



BRB No. 17-0417

ISAAC LAZAR)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
WORLDWIDE LANGUAGE RESOURCES)	
)	
and)	DATE ISSUED: <u>Jan. 24, 2018</u>
)	
ALLIED WORLD NATIONAL)	
ASSURANCE COMPANY)	
c/o BROADSPIRE)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Jeffrey M. Winter and Kim Ellis, San Diego, California, for claimant.

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

Before: BOGGS, GILLIGAN and ROLFE Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2015-LDA-00235) of Administrative Law Judge Jennifer Gee 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 rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked in Iraq as a linguist in 2003 and from 2006 until 2009. He was hired to work in Iraq as a linguist by employer in January 2010, but was laid-off in November 2011. Claimant has not worked since November 2011. Tr. at 33, 56-57. He reported psychological complaints to Dr. Cooper in March 2014, who suggested post-traumatic stress disorder (PTSD) as a possible diagnosis and referred him to a psychologist or psychiatrist for evaluation. JX 8 at 127-128. Claimant initially received psychological treatment in January 2015 from Dr. Sosa-Roche. In April 2015, claimant began treating with Dr. Malik. JXs 10, 22. Claimant was diagnosed with PTSD and Major Depressive Disorder (MDD). JXs 10 at 158-161; 22 at 390B. He filed a claim for a psychological injury on May 21, 2014. JX 1.

In her decision, the administrative law judge rejected employer's contentions that claimant did not provide it with timely notice of his alleged injury and that the claim was not timely filed. Decision and Order at 37-41; 33 U.S.C. §§912, 913. The administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), and that employer rebutted the presumption that he has a work-related psychological condition. *Id.* at 46-47. The administrative law judge concluded claimant did not establish that he has PTSD, work-related MDD, or any other work-related psychological condition, based on the record as a whole. *Id.* at 70-74. Thus, she denied the claim.

On appeal, claimant challenges the administrative law judge's findings that employer rebutted the Section 20(a) presumption and that claimant did not establish he has work-related PTSD and MDD on the record a whole. Employer responds that the administrative law judge's decision should be affirmed. Claimant filed a reply brief.

Claimant argues for reversal of the administrative law judge's rebuttal finding because there is no evidence for a non-industrial cause for his diagnosed PTSD, and the doctors on whom the administrative law judge relied to find the Section 20(a) presumption rebutted based their diagnosis on the lack of credibility of claimant's subjective psychological complaints.

Where, as here, the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant does not have a work-related psychological condition. *See Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). The administrative law judge discussed the medical evidence at length and found the opinions of Drs. Youngjohn and Parker rebut the Section 20(a) presumption. Decision and Order at 47-48. Dr. Youngjohn opined that claimant is malingering and does not have PTSD or any work-related psychological injury. JXs 21 at 378; 31 at 545, 547. Dr. Parker opined that claimant

does not have PTSD, MDD, or any psychiatric condition related to his employment in Iraq.¹ JX 19 at 328-29.

We reject claimant's contention that these opinions are legally insufficient to rebut the Section 20(a) presumption because they did not suggest a non-work-related cause for his diagnosed work-related psychological injuries. Drs. Youngjohn and Parker opined that claimant does not have a work-related psychological condition; employer is not required to show another agency of causation for claimant's alleged psychological injuries in order to rebut the presumption. *See O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000).

Moreover, employer's burden on rebuttal is one of production rather than persuasion. The relative credibility of the evidence is not weighed at this stage of the analysis. *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *see also Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 44 BRBS 13(CRT) (1st Cir. 2010). However, contrary to claimant's strained contention, this does not mean that the administrative law judge cannot find the presumption rebutted because a physician assessed a claimant's credibility and subjective complaints.² *See, e.g., Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989). The administrative law judge did not base her rebuttal finding on her negative assessment of claimant's credibility, but on the medical opinions of Drs. Youngjohn and Parker that claimant does not have the work-related conditions claimed, or any other work-related psychological injury. Decision and Order at 47, 57-66; *see Ogawa*, 608 F.3d at 651, 44 BRBS at 50-51(CRT). This finding is supported by substantial evidence and accords with law. *Ogawa*, 608 F.3d at 651, 44 BRBS at 50-51(CRT). Accordingly, we affirm the administrative law judge's finding that employer rebutted the Section 20(a) presumption. *Cline v. Huntington Ingalls, Inc.*, 48 BRBS 5 (2013); *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999).

¹ Dr. Parker initially opined that claimant had PTSD and MDD causally related to his employment with employer. JXs 19 at 299, 314, 317-18; 35 at 464. Dr. Parker subsequently reviewed Dr. Youngjohn's neuropsychological evaluation, which demonstrated exaggeration of symptoms. Dr. Parker did not examine claimant again. He retracted his former opinion, and, consistent with Dr. Youngjohn's test results, stated claimant was malingering and does not have PTSD or MDD. JXs 19 at 327-29; 35 at 465.

² Dr. Youngjohn found that claimant's subjective complaints are not credible because the results of several objective tests show that claimant over-reported his symptoms and is malingering. *See, e.g., JX 21 at 369-70, 377.*

Claimant also contends the administrative law judge erred in not finding, based on the record as a whole, that he has a work-related psychological condition. If the administrative law judge finds that the Section 20(a) presumption is rebutted, it drops from the case. The administrative law judge then must weigh all the relevant evidence and resolve the causation issue based on the record as a whole with claimant bearing the burden of persuasion. *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT); *see also Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *see generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

The administrative law judge thoroughly addressed the evidence as a whole. Decision and Order at 48-73. The administrative law judge explained at length how the diagnoses of claimant's doctors that claimant has work-related PTSD and MDD rest on the credibility of claimant's subjective complaints, which, ultimately, she found not credible in view of the objective tests administered to him. *Id.* at 70-73. Thus, she concluded that claimant did not establish that he has any work-related psychological conditions. In support of his contention of error, claimant cites Dr. Parker's original opinion that claimant has a work-related psychological condition. *See* n.1, *supra*. The rest of claimant's contention is as follows:

In light of (1) Dr. Parker's change of opinion without medical re-evaluation; (2) the absence of any evidence of non-causation; (3) multiple treaters who diagnosed Claimant with PTSD and depression, counseled him and prescribed medications; and (3) combined with the ALJ's abject willingness to accept Dr. Youngjohn's psychological testing results at face value the Order to denying (sic) Claimant suffers from PTSD is irrational, incredible, and unreasonable.

Cl. Br. at 13.

We find this statement insufficient to raise a cognizable challenge to the administrative law judge's weighing of the evidence. Mere assignment of alleged error and citation of favorable evidence is insufficient to invoke the Board's review. *Montoya v. Navy Exch. Serv. Command*, 49 BRBS 51 (2015); *Plappert v. Marine Corps Exch.*, 31 BRBS 109 (1997), *aff'g on recon. en banc* 31 BRBS 13 (1997); *Collins v. Oceanic Butler, Inc.*, 23 BRBS 227 (1990); *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988); *Carnegie v. C & P Telephone Co.*, 19 BRBS 57 (1986). Moreover, the administrative law judge is entitled to determine the weight to be accorded to conflicting evidence and the Board may not reweigh it. *See, e.g., Jones Stevedoring Co. v. Director, OWCP [Taylor]*, 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). To the extent claimant might be considered to have raised an issue as to the weighing of the evidence, the administrative law judge's conclusion is supported by the

opinions of Drs. Youngjohn and Parker and she permissibly found the opinions of claimant's physicians warranted lesser weight because they relied on claimant's subjective complaints, which the administrative law judge found not credible. *See* Decision and Order at 27-32. As claimant has failed to establish that the administrative law judge's denial of benefits is not supported by substantial evidence or is contrary to law, we affirm the administrative law judge's decision. *Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT).

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge