

BRB No. 13-0130

INSTAR BALES)
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 Claimant-Respondent)
)
 v.)
)
 L-3 COMMUNICATIONS – TITAN) DATE ISSUED: 11/22/2013
 CORPORATION)
)
 and)
)
 INSURANCE COMPANY OF THE STATE)
 OF PENNSYLVANIA)
)
 Employer/Carrier-)
 Petitioners) DECISION and ORDER

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

Joel S. Mills and Gary B. Pitts (Pitts & Mills), Houston, Texas, for claimant.

Michael W. Thomas and Lara D. Merrigan (Thomas, Quinn & Krieger, LLP), San Francisco, California, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Compensation and Benefits (2011-LDA-00178) 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 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 began working for employer in Iraq as an Arabic linguist in August 2007.¹ EX 7 at 10; EX 8; CX 5. On December 11, 2007, while at the Forward Operating Base (FOB) Bernstein, claimant tripped and fell, injuring her right shoulder. She was taken to FOB Warrior on December 12, 2007, for treatment. CXs 1, 19; Tr. at 29-30, 32. Claimant returned to the United States for additional medical treatment on December 19, 2007, when she was evaluated and diagnosed with a non-displaced fracture of the right humerus. CX 1. The next day, she began treatment with Dr. Foerster, an orthopedic surgeon, and underwent physical therapy from January to May 2008. CX 1; EX 9 at 101. Claimant has not returned to full-time work since her accident.² Tr. at 34-35; EX 26 at 353; EX 35 at 627. Employer voluntarily paid claimant’s medical care and temporary total disability benefits from December 16, 2007 to November 22, 2008. CX 9. Thereafter, employer denied her right to continued benefits; however, on February 2, 2009, employer began making payments to claimant as of November 23, 2008, forward. CX 12; EX 5.

Claimant filed her first claim for compensation on January 25, 2010, but amended her claim twice thereafter.³ EXs 2-4. In her final amendment, dated April 11, 2011, claimant claimed work-related injuries to her right shoulder, right arm, left shoulder, neck, back, and right foot. She also claimed she had depression, anxiety, high blood pressure, and worsening of a pre-existing psychological condition. EX 4 at 6. The administrative law judge found only claimant’s right shoulder injury to be work-related, that her right shoulder injury reached permanency on September 2, 2009, and, based on the opinions of Drs. Dodge, Asdit, and Curran, that claimant is not currently physically

¹Claimant was employed pursuant to a one-year contract, with the possibility of continued employment. EX 8 at 16; CX 5 at 4. Claimant stated her job required her to be available around the clock, as needed, to translate for the military. EX 26 at 626; CX 1 at 30; EX 15 at 154. While in Iraq, claimant lived in the Green Zone, but was sometimes required to leave the base and to wear an armored protective vest. Tr. at 28; EX 35 at 626; CX 1 at 30; EX 14 at 154; EX 23 at 247.

²Claimant has served as a planning commissioner for the City of El Cajon, California, which typically meets two times per month, for three hours, and for which she earns \$150 per meeting attended. EX 26 at 353; Tr. at 35, 38.

³On January 25, 2010, claimant stated her injuries included a fractured right arm, a small cut to her lip, and neck and back pain. EX 2 at 2. On August 26, 2010, claimant filed a revised claim, stating that she injured her right shoulder, right arm, left shoulder, neck, back, right foot, and suffered from depression. EX 3 at 4.

disabled from returning to her usual work. Decision and Order at 50. As claimant received some earnings for her work as a planning commissioner beginning in 2008, the administrative law judge awarded claimant temporary total disability compensation from December 11, 2007 to October 5, 2008, and temporary partial disability benefits from October 6, 2008 to September 1, 2009, for her shoulder injury. However, citing *McBride v. Eastman Kodak Co.*, 844 F.2d 797, 21 BRBS 45(CRT) (D.C. Cir. 1988), the administrative law judge found claimant established she was prevented from returning to her usual work after her shoulder healed, as her employment contract was for only one year and there is no indication that her job with employer was still available after her recovery. Decision and Order at 51. Moreover, citing *Rice v. Serv. Employees Int'l, Inc.*, 44 BRBS 63 (2010), the administrative law judge found claimant established a prima facie case of total disability because her return to work is medically contraindicated due to her pre-existing psychiatric condition.⁴ Further finding that employer established the availability of suitable alternate employment, but claimant did not diligently pursue work, the administrative law judge awarded claimant permanent partial disability benefits from September 2, 2009, and ongoing. Decision and Order at 51, 60. Employer challenges the administrative law judge's award of permanent partial disability benefits, and claimant responds, urging affirmance.⁵

Employer asserts the administrative law judge erred in finding claimant is unable to return to her usual work as her only industrial-related condition does not impair her ability to work in her pre-injury capacity. We agree. Disability is defined under the Act as the “incapacity *because of injury* to earn wages which the employee was receiving at the time of the injury in the same or any other employment.” 33 U.S.C. §902(10) (emphasis added). In order to establish a prima facie case of total disability, a claimant must establish that she cannot return to her usual work due to a work injury. *See, e.g., Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994). Thus, there must be at least a partial causal relationship between a claimant's work injury and her disability in order for an injury to be

⁴Dr. Addario opined that claimant was “ill-suited” for work overseas, further opining that claimant's personality profile was the same as it was prior to her deployment and stating that he would not have recommended she go to Iraq in the first place given her personality profile. Dr. Addario explained that “her personality profile shows an individual who has persecutory feelings, who has hysteria, who has hypochondriasis and these patients, notoriously, develop physical problems during the course of their employment. And they certainly, I think, would have difficulties functioning adequately in a war zone area.” Tr. at 77-78.

⁵We accept employer's citation of supplemental authority, filed on August 22, 2013. 20 C.F.R. §802.215.

compensable. *See generally Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999).

In this case, as the administrative law judge found claimant suffered only a work-related injury to her right shoulder,⁶ it is this injury which claimant must establish prevents her from returning to her usual work as a translator. *See* 33 U.S.C. §902(10). The administrative law judge found no condition or restriction, other than claimant's non-work-related psychological condition, which would preclude her from performing her usual employment as a translator.⁷ Decision and Order at 50, 54; *see* CX 1 at 36, 65, 84; EX 9 at 70; EX 14 at 160; EX 19 at 187; EX 23 at 241; Tr. at 71, 77-78, 100, 176-177, 197, 200, 236. Thus, substantial evidence supports the finding that claimant's work-related shoulder injury does not prevent her from returning to her usual work. *Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 241 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990). Although the administrative law judge accurately observed that "disability is an economic as well as medical concept" and consideration must be given to whether work that a claimant can physically perform is available to her, we agree with employer that the administrative law judge erred in failing to place the burden on claimant in this regard. Decision and Order at 51. It is claimant's burden to establish that she cannot return to her usual work due to her work injury, *Edwards*, 999 F.2d 1374, 27 BRBS 81(CRT); *McBride*, 844 F.2d 797, 21 BRBS 45(CRT). The administrative law judge's finding that the record evidence does not disclose whether claimant's job remained available demonstrates that claimant did not satisfy that burden.⁸ Decision and Order at 51; *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

⁶Claimant does not challenge this finding, or the finding that she does not have reflex sympathetic dystrophy syndrome (RSD) or chronic regional pain syndrome CRPS. *See* Decision and Order at 43-44.

⁷The administrative law judge found claimant should limit repetitive reaching or repetitive lifting with her right arm above shoulder height and that these restrictions were consistent with doctors' opinions that she could put on and wear a 40-pound protective vest as she had previously done as a linguist. Decision and Order at 54.

⁸By contrast, in *McBride*, the parties agreed that the claimant's prior position was no longer available, and the evidence of record "clearly indicate[d] that McBride's injury was the precipitating factor that rendered his former job unavailable." 844 F.2d at 799, 21 BRBS at 49(CRT) (internal citations omitted). Here, there is no evidence regarding the availability of the translator job, nor any evidence that it is unavailable because of claimant's shoulder injury.

Moreover, although the administrative law judge credited Dr. Addario's opinion that claimant has a psychological condition that prevents her return to her usual work, the administrative law judge found that condition is not work-related.⁹ Thus, it was improper for the administrative law judge to conclude that claimant established a prima facie case of total disability based on any restrictions due to her non-work-related psychological condition.¹⁰ See *Lamon v. A-Z Corp.*, 46 BRBS 27 (2012), *vacating on recon.* 45 BRBS 73 (2011). Therefore, as claimant's shoulder injury does not prevent her return to her usual work, we reverse the administrative law judge's finding that claimant established a prima facie case of total disability after her shoulder healed. Claimant has not demonstrated that she was disabled by her work injury after reaching maximum medical improvement on September 2, 2009. Consequently, we reverse the administrative law judge's award of permanent partial disability benefits commencing September 2, 2009.¹¹

⁹In finding claimant's psychological condition was not work-related, the administrative law judge found claimant did not complain of any psychological issues until 2.5 years after leaving Iraq, and he gave the opinion of Dr. Addario, the only psychiatrist to examine claimant, controlling weight. Decision and Order at 36-38; 41; EX 25 at 307-309; Tr. at 71. Dr. Addario diagnosed claimant with severe depressive disorder, but also diagnosed her with malingering and magnification of psychiatric symptoms; he concluded that her depression was a consequence of earlier traumatic experiences as a child in Iraq, and subsequent personal, familial, and financial stressors, and was not work-related or aggravated by work with employer. EX 25 at 307-309; Tr. at 71. Thus, substantial evidence supports the finding that claimant's psychological condition is not work-related.

¹⁰The administrative law judge's reliance on *Rice*, 44 BRBS 63, is misplaced. In *Rice*, the claimant suffered from a work-related psychological injury that caused her to become symptomatic while working in Iraq. Although her symptoms abated upon her return to the United States, her return to work in Iraq was medically contraindicated due to the likely recurrence of work-related psychological symptoms. *Id.* at 65. As *Rice* was restricted from returning to her usual work due to her work-related injury, the Board held that she established a prima facie case of total disability. *Id.* By contrast, here, claimant's return to work was medically contraindicated due to a non-work-related condition.

¹¹We need not reach employer's alternate contention that the administrative law judge erred in excluding overseas jobs from the suitable alternate employment analysis. In light of claimant's failure to establish a prima facie case of total disability, the burden to establish the availability of suitable alternate employment did not shift to employer. See generally *Edwards*, 999 F.2d 1374, 27 BRBS 81(CRT); *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988).

Accordingly, the administrative law judge's award of permanent partial disability benefits commencing September 2, 2009, is reversed. In all other respects, the Decision and Order Awarding Compensation and Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge