**U.S. Department of Labor**

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0364

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| MILTON BOWMAN | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| FLUOR DANIEL CORPORATION | ) | DATE ISSUED: Jan. 11, 2017 |
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| and | ) | |
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| INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA | ) | |
| | ) | |
| | ) | ORDER on MOTION |
| Employer/Carrier-Petitioners | ) | for RECONSIDERATION |
| | ) | EN BANC |

HALL, Chief Administrative Appeals Judge:

Employer has filed a timely motion and supplemental motion for reconsideration *en banc* of the Board's decision in this case, *Bowman v. Fluor Daniel Corp.*, BRB No. 15-0364 (May 10, 2016). Claimant responds, urging affirmance of the Board's decision. Employer's motion for reconsideration is denied. 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407.

To reiterate, claimant filed claims for benefits for bilateral Achilles tendonitis, bilateral carpal tunnel syndrome (CTS), Major Depressive Disorder, and an eye injury, which he alleged were due to his employment in Afghanistan. The administrative law judge awarded claimant temporary and permanent total disability benefits for all but the alleged eye injury. Employer appealed the administrative law judge's award. The Board vacated the findings that claimant was totally disabled by his CTS after May 3, 2012, and that claimant's Achilles tendonitis became totally disabling as of July 16, 2012. The Board remanded the case for the administrative law judge to reconsider the extent of claimant's disability between May 3, 2012, and the date the administrative law judge finds that claimant became totally disabled due to his Achilles tendonitis. In all other respects, the Board affirmed the administrative law judge's award. *Bowman*, slip op. at 10-13.

In its motion for reconsideration, employer challenges the Board's analysis of the administrative law judge's findings on the issue of the availability of suitable alternate employment. Specifically, it asserts the Board erred in affirming the administrative law judge's findings regarding the distances between the jobs identified in the July 2014 labor market survey and claimant's home in Maryland. Employer also contends the Board erred in affirming the administrative law judge's rejection of Dr. Goldstein's opinion on the issue of the cause of claimant's Achilles tendonitis and his acceptance of Dr. Martinez's opinion that claimant has a work-related psychological disability. For the reasons identified in the Board's decision as well as the additional clarifications set forth below, we reject employer's contentions because employer has not established error in the Board's decision.

First, in its decision, the Board evaluated the most recent labor market survey, dated July 11, 2014, which was the only survey addressed by the administrative law judge. *Bowman*, slip op. at 10 n.10, 12; EX 102. The Board noted, accurately, that the July 2014 labor market survey consisted of only four positions, all of which the administrative law judge found to be located more than one hour from claimant's home. Decision and Order at 42-43. The Board affirmed the administrative law judge's determination that those four positions are unsuitable in light of claimant's restrictions for his CTS and Achilles conditions because they involved long-distance driving. *Bowman*, slip op. at 12.

Further, despite employer's assertions in its motion for reconsideration, the Board correctly noted that employer did not contest the driving distances between claimant's Maryland home and the jobs *identified in the July 2014 labor market survey*. *Id*. at n.12. Rather, in its appeal, employer lumped the three labor market surveys into one, stating that the administrative law judge erred in rejecting "the labor market survey." Emp. Br. at 5. Employer then referenced jobs identified in the two earlier labor market surveys for the proposition that it identified a number of jobs within one hour of claimant's current home.

Employer makes the same argument in its motion for reconsideration. However, because the administrative law judge did not address the April and May 2014 labor market surveys, the Board's footnote referred only to the July 2014 labor market survey. With regard to the April and May 2014 labor market surveys, the Board remanded the case for the administrative law judge to consider whether employer established the availability of suitable alternate employment during the identified critical period after May 3, 2012, giving him the opportunity to address the suitability of jobs in those labor market surveys. Nothing in the Board's analysis of the July 2014 labor market survey restricts the administrative law judge's evaluation of the other surveys on remand.

Additionally, in its decision, the Board acknowledged that claimant did not provide Dr. Martinez with entirely accurate information concerning prior psychiatric problems or drug use. *Bowman*, slip op. at 7 n.5. However, this does not establish error in the Board's affirmance of the administrative law judge's reliance on Dr. Martinez's opinion that claimant is unable to work due to his depression. Unlike in the cases cited by employer, *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994); *Roberson v. Bethlehem Steel Corp.*, 8 BRBS 775 (1978) (Miller, J., dissenting), *aff'd sub nom. Director, OWCP v. Bethlehem Steel Corp.* [*Roberson*], 620 F.2d 60, 12 BRBS 344 (5th Cir. 1980), Dr. Martinez's opinion is unequivocal in linking claimant's psychiatric injury to his work-related physical injuries, and his diagnosis of depression comports with that of other doctors. Additionally, as the Board noted, even employer's expert, Dr. Schulman, linked claimant's depression and inability to work to his wrist injuries.[1] Moreover, the fact that claimant had a "positive" outlook after in-patient psychiatric treatment subsequent to Dr. Martinez's evaluation does not establish claimant's employability, as employer seems to aver. CX 42.

[1] Dr. Schulman stated: "[Claimant] did not sustain a mental or behavioral impairment consequent to the aggravation of his Carpal Tunnel Syndrome. Rather, he became frustrated and angry secondary to the persistence of *his symptoms* and his failure to return to work in Afghanistan, which he greatly desired." EX 89 at 26 (emphasis added); *see also* Decision and Order at 41 ("As indicated by Dr. Schulman, when the Claimant was unable to find employment and became destitute, he began to suffer from anxiety and depression.").

Accordingly, employer's motion and supplemental motion for reconsideration are denied.[2] The Board's decision is affirmed.[3]

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

We concur:

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GREG J. BUZZARD
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring and dissenting:

[2] Claimant contends that remanding the case is unnecessary because his average weekly wage, which was not addressed by the Board in its original decision, was $2,251.99, such that, regardless of which job, if any, may be found suitable, the difference between the wages of the identified job and his average weekly wage would entitle claimant to the maximum compensation rate. Claimant may present this argument to the administrative law judge on remand.

[3] There is also no error in the Board's affirmance of the administrative law judge's rational decision to give less weight to Dr. Goldstein's opinion because Dr. Goldstein did not explain why claimant's work did not aggravate his Achilles condition. *Bowman*, slip op. at 5-6; Decision and Order at 36-38; CXs 31-32; EXs 1, 5, 40; Tr. at 41; *see generally Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002).

I respectfully dissent from my colleagues' decision to deny employer's motion for reconsideration. Rather, I conclude that the Board's decision should be further clarified on the issue of suitable alternate employment. I also would vacate the administrative law judge's reliance on Dr. Martinez's opinion, as he did not consider the probative value of that opinion in light of its reliance on unreliable statements from claimant. In addition, I would remand the case for the administrative law judge to reconsider the probative value of Dr. Wadington's opinion regarding the cause of claimant's Achilles condition.

Initially, in remanding the case for the administrative law judge to reconsider whether employer established the availability of suitable alternate employment after May 3, 2012, the Board explained in footnote 12 of its decision that:

> Employer is correct that the record does not contain evidence of how far many of the jobs were from claimant's home. Employer does not, however, dispute the stated distances. In light of the long-distance driving restriction, we reject employer's assertion that the administrative law judge erred in determining the distances between the identified jobs and claimant's home, as such information would be in the vein of taking judicial notice of a public fact. *See, e.g., Hill v. Avondale Industries, Inc.*, 32 BRBS 186 (1998), *aff'd sub nom. Hill v. Director, OWCP*, 195 F.3d 790, 33 BRBS 184(CRT) (5th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000).

*Bowman*, slip op. at 12 n.12. In its motion for reconsideration, employer asserts it disputed the administrative law judge's conclusion that the jobs were over one hour away from claimant's home because it identified jobs in Oakland, Maryland, within five miles, and within 12 minutes, of claimant's home and, thus, footnote 12 is in error.

The Board acknowledged that employer's April 2014 retrospective labor market survey included jobs "in, or within ½ hour of, where claimant lives." *Bowman*, slip op. at 10 n.10. Because that survey, as well as the one created retrospectively in May 2014, addressed claimant's CTS restrictions and included near-by jobs, the Board remanded the case for the administrative law judge to address the availability of suitable alternate employment during the critical period after claimant's CTS reached maximum medical improvement. *Id.* The Board also instructed the administrative law judge to address when claimant's Achilles tendonitis became totally disabling, creating a window during which only claimant's CTS restrictions would affect his ability to work. Once claimant's Achilles tendonitis became disabling, claimant's ability to work would hinge on consideration of work restrictions for both his CTS and Achilles injuries.

In rejecting jobs identified in the surveys because they were more than one hour away from claimant's home, the administrative law judge did not identify how he made

the distance determinations. While the distance between two points is unchanging, employer's assertion, that the time it takes to travel that distance can vary, has merit. Thus, I would clarify that if, on remand in addressing the availability of suitable alternate employment, the distance of a job from claimant's home is a determinative factor as to whether the job is suitable, and the administrative law judge elects to use a mapping application to determine the travel times, he is advised to notify the parties beforehand and to give them an opportunity to respond. 29 C.F.R. §18.84.[4] He may then address whether the travel times make the jobs unsuitable. If the administrative law judge finds the identified jobs are unsuitable for other reasons, employer's argument regarding the travel times is moot.

With regard to Dr. Martinez's opinion, the Board noted in its original decision, *Bowman*, slip op. at 7 n.5, that claimant told Dr. Martinez he had no history of psychiatric problems or drug use. These statements are contradicted by the record. *See* EXs 80-85. Consequently, I would have the administrative law judge address the effect of claimant's credibility on the weight to be given to Dr. Martinez's opinion as to the cause, nature, and extent of claimant's psychiatric disability. Moreover, as claimant underwent some psychiatric treatment after seeing Dr. Martinez in November 2013 and, later, underwent two evaluations, CXs 42, 51; EX 89; Tr. at 55-56, 96-97, I would have the administrative law judge also consider these evaluations, and the observations of Dr. Schulman as to claimant's condition at the time of his examination, in rendering a complete decision on any psychiatric disability claimant may have. *See generally Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982).

Additionally, I would remand the case for the administrative law judge to reconsider the probative value of Dr. Wadington's opinion regarding the cause of claimant's Achilles condition in light of claimant's statements to Dr. Wadington denying any trauma or treatment for his Achilles condition prior to November 2012. EX 40. Claimant's statement is belied by prior medical reports indicating Achilles complaints, diagnosis, and treatment in 2009 and 2011. EX 77.

[4] Section 18.84 states: "On motion of a party or on the judge's own, official notice may be taken of any adjudicative fact or other matter subject to judicial notice. The parties must be given an adequate opportunity to show the contrary of the matter noticed."

Thus, with the exception of these issues, I concur with the majority's decision to affirm the Board's decision.

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JUDITH S. BOGGS
Administrative Appeals Judge

GILLIGAN, Administrative Appeals Judge, concurring and dissenting:

I concur with the opinion of Judge Boggs, except with respect to her opinion that the case should be remanded for reconsideration of the probative value of Dr. Wadington's opinion. On that issue, I agree with the majority opinion that the administrative law judge's decision should be affirmed.

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RYAN GILLIGAN
Administrative Appeals Judge