U.S. Department of Labor

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

BRB No. 23-0417

ALBERTO FRANCO MORALES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SOC, LLC and TRIPLE CANOPY, INCORPORATED	)	DATE ISSUED: 3/04/2025
	)	
and	)	
	)	
CONTINENTAL INSURANCE COMPANY	)	
	)	
Employers/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Granting, in Part, and Denying, in Part, Benefits of Timothy J. McGrath, Administrative Law Judge, United States Department of Labor.

Nydia Wallace and Giselle Garcia (Garfinkel Schwartz, PA) Maitland, Florida, for Claimant.

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

Sherman W. Jones, III, and Emily M. Welch (Brown Sims), Houston, Texas, for Triple Canopy, Inc. and its Carrier.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Timothy J. McGrath's Decision and Order Granting, in Part, and Denying, in Part, Benefits (2021-LDA-03879 and 2021-LDA-03904) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (Act), as extended by the Defense Base Act, 42 U.S.C. §§1651-1655 (DBA).[1] We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, a native of Lima, Peru, worked for Triple Canopy from November 10, 2008, to July 19, 2011, and for SOC from July 20, 2011, to September 13, 2011. Claimant's Exhibits (CXs) 1, 2; SOC Exhibit (SX) 5 at 4-7, Dep. at 14-15, 18-25; Hearing Transcript (TR) at 23. During his time with both Employers, Claimant worked as a border security guard in Iraq at different locations including East Middle Camp, the U.S. Embassy entrance, Camp Condor, and Heliport Fenandez. Triple Canopy Exhibit (TCX) 6; TR at 25, 40. During the course of his employment, Claimant experienced mortar attacks, explosions and other traumatic events. SX 5 at 7-17, Dep. at 28-67; TR at 27-42.

For example, Claimant described witnessing two of his co-workers get severely injured due to a mortar attack in December 2008 and experiencing "indescribable shock" and body palpitations as a result. TR at 27-28. He also testified about experiencing another mortar attack in September 2009 that caused a "whistling noise" in his ear, a loss of his hearing "at that moment," and feeling "[d]estroyed" and "[c]ompletely nervous" from watching another colleague get injured. *Id.* at 31-33. Further, he stated he suffered more fear, insecurity, and hearing issues after witnessing two more mortar explosions in October 2010 and August 2011. *Id.* at 35-42. Additionally, Claimant stated he experienced troubled sleep and wore his helmet and vest to bed for a month after the October 2010 mortar attack. *Id.* at 36. And he noticed the whistling sound in his ears had returned causing intermittent hearing problems. *Id.* at 37. In September 2011, Claimant returned to Peru voluntarily because he "was scared something could happen to" him and did not

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

want to continue to risk his safety. *Id.* at 44. He obtained work in Peru and has been employed since his return from Iraq in 2011.[2]

On January 17, 2020, Claimant met with psychiatrist, Dr. Angel Manrique Galvez, who diagnosed him with post-traumatic stress disorder (PTSD) due to his work in a warzone based on his reported symptoms and experiences. CXs 10, 13 at 6-7. He recommended Claimant undergo cognitive behavioral therapy and prescribed medication. CX 13 at 6-7. Claimant returned for a follow-up appointment on February 19, 2020, but he stopped receiving treatment from March 2020 to May 2021 due to the COVID-19 pandemic. *Id.* at 11. In a treatment note dated July 27, 2021, Dr. Manrique Galvez reiterated his PTSD diagnosis based on several follow-up visits during which Claimant reported symptoms including "neurovegetative manifestations, tremors, tachycardia, irrational fears, [and] high impulsivity." *Id.* at 20-22. In an August 27, 2021 treatment note, Dr. Manrique Galvez indicated Claimant continued to experience anxiety despite various treatment interventions. *Id.* at 30. After his ninth follow-up appointment on November 26, 2021, Claimant stopped seeing Dr. Manrique Galvez due to financial constraints. CX 13 at 33; TR at 48.

Claimant also met with psychotherapist Dr. Eduardo Avila Suarez, for an evaluation on January 20, 2020. CX 11, 14. He diagnosed Claimant with PTSD based on his reported symptoms and experiences in Iraq. CX 14 at 3. Claimant returned to Dr. Avila Suarez on August 11, 2021, who recommended Claimant attend additional psychotherapy sessions, practice breathing and relaxation exercises, and refrain from working in a warzone. *Id.* at 11-13. In a questionnaire dated June 22, 2022, Dr. Avila explained that he derived Claimant's diagnosis of PTSD from the results of the "Minnesota Personality Test" and concluded that because Claimant did not demonstrate any improvement, he should not return to work in a warzone. *Id.* at 17-18.

At SOC's request, Dr. Salma Khan, a psychiatrist, examined Claimant on November 5, 2021, and administered various tests. SXs 1, 2 at 1-2, 37-38. Based on Claimant's reported symptoms and experiences, his test results, and her review of Claimant's medical records, Dr. Khan opined Claimant has no mental disorder related to his work with

[2] Since 2011, Claimant has been working as a security guard. SX 5 at 20, Dep. at 79. He worked with a security company called Huayna SAC for approximately four years. *Id.* at 24, Dept. at 96. Currently, he is employed by a security company, JMG, in a position he accepted in 2017. *Id.* at 20, Dep. at 79. His job duties at JMG involve guarding a junk yard. SX 2 at 33.

Employers and can work without restrictions. *Id*. In her deposition on June 21, 2022, she reiterated her conclusions. SX 3 at 23-35.

On February 13, 2020, Claimant filed two claims under the Act against his two Iraq employers and their common insurer; each claim sought benefits for his alleged work-related psychological condition and hearing loss. CXs 1, 2. After receiving notice of the claims, SOC and Carrier (hereinafter "SOC") controverted the claim on March 10, 2020, and Triple Canopy and Carrier (hereinafter "Triple Canopy") controverted the claim on both March 19, 2020, and on October 2, 2020. CXs 7, 8; TCXs 1, 3, 4. The case was forwarded to the Office of Administrative Law Judges (OALJ) for a hearing, which was held on October 18, 2022.

Before the ALJ, Claimant testified that there are "sometimes [he] can't hear well" and that his Otolaryngologist, Dr. Hubert Valdiviezo, recommended hearing aids and earplugs for loud places. TR at 51-52; *see* SX 5 at 20-21; Dep. at 80-81. The ALJ found Claimant established he suffered a work-related hearing loss. D&O at 13-14; CXs 12, 15 at 1, 4; *see also* 33 U.S.C. §920(a). However, he found Claimant did not establish the extent of his hearing impairment because that portion of the audiogram is illegible. D&O at 15; CX 15 at 4. Therefore, the ALJ awarded Claimant medical benefits in accordance with Section 7 of the Act, 33 U.S.C. §907(a), for his work-related hearing loss but denied indemnity benefits. D&O at 16. We affirm these findings as unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc*., 41 BRBS 57, 58 (2007).

Regarding his alleged psychological injuries, Claimant testified he currently suffers from troubled sleep, dizziness, tachycardia, and various psychological symptoms including forgetfulness, nightmares, insomnia, and increased anger. SX 5 at 18-20; Dep. at 70-78; TR at 55. Overall, he stated he does not "feel good" or believe he is "coping well." *Id.* Claimant also indicated his long-term partner left him shortly after he returned to Peru because he was "very aggressive, [and] always on the edge." *Id.* at 20-21.

On June 28, 2023, the ALJ issued his Decision and Order, finding Claimant did not establish a psychological condition and/or post-traumatic stress disorder (PTSD) caused by his work for either Employer. The ALJ found Claimant established a prima facie case of compensable injury; based on documentation of a PTSD diagnosis along with evidence that his work for both Employers in Iraq could have caused his psychological condition, Claimant invoked the Section 20(a) presumption, 33 U.S.C. §920(a). D&O at 10. However, he determined SOC and Triple Canopy rebutted the presumption with Dr. Khan's medical opinion that Claimant does not have PTSD or any psychological condition causally related to his work. *Id*.

Considering the evidence as a whole, the ALJ found Claimant is a credible witness, as he determined Claimant consistently reported his symptoms to his doctors and at the hearing. D&O at 10-11, 13. He found Dr. Manrique Galvez's opinion is entitled to no weight, while Dr. Avila Suarez's opinion is entitled to minimal weight. *Id.* at 11-12. He also assigned some weight to Dr. Khan's opinion. *Id.* at 13. Based on these assessments, the ALJ determined the "evidence on both sides is wanting," *id.*, and found Claimant's credible testimony alone is insufficient to satisfy his ultimate burden of persuasion. Therefore, he concluded Claimant did not establish he suffered a work-related psychological condition. *Id.*

Claimant appeals the ALJ's denial of benefits for his psychological condition. Specifically, he argues the ALJ misinterpreted Dr. Khan's opinion and, thereby, erred in giving it any weight.[3] SOC and Triple Canopy respond, urging the Board to reject Claimant's arguments. Claimant filed a reply brief, reiterating his argument.

First, as the parties do not challenge the ALJ's findings on invocation and rebuttal of the Section 20(a) presumption for Claimant's alleged PTSD or psychological condition, we affirm them. *Scalio*, 41 BRBS at 58; D&O at 10. Having affirmed the findings on invocation and rebuttal, the issue of causation must be resolved on the evidence of the record as a whole with Claimant bearing the burden of persuasion by a preponderance of the evidence. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 271 (1994); *Rainey v. Director, OWCP*, 517 F.3d 632, 634 (2d Cir. 2008); *Rose v. Vectrus Systems Corp.*, 56 BRBS 27, 39 (2022) (Decision on Recon. en banc), *appeal dismissed* (MDFL Aug. 24, 2023); *Bolden v. G.A.T.X. Terminals Corp*., 30 BRBS 71 (1996); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171, 174 (1996). Preponderance of the evidence is not a quantitative standard; rather, it is a standard which denotes a superiority of weight, requiring that the party having the burden of persuasion to prove his position by more convincing evidence than the opposing party's evidence. *Santoro*, 30 BRBS at 174-175; *see* Black's Law Dictionary (5th ed. 1979); *see also* Barron's Law Dictionary (1984). If the evidence is in equipoise, the claimant must lose. *Greenwich Collieries*, 512 U.S. at 271; *Santoro*, 30 BRBS at 174; *see Maher Terminals, Inc. v. Director, OWCP*, 992 F.2d

[3] Claimant stated Dr. Khan noted psychological symptoms that do not "rise to the level of causing functional problems," SX 2 at 19, and he contends Dr. Khan intentionally misrepresented the meaning and scope of the term "functional problems" as it is understood in the "relevant medical community." Cl. Brief at 9-10. Specifically, Claimant alleges Dr. Khan focused exclusively on his *occupational* functioning and presented an inaccurate picture of what constitutes a functional impairment per the DSM-V. *Id.* at 12. Thus, Claimant argues the ALJ erred by giving Dr. Khan's "flawed analysis" the most weight. *Id*.

1277, 1284 (3rd Cir. 1993) (When the ALJ finds the evidence is in equipoise it, "by definition, means that the claimant did not carry [the] burden of proof by a preponderance of the evidence."). In evaluating the evidence as a whole, the ALJ is entitled to weigh the lay and expert opinion evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular witness or medical expert. *See Pietrunti v. Director, OWCP*, 119 F.3d 1035, 1042 (2nd Cir. 1997); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403, 405 (2d Cir. 1961); *Perini Corp. v. Heyde*, 306 F. Supp. 1321, 1325-1326 (D.R.I. 1969). The Board is not free to re-weigh the evidence or to make credibility determinations. *Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 323 (2d Cir. 1993).

In addressing the ALJ's findings during the third stage of the causation analysis, we first affirm as unchallenged on appeal the ALJ's finding that Claimant is a credible witness. *Scalio*, 41 BRBS at 58; D&O at 10-11, 13. Additionally, as Claimant does not challenge the ALJ's findings regarding the weight he gave Claimant's treating physicians' medical opinions, we also affirm those findings. *Scalio*, 41 BRBS at 58; D&O at 11-12. This leaves, as the sole issue, whether the ALJ properly credited, weighed, and assessed Dr. Khan's opinion in considering the relevant evidence.

Contrary to Claimant's arguments, the ALJ's assessment of Dr. Khan's opinion does not provide Claimant any assistance on appeal.[4] We have affirmed as unchallenged the ALJ's rational finding that Dr. Khan's opinion rebuts the Section 20(a) presumption. After the presumption falls from the case, the ALJ must consider and weigh the relevant evidence in the record to determine whether *Claimant* has established his alleged injury is work-related. At this stage of the analysis, the ALJ may address the credibility of witness evidence. The quality or persuasiveness of Employers' evidence is not necessarily dispositive, as Claimant bears the burden of persuasion.

In considering the evidence as a whole in this case, the ALJ found Claimant's testimony is credible; the ALJ gave zero weight to Dr. Manrique Galvez's opinion, minimal weight to Dr. Avila Suarez's opinion, and partial weight to Dr. Khan's opinion. He fully explained his reasoning for each determination. D&O at 10-13. After adequately discussing the relevant evidence and drawing reasonable inferences from the evidence based on his credibility determinations, he concluded the evidence on both sides is "wanting." D&O at 13 (citing *Greenwich Collieries*, 512 U.S. at 271); *Pietrunti*, 119 F.3d at 1042; *Hughes*, 289 F.2d at 405; *Heyde*, 306 F. Supp.at 1325-1326; *Santoro*, 30 BRBS at

[4] Indeed, Claimant has not explained how the ALJ's alleged errors in weighing Dr. Khan's opinion make any difference in the outcome of this case. *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (appellant must explain how the "error to which [it] points could have made any difference").

174. In effect, he found neither side was persuasive. This finding is fatal to Claimant's claim, as it means he has not borne his burden of persuasion. *Maher Terminals*, 992 F.2d at 1284; *Santoro*, 30 BRBS at 175 ("the determination that the opposing evidence warrants equal weight is enough to defeat claimant's claim"). Therefore, despite any flaws Claimant may have identified with either the rationale behind Dr. Khan's opinion or the ALJ's summary of it, he has not shown the ALJ's partial reliance on Dr. Khan was made in error.[5] Even without Dr. Khan's opinion that the claimant does not have a "work-related mental health diagnosis," the opinions of Drs. Manrique Galvez and Avila Suarez, which the ALJ determined are entitled to zero and minimal weight respectively, even in conjunction with Claimant's credible testimony, do not satisfy the "preponderance of the evidence" standard Claimant is required to meet. The ALJ's finding that persuasive evidence is wanting means Claimant failed to establish his burden of persuasion by a preponderance of the evidence, and that finding is rational and affirmable. *Greenwich Collieries*, 512 U.S. at 271; *Rainey*, 517 F.3d at 634; *Rose*, 56 BRBS at 39; *Santoro*, 30 BRBS at 174; D&O at 13. Therefore, we affirm the ALJ's conclusion that Claimant is not entitled to disability and medical benefits for his alleged psychological injury/PTSD as it is rational, supported by substantial evidence, and in accordance with law. *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171,

[5] We reject Claimant's arguments that the ALJ mischaracterized Claimant's testimony as "vague" and "minor," and that he improperly used the term "disabled" to preclude a finding that Claimant suffered a medical injury, as he distorts the ALJ's findings. Cl.'s Brief at 6-9, 12-14. Despite his determination that Claimant is a credible witness, the ALJ permissibly found his "vague" claims of not "feeling good," not "coping well," and loneliness were insufficient to establish Claimant's burden of proof. D&O at 13 (citing TR at 55-56); *see Heyde*, 306 F. Supp. at 1325-1326 (it is solely within the ALJ's discretion to accept or reject all or any part of any testimony according to his judgment.). The ALJ permissibly credited Dr. Khan's opinion that Claimant's reported symptoms do not "rise to the level of causing functional problems." D&O at 13 (citing SX 5 at 19); *see Pietrunti*, 119 F.3d at 1042; *Hughes*, 289 F.2d at 405. He noted Claimant's reports that he has been working as a security guard since he returned from Iraq and generally has had no work performance issues. D&O at 13. He also found the work-related stresses Claimant described were "minor complaints about the tedium of the job rather than difficulties related to a psychological condition." *Id*. Thus, the ALJ permissibly assigned some weight to Dr. Khan's opinion. Additionally, while we agree "disability" and "injury" are distinct terms, the ALJ did not, as Claimant asserts, conduct a disability analysis, but rather focused on whether Claimant suffered an injury related to his work for Employer. *See* 33 U.S.C. §902(2), (10); *see* D&O at 13.

174 (2001); *Coffey v. Marine Terminals Corp.*, 34 BRBS 85, 87 (2000); *Duhagon v. Metro. Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615 (9th Cir. 1999); D&O at 16.

Accordingly, we affirm the ALJ's Decision and Order.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge