U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0051

JOHN NEWCOMER Claimant-Petitioner v. DYNCORP INTERNATIONAL and CONTINENTAL INSURANCE COMPANY/CNA INTERNATIONAL Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: Nov. 9, 2016 DECISION and ORDER

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

Charles Robinowitz, Portland, Oregon, for claimant.

Lisa G. Wilson (Laughlin, Falbo, Levy & Moresi), San Francisco, California, for employer/carrier.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Maia Fisher, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits (2011-LDA-00658, 00659) 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked for employer in Iraq as a police advisor. On March 9, 2005, he was injured when a bomb detonated outside his office. Claimant sustained injuries to his face, legs, right arm, wrist and fingers. Decision and Order at 7. Treatment records included complaints of blurred vision and hearing loss. CX 25 at 31-32. Claimant testified that he had symptoms of post-traumatic stress disorder (PTSD), although he did not seek treatment at that time. Tr. at 200, 230. Employer provided medical benefits for claimant's physical injuries and voluntarily paid claimant compensation for temporary total disability, 33 U.S.C. §908(b), from March 10, 2005 to June 14, 2006. EX 27 at 312. Claimant returned to work for employer on March 17, 2006, and he was sent to Afghanistan in April 2006.[1] Tr. at 155-156, 162, 235. Claimant alleged that he injured his back picking up a small object on March 5, 2008, in the course of his employment. ALJX 1. Employer denied coverage for the back injury. CX 6 at 9; EX 27 at 311. Upon completion of his contract to work in Afghanistan, claimant declined a contract extension because he no longer felt physically capable of performing the job. Tr. at 169-171, 174. Claimant returned home to Oregon where he received treatment for his back. *Id.* at 175-177. Claimant filed a claim under the Act seeking additional compensation and medical benefits related to the 2005 injury, including ocular and auditory injuries, for the March 2008 back injury, which claimant alleged was caused or aggravated by cumulative trauma from his working conditions in Afghanistan, and for PTSD from the 2005 bombing and his work experiences in Iraq and Afghanistan. ALJX 1.

In her decision, the administrative law judge found that claimant's right arm injury, back injury, and auditory and ocular injuries are compensable under the Act, and she awarded claimant medical benefits for these injuries. The administrative law judge found that claimant also is entitled to temporary total disability compensation from March 10, 2005 to January 9, 2006, and to permanent total disability compensation, 33 U.S.C. §908(a), from January 10, 2006 to March 16, 2006, for the right arm injury. The

[1] Employer also voluntarily paid claimant for a 17 percent right arm disability. 33 U.S.C. §908(c)(1); CX 5 at 6.

administrative law judge ordered that compensation for these periods be paid at the maximum compensation rate of $1,047.16 in effect for fiscal year (FY) 2005.[2] *See* 33 U.S.C. §906. The administrative law judge found claimant entitled to a scheduled award for a 30 percent permanent impairment of the right arm commencing on March 17, 2006. The administrative law judge awarded claimant compensation for temporary total disability and partial disability (for his 2005 right arm injury and 2008 back injury), for various periods from May 29, 2008 to September 16, 2012, at the FY 2008 maximum compensation rate of $1,160.36 in effect on March 5, 2008.[3] Based on claimant's post-Afghanistan part-time employment in the United States and employer's showing of suitable alternate employment, the administrative law judge awarded claimant continuing compensation for permanent partial disability for his low back condition, 33 U.S.C. §908(c)(19), (21), commencing September 17, 2012, at the FY 2008 rate of $1,160.36. Decision and Order at 114-115. The administrative law judge found that the claims for disability benefits for claimant's ocular and auditory injuries are barred under Section 13 of the Act, 33 U.S.C. §913, and that claimant failed to establish a prima facie case of work-related PTSD under the criteria enumerated in the Diagnostic Statistical Manual of Mental Disorders (4th ed. 1994) (DSM-IV). *Id*. at 59-68, 84-96.

On appeal, claimant challenges the administrative law judge's findings that the claims for disability compensation for his ocular and auditory injuries are barred by Section 13 and that he did not establish a prima facie case with respect to the PTSD claim. Claimant also asserts error in the administrative law judge's award of permanent total disability compensation from January 10, 2006 to March 16, 2006, based on the maximum compensation rate for FY 2005 of $1,047.16, rather than the FY 2006 rate of $1,073.64.[4] Employer responds, urging affirmance in all respects. The Director, Office

[2] The administrative law judge found that claimant's average weekly wage in 2005 was $2,177.03 and in 2008 was $2,291.55. Decision and Order 124-126.

[3] Specifically, claimant was awarded compensation for temporary total disability from May 29, 2008 to December 31, 2008, and from March 31, 2009 to June 30, 2009, and temporary partial disability compensation from January 1, 2009 to March 30, 2009, and from July 1, 2009 to September 16, 2012. Decision and Order at 143-144.

[4] Claimant also contends that the administrative law judge erred by not awarding him permanent total disability compensation on the day he returned to work for employer on March 17, 2006, rather than only through March 16, 2006. *See* Cl. Pet. for Rev. at 19. The Act provides that permanent total disability benefits are payable "during the continuance of" the total disability. 33 U.S.C. §908(a); *see generally Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991) (partial disability commences on the date suitable alternate employment shown).

of Workers' Compensation Programs (the Director), responds that the administrative law judge erred in finding that claimant did not establish a prima facie case of PTSD and in awarding claimant permanent total disability compensation from January 10, 2006 to March 16, 2006, based on the maximum compensation rate for FY 2005. Employer replies to the Director's response stating that his contentions are without merit. Claimant filed a reply brief to the Director's response. Employer filed a letter brief in response to claimant's reply.

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In her decision, the administrative law judge found that claimant filed a claim for eye and hearing loss injuries sustained in March 2005 on August 2, 2011, when he filed his pre-hearing statement.[5] Decision and Order at 62, 68; *see* EX 27 at 302. The administrative law judge found that claimant was aware of the full extent of his ocular disability when he was in Afghanistan. Decision and Order at 67. The administrative law judge affixed claimant's date of awareness as May 28, 2008, since this was claimant's last day of work there. *Id*. The administrative law judge found, therefore, that the claim filed on August 2, 2011, which is more than one year after claimant's date of awareness, was untimely under Section 13(a), 33 U.S.C. §913(a). Regarding claimant's hearing loss, claimant submitted an audiogram conducted on November 20, 2007, which showed a monaural hearing loss of 1.88 percent.[6] Decision and Order at 67; *see* CX 23 at 28-29. The audiogram report stated that claimant had hearing loss and linked the loss to the Iraq bombing. CX 23 at 28-29. Based on this report, the administrative law judge found that claimant's date of awareness of a work-related hearing loss was more than one year prior to the filing of the claim on August 2, 2011, and thus the claim was not timely filed. Decision and Order at 68.

Claimant contends the administrative law judge erred in finding the claims time-barred because employer did not raise the Section 13 defense at the first hearing, which claimant argues was the informal conference held on March 22, 2012, and because employer did not file a Section 30(a) report on these injuries. 33 U.S.C. §930(a).

Accordingly, we affirm the administrative law judge's award of compensation benefits through the last day prior to claimant's return to work for employer.

[5] This finding is not challenged on appeal.

[6] Claimant also underwent audiometric testing on March 17, 2005. EX 11 at 221. The administrative law judge found that this audiogram did not establish a date of awareness since claimant was told at that time that the ringing and hearing loss he was experiencing was likely temporary. Decision and Order at 68.

Claimant also contends that employer did not rebut the Section 20(b) presumption with respect to these claims. 33 U.S.C. §920(b).

Section 13(a) applies in traumatic injury cases and provides that the right to compensation shall be barred unless the claim is filed within one year of the date claimant is aware, or in the exercise of reasonable diligence should have been aware, of the relationship between the injury and the employment. 33 U.S.C. §913(a); *Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130(CRT) (9th Cir. 1991); *Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991). In the absence of substantial evidence to the contrary, it is presumed, pursuant to Section 20(b) of the Act, that a claim was timely filed. *Bath Iron Works Corp. v. U. S. Dep't of Labor* [*Knight*], 336 F.3d 51, 37 BRBS 67(CRT) (1st Cir. 2003); *Morgan v. Cascade Gen., Inc.*, 40 BRBS 9 (2006). Employer must establish that it filed a Section 30(a) report, 33 U.S.C. §930(a), as a predicate to rebutting the Section 20(b) presumption, 33 U.S.C. §920(b). *Blanding v. Director, OWCP*, 186 F.3d 232, 33 BRBS 114(CRT) (2d Cir. 1999); *Steed*, 25 BRBS 210. Section 13(b)(1) provides that a defense based on untimeliness of the claim must be raised, "at the first hearing of such claim in which all parties in interest are given reasonable notice and opportunity to be heard." 33 U.S.C. §913(b)(1); *see* 20 C.F.R. §702.223.[7]

We reject claimant's contention that employer did not timely raise a defense to the hearing loss and ocular injury claims. Employer raised a Section 13 defense at the hearing before the administrative law judge and in its amended post-trial brief. Tr. at 21-22; Emp. Amended Br. at 5. The Board has not directly addressed whether the "first hearing" on the claim is the first formal hearing before the administrative law judge, but it has assumed this to be the case. *See Alexander v. Ryan-Walsh Stevedoring Co., Inc.*, 23 BRBS 185, 187-189 (1990), *aff'd in pert. part and vacated and remanded on other grounds mem.*, 927 F.2d 599 (5th Cir. 1991); *Shoener v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 630, 633-634 (1978); *Shelton v. Washington Post Co.*, 7 BRBS 54, 57-58 (1977). Moreover, claimant's contention that the "first hearing" is the informal conference is inconsistent with the structure of the Act's implementing regulations at 20 C.F.R. Part 702, which distinguish "informal conferences" from "hearings," the latter

[7] Section 702.223 provides:

> Notwithstanding the requirements of §702.221, failure to file a claim within the period prescribed in such section shall not be a bar to such right unless objection to such failure is made at the first hearing of such claim in which all parties in interest are given reasonable notice and opportunity to be heard.

20 C.F.R. §702.223.

being conducted in accordance with the Administrative Procedure Act, 5 U.S.C. §554 et seq. *See* 20 C.F.R. §§702.331-351; *see also* 33 U.S.C. §919(d). Accordingly, we reject claimant's argument that employer was required to raise its Section 13 defense at the informal conference.[8]

Section 30(a) requires that employer inform the Department of Labor of a work injury within 10 days of its occurrence. *See generally Bustillo v. Southwest Marine, Inc.*, 33 BRBS 15 (1999). Employer filed an LS-202 Report of Injury Form shortly after the 2005 work incident, which is the incident that caused the eye impairment and hearing loss. EX 27 at 316. This report satisfies the requirements of Section 30(a).[9] *See*, *e.g.*, *Ryan v. Alaska Constructors, Inc.*, 24 BRBS 65, 70 (1990). Moreover, contrary to claimant's contention, employer is not required to file additional reports when claimant thereafter asserts he sustained additional injuries in the same work incident, such as, in this case, hearing loss and an eye injury arising from the 2005 bombing. *See Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 23 BRBS 13(CRT) (2d Cir. 1989). Accordingly, we reject claimant's contention that the administrative law judge erred in finding the eye injury and hearing loss claims untimely on the basis of Section 30(a). Because claimant does not raise any other contentions with respect to the administrative law judge's finding that claimant's claim for an eye injury was not timely filed, we affirm the finding that this claim is time-barred.[10]

Claimant also argues that employer did not rebut the Section 20(b) presumption, with respect to the hearing loss claim because there is no evidence of the date claimant received the audiogram and accompanying report. "Awareness" for purposes of a filing a hearing loss claim occurs when "the employee has received an audiogram, with the accompanying report thereon, which indicates that the employee has suffered a loss of hearing" related to his employment. 33 U.S.C. §908(c)(13)(D); *Taylor v. Director, OWCP*, 201 F.3d 1234, 33 BRBS 197(CRT) (9th Cir. 2000); 20 C.F.R. §702.222(c).

[8] Claimant's contention also is disingenuous in that he filed his claim for hearing loss and ocular injuries after the informal conference. *See* n. 5, *supra*.

[9] Moreover, employer's filing of the LS-202 report satisfies this requirement for rebutting the Section 20(b) presumption. *See Steed*, 25 BRBS 210.

[10] Claimant does not challenge the administrative law judge's finding that he was aware of his work-related eye injury by his last day at work in Afghanistan on May 28, 2008.

Claimant testified that he self-referred for the November 20, 2007 audiogram[11] because he noticed his hearing was worse since the 2005 bombing in Iraq, and he thought he may need a hearing aid. Tr. at 213-215. Claimant received a report which explained the results and linked claimant's high frequency hearing loss to the bombing; claimant also was given a copy of the actual audiogram. CX 23 at 28-29. Claimant testified that he provided the audiogram results to his attorney, "whenever they were received," and that, subsequent to the hearing test, he purchased a hearing aid, which he wore in Afghanistan. Tr. at 214, 215; *see* CX 17. The administrative law judge found that the audiogram and report fulfilled the notice requirements of Section 8(c)(13)(D) and that it was received more than one year prior to the filing of the claim. Decision and Order at 68. The administrative law judge thus found that employer rebutted the Section 20(b) presumption. *Id.*

Although the precise date claimant received the audiogram and report is not known, substantial evidence supports the administrative law judge's findings that claimant self-referred for testing in November 2007 and that he purchased a hearing aid in February 2008. It is well established that the Board must affirm the administrative law judge's rational inferences drawn from the evidence of record. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Based on the relevant evidence, the administrative law judge's conclusion that claimant received the audiogram at some date more than one year prior to the filing of his claim on August 2, 2011, i.e., at any time between the November 20, 2007 audiogram and August 1, 2010, is rational. Accordingly, as claimant's date of awareness of the work-relatedness of his hearing occurred more than one year before August 2, 2011, we affirm the administrative law judge's findings that employer rebutted the Section 20(b) presumption and that the claim for compensation for a 1.88 percent monaural hearing loss is time-barred.

PTSD

In her decision, the administrative law judge found that claimant established the working conditions element for invocation of the Section 20(a) presumption with respect to claimant's claim that he sustained PTSD as a result of his overseas employment. 33 U.S.C. §920(a); Decision and Order at 84. She found that "the only genuine dispute is whether or not Claimant suffers from PTSD."[12] Decision and Order at 84. The

[11] The audiogram was conducted at the North Bend Medical Center in Coos Bay, Oregon. CX 23 at 28.

[12] Claimant testified that he has not received treatment for PTSD, but that he self-treats. Tr. at 231-234.

administrative law judge found that claimant's testimony and the competing opinions of Susan Aviotti[13] and Dr. Villanueva,[14] which were based on the DSM-IV criteria, are entitled to only moderate credibility. *Id*. at 42, 50, 52, 84. The administrative law judge found that, given the credibility issues pertaining to the PTSD claim, the medical professionals' use of the DSM-IV, and that both claimant and employer discussed the DSM-IV at length in their briefs, she would examine the DSM-IV diagnostic criteria for establishing PTSD. *Id*. at 84. The administrative law judge found that claimant did not establish the second part of criterion A, or criteria C and F under the DSM-IV.[15] *Id*. at 96. The administrative law judge found claimant's statements that he feels anxiety

[13] Ms. Aviotti is a Licensed Professional Counselor. She stated that 80 percent of her psychotherapy practice is treating persons with PTSD. CXs 69, 77 at 2. Ms. Aviotti saw claimant on two occasions for a total of two hours. CX 77 at 9. She diagnosed PTSD and major depressive disorder. CXs 66 at 167, 77 at 10-16.

[14] Dr. Villanueva conducted an examination at employer's request on March 21, 2013. He interviewed claimant for two hours and claimant underwent testing for approximately another six hours. EXs 39 at 486-487, 41 at 9-11. Dr. Villanueva concluded that claimant does not have a psychological disorder, and he ruled out PTSD and major depressive disorder. EX 39 at 490-491.

[15] These specific criteria are:

A. Exposure to a traumatic event.
   2. Individual's response involved intense fear, helplessness or horror

C. Avoidance of Stimuli or Cues and Numbing Responsiveness (three or more)
   1. efforts to avoid thoughts, feelings, or conversations associated with the trauma
   2. efforts to avoid activities, places, or people that arouse recollections of the trauma
   3. inability to recall an important aspect of the trauma
   4. markedly diminished interest or participation in significant activities
   5. feeling of detachment or estrangement from others
   6. restricted range of affect
   7. sense of a foreshortened future

F. Clinically Significant Distress or Impairment (in social occupational or other important areas of functioning)

DSM-IV at pp. 427-429.

around people with uniforms and guns, and does not enjoy being in crowds or in a college setting "doesn't mean that he is suffering from PTSD,"[16] and that the PTSD diagnosis of Ms. Aviotti "is insufficient, on its own, to show that Claimant has suffered an injury." *Id*. The administrative law judge, therefore, concluded that claimant failed to make a prima facie case that he has PTSD and she denied the claim. *Id*.

Claimant and the Director argue that the administrative law judge erred by impermissibly substituting her opinion whether claimant has PTSD for that of Ms. Aviotti. In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after he establishes a prima facie case. To establish a prima facie case, the claimant must show that he sustained a harm or pain and that conditions existed or an accident occurred at his place of employment which could have caused the harm or pain. *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). In order to establish his prima facie case, claimant is not required to affirmatively prove that his work injury in fact caused or aggravated the harm; rather, claimant need only establish that the work injury could have caused or aggravated the harm alleged. *See Welch v. Pennzoil Co.*, 23 BRBS 395 (1990). In this case, the PTSD diagnosis of Ms. Aviotti, *see* CXs 66 at 167, 77 at 243, arguably is sufficient to establish the harm element for purposes of invocation of the Section 20(a) presumption. *See R.F.* [*Fear*] *v. CSA, Ltd.*, 43 BRBS 139 (2009); *S.K.* [*Kamal*] *v. ITT Industries, Inc.*, 43 BRBS 78 (2009), *aff'd in part and rev'd in part mem.*, No. 04:09-MC-348, 2011 WL 798464 (S.D. Tex. Mar. 1, 2011).[17]

In its response brief, employer argues that any error committed by the administrative law judge is harmless because she conducted a de facto complete Section 20(a) analysis. Emp. Br. at 19-20. The Board may address an argument in a response brief if it provides an alternate basis of affirming the administrative law judge's decision. *Misho v. Global Linguist Solutions*, 48 BRBS 13 (2014). In *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT), the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, held that an administrative law judge's error in finding employer's rebuttal evidence insufficient was harmless where, "the ALJ's detailed

[16] *See* Tr. at 198-199, 244-245, 260-261.

[17] In reversing the Board's decision in part, the district court stated that rigid use of the DSM-IV is not required for legal determinations under the Act. However, if a medical professional purports to use this diagnostic tool, he or she must "support the elements" or state why "a particular element need not be supported under the facts of the particular diagnosis." *ITT Industries, Inc.*, 2011 WL 798464 at *12-13.

analysis took into account all of the evidence" relevant to determining whether the claimant established a work-related injury. *Ogawa*, 608 F.3d at 652, 44 BRBS at 51(CRT). Assuming, arguendo, that the Section 20(a) presumption applies, we note that Dr. Villanueva's opinion that claimant does not have PTSD is substantial evidence to fulfill employer's burden of production on rebuttal. *Id.*, 608 F.3d at 651-652, 44 BRBS at 50(CRT); *see also Cline v. Huntington Ingalls, Inc.*, 48 BRBS 5 (2013); *Manente v. Sea-Land Service, Inc.*, 39 BRBS 1 (2004); EX 39 at 491, 493. Once the Section 20(a) presumption is rebutted, claimant bears the burden of persuading the administrative law judge that he sustained a work-related injury, based on the record as a whole. *Ogawa*, 608 F.3d at 651, 44 BRBS at 50(CRT).

In her decision, the administrative law judge found "a failure of proof" as claimant did not show an initial response of intense fear, helplessness or horror as required by criterion A- subpart 2 of the DSM-IV. Decision and Order at 85. The administrative law judge found that Dr. Villanueva stated this criterion was not met and that there are no notes or medical records describing claimant's reaction to the 2005 bombing or any other traumatic event. *Id*.; *see* EXs 39 at 491, 41 at 14. The administrative law judge rejected Ms. Aviotti's opinion that claimant met this criterion based on his reaction of numbness. *See* CXs 66 at 165, 77 at 11. The administrative law judge found that a numb subjective reaction "cuts against" this sub-criterion, although it may be evidence of PTSD from a prior traumatic event. Decision and Order at 85.

Criterion C requires the presence of three or more of seven symptoms. DSM-IV at 428; *see* n.15, *supra*. The administrative law judge found there is no evidence that claimant has difficulty remembering aspects of the bombing and that Dr. Villanueva noted that claimant has a good memory of the event. Decision and Order at 88; *see* EX 39 at 488. The administrative law judge found that, while claimant may experience numbness and avoidance of certain situations, there is no evidence that this is a change in claimant's behavior that arose after the 2005 bombing. Decision and Order at 88. The administrative law judge also found that claimant has not avoided stimuli associated with traumatic experiences. For example, after the bombing, claimant worked in Afghanistan, there is evidence he tried to do so quickly, and he extended his deployment there. *Id*.; *see* EX 10 at 202.

The administrative law judge found that claimant also has sought out situations inconsistent with his claim of avoidance. While claimant avers he is anxious around people in uniform with guns, he has consistently pursued employment opportunities where he would be surrounded by people in uniform with guns.[18] Decision and Order at

[18] The administrative law judge found in this regard that claimant had worked at crowded festivals and that any security job has the possibility of confrontation. Decision and Order at 89; Tr. at 252; EX 39 at 491. Claimant testified that, after he returned home

89; Tr. at 199, 260-263; CX 77 at 77; EX 39 at 491. The administrative law judge credited evidence that claimant maintains a support group of friends from his time in Iraq and Afghanistan and he has formed and sustained a romantic relationship over several years. Tr. at 99; CX 66 at 165-166; EX 39 at 482-484. The administrative law judge found that there is no evidence that claimant has avoidance behavior and a sense of detachment from others and that Dr. Villanueva stated that the absence of avoidance behavior was central to his finding that claimant does not suffer from PTSD.[19] Decision and Order at 89; EX 39 at 491. The administrative law judge found it "is hard to infer," Decision and Order at 89, that claimant has a sense of a foreshortened future from his statement to Ms. Aviotti that "you only live until you die," which is the only evidence presented to establish this criterion. Accordingly, the administrative law judge concluded that claimant did not meet criterion C. *Id*. at 90.

The administrative law judge found that claimant has not experienced clinically significant distress or impairment as required by criterion F. The administrative law judge found Ms. Aviotti's statement that claimant meets this criterion is "just a bare conclusion and is based solely on the subjective statements of Claimant." Decision and Order at 92. Ms. Aviotti stated that claimant's PTSD commenced in 2005, yet the administrative law judge found that claimant returned to similar work in Afghanistan in 2006, functioning there for two years and leaving voluntarily. *Id.* The administrative law judge thus found Dr. Villanueva's opinion more convincing based on claimant's ability to perform his tasks in Afghanistan and his not seeking treatment for PTSD. *Id*. at 93; EX 41 at 490-491. The administrative law judge credited claimant's testimony about difficulties in social situations and hypervigilance, but she found that claimant did not show significant distress or impairment. Decision and Order at 94; *see* Tr. at 198-200, 230, 244-245. Moreover, the administrative law judge found there is evidence that claimant's adjustment difficulty after returning home appears to have somewhat subsided. *Id*. Specifically, claimant testified at his deposition that his "PTSD is fine as long as I don't get around crowds … I mean, I don't have big issues with cars coming up around me and believing they're car bombs, like I did when I first got home."[20] EX 29 at

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from Afghanistan he had a temporary job with the Coos Bay Sheriff's Department, and that he currently has part-time security work at the Coos Bay port. Tr. at 180-182.

[19] The administrative law judge also found there is evidence that claimant engages in pleasurable activities and maintains social activities. EX 29 at 69, 71. Claimant also shops several times a week, maintains rental properties, takes care of his own property and grows food on his farm. Tr. at 124-125, 199-200; EX 41 at 39-40.

[20] The administrative law judge also found not determinative for establishing criterion F claimant's inability to complete college courses in accordance with the DOL Rehabilitation Plan because he was uncomfortable in social situations and people with

68. Accordingly, the administrative law judge concluded that claimant did not show he had clinically significant distress or impairment. Decision and Order at 95.

The weight to be accorded to the evidence of record is for the administrative law judge as the trier-of-fact and the Board must respect her rational evaluation of the evidence. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Furthermore, it is solely within the administrative law judge's discretion to accept or reject all or any part of any evidence according to her judgment. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). In this case, the administrative law judge weighed the relevant evidence to determine if claimant established he has PTSD under the DSM-IV criteria, and, in light of all of the evidence, credited parts of the opinion of Dr. Villanueva that claimant does not have PTSD over the contrary opinion of Ms. Aviotti.[21] *See generally Brown v. Nat'l Steel & Shipbuilding Co.*, 34 BRBS 195 (2001). Contrary to claimant's contention, the administrative law judge did not substitute her own opinion for that of Ms. Aviotti, but found that her diagnosis is not creditable given evidence of record that detracts from her conclusion. Substantial evidence of record supports this finding. *See Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 1546, 24 BRBS 213, 216(CRT) (9th Cir. 1991) ("Substantial evidence is not evidence considered in isolation from opposing evidence, but evidence that survives 'whatever in the record fairly detracts from its weight.'") (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)). Given the administrative law judge's broad discretion in weighing and resolving conflicts in the evidence, and, as the administrative law judge's finding is based on the totality of the relevant evidence, her conclusion that claimant does not have PTSD, as delineated by the DSM-IV, is rational and supported by substantial evidence. Accordingly, any error in the administrative law judge finding that claimant did not establish a prima facie case of work-related PTSD is harmless, and we affirm the administrative law judge's rejection of the PTSD claim. *See Ogawa*, 608 F.3d at 652, 44 BRBS at 51(CRT).

SECTION 6

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beards carrying backpacks. Decision and Order 95; *see* Tr. at 200, 244-245. The administrative law judge found there were additional reasons he did not complete the rehabilitation plan such as he rejected the appropriateness and goals of the plan, and it did not meet his financial needs. *Id.*; Tr. at 244; CX 66 at 167; EX 29 at 66.

[21] In this respect, we note that the administrative law judge did not accept Dr. Villanueva's opinion in its entirety either, finding that some of the DSM-IV criteria were met based on Ms. Aviotti's opinion. *See* Decision and Order at 90-91.

Lastly, we consider claimant's challenge to the administrative law judge's finding that the FY 2005 maximum compensation rate applies to his permanent total disability benefits for his right upper extremity injury for the period between January 10, 2006 and March 16, 2006.[22] We agree with claimant and the Director that claimant became entitled to the FY 2006 statutory maximum rate as of January 10, 2006, the date that he reached maximum medical improvement and his entitlement to permanent total disability benefits commenced. In *Lake v. L-3 Communications*, 47 BRBS 45 (2013), the Board held, consistent with the decision of the Ninth Circuit in *Roberts v. Director, OWCP*, 625 F.3d 1204, 44 BRBS 73(CRT) (9th Cir. 2010), *aff'd sub nom. Roberts v. Sea-Land Services, Inc.*, 132 S.Ct. 1350, 46 BRBS 15(CRT) (2012),[23] that in cases where the claimant's temporary total disability changes to permanent total disability during a given fiscal year, the "currently receiving" clause of Section 6(c), 33 U.S.C. §906(c), makes applicable the maximum rate in effect at the time the claimant's entitlement to permanent total disability commences. *Lake*, 47 BRBS at 48. Thus, the administrative law judge's Decision and Order is modified to award claimant permanent total disability benefits for his right upper extremity injury from January 10, 2006 through March 16, 2006 at the FY 2006 maximum of $1,073.64. *Id.* at 48-50.

[22] In its response brief, employer argues that claimant may not raise this argument for the first time on appeal. However, the Board may address pure issues of law, as this one, that are raised on appeal. *See Logara v. Jackson Engineering Co.*, 35 BRBS 83 (2001).

[23] The decision of the Ninth Circuit in *Roberts*, 625 F.3d 1204, 44 BRBS 73(CRT), is controlling in this case, which arises within the jurisdiction of that circuit. *See McDonald v. Aecom Technology Corp.*, 45 BRBS 45 (2011).

Accordingly, we modify the administrative law judge's Decision and Order Awarding Benefits to award claimant permanent total disability benefits from January 10, 2006 through March 16, 2006 at the FY 2006 maximum of $1,073.64. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge