U.S. Department of Labor

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

BRB Nos. 14-0257
and 14-0257A

ABDULRAOUF ABDELMEGED	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
GLOBAL LINGUIST SOLUTIONS, L.L.C.	)	
	)	
and	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY	)	DATE ISSUED: Mar. 27, 2015
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits of Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

John S. Evangelisti, Denver, Colorado, for claimant.

Jonathan A. Tweedy and Pierce C. Azuma (Brown Sims), New Orleans, Louisiana, for employer/carrier.

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: McGRANERY, BOGGS and BUZZARD, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge:

Employer appeals and claimant cross-appeals the Decision and Order Awarding Benefits (2012-LDA-00654) of Administrative Law Judge Jonathan C. Calianos 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 worked as a linguist/translator for employer for four tours of duty in Iraq beginning in February 2008. He testified that he saw and experienced a number of traumatic incidents during these deployments. On or about October 31 or November 1, 2009, during his final deployment, claimant had an altercation with a man who claimed claimant was sleeping in the wrong room. During the fight, claimant was hit in the chest and bumped/scraped his shin and elbow. He passed out and was found later by the Army police; claimant was cleared of any wrong-doing. He was taken to the medical clinic complaining of chest pain, and he was examined by Dr. Oliver who found no chest or heart problems but advised claimant to undergo a stress test. Additionally, Dr. Oliver diagnosed claimant with Hepatitis C and sent claimant state-side for treatment. CX 1 (Tabs 9-10). Claimant was granted a leave of absence from November 9, 2009, through February 8, 2010, for treatment of his Hepatitis C. Upon completing that treatment, claimant was cleared to return to work by Dr. Garcia on January 27 and February 3, 2010. CX 5.

Claimant did not return to work. On February 15, 2010, he was referred to Denver Cardiology due to his complaints of hypertension, chest trauma, and shortness of breath. Although his blood pressure was high, other tests, including an EKG, were normal. CX 1 (Tab 12-13); EX BB at 15. Claimant never returned to work for employer due to a mix up with his paperwork, and employer "acknowledged claimant's resignation" effective July 28, 2010. CX 53.[1]

[1] Claimant stated he fulfilled all the steps necessary to return to work, including sending his application. Notations in the file indicate that employer did not receive or had lost claimant's papers. CX 53; EX A. According to the documents, employer began sending claimant return-to-work papers in January 2010 and, as of May 2010, had received only a portion of the package back. Employer gave claimant a deadline of July

Claimant filed a claim for benefits in October 2011 for injuries to his low back, heart, feet and legs. On December 16, 2011, claimant visited Dr. Pock, a psychiatrist, at the behest of his attorney; Dr. Pock treated him six times for extreme anxiety, depression, insomnia, exhaustion, impaired memory, reduced organization, and traumatic memories. TR at 151. Dr. Pock diagnosed post-traumatic stress disorder (PTSD) and depression and stated that claimant cannot return to work in Iraq or in any war zone. JX 1 at 55; CX 7. Because he claimed he suffered a psychological injury from his employment between February 2008 and October 2009 but had only belatedly become aware of such injury, claimant, in April 2012, amended his claim for benefits to include a psychological injury, as well as Hepatitis C, lumbar, cardiac, and other injuries. CX 10. Employer denied the claims.

The administrative law judge held a hearing on July 12, 2013. Pertinent to these appeals, the administrative law judge found that claimant did not establish a prima facie case for his alleged back, cardiac, blood pressure, and Hepatitis C injuries. Decision and Order at 10-12. He found that claimant established a prima facie case for his psychological injury,[2] employer did not rebut the Section 20(a), 33 U.S.C. §920(a), presumption, and, even if it did, claimant's psychological injury is work-related based on the record as a whole. *Id.* at 14-15. Next, the administrative law judge found that the parties stipulated claimant's psychological condition had not reached maximum medical improvement and that because claimant's psychiatrist, Dr. Pock, and employer's expert, Dr. Moe, stated that claimant cannot return to work in Iraq, claimant established a prima facie case of total disability. *Id.* at 16. The administrative law judge found that employer did not establish the availability of suitable alternate employment, and he awarded claimant ongoing temporary total disability benefits commencing November 9, 2009. *Id.* at 18.

27, 2010, to return all necessary documents, and, upon his failure to do so, terminated him as of July 28. Claimant had communicated to employer on July 19, 2010, that he had sent the documents twice, and he did not believe employer could not find them. EX A. Claimant also indicated that he had passed a linguist test and had gone to Iraq in 2010 to try to get his job back and to retrieve some of his equipment. CX 53 at 112; JX 3 at 43-44, 46; TR at 211; Cl. Br. at 16.

[2] In this regard, the administrative law judge found that claimant credibly testified to witnessing shootings and explosions, to interrogating bound prisoners, to poor treatment by Iraqis and U.S. military personnel, and to being in a caravan when an IED exploded. Decision and Order at 12.

The administrative law judge found that claimant was not aware that his psychological injury was work-related until he treated with Dr. Pock in December 2011; however, because he found that the onset of claimant's disability preceded claimant's date of awareness, the administrative law judge calculated claimant's average weekly wage based on his wages between November 7, 2008, and November 9, 2009. The administrative law judge calculated claimant's average weekly wage to be $3,082.02 pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c), and, as that amount exceeds the maximum rate permitted by 33 U.S.C. §906(b)(1), the administrative law judge found that claimant is entitled to the maximum compensation rate of $1,224.66 from November 9, 2009, and continuing. Decision and Order at 20.[3] Employer appeals, and claimant cross-appeals, the administrative law judge's decision. The Director, Office of Workers' Compensation Programs (the Director), responds to two issues in employer's appeal.

BRB No. 14-0257A – Claimant's Cross-Appeal

Claimant cross-appeals the administrative law judge's decision. He generally contends the administrative law judge erred in failing to find his physical injuries to be work-related. He argues that he established a prima facie case for his back injury, his cardiac injury, his high blood pressure, and his Hepatitis C. With regard to his back injury, claimant contends the administrative law judge erroneously limited his consideration to the 2009 altercation rather than considering claimant's overall working conditions. He asserts the administrative law judge erred in failing to find working conditions that could have caused his cardiac condition and his high blood pressure, and he contends he was exposed to the blood of others, which could have caused his Hepatitis C. Employer asserts that the administrative law judge's findings for the physical injuries are supported by substantial evidence and that he correctly found claimant did not establish a prima facie case for any of those injuries. The Director did not respond to claimant's cross-appeal.

In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after he establishes a prima facie case. To establish a prima facie case, the claimant must show 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. *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982).

[3] The administrative law judge also awarded claimant interest, medical benefits, and an attorney's fee. Decision and Order at 20-21.

Back Injury

Claimant avers that the evidence supporting the work-relatedness of his back injury is Dr. Miller's chiropractic report. CX 1 (Tab 14). Dr. Miller's report is dated January 22, 2012, and it indicates that he treated claimant in November 2009 for acute pain from his lower back radiating down his left leg. He stated he treated claimant three or four times and then did not hear from him again until December 2011. As the administrative law judge found, Dr. Miller's letter was written from memory over two years after the treatment, as he could find no treatment or billing records except for an x-ray. The administrative law judge stated that, even assuming claimant established a harm to his back, there is no evidence of record potentially linking a back injury to claimant's employment because, although claimant appears to allege the back pain arose from the altercation at work, he did not complain of back pain when he was seen by either the military doctor, Dr. Oliver, or by the civilian nurse, Nurse Blemings, after the altercation in Iraq, or in testimony describing the altercation. Decision and Order at 10. Thus, the administrative law judge found that claimant failed to establish a prima facie case relating a back injury to the altercation at work.

Claimant, on appeal, asserts that his back injury "could have been caused, contributed to or aggravated by his working conditions in Iraq[,]" and that the administrative law judge improperly limited his consideration to the altercation. The administrative law judge rationally limited his consideration of the work-relatedness of claimant's alleged back condition to the altercation because claimant did not raise his general working conditions as a potential cause of his back pain.[4] *U. S. Industries*, 455 U.S. 608, 14 BRBS 631 (Section 20(a) does not apply to a claim not made). Moreover, the administrative law judge correctly found that claimant did not complain of back pain immediately after the altercation or the next day at the clinic. Decision and Order at 10; CX 1 (Tabs 9-10). As the administrative law judge acted within his discretion in rejecting Dr. Miller's opinion because it was not based on contemporaneous medical notes and because there is no other evidence of record to support the existence of a back injury that could have been caused by the work altercation, the administrative law judge properly concluded that claimant did not establish a prima facie case relating a back injury to his employment. *Bolden*, 30 BRBS 71. We affirm the administrative law judge's denial of benefits for a back condition.

[4] Claimant attempts to show he raised "working conditions" by referring to a poem he wrote on an unknown date and submitted into evidence, wherein he mentioned that he had back pain on the day he wrote it. CX 30; TR at 129-130; Cl. Br. at 58. The poem was written in Arabic and translated into English by someone else.

Cardiac Injury and High Blood Pressure

Claimant relies on the opinions of Drs. Nawaz and Pock to establish the work-relatedness of his high blood pressure and a cardiac condition. In February 2010, Dr. Nawaz at Denver Cardiology reported that claimant had a fight at work; he diagnosed untreated high blood pressure, and he recommended a stress echocardiogram. However, he found that claimant's chest was clear and normal upon examination, as was his EKG.[5] CX 1 (Tab 13); EX BB at 15. Dr. Pock, claimant's psychiatrist, reported that claimant told him he had high blood pressure but was unable to obtain the medicine prescribed by Dr. Nawaz because he had no insurance. Dr. Pock does not mention any cardiac condition. Neither Dr. Nawaz nor Dr. Pock expressed an opinion on the cause of claimant's high blood pressure; they noted only that he has been prescribed medication for this condition. CX 1 (Tab 13); CX 7; JX 1; *see* Decision and Order at 11 n.11.[6]

The administrative law judge found that claimant did not establish he has a cardiac injury. Decision and Order at 11. Dr. Oliver found no signs of trauma, tenderness, or fractures near or to claimant's heart and stated that claimant's EKG was normal. CX 1 (Tab 9). In conjunction with Dr. Nawaz's similar findings in February 2010, this evidence supports the administrative law judge's finding of no cardiac harm, and we affirm the finding that claimant did not establish a prima facie case relating an alleged cardiac condition to his employment, as it is supported by substantial evidence. *See*, *e.g.*, *Mackey v. Marine Terminals Corp*., 21 BRBS 129 (1988).

The administrative law judge found that claimant has high blood pressure; thus, claimant has established a "harm." However, the administrative law judge also found that claimant has not shown working conditions or an incident which could have caused the high blood pressure. The administrative law judge reasonably rejected claimant's assertion that being struck on the chest during the altercation and seeing Dr. Nawaz for heart palpitations is evidence of work-related high blood pressure. Dr. Nawaz is the only cardiac expert of record, and, as he provided no opinion on the cause of claimant's hypertension, the administrative law judge rationally found that claimant did not establish a prima facie case relating his high blood pressure to his employment. We affirm this finding as it is supported by substantial evidence. *See Bolden*, 30 BRBS 71.

[5] There are no results from a stress echocardiogram in the record.

[6] The administrative law judge noted that Dr. Pock, at his deposition, suggested that claimant's hypertension could be a result of stress; he also noted Dr. Pock's disclaimer that he is not an expert, and would defer to an internist, on this matter.

Hepatitis C

Claimant asserts there is evidence that his working conditions could have caused his Hepatitis C because he testified he interpreted for people who were bleeding while being interrogated and he got blood on his hands. *See* TR at 113, 135. The administrative law judge found that, although claimant asserts he did not have Hepatitis C before working for employer, the record establishes that claimant was diagnosed with chronic Hepatitis C in 2005. CX 2. The administrative law judge found that, even assuming claimant did not have the disease while he was employed with employer, claimant did not establish conditions at work that could have caused it, as there is no evidence to establish that any infected person's blood entered his blood stream. Decision and Order at 12. Accordingly, the administrative law judge found that claimant did not establish a prima facie case relating his Hepatitis C to his employment. We affirm the finding that claimant did not establish an incident or working conditions that could have exposed him to Hepatitis C, as it is supported by substantial evidence. *See generally Bolden*, 30 BRBS 71.

Accordingly, we reject claimant's arguments on cross-appeal, and we affirm the administrative law judge's denial of benefits for claimant's physical ailments, as they are not work-related.

BRB No. 14-0257 – Employer's Appeal

Disability commencing November 2009

Employer appeals the administrative law judge's award of temporary total disability benefits from November 9, 2009, through December 16, 2011, stating that claimant did not have a compensable disability at that time.[7] It asserts that claimant was not aware of any psychological disability before December 16, 2011, and that his psychological condition did not preclude him from working prior to this date. Claimant responds, urging affirmance on the basis that he was "clearly" disabled from an undiagnosed psychological condition at the same time as he was released from work due to Hepatitis C. The Director also responds, asserting that the administrative law judge made the permissible finding that the psychological condition disabled claimant from the time he left Iraq and that the finding is supported by the opinions of Drs. Pock and Moe.

The administrative law judge did not specifically discuss and make a finding as to the onset date of claimant's psychological disability. Rather, in addressing the applicable

[7] Employer does not challenge the finding that claimant's psychological injury is work-related and compensable.

average weekly wage and the date claimant became aware of his disability, the administrative law judge summarily stated that the date of injury, December 16, 2011, occurred after the date of disability, November 9, 2009, and he awarded benefits from the date of disability.[8] Decision and Order at 18-20. The administrative law judge did not explain how he determined that November 9, 2009, was the date claimant's disability began.

Section 2(10) of the Act, 33 U.S.C. §902(10) (emphasis added), provides: "'Disability' means incapacity *because of injury* to earn the wages which the employee was receiving at the time of injury in the same or any other employment[.]" The definition of disability has an economic as well as a medical component. *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991). If a claimant is unable to work at all, he is totally disabled. *J.R.* [*Rodriguez*] *v. Bollinger Shipyard, Inc.*, 42 BRBS 95 (2008), *aff'd sub nom. Bollinger Shipyards, Inc. v. Director, OWCP*, 604 F.3d 864, 44 BRBS 19(CRT) (5th Cir. 2010). If he is unable to return to work overseas, he is totally disabled unless his employer establishes the availability of suitable alternate employment stateside. *Service Employees Int'l, Inc. v. Director, OWCP* [*Barrios*], 595 F.3d 447, 44 BRBS 1(CRT) (2d Cir. 2010); *Rice v. Service Employees Int'l, Inc.*, 44 BRBS 63 (2010). Because "disability" is both an economic and a medical concept, we reject the Director's contention that we should construe the administrative law judge's onset "finding" as resting on the medical opinions of Drs. Pock and Moe. Rather, because the administrative law judge did not address the opinions of the doctors as they pertain to this issue and, indeed, did not address this issue at all, we vacate the award of benefits commencing on November 9, 2009, and we remand the case for consideration of relevant evidence. *See, e.g., Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982) (if the Board is "uncertain with respect to the factual underpinning" of the administrative law judge's conclusion, it must remand the case for further findings).

In his recitation of the facts, the administrative law judge summarized claimant's testimony that, when he returned home from Iraq, he had nightmares, felt weak, had suicidal thoughts, and no appetite. TR at 152, 173. Dr. Pock first saw claimant in

[8] The administrative law judge stated only: "In the instant matter, [claimant's] date of disability, November 9, 2009, preceded his date of injury under section 10(i), December 16, 2011, and therefore his AWW must be calculated based on his earnings in the year preceding his disability under section 10(c)." Decision and Order at 18. In his discussion of the amount of compensation due, the administrative law judge stated that, based on his average weekly wage, claimant "is entitled to the maximum compensation rate of $1,224.66 per week from November 9, 2009 to the present and continuing." *Id.* at 20 (footnote omitted).

December 2011, two years after he ceased working for employer. At that time, although Dr. Pock diagnosed work-related PTSD with anxiety, depression, hopelessness, impaired sleep, nightmares, flashbacks, and triggering events, and concluded claimant was presently disabled from work by his severe symptoms, Dr. Pock did not express an opinion as to when claimant's disability began. CX 7. Subsequently, in May 2012, Dr. Pock agreed with claimant's self-assessment when he said "I can't do anything." He also stated, in May 2012, that based on the severity of claimant's symptoms, claimant "has been unable to work since the time he returned from Iraq." CX 7 at 5.[9]

Dr. Moe concluded in December 2012 that claimant does not have PTSD but has a personality disorder that is not work-related; however, he acknowledged that claimant's pre-existing condition was probably more readily manifested on a temporary basis because of his exposure to the violence in Iraq.[10] Dr. Moe believed claimant could work as an interpreter but not in Iraq or in any other violent place. EX M. Dr. Moe did not consider claimant's psychological condition to be "disabling" and did not express an opinion on the onset of disability.

In addition to these doctors' reports, there is other evidence the administrative law judge did not address but which is relevant to making a determination on the onset date. Claimant was sent home from Iraq for treatment of his Hepatitis C. Claimant acknowledged in his brief on appeal that he "would have returned to Iraq in 2009 if he was not diagnosed with Hep C, because of his commitment to the mission." Cl. Resp. Br. at 15. Moreover, during the early part of 2010, claimant attempted to return to work by completing and sending employer copies of the required paperwork, and despite employer's assertion that the paperwork package was incomplete, claimant took and passed a linguist test and flew to Iraq in 2010, in part to try to regain his job. Additionally, claimant subsequently collected unemployment insurance, which, employer asserts, can be obtained only if one is ready and willing to return to work, and claimant commenced working at the Post Office one week before seeing Dr. Pock for the first time, a fact Dr. Pock did not know.[11] CXs 7, 11 at 32; JX 3 at 99-100. As the

[9] In his deposition, Dr. Pock stated that claimant's symptoms began in February 2008, when he first began working for employer, and "became quite strong" after one of the episodes claimant reported as having occurred in Iraq. JX 1 at 18-19. As claimant continued to work for employer, this statement does not support a finding that claimant became "disabled" at any particular time.

[10] Claimant was diagnosed with a personality disorder in 2001. CX 1 (Tabs 1, 3-4, 7).

[11] We also note that claimant obtained part-time work at a hotel in 2012, and he worked part-time for a health-care company. JX 3 at 64-67.

administrative law judge did not discuss all the evidence relative to the onset of claimant's disability, but, rather, made a summary statement when addressing another aspect of the claim, we vacate the award of disability benefits commencing in November 2009. We remand the case for the administrative law judge to specifically address when claimant became disabled by his work-related psychological condition, considering all relevant facts. In this regard, the administrative law judge should address the parties' contentions concerning the weight to be accorded to the opinions of Drs. Pock and Moe. *See* Cl. Post-Hearing Br. at 54-57; Emp. Post-Hearing Br. at 42-49.

Disability after December 16, 2011

Employer also contends the administrative law judge erred in awarding total disability benefits after December 16, 2011, because he improperly rejected its evidence of suitable alternate employment.[12] Claimant responds that the administrative law judge's award should be affirmed.

In order to establish a prima facie case of total disability, a claimant must establish that he cannot return to his usual work due to a work injury. *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994). If the claimant establishes an inability to return to his usual work, the burden shifts to the employer to demonstrate the availability of suitable alternate employment that the claimant is capable of performing and could secure if he diligently tried. *Id.*; *see also Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980).

Employer concedes that, as of December 16, 2011 when he first saw Dr. Pock, claimant has been unable to return to his usual work overseas. Aubrey Corwin, employer's vocational expert, identified a number of jobs she believed claimant capable of performing.[13] The administrative law judge determined that the interpreter jobs are not suitable because claimant has a heavy accent and is hard to understand, his writing is unintelligible, his spelling is poor, and his command of English vocabulary is limited.[14]

[12] Employer does not otherwise challenge the administrative law judge's findings regarding suitable alternate employment and post-injury wage-earning capacity based on claimant's part-time employment.

[13] These jobs were for janitor, driver, customer service representative, and interpreter positions. EX Y.

[14] The administrative law judge found that claimant's position as an interpreter in Iraq likely was due more to his fluency in Arabic than his fluency in English. Decision and Order at 17.

Decision and Order at 17. The administrative law judge also found that claimant cannot perform the janitor and driver positions because of his psychological injury. He noted that claimant has attempted to work at some part-time positions, but he credited claimant's testimony that claimant does not think he can hold a job because of his "frustration" and "anger" issues. TR at 153; CX 7 at 5; CX 11 at 32; JX 3 at 16-17. The administrative law judge stated he personally observed claimant's "anger issues, lack of control over his emotions, and psychological breakdowns" at the formal hearing. Decision and Order at 18. The administrative law judge also found that Ms. Corwin did not fully address claimant's psychological condition in assessing his employability; specifically, she did not address claimant's ability to obtain or maintain a job in view of his psychological difficulties. In addition, when she spoke with prospective employers, she did not mention claimant's psychological condition.[15] The administrative law judge also noted that employer's expert, Dr. Moe, opined that claimant's "maladaptive personality traits" are a "significant hurdle" to his obtaining and maintaining job. EX M at 23. Thus, the administrative law judge concluded that employer did not establish the availability of alternate employment that is suitable for claimant given his psychological condition.

The administrative law judge's credibility determinations are not to be disturbed unless they are "inherently incredible or patently unreasonable." *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Thus, the administrative law judge rationally relied on claimant's demeanor at the hearing, as well as Dr. Moe's opinion, in concluding that employer did not demonstrate the availability of suitable alternate employment. Moreover, the administrative law judge rationally concluded that employer's labor market survey did not sufficiently account for claimant's psychological condition. Therefore, as it is supported by substantial evidence of record, we affirm the award of total disability benefits commencing December 16, 2011. *DM & IR Ry. Co. v. Director, OWCP*, 151 F.3d 1120, 32 BRBS 188(CRT) (8th Cir. 1998); *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997).

[15] A vocational counselor need not personally contact potential employers to ascertain whether they would hire a disabled claimant. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290 (1990). In this case, Ms. Aubrey did contact potential employers, but, in presenting "hypotheticals" about claimant to the employers, did not disclose claimant's psychological difficulties. EX Y at 15-20; *see Armand v. Am. Marine Corp.*, 21 BRBS 305 (1988).

Average Weekly Wage

Employer also contends the administrative law judge erred in calculating claimant's average weekly wage under Section 10(c) of the Act. It asserts that claimant's situation is akin to that of a "voluntary retiree," and his average weekly wage should be based on the national average weekly wage in effect as of the date of injury, December 16, 2011, $647.60, instead of on his actual wages the year before he left work due to his non-work-related Hepatitis C. Therefore, employer posits, claimant's average weekly wage should be calculated in accordance with Sections 8(c)(23), 10(d)(2), and 10(i) of the Act, 33 U.S.C. §§908(c)(23), 910(d)(2), (i). Claimant and the Director assert that the administrative law judge properly used Section 10(c) and claimant's actual wages during his last year of work to calculate his average weekly wage.

Under Section 10(c), the administrative law judge has broad discretion to arrive at a fair approximation of a claimant's annual earning capacity at the time of his injury.[16] *Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010); *Patterson v. Omniplex World Services*, 36 BRBS 149 (2003); *Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991). Section 10(i) states that for purposes of calculating average weekly wage "with respect to a claim for disability or death due to an occupational disease which does not immediately result in death or disability, the time of injury shall be deemed to be the date on which 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."[17] 33 U.S.C. §910(i); *Roberts v. Sea-Land Services, Inc.*, 132 S.Ct. 1350, 46 BRBS 15(CRT) (2012). Section 10(d)(2) provides that, when a retiree's disability becomes manifest more than one year after his retirement, his average weekly wage is to be based upon the national average weekly wage applicable at the time of his injury. 33 U.S.C. §910(d)(2)(B).

Regardless of when claimant's disability commenced, as the administrative law judge is to determine on remand, we reject employer's assertion that the administrative law judge inappropriately utilized the wages from claimant's last employment with employer to ascertain claimant's average weekly wage. "Retirement" occurs when a worker voluntarily removes himself from the workforce with no expectation of returning.

[16] Section 10(c) applies if either Section 10(a) or Section 10(b), 33 U.S.C. §910(a), (b), "cannot reasonably and fairly be applied." 33 U.S.C. §910(c). There is no contention here that Section 10(a) or (b) is applicable in this case.

[17] The parties agree, and the administrative law judge found, that claimant's psychological condition is an occupational disease. Decision and Order at 8.

Coughlin v. Bethlehem Steel Corp., 20 BRBS 193 (1988); 20 C.F.R. §702.601(c). Contrary to employer's assertion, claimant did not voluntarily retire from the workforce: he was removed from work due to his Hepatitis C, with the seeming expectation of a return to work. Moreover, an employee's "retirement" is not "voluntary" if his inability to work is due to his work-related injury. *Harmon v. v. Sea-Land Service, Inc.*, 31 BRBS 45 (1997). Thus, claimant does not fall within the definition of a "voluntary retiree." As the plain language of Section 10(d)(2) limits its use to those workers who have "retired," it cannot apply in this situation, and employer's proposed analogy fails. Moreover, the use of wages earned prior to the date of awareness has been recognized as appropriate in fact patterns such as the one here. *LaFaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS 108(CRT) (2d Cir. 1989) (finding that it is appropriate to apply Section 10(c) where disability pre-dates awareness and claimant has suffered a loss of earnings as of the date of awareness).[18] Thus, pursuant to Section 10(c), the administrative law judge reasonably used the wages in the job in which claimant was injured to calculate his average weekly wage. *Id.*; *see generally Rhine*, 596 F.3d 1161, 44 BRBS 9(CRT); *Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 40 BRBS 13(CRT) (9th Cir. 2006). As it is rational, supported by substantial evidence, and in accordance with law, we affirm the administrative law judge's average weekly wage calculation.[19]

Accordingly, the administrative law judge's award of temporary total disability benefits commencing in November 2009 is vacated, and the case is remanded for further

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[18] In *LaFaille*, the United States Court of Appeals for the Second Circuit stated:

> Among the anomalies that would result if § 10(c) were not applied in lieu of § 10(i) is the scenario described . . . in which an employee becomes [medically] disabled before suffering a wage loss attributable to his disease, but recognizes the occupational origin of the disease only after retirement or after accepting a lower paying job. Section 10(i) would give him nothing.

The court observed that, in amending the Act in 1984, Congress stated that in such circumstances, Section 10(c) should be used to calculate average weekly wage so that compensation shall be "based upon the claimant's wages prior to any reduction attributable to the disability." *LaFaille*, 884 F.2d at 59-60, 22 BRBS at 16(CRT) (citing H.R. Rep. 98-1027, 98th Cong., 2d Sess. 30, 1984 U.S.C.C.A.N. 2771, 2780 (1984)).

[19] Thus, we affirm the administrative law judge's finding as to claimant's average weekly wage; however, we do so on a basis different than that proposed by the Director, as we cannot affirm the finding that claimant suffered a psychological disability immediately upon his ceasing work for employer. *See* discussion, *supra*.

consideration consistent with this opinion. On remand, the administrative law judge must determine the onset date of claimant's work-related psychological disability. In all other respects, the Decision and Order is affirmed.

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

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JUDITH S. BOGGS
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring and dissenting:

I concur with my colleagues' decision to affirm the administrative law judge's denial of benefits for claimant's physical conditions, his finding that employer failed to demonstrate the availability of suitable alternate employment, and his finding regarding claimant's average weekly wage. However, I respectfully dissent from their decision to vacate the award of total disability benefits relating to claimant's psychological condition as of November 9, 2009, the date claimant returned from his deployment in Iraq after being placed on leave by his employer, and to remand the case for further consideration of the onset date.[20] For the reasons set forth below, I would affirm the administrative law judge's determination of the date of onset of claimant's disability because his decision is supported by substantial evidence, is rational, and is in accordance with the law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[20] Because the Board has affirmed the administrative law judge's finding that employer failed to demonstrate suitable alternate employment as of December 16, 2011, the date claimant first visited a psychiatrist and became aware of the connection between his disability and his employment, claimant is entitled to an award of total disability benefits as of that date. *Supra* at 11. Thus, the question to be decided on remand is whether the date of onset of claimant's total disability is either December 16, 2011, or some other date prior to December 16, 2011, including but not limited to November 9, 2009, the date claimant returned from Iraq. Decision and Order at 19, 22; TR at 149.

In this case, claimant was hired as an Arabic translator working alongside U.S. military forces during four deployments to Iraq, including Tikrit, the Green Zone, Abu Ghraib, and other locations. Decision and Order at 3-5. His four deployments spanned approximately 22 months from February 2008 to November 2009. *Id*. During these deployments, claimant testified that he experienced and witnessed numerous traumatic events, including interrogations of prisoners and criminals, shootings and explosions on a daily basis, travelling in a caravan that was hit by an Improvised Explosive Device (IED) that lifted his Humvee off the ground and caused injuries to his head, shootings directed at a caravan in which he was travelling, threats against his life, and other violent incidents. *Id.*

It is undisputed that claimant suffers from a psychological injury that was caused or aggravated by his employment as an interpreter in Iraq.[21] As a result of several visits with claimant's medical expert, Dr. Randolph Pock, a Board-certified psychologist and psychoanalyst, claimant was diagnosed with "severe post-traumatic stress disorder with anxiety, depression, hopelessness, impaired sleep, nightmares, flashbacks, and triggering events." Decision and Order at 7; CX 7 at 3. Employer's medical expert, Dr. Stephen Moe, a Board-certified psychiatrist, evaluated claimant on one occasion and opined that claimant has pre-existing "maladaptive personality traits," but also acknowledged that "the added stress of working in Iraq may have caused [claimant's] pre-existing psychiatric problems to be more readily manifested on a temporary basis." Decision and Order at 7; EX M at 21-23. Furthermore, the administrative law judge noted that "[claimant] became visibly agitated and anxious at several other points during his trial testimony, had similar breakdowns when discussing his time in Iraq with [employer's] vocational expert, with Dr. Moe, and during his deposition testimony." Decision and Order at 14. At one point during the trial, claimant "fell into a near-unconscious state, [which] was brought on by his recounting" of one of his experiences in Iraq. *Id*. The administrative law judge observed that "it is clear [claimant's] time in Iraq has had a serious effect on his mental health." *Id*. Thus, he determined that claimant established a prima facie case of causation for his psychological harm; that employer failed to rebut the presumption; or, in the alternative, when weighing the evidence as a whole, claimant met his burden of establishing causation. *Id*. at 12-14.

As it relates to the date of onset of claimant's disability, I respectfully disagree with the majority's conclusion that the administrative law judge "did not explain how he determined that November 9, 2009, was the date claimant's disability began" and that he "did not discuss this issue at all." *Supra* at 8. I also disagree with employer's assertion that the record is absent of any evidence to support a finding that claimant suffered from

[21] On appeal, employer confirmed that it is "not appealing the [administrative law judge's decision] regarding causation." Emp. Br. at 14.

psychological symptoms as of November 9, 2009. Emp. Br. at 17. It is well established that the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *see also Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962). "The Board must accept the [administrative law judge's] findings of fact if they are supported by 'substantial evidence in the record *considered as a whole*.'" *Schwirse v. Director, OWCP*, 736 F.3d 1165, 1171, 47 BRBS 31, 34(CRT) (9th Cir. 2013) (quoting 33 U.S.C. §921(b)(3)) (emphasis added).

In this case, the record as a whole contains substantial evidence supporting the determination that the date of onset of claimant's disability is November 9, 2009, the date he returned from Iraq. The administrative law judge's decision contains a lengthy discussion of the evidence concerning claimant's psychological condition and resulting disability, and includes a specific finding that "[claimant] credibly testified that he has suffered from symptoms including lack of concentration and memory, difficulty sleeping, nightmares, flashbacks to his time in Iraq, frustration and anger, and noise sensitivity *since his return to the U.S. in November 2009*." Decision and Order at 12 (emphasis added). The administrative law judge also noted that claimant "testified that *when he returned home from Iraq*, he had nightmares about the war every night and felt weak all the time" and that "*following his return from Iraq* [he testified] that he 'was not able to do nothing.'"[22] Decision and Order at 6, 9; TR at 151-153, 172-173 (emphasis added). Furthermore, the administrative law judge credited Dr. Pock's opinion that claimant "is disabled due to the severity of his symptoms" and "has been unable to work *since the time he returned from Iraq*." Decision and Order at 7, 17; CX 7 at 3, 5 (emphasis added). The administrative law judge also noted that employer's own medical expert acknowledged that claimant's psychological condition "is a significant hurdle that must be overcome for him to obtain and maintain a job." Decision and Order at 18; EX M at 25.

As the testimony reveals, this is not a case where the Board is "uncertain with respect to the factual underpinning" of the administrative law judge's conclusion. *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 701, 14 BRBS 538, 544 (2d Cir. 1982). Rather, the administrative law judge considered and discussed the relevant evidence concerning the onset of claimant's disability, including testimony of the claimant, which the administrative law judge found to be credible, and testimony of two medical experts, which he properly weighed. Thus, his finding that claimant is entitled to benefits as of the time claimant returned to the United States after being placed on leave from his deployment in Iraq is supported by substantial evidence.

[22] Claimant testified that when he came back from the war, "I was not able to do nothing, just weak all the time. I tried to get the job, I was not able to." TR at 152.

I am also not persuaded that additional evidence cited by employer to be taken into consideration on remand supports employer's position that the administrative law judge erred in determining the date of onset of claimant's disability. Emp. Br. at 16, 17. "While the [administrative law judge] is required to address each issue with substantial evidence, [he] is not required to address each conflicting fact." *Ceres Gulf, Inc. v. Director, OWCP*, 544 F. App'x 451, 455 (5th Cir. 2013) (unpub.) (citing *H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 480 (5th Cir. 2000)). Whether claimant was initially sent back to the United States because he was diagnosed with a liver disease is not relevant to the administrative law judge's determination that claimant also suffered from a debilitating psychological condition.[23] It is possible for an individual to suffer from multiple medical conditions simultaneously, and the fact that claimant in this case was removed from his employment after being diagnosed with a liver disease does not preclude a finding that claimant also suffered from a psychological condition that arose out of his employment. Additionally, the event giving rise to claimant's discharge was not simply a diagnosis of a liver disease, but rather was one of several violent incidents claimant testified to experiencing during his employment.[24]

Additionally, whether claimant took steps to maintain financial stability after returning from Iraq, but before being diagnosed with post-traumatic stress disorder, does not preclude, or even weigh against, the administrative law judge's finding that claimant was disabled as of the date he returned from Iraq. If anything, claimant's actions of applying for unemployment insurance, unsuccessfully seeking to be rehired by employer as an interpreter, and securing only temporary employment six days before seeking treatment for his psychological condition[25] support the conclusion that claimant

[23] The administrative law judge considered, but rejected, claimant's argument that he contracted a liver disease during his employment in Iraq, because evidence in the record indicated that the disease existed prior to his deployment. Decision and Order at 11-12. Separately, the administrative law judge weighed testimony from claimant and two psychiatrists in reaching his conclusion that claimant suffered from a psychological condition that was caused or aggravated by his employment. *Id*. at 12-15.

[24] Employer became aware of claimant's liver disease only after claimant sought medical treatment for separate injuries sustained as a result of a violent incident during which an individual threatened to kill claimant and struck him in the chest, causing him to pass out. Decision and Order at 5-6.

[25] Claimant was hired on a temporary basis by the United States Postal Service on December 10, 2011. CX 11 at 32. Six days later, on December 16, 2011, claimant first met with Dr. Pock and became aware of the connection between his psychological disability and his employment. Decision and Order at 19.

experienced substantial difficulty in obtaining employment. Employer concedes that claimant's wages between the time he returned from Iraq and the time he sought medical treatment for his psychological condition "are spare." Emp. Br. at 32.

Employer's additional argument that claimant could not have been disabled as of November 9, 2009, because claimant was not aware of his disability until he sought medical treatment from Dr. Pock on December 16, 2011, also lacks merit. Emp. Br. at 15. The administrative law judge noted that employer's expert, Dr. Moe, testified that some individuals with existing mental health issues do not seek treatment because they are not "self-aware," by which he meant that "[y]ou don't really know that you have a condition that lends itself to treatment." Decision and Order at 18-19; JX 2 at 14. Claimant testified that he first visited Dr. Pock because he "was having a lot of stress" and did not "know what is going on." Decision and Order at 18; TR at 176. Thus, the administrative law judge's finding that claimant "was not aware of the relationship between his employment, disease, and disability until he met with Dr. Pock on December 16, 2011" is consistent with his finding that claimant's disability existed prior to his first consultation with a psychiatrist. Decision and Order at 19-20; *see Blankenship v. Bowen*, 874 F.2d 1116, 1124 (6th Cir. 1989) ("Appellant may have failed to seek psychiatric treatment for his mental condition, but it is a questionable practice to chastise one with a mental impairment for the exercise of poor judgment in seeking rehabilitation.").

For the foregoing reasons, I would affirm the administrative law judge's finding that claimant is entitled to total disability benefits as of November 9, 2009, the date he returned to the United States after being placed on leave from his deployment in Iraq.

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GREG J. BUZZARD
Administrative Appeals Judge