BRB No. 08-0564

D.C.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MPRI, INCORPORATED	)	DATE ISSUED: 12/23/2008
	)	
and	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

E. Paul Gibson (Riesen Law Firm, LLP), Charleston, South Carolina, for claimant.

Keith L. Flicker (Flicker, Garelick & Associates, LLP), New York, New York, for employer/carrier.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2006-LDA-00133) of Administrative Law Judge Adele Higgins Odegard 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). We 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 began working for employer as a lawyer in Afghanistan in September 2004. His duties included developing the military law system for Afghanistan. Claimant had had a long career in public service until he retired in 2002. In addition, claimant served in the Judge Advocate General's (JAG) law reserve program for approximately 27 years. On February 21, 2005, claimant was involved in a physical altercation with a Navy JAG officer with whom he worked, after which claimant resigned his position and returned to the United States. In November 2005, claimant sought treatment for disturbing thoughts and nightmares relating to the incident at work in Afghanistan. His treating psychiatrist, Dr. Flanagan, and his family doctor, Dr. Robinson, diagnosed post-traumatic stress disorder and recommended treatment with medication and ongoing psychotherapy. Claimant has not returned to work and sought total disability benefits under the Act.

In her Decision and Order, the administrative law judge found that claimant established invocation of the Section 20(a) 33 U.S.C. §920(a), presumption that he suffers from a work-related condition based on the opinions of Dr. Flanagan, Bergmann and Robinson. However, the administrative law judge also found that employer rebutted the presumption with the opinions of Drs. Lowndes-Rosen and Hilton. After weighing the evidence as a whole, the administrative law judge found that claimant has post-traumatic stress disorder arising from his employment in Afghanistan. In addition, the administrative law judge found that claimant established a *prima facie* case of total disability and that employer presented no evidence of suitable alternate employment. Therefore, the administrative law judge concluded that claimant is entitled to temporary total disability and medical benefits for his work-related post-traumatic stress disorder.

On appeal, employer contends the administrative law judge erred in finding that claimant suffers from work-related post-traumatic stress disorder. In addition, employer contends the administrative law judge erred in finding that claimant is unable to work due to his alleged condition and in finding that the record does not establish the existence of suitable alternate employment. Claimant responds, urging affirmance of the administrative law judge's decision as it is supported by substantial evidence.

When, as here, the Section 20(a) presumption is invoked and rebutted, the presumption falls from the case. *Sprague v. Director, OWCP*, 688 F.2d 862, 15 BRBS 11(CRT) (1st Cir. 1982). The administrative law judge then must weigh the relevant evidence to determine if claimant's injury is work-related. Claimant bears the burden of persuasion on this issue. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).

In finding that claimant has post-traumatic stress disorder related to the work incident, the administrative law judge accorded substantial weight to the opinion of Dr.

Flanagan. Dr. Flanagan opined in November 2005 that claimant suffers from severe post-traumatic stress disorder precipitated by the physical assault in Afghanistan.[1] Cl. Exs. 14, 17. The administrative law judge found that Dr. Flanagan has superior qualifications, that he has a long and documented treating relationship with claimant, and that his opinion is well-reasoned.[2] Contrary to employer's contention on appeal that Dr. Flanagan's long-standing relationship with claimant created a bias in claimant's favor, the administrative law judge rationally found that Dr. Flanagan is in a better situation to assess the effect of the work-related incident on claimant's psychological condition due to his prior treatment. *See Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997); Decision and Order at 19. Moreover, the administrative law judge did not err in finding corroborative the opinion of Dr. Robinson that claimant has post-traumatic stress disorder, as he is claimant's family doctor who also has a long-standing treating relationship with claimant. Cl. Ex. 3. The administrative law judge also rationally found that the psychological testing performed by Dr. Bergmann supports the finding that claimant has post-traumatic stress disorder.[3]

In contrast, the administrative law judge gave less weight to the opinions of employer's examining physicians, Drs. Hilton and Lowndes-Rosen. The administrative law judge found Dr. Hilton's opinion entitled to less weight as it is "fraught with presumptions," and "leaps of logic not necessarily supported by the record." Decision and Order at 19. In this regard, the administrative law judge found that Dr. Hilton stated

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[1] We reject employer's contention that the administrative law judge erred in failing to consider that claimant waited six months after his return to the United States to seek psychological treatment. A psychiatric injury does not necessarily develop contemporaneously with a physical injury and the Act recognizes latent injuries. *Director, OWCP v. Potomac Electric Power Co.*, 607 F.2d 1378, 10 BRBS 1048 (D.C. Cir. 1979).

[2] Dr. Flanagan began treating claimant in 1996. Dr. Flanagan is Board-certified by the National Board of Medical Examiners, the American Board of Psychiatry and Neurology, the American Psychoanalytic Association, the National Registry of Group Psychotherapists, the American College of Forensic Examiners, and the American Board of Forensic Medicine. Cl. Ex. 1a.

[3] Contrary to employer's contention on appeal that the testing also revealed that similarly-situated employees would not have been affected by the assault, the administrative law judge properly found that the relevant inquiry is the effect of the work-related incident on the particular claimant and not on the population as a whole. *See Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994); *see also Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968).

claimant's symptoms were more likely related to a combination of non-work factors without explaining why these factors caused the worsening of claimant's condition to the exclusion of the work-related issues. The administrative law judge gave less weight to the opinions of both Dr. Hilton and Dr. Lowndes-Rosen that claimant does not have post-traumatic stress disorder because he did not experience a threat of death and because most people would not react to the assault as claimant did. The administrative law judge noted that these physicians did not account for the fact that post-traumatic stress disorder can be premised on an event involving a threat of serious injury or a threat to the "physical integrity of self." Cl. Ex. 12 (Diagnostic and Statistical Manual of Mental Disorders (DSM)). The administrative law judge specifically credited claimant's testimony concerning his confrontation with the officer and his reaction to it.

The administrative law judge is entitled to determine the relative weight to be accorded to the evidence of record. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). In this case, the administrative law judge rationally gave determinative weight to the opinion of Dr. Flanagan based on his relationship with claimant and on the basis that his opinion was well-reasoned in view of the DSM standard. The administrative law judge also rationally found claimant's testimony regarding the incident on February 25, 2007, and his reaction to it credible.[4] *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). As the administrative law judge's conclusion is supported by substantial evidence, we affirm her finding that claimant suffers from post-traumatic stress disorder causally related to the incident at work on February 21, 2005. *See Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001).

Employer also contends the administrative law judge erred in finding claimant is unable to perform his usual duties due to his psychological condition. Employer avers that claimant was intending to resign his position in Afghanistan prior to the confrontation with the officer and that the altercation was mere pretext for claimant's leaving his position. Thus, employer contends claimant remains capable of performing his usual work. Employer further contends that claimant's application for attorney positions after his return to the United States indicates his capability of returning to his former duties and that the administrative law judge erred in relying on Dr. Flanagan's opinion. It is claimant's burden to establish his inability to perform his usual work due to his work injury. *Marinelli*, 34 BRBS at 118-119; *Delay v. Jones Washington Stevedoring*

[4] The administrative law judge noted too the photographic documentation of an assault on claimant.

Co., 31 BRBS 197 (1998); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985).

The administrative law judge rationally rejected evidence offered by employer regarding claimant's ability to return to his usual work, as she found it erroneously premised on the absence of post-traumatic stress disorder. The administrative law judge stated that as she found claimant has this condition employer's evidence is not entitled to weight on the issue of claimant's disability. Decision and Order at 22. Similarly, claimant's preparation of a resignation letter prior to the altercation is not dispositive of his ability to return to work thereafter in view of his resignation based in part on the altercation, and the administrative law judge's finding of a work-related psychological condition diagnosed as a result thereof. Therefore, we reject employer's contention. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991).

With regard to Dr. Flanagan's opinion, the administrative law judge found it to be somewhat contradictory, but nonetheless supportive of a finding that claimant's cannot return to his usual work. In July 2007, Dr. Flanagan stated that claimant cannot work as a legal expert in Afghanistan or in any other hostile foreign environment. Dr. Flanagan also stated that claimant could not work full-time or part-time as an attorney in South Carolina and is not capable of performing non-legal employment. Cl. Ex. 17 at 121. Nonetheless, in the same report, Dr. Flanagan stated that claimant's condition had improved and that claimant "maybe capable of working part-time" in a structured environment without confrontation or undue stress. *Id.* at 122.

We reject employer's contention that the administrative law judge erred in crediting Dr. Flanagan's opinion. Claimant's usual work is that which he was performing at the time of injury, which in this case was work as an attorney in Afghanistan. *See, e.g., Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). Regardless of any equivocation regarding claimant's ability to work in general, Dr. Flanagan's opinion is unequivocal regarding claimant's inability to return to his former work as an attorney in Afghanistan. Dr. Flanagan specifically stated that claimant was unable to undertake such work and his opinion that claimant may be able to work part-time in a non-stressful environment precludes a finding that claimant could return to his usual work. As substantial evidence supports the administrative law judge's finding that claimant is unable to return to the work he was performing at the time of injury, we affirm the administrative law judge's finding that claimant established his *prima facie* case of total disability. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004).

Once a claimant has shown his inability to return to his usual work, the burden shifts to employer to establish the availability of suitable alternate employment. In order

to meet its burden, employer must show the realistic availability of jobs that claimant can perform given his restrictions, age, and vocational and educational background, and may not rely solely on claimant's general physical and psychogical capabilities. *Pietrunti*, 119 F.3d 1035, 31 BRBS 84(CRT). We reject employer's contention that the positions for which claimant applied after his return to the United States establish the existence of suitable alternate employment as employer did not establish the suitability of these positions or their realistic availability. *Bunge Corp. v. Carlisle,* 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000). As employer submitted no other evidence of suitable alternate employment, we affirm the administrative law judge's finding that claimant is entitled to temporary total disability benefits under the Act. *Pietrunti*, 119 F.3d 1035, 31 BRBS 84(CRT).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge