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| JEFFREY HAYNES |) | |
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| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
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| VINNELL CORPORATION |) | DATE ISSUED: <u>Nov. 12, 2003</u> |
| |) | |
| and |) | |
| |) | |
| INSURANCE COMPANY OF THE |) | |
| STATE OF PENNSYLVANIA |) | |
| |) | |
| Employer/Carrier- |) | |
| Respondents |) | DECISION and ORDER |

Appeal of the Decision and Order on Remand of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Jeffrey Haynes, Jacksonville, Alabama, *pro se*.

Roger A. Levy (Laughlin, Falbo, Levy & Moresi, LLP), San Francisco, California, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand (2000-LHC-301) of Administrative Law Judge C. Richard Avery 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). In an appeal by a claimant without representation by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law to determine if they are rational, supported by substantial evidence, and in accordance with law. If they are, they must be affirmed. *O'Keeffe v. Smith*,

Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965); 33 U.S.C. '921(b); 20 C.F.R. §§802.211(e), 802.220.

This is the second time that this case is before the Board. From November 1989 to December 1990, and from February 28, 1991 to December 21, 1991, claimant worked for employer in Saudi Arabia where he assisted in the medical training of the Saudi Arabian National Guard. While in Saudi Arabia, claimant lived in a base camp located near the capital city of Riyadh. Claimant testified that, during the later period of his deployment in Saudi Arabia, it was his belief that he was exposed to various unknown toxic chemicals and pesticides, sand flies, and the effects of Kuwaiti oil well fires while at employer=s base camp and during visits to the Saudi Arabian-Kuwaiti border area. Upon his return to the United States in December 1991 after his contract with employer was not renewed, claimant alleges that he began to experience a variety of health problems, including irritable bowel syndrome, headaches, cold hands and feet, insomnia, rashes, shortness of breath, muscle atrophy, bleeding gums, hand tremors and psychological problems. As a result of his ongoing medical complaints, claimant sought treatment with a number of physicians, and he was a participant in a government funded study on Gulf War Illness conducted in 1998 by the State University of New York Health Sciences Center. Claimant sought disability benefits under the Act, arguing that his numerous health problems are related to the various exposures which he experienced while he was employed in Saudi Arabia.

In the initial Decision and Order, Administrative Law Judge Kerr determined that claimant established the existence of various harms, specifically chronic headaches, irritable bowel syndrome, and a psychological disorder, and that claimant reported numerous other symptoms which, although insufficiently documented, would be compensable if claimant established working conditions which caused or aggravated his conditions. The administrative law judge found, however, that claimant failed to establish the existence of working conditions which could have caused, aggravated, or accelerated his symptoms. Additionally, the administrative law judge determined that the medical evidence did not support a finding of a causal relationship between claimant=s medical conditions and his employment with employer. Accordingly, the administrative law judge denied claimant=s claim for benefits under the Act.

On appeal, the Board, after stating that employer did not challenge the administrative law judge's finding that claimant suffers from chronic headaches, irritable bowel syndrome, and a psychological disorder, addressed at length the issue of whether claimant established the existence of working conditions which could have caused his present medical conditions. Regarding this issue, the Board initially affirmed the administrative law judge's finding that claimant did not visit the northern border area of Saudi Arabia subsequent to February 28, 1991. The Board then determined that the administrative law judge's conclusion that claimant was not exposed to working conditions which could have caused his present medical conditions could not be affirmed in light of the uncontradicted evidence that claimant was exposed to pesticides used in

employer's base camp, and smoke and particles resulting from Kuwaiti oil well fires. Accordingly, the Board vacated the administrative law judge's finding that claimant failed to establish the existence of working conditions which could have caused his present medical conditions, and remanded the case in order for the administrative law judge to reconsider whether these exposures, and any other conditions to which claimant was exposed within the scope of his employment in Saudi Arabia, could have potentially caused any of the physical conditions or symptoms sustained by claimant. If the evidence is sufficient for invocation of the Section 20(a), 33 U.S.C. §920(a), presumption, the administrative law judge was to address whether employer established rebuttal of the Section 20(a) presumption, and the issue of causation based on the record as a whole if rebuttal is established. *See Haynes v. Vinnell Corp.*, BRB No. 01-0741 (Jun. 17, 2002)(unpub.).

On remand, the case was assigned to Administrative Law Judge Avery (the administrative law judge) who, in his Decision and Order on Remand, determined that claimant established the existence of working conditions in Saudi Arabia which could have caused his multiple harms; thus, the administrative law judge found claimant to be entitled to invocation of the Section 20(a) presumption linking his harms to his employment. Next, the administrative law judge found that employer produced evidence sufficient to rebut the presumption with respect to claimant's physical and psychological conditions. Lastly, based upon his review of the record, the administrative law judge concluded that, at best, the evidence is in equipoise and that, therefore, claimant failed to carry his burden of persuasion on the issue of causation. Accordingly, the administrative law judge denied the claim for benefits.

On appeal, claimant, representing himself, challenges the administrative law judge's denial of his claim. Employer responds, urging rejection of claimant's claim, based on pleadings employer filed in the previous appeal.

In the instant case, the administrative law judge properly invoked the Section 20(a) presumption as he acknowledged that claimant's complaints of chronic headaches, irritable bowel syndrome, and a psychological disorder were not challenged by employer, and that claimant, while in Saudi Arabia, was exposed to the effects of oil well fires burning in Kuwait and various pesticides used at employer's base camp. *See generally Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13(CRT)(2^d Cir. 1989). Upon invocation of the presumption the burden shifts to employer to rebut it with substantial evidence that claimant's condition was not caused or aggravated by his employment conditions. *See Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT)(5th Cir. 2003); *American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999)(*en banc*), *cert. denied*, 528 U.S. 1187 (2000); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT)(9th Cir. 1999); *O=Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000). If the presumption is rebutted by employer, it drops from the case, *see Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997), and the administrative

law judge must then weigh all the evidence and resolve the causation issue on the record as a whole with claimant bearing the burden of persuasion. *See Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

In undertaking this review, we will first consider whether the administrative law judge's determination that claimant's psychological condition is not causally related to his employment with employer in Saudi Arabia is supported by substantial evidence and in accordance with law. The administrative law judge relied on the opinion of Dr. Perez, a neuropsychologist, in concluding that employer rebutted the presumed causal connection between claimant's personality disorder and his employment with employer. *See Decision and Order on Remand* at 4. While Dr. Perez opined that claimant has no brain disorder or organic impairment, he stated that claimant does exhibit borderline personality features.¹ *See Emp. Ex. 20* at 14-16, 28, 83. Dr. Perez, however, offered no opinion as to whether claimant's borderline personality features were caused or aggravated by his employment with employer in Saudi Arabia;² to the contrary, Dr. Perez testified that a neuropsychological evaluation, while sufficient to provide information for a physician to render a diagnosis, is not sufficiently specific to establish a cause and effect relationship. *See id.* at 20 – 21. Thus, Dr. Perez testified that a neuropsychologist cannot make a diagnosis that a brain disorder is related to any specific event; rather that is with the purview of a physician.³ *Id.* As Dr. Perez offered no opinion as to whether or not claimant's psychological condition was causally related to his employment with employer, his opinion is insufficient to rebut the Section 20(a) presumption. *See generally Bridier v. Alabama Dry Dock & Shipping Corp.*, 29 BRBS

¹ Dr. Perez opined that claimant's psychological testing reflected a pattern of behavior indicating an individual who has a tendency to not find a focus in his life, who has difficulties establishing relationships, who has a tendency to blame others for his problems, and who may tend to exaggerate or focus on symptoms or use those symptoms to manipulate others. Additionally, Dr. Perez found that claimant has some issues related to self-esteem and that, based upon some of the evaluations which he has undergone, claimant has developed a belief system that he has problems attributable to the 1991 Gulf War. *See Emp. Ex. 20* at 15-16.

² During Dr. Perez's deposition, employer's counsel stated that Dr. Perez's testimony was being offered on the narrow issue of whether claimant has, in fact, an organic brain disorder. *See Emp. Ex. 20* at 37, 58. Dr. Perez did testify, however, that personality disorders become established in a person's early 20's, and that individuals with such have a susceptibility to have their condition aggravated by stress. *Id.* at 48, 83.

³ Dr. Perez criticized the report of Dr. Didriksen, a psychologist, stating that she reached a medical diagnosis regarding claimant's psychological condition that she was not qualified to make. *See Emp. Ex. 20* at 20-21.

84 (1995). Moreover, a review of the record reveals that none of the remaining medical opinions of record stated that a causal relationship does not exist between claimant's psychological condition and his employment with employer in Saudi Arabia. Employer, therefore, has failed to meet its burden of presenting substantial evidence that claimant's psychological condition was not caused or aggravated by his employment. *Bath Iron Works Corp. v. Director, OWCP [Shorette]*, 109 F.3d 53, 31 BRBS 19(CRT)(1st Cir. 1997). Accordingly, we reverse the administrative law judge's determination that employer established rebuttal of the Section 20(a) presumption as it relates to claimant's psychological condition. In light of our reversal of the administrative law judge's finding that employer established rebuttal of the Section 20(a) presumption, we need not address the administrative law judge's weighing of the evidence as a whole with regard to claimant's psychological condition. Causation with regard to claimant's psychological condition is established as a matter of law. *See Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002); *Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175 (1996); *see generally ITO Corp. v. Director, OWCP*, 883 F.2d 422, 22 BRBS 126(CRT)(5th Cir. 1989). Accordingly, the case must be remanded to the administrative law judge for consideration of the remaining issues relating to claimant's claim for benefits resulting from a work-related psychological condition.

Since the administrative law judge found the Section 20(a) presumption invoked as it relates to the presumed causal link between claimant's physical complaints and his employment with employer, the next issue we address is the administrative law judge's finding that employer established rebuttal of the Section 20(a) presumption. In finding rebuttal, the administrative law judge relied upon the opinion of Dr. Friedman, who opined that claimant does not suffer from any illness as a result of his employment with employer in Saudi Arabia. *See Emp. Ex. 22 at 20-21*. As Dr. Friedman's opinion constitutes substantial evidence that claimant's present physical complaints are not related to his employment, we affirm the administrative law judge's finding that the Section 20(a) presumption is rebutted insofar as it applies to claimant's physical complaints. *See Ortco Contractors*, 332 F.3d 283, 27 BRBS 35(CRT); *Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT).

We next address the administrative law judge's finding that claimant did not establish a causal link between his physical ailments and complaints and his employment with employer based on the record as a whole. In addressing this issue, the administrative law judge discussed the opinions of Drs. Friedman, Hyman and Rea, and found that, at best, the evidence was in equipoise, that claimant's reported symptoms could not be substantiated by physical examination, and that although claimant complains of various symptoms, his documentary evidence does not establish that he actually was exposed to toxins or that he suffers from his reported symptoms. *See Decision and Order on Remand at 4-7*. Based upon the foregoing, the administrative law judge stated that he was not persuaded that Judge Kerr was in error when he concluded that "Claimant's testimony regarding his medical history and exposure history contains major inconsistencies," and he accordingly denied claimant's claim. *Id.* For the reasons that

follow, we hold that the administrative law judge's findings on this issue cannot be affirmed.

Initially, we note that the administrative law judge on remand was not reviewing Judge Kerr's decision for errors, but was to independently address and weigh all of the evidence of record regarding claimant's many physical complaints and their possible relationship to his employment with employer. The administrative law judge, however, did not address all of the relevant evidence regarding the cause of claimant's physical ailments. Specifically, while the administrative law judge explicitly discussed the testimony of Drs. Freidman, Hyman and Rea, he made no reference, *inter alia*, to the reports of Drs. Michelson or Jin, each of whom discussed claimant's physical ailments, *see* Clt. Exs. 2, 67, to the testing performed on claimant at the University of Washington, *see* Clt. Ex. 68, or to the claimant's participation in a government-sponsored research project on Gulf War illness conducted at the State University of New York at Stony Brook. *See* Clt. Ex. 57. These reports, at a minimum, document claimant's continued complaints of various ailments, in addition to the headaches and irritable bowel syndrome which all parties agree that claimant experiences. *See Haynes*, slip op. at 3 n. 3. Moreover, the parties have submitted into the record literally volumes of medical reports and studies addressing the subject of illnesses and symptomatology allegedly associated with individuals who were in the Persian Gulf area at the time of the 1991 Gulf War. The presence of these exhibits requires careful review by the factfinder in addressing the issue of causation. Lastly, the administrative law judge accepted Judge Kerr's conclusion regarding the "inconsistencies" in claimant's testimony. As we stated in our prior decision and have reiterated herein, it is undisputed that claimant has established the existence of various physical ailments, as well the psychological disorder discussed previously, and that he was exposed to working conditions in Saudi Arabia which could have caused or aggravated those conditions; the administrative law judge's apparent blanket rejection of claimant's complaints therefore cannot be affirmed.

To summarize, all parties are in agreement that claimant suffers from headaches and irritable bowel syndrome, and that claimant additionally complains of a multitude of additional symptoms and ailments.⁴ The record contains both numerous reports from various physicians addressing these complaints, as well as medical articles addressing the issue of Gulf War illnesses in general. As the administrative law judge did not discuss the totality of the evidence before him regarding these documented complaints, and explicitly accept or reject that evidence, we must vacate the administrative law judge's

⁴ Whether or not claimant's family had a history of many of his physical complaints is not dispositive of the question of whether claimant's medical conditions were caused or aggravated by his employment with employer. Claimant's pre-employment physical examination resulted in normal findings, and the physician performing that examination ultimately stated that he had "no reservations against recommending [claimant] for the position that he is applying for. He will do well in the harsh environment as well." *See* Clt. Ex. 1 at 2.

determination that claimant failed to establish a causal connection between his physical complaints and his employment with employer. We remand the case for the administrative law judge to discuss all of the relevant evidence, to make findings based on the relevant law and evidence, and to explain the reasons for his determinations. *See generally Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). The administrative law judge must determine if claimant's headaches and irritable bowel syndrome are work-related based on the record as a whole. With regard to claimant's alleged other conditions, the administrative law judge must determine if claimant suffers from any other physical ailments, and if so, whether they are work-related, consistent with law addressing the Section 20(a) presumption.

Accordingly, the administrative law judge's determination that employer rebutted the Section 20(a) presumption linking claimant's psychological condition to his employment with employer is reversed. On remand, the administrative law judge should address any remaining issues regarding claimant's psychological injury claim. The administrative law judge's finding that claimant's physical complaints are not work-related is vacated, and the case is remanded for the administrative law judge to discuss and weigh all relevant evidence regarding the cause of claimant's physical ailments. In all other respects, the Decision and Order on Remand of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge