BRB Nos. 96-0693
and 96-0693A

ALGEBRA McBRIDE	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
ARMY AND AIR FORCE EXCHANGE SERVICE	)	
	)	
	)	
and	)	DATE ISSUED:_____
	)	
THOMAS HOWELL GROUP (AMERICAS), INCORPORATED	)	
	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Joel R. Williams, Administrative Law Judge, United States Department of Labor.

Michael Agnew (Agnew, Schlam & Bennett), Columbus, Georgia, for claimant.

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

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

PER CURIAM:

Employer, Army & Air Force Exchange Service ("AAFES"), appeals, and claimant cross-appeals,[1] the Decision and Order (93-LHC-1145) of Administrative Law Judge Joel R. Williams

[1]As the formal record in this case had not been forwarded to the Board, by Order dated January 31, 1997, the Board dismissed these appeals and remanded this case to the district director for reconstruction of the record. The formal record has been forwarded to the Board and these appeals are now reinstated on the Board's docket. In addition, the Board considers the one-year review period provided by Public Law Nos. 104-134 and 104-208 to commence on March 5, 1996, the date claimant's cross-appeal was filed. *Barker v. Bath Iron Works*, 30 BRBS 198 (1996)(Order). Since

awarding benefits 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 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 applicable law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant began working for employer in 1956 as a sales clerk, Tr. at 49-50, and advanced to the position of Exchange Manager at the AAFES Exchange in Korea in 1979. While in this capacity, claimant testified that he began to experience work-related pressure, which he attributed to conflicts between his son and the son of his superior, the Exchange's General Manager. Tr. at 57-59. Claimant returned to the United States in 1982, and was assigned to be the manager of the Post Exchange at Eglin Air Force Base in Florida. Claimant testified that he began to experience difficulties with his supervisor, whom claimant believed did not back him up in his supervision of the Exchange employees, and that he was suddenly required to study and absorb an unprecedented amount of training material in order to keep up with his responsibilities. Tr. at 62-63. Claimant also thought that the Exchange security staff was monitoring his activities. Tr. at 64-66.

Claimant first saw Dr. Gill, a psychiatrist, in 1983. Dr. Gill examined claimant on January 22, 1983, and noted the pace of claimant's work. CX-21: 7, 11-17. Dr. Gill initially diagnosed depression and paranoia which involved the stress encountered in claimant's work, and prescribed medication. *See* CX-21: 7-8, 30. Claimant was then absent from work for over two months. Tr. at 67.

In 1983, claimant received a below average performance rating at Eglin AFB, and continued to experience problems with his supervisors at work. Claimant was transferred again in 1983, this time at his request, to the PX at Ft. Benning, where he remained until November 1984. Tr. at 68. At this post, he continued to receive declining performance ratings, which he grieved without success, and testified that he continued to encounter problems in his relationship with AAFES management at this new duty station. Tr. at 70-72. In November 1984, claimant again saw Dr. Gill, who observed symptoms of headache, depression and paranoia. Claimant missed work from October 20, 1984 to May 6, 1985. Tr. at 72. On February 28, 1985, claimant filed a claim for benefits under the Act. CX-18: 1. In an "Attending Physician's Report" dated January 21, 1985, Dr. Gill stated that by January 1985 claimant had come to a "standstill" and that claimant "was not aware that he was experiencing a profound depressive reaction to the stress that he was undergoing." CX-18: 8-14.

Near the end of 1986, claimant was transferred to Panama to become the area food director. There he became embroiled in a dispute about the family housing at Howard AFB to which he had been assigned. This dispute prompted the Air Force, in October 1987, to take action to remove claimant from the base housing and to initiate disciplinary proceedings against him in the form of an attempt to discharge him. EX-22. Ultimately, claimant received a disciplinary downgrade in his salary, which was upheld on appeal. Claimant testified that the events in Panama placed

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this Decision issued prior to this date, we need not address tolling this period due to the remand necessitated by our non-receipt of the record.

considerable pressure on him. Tr. at 112. Claimant transferred to Ft. Bliss, Texas, and testified that he had a poor relationship with his supervisor there and that he believed there was undue scrutiny of his work at Ft. Bliss. Sometime after this transfer, claimant's wife took claimant back to their home in Columbus, Georgia for medical treatment. *See* EX-23. Claimant has not worked since.

Dr. Brende saw claimant as an outpatient at the Bradley Center until August 1988, when he was admitted until September 16, 1988, when he was discharged against medical advice. *See* CX-15: 24-33; EX-1: 31-32. Dr. Brende noted on June 30, 1988, that claimant exhibited symptoms of depression, insomnia, night fears and paranoid ideation. CX-15; EX-1. In his initial diagnosis, Dr. Brende referred to an adjustment disorder with depressed mood and characterized claimant as a "stressor - [with] difficulty in job situation." *Id.* Dr. Brende diagnosed claimant as a schizophrenic, paranoid type, and recalled that claimant lacked insight concerning his condition and the need for assistance. CX-24: 26, 36; *see* CX-15: 21; EX-1: 23. On January 19, 1990, Dr. Brende opined that claimant continued to be disabled and observed that even thoughts about his employment with AAFES prompted considerable fear in claimant. CXS-15-17; EX-1: 27. Dr. Brende opined that claimant could not return to AAFES, and that he could work only in conditions that had little or no stress. CX-24: 26. This view was repeated by Dr. Connolly, who opined that claimant would always need psychiatric care. CX-22: 18, 42. Dr. Gill stated that claimant's psychiatric condition was related to his work, and concluded that no single incident was responsible for the development of this condition. *See* CX-21: 45-46, 54. Dr. Gill also opined that claimant could not function adequately in a work environment with other people. CX-21: 36-37.

Claimant filed an additional claim for benefits under the Act on October 10, 1989. EX-10. In his Decision and Order, the administrative law judge found that claimant suffered from periods of temporary total disability between October 20, 1984 and May 6, 1985, and from June 17, 1988 until March 7, 1989, at which time he found that claimant's condition became permanent. The administrative law judge rejected employer's challenges to the timeliness of either the notice of injury or the claim, determined that claimant's psychological injury and resulting disability are the result of his working conditions at AAFES, and that this emotional injury rendered claimant permanently totally disabled from March 7, 1989. Employer has appealed, and claimant has filed a cross-appeal in which he seeks affirmance of the administrative law judge's decision in all respects.

On appeal, employer asserts that the instant claims are barred as untimely under both Sections 12 and 13 of the Act, 33 U.S.C. §§912, 913. Employer also contends that claimant failed to state a "valid claim" to entitlement under the theory of a "psychiatric" illness, and that it has a valid defense in that any illness or disability suffered by claimant was precipitated solely by deliberate and intentional conduct on his part. For the reasons that follow, we reject employer's contentions, conclude that the administrative law judge's findings are supported by substantial evidence, and therefore affirm the Decision and Order of the administrative law judge in all respects.

I. Section 12 Notice

Employer avers that the record lacks evidence that claimant provided employer with notice of his injury as required by Section 12(a). Under Section 12(a), 33 U.S.C. §912(a), an employee in a traumatic injury case is required to notify the employer of his work-related injury within 30 days after the date of injury or the time when the employee was aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between his injury and employment, and that the injury will affect his earning capacity.[2] *See Bath Iron Works Corp. v. Galen*, 605 F.2d 583, 585, 10 BRBS 863, 865-66 (1st Cir. 1979); *cf. Paducah Marine Ways v. Thompson*, 82 F.3d 130, 134, 30 BRBS 33, 35 (CRT)(6th Cir. 1996)(interpreting identical language of Section 13). The failure to provide timely notice pursuant to Section 12(a) will bar a claim unless such failure is excused under Section 12(d), 33 U.S.C. §912(d)(1988), because employer either had knowledge of the injury or was not prejudiced by the failure to give timely notice. *Sheek v. General Dynamics Corp.*, 18 BRBS 151, 153-154 (1986), *modifying on recon.* 18 BRBS 1 (1985). In the absence of evidence to the contrary, it is presumed pursuant to Section 20(b) of the Act, 33 U.S.C. §920(b), that employer has been given sufficient notice under Section 12. *See Lucas v. Louisiana Insurance Guaranty Association*, 28 BRBS 1, 4 (1994).

Employer's challenge to the administrative law judge's finding that this claim is not barred under Section 12 lacks merit. The administrative law judge initially determined claimant's absences on "sick leave for a substantial period of time" effectively placed employer on notice of claimant's injury. Decision and Order at 20. The administrative law judge further found that employer failed to establish it is prejudiced by the lack of timely notice.[3] *Id.* In this instance, employer failed to proffer evidence that it suffered such prejudice, and does not challenge the administrative law judge's finding in this regard on appeal. Because the administrative law judge reasonably found that employer failed either to rebut the Section 20(b) presumption of timely notice, or to demonstrate prejudice, we affirm the administrative law judge's conclusion that this claim is not barred under Section 12(a).

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[2]A claimant in the case of an occupational disease "which does not immediately result in a disability" must give employer notice of his injury within one year of his date of awareness of the relationship between his employment and his disabling disease. *See* 33 U.S.C. §§912(a), 913(b)(2); *Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS 154, 156 (1996). The issue of whether the psychological injury in question constitutes an occupational disease "which does not immediately result in a disability" has not been raised by either party on appeal, although the gravamen of the instant claim is injury caused by the gradual and cumulative stress of employment. In view of our disposition of this appeal, we have no occasion to address this question.

[3]To establish prejudice, employer must prove that, due to lack of timely written notice, it has been unable effectively to investigate some aspect of the claim. *See Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233, 240 (1990). A "conclusory" assertion, however, is insufficient to establish prejudice. *ITO Corp. v. Director, OWCP*, 883 F.2d 422, 424, 22 BRBS 126, 128 (CRT)(5th Cir. 1989).

II. Timeliness of the Claim

Employer also contends that this claim is barred as untimely. We disagree. 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."[4] *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 296, 23 BRBS 22, 24 (CRT)(11th Cir. 1990); *accord Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 25-26, 24 BRBS 98, 110-11 (CRT)(4th Cir. 1991). The "employee is aware of the full character, extent, and impact of the injury when [he] knows or should know that the injury will impair [his] earning power." *Paducah Marine Ways*, 82 F.3d at 134, 30 BRBS at 35-36 (CRT).

The administrative law judge found that the 1985 and 1989 claims filed by claimant were timely. The administrative law judge concluded that the 1989 claim was not barred by Section 13(a) because claimant was not aware until April 1989 of the work-related nature of his psychological disability when Dr. Brende so concluded in his medical report.[5] Decision and Order at 21. The administrative law judge ruled in the alternative that claimant's 1985 claim remained viable because it was never adjudicated, and that it therefore merged with the 1989 claim. *See Norton v. National Steel & Shipbuilding Co.*, 27 BRBS 33, 40-41 (1993)(Brown, J., dissenting), *aff'g on recon. en banc* 25 BRBS 79 (1991); *see also Madrid v. Coast Marine Construction Co.*, 22 BRBS 148, 152 (1989). This determination is not challenged on appeal.

The administrative law judge's ruling that the 1985 claim continues to be a viable claim accords with applicable law. *See Norton*, 27 BRBS at 40-41; *see generally Intercounty Construction Corp. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975). Moreover, his finding with respect to the 1989 claim that claimant lacked the requisite "awareness" outside of the applicable prescriptive period for the filing of that claim is supported by substantial evidence. *Lewis*, 30 BRBS at 156. We therefore affirm the administrative law judge's determination that the 1985 and 1989 claims are not time-barred.

III. Validity of Claim for Psychological Injuries

Employer initially suggests that claimant has essentially asserted a claim on the basis of racial discrimination and harassment, and that as a result the "Department of Labor lacks subject matter jurisdiction to adjudicate these claims under the LHWCA." Er. Br. at 19. Employer cites

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[4]In an occupational disease case, the claim must be filed within two years of claimant's date awareness of the relationship between his employment and his disabling disease. *See* n. 2, *supra.*

[5]Dr. Brende had noted claimant's lack of insight concerning his condition and the need for assistance. *see, e.g.*, CX-24: 26, 36; CX-15; EX-1. Dr. Gill, in January 1985, had observed that claimant was unaware of the "profound depressive reaction" to his work-related stress. CX-18: 9.

DeFord v. Secretary of Labor, 700 F.2d 281 (6th Cir. 1983), to show that such wrongs do not constitute an "injury" under the Act. In *Deford*, the United States Court of Appeals for the Sixth Circuit addressed the question of whether claims for discrimination and emotional distress were injuries covered under the Federal Employees Compensation Act ("FECA"), 5 U.S.C. §§8101-8151 in a "whistle blower" action under the Energy Reorganization Act ("ERA"), 42 U.S.C §5851, and stated that "the type of injuries covered in [FECA] ... does not appear to include such claims as ... discrimination, mental distress, or loss of employment." 700 F.2d at 290.

Employer's reliance on *DeFord*, with its analysis as to the jurisdictional interplay between FECA and the ERA, is misplaced. In a later decision, *McDaniel v. United States*, 970 F.2d 194, 196 (6th Cir. 1992), the Sixth Circuit "recanted the position taken in *DeFord*" in the above-quoted language, stating that the Department of Labor "has the final say as to the scope of FECA." *See Swafford v. United States*, 998 F.2d 837, 840 & n. 1 (10th Cir. 1993). The *obiter dictum* in *DeFord*, therefore, does not support the weight placed upon it by employer in this case and does not require us to rule that claims for emotional injuries due to stressful working conditions are not compensable injuries under the Longshore Act. On the contrary, it is well-established that claims for psychological injuries are within the scope of the Act. *See American National Red Cross v. Hagen*, 327 F.2d 559 (7th Cir. 1964); *Urban Land Institute v. Garrel*, 346 F.2d 699 (D. D.C. 1972); *see also Director, OWCP v. Cooper Associates, Inc.*, 607 F.2d 1385, 10 BRBS 1058 (D.C. Cir. 1979); *Manship v. Norfolk & Western Railway Co.*, 30 BRBS 175 (1996); *Konno v. Young Brothers, Ltd.*, 28 BRBS 57 (1994); *Whittington v. National Bank of Washington*, 12 BRBS 439 (1980). Thus, we reject employer's argument that the psychological injuries claimed in this case are outside the scope of the Act because they are characterized by employer as products of "discrimination and harassment."

Employer also maintains that claimant has failed to prove a "compensable claim for psychiatric problems," asserting that the "sole precipitating cause of claimant's disability commencing June 16, 1988 was the disciplinary downgrade resulting from the military housing debacle in Panama." Er. Br. at 24. Citing *Marino v. Navy Exchange*, 20 BRBS 166 (1988), employer avers that the disciplinary downgrade which allegedly caused claimant's present psychological difficulties was a legitimate personnel action and thus its effects on claimant are not compensable.[6]

We disagree with employer that the administrative law judge erred in finding that claimant's psychological condition was work-related and compensable. In establishing that an injury is

[6]In *Marino*, the Board held that psychological injury due to a reduction in force is not compensable because the reduction in force in that case constituted a legitimate personnel action. Nevertheless, the Board also remanded that case for the administrative law judge to address Marino's allegations that his injury was due as well to cumulative stress from supervising a number of locations, insufficient personnel to perform the job, working more than the required number of hours, and performing the duties of subordinates. *Marino*, 20 BRBS at 168.

causally related to employment, claimant is aided by the Section 20(a), 33 U.S.C. §920(a), presumption, which provides a presumed causal nexus between the injury and employment. Claimant establishes a *prima facie* case for invocation of the Section 20(a) presumption by showing that he suffered a harm and either that a work-related accident occurred or that working conditions existed which could have caused the harm or aggravated a pre-existing condition. *See Brown*, 893 F.2d at 297, 23 BRBS at 25 (CRT). The administrative law judge invoked the Section 20(a) presumption, finding that claimant suffered from a documented "psychiatric harm." He also concluded that stressful working conditions commencing at Eglin Air Force Base in 1982 with the "aggressive training program," and continuing with claimant's anxiety over lower performance appraisals, relocations, demotions and the difficulties with his base housing in Panama, were conditions, the effects of which were documented by Dr. Gill, *see* CX-21, that could have caused claimant's psychological harm. Decision and Order at 18.

The finding that claimant established the "working conditions" element of his *prima facie* case is supported by substantial evidence in the form of Dr Gill's opinion.[7] *See generally U.S. Industries/Federal Sheet Metal v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Konno*, 28 BRBS at 60-61. The administrative law judge rationally distinguished *Marino*, finding that the demotion is not the sole basis for this claim for stressful working conditions; moreover, he noted that the reduction in force in *Marino* was not disciplinary-based as was the demotion here. *See generally Manship*, 30 BRBS at 179; Decision and Order at 18-20. Inasmuch as employer does not challenge the administrative law judges' finding that the Section 20(a) presumption is not rebutted, and as that finding is proper,[8] *see generally Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 820 (1976); *Manship*, 30 BRBS at 178-179, we affirm the administrative law judge's finding that claimant suffered a work-related psychological injury.

Because we affirm the administrative law judge's findings that this claim is not barred pursuant to Sections 12 and 13, and the administrative law judge's finding that the psychological injuries demonstrated in this instance are compensable under the Act, we affirm the administrative law judge's Decision and Order awarding benefits.

Accordingly, the Decision and Order awarding benefits is affirmed in all respects.

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[7]In view of our affirmance of the administrative law judge's finding that claimant's psychological injury was not due solely to a single incident, we reject employer's contention that Section 3(c) of the Act, 33 U.S.C. §903(c), constitutes a defense to this claim. That provision bars compensation, *inter alia*, where it is shown that the employee willfully intended to injure himself. The supposed intent to injure himself, according to employer, was claimant's alleged "intentional and deliberate actions" in disobeying Colonel Neff's order to vacate military housing in Panama. The administrative law judge rationally determined that claimant's assertion of his right to remain in the residence does not constitute a willful intent to injure himself.

[8]The administrative law judge found that employer's "psychiatric expert," (presumably Dr. Hilton), conceded that stress can aggravate personality disorders such as a "narcissistic personality disorder" and the "delusional" condition from which claimant suffered. Decision and Order at 17; *see* EX-28: 32.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge