



BRB No. 17-0339

HAMIDULLAH MAKHMOOR)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
MISSION ESSENTIAL PERSONNEL, LLC)	
)	DATE ISSUED: <u>Jan. 11, 2018</u>
and)	
)	
ZURICH AMERICAN INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order Denying Compensation Benefits of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Howard S. Grossman, Boca Raton, Florida, for claimant.

Alexandra S. Grover and Elizabeth J. Dye (Brown Sims), Houston, Texas, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Compensation Benefits (2014-LDA-00631) of Administrative Law Judge Richard M. Clark 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 rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked for employer in Afghanistan as a linguist from July 2008 to October 2010, when he voluntarily resigned. Tr. at 136-137; EXs 1 at 14; 11 at 2, 6-7, 10-11. Claimant returned to work for employer in July 2011. He was assigned to the Parwan Detention Center at Bagram Air Base. Tr. at 139; EX 11 at 11. Claimant alleged that the working conditions there caused a psychological injury. Tr. at 143; EX 11 at 15-17, 24. Claimant also testified that he experienced indirect fire from rockets and mortars. Tr. at 144-145, 171-172; EX 11 at 12-13.

Claimant returned to the United States in February 2012, where he received treatment for a right knee injury that occurred during the course of his employment in January 2012.¹ Tr. at 133. Claimant returned to Afghanistan later in February 2012 and worked at the air base until August 2012, when he returned to the United States for additional right knee treatment. Tr. at 153; EX 11 at 17. Claimant did not return to work in Afghanistan.² He first saw Dr. Afshar, a psychiatrist, in October 2012. Tr. at 148-149. Dr. Afshar diagnosed major depressive disorder and posttraumatic stress disorder (PTSD). JX 14 at 1-2, 4. Dr. Afshar referred claimant to a psychologist in December 2012; claimant first saw Laura Phillips, a Licensed Clinical Social Worker, in January 2013; claimant saw Ms. Phillips nine times between January 2013 and May 2015. *Id.* at 6. Ms. Phillips also diagnosed major depressive disorder and PTSD. *Id.* at 8. Claimant filed a claim under the Act for a psychological injury on May 16, 2013. JX 3.

In his decision, the administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), that he sustained a work-related psychological injury. The administrative law judge found that the opinions of Drs. Perry (P.) Maloff and Jared (J.) Maloff that claimant does not have a psychological injury are sufficient to rebut the presumption.³ Decision and Order at 38-39. The administrative law judge concluded based on the record evidence as a whole that claimant did not establish he has

¹ The parties stipulated that claimant sustained a work-related right knee injury for which employer paid temporary total disability of \$1,295.20 weekly from August 28, 2012 to January 10, 2016, and from January 11, 2016 at a weekly rate of \$927.03 while it recoups overpayment of compensation from the previous period. Decision and Order at 3, n.3; *see* 33 U.S.C. §§908(b), 914(j).

² Claimant's contract with employer was terminated when his knee did not improve after receiving three months of treatment in the United States. EX 11 at 17.

³ Dr. J. Maloff is a psychologist who shares a practice with his father, Dr. P. Maloff, a psychiatrist. *See* EXs 5, 8.

a work-related psychological injury.⁴ *Id.* at 39-45. Therefore, he denied the claim for a psychological injury.

On appeal, claimant challenges the administrative law judge's findings that employer rebutted the Section 20(a) presumption and that claimant did not establish he has a work-related psychological injury on the record as a whole. Employer responds, urging affirmance. Claimant filed a reply brief.

Where, as here, the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant does not have a work-related psychological condition. *See Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). Claimant contends that the administrative law judge erred in relying on the opinions of Drs. J. and P. Maloff to find the Section 20(a) presumption rebutted.⁵

Employer's burden on rebuttal is one of production rather than persuasion; the credibility of the witnesses and contrary evidence are not weighed at this stage.⁶ *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010). Dr. J. Maloff, a psychologist, conducted psychological testing and opined, based on the test results, that claimant is malingering. EX 6 at 6; JX 25 at 28, 48. Dr. P. Maloff, a psychiatrist, opined that there is no evidence of mental illness and that claimant does not suffer from a psychiatric condition. EX 2 at 23. The administrative law judge rationally concluded that these opinions constitute substantial evidence to rebut the Section 20(a) presumption. *See Cline v. Huntington Ingalls, Inc.*, 48 BRBS 5 (2013); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). Accordingly, we affirm the administrative law

⁴ The administrative law judge rejected employer's contentions that claimant did not provide timely notice of his psychological injury, 33 U.S.C. §912, and that claimant's multiple myeloma was an intervening cause of injury terminating his entitlement to compensation for the right knee injury. Decision and Order at 27-28, 45-46.

⁵ Dr. J. Maloff stated that some of the prison experiences claimant described *could* contribute to triggering PTSD. Evidence that claimant "could" have a work-related psychological injury does not, per se, supersede a physician's opinion that claimant has no such injury. *See generally Bath Iron Works Corp. v. Director, OWCP [Shorette]*, 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997).

⁶ Thus, contrary to claimant's contention, the administrative law judge was not required to find Dr. P. Maloff's opinion insufficient to rebut the Section 20(a) presumption on the basis that his opinion was entitled to only "moderate weight." Decision and Order at 35.

judge's finding that employer rebutted the Section 20(a) presumption. *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT).

If the administrative law judge finds the Section 20(a) presumption rebutted, it drops from the case. *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT). The administrative law judge then must weigh all the relevant evidence and resolve the causation issue based on the record as a whole, with claimant bearing the burden of persuasion. *Id.*; see also *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); see generally *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). Claimant contends the administrative law judge erred by not crediting the opinions of his treating physicians, Drs. Zamani and Afshar, and the opinion of his treating therapist, Ms. Phillips, that he has a work-related psychological condition. Claimant also contends the administrative law judge erred in giving any weight to the opinions of Dr. J. Maloff and Dr. P. Maloff.

In his extensive analysis, the administrative law judge found that the most significant factors in his decision are the psychological tests administered by Dr. J. Maloff and claimant's lack of credibility.⁷ Decision and Order at 40. The administrative law judge found Dr. J. Maloff's opinion that claimant is malingering to be well-reasoned, based on a thorough analysis, and convincing. The administrative law judge concluded that claimant's subjective complaints of psychological symptoms are suspect. *Id.* at 43. The administrative law judge found that claimant made statements that support this latter conclusion. Specifically, claimant testified that he could continue working overseas and would be a "normal person" if his right knee got better, and he did not mention his psychological condition until prompted by his attorney. *Id.*; Tr. at 200-201; see also JX 24 at 8. Additionally, Dr. J. Maloff stated that, during his interview, claimant denied "all of the hallmark symptoms of PTSD" and focused instead on his knee. Decision and Order at 43; see JX 25 at 25. The administrative law judge concluded that, although claimant suffered from a change in temperament after returning home from his second deployment to Afghanistan and may be unhappy with his life, he does not suffer from a work-related psychological injury.⁸ *Id.* at 44-45; see Tr. at 48-52, 94-98, 101-102.

⁷ The administrative law judge found that claimant was not actively deceptive, but that he has well-documented and obvious memory problems, was confused by questioning at the hearing, and provided inconsistent statements. Decision and Order at 30. Moreover, the administrative law judge found his testimony suggested a tendency to form a self-serving narrative. *Id.* The administrative law judge found credible Dr. J. Maloff's conclusion that claimant was malingering, as claimant scored "off the charts" on eight of the nine scales that indicate symptom exaggeration. *Id.* at 32; see EX 6 at 2; JX 25 at 27-28.

⁸ In this respect, we reject claimant's contention that the administrative law judge "improperly discounted" the testimony of his wife and daughter, who corroborated his

The administrative law judge properly found that Dr. Afshar did not provide an opinion as to the cause of the psychological injury he diagnosed, *see* JX 14 at 35-36, and that Ms. Phillips's opinion that claimant has PTSD is contradicted by the opinion of Drs. J. Maloff, the psychological test results, and, to a lesser extent, by Dr. P. Maloff's opinion.⁹ Decision and Order at 40-41. The administrative law judge also noted that neither Dr. Afshar nor Ms. Phillips provided testimony or issued a report, and that they saw claimant a combined total of only 15 times over a three-year period.¹⁰ *Id.* at 41. Under these circumstances, the administrative law judge concluded that, given Dr. J. Maloff's opinion and the test results on which it was based, he need not defer to the opinions of claimant's treating physicians. Upon fully addressing all the relevant evidence, the administrative law judge concluded that claimant did not meet his burden of establishing he has a work-related psychological injury. *Id.* at 45.

It is well-established that an administrative law judge is entitled to weigh the evidence and to draw his own inferences therefrom; he has the prerogative to credit one medical opinion over that of another and is not bound to accept the opinion or theory of any particular medical examiner. *See Duhagon*, 169 F.3d at 618, 33 BRBS at 3(CRT); *see generally Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). Given the contrasting evidence in this case, the administrative law judge was not required to give determinative weight to the opinions of the treating professionals, but was entitled to consider the rationale, if any, underlying their opinions

reports of post-employment symptoms of nightmares and difficulty sleeping. The administrative law judge found their description of claimant's behavior after he returned from his second deployment to Afghanistan consistent with that reported in medical records and other evidence. Decision and Order at 32-33; *see also id.* at 8-9. Nonetheless, the administrative law judge rationally concluded that this evidence does not demonstrate the existence of a causal relationship between claimant's symptoms and his work for employer. We note, moreover, that claimant did not allege that his psychological condition was related to the knee injury. *See generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982).

⁹ The administrative law judge gave lesser weight to the conflicting opinions of Dr. P. Maloff and Dr. Takamura, but weighted them equal to each other. Decision and Order at 34-37, 43-44.

¹⁰ In its response brief, employer agrees with claimant that he was seen a total of 17 times, rather than 15 times. Emp. Resp. Br. at 18. This error is harmless as the finding that claimant received psychological treatment infrequently over an approximately three-year period is supported by substantial evidence.

as well as the other medical evidence of record. *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir.), *cert. denied*, 528 U.S. 809 (1999) (administrative law judge should give determinative weight to treating physician regarding treatment options in absence of evidence that treatment was unnecessary or inappropriate); *Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195 (2001); *see also Monta v. Navy Exch. Serv. Command*, 39 BRBS 104 (2005). The administrative law judge addressed and permissibly rejected claimant's contention that the decision in *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997) mandates the conclusion that his subjective complaints must be credited.¹¹

In *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT), the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, stated, "our court will interfere only where the credibility determinations conflict with the clear preponderance of the evidence, or where the determinations are inherently incredible or patently unreasonable." *Ogawa*, 608 F.3d at 648, 44 BRBS at 48(CRT). The administrative law judge is vested with the authority to make findings of fact and to draw rational inferences from the record; the Board may not substitute its views for those of the administrative law judge. *See, e.g., Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002). In this case, the administrative law judge set forth a detailed, rational basis for rejecting the evidence claimant submitted in support of his claim of a work-related psychological injury, and for giving greater weight to the psychological test results indicating malingering and the opinion of Dr. J. Maloff.¹² *See Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT); *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000). We affirm the administrative law judge's denial of the claim as it is supported

¹¹ In *Pietrunti*, the administrative law judge rejected the medical opinions that the claimant had a severe psychiatric disorder on the ground that the physicians "simply accepted [the claimant's] asserted [psychological] symptoms as true." The United States Court of Appeals for the Second Circuit held this was error, given the "uncontroverted and unanimous evidence" that the claimant had a psychological condition for which the claimant had undergone two years of treatment and was taking "powerful" antidepressants. 119 F.3d at 1043-1044, 31 BRBS at 90-91(CRT). The administrative law judge in the present case permissibly found that factual evidence in this case was significantly different than that in *Pietrunti* and that he was permitted to weigh the conflicting evidence. Decision and Order at 40-41.

¹² Claimant's contention that the administrative law judge also erred by not crediting the opinion of Dr. Zamani is meritless. Dr. Zamani is claimant's primary care physician. He noted that claimant reported psychological issues and requested a referral to a psychologist. JX 11 at 1. Dr. Zamani's report does not include a diagnosis of a work-related psychological condition. *Id.* at 4.

by substantial evidence. *See Hice v. Director, OWCP*, 48 F.Supp. 2d 501 (D.Md. 1999); *Coffey*, 34 BRBS 85.

Accordingly, the administrative law judge's Decision and Order Denying Compensation Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge