BRB No. 09-0573

TODD WALKLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	DATE ISSUED: 04/23/2010
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Ralph R. Lorberbaum (Zipperer, Lorberbaum & Beauvais), Savannah, Georgia, for claimant.

Jerry R. McKenney (Legge, Farrow, Kimmitt, McGrath & Brown, L.L.P.), Houston, Texas, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2008-LDA-00331) of Administrative Law Judge Paul C. Johnson, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). The Board must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant obtained a job as a labor foreman for employer in Iraq commencing in February 2005, and worked, in succession, at Camp Remagen for eight or nine months, at Camp Danger for about a year, and then at Camp Warrior until May 20, 2007, when he was forcibly removed from that installation after threatening the life of his camp manager. Claimant stated that he was exposed to frequent mortar and rocket attacks and small arms fire at Camps Remagen and Danger, that he witnessed the deaths of a number of soldiers and non-American laborers at Camp Danger, and that he was harassed by the camp manager at Camps Remagen and Warrior, during claimant's work stints at those facilities.[1]

While at Camp Warrior, claimant allegedly developed a plan to kill the camp manager. Prompted by his perceived inability to obtain help from employer's Employee Assistance Program and from medical personnel at Camp Warrior, claimant stated that he intended to enact his homicidal plan on or about May 19, 2007. However, before claimant was able to take any overt action, his plan was discovered; he was handcuffed and immediately escorted to a medic station on May 20, 2007. Claimant was flown by helicopter to Camp Speicher, where he stayed in a hospital for a week for evaluation, and then removed from Iraq to Greece, Germany, and ultimately to his home in Cheboygan, Michigan.

On June 11, 2007, claimant began treating with a clinical psychologist, Dr. Marshall, who diagnosed Post Traumatic Stress Disorder (PTSD) and major depression disorder, based on claimant's having experienced several stressful events in Iraq. EX 9 at 50. Dr. Marshall noted claimant's responses may indicate his tendency to exaggerate or to be self-pitying. Dr. Marshall stated claimant needed medication to relieve clinical anxiety and depression, as well as continued therapy. Claimant saw a family physician, Dr. Oram, on June 21, 2007, who prescribed medication for claimant's conditions and recommended further follow-up with Dr. Marshall. EX 10.

Dr. Griffith, a board-certified psychiatrist, examined claimant on behalf of employer on October 19, 2007. He opined that Dr. Marshall's diagnosis of PTSD is not supportable because claimant could not identify a trauma sufficient enough to warrant

[1] Claimant stated that the camp manager disliked him because he was a "Yankee," while many of the other workers were southerners, and because of claimant's friendship with an African-American co-worker. EX 13, Dep. at 48-53; EX 27, Dep. at 39-40. Claimant alleged he was called unpleasant names as a result. EX 27, Dep. at 39. Additionally, claimant alleged that while at Camp Warrior, the manager routinely required him to violate the requirements of his job. EX 13, Dep. at 18-25, 82-83; EX 27, Dep. at 62, 73-74.

such a diagnosis. Rather, Dr. Griffith opined that claimant is malingering, and that he has a personality disorder and certain stressors including a pending lawsuit, marital difficulties and child-support issues, which are unrelated to his work for employer. Dr. Griffith noted that Dr. Marshall did not rule out malingering and symptom magnification, as required by the *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed. (DSM-IV). EX 17. After receiving Dr. Griffith's report, employer stopped paying compensation and medical benefits. Following an informal conference on April 4, 2008, the district director arranged for claimant to be examined by an independent physician, Dr. van Holla, who is board-certified in general psychiatry. EX 1 at 11. Dr. van Holla diagnosed claimant with PTSD and alcohol and marijuana self-medication. He opined that claimant's PTSD is related to his employment in Iraq, based on his lack of pre-employment psychiatric problems and an intense adjustment reaction he developed while in Iraq; this adjustment reaction led to anxiety and homicidal ideation while claimant was in Iraq. EX 16. Claimant was also examined by Dr. Reppuhn, a clinical psychologist, on August 28, 2008, for purposes of determining his eligibility for Social Security disability benefits. Dr. Reppuhn diagnosed PTSD, depressive disorder, social phobia, and history of alcohol/marijuana dependence.[2] EX 26 at ex. 3.

Claimant filed a claim for benefits under the Act, alleging that his work in Iraq caused PTSD. CX 1. Employer controverted the claim. In his decision, the administrative law judge found that claimant failed to establish that he suffers from PTSD. As claimant did not make out a *prima facie* case, the administrative law judge consequently denied claimant's claim for disability and medical benefits under the Act.

On appeal, claimant challenges the administrative law judge's finding that he is not entitled to benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits.

Claimant argues that the administrative law judge erred in finding that he does not have a "harm," and thus, that he is not entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a). Claimant contends that in determining whether he sustained an injury, the administrative law judge focused too narrowly on whether or not he suffers from PTSD. Claimant also maintains that the administrative law judge erred by rejecting the opinions of Drs. Marshall, Oram, van Holla, and Reppuhn, that claimant has PTSD. We agree with claimant that the case must be remanded for the administrative law judge to reconsider whether claimant has a work-related psychological condition.

[2] Claimant was accepted for Social Security Disability Income benefits and commenced pay status effective September 2008. CX 20.

We first address claimant's contention that the administrative law judge too narrowly focused only on whether claimant established that he has PTSD. In this case, the claim for benefits form, LS-203, states that claimant has PTSD due to his work in Iraq. EX 1 at 14. Claimant's pre-hearing statement, however, states that "Claimant developed post-traumatic stress disorder ("PTSD") and major depressive disorder while in Iraq that is ongoing and totally disabling."[3] EX 1 at 7. Claimant's post-hearing brief stresses his contention that his PTSD is work-related, based on the opinions of claimant's doctors to that effect.

The administrative law judge addressed only whether claimant has PTSD, finding he failed to establish the existence of this condition. Well-established law permits the amendment of claims, unless the "'effect is one of undue surprise or prejudice to the opposing party.'" *U.S. Industries/Federal Sheet Metal, Inc., v. Director, OWCP*, 455 U.S. 608, 613 n.7, 14 BRBS 631, 633 n.7 (1982); *see also Meehan Seaway Service, Inc. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998); *Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286 (1994). In this case claimant raised both PTSD and a depressive disorder prior to the hearing. Moreover, while claimant's post-hearing "Position Memorandum" focuses on PTSD, there is sufficient evidence that claimant is seeking benefits for his general psychological condition, which he alleges is related to his work in Iraq.

In this regard, it is undisputed that all of the physicians of record diagnosed claimant with some sort of psychological disorder. Specifically, Drs. van Holla, Reppuhn, Oram and Marshall all diagnosed claimant with PTSD. *See* EXs 9, 10, 16, 26 at ex. 3. In addition, Drs. Marshall, Oram, and Reppuhn diagnosed claimant with depression. EXs 9, 10, 26 at ex. 3. These are clinical, Axis I, disorders that may respond to medication. EX 15, Dep. at 19. Dr. Griffith, employer's expert, diagnosed claimant with "personality disorder, not otherwise stated," which is an Axis II disorder, and malingering. EX 17. Thus, while Dr. Griffith stated claimant does not have PTSD or depression, his diagnosis of a personality disorder may support a finding that claimant established a harm for purposes of Section 20(a), 33 U.S.C. §920(a). *See generally Wheatley v. Adler*, 407 F.2d 307, 313 (D.C. Cir. 1968) (*en banc*) (a harm occurs when "something unexpectedly goes wrong within the human frame").

[3] The formal hearing was held on October 14, 2008. However, the court reporter did not reappear after lunch, and the administrative law judge subsequently stated that "there will be no transcript of that hearing due to the disappearance of the court reporter." Orders dated Dec. 23, 2008, Feb. 3, 2009. Absent the transcript, there is no way to know what may have been said at the hearing regarding the basis of claimant's claim. The administrative law judge permitted the parties to obtain post-hearing depositions of claimant and Dr. Griffith.

In order for the Section 20(a) presumption to apply, claimant must establish that he sustained a harm or pain and that conditions existed or an accident occurred at his place of employment which could have caused the harm or pain.[4] *See, e.g., Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). It is well established that a psychological condition constitutes a "harm" within the meaning of the Act. *See, e.g., Butler v. District Parking Management*, 363 F.2d 682 (D.C. Cir. 1966); *American National Red Cross v. Hagen*, 327 F.2d 559 (7th Cir. 1964); *Sewell v. Noncommissioned Officers Open Mess, McCord Air Force Base*, 32 BRBS 127 (1997) (McGranery, J., dissenting), *aff'd on recon. en banc*, 32 BRBS 134 (1998) (Brown and McGranery, JJ., dissenting); *Konno v. Young Brothers, Ltd.*, 28 BRBS 57 (1994).

The Board's decision in *S.K.* [*Kamal*] *v. ITT Industries, Inc.*, 43 BRBS 78 (2009), is instructive in this regard. In *Kamal*, the employer contended that, as no doctor had diagnosed the claimant with PTSD or other psychological condition in a manner consistent with the criteria set forth in the DSM-IV, the claimant did not suffer a psychological harm sufficient to invoke the Section 20(a) presumption. The Board rejected the employer's contention, stating first that the Act does not require use of the DSM-IV in assessing whether a claimant has suffered a psychological harm. *Id.* at 79-80. Rather, the administrative law judge was to assess the weight to be accorded to the medical evidence of record, without substituting his judgment for that of the physicians. *Id.*; *see* discussion, *infra.* As all the doctors, including the employer's expert, had reported that the claimant suffered from some psychological condition, whether PTSD, depression, or schizophrenia, the Board stated that the administrative law judge had rationally found that the claimant established a psychological harm for purposes of invoking the Section 20(a) presumption. *Kamal*, 43 BRBS at 80. Similarly, in this case, claimant has received diagnoses of PTSD, depression, and personality disorder, and his claim for benefits sufficiently encompasses his allegation that he has a psychological disorder related to his employment in Iraq. Therefore, on remand the administrative law judge must address anew the "harm" element of claimant's *prima facie* case.

[4] In addressing whether claimant established that he has PTSD, the administrative law judge found that claimant was subject to mortar attacks and witnessed deaths and injuries at Camp Danger. In addition, the administrative law judge noted that claimant had to assist in cleaning areas where casualties occurred. Decision and Order at 13. These incidents are sufficient to establish the "working conditions" element of claimant's *prima facie* case. *See Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004).

Claimant also contends that the administrative law judge specifically erred in finding that he does not have PTSD. The administrative law judge examined the six criteria required for "a proper diagnosis" of PTSD as set forth in the DSM-IV.[5] Specifically, focusing on the first criterion from the DSM-IV, *i.e.*, "exposure to an extreme traumatic stressor" (Criterion A1) and a response thereto involving "intense fear, helplessness, or horror" (Criterion A2), the administrative law judge found that while claimant identified three stressors that satisfy Criterion A1, *see* n. 4, *supra*, claimant did not establish, either by his own deposition testimony or other evidence, that he felt the requisite intense fear, helplessness, or horror from his exposure to these traumatic events in order to satisfy Criterion A2. In light of this, the administrative law judge rejected the opinions of the physicians that claimant has PTSD, finding that Drs. van Holla, Reppuhn, and Oram did not address Criterion A2. The administrative law judge found that Dr. Marshall's opinion that claimant suffered the requisite horror, intense fear, or helplessness, lacks credibility in light of the absence of such a statement by claimant at his depositions.[6] Decision and Order at 13-14. In contrast, the administrative law judge found that Dr. Griffith's conclusion that claimant does not have PTSD is consistent with claimant's statements that he "thought about" the deaths for a little while, but then "it went away." *Id.* at 13. Based on the overall evidence, the administrative law judge concluded that "claimant either has shown exposure to a qualifying traumatic event without showing the accompanying fear, helplessness, or horror, or a reaction to a non-qualifying traumatic event." *Id.* at 14. Consequently, the administrative law judge concluded that since claimant did not establish that he has PTSD, he did not sustain a "harm" and is not entitled to invocation of the Section 20(a) presumption.

As discussed above, the Board stated in *Kamal* that the Act does not require use of the DSM-IV in assessing whether a claimant has suffered a psychological injury either in establishing a *prima facie* case or in proving the work-relatedness of an injury based on the record as a whole. *Kamal*, 43 BRBS at 79-80. Rather, the administrative law judge must base his decision on the evidence of record, assessing it in terms of weight and credibility. That is, the administrative law judge may assess whether the physicians'

[5] The administrative law judge applied the 1994 version of the DSM-IV. We note that in 2000, the American Psychiatric Association revised the PTSD diagnostic criteria to include in Criterion A1, that it could be exposure to "an event *or events*" that involve actual or threatened death or serious injury, or a threat to the physical integrity of oneself or others." *See* http://ncptsd.kattare.com/ncmain/ncdocs/fact_shts/fs_DSM-IV_iv_tr.html.

[6] The administrative law judge found, without any explanation, that Dr. Marshall appears to have been predisposed to find that claimant suffered from PTSD, and that the physician made assumptions that fit his predisposition without any basis for doing so. Decision and Order at 14; *see* discussion, *infra.*

conclusions are rationally based on their underlying documentation. *Id.* The administrative law judge, however, may not substitute his judgment for that of the physicians. *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997).

In this case, the administrative law judge's decision reflects that he independently determined that claimant's reaction to the events in Iraq was insufficient to result in PTSD, rather than relying on the expertise of the physicians. In this regard, the administrative law judge's finding that a "proper diagnosis" of PTSD requires conformance with the DSM-IV and his perfunctory rejection of the opinions of Drs. van Holla, Reppuhn, and Oram because they apparently did not address criterion A2, result from his own interpretation of claimant's reaction to the events, a function which should be left for the medical experts.[7] *Pietrunti*, 119 F.3d 1035, 31 BRBS 84(CRT). In this regard, Dr. Marshall noted that a PTSD diagnosis is based on a person's perception of and reaction to his experiences, which are subjective. EX 15, Dep. at 20-21. In *Pietrunti*, the court held that an administrative law judge erred in refusing to credit uncontradicted evidence of a work-related psychiatric injury because the administrative law judge found that the physician simply accepted the claimant's asserted symptoms as true. *Pietrunti*, 119 F.3d at 1044, 31 BRB at 91(CRT). Thus, the administrative law judge's rejection of Dr. Marshall's opinion, at least in part, because the physician "was predisposed to find that claimant suffered from PTSD," Decision and Order at 14, ignores the fact that a mental health expert has evaluated claimant's subjective complaints and arrived a diagnosis. The administrative law judge is not free to independently evaluate claimant's subjective reportings to the physicians and substitute his own interpretation.[8] *Pietrunti*, 119 F.3d at 1044, 31 BRB at 91(CRT). Moreover, as claimant correctly contends, the credibility of his testimony cannot be assessed in this case, as there was no live testimony before the administrative law judge. *See generally Pigrenet v. Boland Marine & Manufacturing Co.*, 656 F.2d 1091, 13 BRBS 843 (5th Cir. 1981) (*en banc*), *vacating* 631 F.2d 1190, 12 BRBS 710 (5th Cir. 1980).

[7] In denying the claim on this basis, the administrative law judge did not specifically rely on Dr. Griffith's opinion that claimant does not have PTSD, noting only that he found it consistent with claimant's deposition testimony regarding his reaction to events in Iraq. Decision and Order at 14.

[8] In this case, of course, the medical evidence that claimant has PTSD is not uncontradicted, as Dr. Griffith stated claimant does not have this condition based on his evaluation of claimant's subjective complaints. The administrative law judge on remand may rely on this opinion, provided he supplies a valid, rational reason for so doing. However, the mere existence of this opinion does not validate the administrative law judge's methodology in this case.

In addition, the administrative law judge did not discuss that two of the mental health experts did, in fact, discuss claimant's diagnosis in terms of the DSM-IV criteria. Dr. van Holla stated that, "My diagnosis is according to the DSM-IV," and that claimant met the criteria for a diagnosis of PTSD pursuant to the DSM-IV. EX 14, Dep. at 15-17. Dr. Marshall's reports and deposition testimony state that his diagnosis is based on the DSM-IV. *See, e.g.*, EX 9 at 55; EX 15 at 29. His treatment reports state that claimant was experiencing moderate "distressing and intrusive memories of trauma." EX 9 at 21, 25, 28, 32, 37, 40, 42, 44. Significantly, the administrative law judge did not address a letter dated February 20, 2008, wherein Dr. Marshall explicitly responded to Dr. Griffith's criticism that his diagnosis of PTSD does not conform to the DSM-IV criteria.[9] EX 9 at 1.

In light of these errors, we vacate the administrative law judge's finding that claimant did not establish the harm element necessary for invocation of the Section 20(a) presumption. On remand, the administrative law judge must evaluate this element in terms of all of claimant's diagnosed psychological conditions. *Kamal*, 43 BRBS 78. Moreover, in weighing the evidence of record, the administrative law judge cannot substitute his opinion for that of the mental health experts, *see Pietrunti*, 119 F.3d at 1042-1044, 31 BRBS at 90-91(CRT), but must evaluate the bases and rationales for their conclusions. If, on remand, the administrative law judge determines that claimant has a "harm," he must afford claimant the benefit of the Section 20(a) presumption that his psychological condition is work-related. *See generally Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *see* n. 4, *supra* (working conditions element met). He must then address whether employer has rebutted the presumption through the production of substantial evidence that the injury is not related to the employment. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *see also American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999) (*en banc*), *cert. denied*, 528 U.S. 1187 (2000). If so, the presumption no longer controls and the administrative law judge must resolve the issue of causation on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th

[9] Dr. Marshall stated that the DSM-IV requires that an individual be exposed to a single event or events," and that based on that it is sufficient that claimant "was working in a combat zone for a number of years" where "his life was threatened on numerous occasions by incoming rockets and hidden bombs." EX 9 at 1. Additionally, Dr. Marshall stated that the DSM-IV also contains a response requirement and that, in this case, "claimant responded with intense fear and helplessness." *Id.*

Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).[10]

Accordingly, the administrative law judge's Decision and Order Denying Benefits based on a finding that claimant did not establish the harm element of his *prima facie* case is vacated. The case is remanded for further consideration consistent with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[10] As the case is being remanded and the degree of success, if any, is yet to be determined, we deny the fee request of claimant's former counsel, Kurt A. Gronau, at this time. Upon completion of the proceedings before the administrative law judge on remand, claimant's former counsel may re-file his fee petition with the Board. 20 C.F.R. §802.203(c).