BRB No. 12-0133

ANDREA LIMA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DYNCORP INTERNATIONAL	)	DATE ISSUED: 12/07/2012
	)	
and	)	
	)	
CONTINENTAL INSURANCE COMPANY/CNA INTERNATIONAL	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Joan M. Durkin and James G. Graham (Durkin Law Offices, P.C.), Hurst, Texas, for claimant.

Robyn A. Leonard and Lisa Wilson (Laughlin, Falbo, Levy & Moresi LLP), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2011-LDA-241) of Administrative Law Judge Lee J. Romero, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*., as extended by the Defense Base Act, 42 U.S.C. §1651 *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 was hired by employer in April 2004 as a security specialist and was deployed to Baghdad, Iraq. Tr. at 46. Shortly after her deployment, claimant was assigned to the Al-Sadeer Hotel in Baghdad. *Id.* at 48. It is undisputed that in the early morning of March 9, 2005, a vehicle-borne improvised explosive device (VBIED) detonated next to the Al-Sadeer Hotel. JXs 1, 10. The massive explosion caused injuries to a number of hotel occupants and extensive damage to the hotel. Tr. at 50-52, 84-85. Claimant, who was in the bathroom of her second-floor room when the VBIED exploded, felt a wave of pressure that went through her left ear.[1] Tr. at 50-55, 84-86. Claimant testified that her symptoms that day included severe pain in her left ear, dizziness, loss of appetite, and vision problems, and that her "whole system felt off." *Id.* at 55-56. Employer's medic examined claimant's ear the following morning, and referred her to the 86th Combat Support Hospital (Baghdad Hospital) for follow-up of her ear problem. Tr. at 54-55, 57-59, 91-92. Employer's report of injury dated March 10, 2005, describes claimant's injury as "Ringing in Ears, Lt Tempanic [sic] membrane red and bulging." JX 10; *see also* Tr. at 57-58, 91-92. Claimant was seen on at least two occasions during March 2005 at the outpatient clinic at Baghdad Hospital, where she complained of left ear pain, tinnitus, dizziness, nausea, and decreased appetite. EX 13 at 117-119. Audiometric testing revealed moderate left ear hearing loss at 6000 and 8000 Hz. *Id.* at 118. Claimant was diagnosed with bilateral tinnitus, left ear pain and middle ear dysfunction, and was referred for follow-up by an otolaryngologist (ENT) in the United States. *Id.* at 119; *see also* Tr. at 59-62, 92-94. Upon her return to the United States, claimant was treated by Dr. Barrs, an ENT at the Mayo Clinic in Arizona, as well as by Drs. Robb, Fife and Shafran, all of whom are neurologists located in Arizona. EXs 16, 18, 24; CXs 11, 13, 14. Claimant also underwent a neuropsychological evaluation conducted by Dr. Morrone-Strupinski. EX 17. Following claimant's relocation to Texas, she was treated by Dr. Agostini, a neurologist, Dr. Garrett, a psychiatrist, and Dr. Newcomer, an ENT, all of whom practice at the University of Texas Southwestern Medical Center in Dallas. CX 15; EX 24.

In an amended claim for compensation filed on March 31, 2009, claimant described the nature of her injury as follows: "head, brain, hearing, balance problems, nerves, meniere's disease, and body generally-including worsening of psychological condition." JX 6; *see also* CX 3. Dr. Meyer, a neurologist, examined claimant on behalf of employer on April 21, 2009. EX 20. On May 11, 2010, employer controverted the

[1]Claimant testified that the force of the explosion pushed her toward the wall but that she was able to avoid falling or hitting her forehead on the wall by bracing her hands against the wall. Tr. at 56-57. She testified that the explosion blew out all of the hotel windows and tore off the doors to all the rooms, although her open bathroom door did not fly off. *Id.* at 52-53, 85-86, 90-91.

claim and stopped paying disability benefits.[2] JX 7. The district director arranged for claimant to undergo an independent medical examination by Dr. Brylowski, a specialist in psychiatry and pain medicine, on August 13, 2010. EX 21. A formal hearing was held before the administrative law judge on May 23, 2011, at which claimant appeared *pro se.*

In his decision, the administrative law judge initially stated that claimant asserted that the March 9, 2005 explosion resulted in two specific injuries--traumatic brain injury and Meniere's Disease.[3] Decision and Order at 32, 34. He found claimant entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), that claimant's working conditions on March 9, 2005 could have caused her harm. Next, the administrative law judge found that Dr. Brylowski's opinion rebutted the Section 20(a) presumption with respect to both the claimed traumatic brain injury and Meniere's Disease. After weighing the evidence as a whole, the administrative law judge determined that claimant failed to establish that she sustained a traumatic brain injury[4] but that she did establish that she suffers from Meniere's Disease which is causally related to the VBIED explosion. The administrative law judge further found that claimant's condition reached maximum medical improvement on March 28, 2007. He determined that claimant is unable to perform her usual employment duties as a security specialist in Iraq, and that employer proffered no evidence that suitable alternate employment was available to her. Accordingly, the administrative law judge awarded claimant compensation for temporary total disability benefits from March 9, 2005 to March 27, 2007, and for permanent total disability benefits thereafter, and medical benefits. 33 U.S.C. §§907, 908(a), (b).

On appeal, employer assigns error to the administrative law judge's findings that claimant sustained work-related Meniere's Disease, that she reached maximum medical improvement on March 28, 2007, and that she is unable to perform her usual employment

[2]Employer voluntarily paid claimant temporary total disability benefits from March 10, 2005 through May 10, 2010, and some medical benefits. 33 U.S.C. §§907, 908(b). JXs 2, 3, 4, 8.

[3]Meniere's Disease, or endolymphatic hydrops, "is an inner ear disorder that produces vertigo, fluctuating sensorineural hearing loss and tinnitus. There is no diagnostic test. . . . The diagnosis, made clinically, is primarily one of exclusion." Meniere's Disease (2006) in M.H. Beers et al. *Merck Manual of Diagnosis and Therapy* (18th ed. p. 794). Whitehouse Station, N.J.: Merck Research Laboratories.

[4]The administrative law judge's finding that claimant failed to establish that she sustained a work-related traumatic brain injury is not challenged on appeal.

due to her work-related injury.[5] Claimant, who is represented by counsel before the Board, has filed a response brief, urging affirmance.

We first address employer's contention that the administrative law judge erred in finding, based on the record as a whole, that claimant sustained Meniere's Disease as a result of the VBIED explosion in Iraq.[6] Where, as here, the administrative law judge finds that the Section 20(a) presumption is invoked and rebutted, all relevant evidence must be weighed to determine if a causal relationship has been established, with claimant bearing the burden of persuasion. *See Ceres Gulf, Inc. v. Director, OWCP*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994); *Santoro v. Maher Terminal, Inc.*, 30 BRBS 171 (1996). In weighing the evidence as a whole, the administrative law judge found that the opinions of Drs. Barrs, Shafran, Fife, and Meyer support the conclusión that claimant acquired Meniere's Disease as a result of the VBIED explosion and that Dr. Brylowski

[5]Employer initially avers that the administrative law judge's Decision and Order fails to comport with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), which requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor on all the material issues of fact, law or discretion presented on the record." *See, e.g., H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000). Employer does not substantiate its contention that the administrative law judge's decision as a whole fails to comply with the APA. We agree, however, that the administrative law judge did not provide a sufficient explanation, as required by the APA, of his finding that claimant is unable to perform her usual employment duties due to her work-related injury, and we will address this deficiency in our discussion of that issue.

[6]Employer's additional contention that the administrative law judge erroneously found that claimant sustained a work-related hearing loss in her left ear due to the explosion is without merit. *See* Emp. Petition for Review at 17-19; Decision and Order at 35. As claimant correctly notes, the administrative law judge did not find that claimant's hearing loss results in a ratable impairment pursuant to Section 8(c)(13)(E) of the Act, 33 U.S.C. §908(c)(13)(E), nor did he find that the hearing loss itself was the reason for claimant's inability to perform her usual employment. *See* Cl. Response Brief at 7-8. Rather, the administrative law judge's finding that claimant sustained a left ear hearing loss is relevant to his determination that claimant suffers from Meniere's Disease inasmuch as a finding of sensorineural hearing loss is a necessary element of a Meniere's Disease diagnosis. Moreover, the administrative law judge's finding of a work-related hearing loss is germane to his award of Section 7 medical benefits, 33 U.S.C. §907; indeed, employer conceded below that claimant's work-related left ear hearing loss entitled her to annual audiograms under Section 7. *See* Emp. Post-Trial Brief at 17-18.

offered the only contrary opinion regarding the issue of whether claimant currently suffers from Meniere's Disease. Decision and Order at 38-39; EXs 16, 18, 20, 21; CX 14; Tr. at 161-163. Having determined that the evidence supporting a finding of employment-related Meniere's Disease substantially outweighs the single contrary medical opinion, the administrative law judge concluded that claimant suffers from Meniere's Disease resulting from the explosion in Iraq. Decision and Order at 39.

Employer's disagreement with the administrative law judge's weighing of the evidence is not a sufficient reason for the Board to overturn it, as it is axiomatic that the Board is not permitted to reweigh the evidence but may ascertain only whether substantial evidence supports the administrative law judge's decision. *See, e.g., Pool Co. v. Cooper,* 274 F.3d 173, 178, 35 BRBS 109, 112(CRT) (5th Cir. 2001); *Compton v. Avondale Industries, Inc.*, 33 BRBS 174 (1999). It is well-established that the administrative law judge has the authority to address questions of witness credibility and is entitled to draw his own inferences from the evidence; that other inferences could have been drawn does not establish error in the administrative law judge's conclusion. *See James J. Flanagan Stevedores, Inc. v. Gallagher,* 219 F.3d 426, 430, 34 BRBS 35, 37(CRT) (5th Cir. 2000); *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 500-501, 29 BRBS 79, 80-81(CRT) (5th Cir. 1995). In this case, the administrative law judge drew rational inferences from the physicians' opinions and reasonably accorded greater weight to the medical opinions that claimant has trauma-induced Meniere's Disease, rather than to the contrary opinion of Dr. Brylowski.[7] *See, e.g., Mendoza*, 46 F.3d 498, 29 BRBS

[7]The administrative law judge's Decision and Order contains a comprehensive and accurate summary of the hearing testimony and the medical reports of record, Decision and Order at 4-30, and a sufficiently reasoned explanation of his evaluation of the medical evidence regarding the issue of whether claimant suffers from Meniere's Disease resulting from the VBIED explosion, *id.* at 38-39. We reject each of employer's specific contentions of error regarding the administrative law judge's weighing of this evidence. *See* Employer's Petition for Review at 19-27. The administrative law judge reasonably credited medical opinions diagnosing claimant with Meniere's Disease which were based in part on claimant's subjective complaints. Furthermore, the administrative law judge rationally credited the opinions of Drs. Barrs and Fife which, contrary to employer's contention, are sufficiently definitive regarding claimant's Meniere's Disease diagnosis. *Id.* at 38; EXs 16, 18. Moreover, the administrative law judge did not give undue weight to Dr. Shafran's opinion, but rather found it corroborative of the opinions of Drs. Barrs, Fife and Meyer. *See* Decision and Order at 38; CX 14. The administrative law judge properly found that Dr. Meyer's opinion supports a finding of a causal relationship between the explosion in Iraq and claimant's Meniere's Disease, the attacks of which, according to Dr. Meyer, claimant suffered for a four-month period following the explosion. Decision and Order at 28, 38; EX 20. Lastly, we reject employer's assertion

79(CRT). Therefore, as it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant developed Meniere's Disease as a result of the VBIED explosion.

We next address employer's challenge to the administrative law judge's determination that claimant's Meniere's Disease reached maximum medical improvement on March 28, 2007, as determined by Dr. Barrs, who was claimant's treating ENT at that time. *See* Decision and Order at 42-43; EX 16 at 182. A claimant's condition may be considered permanent when it has continued for a lengthy period and appears to be of lasting and indefinite duration, as opposed to one in which recovery merely awaits a normal healing period. *See Watson v. Gulf Stevedore Corp.,* 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 349 U.S. 976 (1969). Moreover, a claimant may be found to have reached maximum medical improvement when she is no longer undergoing treatment with a view toward improving her condition. *See Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994). If surgery is not anticipated or if the prognosis after surgery is uncertain, the claimant's condition may be permanent. *Monta v. Navy Exch. Serv. Command*, 39 BRBS 104 (2005).

In this case, the administrative law judge reasonably relied on Dr. Barrs's opinion that claimant reached maximum medical improvement as of March 28, 2007. Prior to that time, Dr. Barrs continued to provide treatment, and referred claimant to other specialists, with a view toward improving claimant's condition.[8] *See* EX 16; *Abbott*, 40 F.3d at 126, 29 BRBS at 25(CRT). As the administrative law judge correctly found, Dr. Barrs's opinion that claimant reached maximum medical improvement as of March 28, 2007 was based on claimant's decision, with which Dr. Barrs agreed, not to undergo any further invasive surgical procedures. *See* Decision and Order at 42; EX 16 at 182; *Monta*, 39 BRBS at 109. As substantial evidence supports the administrative law judge's

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that the administrative law judge committed reversible error by declining to rely on Dr. Brylowski's opinion. *See* Decision and Order at 38-39; EX 21.

[8]As claimant was still undergoing treatment with a view toward improving her condition until March 28, 2007, the administrative law judge did not err in rejecting the respective opinions of Drs. Meyer and Brylowski that claimant reached maximum medical improvement four months after the VBIED explosion or between four and six months after the explosion. *See* Decision and Order at 42; EXs 20, 21; Tr. at 171; *Abbott*, 40 F.3d at 126, 29 BRBS at 25(CRT). Moreover, the administrative law judge acted within his discretion in according greater weight to Dr. Barrs's opinion, based upon his treatment of claimant from 2005 to 2007, than to the contrary opinions of Drs. Meyer and Brylowski, each of whom saw claimant only once. *See* Decision and Order at 43; *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

finding that claimant's condition reached permanency on March 28, 2007, we affirm his finding. *See Abbott*, 40 F.3d at 126, 29 BRBS at 24-25(CRT).

Lastly, we consider employer's challenge to the administrative law judge's finding that claimant is totally disabled due to her work-related Meniere's Disease. In order to establish a prima facie case of total disability, claimant must establish that she is unable to perform her usual employment due to her work-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Obadiaru v. ITT Corp.*, 45 BRBS 17, 21 (2011). Claimant's regular duties at the time she was injured constitute her usual employment. *Obadiaru*, 45 BRBS at 21; *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). In order to determine whether a claimant can return to her usual work, the administrative law judge must compare the claimant's medical restrictions with the requirements of the usual employment. *See Obadiaru*, 45 BRBS at 21.

In addressing the issue of claimant's ability to return to her usual employment, the administrative law judge stated that Drs. Barrs, Morrone-Strupinski and Meyer each provided an opinion regarding whether claimant's injuries have rendered her incapable of performing her usual work duties. Decision and Order at 41. In this regard, the administrative law judge noted Dr. Barrs's statement in his March 28, 2007 report that claimant "should not work in any situation where a sudden loss of balance could lead to an injury to herself or to anyone else." *Id.*; EX 16 at 182. The administrative law judge next took note of Dr. Morrone-Strupinski's September 25, 2006 opinion that claimant's neuropsychological examination revealed that she "would be unable to return to a normal working schedule." Decision and Order at 41; EX 17 at 189. The administrative law judge further quoted Dr. Meyer's statements that claimant '"is capable of performing substantial customary occupation as indicated by her ability to manage her apartment, drive her car, carry out exercises' and '[s]he is not capable of performing aspects of the usual and customary occupation in Iraq or in a similar environment because of her disabling psychiatric symptoms and symptom exaggeration.'"[9] Decision and Order at 42; EX 20 at 217-218.

[9]Dr. Meyer reported that claimant suffered from Meniere's Disease but recovered four months after the explosion. EX 20 at 217. He additionally stated that claimant had no evidence of psychiatric symptomatology prior to the blast injury but after that, she exhibited numerous psychiatric symptoms. *Id.* at 216. Dr. Meyer opined that claimant suffers from anxiety and depression and that "[t]here is clear evidence of malingering or dysfunctional behavior, symptom exaggeration, post-traumatic compensation neurosis." *Id.* at 217. He further indicated that "[a]ll of her psychiatric symptoms are related to her employment at DynCorp International, when she was exposed to the blast concussion." *Id.*

In considering claimant's ability to perform the duties of her usual employment as a security specialist in Iraq, the administrative law judge rationally inferred that the job would require the ability to maintain one's balance to avoid mishandling dangerous weaponry. Decision and Order at 41-42. The administrative law judge found that "[a]n individual with steadiness problems, as Dr. Barrs noted of claimant, poses a significant danger to themselves [sic] as well as others in the vicinity of a possible misfire." *Id.* at 42. Based on this rational inference, the administrative law judge could reasonably rely on Dr. Barrs's March 28, 2007 report to establish claimant's inability to perform her usual work as of that date, which was the last time Dr. Barrs saw claimant prior to her relocation to Texas. *See* EX 16 at 182; Tr. at 106-107. We agree with employer, however, that the administrative law judge erred in inferring that the opinion given by Dr. Barrs in 2007 represents the doctor's current opinion regarding the extent of claimant's present disability.[10] *See* Employer's Petition for Review at 31-32. The administrative law judge found in this regard that because Dr. Barrs did not subsequently revise his 2007 opinion, that opinion remains valid. *See* Decision and Order at 42. The administrative law judge therefore concluded that Dr. Meyer's opinion, which was given more than two years after Dr. Barr's last opinion, does not invalidate Dr. Barrs's opinion. *See id.* at 41-42. As Dr. Barrs had no further contact with claimant after March 28, 2007, however, it was not rational for the administrative law judge to infer, on the basis of Dr. Barrs's silence in the ensuing years, that the doctor believes, at the present time, that claimant's condition remains unchanged. Thus, it was incumbent upon the administrative law judge to address more recent evidence, including Dr. Meyer's opinion, relevant to the issue of claimant's ability to perform her usual employment subsequent to 2007.[11]

The administrative law judge provided an additional rationale for his finding that Dr. Meyer's later opinion does not invalidate Dr. Barrs's opinion regarding claimant's ability to return to her prior employment in Iraq, stating as follows:

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[10]The Board generally will not interfere with the administrative law judge's weighing of the evidence or credibility determinations. *See, e.g., Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109, 113 (1998). The Board, however, is not bound to accept an ultimate finding or inference if the decision discloses that it was reached in an invalid manner. *Howell v. Einbinder,* 350 F.2d 442 (D.C. Cir. 1965); *Hernandez,* 32 BRBS at 113; *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988).

[11]Moreover, we note that claimant was treated by Dr. Newcomer, an ENT, on March 29, 2011 for active Meniere's Disease. EX 24. Although the administrative law judge summarized Dr. Newcomer's treatment notes in his summary of the evidence, *see* Decision and Order at 28, he did not address this evidence in his discussion of whether claimant remains disabled by Meniere's Disease.

> Furthermore, Dr. Meyer stated, "[Claimant] is capable of performing substantial customary occupation" and ". . . [she] is not capable of performing aspects of the usual and customary occupation in Iraq or in a similar environment because of her disabling psychiatric symptoms and symptom exaggeration."

Decision and Order at 42 (quoting EX 20 at 217-218). We agree with employer that the administrative law judge's reason for quoting this portion of Dr. Meyer's report is unclear. *See* Employer's Petition for Review at 31-32. The administrative law judge did not provide a sufficiently reasoned discussion of the totality of Dr. Meyer's opinion, which, as acknowledged by the administrative law judge, is more recent than that of Dr. Barrs. In his April 24, 2009 report, Dr. Meyer opined that claimant's work-related Meniere's Disease resolved four months after the explosion and that claimant no longer suffers from that condition. EX 20 at 216-217. Meniere's Disease is the harm which is the basis for the administrative law judge's finding, based on the evidence as a whole, of a causal relationship between claimant's injury and her employment. Although the administrative law judge set forth Dr. Meyer's opinion that claimant no longer suffers from Meniere's Disease in his summary of the evidence, *see* Decision and Order at 28, he did not address it in his discussion of the issue of the extent of claimant's disability. Instead, the administrative law judge focused on Dr. Meyer's statement that claimant is not capable of performing aspects of her previous job in Iraq because of her disabling psychiatric symptoms and symptom exaggeration.[12] As the administrative law judge made no findings regarding whether claimant sustained psychiatric injuries as a result of the VBIED explosion, we are unable to discern the administrative law judge's reason for citing Dr. Meyer's statements regarding claimant's psychiatric conditions in his discussion of the issue of claimant's ability to return to her previous employment.

We, therefore, vacate the administrative law judge's finding that claimant established a prima facie case of total disability, and remand the case for further consideration of this issue. On remand, the administrative law judge must address all of the evidence relevant to the issue of whether, subsequent to March 28, 2007, claimant established her inability to perform her usual work due to her work-related injury and evaluate it in light of the applicable legal standards. *See, e.g., Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005).

[12]As previously noted, *supra* at n.9, Dr. Meyer attributed all of claimant's psychiatric symptoms to the VBIED explosion. EX 20 at 217.

Accordingly, the administrative law judge's Decision and Order is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge