BRB Nos. 95-2152
and 95-2152A

HENRY S. MORGAN, JR.	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	
Cross-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order of E. Earl Thomas and the Supplemental Decision and Order Awarding Attorney Fees of Richard D. Mills, Administrative Law Judges, United States Department of Labor.

M. Juliet Lawson (Scruggs, Millette, Lawson, Bozeman & Dent, P.A.), Pascagoula, Mississippi, for claimant.

Richard P. Salloum and Ronald T. Russell (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order (95-LHC-56) of Administrative Law Judge E. Earl Thomas and employer appeals the Supplemental Decision and Order Awarding Attorney Fees (95-LHC-56) 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.* (the Act).[1] We must affirm the findings of fact and conclusions of law of the administrative law judge if they are supported by substantial

[1]In this case, where appeals have been consolidated, the Board considers the date of the last appeal, in this case February 5, 1996, to be operative for purposes of the one-year period in Public Law Nos. 104-134 and 104-208. *See Wilson v. Crowley Marine*, 30 BRBS 199, 201 n.3 (1996).

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). 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 regularly used hand-held vibrating tools in the course of his employment as a pipefitter helper/apprentice and outside machinist for employer between 1942 and 1987. Claimant testified that in 1980 or 1981 he began experiencing tingling, numbness, or "locking up" of his hands and/or arms while using vibrating tools, which necessitated that he temporarily stop what he was doing until he regained circulation and the symptoms disappeared. These symptoms did not preclude claimant from performing his job duties and recurred intermittently at work until claimant's voluntary retirement on February 2, 1987. Claimant's symptoms resurfaced post-retirement whenever he used vibrating equipment. On September 22, 1993, claimant consulted Dr. Pelmear regarding his symptoms. Dr. Pelmear diagnosed hand-arm vibration syndrome, a type of repetitive strain injury recently recognized as an occupational disease by the National Institute of Occupational Safety and Health, which is characterized by the following components occurring singularly or in any combination: vascular, resulting in finger blanching and vasospasm; sensorineural, resulting in tingling, numbness and sleep disturbance, symptoms also common to carpal tunnel syndrome; and musculoskeletal, resulting in loss of grip strength. On October 13, 1993, claimant filed a claim under the Act seeking disability compensation and medical benefits for hand-arm vibration syndrome.

In a Decision and Order issued on August 25, 1995, after finding that the claim was timely under Sections 12 and 13, 33 U.S.C. §§912 and 913, Judge Thomas denied claimant compensation for hand-arm vibration syndrome. Crediting the testimony of Drs. Lowe and McBride, he awarded claimant compensation for a 10 percent impairment of the right hand due to carpal tunnel syndrome, pursuant to Section 8(c)(3) and (19) of the Act, 33 U.S.C. §908(c)(3),(19). Employer appeals this decision, contending that the administrative law judge erred in finding that the claim was not time-barred under Sections 12 and 13, and in finding that claimant's carpal tunnel syndrome is work-related. Claimant responds, urging affirmance.

Claimant has also filed a cross-appeal, in which he seeks interest, penalties, and future medical benefits. In addition, claimant contends that the administrative law judge erred in failing to award him compensation for a 25 percent whole person impairment for hand-arm vibration syndrome based on Dr. Pelmear's diagnosis and disability assessment. In the alternative, claimant urges the Board to affirm the administrative law judge's award for a 10 percent permanent impairment of the right hand. Employer responds, urging affirmance of the administrative law judge's rejection of the diagnosis of hand-arm vibration syndrome.

Following the issuance of the administrative law judge's Decision and Order, claimant's counsel submitted a fee petition, requesting $7,052.50, representing 40.30 hours of services at $175 per hour, plus $582.90 in expenses, for work performed before the administrative law judge. In a Supplemental Decision and Order dated January 8, 1996, Administrative Law Judge Richard D. Mills awarded counsel a fee of $5,037.50, representing 40.30 hours of services at an hourly rate of $125, plus $582.90 in expenses. Employer appeals this fee award, incorporating its objections

below into its appellate brief. Claimant responds, urging affirmance.

Employer initially argues that because the claimant, by his own testimony, was aware as early as 1981, and certainly no later than 1985, that the use of certain tools while working for employer would cause problems with his hands, his notice and claim filed on October 13, 1993, are not timely under Sections 12 and 13 of the Act. Section 13(b)(2) provides that in the case of an occupational disease that does not immediately result in disability or death, the statute of limitations does not begin to run until the employee is aware or should have been aware of the relationship between his employment, the disease, and the disability. 33 U.S.C. §913(b)(2); *Martin v. Kaiser Co., Inc.*, 24 BRBS 112 (1990) (Dolder, J., concurring in the result only). Section 12(a) of the Act requires a notice of injury, in a case involving an occupational disease, to be filed "within one year after the employee...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...disability." 33 U.S.C. §912(a)(1988). Thus, in an occupational disease case, the filing period does not begin to run under Sections 12 and 13 until claimant is actually disabled, or in the case of a voluntarily retired employee, until a permanent impairment exists. *See Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988); *Lindsay v. Bethlehem Steel Corp.*, 18 BRBS 20 (1986); 20 C.F.R. §§702.212(b), 702.222. Section 20(b), 33 U.S.C. §920(b), provides claimant with a presumption, applicable to both Sections 12 and 13, placing the burden of proof on employer to produce substantial evidence that the claim was not timely filed or notice timely given. *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989).

Employer's argument that the administrative law judge erred in finding that claimant's October 13, 1993, notice and claim are timely is rejected. Although employer maintains that as early as 1981, claimant was aware, or should have been aware, of the relationship between his injury and his employment, the administrative law judge rationally found that while claimant was aware that his hands and arms would lock up or begin tingling when he used vibrating tools, there is no evidence that he was aware, or should have been aware, that the vibration itself was actually causing his symptoms until he was so informed by Dr. Pelmear on September 22, 1993. Moreover, the administrative law judge rationally determined that claimant did not believe he had any impairment of earning capacity or appreciate the true nature of his condition prior to September 22, 1993, as he was able to continue working despite his symptoms.[2] Finally, the administrative law judge noted that until Dr. Pelmear assigned claimant a disability rating on September 22, 1993, there was no indication that claimant had any permanent impairment, as is required to commence the time limitations of Sections 12 and 13 running where, as here, the claim involves a voluntary retiree. CX 2; *see Lombardi v. General Dynamics Corp.*, 22 BRBS 323 (1989). As the administrative law judge's finding that claimant did not possess the requisite awareness necessary to commence the Sections 12 and 13 time periods prior to Dr. Pelmear's September 22, 1993, diagnosis is rational, supported by substantial evidence, and in accordance with applicable law, we affirm his

[2]In so concluding, the administrative law judge found the fact that Dr. Pelmear may have misdiagnosed claimant's disease as hand-arm vibration syndrome to be of no consequence because carpal tunnel syndrome is a related disease. Decision and Order at 19.

determination that the October 13, 1993, notice and claim are timely. *See generally Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS 154 (1996); *Love v. Owens-Corning Fiberglass Co.*, 27 BRBS 148 (1993).

Turning to claimant's and employer's arguments regarding causation, we initially reject claimant's assertion that the administrative law judge erred in failing to award him compensation for a 25 percent whole person impairment for hand-arm vibration syndrome in both arms based on Dr. Pelmear's opinion because the administrative law judge's finding that claimant did not suffer from hand-arm vibration syndrome is rational and supported by substantial evidence.[3] Decision and Order at 19. In reaching this conclusion, the administrative law judge noted Dr. Pelmear's testimony that the vast majority of hand-arm vibration syndrome patients experience finger blanching, vasospasm, and loss of grip strength. He then determined, however, that as none of the physicians rendering relevant opinions found any reduction in claimant's grip strength and the most recent testing performed just prior to the hearing revealed little, if any, vasospasm, claimant did not have two of the recognized indicators of hand-arm vibration syndrome. Accordingly, he reasoned that the sensorineural component was the only component present as of the time of the hearing which could be used to differentiate hand-arm vibration syndrome from carpal tunnel syndrome and proceeded to consider the relevant testimony. Decision and Order at 17-18. He noted that Dr. Pelmear, claimant's treating physician, testified that, while the symptoms of the sensorineural component of hand-arm vibration syndrome are also common to carpal tunnel syndrome, claimant's nerve conduction tests supported a diagnosis of hand-arm vibration syndrome; claimant showed neuropathy of both the median and ulnar nerves, and ulnar nerve involvement is specific to hand-arm vibration syndrome. Tr. at 206, 214.

After considering Dr. Pelmear's testimony, however, the administrative law judge rejected his diagnosis in light of the contrary testimony of Drs. Lowe and McBride, which was corroborated by the medical report of Dr. Bassam, EX 15. Drs. Lowe and McBride testified that claimant's nerve conduction tests showed slowing in the right median nerve, indicative of carpal tunnel syndrome, and peripheral polyneuropathy, a generalized sensory slowing in all of the extremities, which was a systemic, nonspecific, and multifactorial condition not due to hand-arm vibration syndrome because claimant's upper and lower extremities were equally affected. Tr. at 268, 269, 276, 278, 308, 309, 322, 329; EX 12. The administrative law judge is not bound to accept the opinion or theory of any particular medical examiner but is free to accept or reject all or any part of any testimony as he sees fit. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Inasmuch as the medical opinions of Drs. Lowe and McBride provide substantial evidence to support the administrative law judge's determination that claimant does not suffer from hand-arm vibration syndrome, we affirm the administrative law judge's denial of benefits for this condition. *See generally Calbeck v. Strachan*

[3]Contrary to claimant's assertions, the administrative law judge did not find that claimant had hand-arm vibration syndrome which had improved to a point where the extent of impairment to the vascular and musculoskeletal components of the disease was insufficient to be compensable under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (3d ed. 1988).

Shipping Co., 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963).

Employer, however, contends that the administrative law judge's finding that claimant's carpal tunnel syndrome in his right hand is work-related is not supported by substantial evidence. Section 20(a) of the Act, 33 U.S.C. §920(a), provides claimant with a presumption that his condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13 (CRT)(2d Cir. 1989). Once claimant has invoked the presumption, the burden of proof shifts to employer to rebut it with substantial countervailing evidence. *Merrill*, 25 BRBS at 144. If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers*, 196 U.S. 280 (1935).

After review of the Decision and Order in light of the relevant evidence and employer's arguments on appeal, we affirm the administrative law judge's finding that claimant's carpal tunnel syndrome is work-related because it is rational, supported by substantial evidence, and in accordance with applicable law. *See O'Keeffe*, 380 U.S. at 359. As the medical opinions credited by the administrative law judge conclude that claimant suffers from carpal tunnel syndrome, and it is undisputed that claimant's work involved the use of hand and vibratory tools which could have caused or aggravated this condition, claimant is entitled to invocation of the Section 20(a) presumption that this condition is work-related. Although the administrative law judge recognized the applicability of the Section 20(a) presumption, he did not analyze the evidence accordingly, but summarily concluded that claimant's carpal tunnel syndrome is an occupational disease and that claimant was permanently partially disabled due to prolonged exposure to injurious conditions in his employment. Decision and Order at 19-20. Any error the administrative law judge may have made in this regard is harmless on the facts presented, as there is no evidence of record sufficient to rebut the Section 20(a) presumption. *See Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990).

None of the evidence cited by employer is sufficient to establish the absence of a work-related causal connection. Although Dr. Lowe opined that people with broken wrists like claimant suffered in 1953 can develop carpal tunnel syndrome, this testimony is insufficient to rebut the Section 20(a) presumption because it does not rule out claimant's employment as a cause of his condition. *See Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990). Similarly, while Dr. Pelmear diagnosed hand-arm vibration syndrome rather than carpal tunnel syndrome, he related claimant's hand condition to his employment, Tr. at 214. In addition, the fact that only claimant's right wrist was affected does not, as employer suggests, mandate a finding that claimant's right-sided carpal tunnel syndrome is not work-related. Moreover, as Dr. McBride specifically recognized claimant's work as a contributing cause of his carpal tunnel syndrome, Tr. at 328, 329, his opinion is clearly insufficient for rebuttal.[4] *See generally Obert v.*

[4]In light of Dr. McBride's testimony, employer's assertion that no evidentiary basis exists in the record to support the administrative law judge's causation determination is without basis in the

John T. Clark & Son of Maryland, 23 BRBS 157 (1990). As there is no record evidence sufficient to establish rebuttal, causation is established as a matter of law.[5] *See Cairns v. Matson Terminals, Inc.*, 21 BRBS 252, 257 (1988). Accordingly, we reject employer's argument and affirm the administrative law judge's award of compensation for claimant's carpal tunnel syndrome. Claimant asserts on cross-appeal, as he did below, that he is entitled to interest, penalties, and future medical benefits. These issues were not addressed by the administrative law judge. In light of the administrative law judge's finding that claimant's condition is work-related, the case must be remanded for the administrative law judge to consider these issues.

Employer also contends that the administrative law judge erred in holding it liable for claimant's attorney's fee under Section 28(a) of the Act, 33 U.S.C. §928(a), because claimant failed to successfully prosecute his claim based on hand-arm vibration syndrome, the only theory of recovery advanced by claimant in his pleadings and at the hearing. In the alternative, citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992), employer argues that the fee requested should have been denied in its entirety or at least substantially reduced because claimant had no success on his hand-arm vibration syndrome theory and only limited success in obtaining minimal compensation for carpal tunnel syndrome, a theory refuted by claimant, his counsel, and his physician, which the administrative law judge raised *sua sponte*. Claimant responds that the *Hensley/Brooks* line of cases are not applicable on the facts presented, because the successful and unsuccessful claims in this case share a common core of facts and are based on related legal theories, and in light of the high degree of success claimant's counsel ultimately achieved. In addition, claimant maintains that the present case differs from *Brooks*, in that the administrative law judge did not make a finding of carpal tunnel syndrome on his own motion; claimant asserts that he raised this theory in his LS-201 filed on October 12, 1993, when he stated that compensation was being sought for "vibration-induced partial loss of use of both hands" as is evidenced by the fact that employer responded by filing a notice of controversion in which it disputed liability for alleged carpal tunnel syndrome.

Inasmuch as employer denied liability for any benefits and claimant was ultimately successful in obtaining compensation for carpal tunnel syndrome, which employer denied, we reject

---

record.

[5]Employer's argument that the administrative law judge's causation finding violates the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries*, ___ U.S. ___, 114 S.Ct. 2251, 28 BRBS 43 (CRT)(1994) is without merit. In *Greenwich Collieries*, the Court recognized that claimants benefit from the statutory presumption provided by Section 20(a). *Id.*, 114 S.Ct. at 2259, 28 BRBS at 47 (CRT). The Court struck down the rule that where the evidence is equally balanced, doubt should be resolved in favor of claimant. The holding in *Greenwich Collieries* does not affect employer's burden to rebut Section 20(a), but does require that once the presumption is rebutted, claimant bears the burden of proving causation by a preponderance of the evidence. *See Holmes v. Universal Maritime Service Corp.*, 29 BRBS 18, 21 (1995). Thus, *Greenwich Collieries* does not affect the resolution of the causation issue presented in this case.

employer's argument that the administrative law judge erred in holding it liable for claimant's attorney's fee. *See* 33 U.S.C. §928(a). *See generally Kinnes v. General Dynamics Corp.*, 25 BRBS 311 (1992); *Kazmarek v. I.T.O. Corp. of Baltimore, Inc.*, 23 BRBS 376 (1990). We agree with employer, however, that the $5,037.50 fee awarded by the administrative law judge cannot be affirmed. The administrative law judge did not address the potential limited success issues present in this case in determining the amount of the fee under *Hensley*, 461 U.S. at 424, and *Brooks*, 963 F.2d 1352, 25 BRBS at 161 (CRT).

Employer's assertion that claimant was awarded compensation based on a theory not advanced by claimant while the case was before the administrative law judge is consistent with the record. In *Hensley*, a plurality of the Supreme Court defined the conditions under which a plaintiff who prevails on only some of his claims may recover attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988. Specifically, it created a two-prong test focusing on the following questions:

> First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

461 U.S. at 435. Where claims involve a common core of facts, or are based on related legal theories, the Court stated that the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on litigation. If a plaintiff has obtained "excellent" results, the fee award should not be reduced simply because he failed to prevail on every contention raised. If the plaintiff achieves only partial or limited success, however, the product of hours expended on litigation as a whole, times a reasonable hourly rate, may result in an excessive award; the fee award should be for an amount that is reasonable in relation to the results obtained. *Hensley*, 461 U.S. at 435-436.

In *Brooks*, 963 F.2d at 1352, 25 BRBS at 161 (CRT), the court applied the *Hensley* analysis in a Longshore case where the claimant sought permanent total disability compensation based on an injury he sustained to his left toe. Although the administrative law judge denied the claim for permanent total disability, on his own motion he awarded Brooks compensation under the schedule for a twenty percent impairment of the left foot totalling $11,968.73. In reversing the Board's and the administrative law judge's finding that the claims were too interrelated to separate for purposes of assessing an attorney's fee, the United States Court of Appeals for the District of Columbia Circuit held that the scheduled and permanent total disability claims were separate claims based on different factual and legal theories. The court noted that the facts needed to demonstrate total disability go well beyond the medical reports needed to establish a partially dysfunctional foot. The court thus found the issues were unrelated, vacated the $24,000 attorney's fee and remanded the case for a fee award reasonably commensurate with claimant's degree of success pursuant to the second prong of the *Hensley* test.

The present case presents facts similar to *Brooks.* As the administrative law judge did not

address the partial success arguments which employer raised, we vacate his award of an attorney's fee. On remand, the administrative law judge should consider whether the successful and unsuccessful claims in the instant case shared a common core of facts or were based on related legal theories, and compute an appropriate fee based on the degree of claimant's success[6] and the regulatory criteria of 20 C.F.R. §702.132 consistent with *Brooks* and *Hensley*.[7]

Lastly, claimant's counsel has submitted a fee petition for work performed before the Board, requesting $1,093.75, representing 8.75 hours of services at $125 per hour. Employer responds that claimant's counsel's fee request is premature as the applicable regulation, 20 C.F.R. §802.203(c), provides that a fee petition for services rendered on appeal before the Board may be submitted within 60 days of issuance of the Board's Decision and Order, and the Board has yet to issue a Decision and Order in this case. In addition, employer reserves

[6]If claimant is successful on remand in obtaining penalties, interest, or future medical benefits, any additional benefits awarded should be considered by the administrative law judge in assessing the fee.

[7]In light of our decision to vacate the fee award, we need not address employer's remaining contentions.

its right to object to the fee requested based upon the lack of or limited success of claimant on the issues raised on appeal and cross-appeal.

We reject the argument that the fee request is premature. The Board's regulation at Section 802.203 states the time period after a decision when a petition may be submitted, but does not preclude earlier filing. In addition, a fee award may be made prior to the time that an award becomes final, although it is not enforceable until such time as all appeals are exhausted. *See Chavez v. Todd Shipyards Corp.*, 28 BRBS 185 (1994)(*en banc*)(Brown and McGranery, JJ., dissenting), *aff'g on recon*. 27 BRBS 80 (1993)(McGranery, J., dissenting) (decision on remand). In the present case, claimant successfully defended against employer's appeal and had limited success on cross-appeal to the extent that the case is being remanded for the administrative law judge to consider claimant's entitlement to penalties, interest, and future medical benefits. Claimant's counsel is thus entitled to a fee payable by employer reasonably commensurate with the necessary work performed before the Board. *See Chavez*, 28 BRBS at 190.

After consideration of counsel's fee petition, we disallow the 3.75 hours claimed on February 6, 1996, as claimant did not prevail in establishing his right to compensation for hand-arm vibration syndrome, his primary argument on cross-appeal, and only 2 and 1/2 lines of claimant's brief on cross-appeal actually concerned the issues on which he did prevail. Counsel is accordingly awarded a fee of $625 for the remaining work performed before the Board, representing 5 hours of services at $125 per hour to be paid directly to claimant's counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the Decision and Order Awarding Benefits of Administrative Law Judge Thomas is affirmed, and this case is remanded for further findings on the issues of interest, penalties and future medical benefits. The fee award made by the administrative law judge in his Supplemental Decision and Order Awarding Attorney Fees is vacated, and the case is remanded for further consideration of the fee consistent with this opinion. Claimant's counsel is awarded a fee of $625 for work performed before the Board payable directly to counsel by employer.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge