

U.S. Department of Labor

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



BRB Nos. 23-0323
and 23-0323A

ALBERT R. SCHINDLER)

Claimant-Petitioner)

Cross-Respondent)

v.)

KELLOGG, BROWN, AND ROOT)

SERVICES)

and)

INSURANCE COMPANY OF THE STATE)
OF PENNSYLVANIA c/o AIG CLAIMS,)
INCORPORATED.)

Employer/Carrier-Respondents)

Cross-Petitioner)

DIRECTOR, OFFICE OF WORKERS')

COMPENSATION PROGRAMS, UNITED)

STATES DEPARTMENT OF LABOR)

Respondent)

Cross-Respondent)

NOT-PUBLISHED

DATE ISSUED: 02/12/2026

DECISION and ORDER

Appeal of the Decision and Order on Remand Granting Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Joel S. Mills and Gary B. Pitts (Pitts, Mills & Ratcliff), Houston, Texas, for Claimant.

Edwin B. Barnes (Thomas Quinn, LLP), San Francisco, California, for Employer and its Carrier.

Victoria Yee (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: GRESH, Chief Administrative Appeals Judge, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and Employer cross-appeals, Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order on Remand Granting Benefits (2018-LDA-00771) 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). 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.¹ 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Factual Background

This is the second time this case has been before the Benefits Review Board. The relevant background facts follow.

Claimant worked as an environmental coordinator for Employer in Iraq between December 2004 and April 2005. TR at 32-33, 60-61; EX 13 at 9, 13, 16, 47. His duties included the handling and securing of chemical storage containers and the daily overseeing of burn pits that functioned as trash disposal for plastic materials, spent ammunition, construction waste, and medical debris. TR at 33-36; EX 15 at 14. Claimant contends the

¹ This case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit because the office of the district director who filed the ALJ's decision is located in Houston, Texas. 33 U.S.C. §921(c); *McDonald v. Aecom Tech. Corp.*, 45 BRBS 45 (2011); *see also Glob. Linguist Sols., L.L.C. v. Abdelmeged*, 913 F.3d 921 (9th Cir. 2019).

burn pits exposed him to copious amounts of smoke and hazardous fumes. EX 15 at 14-15.

In late 2005, Claimant developed respiratory problems requiring hospitalization, and he underwent a CT scan that showed a pulmonary lesion in his left lung that doctors diagnosed as sarcoidosis. *Id.* From 2005 until 2009, Claimant underwent CT scans every three to four months to monitor the spot. TR at 41. He underwent a procedure in 2006 that showed “some mediastinal lymphadenopathy and a left lung nodule” measuring 2.5 cm in size. CX 5 at 2. Claimant’s pulmonologist did not remove or biopsy the nodule but recommended monitoring the condition. *Id.* When subsequent CT scans revealed gradual enlargement of the lesion to the size of a baseball in November 2011, Claimant sought treatment at the Mayo Clinic. *Id.* at 1-5; TR at 42-43.

After a biopsy revealed atypical carcinoid disease, Mayo Clinic surgeons removed Claimant’s entire left lung on November 15, 2011. CX 5 at 6-8; TR at 42-43. The same physicians in March 2012 issued final diagnoses of Stage IIIA atypical pulmonary carcinoid, status post-left pneumonectomy, and intermittent light-headedness. CX 5 at 10-12. Notes from the Mayo Clinic indicated Claimant never smoked and had no personal or family history of cancer. *Id.* at 2. In April 2012, Claimant underwent a second surgery to repair his left vocal cord, which had been injured during the lung surgery, and his voice did not return to being “quasi-normal” until July 2012. *Id.* at 9; CX 3 at 1; TR at 43-44.

Claimant’s personal physician, Dr. Russell Van Houzen, began treating him in 2010 or 2011. TR at 97; EX 8 at 2. In 2018, Claimant made the connection between his Iraq employment and his disability after reading an article describing how one of his colleagues in Iraq reported suffering from lung disease because of her work at the same burn pits to which Claimant was exposed. TR at 90-91.

In March 2018, Dr. Van Houzen authored a letter concerning the relationship between Claimant’s cancer and his employment in Iraq. CX 3; EX 8. He stated it was “highly likely” that Claimant’s exposure to the smoke from the burn pits caused his cancer, as Claimant did not smoke and had no other risk factors for cancer. CX 3. Dr. Van Houzen further noted that researchers had observed a link between individuals exposed to burn pit fumes and cancer. *Id.* Claimant filed his claim in April 2018. EX 1.

Employer thereafter submitted no affirmative evidence in response to show that exposure to toxic chemicals while working in Iraq did not cause Claimant’s lung cancer. Nevertheless, the ALJ originally found the claim untimely filed and further found Claimant failed to establish a prima facie case showing that working conditions could have caused his lung cancer. ALJ 2020 D&O at 7-9.

On appeal to the Board, Claimant challenged the ALJ's decision to exclude five exhibits from the record, arguing the excluded exhibits bolstered his prima facie case on working conditions. *Schindler v. Kellogg Brown & Root Services*, BRB No. 20-0563, slip op. at 5-6 (Aug. 20, 2021). Employer countered that the ALJ properly excluded the exhibits as inadmissible hearsay and that the Board should likewise affirm the rest of the ALJ's decision. *Id.* at 6-7. But Employer notably did not argue that the ALJ should have also excluded the exhibits as untimely exchanged as it suggested to the ALJ. *Id.*²

The Board's Decision and Remand Instructions

As a threshold matter, we noted that "hearsay evidence is generally admissible in administrative hearings if it is considered reliable" and if sufficiently probative it "alone may constitute substantial evidence to support an administrative holding." *Schindler*, slip op. at 6-7. Agreeing with the contention of the Director, Office of Workers' Compensation Programs (Director), we held the excluded exhibits "addressing the link between burn pits and cancer could conceivably bolster Dr. Van Houzen's opinion." *Id.* at 10. We further noted that "[c]ontrary to the administrative law judge's conclusion," and independent of the exhibits, Dr. Van Houzen's opinion "appears to have documentation to support it as evidenced by his understanding of Claimant's work environment in Iraq, the chronology of Claimant's work exposures in 2004 and development of his initial symptoms in 2005, and his acknowledgement of research linking cancer to burn pit exposure." *Id.*

Thus, we instructed the ALJ to determine the admissibility of the exhibits on remand based on their reliability, probative value, and the fairness of their use in the proceedings. *Id.* at 7, 10. After "making a determination on the admissibility of the exhibits in question,"

² Employer generally asserted to the ALJ that all of Claimant's exhibits, which were submitted one week late (but still three weeks before the hearing) were untimely under the ALJ's Pre-Hearing Order. While Employer claimed that receiving the exhibits seven days late "irreparably prejudiced" its defense, it did not attempt to explain *how*, nor did it move for more time for discovery or even list the criteria ALJs consider to establish prejudice. Emp. Mot. to Strike at 4; Emp. Post-Hr'g Br. at 6. The ALJ, in turn, noted Employer had moved to exclude all Claimant's exhibits as untimely exchanged, but summarily excluded only five of them as "inadmissible hearsay" without discussing their timeliness or Employer's assertion it suffered irreparable harm from their one-week-late exchange. ALJ Exhibit Order at 2 (July 27, 2020). Employer dropped its timeliness assertion regarding the exchange on appeal and argued to the Board in defense of the ALJ's original decision only that the ALJ correctly excluded the exhibits on hearsay grounds -- thereby abandoning whatever timeliness assertion it arguably presented to the ALJ on the issue. *Schindler*, slip op. at 6; *see, e.g., Jones Bros. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018).

we further instructed the ALJ to “fully consider whether Claimant’s testimony, Dr. Van Houzen’s opinion and, *if admitted*, the documents addressing a link between burn pits and lung cancer are sufficient to satisfy Claimant’s burden to establish that working conditions existed sufficient to invoke the Section 20(a) presumption.” *Id.* at 10-11 (emphasis added). Significantly, we concluded that if the ALJ “finds Claimant entitled to the Section 20(a) presumption, his occupational disease is work-related as a matter of law, as Employer has not produced any evidence legally sufficient to rebut the presumption.” *Id.* at 11 n.16.³

The ALJ’s Findings on Remand

Employer subsequently filed a letter with the ALJ requesting a conference “to establish the parameters of the proceedings on remand.” Emp. ALJ Letter (March 9, 2022). It also generally raised “due process concerns” and the potential need to re-open the record should the ALJ admit the exhibits she initially excluded. *Id.* Additionally, on April 29, 2022, Claimant filed a letter with the ALJ requesting she take judicial notice of the United States Department of Veterans’ Affairs’ interim final rule on the presumptive service connection between rare respiratory cancers and exposure to fine particulate matter in Southwest Asia, 87 FR 24421. Claimant supplemented his request on August 19, 2022, asking the ALJ to take judicial notice of the Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics (PACT) Act of 2022, Pub. L. No. 117-168, 136 Stat. 1760.

Per the ALJ’s order permitting additional briefing, the parties subsequently filed their respective remand positions on the admissibility and probative force of the exhibits in question. The ALJ also afforded the parties the opportunity to once again fully address the exhibits and any other issues regarding the invocation of the Section 20(a) presumption. She issued her Decision and Order on Remand Granting Benefits on April 5, 2023.

Procedurally, the ALJ admitted CX 6, finding it relevant and reliable, but she maintained her exclusion of the other exhibits as unauthenticated and unreliable. ALJ 2023

³ Notably, while we directed the ALJ to reconsider the exhibits, we did not indicate Section 20(a) invocation depended on them and instructed her to re-examine invocation with or without them. We did not order the ALJ to reopen the record on remand, nor did we require her to accept any further briefing. In addition, we vacated the ALJ’s decision that the entire claim was time-barred. *Schindler*, slip op. at 11, 13-14. On remand, the ALJ reversed her previous finding and held the claim itself was timely. ALJ 2023 D&O at 9. Employer has not appealed that finding, and it is no longer at issue.

D&O at 3. She also granted Claimant's request on remand to take "judicial notice" of the PACT Act. *Id.* at 11.⁴

Substantively, the ALJ summarized Claimant's deposition and hearing testimony, Dr. Van Houzen's medical opinion, and Claimant's medical treatment records from the Mayo Clinic and the Thoracic Oncology Clinic at the University of Michigan. ALJ 2023 D&O at 3-7. In reexamining whether working conditions *could have caused the harm* to invoke the Section 20(a) presumption, 33 U.S.C. §920(a), the ALJ found Claimant testified the burn pits left "nasty, thick black smoke" that lingered close to the ground and "nauseated him" and that neither he nor his workers "had access to personal protective equipment." *Id.* at 4; EX 15 at 54-57. She cited CX 6 for the proposition that the Department of Defense conducted air sampling and found a range of toxic chemicals in similar burn pits in Iraq -- although she did not suggest the government made any specific findings regarding the pits to which Claimant allegedly was exposed or that the letter established any connection in Claimant's specific case. ALJ 2023 D&O at 6-7.

Additionally, after recognizing the PACT Act is binding "only on the Department of Veteran's Affairs," she nevertheless found its presumption of a service connection for veterans with respiratory cancers exposed to burn pits in the Gulf War persuasive of the general link between burn pits and lung cancer and thus relevant to the general question at invocation of whether Claimant's working conditions *could have caused* his injury. *Id.* at 10-11.

Finally, she found that the "only medical opinion in the record states that the Claimant's disease was likely connected to his work at the burn pits." *Id.* at 11.

The ALJ then concluded these factors in combination were "sufficient to demonstrate working conditions that could have caused the Claimant to develop lung cancer" and to invoke the Section 20(a) presumption. *Id.* at 11. While our remand

⁴ Claimant's Exhibit 6 is a letter from the Director of Compensation and Pension Service of the Department of Veteran's Affairs (VA) to all regional offices regarding environmental hazards in Iraq, Afghanistan, and other military installations. The letter explains that air quality testing done in Iraq in 2007 found particulate matter and chemicals "known to adversely affect the respiratory system, skin, eyes, and internal organs," but the VA was unable to determine specific health effects caused by a combination of the chemicals. It also stated, "the Veteran's lay statement of burn pit exposure generally will be sufficient to establish the occurrence of such exposure" and instructed rating authorities to be prepared to "actively review" toxin exposure claims "whenever they are reasonably raised by the record." CX 6 at 4.

instructions informed her she need go no further given Employer put forth no affirmative defense, *Schindler*, slip op. at 11, she nevertheless found the presumption rebutted and that Claimant ultimately met his burden on the evidence as a whole. ALJ 2023 D&O at 12-13.

The ALJ then found Claimant was temporarily totally disabled from the date his lung was surgically removed until he recovered from surgery and returned to full-time work, November 15, 2011, to February 22, 2012, and awarded him temporary total disability (TTD) benefits for that period. *Id.* at 14-15. Based on her findings that Claimant's injury is an occupational disease, and Claimant's date of awareness was in March 2018, she calculated Claimant's average weekly wage (AWW) under Section 10(a) of the Act, 33 U.S.C. §910(a), using his earnings from 2017. *Id.* at 16.

The Parties' Liability Arguments on Appeal

Claimant appeals the ALJ's AWW calculation and disability findings. BRB No. 23-0323. The Director responds in support of Claimant's arguments. Employer urges affirmance of the ALJ's disability findings but acknowledges she erred in calculating Claimant's AWW using Section 10(a), 33 U.S.C. §910(a), and in not applying the Board's binding precedent set forth in *Albonajim v. AECOM*, 56 BRBS 21 (2022).

Employer, in its cross-appeal on liability, BRB No. 23-0323A, contends the ALJ violated the due process guarantee of the Fifth Amendment to the United States Constitution because Claimant's untimely service of his exhibits -- combined with the ALJ's alleged improper notice of the PACT Act, her admission of CX 6, and her refusal to completely reopen the record at the restart of the litigation -- "disrupted [its] hearing strategy." Emp. Cross-Appeal Br. at 19. Claimant and the Director respond in favor of the award.

DISCUSSION

The ALJ did not deprive Employer of due process through her evidentiary rulings.

As an initial matter, Employer did not preserve the timeliness issue regarding Claimant's exhibit exchange for this appeal (even assuming it adequately briefed the issue to the ALJ in the original proceeding). In the first appeal to the Board, Employer argued exclusively that the ALJ had the discretion to exclude certain exhibits as hearsay. Emp. Resp. Br. (BRB No. 20-0563) at 7-22. While it included a factual summary concerning the timing of the exchange of exhibits, it did not assert the ALJ should have excluded the exhibits as untimely, and it presented no law or argument on the issue. *Id.*

Those choices were fatal to raising a timeliness argument now. While Employer did not have to file a cross-appeal to argue the exhibits should have been excluded on timeliness grounds (as Claimant contends), it did at least have to develop and press the argument to preserve it. *See Jones Bros.*, 898 F.3d at 677 (to merely “acknowledge an argument” in a brief “is not to make an argument” and a party “forfeits any allegations that lack developed argument.” (citation omitted)); *see also Sec. & Exch. Comm’n v. Hallam*, 42 F.4th 316, 327 (5th Cir. 2022) (“Any issue not raised in [a party’s] brief is forfeited.” (citation omitted)); *Rollins v. Home Depot*, 8 F.4th 393, 397 (5th Cir. 2021) (One way that a party can forfeit an argument is “by failing to adequately brief the argument on appeal;” to be adequate, a brief “must address [the lower tribunal’s] analysis and explain how it erred”) (citation omitted).

But even if it had preserved the timeliness issue, Employer has not demonstrated how under the correct standard the ALJ’s evidentiary rulings violated the Due Process Clause of the Fifth Amendment. Due process is not the catch all guarantee of procedural fairness Employer envisions. Rather it requires only that a party be given notice of the proceedings and an opportunity to be heard at a reasonable time and in a reasonable manner. *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970). The right to procedural due process in an administrative proceeding encompasses a party’s “meaningful opportunity to present [its] case.” *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976).

Employer had notice and ample opportunity to present its arguments about the exhibits to the ALJ and the Board during the years this litigation has been ongoing, particularly given Employer had Claimant’s testimony, medical records, and Dr. Van Houzen’s opinion, among other things, prior to the hearing, yet it chose not to present a defense to that evidence or make any argument why discovery needed to be extended to address it. *See* ALJ 2023 D&O at 12. Its failure to convince the ALJ it was “irreparably prejudiced” by the one-week-late exchange of exhibits because it was somehow lulled into not developing any affirmative defense, therefore, does not transform routine questions of evidentiary admissibility under the Act into matters of constitutional importance.⁵ *Id.*

In adjudicating matters under the Act, ALJs enjoy broad discretion in evidentiary and procedural matters and may be overturned only if the challenging party shows their findings are arbitrary, capricious, or an abuse of discretion. *Collins v. Elec. Boat Corp.*, 45 BRBS 79, 81-82 (2011); *Everson v. Stevedoring Servs. of Am.*, 33 BRBS 149, 152 (1999);

⁵ Notably, Employer was afforded the same administrative process under the Act, including a hearing, post-hearing briefing, a chance to argue its theories to the Board, briefing on remand, and a second appeal to the Board, as would be afforded in any case arising under the Act.

Ramirez v. Southern Stevedores, 25 BRBS 260, 264 (1992); *McCurley v. Kiewest Co.*, 22 BRBS 115, 118 (1989); *Williams v. Marine Terminals Corp.*, 14 BRBS 728, 734 (1981). They are not bound by common law or statutory rules of evidence or technical or formal rules of procedure. 33 U.S.C. §§919(d), 923(a); 20 C.F.R. §§702.338,702.339; *see also Casey v. Georgetown Univ. Med. Ctr.*, 31 BRBS 147, 152 (1997). Other than obliquely pointing to a forfeited issue, Employer presents no argument that the ALJ arbitrarily or capriciously determined CX 6 is “relevant, reliable” and, therefore, admissible. ALJ 2023 D&O at 3, 6-7, 10-11. We affirm the ALJ’s admission of the exhibit. *Everson*, 33 BRBS at 152; *Ramirez*, 25 BRBS at 264; *McCurley*, 22 BRBS at 118.

Employer’s argument regarding the ALJ’s alleged improper decision to take judicial notice of the PACT Act runs headfirst into a similar legal wall. As the Director explains, Rule 201 of the Federal Rules of Evidence (FRE Rule) and its administrative analog 29 C.F.R. §18.84 (OALJ Rule), which cover the process for taking judicial notice, relate only to “adjudicative facts,” not legislative facts. Dir. Resp. Br. at 5-6; *see Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954, 960 (9th Cir. 2010) (“Judicial notice of legislative facts . . . is unnecessary.”); *United States v. Wynn*, 987 F.2d 354, 358 (6th Cir. 1993) (“judicial notice” applies to facts, not laws). The confinement of both Rule 201 and OALJ Rule 18.84 to “adjudicative facts” by their plain language results from fundamental differences between “adjudicative” and “legislative” facts: “Adjudicative facts are simply the facts of a particular case;” legislative facts, on the other hand, “are those which have relevance to legal reasoning and the lawmaking process, whether the formulation of a legal principle or ruling by a judge or court in the enactment of legislative body.” *United States v. Hernandez-Fundora*, 58 F.3d 802, 812 (2d Cir. 1995) (citation omitted).⁶

⁶ The distinction between the two categories of facts is apparent on the face of the rules. OALJ Rule 18.84 states:

On motion of a party or on the judge’s own, official notice may be taken of *any adjudicative fact* or other matter subject to judicial notice. The parties must be given an adequate opportunity to show the contrary of the matter noticed.

29 C.F.R. §18.84.

Rule 201 titled “Judicial Notice of Adjudicative Facts” states:

(a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

Fed. R. Evid. 201.

That the Department of Defense generally recognized burn pits can cause respiratory cancers is the result of the legislative process in passing the PACT Act; it is not a fact established through litigation unique to a particular case. So, despite the ALJ's statement that she was taking "judicial notice" of the PACT Act, ALJ 2023 D&O at 11, she was under no obligation to follow the process necessary for noticing adjudicative facts. See FRE Rule 201(e) ("a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed"). Moreover, on remand, the ALJ afforded Employer the opportunity to brief why the United States government's general recognition that exposure to burn pits during the Gulf War could cause respiratory cancers is not relevant to the general determination at invocation of whether the burn pits *could have* caused Claimant's respiratory cancer. We find her conclusion that the PACT Act aids Claimant in establishing that very limited purpose reasonable and, therefore, affirm that specific finding. Similarly, we affirm her overall finding that Claimant invoked the Section 20(a) presumption based on the totality of his evidence. And because Employer has not produced any evidence to rebut the presumption, we further find Claimant's occupational disease is work-related as a matter of law. *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 690-691 (5th Cir. 1999); *Suarez v. Serv. Emps. Int'l, Inc.*, 50 BRBS 33, 36-37 (2016); *Burson v. T. Smith & Son, Inc.*, 22 BRBS 124, 126 (1989); *Schindler*, slip op. at 11 n.16.

But even if we did not agree with the ALJ regarding admitting CX 6 or recognizing the PACT Act, we would still affirm Employer's liability. The ALJ, in our view, did not need to consider the PACT Act or CX 6 to *bolster* the evidence here: Claimant's testimony, Dr. Van Houzen's opinion linking Claimant's exposure to his cancer, and Claimant's treatment records comprise sufficient evidence for a reasonable mind to determine Claimant met the low bar of invocation. *Bis Salamis v. Director, OWCP*, 819 F.3d 116, 127 (5th Cir. 2016); *Amerada Hess Corp. v. Director, OWCP*, 543 F.3d 755, 761 (5th Cir. 2008); *Conoco, Inc.*, 194 F.3d at 690-691; see also *Rose v. Vectrus Sys. Corp.*, 56 BRBS 27 (2022) (en banc), *appeal dismissed* (MDFL Aug. 24, 2023).⁷

⁷ To invoke the Section 20(a) presumption, a claimant must make out his prima facie case by "prov[ing] that (1) he suffered harm and (2) conditions of the workplace, or an accident at the workplace, *could have* caused, aggravated, or accelerated the harm." *Bis Salamis*, 819 F.3d at 127 (emphasis added); *Amerada Hess Corp.*, 543 F.3d at 761; *Hunter*, 227 F.3d at 287. Claimant's statements established working conditions, his statements and medical history established he developed lung cancer -- a harm, and Dr. Van Houzen's opinion established Claimant's exposure to the burn pits could have caused that harm. CXs 3, 33; EXs 12, 15.

Simply put, Employer has been on notice since at least April 2018 of Claimant's contention that his work exposure caused his cancer. It willingly chose apparently as a litigation strategy during that time not to develop any evidence to show Claimant's exposure to burn pits did not cause his lung cancer. ALJ 2023 D&O at 11-12; Emp. Cross-Appeal Br.; Emp. Resp. Br. (BRB No. 20-0563). Given that choice, it has failed to demonstrate why this case must be entirely re-set and why the record needs to be reopened simply because Claimant submitted a VA training letter and the ALJ used it for a very limited purpose four years after Claimant filed his claim.

The ALJ erred in determining AWW by applying Section 10(a) and should have applied Section 10(c) instead.

Section 10 of the Act provides three alternative methods for calculating an employee's average annual earnings, which serve as the basis for determining his AWW "at the time of injury:" (a) the employee's earnings from the previous year, if the employee worked in the field in which he was injured for "substantially the whole year immediately preceding his injury;" (b) if (a) does not apply, the average daily wage of a similarly-situated employee, working in the same or similar employment, in the year preceding the employee's injury; or (c) if neither can "be reasonably and fairly be applied," a combination of factors including the employee's previous earnings in the job he was performing when he was injured, his other employment, and previous earnings of similarly-situated employees. 33 U.S.C. §910; *see Albonajim*, 56 BRBS at 23.

In this case, the ALJ applied Section 10(a), finding the employment Claimant held post-Iraq was the same kind of employment as he held in Iraq because both jobs were "in the environmental monitoring, testing, and remediation field." ALJ 2023 D&O at 16. She then found Claimant's date of awareness of the relationship between his disability and employment to be March 28, 2018, and used the best available information regarding Claimant's wages during the prior year to calculate AWW. *Id.* All parties agree, however, the ALJ erred in applying Section 10(a) because, among other reasons, Claimant was a seven-day-a-week worker -- the case therefore must be remanded so the ALJ can apply Section 10(c). *Duhagon v. Metro. Stevedore Co.*, 31 BRBS 98, 101 (1997), *aff'd*, 169 F.3d 615, 618 (9th Cir. 1999).

In applying Section 10(c) on remand, Claimant and the Director further argue Claimant's post-injury work, consisting mainly of office work in the environmental field, was not the same as his covered employment which caused his pulmonary injury, which involved burning plastic disposables and construction debris without respirators, dust masks, or rubber gloves. TR at 34-39; EX 15 at 14. They contend there is no dispute that Claimant cannot perform his usual work in Iraq, where he was required to run into a bunker wearing several pounds of protective gear, given that he currently gets winded even

climbing one flight of stairs and is unable to speak for thirty seconds after he reaches the top. Dir. Resp. Br. at 11; Cl. Br. at 17-18; TR at 45-46. To “fairly and reasonably apply” Section 10(c), they contend the ALJ must consider Claimant’s wages and wage-earning capacity (WEC) from his Iraq employment in 2005 to account for any periods of lost economic choice pursuant to the holding set forth in *Albonajim*. *Albonajim* held that a worker who stopped working overseas prior to developing and becoming aware of his work-related post-traumatic stress disorder was entitled to compensation for being deprived of the economic choice to return to any work overseas.⁸ *Albonajim*, 56 BRBS at 23.

Employer counters that under *Albonajim*, Section 10(c) does not solely mandate the use of the earnings at the time of the awareness of injury, nor does it solely mandate using Claimant’s overseas earnings. Instead, it asserts the “ALJ has the discretion under section 10(c)” to make an AWW “determination by discounting, blending, or ignoring actual wages or various periods of ‘other employment’ or subscribing to one particular employment that best fits the injured worker’s earning capacity” regardless of the date of awareness. Emp. Cross-Appeal Br. at 24.⁹

We agree with the parties that Claimant’s AWW must be determined pursuant to Section 10(c) and *Albonajim*. In applying Section 10(c), the ALJ is not limited to wages actually earned during any single period if those wages do not fairly reflect earning capacity. Rather, the ALJ may consider prior earnings, the nature and continuity of employment, the availability of work, and the wages of similarly situated employees, so long as the resulting figure reasonably represents the claimant’s capacity to earn. *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 823 (5th Cir. 1991) (“[T]he timeframe to consider the 10(c) factors is not limited to the 52 weeks immediately preceding the injury

⁸ The Director argues that not considering higher overseas wages under Section 10(c) has led to untenable results in DBA cases where workers received a premium for working in war zones and then suffered a delayed onset occupational disease while later working for lower wages. Dir. Resp. Br. at 10 (citations omitted). Under these circumstances, the Director contends, injured workers could succeed on the merits but receive no disability compensation because they did not suffer a loss of WEC due to later having lower U.S. earnings when becoming disabled as compared to when they had higher earnings in the war zone. *Id.*

⁹ Employer further contends that under this method the ALJ “could come up with the exact same conclusion” or “a completely different number” including finding “the DBA wages themselves in and of themselves are the best tool” or a blend of DBA wages and post-DBA wages fairly compensates Claimant. Emp. Cross-Appeal Br. at 24.

but includes all the employee's relevant work experience."); *Hall v. Consol. Employ. Sys.*, 139 F.3d 1025, 1030 (5th Cir. 1998) (Section 10(c) applies when the first two methods cannot be "reasonably and fairly applied" such as when "otherwise harsh results would follow were an employee's wages invariably calculated by simply looking at the previous year's earnings." (citation omitted)).

Consistent with this precedent, the Board has recognized that Section 10(c) permits consideration of employment outside the immediate pre-injury period where necessary to avoid distortion of earning capacity or loss of economic choice. *Albonajim*, 56 BRBS at 24; *Robinson v. Liberty Mut. Ins. Co.*, 52 BRBS 47, 48 n.5 (2018); see also *Moody v. Huntington Ingalls, Inc.*, 879 F.3d 96 (4th Cir. 2018) (economic harm under the Act has been defined as the lost capacity to earn wages, not actual economic loss); *Christie v. Ga. Pac. Co.*, 898 F.3d 952 (9th Cir. 2018) (same). Because the object of Section 10(c) is to arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of the injury, the ALJ must make a fair and accurate assessment of "the amount that the employee would have the potential and opportunity of earning absent the injury." *Gatlin*, 936 F.2d at 823; *Jasmine v. Can-Am Prot. Grp., Inc.*, 46 BRBS 17, 18-19 (2012). She may take into account any or all of Claimant's earnings, provided she explains her analysis. *Hall*, 139 F.3d at 1031; *Gatlin*, 936 F.2d at 822-823.

Here, the ALJ did not expressly reject Claimant's overseas contract earnings as irrelevant to a Section 10(c) analysis. Rather, having determined Section 10(a) applied, she did not undertake the discretionary analysis that Section 10(c) requires and therefore did not address whether Claimant's higher overseas earnings were probative of his earning capacity. See *Robinson*, 52 BRBS at 48 n.5. Nor did the ALJ address whether Claimant's occupational exposure resulted in the loss of his ability to return to overseas contract employment prior to his formal diagnosis. See *Albonajim*, 56 BRBS at 24. Importantly, Section 10(c) is designed to capture lost economic choice, including circumstances in which an occupational disease eliminates access to categories of employment previously available to the claimant. *Id.*

On remand, the ALJ shall determine Claimant's AWW pursuant to Section 10(c), without application of Section 10(a) or Section 10(b) methodology. In doing so, the ALJ shall consider all evidence relevant to Claimant's earning capacity, including Claimant's overseas contract employment and associated wages. *Albonajim*, 56 BRBS at 24; *Robinson*, 52 BRBS at 48 n.5. The ALJ also shall address whether Claimant's occupational condition foreclosed his ability to return to overseas contract employment prior to his diagnosis and explain whether and how this asserted loss of employment opportunity affects the assessment of earning capacity under Section 10(c). If a blended, comparative, or representative approach is employed, the ALJ shall explain how such an approach

comports with Section 10(c)'s requirement of a fair approximation of earning capacity. *Hall*, 139 F.3d at 1031; *Gatlin*, 936 F.2d at 822-823.

The ALJ must also reconsider Claimant's disability before and after the period from November 15, 2011, through February 22, 2012.

Claimant and the Director contend the ALJ erred by failing to evaluate disability with reference to Claimant's overseas employment with Employer and did not address whether he was entitled to disability compensation both before and after the period he was awarded TTD benefits (from November 15, 2011, through February 22, 2012). He maintains his employment for Employer constitutes his "usual employment" as that phrase is used under the Act.¹⁰ Finally, he asserts his disability manifested in late 2005, when he developed chest pain and had to take off work for two weeks from FEMA to undergo testing, and claims he is entitled to various types of disability compensation since December 2005.¹¹ In response, Employer argues Claimant offered no evidence to show, both before and after the awarded period of TTD benefits, that he has work restrictions, residual impairment or is unable to return to any employment, including the work he performed for Employer in Iraq. It therefore urges affirmance of the ALJ's disability determination.

Section 2(10) 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." 33 U.S.C. §902(10). Disability under the Act is a medical as well as an economic concept. *Metro. Stevedore Co. v. Rambo*, 515 U.S. 291, 297-298 (1995); *New*

¹⁰ Claimant disputes the ALJ's finding that his post-injury employment is "the same kind of employment he held in Iraq," ALJ 2023 D&O at 16, because his post-injury work with the Federal Emergency Management Agency (FEMA) from 2005 through 2009 was "mainly . . . office work, with some field work" and the work he performs for his own business also only consists of office and field work. The Director notes Claimant's jobs in Iraq and stateside, though "generally related to environmental exposure," are "vastly different in type and method of work." Specifically, the Director maintains that in Iraq, Claimant was exposed to "nasty thick black smoke" from the diesel fuel, gasoline accelerant, and whatever was burned in the burn pits, whereas his stateside employment mostly involves office work and making phone calls. Dir. Resp. Br. at 13-14.

¹¹ Claimant maintains he is entitled to the following disability benefits: TTD benefits for two to three weeks in late 2005; temporary partial disability (TPD) benefits from late 2005 to November 15, 2011; TTD benefits from November 15 to 25, 2011; TPD benefits from November 25, 2011, to July 2012; and permanent partial disability (PPD) benefits thereafter. Cl. Remand Br. at 41.

Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1037-1038 (5th Cir. Unit A 1981). It is the claimant’s burden to establish the nature and extent of any disability sustained as a result of a work-related injury. *Gacki v. Sea-Land Serv., Inc.*, 33 BRBS 127, 128 (1998); *Trask v. Lockheed Shipbuilding and Constr. Co.*, 17 BRBS 56, 59 (1985).

To establish total disability, the claimant bears the burden of showing he is unable to return to his “usual” work. *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 905 (5th Cir. 1998); *P & M Crane Co. v. Hayes*, 930 F.2d 424, 429-430 (5th Cir. 1991); *Moody*, 879 F.3d 96; *Marine Repair Servs., Inc. v. Fifer*, 717 F.3d 327, 334 (4th Cir. 2013); *Norfolk Shipbuilding & Dry Dock Co. v. Hord*, 193 F.3d 797, 800 (4th Cir. 1999); *Gacki*, 33 BRBS at 128; *Manigault v. Stevens Shipping Co.*, 22 BRBS 332, 333 (1989); see *Marathon Ashland Petroleum v. Williams*, 733 F.2d 182, 187-188 (6th Cir. 2013) (“A claimant’s ‘usual work’ is defined by his regular duties at the time of his injury.”). In determining whether a claimant can return to his usual work, the ALJ must compare the claimant’s medical restrictions with the requirements of his usual employment. See *Obadiaru v. ITT Corp.*, 45 BRBS 17, 21 (2011). Because disability under the Act is a medical as well as an economic concept, *Rambo*, 515 U.S. at 297-298; *Turner*, 661 F.2d at 1037-1038, a claimant is “entitled to compensation for any loss of wage-earning capacity based on the ‘deprivation of economic choice’ due to his work-related [condition].” *Albonajim*, 56 BRBS at 24 (quoting *Robinson*, 52 BRBS at 48). If the claimant establishes he is unable to return to his usual employment, the burden then shifts to the employer to establish the availability of other jobs the claimant is capable of performing. *Turner*, 661 F.2d at 1042.

We agree with Claimant’s and the Director’s arguments that the ALJ’s disability determination is flawed. The ALJ awarded Claimant TTD benefits from when his lung was surgically removed on November 15, 2011, until he recovered from surgery and returned to full-time work at his own company on February 22, 2012. ALJ 2023 D&O at 13-15.¹² On the other hand, the ALJ rejected Claimant’s claim for additional TTD benefits between February 23, 2012, and July 2012 because she found he “did not submit proof” that his vocal cord injury and surgery “actually led to a loss of earnings.” *Id.* at 15. But the ALJ did not identify which employment constitutes Claimant’s “usual employment” for disability purposes, address Claimant’s claim for additional disability compensation

¹² The ALJ based her conclusion on Claimant’s report that he had returned to all his pre-surgery activities, was working full-time, was able to perform strenuous activities, and exercised on a daily basis, CX 5 at 10; EX 10 at 3, Dr. Van Houzen’s May 29, 2018 statement that Claimant had no work restrictions but could not do physical activity like he would normally, CX 4, and Claimant’s recorded statement and deposition testimony regarding his physical abilities after surgery. EX 19 at 7 (bike riding; brisk walks); EX 15 at 21 (working sixteen hours per day seven days per week).

based on his asserted inability to return to overseas employment, or make findings regarding whether his work-related pulmonary condition resulted in a loss of WEC outside the period when she awarded TTD benefits.

Because we are unable to determine the factual basis of the ALJ's disability determination, we vacate it and remand the case for further findings. *Goins v. Noble Drilling Corp.*, 397 F.2d 392, 394 (5th Cir. 1968); *see also Volpe v. Ne. Marine Terminals*, 671 F.2d 697, 701 (2d Cir. 1982). On remand, the ALJ must reconsider Claimant's entitlement to disability compensation for the periods before November 15, 2011, and after February 22, 2012. In doing so, she must identify Claimant's usual employment, explain the basis of that determination, address the record evidence relevant to Claimant's functional capacity for each claimed period of disability, and make specific findings as to whether Claimant's work-related pulmonary condition precluded him from performing his usual employment or resulted in a loss of WEC during any of the additional periods claimed.

Accordingly, we vacate the ALJ's disability and AWW determinations and remand the case for further consideration consistent with this decision. In all other respects, we affirm the ALJ's Decision and Order on Remand Granting Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge