*, 380 F.3d 597, 38 BRBS 60(CRT).

Employer next contends the administrative law judge erred in finding that the Section 13(a) statute of limitations was tolled because employer had knowledge of claimant's work-related injuries and failed to file a timely first report of injury under Section 30(a). 33 U.S.C. §§913(a), 930(a), (f). Section 13(a) requires that a claim for disability or death benefits be filed within one year after the injury. 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 his injury, employment, and disability. *See, e.g., Preston*, 380 F.3d 597, 38 BRBS 60(CRT). 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); *see generally Bath Iron Works Corp. v. U.S. Dept. of Labor [Knight]*, 336 F.3d 51, 37 BRBS 67(CRT) (1st Cir. 2003). Section 30(f) provides that where an employer has been given notice or has knowledge of an injury as under Section 12(d)(1) and fails to file a timely first report of injury under Section 30(a), the limitations period set forth in Section 13 does not begin to run until such report has been filed. 33 U.S.C. §930(f); *Blanding v. Director, OWCP*, 186 F.3d 232, 33 BRBS 114(CRT) (2d Cir. 1999); *Stark*, 833 F.2d at 1028, 20 BRBS at 44(CRT). Employer may overcome the Section 20(b) presumption of timeliness by presenting substantial evidence that it did not receive notice or have knowledge of the work-related injury. *Id*.

In this case, the administrative law judge found that employer was aware that claimant's work aggravated his cardiac condition in 1991 because claimant suffered an angina attack at work after which he was taken to the hospital by ambulance. She found that, thereafter, claimant's supervisor assigned him easier tasks and allowed him to take breaks at work and claimant's wife called claimant's supervisors to express concern that

[2]Employer's argument that it could not account for claimant's cardiac condition in a retroactive survey is without merit, given that Mr. Calandra addressed claimant's cardiac condition in his survey. EX 15 at 87.

claimant might suffer another heart attack. Decision and Order at 14; Tr. at 37-41. The administrative law judge also found that employer should have been aware that claimant's anxiety was work-related because claimant's wife testified that she called claimant's supervisors regularly and told them he was anxious about the layoffs. Decision and Order at 14; Tr. at 94. Thus, the administrative law judge concluded that employer was aware of the potential work-relatedness of claimant's cardiac condition and his anxiety and should have filed reports of injury pursuant to Section 30(a). As employer did not do so, the administrative law judge found the statute of limitations tolled pursuant to Section 30(f).

With respect to claimant's cardiac condition, employer contends the administrative law judge erred in finding it should have known of the work-relatedness of the angina attack in 1991 in view of claimant's prior heart attack. Similarly, employer asserts that merely because claimant had physical limitations due to his heart condition and his wife worried he would suffer another heart attack does not indicate his cardiac symptoms are work-related in view of claimant's prior, non-work-related heart attack. We agree that the administrative law judge did not adequately explain her finding that employer should have known that claimant's disabling cardiac condition was work-related based on the occurrence of the 1991 angina attack and claimant's wife's telephone calls. Thus, for the following reasons, we vacate the finding that claimant's cardiac claim is not time-barred.

In *Stark*, 833 F.2d 1025, 20 BRBS 40(CRT), the United States Court of Appeals for the District of Columbia Circuit held that where employer knew of the claimant's respiratory ailment but had not been put on notice that it could be work-related, its failure to file a Section 30(a) report of injury did not toll the Section 13 limitations period pursuant to Section 30(f). The claimant in *Stark* admitted he did not tell employer of his belief he had a work-related condition; the court stated that the claimant's long history of respiratory complaints prior to his employment would suggest non-work causes, and his doctor's letters did not mention a work connection. In holding that employer had not been put on notice of a work-injury, the court stated, "We refuse to impose upon the employer the duty to conduct further investigation when the employee informs the employer that he has seen a doctor, is ill, and cannot return to work, but when neither the employee nor his attorney make any mention that the illness may be job related." *Stark*, 833 F.2d at 1028, 20 BRBS at 45(CRT), *citing Strachan Shipping Co. v. Davis*, 571 F.2d 968, 8 BRBS 161 (5th Cir. 1978). The court additionally held that an employer's adoption of health measures, coupled with information that the employee suffers the type of ailment against which the measures are aimed, cannot support an inference that an employer had notice of a causal connection between the employee's illness and work. *Stark*, 833 F.2d at 1028, 20 BRBS at 45(CRT).

As the claimant here, similar to the claimant in *Stark*, had a history of pre-existing cardiac problems that could explain his symptoms and angina at work, the facts that claimant experienced cardiac symptoms at work, that his wife called to express concern,

and that employer took precautions at work to avoid a work-related injury do not necessarily establish that employer had notice that claimant suffered from a work-related cardiac condition. *Stark*, 833 F.2d 1025, 20 BRBS 40(CRT); *see* CX 41. Moreover, in 1993, Dr. Puerini wrote a note to employer that claimant got tired because of his "underlying medical condition" and should be excused if he could not work a 10-hour day. CX 8. In light of the foregoing, we vacate the administrative law judge's findings that the statute of limitations was tolled pursuant to Section 30(f) and that claimant's cardiac claim is not time-barred. On remand, the administrative law judge must again consider whether claimant's claim for a cardiac injury was timely filed. In so doing, she must first make a finding concerning claimant's date of awareness of a relationship between his cardiac condition, his work and his disability, pursuant to Section 13(a), which she did not do in her initial decision. *See, e.g.*, *Dyncorp Int'l v. Director, OWCP [Mechler]*, 658 F.3d 133, 45 BRBS 61(CRT) (2d Cir. 2011); *Wendler v. American National Red Cross*, 23 BRBS 408 (1990) (McGranery, J., dissenting); *see also Speedy v. General Dynamics Corp.*, 15 BRBS 448 (1983) (statute of limitations expired before employer gained knowledge of the injury). The timeliness of claimant's claim must be measured from this date, unless the time for filing was tolled. The administrative law judge must then reconsider in view of *Stark* and the evidence of record whether employer offered substantial evidence that it never gained knowledge of a work-related injury and therefore was not required to file a Section 30(a) report. 33 U.S.C. §§920(b), 930(f); *see generally Alston v. Safeway Stores, Inc.*, 19 BRBS 86 (1986).

With respect to whether claimant's psychological injury claim is barred under Section 13, employer conceded awareness of claimant's stress and anxiety arising from concern over how a series of layoffs, due to a decline in business, would affect claimant's continued employment. Emp. Br. at 2. However, as will be discussed in our analysis of Section 20(a), *Marino v. Navy Exchange*, 20 BRBS 166 (1988) establishes that layoffs cannot form the basis for a claim. Therefore, we hold that employer did not have knowledge of a psychological injury claim on this basis. *See* discussion, *infra.*

Claimant additionally argued before the administrative law judge that he suffered a psychological injury as a result of his suffering work-related cardiac symptoms, and employer challenged this claim as barred under Section 13. The administrative law judge did not address this issue separately from the psychological claim due to the layoffs. Therefore, on remand, the administrative law judge must make a finding as to claimant's date of awareness under Section 13(a) and address the timeliness of claimant's claim for a psychological injury arising out of a work-related cardiac condition. *See Stark*, 833 F.2d at 1028, 20 BRBS at 44(CRT); *Speedy*, 15 BRBS 448.

Employer additionally challenges the administrative law judge's findings that claimant's cardiac and psychological injuries are compensable, work-related injuries. In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after he establishes a prima facie case. To

establish a prima facie case, the claimant must show that he sustained a harm or pain and that conditions existed or an accident occurred at his place of employment which could have caused the harm or pain. *Preston*, 380 F.3d 597, 38 BRBS 60(CRT); *American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once the claimant establishes a prima facie case, Section 20(a) applies to relate the injury to the employment, and the employer can rebut this presumption by producing substantial evidence that the injury is not related to the employment. *Preston*, 380 F.3d 597, 38 BRBS 60(CRT); *Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT). Where aggravation of a pre-existing condition is at issue, the employer must establish that work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury.[3] *See, e.g., Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998).

Employer avers that claimant's cardiac disability is the result of the gradual progression of his 1989 non-work-related heart attack. Employer asserts the administrative law judge erred in invoking the Section 20(a) presumption as there is no evidence tying claimant's cardiac condition to his employment. The administrative law judge found that claimant is entitled to the Section 20(a) presumption that he suffered a work-related aggravation of his cardiac symptoms. Decision and Order at 16. In so finding, the administrative law judge observed there is no dispute that claimant suffered from an underlying cardiac condition that caused symptoms including exhaustion, shortness of breath and angina. The administrative law judge further found that working conditions existed that could have aggravated or accelerated the harm, as claimant testified he was symptomatic at work and would need naps and frequent breaks when he had to do physical labor. Tr. at 39-41. Dr. Gaudio opined in 2011 after a review of claimant's records that "there seems to be little doubt that the physical exertion required by [claimant's] work and his stress on the job clearly aggravated his symptoms of shortness of breath and chest pains." CX 40 at 2-3. Dr. DiZio's November 1, 1995 report states claimant reported his shortness of breath and chest pain "appear to be aggravated by any physical exertion." CX 2 at 7. Substantial evidence supports the administrative law judge's invocation of the Section 20(a) presumption as claimant demonstrated both a harm and that working conditions existed that could have caused the harm or aggravated a pre-existing condition. *Preston*, 380 F.3d 597, 38 BRBS 60(CRT). Therefore, we affirm this finding.

[3]The aggravation rule provides that where an injury at work aggravates, accelerates or combines with a prior condition, the entire resultant disability is compensable. *Director, OWCP v. General Dynamics Corp. [Krotsis]*, 900 F.2d 506, 23 BRBS 40(CRT) (2d Cir. 1990) (citing *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*)).

The administrative law judge found that employer did not rebut the Section 20(a) presumption and that, assuming it did, the preponderance of the evidence supports the conclusion that claimant's employment aggravated his cardiac symptoms. Decision and Order at 17. While noting that it does not necessarily agree with the administrative law judge's finding on rebuttal, *see* Emp. Br. at 5 n. 3, employer concedes that the administrative law judge's weighing of the evidence is within her discretion. *Id*. at 9; *see generally Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 44 BRBS 13(CRT) (1st Cir. 2010). Therefore, as it is supported by substantial evidence, we affirm the finding that claimant's employment caused his cardiac condition to become symptomatic. *See generally Service Employees Int'l, Inc. v. Director, OWCP [Barrios]*, 595 F.3d 447, 44 BRBS 1(CRT) (2d Cir. 2010).

Nonetheless, employer contends that the administrative law judge did not adequately address whether claimant's work-related cardiac symptoms caused his disability. We agree. Therefore, we vacate the award of benefits premised on claimant's cardiac condition and we therefore remand the case for further findings. Upon finding that claimant suffered work-related symptoms of his underlying cardiac condition, the administrative law judge summarily found that this aggravation is compensable in the form of total disability benefits. Decision and Order at 17. As employer correctly notes, however, claimant did not leave work in 1995 due to the 1991 angina episode or any work-related cardiac symptoms.[4] Claimant returned to work after his angina episode and kept working. *See* EX 3. On June 20, 1995, Dr. Fortunato reported that claimant "denies chest discomfort or dyspnea." Dr. Fortunato reported that claimant's cardiac status was stable with no angina. CX 3. Claimant left work in July 1995 due to stress and anxiety. *See* CX 37 (employer's clinic note on Nov. 2, 1995 states that claimant reports he is in good health except for anxiety); CX 2 (Nov. 1, 1995 report of Dr. DiZio); CX 41-2. Disability forms submitted by Dr. Puerini continually state that claimant was totally disabled due to anxiety and stress. *See, e.g.*, CXs 9-27; *see* CX 17 (Jan. 25, 1996 report attributing claimant's mental impairment to physical symptoms due to job stress).[5] In his November 1, 1995 report, Dr. DiZio stated claimant "appears primarily limited by his physical condition and deteriorating cardiovascular health." CX 2. As the administrative law judge did not address whether claimant was disabled by the work-related aggravation of his underlying cardiac condition, as opposed to the natural progression of his

[4]The claim is for disability commencing in 1995, and not for the angina attack in 1991.

[5]Some of the disability forms also state claimant is disabled by "HTN," presumably hypertension. This condition is not specifically linked to claimant's cardiac condition.

underlying cardiac disease, we remand the case for her to do so.[6] *See Lamon v. A-Z Corp.*, 46 BRBS 27 (2012), *vacating on recon*. 45 BRBS 73 (2011) (discussing disability due to work-related aggravation as opposed to natural progression of underlying condition); *see generally Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999).

Employer also asserts the administrative law judge erred in finding that claimant suffered from a compensable work-related psychological condition. Specifically, employer asserts that claimant's psychological injury arose from a "legitimate personnel action," namely employer's downsizing, and, therefore, is barred by *Marino v. Navy Exchange*, 20 BRBS 166 (1988). We agree.

With regard to psychological injury cases, the Board has held that a "legitimate personnel action," such as a reduction-in-force, is not a working condition that can form the basis of a compensable injury. *Marino*, 20 BRBS at 168. The Board reasoned that to hold otherwise would unfairly hinder an employer in making legitimate personnel decisions and in conducting its business; an employer must be able to make decisions regarding layoffs without the concern that it will involve worker's compensation remedies. *Id.* Nevertheless, in *Marino*, the Board drew a distinction between legitimate personnel actions and "working conditions such as 'cumulative stress on the job due to supervising a number of locations, insufficient personnel to perform the job, working more than the required hours, and performing the duties of his subordinates,'" and it remanded that case for the administrative law judge to address the claimant's allegation that his injury was due to work-related cumulative stress arising out of working conditions. *Id*.

Following *Marino*, the Board held that, irrespective of disciplinary actions, stressful general working conditions, if alleged and established by the claimant, can satisfy the "working conditions" element of a prima facie case. In such instances, the administrative law judge must consider the facts, excluding the legitimate personnel actions, to determine whether conditions existed that could have caused or contributed to claimant's injury. *See Sewell v. Noncommissioned Officers' Open Mess*, 32 BRBS 134 (1998) (*en banc*) (Brown and McGranery, JJ., dissenting).

In *Pedroza v. BRB*, 624 F.3d 926, 44 BRBS 67(CRT) (9th Cir. 2010), the United States Court of Appeals for the Ninth Circuit held that psychological injuries arising from legitimate personnel actions are not compensable under the Act and that the Board's development of the *Marino-Sewell* doctrine is a correct interpretation of the Act and a reflection of its underlying policy. In so holding, the court explained that the distinction

[6]Employer, on appeal, does not contest the administrative law judge's finding that claimant has been unable to perform any work since leaving work in 1995. Decision and Order at 20-22.

that the *Marino-Sewell* doctrine creates between "legitimate" or "illegitimate" personnel actions "is about whether the employer's actions created an environment of poor working conditions to trigger psychological injuries." *Pedroza*, 624 F.3d at 933, 44 BRBS at 72(CRT).

In this case, the administrative law judge found that *Marino* does not bar claimant's psychological injury claim because employer never took a "legitimate personnel action" against claimant. The administrative law judge stated that the Marino doctrine "cannot be stretched so far as to apply to fear of possible future personnel actions," but, if it could, claimant's fear of a possible lay-off was not the sole cause of his psychological injury; rather, claimant's work-related chest pains also contributed to his stress, depression, and anxiety.[7] Decision and Order at 18.

We disagree with the administrative law judge's finding that *Marino* does not apply to this case. *Marino* establishes that employer's downsizing its workforce is a "legitimate" personnel action and, therefore, not a "working condition" that can form the basis for the claim. *Marino*, 20 BRBS at 168. There is no requirement in *Marino* or its progeny that the claimant be the particular target of the legitimate personnel action. Further, the rationale behind *Marino* is that employers should be able to make legitimate business decisions without incurring compensation liability under the Act each time they do so. This rationale is applicable regardless of against whom the legitimate personnel action is taken.[8] As the only action on the part of employer that claimant argues caused his anxiety is a legitimate personnel action and, therefore, as a matter of law, is not a working condition, claimant's psychological injury due to fear of layoffs is not compensable. *Marino*, 20 BRBS at 168; *see Pedroza*, 624 F.3d 926, 44 BRBS 67(CRT). Therefore, we reverse the award of benefits premised on claimant's psychological injury due to anxiety over the layoffs.

The administrative law judge properly stated claimant's psychological injury claim is compensable if claimant had a work-related physical harm that resulted in psychological harm. *See generally Director, OWCP v. Potomac Electric Power Co.*, 607 F.2d 1378, 10 BRBS 1048 (D.C. Cir. 1979); 33 U.S.C. §902(2). The administrative law judge did not specifically address whether claimant's work-related cardiac aggravation injury resulted in psychological disability irrespective of employer's legitimate personnel decisions. Thus, on remand the administrative law judge must address whether claimant's *work-related* cardiac injury caused or contributed to claimant's psychological

[7]Claimant's department head testified that there, in fact, were lay-offs at the time in question. EX 21 at 16.

[8]In fact, the policy consideration is even stronger when the action is not taken against the claimant.

disability commencing in 1995 or whether claimant was disabled only by his non-compensable psychological condition arising out of a legitimate personnel action. 33 U.S.C. §902(2); *see generally Vessel Repair, Inc.*, 168 F.3d 190, 33 BRBS 65(CRT).

Accordingly, we affirm the administrative law judge's findings that employer was not prejudiced by claimant's late notice of his injuries pursuant to Section 12(d) and that claimant's work caused his underlying cardiac condition to become symptomatic. We vacate the administrative law judge's finding that claimant's claims are not time-barred pursuant to Section 13(a) and we remand the case for further findings consistent with this decision. We vacate the award of total disability benefits premised on claimant's cardiac condition and remand the case for further findings. We reverse the award of total disability benefits premised on claimant's psychological condition as it pertains to anxiety from employer's layoffs. We remand the case for further consideration of the claim for psychological disability as a consequence of the work-related cardiac symptoms.[9]

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge

[9]The administrative law judge must reconsider the award of medical benefits in view of her findings on remand concerning the work-relatedness of claimant's conditions.