

Rodriguez v. Triple Canopy, Inc.: The Board Addresses Timeliness of a Psychological Injury Claim in a Defense Base Act Case

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Whether a psychological injury claim was timely filed is among the most prevalent and pressing issues, particularly in light of the high volume of such claims arising under the Defense Base Act (“DBA” or “the Act”), 42 U.S.C. § 1651, *et seq.* This article surveys published and unpublished decisions addressing this issue, as well as related topics.

Timely Claim under Section 13: General Background

Section 13 of the Longshore and Harbor Workers Compensation Act (“LHWCA”) governs the timely filing of a claim for compensation.¹ Section 20(b) provides claimant with a presumption that his or her claim was timely filed, in the absence of substantial evidence to the contrary.² In order to rebut the presumption, employer must produce evidence that the claim was not filed within the required time after claimant’s “awareness.”³

The applicable limitations period depends on whether claimant is seeking compensation for a traumatic injury or for an occupational disease. Section 13(a) states that, except as otherwise provided in this section, the right to compensation for disability or death shall be barred unless the claim is filed within one year after the injury or death. This time does 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.”⁴ In traumatic injury cases, the courts have held that an employee is not aware of an “injury” until he or she is aware of a work-related injury resulting in the likely impairment of his or her wage-earning capacity (“WEC”) or of the full character, extent, and impact of the harm done as a result of the work injury.⁵

¹ 33 U.S.C. § 913. The § 13 time limitation is jurisdictional in nature. *Dir., OWCP v. Nat. Van Lines Inc.*, 613 F.2d 972, 11 BRBS 298 (D.C. Cir. 1979). Section 13(b)(1) provides that the § 13(a) time limitation will not be a bar unless it is raised at the first hearing on the claim. 20 C.F.R. § 702.214. A claim for medical benefits is never time-barred. *Siler v. Dillingham Ship Repair*, 28 BRBS 38 (1994) (decision on recon. en banc).

² 33 U.S.C. § 920(b).

³ *Bath Iron Works Corp. v. U.S. Dept. of Labor [Knight]*, 336 F.3d 51, 37 BRBS 67(CRT) (1st Cir. 2003); *E.M. [Mechler] v. Dyncorp Int’l*, 42 BRBS 73 (2008), *aff’d sub nom. Dyncorp. Int’l v. Dir., OWCP*, 658 F.3d 133, 45 BRBS 61(CRT) (2d Cir. 2011); *Martin v. Kaiser Co., Inc.*, 24 BRBS 112 (1990) (Dolder, J., concurring in the result only). Because the “awareness” provisions are identical under §§ 12 and 13, the case law addressing this issue applies to both provisions.

⁴ 33 U.S.C. § 913(a).

⁵ This definition of “injury” originated in *Stancil v. Massey*, 436 F.2d 274 (D.C. Cir. 1970) (Claimant reasonably

Section 13(b)(2) provides a separate statute of limitations for claims for death or disability due to an occupational disease that does not immediately result in death or disability. Such claims are “timely if filed within two years after 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, or within one year of the date of the last payment of compensation, whichever is later.”⁶ Section 13(b)(2) explicitly requires “awareness” of the relationship between the disease, employment, and death or disability. Thus, in an occupational disease claim, the filing period does not begin to run until the employee is deceased or disabled, or in the case of a retired employee, until a permanent impairment exists.⁷

The Board has held that the date of a medical diagnosis of a work-related condition, while significant, is not controlling.⁸ It is not a statutory prerequisite to “awareness” for § 13 purposes, and thus it does not exclude a finding that claimant knew or should have known of the relationship between his or her injury and employment at an earlier date.⁹ Conversely, the mere diagnosis of a work-related condition and treatment for it does not commence the running of the statute of limitations; claimant must have “awareness” of a work-related injury and a loss of WEC.¹⁰ As

believed that he had suffered a back strain and that his pain would resolve; he thus had no basis for filing a claim until he was diagnosed with herniated discs years later). Early BRB decisions limited *Stancil* to facts demonstrating that claimant received a misdiagnosis or incorrect prognosis. Ultimately, the *Stancil* test was widely accepted without such limitations.

⁶ 33 U.S.C. § 913(b)(2).

⁷ 20 C.F.R. § 702.222(c).

⁸ See *Bezanson v. Gen. Dynamics Corp.*, 13 BRBS 928 (1981) (Miller, dissenting) (The Board rejected claimant’s argument that his date of awareness was based on his 1976 diagnosis of asbestosis. Medical diagnosis is irrelevant when it does not link the injury to the employment. The Board affirmed a date of awareness in 1974, when claimant submitted a written statement to employer indicating his awareness of the relationship between his work and his lung condition and the deputy commissioner advised him to file a claim.); *Geisler v. Columbia Asbestos, Inc.*, 14 BRBS 794 (1981) (Miller, dissenting) (The Board imputed awareness of a work-related condition to a claimant as of the day he submitted a medical history to his physician in 1975 that referred to a prior diagnosis of asbestosis. He also had x-ray changes consistent with those of asbestos workers, and he had a “suspicion” that he had asbestosis as early as 1971). These decisions modified *Stark v. Lockheed Shipbuilding & Constr. Co.*, 5 BRBS 186 (1976).

⁹ See *Geisler*, 14 BRBS 794. See also *Sun Shipbuilding & Dry Dock Co. v. McCabe*, 593 F.2d 234, 10 BRBS 614 (3rd Cir. 1979), *rev’g* 1 BRBS 509 (1975) (The Third Circuit stated that although the date on which a physician tells an employee that his injury is work related establishes a date no later than which the employee knew this fact, it does not exclude the possibility that the employee should have known of the relationship of the injury to the employment prior to that date. The test is not subjective, but objective, *i.e.*, the date claimant should have been aware.); *Patterson v. Savannah Machine & Shipyard*, 15 BRBS 38 (1982), *aff’d sub nom.*, *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988) (Claimant should have been aware of the connection between his disability, his disease, and his employment once he missed work because of his disease -- *i.e.*, once his disease resulted in economic effects).

¹⁰ See *Paducah Marine Ways v. Thompson*, 82 F.3d 130, 30 BRBS 33(CRT) (6th Cir. 1996) (claimant continued to work for several years following his recuperation from four separate work-related back injuries, and although he missed work temporarily and regularly experienced back pain, it was not until his herniated discs were diagnosed and he was unable to work that he was put on notice of a likely permanent impairment of his long-term WEC); *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98(CRT) (4th Cir. 1991) (Claimant was initially injured and treated for six months and then was able to work for 25 years, even though he had pain. Pain alone is not sufficient to provide “awareness,” and it was not until surgery was arranged that claimant knew that the injury would impair his WEC.). See also *Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130(CRT) (9th Cir. 1991) (The court disagreed with the Board’s prior interpretation that claimant’s awareness of a work-related injury that may diminish his WEC is relevant only in cases involving misdiagnosis or incorrect prognosis. Claimant relied on his doctor’s advice that his knee injury would heal, and was not aware of the full extent of his work injury until rest did not improve the

discussed below, the Board has applied this same principle in claims involving psychological injuries.¹¹ Furthermore, an initial period of temporary total disability does not necessarily establish that claimant was aware of the full nature of the injury, and thus the § 13 time period may not commence until a later date when claimant becomes aware of a permanent impairment.¹² Where claimant is misdiagnosed, *e.g.*, is told his condition is less serious or is not work-related, claimant is not “aware” until he receives a correct diagnosis.¹³

Section 30(f)¹⁴ provides that if employer has notice or knowledge of claimant’s work injury, the time for filing a claim is tolled until employer complies with § 30(a).¹⁵ Thus, in order to rebut the § 20(b) presumption that the claim was timely filed, an employer must establish it complied with § 30(a), if applicable.¹⁶

Psychological Injury as an Occupational Disease vs. Traumatic Injury

Whether a psychological injury is an occupational disease or a traumatic injury within the meaning of the Act is a question of fact; if disputed, this issue is for an ALJ to resolve based on the circumstances of the case. In *Gindo v. Aecon Nat’l Sec. Programs, Inc.*, 52 BRBS 51, 53-55 (2018), *vacated on other grounds and remanded sub nom. Gindo v. Director, OWCP*, No. 4:19-CV-1745, 2022 WL 861415 (S.D. Tex. Mar. 23, 2022),¹⁷ the Board examined the characteristics of claimant’s psychological condition and affirmed the ALJ’s finding that claimant’s delayed onset Post-Traumatic Stress Disorder (“PTSD”) was an occupational disease.¹⁸ Specifically, claimant’s PTSD was not due to a physical accident but was the result of exposure to the external environmentally hazardous conditions of his employment in Iraq; his working conditions were peculiar to work in a war zone, and there was a delayed onset. The dangers of claimant’s employment were not known to be harmful to him until he was diagnosed, and claimant’s

condition and he was advised to see a surgeon.).

¹¹ For an example of potential issues with pleading and proving a work-related injury in this context, *see Carrasco v. Triple Canopy, Inc.*, 54 BRBS 45(UBD) (BRB Sept. 2020) (unpub.).

¹² In *J.M. Martinac Shipbuilding v. Dir., OWCP [Grage]*, 900 F.2d 180, 23 BRBS 127(CRT) (9th Cir. 1990), the Ninth Circuit held that the ALJ erred in finding the time for filing was triggered when the employee knew he was temporarily unable to work due to his back injury. The period was tolled until claimant learned of his degenerative joint diseases and, consequently, of his permanent disability, as it was then that he knew the full character, extent and impact of his injury. *See also Parker*, 935 F.2d 20, 24 BRBS 98(CRT). *Cf. Suarez v. Service Employees Int’l, Inc.*, 50 BRBS 33 (2016) (Claimant’s awareness of a temporary loss of his ability to work due to a work-related injury, in a claim for a specific period of temporary disability benefits, is sufficient to commence the running of the statute of limitations.).

¹³ *Stancil*, 436 F.2d 274; *Lunsford v. Marathon Oil Co.*, 15 BRBS 204 (1982), *aff’d*, 733 F.2d 1139, 16 BRBS 100(CRT) (5th Cir. 1984); *Todd Shipyards Corp. v. Allan*, 666 F.2d 399 14 BRBS 427 (9th Cir. 1982), *aff’g* 12 BRBS 589 (1980).

¹⁴ 33 U.S.C. § 930(f).

¹⁵ 33 U.S.C. § 930(a).

¹⁶ *See, e.g., Blanding v. Dir., OWCP*, 186 F.3d 232, 33 BRBS 114(CRT) (2d Cir. 1999), *rev’g in part* 32 BRBS 174 (1998); *Nelson v. Stevens Shipping & Terminal Co.*, 25 BRBS 277 (1992) (Dolder, J., dissenting) (Where claimant had not yet lost any time from his work injury when employer completed an LS-202 form, the Board held that that form was not sufficient to satisfy the requirements of § 30(a) and start the § 13(a) statute of limitations running.).

¹⁷ The district court adopted the Magistrate Judge’s recommendation to grant claimant’s appeal of the Board’s decision because the ALJ rejected the parties’ stipulation that claimant was temporarily totally disabled without prior notice. *Gindo v. Director, OWCP*, No. 4:19-CV-1745, 2022 WL 663810 (S.D. Tex. Feb. 28, 2022). The recommendation did not address the ALJ/BRB’s determination that claimant’s PTSD should be classified as an occupational disease.

¹⁸ Accordingly, the claim was within the purview of § 10(i).

awareness of his PTSD occurred a significant time after he last worked there.

By contrast, in *Mechler*, 658 F.3d 133, 45 BRBS 61(CRT), *aff'g E.M.*, 42 BRBS 73 (2008), where claimant sustained physical and psychological injuries following a work-related shooting, the one-year statute of limitation for traumatic injuries was applied. Similarly, in *Kallabat v. AECOM*, BRB No. 19-0442, 2020 WL 3497902 (BRB May 8, 2020) (unpub.),¹⁹ the Board distinguished *Gindo*, stating:

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 [ALJ'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 [ALJ's] finding that claimant's psychological condition is a traumatic injury rather than an occupational disease as it is supported by substantial evidence. The [ALJ] 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. In particular, Dr. O'Brien stated claimant's psychological condition was not the result of cumulative physiological trauma. Thus, substantial evidence supports the finding that claimant's psychological injuries resulted from a specific traumatic incident.

Id., slip op. at 14-15 (citations to the record omitted).²⁰

Rodriguez v. Triple Canopy, Inc.: Awareness of a Psychological Injury

In *Rodriguez v. Triple Canopy, Inc.*, 55 BRBS 17 (2021),²¹ a case arising under the DBA, the Board

¹⁹ In *Kallabat*, the ALJ found claimant's psychological condition is not an occupational disease under §§ 10, 12 and 13 because it stems from a single traumatic event, rather than the cumulative hazards of his overseas work. He found § 10, in contrast to §§ 12 and 13, does not contain an awareness provision for traumatic injuries. The ALJ thus rejected employer's position that § 10(i) applied to the calculation of claimant's average weekly wage ("AWW") for his psychological conditions and instead used the "time of injury" for that determination.

²⁰ Accordingly, the Board rejected employer's contention that § 10(i) had to be used to calculate claimant's AWW and affirmed the ALJ's use of the AWW at the time of the attack. *Id.* (citing *Leblanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157, 31 BRBS 195(CRT) (5th Cir. 1997) (use AWW at time of traumatic injury despite delayed onset); *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)).

²¹ This decision was initially issued on May 27, 2021, and was subsequently designated as a published decision by the Board in September 2021. In the interim, the Board decided *Gashi v. Fluor Conops, Ltd.*, 55 BRBS 75(UBD) (BRB June 28, 2021) (unpub.). In *Gashi*, claimant worked for employer in Afghanistan from 2010 to June 2015, when he returned to Kosovo. He experienced numerous traumatic events, such as rocket and mortar attacks, car bombings, and the death of fellow employees. In 2015, Dr. Jashari diagnosed anxiety-depressive disorder. In February 2016, Dr. Jashari noted that claimant was "still unable to work." On April 25, 2016, Dr. Jashari linked claimant's psychiatric condition to his employment in Afghanistan and again noted that he is unable to work. In September 2018, Dr. Jashari diagnosed PTSD, stating that the symptomatology did not commence until around that time. Claimant filed his claim in March

agreed with the Director and reversed the ALJ's determination that claimant's PTSD claim was untimely.

Claimant, a citizen of Peru, worked for employer in Iraq from 2006 to 2010, performing security duties at U.S. military bases. In 2010, employer declined to renew his contract. In 2008, an explosion damaged claimant's hearing and killed two persons next to him, and a mortar attack hit his bunker and rendered him unconscious. He sought medical treatment following the mortar attack and later when his ears started bleeding. Claimant also testified at his deposition that he could hear mortars, rockets, bullets, and car bombs throughout 2009. He stated he had work-related bilateral hearing loss, vision problems, and psychological symptoms. Specifically, claimant testified he has trouble sleeping, isolates, is easily irritated, constantly wants to get in fights, and feels like killing people when he sees blood. Claimant first sought psychological treatment in 2016 and treatment for his hearing loss in 2018. In March 2018, he filed a claim for benefits under the Act for his hearing loss and psychological condition.

The ALJ found employer did not rebut the § 20(a) presumption that claimant's hearing loss is work-related. He determined claimant did not provide timely notice to employer of his work injuries, but employer was not prejudiced by the delay.²² The ALJ found claimant timely filed a claim for his hearing loss on March 13, 2018, since he did not receive an audiogram documenting his hearing loss until January 22, 2018.²³ The ALJ denied claimant compensation for his hearing loss because he did not establish the extent of his loss,²⁴ but he did award medical benefits for this injury.

The ALJ further concluded that employer rebutted the § 20(a) presumption with respect to the psychological injury claim, and after considering all the evidence concluded that claimant

2019. The ALJ granted employer's motion for partial summary decision, finding that claimant should have known by April 25, 2016, that his psychological symptoms and his diminished WEC were related to his employment, and thus his claim was untimely under either § 13(a) or § 13(b)(2). He later awarded medical benefits.

The Board vacated the ALJ's ruling. Initially, it agreed with the Director that the § 13(b)(2) two-year statute of limitations applied, citing *Gindo*. Observing that this case arose in the Second Circuit, the Board concluded that the ALJ did not apply the awareness standard enunciated in *Mechler*. The mere diagnosis of a work-related condition and treatment for it does not commence the running of the statute of limitations. Further, the ALJ failed to draw inferences in claimant's favor and erroneously weighed evidence in favor of employer without applying the § 20(b) presumption. Although Dr. Jashari diagnosed a work-related psychological condition in April 2016, there was no evidence presented to the ALJ of when claimant was aware of this diagnosis or of the relationship of his psychological injury to his working conditions in Afghanistan. Additionally, there was evidence claimant obtained part-time employment from December 2016 to January 2018, which if construed in a light most favorable to him, could defer his awareness of a permanent loss of WEC from his psychological condition. "Awareness" means claimant can, or should be able to, determine from the information given that his ability to earn wages has been affected by his work injury. As the trier-of-fact could conclude that, based on this limited record and application of the § 20(b) presumption, claimant did not have the requisite awareness in April 2016 of a work-related injury that impaired his WEC, the ALJ erred by granting employer's motion.

²² 33 U.S.C. § 912(a), (d).

²³ 33 U.S.C. §§ 908(c)(13)(D), 913(a).

²⁴ In this regard, the Board observed that the Act provides that hearing loss determinations must be made in accordance with the American Medical Association *Guides to the Evaluation of Permanent Impairment*. 33 U.S.C. § 908(c)(13)(E).

established he has work-related PTSD.²⁵ However, the ALJ found that claimant's PTSD claim, also filed on March 13, 2018, was not timely because he should have known in 2014 that he had work-related PTSD. The ALJ agreed with employer that claimant's PTSD is an occupational disease and therefore he had two years to file a claim under § 13(b)(2). He determined claimant was first diagnosed with work-related PTSD on October 21, 2016.²⁶ He further found claimant was denied employment in 2010 on the basis of having worked in Iraq and in 2014 because he failed a prospective employer's psychological examination. The ALJ found claimant should have filed his PTSD claim no later than some point in 2016 because, by 2014, claimant was aware or should have been aware that he had a loss in WEC due to a work-related psychological condition.²⁷ The ALJ found claimant entitled to past and future medical treatment for his work injuries.

The ALJ next denied claimant's motion for reconsideration, reiterating his finding that the claim was untimely and noting claimant's unemployed status since 2010 as further evidence of awareness.²⁸ The ALJ rejected claimant's contention that employer should be estopped from contending his PTSD claim was untimely filed because employer misrepresented the availability of benefits under the DBA. Although claimant alleged employer knew of the 2008 mortar attack when it occurred, the ALJ found claimant cannot rely on the 2008 mortar attack to trigger the requirement under § 30(a) that employer file a notice of injury because there is no evidence employer was aware of any injury to claimant at that time. In his second decision on reconsideration, the ALJ again found claimant failed to establish employer deliberately misled him concerning his entitlement to claim compensation; he also found that claimant never testified employer deliberately misled him. Claimant appealed, and the Director filed a brief.

The Board initially stated that § 20(b) provides a presumption that the claim was timely filed. 55 BRBS at 18 (citing *Mechler*, 658 F.3d 133, 45 BRBS 61(CRT), *aff'g E.M.*, 42 BRBS 73;²⁹ *Stark v.*

²⁵ *Cf. Chavarria v. Constellis Group*, BRB No. 21-0032 (Nov. 23, 2021) (unpub.). In that case, recognizing the ALJ's broad discretion in weighing the evidence and making credibility determinations, the Board affirmed her finding that claimant did not establish he suffered a psychological injury as a result of his work in Iraq with either of the two employers. The Board rejected claimant's argument that the ALJ's decision did not comport with the Administrative Procedure Act. *See* 5 U.S.C. § 557(c)(3)(A). The ALJ set out all of the relevant evidence of record in her summary of the evidence and sufficiently discussed the weight afforded this evidence when considering the issue of causation. Further, the Board rejected claimant's suggestion that he was entitled to add to the record Dr. Galli's *curriculum vitae* ("CV") through the filing of his motion for reconsideration. This evidence was previously available, and a party must exercise due diligence in developing its claim prior to the hearing and not utilize a motion for reconsideration as a vehicle for a second bite at the apple. Further, the ALJ's order denying reconsideration did not violate the APA; Dr. Galli's CV did not constitute new evidence and thus the ALJ did not have to extensively address it.

²⁶ The ALJ determined claimant was unaware of the connection between his PTSD and his employment until after he stopped working for employer in 2010.

²⁷ Claimant did not challenge the ALJ's determination that employer could not have known claimant was injured before he filed his claim and, thus, the time for filing a claim was not tolled under § 30(f). *See* 33 U.S.C. § 930(a), (f).

²⁸ Claimant testified he has not applied for other jobs, but worked at his mother's grocery store when it was open two to three days per week and washed his father's commercial vehicle.

²⁹ In *Mechler*, the Board applied the principle that the mere diagnosis of a work-related condition and treatment does not commence the running of the § 13(a) statute of limitations as claimant must be aware of a likely impairment of WEC. The ALJ found that Dr. Hough's evaluation provided the date of awareness. Dr. Hough diagnosed acute and chronic PTSD and major depression, which the ALJ referred to as a "disabling" diagnosis. The Board concluded that Dr. Hough's report demonstrated claimant's desire to keep working in Kosovo despite her conditions. Further, while claimant and other survivors were evaluated by Dr. Brand, a psychologist, at employer's request, claimant was never informed of the findings. Claimant did not lose any work time due to her psychological condition and was not

Washington Star Co., 833 F.2d 1025 (D.C. Cir. 1987).³⁰) Thus, the burden was on employer to produce substantial evidence that the claim was untimely filed.³¹ *Id.* (citing *Knights*, 336 F.3d 51, 37 BRBS 67(CRT));³² *Blanding*, 186 F.3d 232, 33 BRBS 114(CRT).³³).

Turning to the facts of this case, the Board found that:

We cannot affirm the [ALJ's] determination that Claimant's PTSD claim was not timely filed. Employer has not produced substantial evidence to rebut the Section 20(b) presumption that Claimant was aware of the relationship between his

informed by a medical professional or employer prior to her dismissal that her condition would likely cause a loss of employment or reduction in WEC. The purpose of the requirement that claimant be aware of an impairment of WEC is to avoid claimants having "to protect their rights by filing claims for aches and pains that are not disabling and thus not compensable." Claimant's temporary inability to work due to her physical injuries did not make her aware that her earning power would be impaired due to psychological injury, as she returned to work after her physical condition healed.

The Second Circuit affirmed, agreeing that a reasonable mind could not conclude that claimant knew or should have known that she had suffered a permanent impairment to her WEC prior to her termination by employer. During the year following claimant's work-related shooting, her work was largely unaffected by her psychological problems; light-duty work was provided because of her physical injury. The treatment claimant received for her psychological problems, *i.e.*, therapy and medication, was not the sort typically associated with debilitating mental illness. Although employer arranged for claimant, along with the other survivors of the shooting, to undergo a psychological evaluation, the findings were not shared with claimant.

³⁰ In *Stark v. Washington Star Co.*, 833 F.2d 1025, 20 BRBS 40(CRT) (D.C. Cir. 1987), the D.C. Circuit affirmed an ALJ's finding that claimant's date of "awareness" was at least four years before he filed his claim in 1980, as it was supported by substantial evidence. Claimant testified that he believed the air in the pressroom was making his respiratory problems worse; that from his first day at work, he coughed up a black substance; that he wore a breathing mask for protection; that his doctor recommended in 1975 that he retire; that he did retire in 1976; that he retained an attorney in 1976 to represent him in a workers' compensation action; that he opted out of a class action against employer regarding lung conditions because he thought his was more serious; and that he did not file because his medical expenses were not large.

³¹ The Board noted that "an employer's burden to rebut the Section 20(b) presumption that the claimant was aware of a disabling work-related injury can, by their nature, be especially problematic in psychological injury cases. *See generally Blankenship v. Bowens*, 874 F.2d 1116 (6th Cir. 1989); *see also DynCorp Int'l*, 658 F.3d at 139, 45 BRBS at 65(CRT) (denial of symptoms often associated with PTSD)." *Id.* at 20 n.9.

³² In *Knights*, claimant filed a claim for death benefits three years after her husband's death due to stomach cancer in 1996. At the request of claimant's attorney, a physician examined decedent's medical records and his pathology specimens and concluded that decedent died of mesothelioma due to long-term exposure to asbestos. The First Circuit affirmed the ALJ's finding that claimant credibly testified that she first realized that there was a connection between her husband's death, asbestos, and her husband's job after reading the report in 1999, and it agreed that § 20(b) applied to place the burden of demonstrating to the contrary on employer. Substantial evidence supported the ALJ's conclusion that claimant lacked the requisite awareness, under both the subjective and objective standards, prior to 1999. The court rejected employer's argument that since claimant knew some employees had filed claims for asbestos-related disease and knew that the white powder on decedent was asbestos, she should have been aware through the exercise of reasonable diligence at an earlier date.

³³ In *Blanding*, the Board reversed the ALJ's finding that the death benefits claim filed in 1992 was timely filed in this asbestosis case after holding that claimant was or should have been aware on the date of death in 1987 that her husband's death due to mesothelioma was related to asbestos exposure at work since she knew before his death that the disease was caused by asbestos exposure, that he was exposed to asbestos at work, and that the disease was fatal. The Second Circuit reversed. It held that employer and carrier did not rebut the § 20(b) presumption, as they failed to present substantial evidence that they lacked knowledge of the decedent's work-related death before 1992, and thus their failure to file a § 30(a) report tolled the statute of limitations under § 30(f).

employment, his PTSD, and his disability more than two years prior to filing his claim on March 2018. The [ALJ] erred in finding Claimant was aware of his work-related disabling injury after being rejected for jobs in 2010 and 2014 due to his working in Iraq and failing a psychological examination, respectively. The rejection in 2010 was not based on a diagnosis of an actual work-related psychological condition, but merely due to his prospective employer's perception of former overseas workers. Claimant was not provided a copy of the 2014 psychological examination and thus, even assuming it did contain a diagnosis, "awareness" within the meaning of the Act could not be imputed to Claimant. *See [Mechler]*, 658 F.3d at 139-140, 45 BRBS at 64-65(CRT). The [ALJ's] finding Claimant should have been aware of a psychological injury related to his employment by 2014 based on a prospective employer telling him in 2010 that contractors in Iraq were "crazy" and his failing the psychological examination in 2014 is not substantial evidence of a work-related psychological injury sufficient to rebut the Section 20(b) presumption that his March 2018 PTSD claim was timely filed.

55 BRBS at 19 (footnotes omitted). The Board further concluded that "[t]he record supports only the conclusion that the earliest date claimant could have been aware of a work-related psychological injury was on October 21, 2016, when Ms. Carmen Ciuffardi Montoya, a psychologist, diagnosed claimant with PTSD related to his employment in Iraq." *Id.* at 20. Claimant testified that he sought a psychological examination in October 2016 because he was sick. The Board reasoned that:

This is the first medical opinion diagnosing a psychological injury related to Claimant's employment. *See Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS 154, 156 (1996) (claimant not aware of work-related asbestosis until diagnosed by physician); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84, 87-89 (1995) (awareness of injury insufficient to rebut Section 20(b) presumption; claimant must be aware of its relation to his employment^[34]). There is no evidence prior to Ms. Montoya's report which linked Claimant's psychological injury to his employment in Iraq. *Bezanson*[,13 BRBS 928] (medical diagnosis irrelevant when diagnosis does not link the injury to the employment). While a medical diagnosis is not a statutory prerequisite to "awareness" for Section 13 purposes . . . , in this case there is not substantial evidence of the "full character, extent, and impact" of Claimant's work-related injury prior to his PTSD diagnosis in October 2016.^[35]

Id. at 19-20 (additional citations omitted). Accordingly, the claim was timely as a matter of law.³⁶

³⁴ In *Bridier*, the Board held that a letter accompanying an audiogram, which indicated that claimant had "fair" and "below normal" hearing and was silent as to any employment connection, stating only that due to noise surveys conducted by employer claimant should wear earplugs, was inadequate to constitute an accompanying report which would trigger the running of the § 13 time limitations. Such a letter is insufficient to confer "awareness" of an employment-related hearing loss as contemplated by the statute. Moreover, § 8(c)(13)(C) and 20 C.F.R. § 702.441, setting out the requirements for an audiogram to be presumptive evidence of the amount of hearing loss, are not related to timeliness determinations under §§ 8(c)(13)(D), 12 and 13.

³⁵ The Board noted that, at this time, claimant arguably had a loss in WEC due to his PTSD.

³⁶ Based on this finding, the Board noted that it did not have to address claimant's contention that employer is estopped

The case was remanded for the ALJ to address the remaining contested issues.

Conclusion

As with other large-scale industrial injuries covered by the Longshore Act and its extensions, such as those underlying work-related asbestos injury claims, the Board's decisions instruct that each psychological injury claim should be addressed based on its specific facts. The Board continues to hold and emphasize that Section 20(b) places the burden on employer to produce substantial evidence that the claim was untimely filed. Cases arising under the DBA present a variety of factual scenarios, including variations stemming from the international nature of many DBA claims, and call for a close analysis of the relevant evidence. The ALJ's determination regarding the timeliness issue must be based on substantial evidence in the record.

from contesting the timeliness of his claim because of its alleged misrepresentations to employees about their employee status and lack of posted notice regarding the right to file a claim for a work-related injury. *See* 33 U.S.C. § 934; 20 C.F.R. § 702.211.

