U.S. Department of Labor

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

BRB No. 24-0340

EMIL KJUSHTEROV Claimant-Petitioner v. GLOBAL INTEGRATED SECURITY and AMERICAN HOME ASSURANCE COMPANY Employer/Carrier-Respondents	)	**NOT-PUBLISHED** DATE ISSUED: 05/15/2026 DECISION and ORDER

Appeal of the Decision and Order of Patrick M. Rosenow, District Chief Administrative Law Judge, United States Department of Labor.

Brian E. Gillette, Jason Gillette, and Kali Guttman (The Gillette Law Firm), Sugar Land, Texas, for Claimant.

Dana Ladner and Rachel Miller (Schouest, Bamdas, Soshea, BenMaier, & Eastham, PLLC), Houston, Texas, for Employer and its Carrier.

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

PER CURIAM:

Claimant appeals District Chief Administrative Law Judge (ALJ) Patrick M. Rosenow's Decision and Order (2021-LDA-05522) 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). The Benefits Review Board must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[1] 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 361-362 (1965).

Claimant sustained psychological injuries while working for Employer in Afghanistan as a security defense consultant from 2012 until 2014. Claimant's Exhibit (CX) 6 at 17-18, 21-22. The ALJ found Claimant invoked the Section 20(a) presumption, 33 U.S.C. §920(a), linking his psychological injuries to his work for Employer and that Employer and its Carrier (Employer) failed to rebut the presumption. Consequently, he found Claimant's psychological injury is work-related as a matter of law and awarded medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907. However, the ALJ found Claimant failed to establish a prima facie case of total disability because he did not establish an inability to perform his usual employment. Thus, the ALJ denied disability benefits.

On appeal, Claimant contends the ALJ erred in finding he failed to establish a prima facie case of total disability.[2] Employer responds in support of the ALJ's decision.

Nature and Extent of Disability

The Act defines disability as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. §902(10). To establish a prima facie case of total disability, a claimant must demonstrate an inability to perform his usual employment due to his work injury. *Bumble Bee Seafoods v. Director, OWCP* [*Hansen*], 629 F.2d 1327, 1328-1329 (9th Cir. 1980); *Manigault v. Stevens Shipping Co.*, 22 BRBS 332, 333 (1989). "Usual" employment involves the employee's regular duties at the time that he was injured. *Manigault*, 22 BRBS at 333. In determining whether a claimant can return to his usual work, the ALJ must compare the claimant's medical restrictions with the specific physical

[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); *Glob. Linguist Sols., LLC v. Abdelmeged*, 913 F.3d 921, 922 (9th Cir. 2019); *see also McDonald v. Aecom Tech. Corp.*, 45 BRBS 45, 47 (2011).

[2] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established a work-related psychological injury and the award of medical benefits under Section 7 of the Act. *See Scalio v. Ceres Marine Terminals, Inc*., 41 BRBS 57, 58 (2007); D&O at 7-9, 12.

requirements of his usual employment. *See Obadiaru v. ITT Corp.*, 45 BRBS 17, 21 (2011).

The ALJ acknowledged Claimant's usual employment in a war zone required him to wear protective gear, carry weapons, and secure a military base and its perimeter. Decision and Order (D&O) at 5-6; CX 6 at 20-21. He also recognized Claimant was routinely exposed to gunfire, explosions, blood, injuries, and death. D&O at 5-6; CX 6 at 35-46. The ALJ then considered Claimant's testimony, his treatment record, and the medical opinion of Dr. Aaron Hervey, a neuropsychiatrist retained by Employer, regarding Claimant's work restrictions. D&O at 9-12. Claimant testified that his treating neuropsychiatrist, Dr. Ristro Ljapcev, gave him work restrictions, but he could not remember them. CX 6 at 26, 28. The ALJ noted the record demonstrated an "extended course of treatment" with Dr. Ljapcev who concluded Claimant "is unable to work at military bases" or "for work at the military bases." D&O at 10-11; CX 2 at 8, 14, 17, 21, 39, 47, 50, 53, 63, 87, 89, 93, 101, 104. Meanwhile, Dr. Hervey opined Claimant can return to his usual employment because "a diagnosis could not be confirmed." Hearing Exhibit (HX) 2 at 8.

The ALJ discredited Claimant's testimony because he appeared to "have forgotten" the nature of his work restrictions, there were inconsistencies about his post-deployment work, and Dr. Hervey identified Claimant's inconsistent symptom reporting. D&O at 9-10. Thus, the ALJ gave Claimant's testimony "little evidentiary weight" because the "many inconsistencies within it inspire no confidence in his power to recall" or "accurately share what happened to him." *Id.* at 10. He also gave little weight to Claimant's treatment record because, although it repeatedly mentioned Claimant is "unable to work at . . . military bases," he found it lacked more specific explanation and was "devoid of any psychological testing, discussion of applicable diagnostic standards, longitudinal evaluations, or meaningful extended treatment plans." *Id.* at 10-11. In contrast, he gave great weight to Dr. Hervey's opinion because it was "reliable" and "clear that Claimant has no limitations and has no condition from which he requires treatment to improve." *Id.* at 11-12. Therefore, the ALJ determined Claimant failed to establish he is unable to perform his usual employment. *Id.* at 12.

Initially, we agree with Claimant's assertion that the ALJ's disability finding cannot be affirmed. Claimant's Br. at 29-34. While the ALJ is entitled to evaluate the credibility of witnesses, accept parts of a witness's testimony while rejecting other parts, and draw his own inferences and conclusions from the evidence, the Board is not bound to accept an ultimate finding or inference if it was reached in an invalid manner or is not supported by substantial evidence. *Howell v. Einbinder*, 350 F.2d 442, 444 (D.C. Cir. 1965); *Director, OWCP v. Bethlehem Steel Corp.* [*Roberson*], 620 F.2d 60, 64 (5th Cir. 1980); *Goins v. Noble Drilling Corp.*, 397 F.2d 392, 394 (5th Cir. 1968); *see also Pietrunti v. Director,*

OWCP, 119 F.3d 1035, 1042 (2d Cir. 1997); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403, 405 (2d Cir. 1961). A finding lacking the support of substantial evidence is not in accordance with law and must be set aside. *Director, OWCP v. Gen. Dynamics Corp.* [*Fantucchio*], 787 F.2d 723, 725 (1st Cir. 1986).

In this case, the ALJ found Claimant has a work-related psychological injury as a matter of law because Dr. Hervey's opinion did not rebut the Section 20(a) presumption.[3] D&O at 9. However, he then gave great weight to Dr. Hervey's opinion that Claimant can return to his usual employment because he has no condition.[4] *Id.* at 11-12. This finding is not rational. Because we have affirmed the ALJ's finding that Claimant has a work-related psychological injury as unchallenged, *see* n.2 *supra,* Dr. Hervey's opinion that Claimant has no work restrictions rests upon the erroneous premise that Claimant does not have a work-related injury. HX 2 at 8. As Dr. Hervey provided no other reason to support his opinion that Claimant has no work restrictions, his opinion cannot be the basis for concluding Claimant did not establish a prima facie case of total disability.[5] *Fantucchio*, 787 F.2d at 725; *Goins*, 397 F.2d at 394.

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[3] Specifically, the ALJ found Dr. Hervey "unambiguously opine[d] that Claimant has significant distress associated with exposure to traumatic events while working in a war zone." D&O at 8-9. Dr. Hervey stated that while no diagnoses "are made at the present," "[t]his is not to say that the Claimant does not have significant distress associated with exposure to traumatic events while working in a war zone." HX 2 at 6. The ALJ recognized Dr. Hervey's use of double negatives (i.e., "not to say" and "does not have") and found, "[d]ivested of the double negative," Dr. Hervey conceded Claimant has significant work-related distress. D&O at 8-9.

[4] Dr. Hervey opined Claimant "is capable of returning to his job . . . because a diagnosis could not be confirmed." HX 2 at 8. The ALJ found Dr. Hervey's opinion "clear[ly]" indicates Claimant can return to his usual employment because he "has no condition." D&O at 12.

[5] We are not persuaded by Claimant's argument that he should be presumed totally disabled because Employer failed to rebut the Section 20(a) presumption. Claimant's Br. at 18-26. Contrary to Claimant's contention, the Board has long held that while the Section 20(a) presumption applies to the issue of whether the claimant's disability is work-related, it does not aid the claimant in establishing the nature and extent of his disability. *Jones v. Genco, Inc.*, 21 BRBS 12, 15 (1988); *Holton v. Indep. Stevedoring Co*., 14 BRBS 441, 433 (1981); *Duncan v. Bethlehem Steel Corp*., 12 BRBS 112, 199 (1979). Therefore, the claimant must establish the nature (temporary or permanent) and extent (total or partial) of his disability under Section 8 of the Act without benefit of a presumption. The Board has

Further, we agree with Claimant's assertion that, contrary to the ALJ's findings, the record contains medical evidence, in addition to Claimant's testimony, which, if accepted, could establish he is unable to perform his usual employment. *See generally Curit v. Bath Iron Works Corp.*, 22 BRBS 100, 103 (1988); *Hansen*, 629 F.2d at 1328-1329; *Manigault*, 22 BRBS at 333; Claimant's Br. at 30-32. Although Claimant could not recall what work restrictions his treating physician recommended, he testified that Dr. Ljapcev "actually gave [him] restrictions." CX 6 at 28. Claimant's treatment record indicated that during his first visit, Dr. Ljapcev stated Claimant showed difficulty concentrating and communicating, headaches, rapid heartbeat, sweating, insomnia, and nightmares. CX 2 at 29. His treatment record also consistently indicated Claimant's psychological symptoms of anxiety, irritability, sleep problems, and nightmares persisted with no improvement over several years. *Id.* at 1-109. On January 20, 2022, the treatment record indicated Claimant was "provoked" by fireworks before the holidays causing him to experience anxiety with aggression, fear, and insecurity. *Id.* at 41, 50. They also consistently indicated his diagnosis of post-traumatic stress disorder (PTSD) and insomnia, his medical treatment for those diagnoses, and that he is "incapable," "unfit," and "unable," "to work at military bases." *Id.* at 2, 5, 8-109. Therefore, because the ALJ's crediting of Dr. Hervey's opinion affected his weighing of Claimant's evidence, we vacate the ALJ's finding that Claimant did not establish a prima facie case of total disability and remand the case for further consideration, disregarding Dr. Hervey's unsupported opinion. *See Hansen*, 629 F.2d at 1328-1329; *Howell*, 350 F.2d at 444; *Fantucchio*, 787 F.2d at 725; D&O at 12.

Remand Instructions

On remand, the ALJ must reconsider Claimant's credibility and treatment record, disregarding Dr. Hervey's unsupported opinion, to determine whether Claimant has any limitations which affect his ability to return to his usual employment and then compare those limitations with the requirements of his usual employment. *See Hansen*, 629 F.2d at 1328-1329; *Obadiaru*, 45 BRBS at 21; *White v. Peterson Boatbuilding Co*., 29 BRBS 1, 13 (1995). If the ALJ finds Claimant established a prima facie case of total disability, he must then address the remaining issues regarding the nature and extent of Claimant's disability and any other remaining disputed issues.[6] *See Gacki v. Sea-Land Serv., Inc.*, 33

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stated that a claimant is fully able to muster evidence on this point. *See Brocato v. Universal Mar. Serv. Corp*., 9 BRBS 1073, 1074 (1978); *Davis v. George Hyman Constr. Co.*, 9 BRBS 127, 131 (1978); *Hunigman v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 141, 145 (1978).

[6] The ALJ's discussion of Claimant's work history after leaving his employment with Employer goes to the issue of diligence, which is reached only after a finding has been made on the availability of suitable alternate employment. *See Roger's Terminal &*

BRBS 127, 128 (1998); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 59 (1980). In making his determinations, the ALJ must explain the bases for his findings in accordance with the Administrative Procedure Act.[7] 5 U.S.C. §557(c)(3)(A).

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order and remand the case to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

GLENN E. ULMER
Administrative Appeals Judge

Shipping Corp. v. Director, OWCP [*Smith*], 784 F.2d 687, 691 (5th Cir.), *cert. denied*, 479 U.S. 826 (1986); D&O at 9-10.

[7] The Administrative Procedure Act, 5 U.S.C. §§500-591, requires that every adjudicatory decision include a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented…." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171, 172 (1996).