



BRB Nos. 24-0064, 25-0164,
and 25-0193

KEVIN WOOLUM)
)
 Claimant-Respondent)
)
 v.)
)
 ARMA AVIATION)
)
 and)
)
 INSURANCE COMPANY OF THE STATE)
 OF PENNSYLVANIA)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent)

PUBLISHED

DATE ISSUED: 03/20/2026

DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits, Decision and Order Awarding Attorneys' Fees and Costs, and Order Approving Stipulated Attorney's Fees of Evan H. Nordby, Administrative Law Judge, United States Department of Labor.

John R. Singer (Law Office of Matthew T. Singer), St. Louis, Missouri, for Claimant.

Lawrence P. Postol and Joshua M. Obszanski (Postol Law Firm, P.C.), McLean, Virginia, for Employer and its Carrier.

Alice B. Catlin (Jonathan Berry, Solicitor of Labor; Jennifer Feldman Jones, Acting Associate Solicitor; William M. Bush, Acting Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: ROLFE, JONES, and ULMER, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Evan H. Nordby's Decision and Order Awarding Benefits, Decision and Order Awarding Attorneys' Fees and Costs, and Order Approving Stipulated Attorney's Fees (2021-LDA-03506), rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (Act), as extended by the Defense Base Act, 42 U.S.C. §§1651-1655 (DBA).¹ We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law.² 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 362 (1965).

Claimant allegedly began having breathing, sleeping, and psychological issues due to exposure to "constant" fumes from burn pits located near his worksite and hotel while working for Employer as an aircraft mechanic from February 30, 2020, to October 15, 2020, in Kabul, Afghanistan.³ Hearing Transcript (HT) at 23-24, 27-29, 38-40; Respondent's Exhibits (RXs) 5, 13 at 34-35; *see* Claimant's Exhibits (CXs) 17-22. Claimant testified he began experiencing sinus pressure, congestion, and sleeping problems within a week or two of arriving in Kabul, which he initially believed were due to a cold

¹ The Benefits Review Board consolidated Employer's appeals for purposes of this decision. *Woolum v. Arma Aviation*, BRB Nos. 24-0064, 25-0164, and 25-0193 (June 4, 2025) (Order).

² This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because the office of the district director who filed the ALJ's decision is located in California. 33 U.S.C. §921(c); *Glob. Linguist Sols., L.L.C. v. Abdelmegeed*, 913 F.3d 921, 922 (9th Cir. 2019); *McDonald v. Aecom Tech. Corp.*, 45 BRBS 45, 47 (2011).

³ Claimant testified that prior to working for Employer, he worked in multiple locations overseas including Afghanistan, Iraq, and Kuwait, there were burn pits located two or three miles from his work and sleeping locations in Iraq, and he did not experience sinus issues while in Iraq. RX 13 at 21-24, 32, 36; HT at 38, 52-53.

or sinus infection, and he attempted to treat his symptoms with over-the-counter medications.⁴ HT at 26, 30; RX 13 at 40-42. He testified his symptoms had become severe and constant by mid-April, he could not breathe through his nose “at any time,” and he had the “feeling of suffocating in [his] sleep,” which was causing panic attacks and anxiety. HT at 26, 30-32; RX 13 at 40-42, 45.

Claimant reported his ongoing symptoms to his supervisor, and on May 2, 2020, he began treating with Dr. Patrick Echebi at the clinic located in the hotel compound. Joint Exhibit (JX) 5 at 1; HT at 31-33; RX 13 at 27, 44. Dr. Echebi identified “[s]wollen and reddish nasal turbinates,” made a differential diagnosis of chronic sinusitis, and prescribed antihistamines. JX 5 at 2-4. In his May 25, 2020, referral letter for an ear, nose, and throat (ENT) specialist, Dr. Echebi stated his “provisional diagnosis [is c]hronic rhinitis with sleep apnea and panic attacks,” and he sought “to rule out [c]hronic sinusitis.” *Id.* at 5.

On May 30, 2020, Claimant began treating at the same clinic with Dr. Daniel Akech who diagnosed him with chronic sinusitis and vasomotor rhinitis. JX 5 at 8. On June 2, 2020, Dr. Akech wrote a “REFERRAL OUT OF THEATER” letter because Claimant “urgently need[ed] [computed tomography] CT scan imaging of his sinuses and [wa]s a potential candidate for urgent sinus surgery” which could not be performed at the clinic. *Id.* at 13. He noted Claimant had a “poor response to treatment” for his chronic sinusitis and had “blockage of all eight sinuses (Pansinusitis).” *Id.* Dr. Akech evaluated Claimant on June 4, 2020, June 7, 2020, and June 17, 2020, acknowledging Claimant’s improving symptoms with medication but noting his rhinitis had “flared up since his arrival in Kabul.” *Id.* at 14-20.

Claimant left Kabul on or around July 1, 2020, on scheduled leave, and arrived in the United States on or around July 3, 2020. RXs 2 at 2, 13 at 50-52; HT at 29, 35. He testified that his symptoms “improved almost immediately after leaving Kabul,” his “symptoms were lessened by more than half” upon arriving in the United States, and during his leave, he had only “slight irritation” in his sinuses without mucus discharge and no sleeping issues or anxiety. HT at 35; RX 13 at 51.

On July 7, 2020, Dr. Winston Vaughan evaluated Claimant and conducted a nasal endoscopy. JX 6 at 2-4. He noted Claimant’s complaints of congestion, sinus issues,

⁴ Claimant testified he experienced regular sinus infections, head colds, pneumonia, and respiratory infections prior to working for Employer, but these conditions did not affect his ability to work, did not usually last longer than a week, and were “[n]ot that severe and not that long in time” in comparison to the duration of his symptoms after working for Employer. HT at 23, 26, 39; RX 13 at 45.

suspected sleep apnea, panic attacks, and loss of smell. He diagnosed Claimant with hypertrophy of nasal turbinates, nasal congestion, and chronic rhinitis, and he recommended the use of “masks and air filters to help with the filtration and moisturization of the nasal tissue” and saline irrigation to clear his nose. *Id.* at 2-5.

Claimant returned to Kabul on or around September 14, 2020, and he testified that his severe and constant breathing issues, sleeping disturbances, and panic attacks returned within a few days. JX 6 at 10; HT at 29, 35-38; RXs 2 at 4, 13 at 51-53. On September 24, 2020, Dr. Vaughan conducted a telehealth evaluation of Claimant and noted Claimant reported his worsening symptoms upon returning to Kabul, including waking “fully congested” in the middle of the night and burning “sinuses . . . when he breathe[d] through his nose throughout the day.” JX 6 at 10. Dr. Vaughan opined Claimant “may want to consider returning to the United States for work, as [his] symptoms seem to return when [he went] abroad” and he should have a CT scan after returning to the United States “to see if there are any chronic changes to [his] sinuses.” *Id.* at 12.

On September 26, 2020, Claimant returned to Dr. Akech for treatment, who again diagnosed vasomotor rhinitis and chronic sinusitis. JX 10 at 1-2. Dr. Akech noted Claimant’s conditions are “not sufficiently controlled with medication” and opined his “vasomotor rhinitis is triggered by environmental pollution[,] which explains the recurrence of symptoms every time he travels to Kabul.” *Id.* at 1-3. Dr. Akech recommended Claimant leave his work in Kabul. *Id.* at 3.

Claimant resigned on October 1, 2020, based on Drs. Akech’s and Vaughan’s recommendations and his ongoing symptoms. HT at 40; RX 13 at 64. He left his employment on October 15, 2020. HT at 29. Claimant immediately returned to the United States, and he began working as an aircraft mechanic for Air Methods Corporation on April 11, 2021. CX 16; HT at 40-42. Claimant has not worked overseas since returning to the United States but has applied for multiple overseas jobs. HT at 68-70.

Claimant began treating with Drs. Ronald N. Wong and Brien Tonkinson, and he continued his treatment with Dr. Vaughan and Dr. Ye Min, with whom he had treated before his work for Employer. CX 11; JXs 8, 11; RX 14. Drs. Wong, Tonkinson, and Vaughan ordered CT scans, which were performed on May 5, 2021, July 13, 2021, and January 22, 2022, respectively. CX 11 at 9-10; JX 11 at 5-6; RXs 14 at 3-8, 15 at 1. All the CT scans indicated varying degrees of sinusitis, and Drs. Tonkinson and Vaughan diagnosed hypertrophy of nasal turbinates and chronic sinusitis. JXs 9 at 1-2, 11 at 1-6; CX 11 at 9-10; RXs 14 at 3-8, 15 at 1.

Based on the CT scan results and Claimant’s resistance to treatment, Dr. Tonkinson recommended turbinate reduction and septoplasty to address Claimant’s conditions, and

on September 1, 2021, Dr. Tonkinson performed the surgery. RXs 14 at 6-8, 10, 16 at 1-2; CX 12 at 3. Claimant testified Dr. Tonkinson's surgery "significantly" improved his condition, stating he was able to breathe and sleep, but he continues to have no sense of smell, and has sensitivity to chemical vapors, ongoing congestion, and inflammation of his sinuses. HT at 40-41, 46-47.

At Employer's request, Dr. Mark Singer reviewed Claimant's medical records and examined him on May 16, 2022. RX 26. He noted Claimant reported a history of nasal and sinus issues dating back to 2014 but explained Claimant's current complaints of sleep disturbances, panic attacks, and mood alteration are due to pre-existing and untreated obstructive sleep apnea. *Id.* at 1, 5-7. He opined Claimant does not have chronic sinusitis or any other medical conditions caused or aggravated by his work for Employer and explained chronic sinusitis is often incorrectly diagnosed by primary care providers without CT scans and endoscopy. *Id.* at 5, 7. He further noted Claimant had pre-existing nasal congestion, which can be aggravated by poor air quality but is not the "primary cause" for his reported sleep disturbances and panic attacks. *Id.* at 7.

At the hearing, Dr. Singer reiterated his opinion that Claimant's current complaints are due solely to untreated obstructive sleep apnea and unrelated to the environmental conditions in Kabul. But he conceded pollution could have aggravated Claimant's pre-existing nasal congestion. HT at 88-89, 95, 98, 104, 107. He believed Dr. Akech's diagnosis of chronic sinusitis was not properly documented because he was unable to conduct a CT scan and Dr. Vaughan's CT scan showed a "low-grade left-sided nasal obstruction" and not chronic sinusitis. *Id.* at 90, 93-94, 97. He further opined sinusitis is not caused by poor air quality. *Id.* at 98-99.

On July 12, 2020, Claimant filed a claim seeking benefits for sinusitis, sleep issues, and psychological disorders. JX 1. Employer controverted his claim. JX 3. The case was transferred to the Office of Administrative Law Judges for a video hearing, held on June 21, 2022. The ALJ found Claimant invoked the Section 20(a) presumption, 33 U.S.C. §920(a), linking his work to his alleged nasal and sinus conditions, and Employer rebutted the presumption. D&O at 22, 24. Weighing the evidence as a whole, the ALJ found Claimant established he had "mild and intermittent" nasal and sinus conditions that became chronic and resistant to treatment after his exposure to burn pits while working for Employer in Kabul. *Id.* at 25-29.

The ALJ also determined Claimant invoked the Section 20(a) presumption for his alleged psychological injuries, Employer rebutted the presumption, and Claimant failed to establish he suffered a work-related psychological injury. D&O at 23-28.

In addressing the nature and extent of Claimant's disability, the ALJ found Claimant's nasal and sinus conditions have not reached maximum medical improvement (MMI) and have prevented him from returning to his former work for Employer, thereby establishing a prima facie case of total disability. D&O at 30-31. As Employer presented no evidence of suitable alternate employment, the ALJ awarded Claimant temporary total disability (TTD) benefits from October 15, 2020, through April 10, 2021. *Id.* at 32. The ALJ considered Claimant's concession that he returned to gainful employment as an aircraft mechanic on April 11, 2021, as evidence of suitable alternate employment, and he awarded Claimant temporary partial disability (TPD) benefits from April 11, 2021, through the present and continuing. *Id.* at 32-34. The ALJ calculated Claimant's average weekly wage (AWW) under Section 10(a) of the Act, 33 U.S.C. §910(a), and declined to adjust Claimant's AWW based on the unavailability of his usual work in Kabul after August 30, 2021, when the United States Armed Forces withdrew from Afghanistan. *Id.* at 33-34. He then calculated Claimant's lost wage-earning capacity and his resulting TTD and TPD compensation. *Id.* at 32-34. The ALJ also awarded Claimant all past, present, and future reasonable and necessary medical expenses related to his nasal and sinus conditions. *Id.* at 35-36; 33 U.S.C. §907(a).

On appeal, Employer contends the ALJ erred in finding Claimant established a work-related injury upon weighing the evidence as a whole, in determining the extent of Claimant's disability, and in granting Claimant any disability benefits after August 30, 2021, when the United States completed withdrawal of its troops from Afghanistan.⁵ BRB No. 24-0064. Claimant responds, urging affirmance of the ALJ's decision. The Director, Office of Workers' Compensation Programs (Director), filed a limited response urging the Benefits Review Board to reject Employer's argument regarding the award and calculation of disability benefits after August 30, 2021. Employer filed a reply brief addressing the Director's arguments.

BRB No. 24-0064 – Entitlement to Benefits

Causation – Weighing the Evidence as a Whole

Employer first contends the ALJ erred in finding Claimant sustained a work-related sinus condition, asserting his current condition is solely the result of his pre-existing sleep apnea. It argues the ALJ's decision violates the Administrative Procedure Act (APA), 5

⁵ We affirm, as unchallenged on appeal, the ALJ's findings that Claimant failed to establish a psychological injury but invoked the Section 20(a) presumption with respect to his sinus and nasal conditions, and Employer rebutted the presumption. *See Scilio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57, 58 (2007); D&O at 23-28.

U.S.C. §557(c)(3)(A),⁶ because he failed to discuss relevant evidence, rejected contradictory evidence when evaluating Claimant’s credibility (particularly in “finding the Claimant did not have pre-existing chronic sinus problems and sleep apnea”), and mischaracterized and failed to adequately explain why he discredited Dr. Singer’s opinion. Emp. Brief at 38-46, 49-53. We are not persuaded the ALJ committed any error.

When a claimant invokes the Section 20(a) presumption that his injury is work-related and the employer successfully rebuts the presumption, as in this case, it drops out of the analysis and the issue of causation must be resolved based on the evidence of record as a whole with the claimant bearing the burden of persuasion by a preponderance of the evidence.⁷ *Haw. Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 651 (9th Cir. 2010); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171, 173-174 (1996); see also *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267 (1994). As the factfinder, the ALJ is entitled to evaluate the credibility of all witnesses, including physicians, weigh the medical evidence, and draw his own inferences and conclusions from the record. See *Ogawa*, 608 F.3d at 650-653; *Duhagon v. Metro. Stevedore Co.*, 169 F.3d 615, 618 (9th Cir. 1999). The Board may not reweigh the evidence, draw other inferences from the record, or substitute its views for those of the ALJ. *Rhine v. Stevedoring Servs. of Am.*, 596 F.3d 1161, 1165 (9th Cir. 2010); *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 1159 (9th Cir. 2002).

In weighing the evidence as a whole, the ALJ considered Claimant’s treatment records, pre-deployment health assessments from multiple jobs including his most recent assessment with Employer, and testimony from various witnesses.⁸ D&O at 18-21, 24-27. Although he found “there are moments where Claimant’s history disagrees with his

⁶ The APA requires every adjudicatory decision “include 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.” 5 U.S.C. §557(c)(3)(A).

⁷ Under the aggravation rule, if a work-related injury contributes to, combines with, or aggravates a pre-existing condition, the entire resultant condition is compensable. *Indep. Stevedore Co. v. O’Leary*, 357 F.2d 812, 815 (9th Cir. 1966).

⁸ The ALJ considered Drs. Shakil A. Mustaq’s, Peter G. Ventura’s, Blake Beazer’s, Min’s, Vaughan’s, Marcos A. Duran’s, Wong’s, and Tonkinson’s treatment records; Dr. Steven Bures’s hearing evaluation; and Dr. John Beck’s psychological evaluation. See D&O at 4-5, 9, 13, 26, 18-21, 25.

medical records,” the ALJ concluded Claimant’s testimony was “generally credible.”⁹ *Id.* at 16-17.

The ALJ next weighed Drs. Akech’s and Vaughan’s opinions that Claimant’s work exposure caused or aggravated his nasal and sinus conditions against Dr. Singer’s contrary opinion that Claimant’s complaints were due to his pre-existing sleep apnea and nasal congestion and unrelated to his work. D&O at 19-21, 25-28. The ALJ found Dr. Akech’s and Vaughan’s opinions were supported by the “extensive medical records” which demonstrated Claimant’s pre-existing “mild and intermittent” sinus and nasal conditions were aggravated by his exposure to burn pits in Kabul. *Id.* at 27. He further found that Dr. Akech’s diagnosis of chronic sinusitis was supported by the treating physicians’ CT scans identifying varying degrees of sinusitis and that Dr. Singer’s disagreement with this evidence was “poorly explained.” *Id.* at 26-27. Consequently, the ALJ determined Dr. Akech’s opinion outweighed Dr. Singer’s opinion. *Id.* at 27. Therefore, he found the weight of the medical evidence demonstrated Claimant had “mild and intermittent” nasal and sinus conditions that became chronic and resistant to treatment after his exposure to burn pits while working for Employer. *Id.* at 27-29.

We reject Employer’s contention that the ALJ failed to weigh multiple pieces of evidence in determining Claimant did not have chronic sinus problems prior to his work for Employer and that the alleged failure affected his consideration of Claimant’s credibility.¹⁰ Emp. Brief at 38-46. First, the ALJ reviewed all the pre-employment evidence that Employer identifies as having been ignored. He weighed it alongside the other pre-employment medical evidence and determined Claimant had “mild and intermittent” sinus and nasal conditions prior to his work for Employer. He based this conclusion on the documented progression of Claimant’s symptoms and Dr. Singer’s explanation that non-chronic sinusitis resolves within two weeks with medication. D&O at 4-5 n.10, 25, 27 n.31; HT at 99; *see* Emp. Brief at 16-24, 39-41, 45. Second, in determining Claimant’s testimony is “generally credible,” the ALJ specifically acknowledged the inconsistencies between Claimant’s denial of prior diagnoses of sleep

⁹ Despite the discrepancies, the ALJ determined Claimant’s “recollection of his own medical history” was otherwise “consistent and supported.” D&O at 16-17.

¹⁰ Given the ALJ’s weighing of the medical opinions on causation, as discussed herein, there is no error in the ALJ’s determination that Claimant experienced sleep disturbances rather than making a specific finding about the existence of sleep apnea. We decline to address Employer’s other arguments about the credibility of evidence establishing pre-existing sleep apnea and Claimant’s use of a Continuous Positive Airway Pressure (CPAP) machine. *See* Emp. Brief at 39-40, 44-45.

apnea, chronic sinusitis, and rhinitis and his medical records documenting these diagnoses, and found they were not discrediting because his “recollection of his own medical history” was otherwise “consistent and supported” and any discrepancies could have been due to miscommunication between Claimant and his providers. D&O at 16-17; *see* Emp. Post-Hearing Brief at 28-35; Emp. Brief at 38-46.

We are also not persuaded by Employer’s contention that the ALJ erred in rejecting Dr. Singer’s opinion that Claimant’s current complaints were due solely to pre-existing sleep apnea and unrelated to his exposure to burn pits. Emp. Brief at 49-53. The ALJ initially found Dr. Singer was well-qualified and his opinion was well-reasoned. D&O at 21. In weighing the conflicting opinions of Dr. Singer and Drs. Akech and Vaughan, however, the ALJ found Drs. Akech’s and Vaughan’s opinions were credible and supported by the “extensive medical records” -- which demonstrated Claimant’s history of “mild and intermittent” nasal and sinus conditions that became chronic after Claimant’s work for Employer -- whereas Dr. Singer’s opinion was not.¹¹ *Id.* at 19-20, 25-27. Further, the ALJ found Dr. Singer’s disagreements with Dr. Akech’s diagnosis of chronic sinusitis in Kabul and the post-employment CT scans confirming Dr. Akech’s diagnosis to be “poorly explained” and contrary to the opinions of multiple treating physicians who interpreted the CT scans as showing chronic sinusitis. *Id.* at 26-27. For these reasons, the ALJ determined Dr. Akech’s credible and supported opinion outweighed Dr. Singer’s opinion that Claimant’s symptoms were due solely to pre-existing sleep apnea.¹² *Id.* at 25-27.

As the ALJ rationally weighed all evidence of record, including the medical opinions, Claimant’s testimony, and his treatment records, and he adequately detailed and explained his findings in compliance with the APA, we affirm his conclusions that Claimant had “mild and intermittent” nasal and sinus issues that became chronic after his exposure to burn pits while working for Employer.¹³ *See Ogawa*, 608 F.3d at 652-653;

¹¹ We affirm the ALJ’s determination that Drs. Akech’s and Vaughan’s opinions are credible and supported by the “extensive medical records” as those findings are unchallenged on appeal. *See Scilio*, 41 BRBS at 58; D&O at 19-20, 25-27.

¹² We agree with Claimant’s contention that to the extent Dr. Singer agreed the pollution in Kabul impacted Claimant’s nasal congestion, his opinion supports the ALJ’s finding of an aggravation injury under the Act, whether or not he believed it was disabling. *See O’Leary*, 357 F.2d at 815; *see* HT at 98, 104, 107; RX 26 at 7; Cl. Brief at 5-6 (unpaginated).

¹³ Because the ALJ provided valid reasons for rejecting Dr. Singer’s opinion on causation, we need not address Employer’s remaining arguments regarding his weighing

Gelinas v. Elec. Boat Corp., 45 BRBS 69, 71 (2011); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184, 187 (1988); D&O at 27, 29. Substantial evidence supports the ALJ's finding that Claimant's condition is work-related, and we decline Employer's invitation to reweigh the evidence. *Sealand Terminals v. Gasparic*, 7 F.3d 321, 323 (2d Cir. 1993) (Board may not reweigh the evidence even if it could support other conclusions); *Young v. Newport News Shipbuilding & Dry Dock Co.*, 45 BRBS 35, 39 (2011) (ALJ rationally weighed the evidence).

Extent of Disability

We next address Employer's contentions that the ALJ erred in finding Claimant is incapable of returning to his usual employment with a respirator and that the ALJ failed to discuss "critical evidence" on the return-to-work issue. Emp. Brief at 47-49. We reject Employer's assertion of error on the ALJ's resolution of the extent of Claimant's disability.

The Act defines disability as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. §902(10). To establish a prima facie case of total disability, a claimant must demonstrate an inability to perform his usual employment due to his work injury. *Bumble Bee Seafoods v. Director, OWCP [Hansen]*, 629 F.2d 1327, 1328-1329 (9th Cir. 1980); *Manigault v. Stevens Shipping Co.*, 22 BRBS 332, 333 (1989). In determining whether a claimant can return to his usual work, the ALJ must compare the claimant's medical restrictions with the specific physical requirements of his usual employment. See *Obadiaru v. ITT Corp.*, 45 BRBS 17, 21 (2011). If the claimant establishes he is unable to return to his usual employment, the burden shifts to the employer to establish the availability of suitable alternate employment. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 1196 (9th Cir. 1988).

The ALJ reviewed Drs. Akech's, Vaughan's, and Singer's opinions and Claimant's testimony on his ability to return to his usual work. D&O at 30-31. Claimant testified he had been fitted with a respirator in previous employment, and he could not return to his usual work with a respirator because it would restrict his breathing. HT at 47, 72-73. Both Drs. Akech and Vaughan recommended Claimant leave Kabul due to the impact of environmental pollution on his nasal and sinus conditions. JXs 6 at 10-12, 10 at 1-3. On the other hand, Dr. Singer opined Claimant could continue his work in Kabul without work restrictions or with a respirator. HT at 89; RX 26 at 6.

of Dr. Singer's opinion. See *Pisaturo v. Logistec, Inc.*, 49 BRBS 77, 81 (2015); D&O at 25-28; Emp. Brief at 49-53.

In concluding Claimant established a prima facie case of total disability, the ALJ relied on Drs. Akech's and Vaughan's "unequivocal[]" agreement that Claimant should leave Kabul due to the aggravation of his nasal and sinus conditions and on neither doctor's proposing the use of a respirator as an alternative allowing him to stay. D&O at 31; *see* JXs 6 at 10-12, 10 at 1-3. Additionally, the ALJ credited Claimant's testimony that he could not work with a respirator because it would restrict his breathing based on his experience of being fitted for respirators in previous employment. D&O at 31; *see* HT 47, 72-73. Conversely, the ALJ was not persuaded by Dr. Singer's opinion that Claimant could continue his work in Kabul without work restrictions or with a respirator. D&O at 31, n.33; *see* HT at 89; RX 26 at 6.

We reject Employer's assertion that Dr. Singer's opinion is uncontradicted by medical evidence and is supported by Dr. Vaughan's recommendation to use "masks and air filters" and by Claimant's testimony that he was certified to use a respirator. Emp. Brief at 35, 47-49. The ALJ accurately noted, after Claimant's first visit, Dr. Vaughan recommended "filtration of air – masks and air filters" but after his second evaluation recommended Claimant return to the United States for work. D&O at 31; *see* JX 6 at 4-5, 10-12. The ALJ concluded Dr. Vaughan considered the use of a respirator or mask but "promoted departure instead" after his second evaluation. D&O at 31. Further, while Claimant testified that he was fitted for use of a respirator in *prior employment*, the ALJ determined this experience supported his assertion that he would not be able to use a respirator in his work for Employer. D&O at 31; *see* HT 47, 72-73. As these conclusions are rational and supported by substantial evidence, *Ogawa*, 608 F.3d at 652-653, we affirm them.¹⁴

The ALJ gave a clear rationale for his conclusions regarding Claimant's use of a respirator; his crediting of Dr. Vaughan's recommendation that Claimant should leave his usual work in Kabul due to the aggravation of his nasal and sinus conditions, in combination with Claimant's testimony and over Dr. Singer's contrary opinion, is rational

¹⁴ Employer correctly points out the ALJ failed to consider Claimant's testimony that he had not discussed the use of a respirator with Drs. Akech and Vaughan; however, this does not undermine the ALJ's conclusion that both doctors considered and rejected the use of a respirator. Emp. Brief at 35, 48 (citing HT at 73). First, whether Claimant was consulted does not reflect on whether the doctors considered the matter. Also, as we have just discussed, Dr. Vaughan did consider the use of a respirator or mask but changed his recommendation based on Claimant's returning symptoms. JX 6 at 4-5, 10-12. As this is substantial evidence to support the ALJ's conclusion that Claimant cannot return to his work even with a respirator, any error with respect to whether Dr. Akech also considered the use of a respirator is harmless.

and within his discretion as the factfinder. *See Ogawa*, 608 F.3d at 650-653; D&O at 31. Consequently, we affirm the ALJ's determination that Claimant established a prima facie case of total disability.¹⁵ *See Hansen*, 629 F.2d at 1329; *Obadiaru*, 45 BRBS at 21; D&O at 31.

Disability Compensation

Because Claimant established a prima facie case of total disability, the ALJ found he is entitled to TTD benefits from October 15, 2020, through April 10, 2021. Although Employer did not present evidence of suitable alternate employment, D&O at 32, based on Claimant's concession that he was able to return to gainful employment on April 11, 2021, the ALJ awarded Claimant TPD benefits as of that date.¹⁶ D&O at 32, 36. The record contains evidence that Claimant began post-injury work as an aircraft mechanic with a different employer on April 11, 2021. *Id.* at 32, 36; CX 16; HT at 40-42. Substantial evidence supports the ALJ's award of TPD benefits, and we affirm it. *See Ogawa*, 608 F.3d 652-653.

Employer does not challenge the ALJ's calculation of Claimant's TTD and TPD benefits but, rather, asserts the ALJ erred in granting Claimant any benefits after August 30, 2021, when the United States withdrew from Afghanistan.¹⁷ Emp. Brief at 57-59; Emp. Reply Brief at 4-5. It asserts that because the withdrawal eliminated the availability of work in Afghanistan, Claimant has not demonstrated any "wage loss" after August 30, 2021, and the two-tiered method of computing earning capacity in *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995), should apply. Emp. Brief at 58-59. Employer further contends

¹⁵ Contrary to Employer's assertion, the ALJ did not determine Claimant's disability would restrict him from "all overseas employment" based on Drs. Akech's and Vaughan's recommendations. Emp. Brief at 4-5, 53-57; D&O at 33-34, n.35. Rather, the ALJ noted Claimant's testimony regarding post-injury employment he applied for in Iraq, Kuwait, Africa, and other undisclosed locations abroad where he alleged he could earn "double or triple" what he makes in the United States. D&O at 33-34 (citing HT at 68-70). The ALJ observed there is no evidence in the record concerning the air quality in Iraq, Kuwait, and Africa, and he did not conclude whether Claimant's disability would restrict him from these employment opportunities. D&O at 33-34, n.35.

¹⁶ We affirm the ALJ's finding that Claimant's condition has not reached MMI, as it is unchallenged on appeal. *See Scilio*, 41 BRBS at 58; D&O at 30.

¹⁷ Using Section 10 of the Act, the ALJ found Claimant's AWW is \$2,742.03, and his post-injury wage-earning capacity is \$1,012.57 per week based on his actual post-injury wages. D&O at 32-34; *see* 33 U.S.C. §§908(e), 910(a), (h).

the ALJ misconstrued the Board’s *Kubin* decision, which it asserts “clearly holds that disability compensation is not awarded when an injury precludes a job the worker *would not have available to him*.”¹⁸ *Id.* at 58 (emphasis added).

Both Claimant and the Director respond. They argue *Kubin* does not apply, and the two-tier basis for the *Kubin* award is dicta. They assert the Board addressed and rejected a similar argument in *Raymond v. Blackwater Sec. Consulting, L.L.C.*, 45 BRBS 5 (2011), *aff’d sub nom. Blackwater Sec. Consulting, L.L.C. v. Director, OWCP*, 503 F. App’x 498 (9th Cir. 2012), *cert. denied*, 571 U.S. 817 (2013), explaining the discussion of two-tier benefits in *Kubin* was dicta. *Raymond*, 45 BRBS at 6 n.4; Dir. Brief at 2-3; Cl. Brief at 7-8 (unpaginated). The Director interprets Employer’s argument as meaning Claimant’s benefits should be based on two distinct AWWs, one of which would result in no loss of wage-earning capacity and asserts the ALJ properly calculated Claimant’s AWW based on the date of injury and his wage-earning capacity based on his actual post-injury wages. Dir. Brief at 3.

In reply, Employer contends it “is not arguing that Claimant’s AWW suddenly downgraded at this time,” rather, Claimant’s alleged disability ended with the withdrawal from Afghanistan because the position was no longer available for him (or anyone) to secure; therefore, there is no loss of wage-earning capacity, and he is entitled to no benefits after August 30, 2021.¹⁹ Emp. Reply Brief at 4-5. Employer further asserts the Board erred in *Raymond* because its discussion of the two-tiered benefits in *Kubin* was essential to the decision. *Id.* at 2-4. We reject Employer’s arguments.

Contrary to Employer’s assertion, *Kubin* does not apply. In *Kubin*, the ALJ awarded the claimant, a former professional football player, benefits based on a two-tiered system:

¹⁸ The ALJ rejected Employer’s arguments about *Kubin* “because the U.S. withdrawal from Afghanistan does not predictably influence Claimant’s ongoing earning capacity as one’s age does for a professional football player.” D&O at 33. He declined to adjust Claimant’s AWW based on the unavailability of his work for Employer in Afghanistan after August 30, 2021. *Id.* at 33-34.

¹⁹ Employer asserts Claimant’s “alleged disability (an inability to work in Kabul, Afghanistan) ended” on August 30, 2021, when the United States withdrew from Afghanistan, which eliminated the availability of any work in Afghanistan. Emp. Reply Brief at 4. In other words, because the Act defines disability as the “incapacity because of injury to earn the wages,” 33 U.S.C. §902(10), Claimant purportedly cannot be disabled because his inability to return to his usual work is not related to his injury but to the U.S. withdrawal.

the first, a higher award for the presumed duration of his football career, which was cut short due to his work injury, and the second, a lower award for his post-football career. The employer appealed, raising causation, disability, and Section 8(f), 33 U.S.C. §908(f), issues. Although the date on which to base the claimant's average weekly wage was an issue, the Board affirmed the ALJ's award of benefits, specifically noting "*neither party contest[ed] the [ALJ's] decision to fashion separate awards for the projected duration of claimant's career and for his post-football career.*" *Kubin*, 29 BRBS at 123 n.9 (emphasis added).

In *Raymond*, the Board explained its commentary in *Kubin* about the two-tiered award based on the projected duration of the claimant's football career and his post-football work was dicta because neither party "appeal[ed] the changes to the compensation rates at the end of the projected football career." *Raymond*, 45 BRBS at 6 n.4.

Despite Employer's issue with *Raymond*, it is controlling. In that case, the claimant was injured in Afghanistan during physical training for his security job. He completed his one-year contract, returned to the United States, and filed a claim for benefits. The ALJ awarded periods of TTD and permanent total disability benefits before reducing benefits to a nominal \$1 per week starting in September 2011 because the claimant expressed his intent to cease overseas work on August 31, 2011. *Raymond*, 45 BRBS at 5-6. The claimant challenged the ALJ's two-tiered award and conversion to nominal benefits. The Board held "the [ALJ] erred in changing claimant's compensation rate based on his testimony regarding his planned departure from Afghanistan . . . [because] there is no legal support in the Act or case law for the [ALJ]'s finding that he may limit the duration of claimant's award of permanent partial disability benefits." *Id.* at 7. The Board explained the Act "provides set formulas for awarding disability compensation" and "contemplates wages at the time of the injury as the baseline for comparison with actual post-injury earning capacity." *Id.* at 7 (citing *Keenan v. Director, OWCP*, 392 F.3d 1041, 1045-1046 (9th Cir. 2004)). Further, the Board explained "[i]t is well-settled that there is only one average weekly wage per injury on which disability benefits will be based and post-injury events generally are not relevant to determining average weekly wage." *Id.* at 8 (citing 33 U.S.C. §910); *Thompson v. Nw. Enviro Services, Inc.*, 26 BRBS 53, 58 (1992).

Further, in an unpublished case affirming *Raymond*, the Ninth Circuit explained the Act defines disability as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." *Blackwater*, 503 F. App'x at 498 (quoting 33 U.S.C. §902(10)).²⁰ The court further

²⁰ *Blackwater* is an unpublished decision and is "not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion." 9th Cir. R. 36-3(a). Nonetheless, while *Blackwater* is not precedential, we

explained “[n]othing in the statutory scheme allows for an ALJ to disregard or modify this formula [in Section 8] . . . [and] [w]e have repeatedly held that the [Act] does not grant an ALJ any discretion to re-calibrate a claimant’s average weekly wages at the time of injury based on future events that would have changed that wage regardless of injury.”²¹ *Id.* at 499 (citing *Sestich*, 289 F.3d at 1160-1161; *Keenan*, 392 F.3d at 1045-1046).

As Employer does not challenge the ALJ’s mathematical calculation of Claimant’s TTD and TPD benefits and under the Act there can be only one average weekly wage upon which payments of compensation for a specific injury may be based, we affirm the ALJ’s average weekly wage calculation and the award of disability benefits calculated therefrom. *See Raymond*, 45 BRBS at 8; *Thompson*, 26 BRBS at 58; *see also Blackwater*, 503 F. App’x at 498-499; D&O at 32-34, 36.

BRB Nos. 25-0164 and 25-0193 – Attorney’s Fee

While Employer’s appeal above was pending before the Board, Claimant’s counsel before the ALJ, Matthew T. Singer (Counsel), filed an itemized fee petition with the ALJ, requesting an attorney’s fee under Section 28(a) of the Act, 33 U.S.C. §928(a), totaling \$113,775.80 for services and \$1,609.70 in costs.²² Cl. Application for Award of Attorney Fees and Expenses. Employer objected to the fee petition. The ALJ awarded Counsel a

find it persuasive and consistent with the Ninth Circuit’s reasoning in *Sestich*, 289 F.3d at 1160-1061, and *Keenan*, 392 F.3d at 1045-1046.

²¹ Employer attempts to distinguish *Raymond* based on the Board’s rejection of the ALJ’s reliance on “speculative future factors” in calculating disability compensation, asserting the withdrawal from Afghanistan is not a speculative future event but rather an event that occurred and directly impacted the availability of Claimant’s work. Emp. Reply Brief at 3-4. Contrary to Employer’s assertion, use of the term “future” in this instance is relative to the date of injury, not the current date. Consequently, although the withdrawal from Afghanistan is now an event in the past, it was a future speculation at the time of Claimant’s injuries. In *Raymond*, the Board specifically rejected the ALJ’s reliance on *speculative future factors* because “the Act provides set formulas for awarding disability compensation.” *Raymond*, 45 BRBS at 7. And there is no reason to diverge from the statutory formulas here.

²² Matthew T. Singer requested an hourly rate of \$465 to \$500 for himself, noting his rates had increased during the course of this case, \$339 to \$350 for attorneys John R. Singer and Brett B. Heger, noting their rates had increased during the course of this case, and \$157 for paralegals and legal assistants. Cl. Application for Award of Attorney Fees and Expenses at 6-7, 9, 11-12.

rate of \$465 to \$500 per hour, John R. Singer and Brett B. Heger a rate of \$339 to \$350 per hour, and a rate of \$157 per hour for non-clerical paralegal work, plus \$1,609.70 in costs; the ALJ ordered the parties to calculate the final fee award based on the findings in his order. Fee Order at 13. Thereafter, the parties filed a joint stipulation agreeing to a fee of \$97,323.77, and the ALJ issued an order approving the stipulated fee calculation. Order Approving Stip. at 1-2.

Employer appeals the ALJ's award of attorney's fee and costs and his order approving the stipulated fee calculation. BRB Nos. 25-0164 and 25-0193. Claimant responds in support of the attorney's fee award and the fee calculation. The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, based on an abuse of discretion, or not in accordance with law. *See Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 952 (9th Cir. 2007).

Employer asserts the attorney's fee award and subsequent order approving the stipulated attorney's fee calculation should be vacated if the Board vacates the award of benefits. *See* Emp. Briefs on Attorney's Fees and Fee Calculation. It does not raise any substantive challenges to the amount of the ALJ's fee award or the stipulated fee calculation. As we have affirmed the award of benefits, and Employer has not shown the fee is arbitrary, capricious, or an abuse of discretion, we affirm the ALJ's award of an attorney's fee payable by Employer to Counsel totaling \$97,323.77 for work performed before the Office of Administrative Law Judges. 33 U.S.C. §928(a); *see Richardson v. Cont'l Grain Co.*, 336 F.3d 1103, 1106 (9th Cir. 2003).

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits, Decision and Order Awarding Attorneys' Fees and Costs, and Order Approving Stipulated Attorney's Fees.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

GLENN E. ULMER
Administrative Appeals Judge