U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 20-0167

JELANI A. GARRETT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DYNCORP INTERNATIONAL	)	
	)	
and	)	
	)	DATE ISSUED: 04/28/2021
ALLIED WORLD NATIONAL ASSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA (AIG)	)	
	)	
Carrier/Respondent	)	DECISION and ORDER

Appeal of the Preliminary Findings, Final Decision and Order, Decision and Order on Reconsideration, and Decision on Claimant's Motion for Reconsideration of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Jelani Garrett, Austin, Texas.

Richard L. Garelick (Flicker, Garelick & Associates, LLP), New York, New York, for Employer/Allied World National Assurance Company.

Limor BenMaier and Bobbi Roquemore (Schouest, Bambas, Soshea & BenMaier, P.L.L.C.), Houston, Texas, for Employer/AIG.

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

BUZZARD, Administrative Appeals Judge:

Claimant, appearing without legal representation, appeals Administrative Law Judge Patrick M. Rosenow's Preliminary Findings, Final Decision and Order, Decision and Order on Reconsideration, and Decision on Claimant's Motion for Reconsideration (2016-LDA-00184, 2017-LDA-00040, 2017-LDA-00041) rendered on a claim filed pursuant to 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*. (Act). In an appeal by a claimant without representation by counsel, the Board reviews the administrative law judge's decision to determine if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with applicable law. If they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant began working in Afghanistan in 2005 for KBR as a warehouseman and subsequently became a logistics coordinator. July 6, 2016 Hearing Transcript (Tr. 2) at 32. In December 2009, he continued in essentially the same position for Dyncorp International (Employer). *Id.* at 37-38. Claimant alleged he sustained a work-related shoulder injury in June 2010, but continued to work full duty. SCX 3[1] at 5-6; AIGX 19 at 9-10. He asserted he injured his right calf on November 20, 2010, but lost no time from work. SCXs 1 at 10, 3 at 4. AIG was Employer's insurance carrier when Claimant sustained these two injuries. Claimant stopped working for Employer on December 4, 2014. Tr. 2 at 43. Allied World Assurance Company (AWAC) provided Employer's insurance coverage as of July 1, 2014. Claimant subsequently filed a claim for cumulative trauma injuries to his neck, shoulders and back, pulmonary and nasal injuries, tinnitus, eosinophilic esophagitis, and post-traumatic stress disorder (PTSD), for which he asserted AWAC is the responsible carrier. SCX 3.

Prior to the hearing, AWAC and Claimant stipulated he sustained work-related PTSD and nasal and pulmonary conditions, and he is unable to return to his usual work due to PTSD.[2] JX 1. In his initial decision, entitled "Preliminary Findings," the administrative

[1] SCX denotes Claimant's exhibits submitted at the second hearing on December 8, 2017.

[2] AWAC and Claimant also stipulated the nasal and sinus conditions are at maximum medical improvement, but the PTSD is not, the date of injury for these conditions is December 4, 2014, Claimant's average weekly wage is $1,789.48, and

law judge denied the claims for work-related tinnitus and eosinophilic esophagitis. Preliminary Findings at 41-42. He determined Claimant established a work-related calf injury with a two percent impairment of the lower right extremity, but AIG is not liable for disability compensation because Claimant failed to timely file a claim for this injury. *See* 33 U.S.C. §913; Preliminary Findings at 42. The administrative law judge found Claimant established bilateral shoulder injuries from repetitive activity for which AWAC is the responsible carrier. *Id*. at 43-44. He determined Claimant did not establish work-related spinal injuries because the evidence is in equipoise regarding their relation to his employment. *Id*. at 45-46.

The administrative law judge determined Claimant's deployment-related lung disease rendered him disabled as of August 18, 2015, as he is unable to work in austere environments with inhalation exposures, and that this lung condition is not at maximum medical improvement.[3] Final Decision and Order at 7. He rejected Claimant's contention that he has been totally disabled by PTSD from his last day of work in Afghanistan on December 4, 2014, and instead accepted AWAC's stipulation that Claimant became unable to return to work in Afghanistan due to PTSD as of February 23, 2015. The administrative law judge determined the jobs Employer identified in the United States establish the availability of suitable alternate employment as of October 18, 2017, and that Claimant did not show a diligent effort to secure alternate work. Preliminary Findings at 48-50. He directed the parties to submit briefs addressing the extent of Employer's liability for medical benefits. *Id*. at 51-52.

In his Final Decision and Order, the administrative law judge ordered AWAC to pay Claimant temporary total disability compensation, based on an average weekly wage of $1,789.48, from February 23, 2015 to October 17, 2017. Final Decision and Order at 7. He awarded Claimant compensation for temporary partial disability, 33 U.S.C. §908(e), based on a loss in wage-earning capacity commencing on October 18, 2017. *Id*. at 2-3, 8.

AWAC has paid compensation for temporary total disability, 33 U.S.C. §908(b), since February 23, 2015. JX 1.

[3] The administrative law judge found Claimant has been unable to return to work in Afghanistan due to his nasal condition as of June 20, 2016, and that this condition is not at maximum medical improvement. Preliminary Findings at 46-47; Final Decision and Order at 8. He determined Claimant's sleep apnea is not a separate injury but a non-disabling consequence of his work-related nasal and pulmonary injuries. Preliminary Findings at 47. He determined Claimant became disabled by his bilateral shoulder injuries on August 1, 2017. *Id*. at 2. He found Claimant's calf injury does not prevent him from performing his usual work. *Id*. at 2.

He awarded Claimant some medical benefits and travel expenses for his work-related injuries. *Id.* at 4-7. He determined, however, Claimant failed to show surgical treatment for his nasal injury is reasonable and necessary. *Id*. at 5. He also rejected Claimant's assertion that he is entitled to reimbursement of $15,981.32 for private health insurance premiums and $10,810.80 for travel expenses to Denver, Colorado, for medical treatment.[4] *Id*. at 6-7.

Claimant appeals the administrative law judge's decision. AIG and AWAC filed response briefs urging affirmance in all respects. Claimant filed two reply briefs.[5]

SECTION 13

Claimant challenges the administrative law judge's denial of compensation for his work-related right calf injury because the claim was not timely filed. Claimant injured his right calf on November 20, 2010, while AIG was on the risk. Preliminary Findings at 42. He immediately received treatment from medics at the Kandahar Military Base (Kandahar); he was also examined on November 25, 2010, at the Canadian Specialists Hospital for "severe swelling" and was diagnosed with a calf sprain based on an MRI. December 8, 2017 Hearing Transcript (Tr. 1) at 64; SCX 1 at 10-13.

Claimant did not miss any time from work beyond the day of the injury but the injury occasionally caused him pain. Preliminary Findings at 42; Tr. 1 at 66-68. He did not have the injury examined when he returned to the United States but "popped it a couple of times" after his return; it still gives him problems and flares up periodically. Tr. 1 at 33-35. In July and August 2016, Claimant was evaluated at Orthopedic Specialists of Austin, Texas, and diagnosed with a chronic calf tear with intermittent flares from increased physical activity. *Id*. at 32. In October 2016, Dr. William Lawson examined Claimant's calf and opined he sustained a seven percent impairment under the *American Medical Association Guides to the Evaluation of Permanent Impairment* (AMA Guides) and the injury reached maximum medical improvement two years after the accident. SCX 1 at 165, 167. In February 2017, Dr. Terry Beal examined Claimant's calf and opined he

[4] The administrative law judge granted Employer's motion for reconsideration and modified his finding as to Claimant's post-injury wage-earning capacity. He summarily denied Claimant's subsequent motion for reconsideration.

[5] Claimant avers in his reply brief dated December 8, 2020, that Employer has not paid compensation and out-of-pocket medical expenses awarded by the administrative law judge. The statute provides that the enforcement of compensation awards should be initiated with the district director. 33 U.S.C. §918; 20 C.F.R §702.372.

sustained a two percent impairment and reached maximum medical improvement six weeks after the accident.

The administrative law judge found Claimant should have been aware of the effect of his calf injury on his wage-earning capacity as of January 1, 2011, based on Dr. Beal's opinion it would have reached maximum medical improvement by then. Preliminary Findings at 43. Because Claimant did not filed his claim until September 21, 2015, SCX 3 at 4, the administrative law judge denied it as untimely.[6] *See* 33 U.S.C. §913(a); Preliminary Findings at 43.

Section 13(a) of the Act provides a claimant with one year to file a claim for compensation after he becomes aware, or with the exercise of reasonable diligence should be aware, of the relationship between his traumatic injury and his employment. 33 U.S.C. §913(a). Following the decision of the United States Court of Appeals for the District of Columbia Circuit in *Stancil v. Massey*, 436 F.2d 274 (D.C. Cir. 1970), the courts of appeals have held that the statute of limitations begins to run only after the employee becomes aware or reasonably should have been aware of the full character, extent, and impact of the injury. *Dyncorp Int'l v. Director, OWCP* [*Mechler*], 658 F.3d 133, 45 BRBS 61(CRT) (2d Cir. 2011); *Paducah Marine Ways v. Thompson*, 82 F.3d 130, 30 BRBS 33(CRT) (6th Cir. 1996); *Duluth, Missabe & Iron Range Ry. Co. v. Director, OWCP* [*Heskin*], 43 F.3d 1206 (8th Cir. 1994); *Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130(CRT) (9th Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98(CRT) (4th Cir. 1991); *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *Marathon Oil Co. v. Lunsford*, 733 F.2d 1139, 6 BRBS 100(CRT) (5th Cir. 1984); *see Suarez v. Serv. Employees Int'l, Inc.*, 50 BRBS 33 (2016).

The mere diagnosis of a work-related condition and treatment therefor does not commence the running of the statute of limitations. *Paducah Marine Ways*, 82 F.3d 130, 30 BRBS 33(CRT); *Parker*, 935 F.2d 20, 24 BRBS 98(CRT); *E.M. [Mechler] v. Dyncorp Int'l*, 42 BRBS 73 (2008), *aff'd sub nom. Dyncorp Int'l*, 658 F.3d 133, 45 BRBS 61(CRT). Furthermore, in the absence of substantial evidence to the contrary, Section 20(b) of the Act, 33 U.S.C. §920(b), presumes the claim was timely filed. *Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991).

The administrative law judge's finding Claimant should have been aware of the full nature and extent of his calf injury by January 1, 2011, is unsupported by the evidence and

[6] Claimant's entitlement to medical benefits is never time-barred, and the administrative law judge awarded medical benefits for this injury. *See generally Siler v. Dillingham Ship Repair*, 28 BRBS 38 (1994) (decision on recon. en banc).

inconsistent with law. Claimant testified at the December 2017 hearing that the injury did not cause him to lose time from work. Tr. 1 at 63-68. Additionally, there is no evidence he was informed by a medical professional or his employer at any time prior to his leaving Afghanistan in December 2014 that his injury would cause a permanent impairment or reduction in earning capacity. Dr. Beal's 2017 opinion on which the administrative law judge relied was not rendered until after Claimant filed his claim; nor does the administrative law judge explain how an opinion as to the date of maximum medical improvement establishes the date on which Claimant should have been aware of the full extent of his injury. The earliest date Claimant could have been aware was in October 2016, also after he filed his claim, when Dr. Lawson examined him and diagnosed a seven percent impairment. SCX 1 at 165, 167. At that time, Claimant should have been aware of the "full character, extent, and impact" of his injury. *Abel*, 932 F.2d 819, 24 BRBS 130(CRT). As Claimant's claim was filed in September 2015, it is timely as a matter of law. *Bechtel Associates v. Sweeney*, 834 F.2d 1029, 20 BRBS 49(CRT) (D.C. Cir. 1987). We reverse the administrative law judge's finding to the contrary. *Welch v. Pennzoil Co*., 23 BRBS 395 (1990).

We affirm as supported by substantial evidence, however, the administrative law judge's finding that Claimant has a two percent permanent impairment of the right leg, based on Dr. Beal's opinion. AIGX 11 at 7. We modify the administrative law judge's decision to reflect Claimant's entitlement to permanent partial disability benefits for a two percent leg impairment, payable by AIG.[7] 33 U.S.C. §908(c)(2), (19).

CAUSATION

Claimant contends the administrative law judge erred in finding his tinnitus, esophagitis, and spinal conditions are not related to his work for Employer in Afghanistan.

1. *Tinnitus*

The administrative law judge found the record included evidence of tinnitus and work exposure to loud noise but otherwise was "woefully underdeveloped," with no evidence Claimant's "occasional" noise exposure could have caused tinnitus. Preliminary Findings at 41. The administrative law judge, therefore, concluded Claimant failed to invoke the Section 20(a) presumption and denied the claim. *Id*.

[7] This award is not payable until Claimant is not totally disabled. *Maglione v. APM Terminals*, 50 BRBS 29 (2016); *Johnson v. Del Monte Tropical Fruit Co.*, 45 BRBS 27 (2011).

To be entitled to the Section 20(a) presumption that a condition is work-related, a claimant bears the initial burden of establishing the existence of an injury or harm and a work-related accident or working conditions which could have caused his harm. 33 U.S.C. §920(a); *see Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). We affirm the administrative law judge's permissible finding that Claimant did not put forth sufficient evidence that his tinnitus could have been caused by his occasional work exposure to loud noise. Accordingly, we affirm his finding that Claimant did not establish the working conditions element of his prima facie case and thus failed to establish his tinnitus is work-related. *See Sanders v. Alabama Shipbuilding & Dry Dock Co.*, 22 BRBS 340 (1989); *see also Bis Salamis, Inc. v. Director, OWCP [Meeks]*, 819 F.3d 116, 50 BRBS 29(CRT) (5th Cir. 2016); *Brown v. Pac. Dry Dock*, 22 BRBS 284 (1989).

2. *Eosinophilic Esophagitis*

The administrative law judge found Claimant entitled to the Section 20(a) presumption because "it is more likely than not" he has eosinophilic esophagitis and Dr. John Cluley linked the condition to his employment in Afghanistan. Preliminary Findings at 41. He determined Employer rebutted the presumption based on Dr. Cluley's statement that Claimant's eosinophilic esophagitis "can be related to food allergies." *Id*.; SCX 1 at 140-141. The administrative law judge found "suspect" Claimant's testimony that his esophageal symptoms started in Afghanistan, especially since the condition did not resolve upon his removal from pulmonary irritants at Kandahar. *Id*. at 41-42. The administrative law judge concluded Claimant failed to establish his eosinophilic esophagitis was caused or aggravated by his employment in Afghanistan. *Id*. at 42.

Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence "through facts—not mere speculation—that the harm was not work-related." *Amerada Hess Corp. v. Director, OWCP*, 543 F.3d 755, 761, 42 BRBS 41, 44(CRT) (5th Cir. 2008) (quoting *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 687, 33 BRBS 187, 189(CRT) (5th Cir. 1999)). Employer's burden on rebuttal is one of production, not persuasion; in order to rebut the Section 20(a) presumption, the employer must offer substantial evidence that "throws factual doubt" on claimant's prima facie case. *Ceres Gulf, Inc. v. Director, OWCP* [*Plaisance*], 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012).

We reverse the administrative law judge's finding that Employer rebutted the Section 20(a) presumption as it did not present substantial evidence Claimant's eosinophilic esophagitis was not caused, aggravated, or contributed to by his exposure to

pulmonary irritants in Afghanistan. Claimant testified he was in a desert environment at Kandahar, where he was exposed to smoke from a burn pit, fumes from an open cesspool, and dust.[8] Tr. 1 at 35; Tr. 2 at 3, 41-42. Approximately six months after his return to the United States, Claimant complained on May 18, 2015, to Dr. Jeffrey Zapalac that solid food would stick in his esophagus every week or so; Dr. Zapalac diagnosed mid-esophageal dysphagia. SCX 1 at 54. On June 9, 2015, Claimant sought treatment for shortness of breath from the Occupational/Environmental Medicine Clinic at the National Jewish Hospital; he reported, inter alia, solid food dysphagia since 2012. SCX 1 at 57. An esophagram showed a small hiatal hernia, reflux, and residual food in the stomach after six and a half hours. *Id*. at 61.

Dr. Cluley performed a biopsy of Claimant's esophagus on October 29, 2015; he reported that Claimant had "eosinophilic esophagitis/allergic condition." SCX 1 at 142. Dr. Cluley opined that Claimant's eosinophilic esophagitis "can be related to food allergies but given the timing of his symptoms with his deployment, I have to thinks (sic) that it is likely related to some sort of exposure that he experienced during his deployment."[9] *Id*. at 141. After Claimant underwent allergy testing, Dr. Cluley stated in his November 8, 2016 report that the testing "exposed a number of possible culprits but patient reports he has been avoidant of these for months if not years . . . it is not entirely clear to me why he was continue (sic) to have symptoms after having been removed from any potential exposure [in Afghanistan]." *Id*. at 177.

Although Dr. Cluley stated the eosinophilic esophagitis "can be" due to food allergies, he stated Claimant's condition is "likely related to some sort of exposure that he experienced during his deployment."[10] SCX 1 at 141. Further, while he stated it was not

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[8] Employer accepted liability for deployment-related lung disease, sleep apnea, and aggravation of pre-existing nasal symptoms related to these working conditions. Preliminary Findings at 4; *see* SCX 1 at 80.

[9] Dr. Cluley reiterated this assessment in his September 19, 2016 report. SCX 1 at 151.

[10] Claimant was examined by Dr. Uday Reddy on November 30, 2016. Dr. Reddy noted Claimant's occupational exposure and his diagnosis of deployment-related lung disease. SCX 1 at 178. He stated "There has been anecdotal evidence that these occupational exposures can cause lung disease, and can even affect . . . other organ systems, including the GI tract, which may be related to the Eosinophilic Esophagitis." *Id*. Dr. Reddy further stated that eosinophilic esophagitis is "thought to be a more delayed type hypersensitivity disease" and he recommended more specialized allergy testing. *Id*.

"entirely clear" why Claimant's symptoms continued after his exposure ceased, he did not state the condition is due to allergies and not to Claimant's employment; thus his opinion is not substantial evidence that Claimant's work environment did not cause, contribute to or aggravate his eosinophilic esophagitis. *See Ramsey Scarlett & Co. v. Director, OWCP [Fabre]*, 806 F.3d 327, 49 BRBS 87(CRT) (5th Cir. 2015); *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000). Accordingly, we reverse the administrative law judge's finding that Dr. Cluley's opinion rebuts the Section 20(a) presumption. Claimant's eosinophilic esophagitis is work-related as a matter of law. *C&C Marine Maint. Co. v. Bellows*, 538 F.3d 293, 42 BRBS 37(CRT) (3d Cir. 2008); *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001). AWAC is liable for any medical treatment of this condition, provided Claimant complied with Section 7 of the Act, 33 U.S.C. §907(a). *Fabre*, 806 F.3d 327, 49 BRBS 87(CRT); *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997).

3. *Spinal Injuries*

The administrative law judge determined the objective evidence shows Claimant has cervical, thoracic and lumbar spinal conditions.[11] Preliminary Findings at 45. He found Drs. John Kim and Louis Seade opined Claimant's spinal conditions were caused or aggravated by Claimant's work in Afghanistan. SCXs 1 at 45; 28. The administrative law judge determined this evidence is sufficient to invoke the Section 20(a) presumption while the testimony of Dr. William Nemeth rebuts the presumption. Preliminary Findings at 46. Dr. Nemeth opined Claimant's spinal conditions are degenerative or congenital and his neck and back complaints are related to pre-existing spondylosis and scoliosis and "had absolutely nothing to do with workplace activity." July 25, 2018 dep. at 11; *see also* AWACX 3 at 5. The administrative law judge properly found Dr. Nemeth's opinion is sufficient to rebut the Section 20(a) presumption and we affirm this finding. *Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT).

After the employer rebuts the presumption, the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of establishing the work-relatedness of his condition. *Meeks*, 819 F.3d 116, 50 BRBS 29(CRT);

[11] Imaging studies from 2015 showed spondylosis, disc herniation at L5-S1 with foraminal narrowing, disc bulge at C3-4, C5-6, and herniation at C7, disc disease at T4-5, T7-8, T8-9, and scoliosis. SCX 1 at 40-41, 49-51. A spinal myelogram in June 2017 showed cervical and thoracic spondylosis with asymmetric foraminal encroachment, and bilateral L5 spondylosis with mild instability and severe bilateral foraminal encroachment. *Id*. at 227-229.

Plaisance, 683 F.3d 225, 46 BRBS 25(CRT); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). The administrative law judge determined Dr. Nemeth's causation opinion offsets the contrary opinions of Drs. Kim and Seade and, therefore, the evidence is in equipoise.[12] Preliminary Findings at 46. In reaching this conclusion, the administrative law judge found Dr. Seade's and Dr. Kim's opinions undermined by their reliance on Claimant's subjective complaints, which the administrative law judge found sporadic and inconsistent. *Id*. Specifically, Claimant complained of spinal pain, yet he reported in February 2015 that he exercised with a rowing machine and in September 2016 that he performed cardiovascular exercise and lifted weights at a gym four to five times a week. *Id*.; *see* SCX 1 at 35, 153. Accordingly, the administrative law judge determined Claimant did not establish his spinal injuries are work-related.

In arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence, *see Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT), and the Board may not reweigh the evidence, but may assess only whether there is substantial evidence to support the administrative law judge's decision. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). We affirm as supported by substantial evidence the administrative law judge's finding that claimant did not establish by a preponderance of the evidence that his spinal conditions were caused, aggravated, or contributed to by his working conditions in Afghanistan. *See Sea-Land Services, Inc., v. Director, OWCP* [*Ceasar*], 949 F.3d 921, 54 BRBS 9(CRT) (5th Cir. 2020); *Bourgeois v. Director, OWCP*, 946 F.3d 263, 53 BRBS 91(CRT) (5th Cir. 2020); *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001).

SHOULDER INJURIES

Claimant challenges the administrative law judge's findings regarding his bilateral shoulder injuries.

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[12] In *Greenwich Collieries*, the Supreme Court addressed Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. §556(d), which is incorporated into the Act by 33 U.S.C. §919(d). Section 7(c) states in pertinent part: "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. §556(d). The Court held that the "burden of proof" means that the proponent bears the burden of persuasion by a preponderance of the evidence. The Court, therefore, held that, if the evidence is in equipoise, in accordance with Section 7(c), the claimant's claim fails. *Greenwich Collieries*, 512 U.S. at 276, 281, 28 BRBS 46, 48(CRT); *see Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996).

The administrative law judge found Claimant's bilateral shoulder injuries became disabling on August 1, 2017, when he reported continuing shoulder symptoms to Dr. Seade. Claimant underwent right shoulder surgery on September 13, 2017. The administrative law judge found the right shoulder was not at maximum medical improvement because Dr. Seade opined Claimant requires additional surgery on this shoulder. We affirm this finding as it is supported by substantial evidence and accords with law. *Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004); *Victorian v. International-Matex Tank Terminals*, 52 BRBS 35 (2018), *aff'd*, 943 F.3d 278, 53 BRBS 79(CRT) (5th Cir. 2019).

We cannot affirm, however, the administrative law judge's finding Claimant's left shoulder condition reached maximum medical improvement on December 1, 2017, as he did not discuss Dr. Seade's testimony regarding the subsequent left shoulder surgery. Preliminary Findings at 44-45. At his March 25, 2019 deposition, Dr. Seade testified Claimant underwent surgery on the left shoulder "a couple of months" after the September 2017 right shoulder surgery. AIGX 27 at 4-5. Accordingly, we vacate the administrative law judge's finding Claimant's left shoulder was at maximum medical improvement on December 1, 2017, and we remand for him to address the evidence relevant to this issue consistent with the law. *Methe*, 396 F.3d 601, 38 BRBS 99(CRT). In addition, on remand the administrative law judge should address the nature and extent of Claimant's shoulder impairments in assessing whether and when Employer established the availability of suitable alternate employment.[13] *See* discussion, *infra*.

EXTENT OF DISABILITY

1. *Onset of temporary total disability*

Claimant challenges the onset date of his temporary total disability award, which was based on Employer's stipulation that Claimant became temporarily totally disabled by

[13] Claimant testified at his July 24, 2018 deposition that he wore a sling after the September 13, 2017 surgery until around October 23, 2017, and that Dr. Seade imposed a 10 pound lifting restriction when he examined his right shoulder on November 16, 2017. Cl. Dep. at 8-9. At his March 25, 2019 deposition, Dr. Seade testified that until Claimant has the second right shoulder surgery, he will have no restrictions, other than to avoid overuse and inflammation resulting from activities like picking up wood, throwing sandbags, off-loading trucks, and overhead lifting. AIGX 27 at 6-7

PTSD on February 23, 2015.[14] Claimant avers he was totally disabled by PTSD from his last day of work on December 4, 2014.[15] Claimant has the burden of establishing the extent of his work-related disability. *Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998).

The administrative law judge rejected Claimant's contention. Preliminary Findings at 48. He relied on Claimant's testimony he stopped working because he wanted to return to the United States after working in Afghanistan for 10 years and he disliked Employer's new security and documentation procedures, which required him to travel from Kandahar to Kabul, Afghanistan. Tr. 1 at 62. Claimant testified that staying in Kabul while complying with Employer's procedures was a personal safety issue that frightened him. *Id*. The administrative law judge also relied on Claimant's testimony he was capable of performing his usual job when he left Afghanistan in December 2014. *Id*. at 63.

It is well-established that an administrative law judge is entitled to weigh the evidence and to draw his own inferences and conclusions from it. *See generally Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). He rationally relied on Claimant's testimony he was capable of performing his usual work and wanted to return to the United States after 10 years in Afghanistan to find Claimant was not totally disabled by PTSD when he stopped working for Employer on December 4, 2014. Accordingly, we affirm the administrative law judge's finding that Claimant was temporarily totally disabled by PTSD as of February 23, 2015. *See Suarez*, 50 BRBS 33.

2. *Suitable Alternate Employment*

Claimant contends the administrative law judge erred in finding Employer established the availability of eight suitable alternate positions in Austin, Texas, that

[14] The administrative law judge relied on the stipulation and the opinion of Dr. A.R. Mangiardi that Claimant is unable to return to work due to PTSD. SCX 20 at 1-3; JX 1 at 2.

[15] Alternatively, Claimant avers he was disabled by his nasal condition from his first office visit to Dr. Kim on January 12, 2015. In his post-hearing brief, Claimant contended only that he was disabled from returning to work in Afghanistan from December 4, 2014. Cl. Post-hearing Br. at 47. We decline to address arguments not raised below where Claimant was represented by counsel. *See generally Bernuth Marine Shipping, Inc. v. Mendez*, 638 F.2d 1232 (5th Cir. 1981); *Johnston v. Hayward Baker*, 48 BRBS 59 (2014).

Claimant could perform as of October 18, 2017, the date of the labor market survey.[16] Preliminary Findings at 49-50.; *see* AWACX 5 at 1, 6, 23.

Once, as here, a claimant establishes he is unable to perform his usual work overseas due to his work injury, the burden shifts to his employer to demonstrate the availability of realistic job opportunities which, by virtue of his age, education, work experience, and physical restrictions, he is capable of performing. *New Orleans (Gulfwide) Stevedores v. Turner,* 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In determining whether an employer establishes the availability of suitable alternate employment, the administrative law judge must compare the requirements of the jobs identified with the claimant's restrictions and vocational factors. *Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001); *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1999); *Montoya v. Navy Exch. Serv. Command,* 49 BRBS 51 (2015).

The administrative law judge found Claimant is restricted from working in a war zone, exposure to pulmonary irritants, engaging in activity in excess of five METs,[17] or performing work beyond a medium physical demand level. Preliminary Findings at 48-49. He found none of the jobs listed in Employer's labor market survey is in excess of these restrictions, "given the fact that any restrictions or limitations based on [Claimant's] spine are not relevant." *Id*. at 49. This finding is in error.

Restrictions from pre-existing conditions are to be included in addressing a claimant's ability to work in alternate employment, as an employer "takes an employee as

[16] This finding may be inconsistent with the fact that Claimant had surgery on his right shoulder one month before and on his left shoulder two months after this date. *See* discussion, *supra*. Suitable alternate employment cannot be established during a period when the claimant is incapable of working at all. *J.R. [Rodriguez] v. Bollinger Shipyard, Inc.*, 42 BRBS 95 (2008), *aff'd sub nom. Bollinger Shipyards, Inc. v. Director, OWCP*, 604 F.3d 864, 44 BRBS 19(CRT) (5th Cir. 2010). On remand, the administrative law judge must consider Dr. Seade's testimony that post-surgical recovery lasts about three months and any restrictions resulting from the surgery. *See* Tr. 1 at 29; AIGX 27 at 6-7[21-22]; *see also* Cl. Jul. 24, 2018 Dep. at 8.

[17] One metabolic equivalent (MET) is defined as the amount of oxygen consumed while sitting at rest and is equal to 3.5 ml O2 per kg body weight x minutes. The MET concept represents a simple, practical, and easily understood procedure for expressing the energy cost of physical activities as a multiple of the resting metabolic rate. https://pubmed.ncbi.nlm.nih.gov/2204507/ (abstract of article by M. Jette, K. Sidney and G. Blumchen) (accessed 04/26/2021).

it finds him." *See J.V. Vozzolo, Inc. v. Britton*, 377 F.2d 144, 147-148 (D.C. Cir. 1967); ("[E]mployers accept with their employees the frailties that predispose them to bodily hurt."); *Fox v. West State, Inc.*, 31 BRBS 118 (1997). There is no evidence Claimant's spinal conditions are solely due to any incident occurring after his employment in Afghanistan ended. *See, e.g., J.T. [Tracy] v. Global Int'l Offshore, Ltd*., 43 BRBS 92 (2009), *aff'd sub nom. Keller Found./Case Found. v. Tracy*, 696 F.3d 835, 46 BRBS 69(CRT) (9th Cir. 2012), *cert. denied*, 570 U.S. 904 (2013). Dr. Nemeth opined Claimant's spinal conditions are degenerative or congenital and his neck and back complaints are related to pre-existing spondylosis and scoliosis. Accordingly, Claimant's pre-existing spine-related physical restrictions must be considered in the assessment of whether Employer established the availability of suitable alternate employment. We, therefore, vacate the administrative law judge's finding Employer established the availability of suitable alternate employment and remand for him to address the evidence in light of all of Claimant's pre-existing and work-related restrictions.

DILIGENCE

In the event the administrative law judge determines on remand that Employer established the availability of suitable alternate employment, we address his finding Claimant did not show he diligently sought alternate work. The claimant can rebut the employer's showing of suitable alternate employment, and retain eligibility for total disability benefits, if he shows he diligently pursued alternate employment opportunities but was unable to secure a position. *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986); *see also Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). The claimant "is not required to show that he tried to get the identical jobs the employer showed were available. The claimant merely must establish that he was reasonably diligent in attempting to secure a job 'within the compass of employment opportunities shown by the employer to be reasonably attainable and available.'" *Palombo*, 937 F.2d at 74-75, 25 BRBS at 8(CRT) (citing *Turner*, 661 F.2d at 1043, 14 BRBS at 165).

The administrative law judge discussed Claimant's evidence that he sought work after returning from Afghanistan.[18] Preliminary Findings at 50. Even though Claimant disputes the facts on appeal, the administrative law judge found "most probative" Claimant's account to Employer's rehabilitation counselor that he told prospective

[18] Claimant submitted a number of exhibits documenting his job search from January 2016 to December 2017. SCXs 5, 23, 25.

employers he had a back injury and would require extended lunch breaks for physical therapy. AIGX 23. The administrative law judge found these representations are "not indicative of an industrious, assiduous effort to find a job." Preliminary Findings at 50.

The administrative law judge's finding that Claimant's evidence of his efforts to secure alternate employment is insufficient to establish that he diligently sought appropriate work is rational and supported by substantial evidence. *See Palumbo,* 937 F.2d 70, 25 BRBS 1(CRT). He considered both the nature and sufficiency of Claimant's efforts, and rationally found Claimant was not genuinely seeking alternate employment.[19] *See Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000). Significantly, Claimant's medical records do not fully support his assertion that he required extended lunch breaks for physical therapy during the time period he was searching for jobs. While Drs. Seade, Perez, and Ebert prescribed physical therapy for limited periods of two to three times per week for four weeks in December 2015 and January 2017, Dr. Seade's notes in October and December 2016 and January 2017 recommended only that Claimant utilize physical therapy videos from his website. SCX 1 at 94, 170, 173, 190, 200. In February 2017, Dr. Josey recommended stretching for Claimant's non-work-related spinal condition, he prescribed massage therapy only two times per month for six months in July 2017, and he recommended in August 2017 that Claimant continue his home exercise program. *Id*. at 204, 234, 260. Thus, we affirm the administrative law judge's finding that Claimant did not undertake a diligent post-injury job search. *Wilson v. Virginia Int'l Terminals*, 40 BRBS 46 (2006).

MEDICAL BENEFITS

Claimant challenges the denial of surgical treatment for his nasal conditions, the amount allowed for medical expenses for treating his shoulder injuries, the denial of reimbursement for travel expenses to Denver, Colorado, and reimbursement for his private health insurance premiums. Claimant also avers the administrative law judge failed to address the necessity of additional shoulder surgery and continuing treatment for sleep apnea.

In his Final Decision and Order, the administrative law judge adjusted the mileage rate awarded to the rate in effect at the time of the travel, and allowed Claimant $1,503.27

[19] Any error in the administrative law judge's noting Claimant informed potential employers of his pre-existing spinal condition is harmless as the administrative law judge rationally concluded Claimant did not show diligence based on his reported statement to prospective employers that he would require extended lunch breaks. *See Lennon v. Waterfront Transport,* 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994).

of the requested $1,513.88 in medical and travel expenses incurred to obtain treatment for Claimant's calf injury. Final Decision and Order at 4-5. The administrative law judge allowed Claimant the amounts claimed for treatment of his PTSD, nasal conditions, sleep apnea, pulmonary conditions, and shoulder injuries. *Id*. at 5-6. As these allowed expenses are supported by substantial evidence, they are affirmed.[20] *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994); *see* Cl. Br. Med. Exp.

The administrative law judge rejected Claimant's request for $10,810.80 for travel expenses from Austin, Texas, to Denver for pulmonary treatment. Final Decision and Order at 6-7. Claimant received treatment for his pulmonary condition in Austin from Dr. Kim until he referred himself to the National Jewish Hospital in Denver in June 2015. SCX 1 at 32-39, 43-45, 55-59. The administrative law judge relied on the July 25, 2018 deposition testimony and October 31, 2017 report of Dr. Freddie Morales that Claimant "volunteered" to go the National Jewish Hospital in Denver for pulmonary treatment and that doing so was not medically necessary. Morales Jul. 25, 2018 Dep. at 10; AWACX 8 at 6. He found reasonable and necessary the pulmonary treatment Claimant underwent in Denver, and he allowed the cost of the treatment and travel expenses incurred while in Denver. Final Decision and Order at 6-7/3 at 51-52. However, as substantial evidence supports the finding that it was not necessary for Claimant to go to Denver to receive this treatment, we affirm the administrative law judge's denial of the travel expenses to Denver. *Ezell v. Direct Labor, Inc.*, 37 BRBS 11 (2003) (not reasonable for the claimant to seek treatment a considerable distance from his residence when other equally qualified physicians were available in the local area); *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996) (where competent medical care is available locally, claimant's medical expenses may be limited to those costs which would have been incurred for local treatment).

Claimant asserted he obtained health insurance upon his return to the United States only because Employer refused to authorize medical treatment for his work-related injuries. The administrative law judge rejected Claimant's contention he is entitled to reimbursement of $15,981.32 for his health insurance premiums. Final Decision and Order at 6. He properly determined there is no authorization in the Act or the regulations allowing

[20] Accordingly, we reject Claimant's assertion the administrative law judge erred by not allowing more in medical expenses for his shoulder injuries than documented by his attorney. Although Claimant submitted his own accounting of medical expenses, he informed the administrative law judge by letter dated August 24, 2019, that the administrative law judge should rely on the medical expenses documented in his counsel's brief.

for Employer's reimbursement of private health insurance premiums. We agree.[21] Accordingly, we affirm the administrative law judge's denial of reimbursement for private health insurance premiums.

In his post-hearing brief, Claimant asserted Employer declined to authorize nasal revision surgery for his work-related sinus condition. Cl. Post-Hearing Br. at 39; Cl. Supp. Br. at 3-4; *see also* Preliminary Findings at 4, 51. The administrative law judge denied Claimant's request for the surgery "since Dr. Chu stated only that Claimant may require that treatment." Final Decision and Order at 5.

Section 7 of the Act, 33 U.S.C. §907, provides that the employer "shall furnish such medical, surgical, and other attendance or treatment, . . . for such period as the nature of the injury or the process of recovery may require." Claimant bears the burden of establishing that medical treatment is necessary to treat his work-related injury. *Fabre*, 806 F.3d 327, 49 BRBS 87(CRT). A claimant establishes a prima facie case for compensable medical treatment where a qualified physician states the treatment is necessary for a work-related condition. *See Ingalls Shipbuilding, Inc. v. Director, OWCP* [*Baker*], 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993); 20 C.F.R. §702.402.

Claimant had nasal surgery in February 2006. The parties stipulated Claimant's sinus and nasal problems were worsened by his employment. Claimant was examined by Dr. Michael Yium on September 26, 2016. Dr. Yium opined that Claimant "should consider revision septoplasty and turbinate reduction in the future." SCX 1 at 158. Claimant was examined at Employer's request by Dr. Chu on October 31, 2017. He too opined that Claimant "should consider revision of turbinates and septoplasty." AWACX 7 at 4. Dr. Chu stated at his July 26, 2018 deposition, when asked about the need for additional treatment, "I felt that [Claimant] might benefit from a little additional reduction of those turbinates." Chu Dep. at 13; *see also* AWACX 7 at 12. The statements by Drs. Yium and Chu are sufficient to establish the recommended surgery is reasonable and necessary for claimant's work-related condition notwithstanding their not explicitly using those words. *See Director, OWCP v. Ingalls Shipbuilding, Inc. [Ladner]*, 125 F.3d 303, 307, 31 BRBS 146, 148(CRT) (5th Cir. 1997); *Ceres Marine Terminal v. Director OWCP [Allred]*, 118 F.3d 387, 391, 31 BRBS 91, 94(CRT) (5th Cir. 1997). Further, there is no contrary evidence undermining their recommendation of surgery for Claimant's work-

[21] Contrary to Claimant's contention, the administrative law judge does not have authority beyond that provided in Section 7 of the Act, 33 U.S.C. §907, and the implementing regulations, such that he could award reimbursement for private health insurance premiums. *See Greenhouse v. Ingalls Shipbuilding, Inc.*, 31 BRBS 41 (1997); 33 U.S.C. §919(d).

related condition. Therefore, based on this record, we vacate the administrative law judge's denial of the surgical procedure recommended by Drs. Chu and Yium. *Baker*, 991 F.2d 163, 27 BRBS 14(CRT); *Kelley v. Bureau of Nat'l Affairs*, 20 BRBS 169 (1988). Provided Claimant complies with the requirements of Section 7(d) of the Act, 33 U.S.C. §907(d), AWAC is liable for surgery necessary for Claimant's work-related sinus and nasal condition.

Finally, Claimant seeks authorization for right shoulder surgery recommended by Dr. Seade and for future sleep apnea treatment. In his post-hearing brief, Claimant averred he sought and was denied authorization from Employer for the second shoulder surgery recommended by Dr. Seade, and he requested the administrative law judge order future treatment for his work-related injuries, including sleep apnea. Cl. Post-hearing Br. at 39; Cl. Supp. Br. at 3-4. The administrative law judge held Employer liable for "necessary nasal/sleep apnea treatment" and "reasonable, appropriate, and necessary shoulder treatment in accordance with Section 7." Final Decision and Order at 8. If Employer has refused treatment requested by Claimant for these work-related conditions, he should contact the district director. 20 C.F.R. §702.407.

Accordingly, we reverse the administrative law judge's finding that Claimant's calf injury claim is time-barred, and we award Claimant compensation for a two percent permanent partial disability of the right lower extremity. We reverse the administrative law judge's finding Claimant's eosinophilic esophagitis is not work-related. We vacate the administrative law judge's findings that Claimant's left shoulder reached maximum medical improvement on December 1, 2017, and that Employer established the availability of suitable alternate employment on October 18, 2017, and we remand for further findings in accordance with this opinion. Finally, we reverse the administrative law judge's finding that the surgeries recommended by Drs. Yium and Chu are not reasonable or necessary for

Claimant's work-related nasal condition. In all other respects, we affirm the administrative law judge's decisions.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

JONES, Administrative Appeals Judge, dissenting in part:

I dissent from my colleagues' reversal of the administrative law judge's finding that Claimant did not show nasal revision surgery is "reasonable, appropriate and necessary." Final Decision and Order at 5. In my opinion, the administrative law judge permissibly found the doctors' statements that Claimant "may" require surgery is insufficient to show that surgery is in fact necessary for Claimant's work-related injury. *See Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993). However, this does not foreclose Employer's liability for nasal surgery if Claimant obtains a recommendation that such surgery is in fact "necessary." 33 U.S.C. §907(a). In all other respects, I concur with my colleagues' decision.

MELISSA LIN JONES
Administrative Appeals Judge