



BRB No. 17-0504

KANISHKA PILOTI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MISSION ESSENTIAL PERSONNEL,	)	DATE ISSUED: <u>Mar. 7, 2018</u>
L.L.C.	)	_____
	)	
and	)	
	)	
ACE AMERICAN INSURANCE	)	
COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

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

Jeffrey M. Winter and Kim Ellis, San Diego, California, for claimant.

Robert N. Dengler and Timothy A. Pedernana (Flicker, Garelick & Associates, L.L.P.), New York, New York, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2016-LDA-00100) 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 began working for employer as a linguist in 2009 and was deployed to Afghanistan in April 2010. Claimant testified that he worked at a number of sites,

including in Mazar-e-Sharif with Special Forces. Claimant stated he was ambushed, witnessed rocket and suicide attacks, and developed symptoms of depression and nightmares, but did not seek treatment, even when he was home on leave. Rather, he stated he wanted to return to work because he was the only top secret interpreter. In December 2013 or January 2014, claimant was assigned to the Herat province; he testified he was no longer exposed to attacks but continued to suffer nightmares and symptoms of depression. Decision and Order at 4; CX 34 at 554; Tr. at 39-40, 50-51, 55.

On April 26, 2014, while in Mazar-e-Sharif, claimant was cited for driving a vehicle and carrying a weapon in violation of his employment contract. Claimant was terminated for this contract violation on May 16, 2014; his last day in Afghanistan was May 28, 2014. Decision and Order at 4-5; CX 25; Tr. at 33-36. After his termination, he completed a post-employment health assessment on May 26, 2014. CX 20. Claimant asserted that his psychological condition worsened when he returned home, and he first sought treatment in late 2014.<sup>1</sup> CX 17. Claimant filed a claim for benefits.<sup>2</sup>

Prior to the hearing, the parties stipulated that claimant suffers from a psychological injury, PTSD, due to his employment. The parties also stipulated that employer agreed to pay claimant temporary total disability benefits beginning December 29, 2014, and that claimant's psychological disability changed from temporary total to temporary partial as of June 1, 2015, and to permanent partial as of October 5, 2015. Decision and Order at 2-3; ALJX 1. The only dispute to be resolved concerned the onset of claimant's temporary total disability. *Id.* Claimant asserted that, pursuant to the opinion of one of his doctors, Dr. Kaiser, as supported by claimant's May 2014 post-employment health assessment, his temporary total disability began May 28, 2014. CX 10 at 81. Employer responded that the disability commenced on December 29, 2014, when claimant first sought treatment for his psychological condition. The administrative

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<sup>1</sup> A report from the Hamlin Psyche Center dated March 5, 2015, indicates claimant's initial evaluation occurred on two days, December 29, 2014, and January 6, 2015. CX 17. The parties agreed that December 29, 2014, was claimant's first day of "treatment" for purposes of the claim. Decision and Order at 6 n.14. Following the initial evaluation, claimant received psychological treatment and medications from medical professionals at the Center. CXs 10, 17-18, 36.

<sup>2</sup> Claimant filed two claims against employer, citing psychological and neurological injuries as well as injuries to his right index finger and lungs (OWCP No. 18-302291; April 23, 2013), and cumulative injuries to those same conditions and body parts (OWCP No. 18-303076; May 28, 2014). In November 2016, the administrative law judge approved the parties' Section 8(i), 33 U.S.C. §908(i), settlement covering all injuries except the cumulative psychological injury. Decision and Order at 2-3.

law judge agreed with employer and rejected claimant's contention that he is entitled to temporary total disability benefits between May 28 and December 29, 2014. Decision and Order at 13-16. The administrative law judge found that, even if claimant was suffering from PTSD or some psychological distress, claimant did not establish that he was unable to work as of May 28, 2014, due to that injury. He found that claimant's last day in Afghanistan is not necessarily the first day of disability. *Id.* at 14. Claimant appeals the administrative law judge's decision, and employer responds, urging affirmance. Claimant filed a reply brief.

Claimant contends the administrative law judge erred by disregarding Dr. Kaiser's uncontradicted opinion which establishes his prima facie case of total disability as of May 28, 2014.<sup>3</sup> Employer responds that, even if claimant was suffering from undiagnosed PTSD, there is no credible evidence of record establishing that the disorder prevented claimant from performing his usual work as an interpreter as of May 28, 2014. Rather, he was not performing his usual work at that time because he had been terminated for non-injury reasons. Claimant's reply brief reasserts that he was displaying symptoms of depression as of May 28, 2014.

A claimant has the burden of establishing the nature and extent of disability, and the Section 20(a), 33 U.S.C. §920(a), presumption does not apply to these issues. *Gacki v. Sea-Land Service, Inc.*, 33 BRBS 17 (1998); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1980). Disability is defined as the "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. §902(10); *see generally Barlow v. Western Asbestos Co.*, 20 BRBS 179 (1988). Thus, disability under the Act is an economic concept based on a medical foundation. *Bath Iron Works Corp. v. White*, 584 F.2d 569, 8 BRBS 818 (1st Cir. 1978); *see also Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). Evidence of a work-related physical condition, alone, is insufficient to support an award of benefits. *See Liberty Mutual Ins. Co. v. Commercial Union Ins. Co.*, 978 F.2d 750, 26 BRBS 85(CRT) (1st Cir. 1992); *Morin v. Bath Iron Works Corp.*, 28 BRBS 205 (1994). Because "disability" is "incapacity because of injury to earn wages[,]" 33 U.S.C. §902(10) (emphasis added), claimant in this case must demonstrate that he was unable to perform his usual work as of May 28, 2014, due to his

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<sup>3</sup> If an employee shows he cannot return to his usual employment due to his work injury, he has established a prima facie case of total disability, and the burden shifts to his employer to demonstrate the availability of suitable alternate employment. *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980).

psychological injury in order to be entitled to temporary total disability benefits from that date.

To support his contention of error, claimant emphasizes his May 2014 health assessment and Dr. Kaiser's uncontradicted opinion. In the health assessment, claimant indicated he suffered, either at the time of the assessment or sometime during his deployment, memory and sleep problems, feelings of depression and hopelessness, lack of interest, and nightmares. CX 20. He also indicated he felt in danger of being killed and was "currently interested in receiving help for a stress, emotional, alcohol, or family problem[.]" *Id.* Claimant first sought treatment for psychological symptoms on December 29, 2014. *See* n.1, *supra*. Ten months into his treatment, on October 13, 2015, which was nearly 17 months after claimant's departure from Afghanistan, Dr. Kaiser<sup>4</sup> reported that claimant had been temporarily totally disabled from his psychological condition from May 28, 2014, through October 5, 2015, when his condition became permanent and stationary.<sup>5</sup> CX 10 at 56, 79, 81. Dr. Kaiser considered claimant's termination from employment as the "cap stone of a series of events that led" to his inability "to perform that job at that point." CX 36 at 26-29.

Contrary to claimant's contention, the administrative law judge did not disregard claimant's evidence. He acknowledged that Dr. Kaiser is claimant's treating physician and that his opinion is generally credible and entitled to weight. However, he rationally found that Dr. Kaiser's opinion regarding the onset of disability, although uncontradicted by another medical expert, was unpersuasive and not supported by the record; he found there are "sufficient and clear convincing reasons" for rejecting it. Decision and Order at 12 (citing *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989));<sup>6</sup> ALJX 1; CXs 10,

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<sup>4</sup> Dr. Kaiser, the Director of Clinical Services at the Hamlin Psyche Center who consults with and/or intervenes in other practitioners' cases at the Center as needed, conducted a comprehensive evaluation of claimant on October 5, 2015, following claimant's treatment with Dr. Windman, Dr. Curtis, Ms. Greenspan, and others. *See* CXs 10, 17-18. As of that date, Dr. Kaiser had met with claimant between six and 12 times. CX 36 at 608, 612.

<sup>5</sup> The parties, however, stipulated that claimant was no longer totally disabled as of June 1, 2015. ALJX 1.

<sup>6</sup> *Magallanes* involved the onset of disability in a social security claim. In setting forth the law, the court stated that, generally, a treating physician's opinion is afforded greater weight; however, it is not necessarily conclusive as to the existence of an injury or disability. The court stated that the treating physician's opinion may be disregarded whether or not it is contradicted, but the judge must give specific legitimate reasons, set out in detail, for not accepting the treating physician's opinion. *Magallanes*, 881 F.2d at

17, 23, 36; n.5, *supra*. First, he found claimant left Afghanistan on May 28, 2014, because he was terminated for a contract violation and not due to his injury. Second, the administrative law judge accepted claimant's testimony that, but for the contract violation, he would have continued to work for employer; the administrative law judge found that claimant was a valued employee who had received, upon his termination, a number of letters of recommendation from his superiors. Decision and Order at 13-14; CXs 13, 25; Tr. at 51, 53. Third, although claimant may have been suffering some depression- or PTSD-related symptoms before he left Afghanistan, the administrative law judge found that claimant did not complain about their effect on his ability to perform his job and did not seek psychological treatment until December 2014;<sup>7</sup> instead, claimant secured work as a real estate agent upon his return home. Decision and Order at 13-15; Tr. at 54-56.

The administrative law judge has given specific reasons for not accepting Dr. Kaiser's opinion that the onset date of claimant's disability was May 28, 2014. *Magallanes*, 881 F.2d at 751; *see also Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). His determination that claimant did not satisfy his burden of establishing his inability to perform his usual work because of his injury as of May 28, 2014, is rational, within his discretion, and supported by substantial evidence. *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); *Pimpinella v. Universal Maritime Service Inc.*, 27 BRBS 154 (1993); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Therefore, as claimant did not establish that his work-related injury precluded the performance of his usual work, we affirm the administrative law judge's finding that claimant was not totally disabled as of May 28, 2014, and is not entitled to benefits from that date. *Morin*, 28 BRBS 205 (claimant not entitled to benefits because he submitted no evidence of lost earning capacity due to work-related lung disorder); *see Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994) (Board must affirm if substantial evidence supports an administrative law judge's inference); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991) (same).

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

SO ORDERED.

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751; *see also Amos v. Director, OWCP*, 153 F.3d 1051 (1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999).

<sup>7</sup> Although claimant sought treatment for other ailments, there are no records for overseas or pre-termination treatment for his mental health. CXs 14-15, 24-25, 34.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge

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RYAN GILLIGAN  
Administrative Appeals Judge