U.S. Department of Labor

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

BRB No. 22-0363

SARAH NAMWANJE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SOC, LLC	)	
	)	DATE ISSUED: 4/27/2023
and	)	
	)	
CONTINENTAL CASUALTY COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Disability Compensation and Medical Benefits of Dan C. Panagiotis, Administrative Law Judge, United States Department of Labor.

Andrew Nyombi (KNA PEARL), Silver Spring, Maryland, for Claimant.

Krystal L. Layher and Rebecca R. Sonne (Brown Sims), Houston, Texas, for Employer/Carrier.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

GRESH, Chief Administrative Appeals Judge, and ROLFE, Administrative Appeals Judge:

Claimant appeals Administrative Law Judge (ALJ) Dan C. Panagiotis's Decision and Order Denying Disability Compensation and Medical Benefits (2020-LDA-02420) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation

Act, as amended, 33 U.S.C. §901 *et seq.* (Act), as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq*. (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 law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, a Ugandan citizen, allegedly sustained a hearing loss and a psychological injury as a result of her exposures while working for Employer as a security guard at Camp Victory in Iraq from December 2009 to October 2011, the completion date of her two-year contract.[2] She thereafter returned to Uganda, where she opened a grocery store, which ultimately proved unprofitable and closed in 2013. Since then, she has not attempted to find any employment and is dependent upon her mother, with whom she lives on the family farm. Meanwhile, Claimant alleged she began experiencing psychological symptoms in 2012,[3] JX 1, Dep. at 12, which she treated through monthly visits with an herbalist in 2014,[4] *id*. at 46. The herbalist attributed Claimant's symptoms to being haunted by "evil spirits" and prescribed "herbs in the form of juice" to address her condition. *Id.*

Claimant did not seek further treatment until November 2019, when a severe headache and corresponding temporary loss of consciousness prompted a visit to the China-Uganda Friendship Hospital emergency room. While there, Claimant also explained she was having problems hearing. At that time, she was referred to Musuto Bwonya Alex,

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[1] This case arises within the jurisdiction of the United States Court of Appeals for the Second Circuit because the district director who filed the ALJ's decision is in New York. 33 U.S.C. §921(c); *McDonald v. Aecom Technology Corp*., 45 BRBS 45 (2011).

[2] Claimant was assigned to provide security at the base's dining hall, gym, recreational facilities, and store. She described three specific instances where she was in the proximity of rocket attacks, including one incident in 2011 where a section of her sleeping quarters was struck, resulting in her obtaining treatment for some minor bruises.

[3] Claimant stated her symptoms included flashbacks, panic attacks, nightmares, anger/irritability, difficulty sleeping, and suicidal ideations.

[4] As Claimant notes, "because Ugandans believe in a supernatural cause of disease, the traditional healer will confront the underlying cause, which is witchcraft, demons, or ancestral spirits," by providing "herbs, bleed patients, and assist the patient with negotiations with the evil forces." Cl's PH Brief at 6 n.1.

a psychological treatment provider at Naguru Hospital,[5] and to Mr. Leonard Bosco Opio, a clinical officer in the Ear, Nose, and Throat Department at the China-Uganda Friendship Hospital.[6] Claimant treated monthly with Mr. Alex beginning on November 20, 2019, who diagnosed her with Post-Traumatic Stress Disorder (PTSD), which, he stated, was greatly contributed to by her work exposures in Iraq. JX 13. Mr. Alex recommended long-term psychotherapy and pharmacotherapy care and opined Claimant could return to light duty work, although not in a conflict zone. *Id.* On December 12, 2019, Mr. Opio conducted an audiogram and diagnosed Claimant with severe sensorineural hearing loss for which he recommended "medication and hearing aids." JX 13 at 5.

At Employer's behest, Claimant was evaluated by Dr. Bahar Safaei-Far, a doctor in clinical psychology, on March 13, 2021. JX 7. Dr. Safaei-Far opined Claimant did not meet any diagnostic criteria for a mental disorder. She based her conclusion on Claimant's general performance in testing, which, she stated, indicated overreporting and exaggeration of symptoms. *Id.* Additionally, she stated there was no evidence of any pre-existing mental health diagnosis. *Id.* Dr. Safaei-Far therefore concluded Claimant was at maximum medical improvement and could return to work, domestically or overseas, without restriction, including to her prior work as a security guard. *Id.*

Dr. Laurie S. Hebert, a doctor of audiology, performed a peer review of Claimant's audiogram and Mr. Opio's treatment records. In her May 5, 2021 report, she stated Claimant's testing was consistent with a flat moderately severe to severe hearing loss, though the type of hearing loss could not be determined due to a lack of bone conduction testing. JX 10. She opined, however, any alleged hearing loss "is less likely than not related to noise exposure during [her] employment on a military base." *Id.* Dr. Hebert further opined Claimant's audiogram was of "limited value" because it consisted of "purely volitional behavioral data" and "did not include objective tests to validate the subjective/behavioral responses." *Id.*

[5] The record contains a license issued by the Allied Health Professional Council of the Republic of Uganda for Mr. Alex indicating he has a diploma in mental health. JX 14. Additionally, the record contains documentation from the Ministry of Health verifying that Mr. Alex is "qualified with a Diploma in Mental Health since 2006 from Butabika School of psychiatric Clinical Officers" and indicating he is a "Principal Psychiatric Clinical Officer" and "Head of Department China Uganda Friendship Hospital Naguru." *Id.* However, as the ALJ found, there is no record of Mr. Alex having obtained a medical or doctorate degree. D&O at 6 n.10.

[6] The record lists Mr. Opio as a licensed "clinical officer." JX 25

On March 24, 2020, Claimant filed her claim seeking benefits for a psychological injury and hearing loss, JX 2, which Employer controverted, JX 4, and the case was thereafter transferred to the Office of Administrative Law Judges. In an order dated March 18, 2021, the ALJ granted the parties' joint motion for an on-the-record determination without a formal evidentiary hearing and set discovery and briefing schedules.

In his decision, the ALJ found Claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), relating her psychological condition and hearing loss to her overseas work with Employer and found Employer, in both instances, rebutted the presumption. On the record as a whole, the ALJ, having accorded greatest weight to the opinions of Drs. Safaei-Far and Hebert, found Claimant did not prove she sustained either a work-related psychological injury or a work-related hearing loss.[7] Accordingly, the ALJ denied Claimant's claim for benefits relating to both her psychological condition and hearing loss.

On appeal, Claimant challenges the ALJ's denial of benefits. Employer responds, urging affirmance of the ALJ's decision.

Claimant asserts the ALJ erred in finding Employer rebutted the Section 20(a) presumption as in so doing he completely disregarded substantial evidence in the record, including Claimant's uncontradicted testimony and overall medical history, which, she maintains, conclusively shows her PTSD arose out of her work for Employer within a zone of special danger.[8] Further, Claimant contends, in weighing the evidence as a whole, the

[7] The ALJ found Claimant's claim for a psychological injury is also otherwise barred because her notice of injury and claim for compensation relating to that injury were untimely filed. 33 U.S.C. §§912, 13; D&O at 21-24.

[8] We reject Claimant's suggestion that the ALJ erred in failing to apply "the zone of special danger" principle to this case. Under the Act, an injury generally occurs in the course of employment if it occurs within the time and space boundaries of the employment and in the course of an activity whose purpose is related to the employment. *Palumbo v. Port Houston Terminal, Inc.*, 18 BRBS 33 (1986); *Mulvaney v. Bethlehem Steel Corp*., 14 BRBS 593 (1981). However, in cases arising under the DBA, the United States Supreme Court has held the injury may be within the course of employment even if the injury did not occur within the space and time boundaries of work, so long as the employment creates a "zone of special danger" out of which the injury arises. *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 507 (1951). In this case, the issue does not concern whether Claimant's injuries occurred in the course of her employment but whether they arose out of her employment, *i.e.*, were they caused by the employment. *See* 33 U.S.C. §902(2). The "zone of special danger" doctrine does not aid claimant in this inquiry, although the Section

ALJ erred in rejecting her uncontradicted testimony as not credible,[9] because she accurately relayed the traumatic incidents and exposures to loud noise she encountered in her work with Employer. Claimant also asserts the ALJ improperly assigned little evidentiary weight to her treating providers' reports, while erroneously affording greatest weight to the opinions of Employer's experts. She maintains the reports of Drs. Safaei-Far and Hebert contain "numerous infirmities" which should have compelled the ALJ to assign their opinions little to no weight.[10]

Section 20(a) Rebuttal

Once the Section 20(a) presumption is invoked, as is the case here,[11] the burden shifts to the employer to rebut it with substantial evidence that the claimant's condition was not caused or aggravated by his employment. *Rainey v. Director, OWCP*, 517 F.3d 632, 634, 42 BRBS 11, 12(CRT) (2d Cir. 2008); *American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 64-65, 35 BRBS 41, 49(CRT) (2d Cir. 2001); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). Substantial evidence is the amount of evidence which a reasonable mind could accept as adequate to support a conclusion. *Rainey*, 517 F.3d at 637, 42 BRBS at 14(CRT). The employer's burden on rebuttal is one of production, not

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20(a) presumption, which the ALJ applied to link Claimant's alleged psychological injury and hearing loss to her employment, does aid Claimant.

[9] Claimant asserts the ALJ applied an inappropriate "extreme memory standard" in rejecting her uncontradicted statements merely because the traumatic incidents she mentioned happened more than ten years ago.

[10] For instance, Claimant states Dr. Safaei-Far's report is incomplete, inconsistent, and unreliable because it lacks any indication that she: reviewed Claimant's complete medical records; has the expertise to diagnose conditions of patients who have worked in war zones; adequately explained her diagnoses in terms of the diagnostic criteria and suspect testing she performed; or adjusted her report to account for Claimant's cultural and linguistic differences. Claimant states Dr. Hebert's report is similarly flawed because she merely reviewed the existing audiology report, acknowledged it was consistent with severe hearing loss, but she nevertheless discredited it as evidence of a work-related hearing loss without conducting any of her own objective testing on Claimant.

[11] We affirm the ALJ's findings that Claimant invoked the Section 20(a) presumption relating to her psychological condition and hearing loss to her work, as they are unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

persuasion, and is not dependent on credibility.[12] *Id.*; *Rose v. Vectrus Systems Corp.*, 56 BRBS 27, 35 (2022) (Decision on Recon. en banc), *appeal pending*; *Victorian v. International-Matex Tank Terminals*, 52 BRBS 35 (2018), *aff'd sub nom. International-Matex Tank Terminals v. Director*, OWCP, 943 F.3d 278, 53 BRBS 79(CRT) (5th Cir. 2019); *Suarez v. Serv. Employees Int'l, Inc.*, 50 BRBS 33 (2016); *Cline v. Huntington Ingalls, Inc.*, 48 BRBS 5 (2013). If the employer successfully rebuts the presumption, the claimant is no longer entitled to it, and the issue of causation must be resolved on the evidence of the record as a whole, with the claimant bearing the burden of persuasion by a preponderance of the evidence. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 262, 31 BRBS 119, 124(CRT) (4th Cir. 1997). If, however, the employer does not present substantial evidence rebutting the presumption, the claimant's condition is work-related as a matter of law. *See, e.g.*, *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011).

Hearing Loss Claim

The ALJ found Dr. Hebert's opinion constitutes substantial evidence that a reasonable mind would find adequate to support a finding that Claimant's hearing loss is not work-related. In reaching this conclusion, the ALJ relied on Dr. Hebert's opinion "that noise exposure creates a high frequency sensorineural loss between 2000-8000 Hz," and "typically does not create hearing loss at lower frequencies such as 250-1000 Hz," as seen in Claimant's report. D&O at 20. He also found Dr. Hebert "opined that Claimant's audiogram was consistent with a bilateral conductive hearing loss, which is not caused by noise exposure." *Id.*

The ALJ's interpretation, however, does not accurately reflect Dr. Hebert's opinion. JX 10. First, Dr. Hebert's causation opinion consists entirely of her statement that Claimant's hearing loss "is less likely than not related to noise exposure during [her] employment on a military base," a clear-cut statement which is neither reflected in the ALJ's decision nor apparently considered by the ALJ in his causation analysis.[13] Second, a review of Dr. Hebert's report indicates, in contrast to the ALJ's finding, she did not opine

[12] At the outset, we reject Claimant's assertions that the ALJ failed to address the credibility of Employer's experts in addressing whether those opinions rebutted the Section 20(a) presumption.

[13] Although the ALJ's decision contains a general overview of Dr. Hebert's opinion, D&O at 9-10, and consideration of the doctor's opinion in the context of his overall causation analysis, *id.*, at 20-21, it lacks any mention or consideration whatsoever of Dr. Hebert's actual "less likely than not" causation statement.

"that Claimant's audiogram was consistent with a bilateral conductive hearing loss, which is not caused by noise exposure."[14]

Moreover, Dr. Hebert's opinion contains contradictory statements regarding causation and her conclusions are inadequately explained. In this regard, Dr. Hebert, on two occasions in the report, explicitly admitted "the type of hearing loss could not be determined" due to the lack of bone conduction testing. JX 10 at 1. Despite recognizing her inability to determine "the type of hearing loss" in this case, Dr. Hebert nevertheless attempted to do just that in opining that Claimant's "hearing loss is less likely than not related to noise exposure during [her] employment."[15] *Id.* Although Dr. Hebert indicated her "less likely than not" conclusion was "based on" the general characteristics of a noise-induced hearing loss she did not explain how she reached that determination particularly in the absence of what she deemed to be required bone conduction testing. Additionally, her statement that "noise exposure creates a high frequency sensorineural hearing loss between 2000-8000 Hz" but it "typically does not create hearing loss at lower frequencies such as 250-1000 Hz," *id.* at 2, does not adequately address Claimant's audiogram which demonstrates hearing loss at all tested frequencies, including at 2000-8000 Hz. JX 13 at 5. In this regard, Dr. Hebert did not explain whether Claimant's documented hearing loss at 2000-8000 Hz could be noise-induced. Moreover, her use of the phrase "typically does not," in regard to whether noise exposure can create hearing loss at lower frequencies, necessarily implies it is possible, particularly in instances where an audiogram, such as Claimant's in this case, reveals hearing loss at all frequencies. [16]

[14] Dr. Hebert's report states that the audiogram's "bilateral pure tone responses were consistent with a flat moderately severe to severe hearing loss." JX 10 at 1. However, it makes no mention whatsoever of "bilateral conductive hearing loss," let alone state the audiogram is indicative of that condition. *Id.* Rather, as shall be discussed, it explicitly states "[t]he type of hearing loss could not be determined." *Id.*

[15] Given this contradiction, there is no way to view Dr. Hebert's reasoning except that by its own terms it is inherently illogical.

[16] Dr. Hebert stated the audiogram results "are of limited value" for various reasons. For example, she stated there was no calibration date provided for the audiometer, no objective data was collected, and information regarding a speech reception threshold, tympanometry, and acoustic reflex responses were not obtained. JX 10 at 2. Nevertheless, it appears her causation opinion was based entirely on her interpretation of those audiogram results. D&O at 20; JX 10 at 1.

Because of these errors, a reasonable mind could not accept Dr. Hebert's opinion as adequate to support her conclusion, *Rainey*, 517 F.3d at 637, 42 BRBS at 14(CRT).[17] Thus, we hold Dr. Hebert's opinion is insufficient to rebut the Section 20(a) presumption as a matter of law. *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995); *Phillips v. Newport News Shipbuilding & Dry Dock Co*., 22 BRBS 94 (1988). We, therefore, reverse the ALJ's finding that Employer rebutted the Section 20(a) presumption and hold Claimant's binaural hearing loss is work-related as a matter of law. *Obadiaru*, 45 BRBS at 20. We remand this case to the ALJ for a determination as to the extent of Claimant's hearing loss and entry of an award of benefits on that claim. 33 U.S.C. §908(c)(13)(b).

Psychological Injury

The ALJ permissibly found Dr. Safaei-Far's opinion constitutes substantial evidence that a reasonable mind could find adequate to support a finding that Claimant does not have any psychological condition. *Victorian*, 52 BRBS 35; *Suarez*, 50 BRBS 33; *Cline*, 48 BRBS 5. Dr. Safaei-Far opined Claimant "does not meet any diagnostic criteria for a mental disorder" and "[h]er performance on three separate psychological tests showed an over reporting and exaggeration of symptoms" consistent with "malingering or feign psychiatric symptoms." JX 7 at 7. She additionally stated, "the data does not support that [Claimant] has any current mental health related issues due to her overreporting of symptoms" and "there is no evidence that a mental health diagnosis pre-existed her employment with [E]mployer." *Id.* at 7-8. If taken as true, these statements constitute substantial evidence that Claimant has no current psychological or mental condition and, more specifically, no psychological condition caused, aggravated, or exacerbated by her work with Employer.[18] EX 1 at 10. This is sufficient to rebut, *O'Kelley*, 34 BRBS at 41-

[17] We respectfully disagree with our dissenting colleague that Dr. Hebert's opinion could constitute substantial evidence sufficient to rebut the Section 20(a) presumption "depending on the inferences made by the ALJ." *See* Concurrence/Dissent at 11. Dr. Hebert's opinion -- on its face -- is inherently contradictory and her conclusion cannot logically follow from her premises, regardless of how it is interpreted. Dr. Hebert did not conduct the test she herself stated was necessary to determine the type of hearing loss Claimant suffered. In addition, Claimant suffered the type of hearing loss Dr. Hebert acknowledged Claimant's work exposure would have caused. Those admissions make it logically impossible to accept her conclusion that Claimant's hearing loss is "less likely than not" related to her work exposure; there simply is no way to accept Dr. Hebert's premises as true without creating an irreconcilable conflict with her conclusion.

[18] Although Dr. Safaei-Far also stated "it is not possible to provide a diagnosis due to the veracity of symptoms reported being questioned," a reasonable mind could conclude her "N/A" response to the question "[w]as [Claimant's] psychological condition caused or

42, and we therefore affirm the ALJ's finding that Employer rebutted the Section 20(a) presumption for Claimant's psychological condition. *Rainey*, 517 F.3d at 637, 42 BRBS at 14(CRT); *Victorian*, 52 BRBS at 41.

Weighing the Evidence on Causation as a Whole

Once the employer rebuts the Section 20(a) presumption, it no longer controls and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). Addressing the credibility of those medical providers assessing Claimant's mental health, the ALJ accorded little weight to Mr. Alex's PTSD diagnosis because the record lacks sufficient information regarding his qualifications,[19] he did not discuss what tests he administered, and he did not adequately describe what stressful events he believed contributed to Claimant's PTSD. D&O at 17-18. In contrast, the ALJ found Dr. Safaei-Far "accurately summarized Claimant's social, employment, medical, and psychological history" and relied on her own evaluation and objective testing of Claimant in concluding, based on a reasonable degree of medical certainty, that Claimant did not meet any diagnostic criteria for a mental disorder.[20] *Id.*

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aggravated by her employment with Employer" stems from her conclusions that Claimant did not, nor does she currently have, any psychological condition and corresponding evidence of malingering or feigning psychiatric symptoms, rather than to any inability to respond to the causation question, JX 7. *See generally Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994) (the Board may not disregard the ALJ's findings, if they are supported by substantial evidence, on the basis that other inferences are more reasonable); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991) (the choice among reasonable inferences is left to the ALJ; the Board may not engage in *de novo* review or substitute its credibility determinations); *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000).

[19] In this regard, the ALJ stated he could "not find Mr. Alex is qualified to give an expert opinion based on the lack of evidence of his education, training, and experience in the mental health field, and he does not appear to have received a medical or doctorate degree." D&O at 17.

[20] We reject, as meritless, Claimant's contention that Dr. Safaei-Far's opinion is fundamentally flawed by "infirmities" contained therein. Contrary to Claimant's position, Dr. Safaei-Far's nine-page report contains information regarding her qualifications and identifies and explains the underpinnings of her conclusions. JX 7. Additionally, her

Recognizing the ALJ's broad discretion in weighing the evidence and making credibility determinations, we affirm his finding that Claimant did not establish she sustained a psychological injury as a result of her work in Iraq with Employer.[21] *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 430, 34 BRBS 35, 37(CRT) (5th Cir. 2000). Contrary to Claimant's contentions, the ALJ acted within his discretion in finding her "not completely credible" and his underlying rationale is adequately explained and supported by substantial evidence. D&O at 10-11. We therefore affirm his decision to accord diminished weight to Claimant's testimony as that decision is neither unreasonable nor irrational. *Gallagher*, 219 F.3d at 430, 34 BRBS at 37(CRT). We further hold substantial evidence supports his decision to give Dr. Safaei-Far's opinion "considerably greater weight" than to either Mr. Alex's opinion or Claimant's self-reporting as he permissibly found Dr. Safaei-Far better qualified and his opinion to be more credible, better documented, and well-reasoned. *Gallagher*, 219 F.3d at 430, 34 BRBS at 37(CRT); *Mendoza*, 46 F.3d at 500-501, 29 BRBS at 80-81(CRT).

Dr. Safaei-Far's statements that "the data does not support that [Claimant] has any current mental health related issues" and "there is no evidence that a mental health diagnosis pre-existed her employment with [E]mployer," *id.* at 7-8, are sufficient to establish the lack of a causal nexus between any alleged psychological condition and Claimant's work in Iraq. Consequently, we affirm the ALJ's conclusion that Claimant has not established she sustained a work-related psychological condition by a preponderance of the evidence, as it is supported by substantial evidence.[22] *See generally Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962) (that other inferences could have been drawn from the record does not establish error in the ALJ's conclusion).

Accordingly, we reverse the ALJ's denial of benefits relating to Claimant's work-related hearing loss and remand this case for further consideration consistent with this

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accompanying curriculum vitae details her relevant expertise, including her "specializing in trauma and PTSD." JX 8.

[21] The Board is not permitted to reweigh the evidence but may ascertain only whether substantial evidence supports the ALJ's decision. *See, e.g., Pool Co. v. Cooper*, 274 F.3d 173, 178, 35 BRBS 109, 112(CRT) (5th Cir. 2001); *Compton v. Avondale Industries, Inc.*, 33 BRBS 174 (1999).

[22] In light of this, we need not address the ALJ's finding that Claimant's claim for a psychological injury is otherwise barred because her notice of injury and claim for compensation relating to that injury were untimely filed. 33 U.S.C. §§912, 13.

opinion. In all other respects, we affirm the ALJ's Decision and Order Denying Disability Compensation and Medical Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring and dissenting:

I concur in affirming the ALJ's findings and determination concerning Claimant's claim of psychological injury; however, I respectfully disagree with my colleagues concerning their reversal of the ALJ's findings as to rebuttal regarding the claim for hearing loss. Rather than reverse the ALJ, I would remand for further consideration as to whether Employer has rebutted the presumption with respect to the hearing loss claim.

First, I disagree that no reasonable person could find that the testimony of Dr. Hebert constitutes rebuttal.[23] Because the ALJ may make reasonable inferences from the evidence, it is possible, depending on the inferences made by the ALJ, to find that Dr. Hebert's statements are not inconsistent. *See Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT) (2d Cir. 1993); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961) (ALJ is entitled to draw inferences and to make credibility determinations); *see also Newport News Shipbuilding & Dry Dock Co. v. Riley*, 262 F.3d 227, 35 BRBS 87(CRT) (4th Cir. 2001); *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Monta v. Navy Exch. Serv. Command*, 39 BRBS 104 (2005). For

[23] I do agree the ALJ appears to lack adequate foundation for his finding that Dr. Hebert opined that the "audiogram was consistent with a bilateral conductive hearing loss, which is not caused by noise exposure." Decision and Order at 20.

example, the ALJ could find Dr. Hebert's statements regarding the testing being of little use are not inconsistent with her statements that relate to conclusions using the testing results by inferring she is simply stating the testing is not reliable or credible; however, if the testing is considered, it does not show there is injury due to noise because more likely than not any injury at the lower frequencies is not caused by noise and any injury at the upper frequencies can be ascribed to noise only if bone conduction testing evidences that fact, and bone conduction testing was not done. Moreover, Dr. Hebert's statements, *if credited*,[24] can be taken as showing that Claimant's evidence, including Claimant's testimony regarding her hearing loss, *is not credible evidence of work-related injury*. In this regard, Dr. Hebert opined: 1) the testing does not bear indicia that establish reliability and credibility (these indicia have been professionally established), and 2) hearing loss due to noise is always sensorineural loss which can *only* be determined through bone conduction testing, and no such testing was done. JX 10. Because of this, Dr. Hebert's opinion may be interpreted as concluding there is no credible evidence of hearing injury to Claimant due to noise during her employment, whether through the testing that was conducted, or through Claimant's testimony.

In this light, Dr. Hebert's opinion may constitute substantial evidence to rebut the Section 20(a) presumption that Claimant's hearing loss is work-related as, if credited, it can adequately refute Claimant's evidence that she sustained any work-related hearing loss. *Rainey v. Director, OWCP*, 517 F.3d 632, 634, 42 BRBS 11, 12(CRT) (2d Cir. 2008); *American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 64-65, 35 BRBS 41, 49(CRT) (2d Cir. 2001); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). Nevertheless, because the evaluation of Dr. Hebert's opinion and determination as to whether it meets Employer's burden on rebuttal is a question best left for the ALJ, *Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT); *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982), remand is required.

Accordingly, I would remand this case for the ALJ to address Dr. Hebert's report and determine whether it constitutes substantial evidence to rebut the Section 20(a) presumption that Claimant's hearing loss is work-related. If so, and he found the presumption rebutted, he would weigh all the evidence together without the presumption and determine whether Claimant had carried her burden of persuasion. If Claimant did not carry her burden, he would reinstate his denial of benefits. If Claimant prevailed or the ALJ found Employer's evidence inadequate to constitute rebuttal, he would proceed as my

[24] The ALJ found Dr. Hebert's statements entitled to "substantial weight" based on her credentials, professional knowledge, and "the thoroughness of her review of Claimant's records." Decision and Order at 21

colleagues have outlined. In all other regards, I would affirm the ALJ's Decision and Order Denying Disability Compensation and Medical Benefits.

JUDITH S. BOGGS
Administrative Appeals Judge