BRB No. 13-0299

CORNELIUS KLEYNHANS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SALLYPORT GLOBAL SERVICES	)	DATE ISSUED: Jan. 23, 2014
	)	
and	)	
	)	
ALLIED WORLD ASSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
and	)	
	)	
CONTINENTAL INSURANCE COMPANY	)	
	)	
Carrier-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Brian C. Karsen (Barnett, Lerner & Karsen, P.A.), Fort Lauderdale, Florida, for claimant.

Brendan E. McKeon and Keith L. Flicker (Flicker, Garelick & Associates, LLP), New York, New York, for employer and Allied World Assurance Company.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer Sallyport Global Services and carrier Allied World Assurance Company

(AWAC) appeal the Decision and Order Awarding Benefits (2012-LDA-469; 2012-LDA-526) of Administrative Law Judge Linda S. Chapman rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*., as extended by the Defense Base Act, 42 U.S.C. §1651 *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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In December 2004, claimant commenced employment for employer as a personal security escort in Baghdad, Iraq, where he escorted and protected employer's clients.[1] On April 20, 2009, while employer was insured by Continental Insurance Company (CIC), claimant was on convoy duty when the vehicle in front of his was struck by an improvised explosive device (IED). Claimant, who reported that he did not experience any subsequent direct attacks, nevertheless described his employment in Iraq as involving a dangerous environment based upon the ongoing threat of attacks. On October 8, 2010, AWAC commenced insuring employer. Claimant continued to work for employer until March 14, 2011, when he returned to his home in South Africa.[2] Claimant subsequently sought treatment for various psychological symptoms. Specifically, claimant underwent therapy for a limited period with Dr. van Rensenberg, who stated that claimant exhibited symptoms of post-traumatic stress disorder and major depressive disorder, and he obtained prescription medication from his family physician, Dr. du Preez. On November 11, 2011, claimant filed two claims for benefits under the Act for his psychological conditions.

In her Decision and Order, the administrative law judge found that claimant established that his working conditions in Iraq could have caused or aggravated his psychological conditions. The administrative law judge thus applied the Section 20(a), 33 U.S.C. §920(a), presumption, found that employer did not rebut it, and concluded that claimant's conditions are related to his employment with employer. The administrative law judge found that claimant's psychological conditions have not yet reached maximum medical improvement, that claimant is incapable of returning to his employment duties with employer, and that employer did not establish the availability of suitable alternate employment. The administrative law judge consequently awarded claimant temporary

[1] The requirements of claimant's employment included participating in convoy duty, during which time claimant wore protective armor and a helmet, and providing personal protection to employer's clients once those clients arrived at their destination.

[2] Claimant is a citizen of South Africa.

total disability benefits from March 14, 2011, and continuing. 33 U.S.C. §908(b). Finding that claimant continued to work in a harsh and stressful working environment throughout his employment with employer in Iraq, the administrative law judge held AWAC, employer's carrier on the last day of claimant's employment, liable for the payment of claimant's benefits.

On appeal, AWAC challenges the administrative law judge's determination that it is the carrier responsible for the payment of any benefits due claimant under the Act. Specifically, AWAC contends claimant did not establish that his employment while AWAC was on the risk resulted in his psychological conditions; AWAC thus contends that it cannot be the liable carrier because claimant's conditions were not aggravated by his continued employment after the IED incident. Claimant responds, urging affirmance of the administrative law judge's decision in its entirety. AWAC has filed a reply brief. CIC did not respond to AWAC's appeal.

AWAC first contends that the administrative law judge erred in applying the Section 20(a), 33 U.S.C. §920(a), presumption to claimant's period of employment while AWAC was on the risk. In order to be entitled to the benefit of the Section 20(a) presumption, claimant must establish a prima facie case by showing that he sustained a harm and that an accident occurred or working conditions existed which could have caused the harm. *See 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 claimant has established his prima facie case, Section 20(a) links his harm to his employment. *See Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT); *see also Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000).

AWAC contends that claimant's psychological conditions do not constitute a "harm" in this case since claimant did not demonstrate those conditions arose from his work subsequent to April 20, 2009, the date of the IED attack, when employer was insured by CIC. We disagree. For purposes of establishing the first element of a prima facie case, a "harm" has been defined as "something [that] unexpectedly goes wrong within the human frame," *Wheatley v. Adler*, 407 F.2d 307, 313 (D.C. Cir. 1968)(en banc), and it is well-established that a psychological injury can constitute a "harm" under the Act. *See American Nat'l Red Cross v. Hagen*, 327 F.2d 559 (7th Cir. 1964); *R.F.* [*Fear*] *v. CSA, Ltd.*, 43 BRBS 139 (2009); 33 U.S.C. §902(2). In finding that claimant established the harm element of his prima facie case, the administrative law judge found that Dr. van Rensenberg, claimant's treating psychologist, found that claimant exhibited symptoms of post-traumatic stress disorder and depression, and that Dr. du Preez, claimant's family physician, prescribed claimant medication for post-traumatic stress. Decision and Order at 9. Thus, as substantial evidence supports the administrative law

judge's determination that claimant suffers from a psychological condition, we affirm the administrative law judge's finding that claimant established the existence of a harm under the Act for purposes of establishing the first element of his prima facie case. *See Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997); *Fear*, 43 BRBS 139.

AWAC also contends the administrative law judge erred in finding that working conditions existed in Iraq through the last day of claimant's employment with employer which could have caused or aggravated claimant's current psychological conditions. In establishing this element of his prima facie case, claimant is not required to prove that his employment activities did, in fact, cause his harm; he need show only that working conditions existed which *could have* caused or aggravated the harm. *See Hunter*, 227 F.3d 285, 34 BRBS 96(CRT). The administrative law judge found that working conditions existed in Iraq throughout the duration of claimant's employment with employer that could have resulted in, or aggravated, claimant's psychological conditions. In finding that claimant established the second element of his prima facie case, the administrative law judge credited claimant's testimony that he worked in a dangerous environment throughout the course of his employment in Iraq since he was under the constant threat of bodily harm. Decision and Order at 9-10. The administrative law judge also noted that Dr. van Rensenberg related claimant's report that he worked under life-threatening circumstances on a daily basis. It is well-established that the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw her own inferences and conclusions from the evidence. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 371 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). The administrative law judge's decision to rely upon the testimony of claimant in this regard is neither inherently incredible nor patently unreasonable. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Thus, as it supported by substantial evidence, we affirm the administrative law judge's finding that claimant established the second prong of his prima facie case, and the consequent application of the Section 20(a) presumption. *Hunter*, 227 F.3d 285, 34 BRBS 96(CRT).

AWAC next contends that, if the Section 20(a) presumption applies, it presented substantial evidence to rebut the presumption. Upon invocation of the presumption, the burden shifts to employer to rebut it with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008).

We affirm the administrative law judge's finding that AWAC did not rebut the Section 20(a) presumption. In her decision, the administrative law judge properly found that AWAC "has presented NO evidence in rebuttal, or anything that would sever the

causal connection between [claimant's] daily exposure to the threat of injury or death in his employment in Iraq and his current condition," Decision and Order at 10 (emphasis in original), and AWAC, on appeal, does not cite any evidence addressing the cause of claimant's present psychological conditions. Accordingly, in the absence of any evidence that claimant's psychological conditions were not caused by his employment, we affirm the administrative law judge's finding that the Section 20(a) presumption was not rebutted and her consequent finding of a causal relationship between claimant's employment and his psychological conditions. *See Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009). The award of benefits to claimant therefore is affirmed.

AWAC also challenges the administrative law judge's finding that it is the carrier responsible for the payment of benefits due claimant. We disagree.

In allocating liability between successive carriers in cases involving traumatic injury, the carrier at the time of the original injury remains liable for the full disability resulting from the natural progression of that injury. If, however, the claimant sustains an aggravation of the original injury, the carrier insuring employer at the time of the aggravation is liable for the entire disability resulting therefrom.[3] *New Haven Terminal Corp. v. Lake*, 337 F.3d 261, 37 BRBS 73(CRT) (2d Cir. 2002); *see also Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co.* [*Price*], 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003), *cert. denied*, 543 U.S. 940 (2004). Each employer/carrier bears the burden of persuading the factfinder, by a preponderance of the evidence, that the claimant's disability is due to the injury with the other employer/carrier. *See Buchanan v. Int'l Transportation Services* [*Buchanan II*], 33 BRBS 32 (1999), *aff'd mem. sub nom. Int'l Transportation Services v. Kaiser Permanente Hospital, Inc.*, 7 F. App'x 547 (9th Cir. 2001).

Once, as here, claimant has established he sustained a work-related injury, it is not also his burden to establish which carrier is liable for the awarded benefits. *See Buchanan II*, 33 BRBS 32. The administrative law judge found AWAC liable because claimant's continued working conditions in Iraq after the IED incident "aggravated his condition and resulted in greater overall impairment." Decision and Order at 13. The finding that claimant's continued employment in fact aggravated his condition and

[3] Thus where claimant's work results in an aggravation of his symptoms, the carrier insuring employer at the time of the work events resulting in the aggravation is responsible for any resulting disability. *See Marinette Marine Corp. v. Director, OWCP*, 431 F.3d 1032, 39 BRBS 82(CRT) (7th Cir. 2005); *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3d Cir. 2002).

increased his disability is not supported by any evidence.[4] Nevertheless, it is AWAC's burden to establish that claimant's condition is the natural progression of the April 20, 2009, IED attack in order to avoid liability. *Id.* This it cannot do, nor could CIC demonstrate that claimant's continued employment aggravated his condition, because the record is simply devoid of evidence on this subject. In *Buchanan II*, 33 BRBS 32, the Board stated that

> In the unlikely event that neither employer was able to persuade the administrative law judge that its evidence is entitled to greater weight, [footnote omitted] we believe . . . that the purposes of the Act would best be served by assigning liability to the later employer . . . .

Buchanan II, 33 BRBS at 36.[5] The Board noted that this would occur if the administrative law judge "rationally found that neither employer put forth any creditable evidence." *Id.* n.8. This scenario applies in this case, as the record is devoid of evidence demonstrating that claimant's condition is due to either the natural progression of the IED incident while CIC was on the risk, or to an aggravation while AWAC was on the risk. AWAC, the last carrier, has failed to meet its burden of proving it is not the responsible carrier.[6] The administrative law judge's determination that AWAC is liable as the

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[4] Dr. van Rensenberg documented her understanding of claimant's employment history in Iraq, stating that claimant "worked under life threatening circumstances on a daily basis and was the victim to a mortar and gunfire attack whilst accompanying a client on the 20 April 2009." AWAC EX 1 at 1. Her November 14, 2012, report states that she focused claimant's therapy on his experience of the April 20, 2009 incident, but it is silent as to the cause of claimant's current conditions. *See id.* at 3. Thus, contrary to AWAC's contention, Dr. van Rensenberg's reports do not compel the conclusion that claimant's disabling condition is the natural progression of the IED incident while CIC was on the risk.

[5] Citing *General Ship Service v. Director, OWCP* [*Barnes*], 938 F.2d 960, 25 BRBS 22(CRT) (9th Cir. 1991) (a case involving an occupational disease claim wherein is was not possible to discern which employer claimant last worked for), the Board in *Buchanan II* noted that assigning liability to the later employer in such a case would be consistent with case law defining responsible employer in an occupational disease context. *See Port of Portland v. Director, OWCP* [*Ronne I*], 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991).

[6] While AWAC's brief contains references to claimant's failure to present affirmative evidence establishing a causal relationship between his current conditions and his employment with employer through March 14, 2009, the burden of proof on issues of liability allocation rests with employer and its carriers. *See Buchanan II*, 33 BRBS 32;

responsible carrier is, therefore, affirmed. *See Buchanan II*, 33 BRBS 32.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

Buchanan v. Int'l Transportation Services [*Buchanan I*], 31 BRBS 81 (1997).