U.S. Department of Labor

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

BRB No. 23-0260

MIGBIL SULEJMANI Claimant-Respondent v. ECOLOG INTERNATIONAL/DYNCORP INTERNATIONAL, INCORPORATED and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	**NOT-PUBLISHED** DATE ISSUED: 05/29/2025 DECISION and ORDER

Appeal of Decision and Order Awarding Benefits of Stephen R. Henley, Chief Administrative Law Judge, United States Department of Labor.

Lara D. Merrigan (Merrigan Legal), Campbell, California, and Jon B. Robinson (Strongpoint Law Firm, LLC), Mandeville, Louisiana, for Claimant.

Lawrence P. Postol and Joshua M. Obszanski (Postol Law Firm, P.C.), McLean, Virginia, for Employer and its Carrier.

Victoria Yee (Jonathan Snare, Deputy Solicitor of Labor; Jennifer Feldman Jones, Acting Associate Solicitor; William M. Bush, Acting Counsel for Administrative Appeals), Los Angeles, California, for the Acting Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals Chief Administrative Law Judge (ALJ) Stephen R. Henley's Decision and Order Awarding Benefits (2021-LDA-01710) 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 applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In 2007, Claimant began working in Iraq for Ecolog, a subcontractor for Service Employees International, Inc. (SEII), driving potable water trucks to different camps within Victory Base. Claimant's Exhibit (CX) 2 at 18, 20, 53; *see also* Joint Motion to Join Dyncorp International/Ecolog as a Party. In May 2010, he returned home to North Macedonia on leave. CX 2 at 63. However, upon expiration of his twenty-one-day leave period, he was told he was being transferred to Afghanistan and to wait for a call informing him of his return date. *Id*. at 22, 64. In May 2011, he began working at Camp Leatherneck in Afghanistan, again driving potable water trucks for Ecolog but under Ecolog's

[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).

subcontract with Dyncorp International (Employer).[2] CX 2 at 23; *see also* CX 11 at 2. He remained in Afghanistan for four months before resigning and returning to North Macedonia. CX 2 at 24-25.

Claimant testified he experienced two traumatic events while he was working in Iraq. In 2008, he was delivering water when he came across a group of U.S. military personnel unloading American soldiers "covered in blood" off a military vehicle. CX 2 at 32-34. He could not tell whether the soldiers were alive or dead. *Id*. at 32, 34. Another soldier pointed a gun at him and told him to leave the area immediately. *Id*. at 32. He became very afraid and could not recall how he backed his truck up to leave. *Id*. at 32, 76. He stated he had to stop the truck for at least an hour to collect himself. *Id*. at 33.

Claimant described a second traumatic event that occurred in 2009. He was working at night during a dust storm when there was a rocket attack. CX 2 at 35. He had to go to the bunker for at least forty minutes, and afterward he heard some people on the base were injured as a result of the attack. *Id*. at 35-36.

While in Afghanistan, Claimant recalled witnessing two rockets being launched by the United States military, which made him fearful. CX 2 at 27-29, 69-70. He never heard alarms go off while working in Afghanistan, and he never had to seek shelter in a bunker. *Id*. at 30. He resigned after four months because he could no longer withstand living in a war zone, and he wanted to return to his family in North Macedonia. *Id*. at 24-25.

Claimant testified he began having fearful thoughts and difficulty sleeping while in Iraq. CX 2 at 38-39, 72. He did not tell anyone because he thought these problems would resolve on their own. *Id*. at 39-40. When he returned to North Macedonia in 2011, he started experiencing nervousness, trouble sleeping, and nightmares. *Id*. at 40-41, 78. In 2020, his family insisted he seek medical attention for his symptoms, and on August 14, 2020, he came under the care of psychiatrist Dr. Tanja Risteska. *Id*. at 42; CX 5 at 1. Dr. Risteska diagnosed Claimant with Post-Traumatic Stress Disorder (PTSD) related to his time in a war zone while working for Ecolog. CX 2 at 45; CX 5 at 2. She prescribed three medications and restricted Claimant from working on a military base or in a war zone. CX 2 at 45; CX 5 at 2, 9. On October 13, 2020, Claimant filed a claim for benefits. CX 1 at 1.

[2] The ALJ found Dyncorp International to be Claimant's last responsible employer. Decision and Order Awarding benefits (D&O) at 28, 35. As no party has appealed this finding, we affirm it, *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57, 58 (2007), and hereafter refer to Dyncorp International as "Employer."

The ALJ issued a Decision and Order Awarding Benefits (D&O) on March 30, 2023. He found Claimant invoked the Section 20(a) presumption of compensability with respect to his alleged psychological condition, 33 U.S.C. §920(a), and Employer rebutted the presumption. D&O at 21-22. Upon weighing Claimant's credibility, as well as the medical reports and opinions of Dr. Risteska, Claimant's expert psychiatrist Dr. Zachary Torry, and Employer's expert psychiatrists, Dr. James O'Brien and Dr. Geoff Isaacs, the ALJ found Claimant established a work-related psychological injury. *Id*. 24-28.

As for the timeliness of Claimant's notice and claim, the ALJ found Claimant was not aware of the connection between his psychiatric condition and his employment until his initial visit with Dr. Risteska on August 14, 2020. D&O at 33. Therefore, the ALJ found Claimant's October 2020 claim was timely under both Sections 12(a) and 13(b)(2) of the Act. *Id*. at 33-34; *see* 33 U.S.C. §§912(a), 913(b)(2).

Relying on Section 10(c) of the Act, 33 U.S.C. §910(c), the ALJ calculated Claimant's average weekly wage (AWW) by multiplying his contracted pay rate of $1,800 per month by twelve months, then dividing by fifty-two weeks, resulting in an AWW of $415.38. D&O at 35-37; *see* CX 2 at 24.

Turning to the nature and extent of Claimant's work-related disability, the ALJ found Claimant's condition reached maximum medical improvement (MMI) "at least as of" May 17, 2022,[3] and was totally disabled from September 28, 2011 (the date he left his employment in Afghanistan),[4] to the present and continuing. D&O at 30-32. He therefore found Employer liable for temporary total disability (TTD) benefits from September 28, 2011, through May 16, 2022, and for permanent total disability (PTD) benefits from May 17, 2022, through the present and continuing. *Id*. at 38. Finally, the ALJ awarded interest on all past-due compensation, "computed from the date each payment was originally due until paid," and "based on the 52-week U.S. Treasury bill yield pursuant to 28 U.S.C. § 1961." *Id*. at 38-39.

Employer appeals, contending the ALJ erred by not allowing both of its experts to testify at the formal hearing and by excluding Employer's Exhibit (EX) 22, Dr. O'Brien's response to Dr. Torry's report. Employer's Appellate Brief (ER Br.) at 1-2. It also

[3] This date corresponds with Dr. Risteska's May 17, 2022 narrative medical report, in which she indicated she did not "expect any significant improvements in [Claimant's] disorder, nor any immediate cure." CX 5 at 48; *see* D&O at 30.

[4] The ALJ based this finding on the medical opinions of Drs. Risteska and Torry, who both opined Claimant could not return to work in a war zone because of his psychological condition. D&O at 31-32; CX 5; CX 7 at 30.

maintains the ALJ repeatedly violated the Administrative Procedure Act (APA), 5 U.S.C. §§551-559, by failing to consider or discuss relevant record evidence that is contrary to his conclusions and by failing to explain why he rejected the contradictory evidence. ER Br. at 2-6, 43-52, 57-59. Further, Employer asserts the ALJ's MMI determination is not supported by substantial evidence, the ALJ's award of interest on unpaid compensation was based on the wrong rate, and finally, to the extent the ALJ's decision relies on foreign testimony, it should be vacated because the record lacks evidence that such testimony was obtained in accordance with North Macedonian law. *Id*. at 4-5, 52-56.

Both Claimant and the Director, Office of Workers' Compensation Programs (Director), respond to Employer's appeal, urging affirmance of the ALJ's findings. Employer submitted separate replies to each response, reiterating its contentions.

Exclusion of Testimony and Evidence

At the outset, Employer contends the ALJ improperly prohibited one of its two expert psychiatrists, Dr. O'Brien, from testifying at the formal hearing and also improperly excluded the doctor's supplemental report, offered as EX 22. Dr. O'Brien's evaluation of Claimant was scheduled to take place on December 8, 2021. *See* EX 16. Prior to his evaluation, and given the impending discovery deadline,[5] the ALJ granted Claimant an extension of thirty days beyond receipt of Dr. O'Brien's report to conduct discovery "limited to the report's conclusions, the basis for the conclusions, the propriety of the examination, and the adequacy of Dr. O'Brien's credentials." *See* Order Granting Claimant's Motion to Extend Discovery In Part dated November 30, 2021 (Extension Order) at 3. The ALJ also ordered Employer to produce Dr. O'Brien's test data within ten days of his evaluation. *Id*.

Dr. O'Brien's evaluation of Claimant proceeded as scheduled on December 8, 2021. Utilizing a videoconference and with assistance from a translator, Dr. O'Brien both interviewed Claimant and conducted psychological testing.[6] EX 16 at 1-8. Based on both his interview and the test results, which demonstrated evidence of malingering and symptom exaggeration, Dr. O'Brien concluded Claimant did not suffer from any diagnosable psychiatric condition. *Id*. at 18-20. Employer produced Dr. O'Brien's testing

[5] The deadline for discovery was December 14, 2021, as per the ALJ's Order granting the parties' consent motion to extend discovery, issued October 27, 2021.

[6] Dr. O'Brien administered the Clinical Assessment of Depression (CAD), the Structured Inventory of Malingered Symptomatology (SIMS), and the Morel Emotional Numbing Test (MENT). EX 16 at 7-8.

data on December 28, 2021 (twenty days after the evaluation), provided Claimant with Dr. O'Brien's report on January 13, 2022, and provided the audio-recording of Dr. O'Brien's videoconference evaluation on February 1, 2022.

On March 2, 2022, Employer received notice Claimant intended to submit the report and testimony of its expert, Dr. Torry, at the formal hearing scheduled for March 31, 2022. Employer moved to exclude both Dr. Torry's report and testimony, arguing it was prejudiced by the late notice from Claimant. Alternatively, Employer, who at this point appeared to believe Dr. Torry was a psychologist (as opposed to a psychiatrist), requested a continuation of the scheduled hearing to allow it to obtain its own expert psychological evaluation.[7]

The ALJ refused to exclude Dr. Torry's testimony, noting he had given Claimant a limited discovery extension of thirty days beyond receipt of Dr. O'Brien's records and test data, but because Claimant did not receive these materials until February 1, the March 2 notice of Dr. Torry as a testifying witness was timely.[8] *See* Order Continuing Hearing and Denying Employer/Carrier's Motion to Exclude Testimony dated March 30, 2022. Further, despite Employer's request for an expert psychological evaluation (made under the assumption Dr. Torry was a psychologist) and Claimant's subsequent clarification that Dr. Torry was in fact a psychiatrist, the ALJ specifically granted Employer permission to obtain an expert opinion from a second psychiatrist with the caveat that this second psychiatrist would not be allowed to testify at the hearing because Dr. O'Brien was already scheduled to do so.[9] *Id*. at 3-4. He therefore continued the formal hearing to June 6, 2022.

On April 7, 2022, Employer's second expert psychiatrist, Dr. Isaacs, interviewed Claimant by videoconference. EX 20. He did not perform any psychological testing but did review Claimant's medical records and deposition testimony.[10] *Id*. at 2. Ultimately, he issued a report on April 20, 2022, in which he found Claimant "unconvincing" and

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[7] *See* Employer's Motion to Exclude Any Report and Testimony from Dr. Torry or, in the alternative, to Continue the Trial and Allow the Employer an IME [independent medical examination] by a Psychologist at 2.

[8] The ALJ did not address Employer's request that Dr. Torry's report, which Claimant had not yet produced, also be excluded.

[9] Prior to the scheduled hearing, Employer identified its second psychiatric expert, Dr. Geoff Isaacs, as its one-allowed testifying expert.

[10] Dr. Isaacs did not review Dr. O'Brien's psychiatric report. EX 20 at 2.

concluded he did not suffer from PTSD or any other psychiatric ailment as a result of his employment in a warzone. *Id*. at 21-22.

On May 17, 2022, Dr. Risteska issued a lengthy report summarizing her findings with respect to Claimant's psychiatric condition.[11] CX 5 at 41. She diagnosed him with PTSD, opined she did not expect "any significant improvements…nor any immediate cure," and restricted Claimant from working in a "military area." *Id*. at 48.

On May 26, 2022, Dr. Torry issued his report. CX 7. Dr. Torry not only provided rebuttals of both Drs. O'Brien's and Isaacs's reports,[12] *id.* at 13-27, he also examined Claimant, reviewed Claimant's deposition testimony and medical records, and offered his own psychiatric opinion as to his diagnosis of Claimant, causation, and Claimant's employability and prognosis, *id*. at 3-13, 27-31.[13] Dr. Torry diagnosed Claimant with

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[11] Unlike Dr. Risteska's reports documenting her monthly examinations of Claimant, which are short one-page summaries, her May 17, 2022 psychiatric report is an eight-page document with two expressed purposes:

> 1. To give a finding and opinion on the degree, intensity and duration of the suffered fear, as the PRIMARY and SECONDARY fear, as well as the possible consequences on the individual dynamic psychosocial balance and the possible long-term consequences of the experienced fear and their consequences on the mental health of the injured party and his overall functioning.
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> 2. To give a finding and opinion on the degree, intensity and duration of mental pain due to reduced general life activity from a psychological point of view, given the age, profession and social status of the injured party, as well as the consequences for the functioning of the injured party.

CX 5 at 41. In the report, Dr. Risteska provided a thorough summary of Claimant's exposure to traumatic events and his symptoms, followed by a detailed application of the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5) in diagnosing Claimant with PTSD. *Id*. at 42-45. She also provided opinions as to his prognosis and ability to work. *Id*. at 48.

[12] Dr. Torry reviewed the reports of both Drs. O'Brien and Isaacs, the audio-recordings and translations of both psychiatrists' evaluations, and Dr. O'Brien's raw testing data. CX 7 at 2.

[13] Dr. Torry did not conduct any psychological testing.

PTSD resulting from his employment in Iraq, found no evidence of malingering, opined Claimant's psychiatric injury had reached MMI, opined he was unable to return to work in Iraq, and recommended additional treatment. *Id*. at 1, 11-13, 30-31.

In addition, Dr. Torry addressed the opinions of Drs. O'Brien and Isaacs. CX 7 at 13-26. He criticized Dr. O'Brien's report for containing summaries that were inconsistent with Claimant's recorded responses, for his minimization of Claimant's reported traumatic experiences, and for the way he administered the psychological testing.[14] *Id*. at 13-23. Dr. Torry also criticized Dr. Isaacs's interview style, indicating he improperly questioned Claimant in a leading and confrontational manner rather than asking open-ended questions, and failed to adequately explore Claimant's reported symptoms. *Id*. at 24-25. Further, Dr. Torry concluded Claimant reported symptoms consistent with PTSD to both Dr. O'Brien and Dr. Isaacs, despite both psychiatrists finding Claimant did not suffer from PTSD. *Id*. at 15, 26.

On June 3, 2022, Employer notified the ALJ it objected to Claimant's Exhibit 7, Dr. Torry's report, arguing it was untimely because it was submitted as an exhibit less than ten days prior to the hearing.[15] Employer also maintained it was prejudiced by the late submission, as there was insufficient time prior to the June 6, 2022 hearing to either depose Dr. Torry or have its own experts respond to his report. Employer urged the ALJ to exclude Dr. Torry's report or, alternatively, either allow Employer to submit rebuttal evidence post-hearing or delay the hearing to allow it time to develop rebuttal evidence.

The formal hearing proceeded on June 6, 2022. The ALJ summarily denied Employer's motion to exclude Dr. Torry's report. Transcript from June 6, 2022 Hearing (HT I) at 11. Nevertheless, Employer objected to the ALJ allowing only one of its experts to testify and maintained the ALJ's refusal to allow it to obtain rebuttal reports from both Drs. O'Brien and Isaacs violated its due process rights. HT I at 46.

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[14] Specifically, Dr. Torry indicated the tests should have been translated prior to the testing rather than interpreted contemporaneously without the psychiatrist in the room, and he pointed to several inaccuracies in the recorded translations and test scoring as reasons the testing results should be deemed invalid. CX 7 at 18-23.

[15] According to the ALJ's Order Setting Hearing Date issued on December 10, 2021, which was not altered by any subsequent orders, trial exhibits were to be submitted by the parties "no later than ten (10) days before the hearing." Ten days prior to the June 6, hearing was Friday, May 27, 2022. Employer indicated it received Dr. Torry's report on May 27, 2022, but not until 10:43 p.m., in contravention of the Office of Administrative Law Judges Rules of Practice and Procedure (OALJ Rules), which require "last day" filings to be made before 4:30 p.m. local time. *See* 29 C.F.R. §18.32(a)(2).

Only Dr. Torry testified at the hearing. Because Dr. Isaacs's testimony would have exceeded the time allotted, the parties agreed to postpone his testimony until June 21, 2022. HT I at 125-126, 129.

On June 16, 2022, Employer moved to admit into evidence EX 22, Dr. O'Brien's response to Dr. Torry's report. The ALJ declined to rule on Employer's motion at the June 21, 2022 hearing, during which only Dr. Isaacs testified. Rather, he invited the parties to submit briefs as to whether he should admit EX 22. Transcript from June 21, 2022 Hearing (HT II) at 242-245.

On August 5, 2022, the ALJ issued an Order Denying Employer Dyncorp/Ecolog's Motion to Admit Exhibit 22 (Exclusion Order). He rejected Employer's argument that it was prejudiced by the late filing of Dr. Torry's report (which he found timely filed)[16] because Employer was on notice since November 2021 that Claimant would have the opportunity to have his own expert address Dr. O'Brien's report and because the ALJ previously attempted to "assuage Employer's concerns that it should have the same chance to make its case" by allowing it to obtain a second psychiatrist's evaluation and opinion. Exclusion Order at 5. The ALJ noted Dr. Torry raised "at least some of the same critiques for both of Employer's experts," and Dr. Isaacs, who Employer chose to testify as opposed to Dr. O'Brien, had the opportunity to address "some" of Dr. Torry's criticisms at the formal hearing. *Id*. Therefore, to the extent Dr. O'Brien addressed the same criticisms in EX 22, the ALJ found it to be duplicative of evidence already in the record. *Id*. at 5-6. Finally, the ALJ found Dr. O'Brien's review of Dr. Torry's report exceeded the scope of what he allowed Claimant's expert to review. Therefore, he denied Employer's motion to admit EX 22. *Id*. at 6.

On appeal, Employer argues the ALJ erred in not allowing both of its experts to testify at the hearing and in excluding Dr. O'Brien's supplemental report from the record, thereby violating statutory and regulatory directives. ER Br. at 31-32; *see* 5 U.S.C. §556(d); 20 C.F.R. §702.338. Employer further argues the ALJ erroneously determined the testimony of one of its experts could stand as the same testimony for both and improperly denied Dr. O'Brien the opportunity to explain his findings while also according his opinion less weight due to a lack of explanation. ER Br. at 32-33, 36-40.

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[16] The ALJ noted the OALJ Rules define "last day" as ending at "4:30pm local time where the event is to occur," 29 C.F.R. §18.32(a)(2), but that a subsequent OALJ memorandum issued on April 29, 2022, indicated the last day for a filing period for e-filed documents ends at midnight in the applicable time zone. As Claimant's exhibits were submitted before midnight on May 27, 2022, he found they were timely filed. Exclusion Order at 5. Employer is not appealing this timeliness ruling; therefore, we affirm it. *Scalio*, 41 BRBS at 58.

The Director responds, arguing Employer's objections must fail due to the broad discretion afforded ALJs in making evidentiary rulings. Director's Response to Employer's Petition for Review and Brief (Dir. Resp.) at 6. Rather, the Director maintains the ALJ adequately explained his rulings, and Employer fails to show they are arbitrary or an abuse of discretion. *Id*. at 7-8. Claimant also responds, maintaining Employer cannot now complain of unfair treatment when it made the strategic decision to have Dr. Isaacs testify instead of Dr. O'Brien. Claimant-Respondent's Response Brief (Cl. Resp.) at 6. Regardless, Claimant argues both psychiatric experts were offering opinions on whether Claimant is truthful and whether he suffers from a psychiatric condition, and the ALJ rationally and properly excluded duplicative evidence. *Id*. at 7-8. Claimant argues it is irrelevant that one of Employer's experts performed testing while the other did not, as the testing itself is clearly invalid. *Id*.

Employer replies to both the Director's and Claimant's arguments. It asserts the ALJ's broad discretion does not override its substantive due process rights. In addition, it asserts Dr. Isaacs and Dr. O'Brien, although both psychiatrists, utilized different methods of evaluating Claimant and, by refusing to allow Dr. O'Brien to testify, while also excluding his rebuttal report, the ALJ violated his duty to fully investigate and review all relevant and material evidence. Employer's Reply to Director's Response to Employer's Petition for Review and Brief (ER Reply to Dir.) at 2-3; Employer's Reply to Claimant's Response to Employer's Petition for Review and Brief (ER Reply to Cl.) at 1-3.

Section 23(a) of the Act, 33 U.S.C. §923(a), states the ALJ is not bound by common law or statutory rules of evidence or procedure but may conduct the hearing "in such manner as to best ascertain the rights of the parties." *See also* 20 C.F.R. §702.339. The ALJ has great discretion concerning the admission of evidence, and any decisions regarding the admission or exclusion of evidence are reversible only if arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Everson v. Stevedoring Services of Am.*, 33 BRBS 149, 152 (1999); *Ramirez v. Southern Stevedores*, 25 BRBS 260, 264 (1992); *McCurley v. Kiewest Co.*, 22 BRBS 115, 118 (1989).

An ALJ abuses the discretion afforded him when his evidentiary rulings fail to protect the parties' due process rights. *See*, *e.g.*, *Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 31 BRBS 75, 79 (1997) (ALJ erred in failing to allow employer to cross-examine claimant or respond to his post-hearing affidavit concerning his diligent job search); *Cornell v. Lockheed Aircraft Int'l*, 23 BRBS 253, 259 (1990) (ALJ's failure to compel production of highly relevant evidence was so prejudicial as to result in a denial of due process). The right to procedural due process in an administrative proceeding encompasses a party's "meaningful opportunity to present [its] case" including presenting evidence and cross-examining witnesses. *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976); *see also Goldberg v. Kelly*, 397 U.S. 254 (1970); *see generally Richardson v. Perales*, 402 U.S.

389, 401-402 (1971). "The overriding concern is whether the procedure demonstrates integrity and fundamental fairness." *Feezor v. Paducah Marine Ways*, 13 BRBS 509, 511 (1981) (citing *Richardson*, 402 U.S. at 410).

In this case, the ALJ violated Employer's procedural due process rights by allowing Dr. Torry to provide both an independent psychiatric expert report and a rebuttal of Dr. O'Brien's report but limiting Dr. O'Brien to his psychiatric expert opinion without the opportunity for rebuttal. It is important to note the ALJ's Extension Order clearly limited Claimant's expert to a rebuttal opinion; thus, Dr. Torry's report exceeded the scope of the ALJ's Extension Order by providing both a rebuttal opinion and his own conclusions following an independent psychiatric evaluation of Claimant. Despite this defect, the ALJ permissibly exercised his broad evidentiary discretion in accepting Dr. Torry's report into evidence, even though Claimant's treating psychiatrist, Dr. Risteska, had also recently issued a psychiatric evaluation report. *Everson*, 33 BRBS at 152. Nevertheless, having admitted Dr. Torry's independent opinion, he was obligated to provide Employer with a "meaningful opportunity" to present rebuttal opinions. *Mathews*, 424 U.S. at 349; *Feezor*, 13 BRBS at 511. The ALJ fulfilled this obligation with respect to Dr. Isaacs, who had the opportunity to provide rebuttal testimony at the formal hearing. However, the ALJ arbitrarily denied Employer the same opportunity with respect to Dr. O'Brien by both precluding him from testifying and also excluding his rebuttal report. This error constitutes an abrogation of "fundamental fairness." *Feezor*, 13 BRBS at 509; *see also Mathews*, 424 U.S. at 349; *Richardson*, 402 U.S. at 401-402. By allowing Claimant to submit two affirmative medical reports (the reports of Drs. Risteska and Torry) based on examinations of Claimant and review of related records, as well as rebuttals of *both* the reports of Drs. Isaacs and O'Brien (in essence two rebuttal reports) and allowing Employer to submit two affirmative reports but limiting its ability to submit rebuttal evidence in response to Claimant's reports,[17] he treated the parties unequally.

Moreover, ALJs are required to inquire fully into matters at issue and to receive into evidence all relevant and material testimony and documents. 20 C.F.R. §702.338; *see also* 33 U.S.C. §923(a); *Cornell*, 23 BRBS at 259; *Williams v. Marine Terminals Corp.*, 14 BRBS 728, 732 (1981); *Bachich v. Seatrain Terminals of California*, 9 BRBS 184, 186 (1978). In this case, the first issue the ALJ addressed was whether Claimant was able to prove, by a preponderance of the evidence, that he suffered a work-related psychological injury. The medical opinions of Claimant's and Employer's experts are clearly material and relevant to this issue. *Cornell*, 23 BRBS at 259; *Bachich*, 9 BRBS at 186. Therefore,

[17] Although Claimant chose to submit rebuttal of two physicians' reports through the report of one physician, Dr. Torry, the ALJ provided no rationale for restricting Employer to presenting its rebuttal through the report or testimony of only one physician.

the ALJ erred in refusing to admit and consider Dr. O'Brien's rebuttal opinion, which Employer submitted as EX 22.[18]

The ALJ explained that the exclusion of Dr. O'Brien's report was warranted in order to avoid duplicative or cumulative evidence and because it exceeded the scope of what he allowed Dr. Torry to review. Exclusion Order at 5-6. Neither of these reasons for prohibiting Dr. O'Brien from testifying and excluding EX 22 are supportable under the circumstances presented. Although an ALJ does have authority to limit "the number of expert or other witnesses" in order to avoid "unnecessary proof and cumulative evidence," *see* 29 C.F.R. §18.44(d)(4), he acknowledged that Dr. Torry's criticisms of Dr. O'Brien only partially overlapped with the criticisms he levied against Dr. Isaacs and that Dr. O'Brien's rebuttal report was only partially duplicative of Dr. Isaacs's testimony. Exclusion Order at 5-6. The ALJ therefore abused his discretion by prohibiting Employer from providing new evidence that was both material and relevant to the fundamental issue of the cause of Claimant's alleged injury, especially considering he could have taken less restrictive steps to prevent cumulative evidence.[19] *See Champion v. S & M Traylor Bros.*, 14 BRBS 251, 255 (1982) ("[T]he duty to fully inquire is violated where the administrative law judge fails to inquire into matters fundamental to the disposition of the issues in a case."); *see also Patterson v. Omniplex World Services*, 36 BRBS 149, 152 (2003); *Hansen v. Container Stevedoring Co.*, 31 BRBS 155, 160 (1997); *Ramirez*, 25 BRBS at 264.

The ALJ also found excluding EX 22 was warranted because it exceeded the scope of what he had allowed Claimant's expert, Dr. Torry, to review. Exclusion Order at 6. While the ALJ explained he permitted the extended discovery time for Dr. Torry to respond to Employer's expert's report, he limited Dr. Torry's response to addressing Dr. O'Brien's "conclusions, basis for conclusions, propriety of the examination, and the adequacy of [his] credentials." Extension Order at 2. However, in EX 22 (which the ALJ reviewed prior to deciding to exclude it), the ALJ found Dr. O'Brien indicated he had reviewed Dr. Torry's report and "another '573 pages of pdf review.'"[20] The ALJ noted this review covered "far

[18] We note the record was still open on June 16, 2022, when Employer moved for EX 22 to be admitted into the record, although the deadline for submission of trial exhibits had expired.

[19] For instance, the ALJ could have limited Dr. O'Brien's hearing testimony to addressing only how his opinion differed from Dr. Isaacs, particularly with respect to Dr. Torry's criticisms of his testing methods, something Dr. Isaacs lacked the authority and expertise to address. Alternatively, he could have admitted EX 22 but given no weight to those portions of the report he found duplicated Dr. Isaacs's testimony.

[20] The ALJ acknowledged that Dr. O'Brien's invoice indicated he reviewed only 373 pages. Exclusion Order at 6.

more than Dr. Torry's 32-page report," thereby suggesting Dr. O'Brien's rebuttal report should have been limited to review of Dr. Torry's report alone. Exclusion Order at 6.

What the ALJ did not acknowledge, however, is that Dr. Torry's rebuttal report indicated he also reviewed documents beyond just Dr. O'Brien's report and test results and that those documents included Claimant's pre-employment physicals, Dr. Risteska's records, Dr. Isaacs's report and a translated transcript of Dr. Isaacs's evaluation of Claimant, Claimant's temporary employment contract, Claimant's statement of stressful events during his employment, and Claimant's deposition transcript. CX 7 at 2. As for Dr. O'Brien's review, the ALJ noted Employer's letter to the psychiatrist asked that he look at the following documents in anticipation of preparing EX 22: Dr. Risteska's notes, Dr. Torry's report, and translations from Dr. O'Brien's examination of Claimant. Exclusion Order at 6 n.4. All of these are items that Dr. Torry also reviewed. Regardless of the number of pages Dr. O'Brien reviewed, the ALJ failed to explain why Dr. O'Brien should not be allowed to review the documents that Dr. Torry considered so that he had the same knowledge base for understanding Claimant's current medical condition and responding to Dr. Torry's criticisms about Dr. O'Brien's testing procedures – especially when Dr. Torry was permitted to do so and based his rebuttal opinion on them. Therefore, excluding Dr. O'Brien's rebuttal report is arbitrary and an abuse of discretion. *Ramirez*, 25 BRBS at 264; *Cornell*, 23 BRBS at 259.

More significant, however, is the ALJ's improper reliance on Dr. Torry's criticisms to discredit Dr. O'Brien's opinion when he did not give Dr. O'Brien an opportunity to respond. D&O at 26-27. For example, Dr. Torry criticized Dr. O'Brien for minimizing Claimant's recounting of the traumatic events he experienced while working in a war zone. CX 7 at 15. In turn, the ALJ found Dr. O'Brien failed to adequately explain why he did not consider Claimant's recollection of events in a war zone to be life-threatening. D&O at 27. Dr. Torry's most significant criticisms against Dr. O'Brien's evaluation involved Dr. O'Brien's testing of Claimant – how it was administered, how it was translated, and how it was scored. HT I at 31-34; CX 7 at 18-22. Likewise, the ALJ found Dr. O'Brien's expert report to be of limited probative value because he failed to explain the objective testing he conducted "beyond stating the ultimate result of each test," how the results of each test factored into his conclusion, and "why he concluded that the tests were more reliable than Claimant's self-reporting, even though he conceded that these tests included at least some cultural bias." D&O at 27. The ALJ's assessment of Dr. O'Brien's opinion echoed the criticisms leveled by Dr. Torry. Considering that only Dr. O'Brien could have addressed Dr. Torry's criticisms of Dr. O'Brien's testing, the ALJ erred in not allowing

Employer to present Dr. O'Brien's response but then giving Dr. O'Brien's opinion less weight based on Dr. Torry's unanswered criticisms.

The ALJ's evidentiary rulings violated procedural due process and 20 C.F.R. §702.338 because he arbitrarily excluded one party's evidence from the record on a fundamental issue in this case. *Ion*, 31 BRBS at 79; *Ramirez*, 25 BRBS at 264. Further, the ALJ deprived Employer of a meaningful opportunity to present its case by refusing to give it the opportunity to respond to criticisms leveled against its expert by Claimant's expert, Dr. Torry. He compounded this error by then also faulting Employer's expert for his lack of providing a similar explanation. *Mathews*, 424 U.S. at 349; *Cornell*, 23 BRBS at 259; *Feezor*, 13 BRBS at 511.

Consequently, we reverse the ALJ's exclusion of Dr. O'Brien's testimony and report in response and vacate the award of benefits. On remand, the ALJ should re-open the record to allow Dr. O'Brien to respond to Dr. Torry's criticisms of his evaluation and report. The ALJ should then re-weigh the medical evidence to determine if Claimant proved, by a preponderance of the evidence, that he suffered a work-related psychological injury.

In re-weighing the evidence, the ALJ also should address Employer's request for the ALJ to draw an adverse inference against Claimant and Dr. Risteska due to their choosing not to testify.[21] Although the ALJ acknowledged Employer's request for such an adverse inference, he did not explicitly deny it or explain his reasons for not drawing such an adverse inference. D&O at 23. This is a violation of the APA. 5 U.S.C. §557(c)(3)(A); *see also* 20 C.F.R. §702.348. Due to the ALJ's silence, the ALJ apparently rejected Employer's argument; however, given the lack of any discussion or explanation of this apparent finding, it is not possible to determine whether it is supported by substantial evidence and in accordance with the law. *Gremillion v. Gulf Coast Catering Co*., 31 BRBS 163, 168 (1997); *McCurley*, 22 BRBS at 119-120; *see also Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 701 (2d Cir. 1982).

Because the ALJ could again conclude on remand that Claimant established he suffered a work-related psychological injury, we will address, for the sake of efficiency, the remainder of Employer's arguments on appeal.

[21] On appeal, Employer argues the ALJ violated the APA by failing to explain his not drawing an adverse inference against Claimant and Claimant's treating physician for their choosing not to testify. ER Br. at 3, 40-42. In his response, the Director took no position on this issue. Dir. Resp. at 2, 6 n.1, 16.

Alleged Violations of the Administrative Procedure Act

Employer contends the ALJ violated Section 557 of the APA by failing to discuss relevant evidence or reject contradictory evidence when evaluating Claimant's credibility, in calculating Claimant's AWW, in determining the extent of Claimant's disability, and in evaluating the timeliness of Claimant's claim. ER Br. at 2-4, 6, 43-52, 56-59. The Director and Claimant respond, urging affirmance.[22]

The APA, as incorporated into the Longshore Act by 30 U.S.C. §919(d), requires every adjudicatory decision "include a statement of…findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record…." 5 U.S.C. §557(c)(3)(A). An ALJ's failure to independently analyze and discuss evidence violates the APA's requirement for a reasonable analysis. *Gelinas v. Electric Boat Corp.*, 45 BRBS 69, 71-72 (2011).

In this case, we agree with Employer that the ALJ violated the APA when calculating Claimant's AWW, determining the extent of his disability, and determining the timeliness of his claim, as there is no indication within the ALJ's Decision and Order that he considered certain evidence relevant to each of these issues or explained why he rejected such evidence. *Gelinas*, 45 BRBS at 71-72. For instance, in calculating Claimant's AWW, the ALJ did not discuss Claimant's actual earnings during the year preceding his alleged injury, a key component of an AWW finding, or explain why he did not consider them.[23]

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[22] The Director addressed the ALJ's alleged violations when discussing AWW, the extent of Claimant's disability, and the timeliness of Claimant's claim. Dir. Resp. at 8-11, 15-16. The Director took no position with respect to the ALJ's analysis of Claimant's credibility. *Id*. at 2, 16.

[23] The Director maintains a claimant's actual earnings are not necessarily controlling when calculating AWW under Section 10(c) and that the ALJ appropriately used his discretion to calculate Claimant's AWW based on his contracted rate. Dir. Resp. at 8-9 (citing *Proffitt v. Service Employers Internat'l, Inc.*, 40 BRBS 4 (2006)). Claimant argues that of the two methods for calculating AWW presented to the ALJ, he rationally rejected Employer's position that Claimant's AWW was $0 (based on Claimant's resignation for reasons unrelated to his alleged work-related disability) and instead credited Claimant's argument in favor of an AWW based on his contracted rate. Cl. Resp. at 12-13. In addition, Claimant maintains the ALJ was under no obligation to use a potential third method of calculating Claimant's AWW – his actual pre-injury earnings – especially considering the dubious origin of the wage statement that Employer submitted as EX 4. *Id*. at 13.

We disagree. While the ALJ does have broad discretion in calculating a Claimant's AWW, *Fox v. West State Inc.*, 31 BRBS 118, 123 (1997), and while actual earnings are not

D&O at 35-37; EX 4; *see* 33 U.S.C. §910. Moreover, although the ALJ acknowledged Claimant's testimony about his employment since returning to Macedonia, *id*. at 5, he did not address it when determining the extent of Claimant's disability or explain why he considered it irrelevant to the issue of Claimant's employability, *id*. at 31-32.[24] Finally, in determining the timeliness of the claim, there is no indication the ALJ considered relevant evidence about Claimant's condition and diagnosis contained in Dr. O'Brien's opinion or explained why he disregarded this evidence.[25] D&O at 33-34; *see* EX 16 at 19. While

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necessarily controlling when calculating AWW under Section 10(c), *Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104, 109 (1989), the plain language of Section 10(c) requires an ALJ to at least give "regard to the previous earnings of the injured employee in the employment in which he was working at the time of injury." 33 U.S.C. §910(c); *see Hall v. Consol. Emp't Sys., Inc.*, 139 F.3d 1025, 1031 (5th Cir. 1998) ("It will be an exceedingly rare case where the claimant's earnings at the time of injury are wholly disregarded as irrelevant, unhelpful, or unreliable."). Thus, while it is within the ALJ's authority and discretion to disregard a claimant's actual earnings in favor of a more reasonable approximation of his pre-injury earning capacity, the ALJ must at least acknowledge the claimant's actual earnings and explain his reasons for disregarding them in his AWW calculation. *Hall*, 139 F.3d at 1031.

[24] The Director argues the ALJ appropriately found Claimant established a prima facie case of total disability and that Employer failed to rebut it. Dir. Resp. at 11. According to the Director, the ALJ noted Claimant worked intermittently post-injury (*see* D&O at 5), but Employer did not offer any labor market research or evidence of suitable alternate employment. Dir. Resp. at 11. Claimant also responds but merely adopts the Director's argument. Cl. Resp. at 13. Employer replies, maintaining the evidence of Claimant's post-employment work may meet its burden to rebut total disability, but the ALJ erred by failing to even consider it. ER Reply to Dir. at 5-6.

Employer's argument has merit. The record contains evidence that Claimant was involved in some post-injury employment upon his return to North Macedonia in 2011. CX 2 at 48-50, 90; CX 7 at 3, 7; CX 14 at 13, 31, 43; CX 17 at 7; EX 14 at 7, 9, 17; EX 16 at 4; EX 20 at 13-14. While the ALJ acknowledged Claimant performed some work after his return home, D&O at 5, it is not clear whether he considered this evidence in determining the extent of Claimant's disability, i.e., his post-injury employability or, if he did consider it, why he rejected it. *Gelinas*, 45 BRBS at 71-72

[25] The Director maintains the ALJ's failure to mention Dr. O'Brien's opinion on Claimant's awareness of the connection between his psychiatric condition and his employment did not violate the APA as he found Dr. O'Brien's report lacked probative value. Dir. Resp. at 16. Rather, the Director argues the ALJ rationally and adequately

ALJs are not required to "scour the record," they are required to consider all relevant law and evidence needed to reach their determinations. *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184, 187 (1988). Failure to do so makes it impossible for the Board to apply its standard of review. *Id*.

In sum, after reweighing the medical evidence on remand, if the ALJ finds Claimant establishes he suffered a work-related psychological injury, the ALJ should fully address the relevant evidence when determining Claimant's AWW, the extent of his disability, and the timeliness of his claim.

Employer also contends the ALJ violated the APA in evaluating Claimant's credibility. ER Br. at 2-3, 43-48. It argues the ALJ failed to address inconsistencies in Claimant's testimony that it pointed out in its post-hearing brief regarding Claimant's report of his symptoms and post-deployment work. Instead, it asserts the ALJ generally found the discrepancies were "within the expected range of variance" and, therefore, insufficient to discredit Claimant's testimony.[26] ER Br. at 44-46; D&O at 24.

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explained his findings as to the timeliness of the claim, which are supported by substantial evidence. *Id*. Claimant also replies, arguing the standard for determining awareness for purposes of the timeliness of the claim includes a claimant's awareness of the permanent loss of his wage-earning capacity, and therefore because Dr. O'Brien did not address that element, the ALJ's failure to mention his opinion is irrelevant. Cl. Resp. at 19. Despite such awareness being a legal issue for the ALJ to decide, Dr. O'Brien's opinion contained material evidence relevant to assessing the date of Claimant's awareness and therefore the ALJ should have, at the very least, indicated that he considered it and how he addressed it. 5 U.S.C. §557(c)(3)(A); *Gelinas*, 45 BRBS at 71-72.

[26] Employer argues the ALJ incorrectly relied on the holding in *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684 (5th Cir. 1999), for his finding that "[i]nsignificant discrepancies, or discrepancies that fall within the expected range of variance, do not necessarily discount a claimant's credibility." D&O at 23. It asserts *Prewitt* had nothing to do with credibility but rather addressed whether inconsistencies within a claimant's testimony were sufficient to rebut the Section 20(a) presumption. ER Br. at 46.

We disagree. In *Prewitt*, the United States Court of Appeals for the Fifth Circuit upheld the Board's affirmance of an ALJ's finding that the claimant invoked the Section 20(a) presumption despite some inconsistencies in her statements about her accident and symptoms. *Prewitt*, 194 F.3d at 691. It is important to note that in cases arising under the jurisdiction of the Fifth Circuit, such as *Prewitt*, an ALJ is allowed to consider credibility prior to the weighing stage of the Section 20(a) analysis. *Bis Salamis, Inc. v. Director,*

Contrary to Employer's arguments, the ALJ did address the inconsistencies and discrepancies in Claimant's testimony. D&O at 23-24. He noted Employer's contentions regarding the variations in Claimant's self-reported symptoms and acknowledged "some details of Claimant's self-reporting have varied." *Id*. Nevertheless, the ALJ found Claimant's testimony was "largely consistent," particularly as to his description of the "incidents he experienced while working in a war zone, the onset of his symptoms, and his treatment." *Id*. at 24. Given the broad discretion accorded ALJs in making credibility determinations, *Sealand Terminals v. Gasparic*, 7 F.3d 321, 323 (2d Cir. 1993), as well as the Board's refusal to interfere with those determinations unless they are "inherently incredible or patently unreasonable," *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335 (9th Cir. 1978), we reject Employer's argument that the ALJ violated the APA with regard to his credibility assessment.

Nature of Disability – Maximum Medical Improvement

Employer contends the ALJ's MMI determination is not supported by any medical opinion but, rather, constitutes pure speculation and cannot stand. ER Br. at 52-54. Claimant responds, urging affirmance; the Director did not address this issue. Cl. Resp. at 13; Dir. Resp. at 2, 16.

The ALJ found Dr. Torry opined Claimant's condition had reached MMI, but did not indicate when. D&O at 30; *see* CX 7 at 29-30. He further found Dr. Risteska did not explicitly address MMI but stated in her May 17, 2022 report that she did "not expect any significant improvements in the disorder, nor any immediate cure." *Id*. (citing CX 5 at 48). The ALJ therefore found:

> Based on Dr. Risteska's summary of Claimant's current condition and her belief that Claimant continues to need treatment, I interpret Dr. Risteska's opinion as indicating that Claimant reached MMI, at least as of May 17, 2022.

OWCP [Meeks], 819 F.3d 116, 127 (5th Cir. 2016). This case arises within the Second Circuit, where an ALJ's assessment of a claimant's credibility must occur at the weighing stage of the Section 20(a) analysis. *Rose v. Vectrus Systems Corp.*, 56 BRBS 27 (2022) (en banc), *vacating on recons.* 55 BRBS 69(UBD) (2021) (unpublished). Regardless, *Prewitt* addressed and upheld an ALJ's credibility assessment in determining whether the claimant established a work-related injury. Thus, the ALJ's reliance on the holding in *Prewitt* in evaluating Claimant's credibility in this case was not misplaced.

Id.

A claimant's condition has reached MMI when he is no longer undergoing treatment to improve that condition or his condition is of a lasting and indefinite duration and beyond a normal healing period. *See Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 605 (5th Cir. 2004); *Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 126 (5th Cir. 1994); *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *see also McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9, 12 (2000). If a physician believes further treatment should be undertaken, then the possibility of improvement exists; even if, in retrospect, the treatment was unsuccessful, MMI does not occur until the treatment is complete. *Methe*, 396 F.3d at 605-606.

Employer's argument challenging the ALJ's finding is premised on the assumption that no physician expressly stated Claimant's condition has reached MMI.[27] ER Br. at 53. But Dr. Torry expressly opined, in a statement both underlined and italicized, that Claimant "*has reached maximum medical improvement for his psychiatric injury*." CX 7 at 30. Thus, the ALJ permissibly and reasonably relied on Dr. Torry's explicit MMI finding and Dr. Risteska's opinion to find Claimant's psychiatric condition reached MMI on May 17, 2022. *Abbott*, 40 F.3d at 126; *Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98, 100 (2005); *Ezell v. Direct Labor*, 33 BRBS 19, 24 (1999). Consequently, after reconsidering the medical evidence on remand, if the ALJ finds that Claimant has a work-related psychiatric condition, we affirm his finding that this condition reached MMI on May 17, 2022.

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[27] *See* the following statements in Employer's Petition for Review:

"[N]either of the Claimant's physicians, Dr. Torry and Dr. Risteska, affirmatively stated that the Claimant reached MMI…." ER Br. at 53.

"While the Claimant asserted that Dr. Torry informed him that he reached MMI, Dr. Torry's records fail to mention that the Claimant reached MMI…. Rather, Dr. Torry's records indicate that the Claimant's condition 'has improved and stabilized.'" *Id*.

"…nothing in Dr. Torry's records show that he ever offered an opinion on MMI expressly…." *Id*.

Calculation of Interest

The ALJ ordered Employer to pay interest on all past due compensation, computed from the date each payment was originally due, using an interest rate based on the 52-week United States Treasury bill yield pursuant to 28 U.S.C. §1961, to be determined as of the filing date of the Decision and Order. D&O at 38-39. Employer insists an assessment of interest on unpaid past-due compensation is not statutorily authorized, and even if it was, it should not be assessed at current rates. ER Br. at 55.

We reject Employer's argument. Although there is no express provision in the Act for the payment of interest on past-due compensation, United States Courts of Appeals and the Board have uniformly approved interest awards as consistent with the Congressional purpose of ensuring claimants receive the full amount of compensation due. *See Matulic v. Director, OWCP,* 154 F.3d 1052, 1059 (9th Cir. 1998); *Sproull v. Director, OWCP*, 86 F.3d 895, 900-901 (9th Cir. 1996); *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 625 (9th Cir. 1991), *aff'g Vanover v. Foundation Constructors, Inc.,* 22 BRBS 453 (1989); *see also Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 907-908 (5th Cir. 1997); *Sea-Land Service, Inc. v. Barry*, 41 F.3d 903, 910-911 (3d Cir. 1994), *aff'g* 27 BRBS 260, 265 (1993); *Grant v. Portland Stevedoring Co.*, 16 BRBS 267, 269-270 (1984), *modified on recons.*, 17 BRBS 20 (1985).

While cases under the Act generally involve pre-judgment interest, *i.e.,* interest that accrues on unpaid benefits during the period prior to the issuance of the ALJ's Decision and Order, *see Matulic,* 154 F.3d at 1059; *Jones v. U.S. Steel Corp.,* 25 BRBS 355, 359 (1992), the Board held in *Grant* that 28 U.S.C. §1961 is to be used as a guide in determining the proper interest rate applicable when awarding interest on past-due compensation under the Act. *Grant,* 16 BRBS at 270-271, *modified on recons.,* 17 BRBS at 22-23.[28] The Board has since consistently utilized Section 1961 for guidance in determining interest rates under the Act in accordance with its holding in *Grant. See B.C. [Christensen] v. Stevedoring Services of Am.*, 41 BRBS 107, 112 (2007); *Santos v. General Dynamics Corp.,* 22 BRBS 226, 228 (1989); *see also Meardry v. Internat'l Paper Co.,* 30 BRBS 160, 164 n.3 (1996); *Brown v. Alabama Dry Dock & Shipbuilding Corp.,* 28 BRBS 160, 163 (1994). Employer

[28] In utilizing 28 U.S.C. §1961 for guidance in determining interest rates for awards of pre-judgment interest under the Act, the Board was cognizant that Section 1961 is a post-judgment interest provision, applicable by its terms to awards of post-judgment interest on United States district court judgments. *See Grant,* 16 BRBS at 271. In its decision on reconsideration in *Grant,* the Board explained that because there is no general federal statute providing for pre-judgment interest on judgments of the United States district courts, Section 1961 represented the most appropriate guide to employ. *Grant*, 17 BRBS at 23 n.4.

has provided no legal support that would warrant overturning long-standing Board precedent, nor suggested an alternate means to calculate the interest rate. *See Bonner v. Ryan-Walsh Stevedoring Co.*, 15 BRBS 321, 325 (1983) (the Board will not address an inadequately briefed issue). Therefore, after reweighing the medical evidence on remand, if the ALJ finds Claimant has a work-related psychological injury, we affirm the ALJ's award of interest.

Foreign Testimony

Finally, Employer relies on an argument in a brief the Director filed in a different case to argue that all parts of the ALJ's decision based on foreign testimony should be vacated because there is no evidence the testimony was obtained in accordance with North Macedonian law. ER Br. at 55-56. Despite acknowledging the Board rejected that argument when reaching its holding in that case, *Sylejmani v. Fluor Conops, Ltd.*, 57 BRBS 25 (2023), Employer asserts the ALJ's reliance on foreign testimony in this case warrants reversal of his decision. Specifically, it argues "there is no evidence that a commissioner was appointed under the Hague Evidence Convention to assist in the Claimant's deposition, nor any indication it was taken in a manner consistent with the laws of North Macedonia…." ER Brief at 56. The Director, to the contrary, argues Claimant filed a certificate of foreign evidence establishing the testimony and documents were obtained legally and therefore do not violate North Macedonian law. Dir. Brief at 14.

In *Sylejmani*, the Board held a party who fails to object to the admission of foreign testimony when it is offered waives that objection on appeal. *Sylejmani*, 57 BRBS at 28-29. As it is undisputed Employer voiced no objection to Claimant's deposition testimony either during the deposition or upon submission of the testimony as an exhibit for the ALJ to consider, Employer is precluded from raising this objection for the first time on appeal. *Id*.

Summary

We vacate the ALJ's award of benefits and his findings on the timeliness of the claim, AWW, and the extent of Claimant's injury, and we remand the case for the ALJ to re-open the record and reweigh the medical evidence in accordance with this decision – including addressing Employer's request for him to draw an adverse inference against Claimant and Dr. Risteska. If the ALJ finds on remand that Claimant has a work-related psychological injury, he must consider and evaluate all relevant evidence of record and adequately explain his reasoning in deciding the issues of the timeliness of notice, timeliness of the claim, the calculation of Claimant's AWW, and the extent of his post-

injury disability. In all other respects, we affirm the ALJ's Decision and Order Awarding Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge