U.S. Department of Labor

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

BRB No. 19-0442

SAM KALLABAT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
AECOM TECHNOLOGY, f/k/a McNEIL TECHNOLOGIES, INCORPORATED	)	DATE ISSUED: 05/08/2020
	)	
and	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and Erratum of Larry A. Temin, Administrative Law Judge, United States Department of Labor.

Stephen P. Moschetta (The Moschetta Law Firm, P.C.), Washington, Pennsylvania, for claimant.

Alan G. Brackett, Patrick J. Babin and Daniel P. Sullivan (Mouledoux, Bland, Legrand & Brackett, LLC), New Orleans, Louisiana, for employer/carrier.

William M. Bush (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order and Erratum (2018-LDA-00031) of Administrative Law Judge Larry A. Temin rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We must affirm the administrative law judge'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, while working for employer as a linguist, cultural advisor and analyst in Iraq, injured his right leg and allegedly sustained psychological injuries and type II diabetes as a result of a March 28, 2011 rocket attack. After initial treatment at the base clinic, claimant was taken to Sather Air Base where he underwent a same-day surgical procedure to address acute compartment syndrome of his right leg. On March 31, 2011, claimant underwent irrigation and debridement of his right leg wound. He was transferred to City Hospital in Dubai on April 2, 2011, where a second irrigation and debridement occurred on April 3, 2011, and skin grafts were applied on April 5, 2011. Claimant thereafter began a rehabilitation and physiotherapy program and was released to return to the United States on April 24, 2012.

Once stateside, claimant received additional treatment for blood clots from Dr. Modini Liyange, who referred claimant to orthopedic surgeon Dr. Stanley Sczecienski. Claimant also underwent physical therapy. He soon began having an "emotional reaction" to the rocket attack in the form of nightmares, depression, anxiety, and panic attacks. Claimant stated he was initially capable of handling these symptoms on his own, but at his wife's insistence, he began seeing a psychiatrist, Dr. Sam Ajluni, on January 8, 2016. Dr. Ajluni diagnosed claimant with major depressive disorder – single episode and PTSD, caused by the work injuries he sustained on March 28, 2011. He opined, in a July 11, 2017 report, that claimant has been temporarily disabled since January 8, 2016, and should remain off work due to his industrial psychological injuries.

Meanwhile, Dr. Sczecienski opined claimant's right leg injury reached maximum medical improvement on September 12, 2012, with a ten percent impairment.[1] Claimant began looking for work one week after he returned home from Iraq, but was unable to procure any regular employment until April 1, 2014, when he started working as a manager at a liquor store owned by his cousin. Employer voluntarily paid claimant temporary total disability benefits from March 29, 2011 to September 12, 2012, permanent partial disability benefits under the schedule for a ten percent loss of use of his right lower extremity, and medical benefits. 33 U.S.C. §§907, 908(b), (c)(2), (19).

On August 10, 2016, claimant filed a claim under the Act alleging, in addition to his right leg injury, he sustained psychological injuries, back pain, left leg pain, and type II diabetes as a result of the 2011 work accident. Employer controverted the claim on the grounds claimant has been fully compensated for his right leg injury and the claim for the other injuries was not timely filed, nor are the conditions work-related. The case was forwarded to the Office of Administrative Law Judges and a formal hearing was held on August 30, 3018.

In his decision, the administrative law judge found claimant provided timely notice to employer of his physical injuries, but not his psychological injuries, under Section 12(a), 33 U.S.C. §912(a), but employer was not prejudiced by the delayed filing under Section 12(d)(2), 33 U.S.C. §912(d)(2). He found claimant's claim timely under Section 13(a), 33 U.S.C. §913(a).

The administrative law judge found claimant invoked the Section 20(a), 33 U.S.C. §920(a), presumption with regard to his right leg and psychological injuries, but not for his back and left leg pain or diabetes. Finding employer offered no evidence to rebut the Section 20(a) presumption, the administrative law judge concluded claimant's psychological injuries and right leg injury are work-related. The administrative law judge found claimant is neither physically nor psychologically capable of returning to his usual employment, employer did not show the availability of suitable alternate employment, but claimant's actual work as an assistant manager at a liquor store from April 1, 2014, constitutes suitable alternate employment. He therefore awarded claimant temporary total disability benefits from March 29, 2011 to September 12, 2012, permanent total disability benefits from September 13, 2012 to April 1, 2014, and concurrent awards for permanent partial disabilities of the right leg under Sections 8(c)(2), (19), 33 U.S.C. §908(c)(2), (19), and for his psychological injuries under Section 8(c)(21), 33 U.S.C. §908(c)(21), from

[1]Dr. Sczecienski imposed the following physical restrictions on claimant: no lifting more than 100 pounds, more than 85 pounds from floor to waist, or more than 75 pounds from waist to shoulders.

April 2, 2014. At employer's request, the administrative law judge issued an Erratum clarifying the maximum compensation rate and the schedule of payments to reflect claimant's entitlement to concurrent awards of scheduled and unscheduled permanent partial disability benefits for periods subsequent to April 1, 2014.

On appeal, employer challenges the administrative law judge's findings that claimant's filings relating to his psychological injuries were timely under Sections 12 and 13 and that certain jobs identified in its labor market surveys do not constitute suitable alternate employment. Employer also challenges the administrative law judge's calculation of claimant's benefits, including his failure to apply Sections 6(b)(1) and 10(i) of the Act, 33 U.S.C. §§906(b)(1), 910(i). Claimant responds, urging affirmance of the administrative law judge's decision. The Director, Office of Workers' Compensation Programs (the Director), responds, asserting the administrative law judge's decision "contains errors of commission and omission" requiring remand for him to make complete findings with respect to the duration, nature, and extent of claimant's psychological disability.[2] Employer filed a reply brief.

Sections 12 and 13

Employer contends claimant's psychological claim should be barred because it did not receive timely notice of the injury under Section 12 of the Act. Employer avers the administrative law judge's finding that claimant became aware of his psychological injury on January 6, 2016, irrationally ignores claimant's testimony and medical history from 2011, which establishes he had the requisite awareness of the relationship between his psychological injury, employment, and disability prior to that date. Employer further contends the administrative law judge erred in finding it was not prejudiced by claimant's "more-than-five-year delay" in giving notice of his psychological injuries, such that claimant's late notice should not be excused.

Section 12(a) of the Act, 33 U.S.C. §912(a), provides that in a traumatic injury case a claimant must give the employer written notice of his injury within 30 days of the injury or the date the claimant is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the injury and his

[2]The Board, in an Order dated February 5, 2020, granted the Director's motion for leave to file her response brief out of time, and accepted it as part of record. 20 C.F.R. §§802.212, 802.217. We therefore reject employer's assertion that the Director's brief is untimely. The Director does not address employer's contentions as to the timeliness of claimant's psychological claims under Sections 12 and 13, or suitable alternate employment.

employment.[3] *Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14 BRBS 427 (9th Cir.), *cert. denied*, 459 U.S. 1034 (1982); *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990). "Awareness" for purposes of Section 12 in a traumatic injury case occurs when the claimant is aware, or should have been aware, of the relationship between his injury, employment, and an impairment in earning capacity, and not necessarily on the date of the accident. *See Ceres Gulf, Inc. v. Director, OWCP* [*Fagan*], 111 F.3d 17, 31 BRBS 21(CRT) (5th Cir. 1997); *Marathon Oil Co. v. Lunsford*, 733 F.2d 1139, 6 BRBS 100(CRT) (5th Cir. 1984); *Suarez v. Service Employees Int'l, Inc.*, 50 BRBS 33 (2016). The date a claimant becomes aware of the relationship between his work and his disabling injury is often the date a doctor states there is a connection. However, a doctor's opinion relating the condition to the employment is not necessarily controlling; the administrative law judge may consider other facts as to when the claimant should have been aware of that relationship. *Fagan*, 111 F.3d 17, 31 BRBS 21(CRT); *Wendler v. American Red Cross*, 23 BRBS 408 (1990) (McGranery, J., concurring and dissenting); *see also V.M.* [*Morgan*] *v. Cascade General, Inc.*, 42 BRBS 48 (2008), *aff'd mem.*, 388 F. App'x 695 (9th Cir. 2010). Failure to give timely notice will bar the claim unless one of the exceptions under Section 12(d) applies. 33 U.S.C. §912(d); 20 C.F.R. §702.216.

The administrative law judge found a reasonable person would have been aware of the full extent and impact of claimant's psychological injuries on January 8, 2016, the date he first sought treatment with a mental health professional, Dr. Ajluni, and was diagnosed with major depressive disorder (MDD) and post-traumatic stress disorder (PTSD). He found on that date a reasonable person with those diagnoses could surmise he has a psychological condition severe enough to affect personal relationships, including those with a prospective employer, which could also likely affect his wage-earning capacity.[4] The administrative law judge thus concluded claimant was aware of a relationship between the 2011 rocket attack and his alleged psychological condition, and should have been aware

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[3]Section 12(a), 33 U.S.C. §912(a), states:

> Notice of an injury or death in respect of which compensation is payable under this chapter shall be given within thirty days after the date of such injury or death, or thirty days after the employee or beneficiary is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of a relationship between the injury or death and the employment . . . .

[4]The administrative law judge also found, at this point, claimant realized his symptoms were affecting his personal relationships and were severe enough to require medical attention from a mental health professional.

his condition would likely affect his earning capacity, on January 8, 2016. Consequently, he found claimant's notice to employer of his psychological injury upon the filing of his August 10, 2016 claim untimely because it was more than 30 days after claimant's date of awareness.

Claimant stated he began looking for work a week after returning to the United States. HT at 74. He applied for a number of jobs, including those outlined in Ms. Paradis's 2012 and 2015 labor market surveys and "periodically" for re-employment with employer in 2012. *Id.* at 74-80, 99-106; *see also* EX 26, Dep. at 20, 21-23; EX 27, Dep. at 51-53. Claimant stated he obtained an insurance license and worked in the insurance industry for "a very short period of time" in 2011 or 2012, HT at 77, and that he has been working regularly, 35-45 hours per week, as an assistant manager at his cousin's liquor store since April 1, 2014. *Id.* at 71-74, 95-99, 116; EX 27, Dep. at 10. Moreover, claimant stated he would like to return to his overseas work, HT at 99-106; EX 26, Dep. at 50; EX 27, Dep. at 54, but has been told by Dr. Ajluni that he is not ready or able to perform such work.[5] EX 27, Dep. at 50, 58. Dr. Ajluni stated claimant has been temporarily disabled by his work-related psychological injury since January 8, 2016. JX 23 at 4. This constitutes substantial evidence in support of the administrative law judge's finding that claimant was not aware his psychological conditions would likely affect his wage-earning capacity until January 8, 2016. Accordingly, we affirm that finding, as well as the administrative law judge's finding that claimant did not provide timely notice of his psychological injuries to employer. *See Dyncorp Int'l v. Director, OWCP* [*Mechler*], 658 F.3d 133, 45 BRBS 61(CRT) (2d Cir. 2011).

Under Section 12(d), failure to give timely written notice to the district director and employer will not bar the claim if: (a) the employer had actual knowledge of the injury; (b) the employer was not prejudiced by late notice or lack of notice; or (c) the district director excuses the failure to file the notice. In view of the Section 20(b) presumption,[6] an

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[5]Dr. James O'Brien, who is board-certified in general and forensic psychiatry, noted in his report dated February 12, 2018, that the reason claimant did not work between 2011 and 2014 was due to a physical, rather than psychological, disability. EX 24.

[6]Section 20(b) provides:

> In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary--
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> ***
>
> (b) That sufficient notice of such claim has been given.

employer bears the burden of showing it had no knowledge of the injury during the filing period and was prejudiced by the lack of proper notice. *Sheek v. General Dynamics Corp.*, 18 BRBS 151 (1986), *modifying on recon.* 18 BRBS 1 (1985). A conclusory allegation of prejudice or an inability to investigate the claim when it is fresh is insufficient to meet the employer's burden of proof. *See ITO Corp. v. Director, OWCP* [*Aples*], 883 F.2d 422, 22 BRBS 126(CRT) (5th Cir. 1989); *Vinson v. Resolve Marine Services,* 37 BRBS 103 (2003); *Bustillo v. Southwest Marine, Inc.*, 33 BRBS 15 (1999).

In this case, the administrative law judge found employer's general allegations of prejudice due to the lack of timely notice without merit. The record establishes employer conducted an investigation of the work incident on March 29, 2010, JX 5, questioned claimant and his treating psychiatrist, Dr. Ajluni, about claimant's "emotional" symptoms and psychological conditions, and engaged Dr. O'Brien, in February 2018, to conduct a psychological evaluation of claimant.[7] Moreover, the administrative law judge noted employer inquired about a possible psychological injury in 2013 when a sleep aid drug was prescribed for claimant. Based on employer's actions, the administrative law judge rationally found employer did not establish it was precluded from gathering medical or other evidence regarding claimant's condition or claimant's medical treatment would have been altered if timely notice had been given. *Cf. Kashuba v. Legion Ins. Co.*, 139 F.3d 1273, 32 BRBS 62(CRT) (9th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999). We, therefore, affirm the administrative law judge's finding that claimant's "claims for his psychological injuries are preserved by Section 12(d)(2)" as employer did not demonstrate prejudice caused by the seven-month delay between claimant's awareness of the injury in January 2016 and his notice to employer in August 2016. *See Aples*, 883 F.2d 422, 22 BRBS 126(CRT); *Vinson*, 37 BRBS 103; *Bustillo*, 33 BRBS 15; Decision and Order at 43.

Furthermore, we reject employer's contention claimant's claim is barred pursuant to Section 13. Section 13(a) applies in traumatic injury cases and provides the right to compensation is barred unless the claim is filed within one year of the date the claimant is aware, or in the exercise of reasonable diligence should have been aware, of the relationship

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33 U.S.C. §920(b). In the absence of substantial evidence to the contrary, it is presumed, pursuant to Section 20(b) that employer has been given sufficient notice of the injury and claimant timely filed his claim under Sections 12 and 13 of the Act. *See Lucas v. Louisiana Ins. Guaranty Ass'n*, 28 BRBS 1 (1994).

[7]The fact employer received actual notice of claimant's psychological injuries in 2016, but waited until 2018 to obtain Dr. O'Brien's opinion, belies its position that the delay hindered its ability to obtain "a more timely second medical opinion to defend the claim."

between the injury and the employment. 33 U.S.C. §913(a);[8] *Fagan*, 111 F.3d 17, 31 BRBS 21(CRT). Given our affirmance of the administrative law judge's date of awareness finding, January 8, 2016, claimant's August 10, 2016 claim was timely filed pursuant to Section 13(a) of the Act. *Mechler*, 658 F.3d at 140, 45 BRBS at 66(CRT).

Suitable Alternate Employment

Employer contends the administrative law judge erred in finding it did not identify suitable alternate employment in its labor market surveys dated October 18, 2012, June 11, 2015, March 14, 2018, and July 17, 2018. Employer maintains the administrative law judge did not sufficiently consider claimant's background and skills in rejecting the majority of the jobs in employer's labor market survey that pay more than claimant currently earns at the liquor store.

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

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[8]Section 13(a) provides:

> Except as otherwise provided in this section, the right to compensation for disability or death under this chapter shall be barred unless a claim therefore [sic] is filed within one year after the injury or death. If payment of compensation has been made without an award on account of such injury or death, a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or death occurred. The time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment.

33 U.S.C. §913(a).

The administrative law judge found that while "most of the jobs identified" in employer's labor market surveys "are within [claimant's] physical work restrictions," they do not, for various reasons, constitute suitable alternate employment. Decision and Order at 61. He found claimant's relevant local community is Detroit, Michigan, and was Afghanistan and Iraq. He rejected positions requiring work outside those locations,[9] as well as positions that lack information necessary to determine claimant's ability to perform the jobs.[10] He also rejected all but one of the remaining positions because he found claimant lacks the requisite skills, background or experience to obtain that work. With regard to the remaining single job opening as a convenience store manager at the Barbat Organization in Birmingham, Michigan, the administrative law judge, citing *Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988), found the position insufficient because employer "made no showing that a convenience store manager position requires a highly skilled or specialized worker or that only a small number of workers in the Detroit, Michigan[,] area possess the skills and qualifications to manage a convenience store." Decision and Order at 63. The administrative law judge concluded employer did not establish the availability of suitable alternate employment through the labor market surveys. Nevertheless, he found claimant's "continuous, regular, and necessary" work as an assistant manager at his cousin's liquor store since April 1, 2014, constitutes suitable alternate employment. Accordingly, he found claimant was totally disabled from March 29, 2011 to March 31, 2014, and partially disabled from April 1, 2014, and continuing. *See* Erratum at 2.

The administrative law judge properly reviewed claimant's physical and psychological restrictions, Decision and Order at 57-58, and discussed his testimony

[9]We affirm the administrative law judge's rejection of the jobs which are outside claimant's local community, as those findings are unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

[10]We affirm the administrative law judge's rejection of Arab linguist positions identified in 2012 by Ms. Paradis in Afghanistan and Iraq because he permissibly found the physical requirements of those jobs, consisting of a statement that the "applicant must be physically fit to work and live in austere conditions," are too vague to determine if claimant is physically capable of performing that work. *See Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94 (1988). Moreover, we affirm the administrative law judge's rejection of the hotel clerk position identified by Mr. Crane because he properly compared claimant's physical restrictions with the requirements of that position and rationally found it was beyond his capabilities. *See Patterson v. Omniplex World Services*, 36 BRBS 149 (2003); *Fox v. West State Inc.*, 31 BRBS 118 (1997).

regarding his education, experience, and vocational skills, *id.* at 5-8. Claimant testified he has a Bachelor of Science degree in criminal justice, several credits towards a Master's degree in business, a real estate license obtained in 2001, and certifications in office management and office technology, which includes training in Microsoft Office. HT at 48, 99-100. Claimant also passed the test to become a licensed property and casualty insurance agent, and worked in the insurance industry for a "very short period of time," though he felt he was not cut out to be an insurance salesman. *Id.* at 48, 77. He stated his overseas job "covered many aspects" including economic and cultural advising, *id.* at 53, and that his regular job duties at the liquor store include running the cash register, running the lottery machine, making bank deposits, keeping track of inventory, and other customer service skills. *Id.* at 96-97.

We agree with employer that the administrative law judge's review of some of the jobs in the labor market survey is cursory and inadequate.[11] For instance, as employer notes, the administrative law judge found positions identified by Ms. Paradis as a testing clerk and administrative assistant are not realistically available to claimant because "he lacks the requisite experience in proctoring tests or working in an office." Decision and Order at 62. He did not discuss whether claimant's college degree or certifications in office management and office technology would make these jobs suitable for claimant. The administrative law judge also rejected a retail sales consultant position identified by Mr. Crane in 2018 because claimant had "no sales experience in [the] telecommunications field." Decision and Order at 63. However, Mr. Crane's labor market survey indicates that the job duties "include customer service/sales functions," that "[p]rior customer-facing experience is 'a plus, but not required,'" and that "AT&T provides specific on-the-job training for this position." EX 37 at 12-13. The administrative law judge did not consider whether, in view of claimant's work at the liquor store he may possess transferrable skills that make the retail sales consultant positions suitable. In light of his cursory comparison of the job requirements to claimant's transferrable skills, we vacate the administrative law judge's rejection of those positions for which he found claimant lacked the requisite skills, background or experience. We remand this case for a more thorough analysis of this evidence to determine whether employer has met its burden of establishing the availability

[11]We affirm the administrative law judge's rejection of the insurance sales position with State Farm identified by Mr. Crane as it is supported by substantial evidence. While the job requires "[p]revious sales experience," rather than the "significant insurance sales experience" as stated by the administrative law judge, the administrative law judge gave alternative reasons for rejecting the position - claimant was not successful in his prior attempt at selling insurance and claimant had been previously rejected for a position with State Farm. These reasons are sufficient to support his conclusion. Decision and Order at 23, 63 n.52.

of suitable alternate employment and, potentially, showing claimant has a higher wage-earning capacity than he has at the liquor store.[12] *See generally Hinton*, 243 F.3d 222, 35 BRBS 7(CRT); *Ledet*, 163 F.3d 901, 32 BRBS 212(CRT).

Nature/Extent of Claimant's Disability

The Director contends the administrative law judge's finding that claimant's disability from his psychological injuries was permanent as of April 2014 is at odds with his finding that claimant's PTSD first reached maximum medical improvement (MMI) on February 19, 2018. The Director also asserts the administrative law judge never clearly articulated a commencement date for claimant's disability relating to his PTSD, which, she adds, may also affect claimant's maximum compensation rate. The Director's position has merit.

As the Director asserts, the administrative law judge's award of unscheduled permanent partial disability benefits relating to claimant's psychological injuries from April 1, 2014, directly conflicts with his finding that claimant's condition did not reach MMI until February 19, 2018. The decision also contains confusing statements regarding

[12]Even though this case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, the administrative law judge did not err in citing *Lentz v. Cottman Co*., 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988), to conclude one suitable position, namely the convenience store manager for the Barbat Corporation, is insufficient to meet employer's burden. If this is the only suitable position available, the administrative law judge permissibly concluded employer did not demonstrate claimant is highly skilled, the job is specialized, and the number of workers with suitable qualifications in the local community is small. *See P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *Ryan v. Navy Exch. Serv. Command,* 41 BRBS 17 (2007). However, if, on remand, the administrative law judge determines additional suitable alternate employment exists, he may add this job to any other suitable employment for purposes of calculating claimant's post-injury wage-earning capacity. Moreover, we reject claimant's contention that the administrative law judge erred in finding he did not engage in a diligent job search. *See* Decision and Order at 64. The administrative law judge's findings regarding the nature and sufficiency of claimant's job search efforts are rational and supported by substantial evidence. *See Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000). The Board cannot reweigh the evidence. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Claimant, therefore, cannot rebut any showing of suitable alternate employment prior to April 1, 2014. *See generally Wilson v. Virginia Int'l Terminals*, 40 BRBS 46 (2006).

the commencement date of claimant's psychological disability. The finding that "[c]laimant is neither physically nor psychologically capable of returning to his pre-injury employment as a cultural advisor and translator," Decision and Order at 57-58, suggests claimant's psychological injuries precluded him from returning to his usual work in 2011.[13] Nevertheless, in addressing employer's evidence of suitable alternate employment, the administrative law judge did not find claimant's psychological injuries relevant until he addressed Mr. Crane's 2018 labor market surveys. Consequently, the administrative law judge must, on remand, resolve these inconsistencies, make specific findings regarding the date of onset and the nature and extent of claimant's psychological injuries, and apply those findings accordingly to the award of benefits. 5 U.S.C. §557(c)(3)(A); *Gremillion v. Gulf Coast Catering Co.*, 31 BRBS 163 (1997) (Brown, J., concurring).

Wage-Earning Capacity – NAWW

Employer contends the administrative law judge improperly adjusted claimant's actual wages in his post-injury suitable work at the liquor store downward based on the percentage change in the National Average Weekly Wage (NAWW) to arrive at a "theoretical" wage-earning capacity for purposes of calculating claimant's compensation. We reject this contention. In order to determine a claimant's post-injury wage-earning capacity, post-injury wages must be adjusted to reflect their value at the time of the claimant's injury for comparison with his average weekly wage. *Richardson v. General Dynamics Corp.*, 19 BRBS 48 (1986). The percentage change in the NAWW should be applied to adjust post-injury wages downward when the actual wages paid for the alternate work at that time are unknown.[14] *Quan v. Marine Power & Equipment Co.*, 30 BRBS 124 (1996); *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990).

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[13]The administrative law judge stated:

> Both Dr. Ajluni and Dr. O'Brien noted that Claimant has seen little improvement in [his psychological] symptoms since 2011. Given the subject of Claimant's anxieties and his lack of improvement, I find Dr. Ajluni's conclusion that he should not return to his pre-injury job to be reasonable. Thus, I find based on the record that Claimant is not psychologically capable of returning to his pre-injury job as a translator.

Decision and Order at 58.

[14]"The Act contemplates that the current dollar amount of post-injury 'wage-earning capacity' be adjusted downward (i.e., backward in time) to account for post-injury inflation and general wage increases. This adjustment allows post-injury 'wage-earning capacity'

In this case, the administrative law judge properly used the percentage changes in the NAWW between claimant's date of injury and the date upon which suitable alternate employment was established, April 1, 2014, to adjust the post-injury wage downward in order to account for inflation. *See Quan*, 30 BRBS 124. As it is rational, supported by substantial evidence, and in accordance with law, we affirm the administrative law judge's use of the NAWW in this manner. If, on remand, the administrative law judge finds employer established the availability of suitable alternate employment through its labor market surveys, he must recalculate claimant's post-injury wage-earning capacity using wage rates in effect at the time of injury.[15]

Average Weekly Wage

Employer contends the administrative law judge incorrectly calculated claimant's average weekly wage for his psychological injuries at the time of the March 28, 2011 work accident, rather than, in this case of delayed onset of claimant's psychological disability, on the date of claimant's awareness of that condition, January 8, 2016. Employer maintains the administrative law judge should have applied 33 U.S.C. §910(i)[16] to determine that the "time of injury" for purposes of average weekly wage should be at the commencement of claimant's disability due to that condition. Moreover, employer avers the administrative law judge's treatment of claimant's psychological injuries as a delayed onset occupational disease for purposes of Sections 12 and 13, but then as a traumatic

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to be meaningfully compared to pre-injury 'average weekly wages.'" *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 1161, 36 BRBS 15, 18(CRT) (9th Cir. 2002).

[15]If the administrative law judge finds, upon further review, that employer's evidence remains insufficient to establish the availability of suitable alternate employment, he may reinstate his finding that claimant's post-injury wage-earning capacity, adjusted for inflation, is $279.90.

[16] Section 10(i) of the Act states:

> For purposes of this section with respect to a claim for compensation for death or disability due to an occupational disease which does not immediately result in death or disability, the time of injury shall be deemed to be the date on which the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability.

injury for purposes of determining claimant's average weekly wage is not in accordance with law.

Contrary to employer's contention, the administrative law judge found claimant's psychological condition is not an occupational disease under Sections 10, 12 and 13 because it stems from a single traumatic event, rather than the cumulative hazards of his overseas work. Decision and Order at 67. He found Section 10 of the Act, in contrast to Sections 12 and 13, does not contain an awareness provision for traumatic injuries. The administrative law judge thus rejected employer's position that Section 10(i) applies to the calculation of claimant's average weekly wage for his psychological conditions and instead used the March 28, 2011 "time of injury" for that determination. Consequently, the administrative law judge found claimant's average weekly wage for his psychological injuries is $2,182.88, the average weekly wage the parties stipulated to as of the March 28, 2011 time of injury.

This case is distinguishable from *Gindo v. Aecon Nat'l Sec. Programs, Inc.*, 52 BRBS 51 (2018). In *Gindo*, the Board affirmed the application of Section 10(i) because the claimant suffered from an occupational disease, PTSD, which did not immediately result in disability. Specifically, the Board examined the characteristics of the claimant's psychological malady and agreed with the administrative law judge's finding that the delayed onset PTSD in that case was not due to a physical accident but was the result of exposure to the external environmentally hazardous conditions of his employment in Iraq. *Gindo*, 52 BRBS at 53-55.

Under the circumstances of this case, we affirm the administrative law judge's finding that claimant's psychological condition is a traumatic injury rather than an occupational disease as it is supported by substantial evidence. The administrative law judge correctly found both Dr. O'Brien and Dr. Ajluni opined claimant's psychological condition was directly related to the March 2011 rocket attack and to the resulting complicated right leg injury. Decision and Order at 49, 67. In particular, Dr. O'Brien stated claimant's psychological condition was not the result of cumulative physiological trauma.[17] EX 24 at 40. Thus, substantial evidence supports the finding that claimant's psychological injuries resulted from a specific traumatic incident. We reject employer's contention that Section 10(i) must be used to calculate claimant's average weekly wage and affirm the administrative law judge's finding that claimant's average weekly wage for his psychological injuries is $2,182.88, his stipulated average weekly wage at the time of the attack. Decision and Order at 3, 67; *Leblanc v. Cooper/T. Smith Stevedoring, Inc.*, 130

[17]Dr. O'Brien also stated claimant's PTSD was caused by a specific event, the 2011 rocket attack, and not due to cumulative trauma. EX 24.

F.3d 157, 31 BRBS 195(CRT) (5th Cir. 1997) (use average weekly wage at time of traumatic injury despite delayed onset); *see also generally Ceres Marine Terminals, Inc. v. Director, OWCP*, 848 F.3d 115, 50 BRBS 91(CRT) (4th Cir. 2016) (immediate onset of psychological condition following accident).

Section 6(b) – Proper Compensation Rate

Employer contends the administrative law judge's order that it concurrently pay claimant scheduled and unscheduled awards of permanent partial disability benefits from April 1, 2014 through September 28, 2017, at two-thirds of claimant's average weekly wage ($1,455.25), is in excess of the statutory maximum compensation rate of Section 6(b), 33 U.S.C. §906(b), and cannot stand. In addressing claimant's permanent partial disabilities, the administrative law judge, citing *I.T.O. Corp. of Baltimore v. Green*, 185 F.3d 239, 33 BRBS 139(CRT) (4th Cir. 1999), found claimant entitled to concurrent awards of scheduled and unscheduled permanent partial disability benefits which he concluded may exceed the applicable maximum compensation rate ($1,256.84), but not two-thirds of claimant's average weekly wage ($1,455.25). Erratum at 2.

When a claimant's injuries resulting from the same accident are each partially disabling, the claimant is entitled to concurrent awards provided the amount paid does not exceed what he would receive if he were permanently totally disabled. *Green*, 185 F.3d at 243, 33 BRBS at 142-43(CRT). If the concurrent partial awards exceed the total disability rate, then the unscheduled award should be given priority and paid in full while the scheduled benefits would be pro-rated and paid out over a longer period of time until they are paid in full. *Id.*; *Padilla v. San Pedro Boat Works*, 34 BRBS 49, 53 (2000); *see also Stevedoring Services of America v. Price*, 382 F.3d 878, 38 BRBS 51(CRT) (9th Cir. 2004), *cert. denied*, 544 U.S. 960 (2005).

As of April 1, 2014, claimant sustained a scheduled permanent partial disability and an unscheduled partial disability (as previously discussed, the administrative law judge must on remand determine the nature of this unscheduled disability) arising from the same accident, the 2011 rocket attack. In each case, both injuries independently foreclosed claimant from performing his pre-injury job.[18] The cases relied on by the administrative law judge involve claims for compensation of separate injuries/disabilities sustained at different times of employment, with each injury/disability causing a distinct loss of wage-earning capacity; such concurrent awards are subject to the Section 8(a), 33 U.S.C. §908(a),

[18]Such an inference may be drawn in this case from the administrative law judge's finding that claimant "is neither physically nor psychologically capable of returning to his pre-injury employment as a cultural advisor and translator." Decision and Order at 57.

maximum and not to an individual Section 6(b)(1) maximum. *See Price*, 382 F.3d 878, 38 BRBS 51(CRT) (9th Cir. 2004).

This case, in contrast, involves multiple injuries from a single accident or time of employment and is like *Green* and *Padilla*. Because Section 6(b)(1) applies to compensation liability due to a single work accident, the concurrent scheduled and unscheduled awards resulting from the rocket attack in this case cannot exceed the applicable statutory maximum compensation rate. 33 U.S.C. §906(b)(1). Consequently, in accordance with *Green*, we reverse the administrative law judge's finding that Section 6(b)(1) is inapplicable. However, because employer paid the entire scheduled award prior to the claim's adjudication,[19] there is no concern about concurrent payments in this case. On remand, rather, the administrative law judge may enter an unscheduled partial disability award for claimant's loss of wage-earning capacity due to his psychological condition subject to the applicable maximum rate.[20]

[19]The parties stipulated employer paid the entire scheduled award, based on the appropriate maximum compensation rate for that injury, from September 13, 2012 through April 2, 2013. Decision and Order at 3. As claimant's right leg and psychological injuries arose from the same accident, employer is entitled to a Section 14(j) credit, 33 U.S.C. §914(j), of that amount against the compensation awarded by the administrative law judge for the scheduled injury.

[20]The administrative law judge determined the maximum rate in effect under Section 6(b)(1) at the time of claimant's accident on March 28, 2011, was $1,256.84. This figure represents the maximum compensation rate for temporary partial, permanent partial, and temporary total disability benefits. 20 C.F.R. §702.805(a). However, if, on remand, the administrative law judge finds claimant entitled to a period of permanent total disability benefits, the maximum compensation rate would change to that in effect on the date claimant became totally and permanently disabled and would thereafter be subject to each subsequent year's maximum rate so long as claimant remained permanently totally disabled. 20 C.F.R. §702.805; *see Roberts v. Director, OWCP*, 625 F.3d 1204, 44 BRBS 73(CRT) (9th Cir. 2010), *aff'd sub nom. Roberts v. Sea-Land Services, Inc.*, 566 U.S. 93, 46 BRBS 15(CRT) (2012). The rate would not increase for succeeding periods of temporary partial, permanent partial, or temporary total disability.

Accordingly, we vacate the administrative law judge's finding that employer did not establish the availability of suitable alternate employment and his conflicting statements regarding the date claimant's psychological condition became permanent. We remand the case for further consideration of these issues consistent with this decision. We reverse his finding that the maximum compensation rate of Section 6(b)(1) is not applicable. We affirm his decision in all other respects.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge