U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 21-0568

KUJTIM OSMANI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	DATE ISSUED: 02/27/2023
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Kujtim Osmani, Ferizaj, Kosovo, without representation.

Edwin B. Barnes (Thomas Quinn, LLP), San Diego, California, and Angela A. Nelson (Thomas Quinn, LLP), San Francisco, California, for Employer/Carrier.

Steven Winkelman (Seema Nanda, Solicitor of Labor; Barry H. Joyner, 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: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant, without representation, appeals Administrative Law Judge (ALJ) Larry W. Price's Decision and Order Denying Benefits (D&O) (2020-LDA-00203) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act), as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq*. (DBA). In an appeal by a claimant without legal representation, we will review the ALJ's decision to determine if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are in accordance with law. If they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, a citizen of Kosovo, allegedly sustained a psychological injury as a result of his exposure to the hazards of war in his work for Employer in Afghanistan and Iraq from September 12, 2005 to April 1, 2008.[1] He stated he began experiencing insomnia, nightmares, stomach aches, and difficulty breathing (general symptoms) while deployed in Afghanistan, and he voluntarily left his job with Employer because he could no longer handle the working conditions. HT at 14-17. He returned to Kosovo and to a prior job with ProCredit Bank,[2] where he worked until he was fired in January 2017 due to poor performance. *Id.* at 42-47. Claimant was unemployed for the next fifteen months before taking a job with Banka per Biznes (BPB); a position he held through the date of the February 2021 hearing.

[1] Because the ALJ's decision in this case was filed by the district director in New York, New York, it arises under the jurisdiction of the United States Court of Appeals for the Second Circuit. 33 U.S.C. §921(c); *McDonald v. Aecom Technology Corp*., 45 BRBS 45 (2011); *see also Global Linguist Solutions, L.L.C. v. Abdelmeged*, 913 F.3d 921, 52 BRBS 53(CRT) (9th Cir. 2019).

[2] Claimant stated he worked for ProCredit Bank, first as a cashier and then as a loan analyst between June 2001 and August 2005, before leaving to work for Employer in the Middle East. HT at 31-32.

Meanwhile, Claimant stated his general symptoms continued to plague him after his return to Kosovo and would vary in intensity over the years. HT at 52-54. In August 2014, Claimant began treating with Dr. Afrim Bekteshi, an internist and endocrinologist, for "stomach issues" and/or "insomnia, distress and [a] state of anxiety." CX 5 at 6. Dr. Bekteshi diagnosed Claimant with depression on April 7, 2015. CX 5. On March 14, 2018, Claimant began treating with Dr. Aziz Zubaku, a licensed neuropsychiatrist, who on October 2, 2018, diagnosed Claimant with post-traumatic stress disorder (PTSD), opined Claimant's condition rendered him unfit to work, and referred him for psychotherapy. CX 9 at 1. Subsequently, Claimant treated with a clinical psychologist, Bekrije Maxhuni, who on June 20, 2019, diagnosed Claimant with PTSD and panic disorder, and recommended Claimant seek psychological treatment and not work in conflict areas. CX 5 at 54.

Claimant was also examined in December 2020 by Dr. Howard Friedman, a clinical psychologist, and by Dr. Ayesha Ashai, a forensic psychologist. Based on his evaluation of Claimant, Dr. Friedman concluded there is no indication of a diagnosable condition. EX 4. He further stated Claimant clearly exaggerates his presentation and, while Claimant presents some symptoms associated with PTSD, he has none of the indicators that might be found with PTSD. *Id.* Dr. Ashai determined Claimant met the criteria for Persistent Depressive Disorder but opined his symptoms are not associated with exposure to traumatic events. She concluded Claimant's presentation is consistent with malingering of psychiatric symptoms related to the incidents in Afghanistan and Iraq. EX 9 at 51.

Claimant alleged he did not become aware of the relationship between his psychological condition and his work with Employer until either March 14, 2018, the date of his first visit to Dr. Zubaku, or October 2, 2018, when Dr. Zubaku diagnosed Claimant with PTSD. He filed a claim under the Act on July 22, 2019, seeking benefits for his alleged work-related psychological condition. JX 1. Employer, who first received notice through an Office of Workers' Compensation Programs (OWCP) letter dated July 24, 2019, controverted the claim, JX 3, and the case was transferred to the Office of Administrative Law Judges (OALJ) for a hearing, which was held telephonically on February 10, 2021.

In his decision dated July 6, 2021, the ALJ found Claimant did not provide Employer timely notice of his psychological condition under Section 12(a) of the Act, 33 U.S.C §912(a), and his claim was untimely filed pursuant to Section 13(b), 33 U.S.C. §913(b). He nevertheless alternatively addressed the merits of the claim, ultimately concluding Claimant did not establish his psychological symptoms are connected to his work for Employer.[3] Consequently, the ALJ denied Claimant's claim for benefits.

[3] The ALJ found Claimant did not invoke the Section 20(a) presumption, 20 C.F.R. §920(a), but even if he had, Employer rebutted it, and Claimant did not, upon a weighing

Claimant, without representation, appeals the ALJ's decision. Employer responds, urging the Board to affirm the decision as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), responds on the limited issue of the legality of Claimant's foreign testimony. He urges the Board to vacate the ALJ's decision and remand the case for him to determine whether Claimant was in Kosovo when he testified and, if so, whether the parties complied with all the legal requirements, including Kosovar law, for obtaining that testimony. Employer replied, urging rejection of the Director's position.

Legality of Claimant's Testimony

Claimant generally asserts his July 28, 2020 deposition testimony was "taken illegally" because, at the time it was conducted, he was in Kosovo and was "deposed without the permission of Kosovar authorities" in violation of Kosovar law.[4] The Director agrees with Claimant's position that Kosovar law prohibits foreign attorneys and tribunals from taking testimony from witnesses located in Kosovo, either in person or by video, without prior permission from Kosovar authorities. However, he states that because the deposition and hearing transcripts do not clearly establish where Claimant was when he testified, the Board should vacate the ALJ's decision and remand the case for the ALJ to consider, in the first instance, whether Claimant testified from Kosovo and, if so, whether that testimony was taken in violation of Kosovar law.

In contrast, Employer urges the Board to reject Claimant's contention because it is being raised for the first time on appeal. It argues Claimant was represented by counsel at all relevant times before the OALJ and no one, including the Director, ever objected to the form or manner of Claimant's deposition or hearing testimony either prior to or during its taking, or upon its admission into the record at the hearing.[5] Had they done so, the ALJ would have been able to address the issue and provide the Benefits Review Board with analysis to review on appeal. Instead, Employer states Claimant introduced and relied on

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of the evidence as a whole, establish his psychological symptoms were connected to his work for Employer.

[4] Claimant correctly notes his homeland, the Republic of Kosovo, is not a signatory of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil and Commercial Matters (Hague Evidence Convention).

[5] Employer asserts the Director is a party and could have participated in this litigation but chose not to. It also argues the Director's position is not entitled to any deference.

his own testimony for his case in chief and now raises the illegality of that evidence only after the ALJ denied his claim by finding Claimant's testimony, and the medical evidence which "relied heavily" upon his testimony, "unreliable." Therefore, Employer asserts Claimant has waived any challenge to the legality of his testimony.

29 C.F.R. §18.64(c)(2) of the OALJ Rules of Practice and Procedure states:[6]

> An objection at the time of the examination – whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition – must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the judge, or to present a motion under paragraph (d)(3) of this section.

A party may raise an objection to a deposition following receipt of a notice of deposition for reasons including the qualification of the officer before whom the deposition is to be taken, or to any error or irregularity as it relates to the manner of taking the deposition. 29 C.F.R. §18.55(d)(2), (3)(ii). The parties waive their objections to an error or irregularity at oral examination, including objections related to the manner of taking the deposition or other matters that might have been corrected at that time, if they do not timely make them during the deposition. 29 C.F.R. §18.55(d)(3)(ii); *see e.g.*, *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1160 (11th Cir. 2005) (Because a defect could have been cured at the taking of the deposition, subsequent objection to the defect was considered waived.).

Claimant was afforded multiple opportunities below to object to the taking of his deposition, including upon receipt of the notice of deposition, during the deposition, and subsequently up to and at the hearing, when that testimony was admitted into evidence (and Claimant himself testified on his own behalf). The parties agreed to a deposition on July 28, 2020, which would take place remotely from a designated location in Kosovo. Emp. Br. at 30. Claimant's attorney, Anjali Gillette, represented him and participated in this deposition but never raised any concerns or objections about its legality.[7]

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[6] 29 C.F.R. §18.64 is entitled, "Depositions by oral examination." Section 18.64(c) pertains to "[e]xamination and cross-examination; record of the examination; objections; written questions."

[7] Ms. Gillette did not cross-examine Claimant during the nearly three and one-half-hour deposition and raised but one objection: noting "an objection for the record" relating to Employer's question to Claimant about his medical complaints to Dr. Bekteshi. EX 12,

Additionally, Ms. Gillette advised the ALJ of her intent to call four "live" witnesses to testify at the scheduled hearing: Claimant and three of his physicians, Drs. Zabuku, Bekrige Maxhuni, and Bekteshi. Cl's Supp. Witness List dated January 19, 2021. She provided addresses in Kosovo for all four witnesses. *Id.* at 2-3. Ultimately, only Claimant testified at the February 2021 telephonic hearing where he was represented by both Ms. Gillette and her law partner, Jason Gillette. HT at 4. At the hearing, the ALJ asked, and Mr. Gillette confirmed, Claimant had no objections to the admission of any of Employer's exhibits, including the transcript of Claimant's July 2020 deposition. HT at 5-6. Thereafter, Ms. Gillette called Claimant as a witness,[8] *id.* at 8, asking "just two questions," *id.* at 9-11. This was followed by Employer's cross-examination, *id.*, at 11-68, and Ms. Gillette's redirect examination, *id.*, at 68-70. At no point during the hearing did Claimant's attorneys object to the legality of Claimant's testimony.

Generally, a party may not raise a new issue for the first time on appeal. *See Johnston v. Hayward Baker*, 48 BRBS 59 (2014); *Turk v. Eastern Shore Railroad, Inc.*, 34 BRBS 27, 32 (2000); *Boyd v. Ceres Terminals*, 30 BRBS 218, 223 (1997). However, if the issue raised concerns purely a question of law, it is appropriate for the Board to address the issue. *See generally Logara v. Jackson Eng'g Co.*, 35 BRBS 83 (2001); *Aurelio v. Louisiana Stevedores, Inc.*, 22 BRBS 418 (1989), *aff'd mem.*, No. 90-4135 (5th Cir. March 5, 1991); *see also Martinez v. Mathews*, 544 F.2d 1233 (5th Cir. 1976). There is no doubt Claimant is raising the legality of his testimony for the first time on appeal. Additionally, the legality of Claimant's testimony rests on a factual determination of where Claimant was at the time his testimony was taken and the origin of his medical evidence.

Under the circumstances of this case, we reject Claimant's and the Director's position that we should address the question of the legality of the evidence obtained from

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Dep. at 53. At the conclusion of Employer's examination, she stated "I have no questions at this time" for Claimant, and she would otherwise "reserve ours" for now. EX 12, Dep. at 65. She also responded "[t]hat's fine" to Employer's counsel's request "to reserve my right to keep the record open and to amend the deposition with additional testimony [from Claimant] at a later time." *Id.*, Dep at 65.

[8] Ms. Gillette conceded "most of the testimony regarding the incidents that [Claimant] experienced is already in the record" through Claimant's deposition. Prior to examining Claimant, she informed the ALJ that "we'd like to ask a few questions of our witness at this time if that's okay?" HT at 8. The ALJ responded, "[o]kay, I'm going to admit [Claimant's] deposition testimony as affirmative evidence in this case so you don't need to go over all that background information that you already did" during the deposition. *Id.* at 8-9. He also informed Employer "you can cross-examine" Claimant. *Id.*

Kosovo as it involves a mixed question of fact and law which is now being raised for the first time on appeal. *Johnston*, 48 BRBS 59; *Turk*, 34 BRBS at 32; *Boyd*, 30 BRBS at 223. As previously described, Claimant, then represented by legal counsel, had every opportunity before the ALJ to object to Employer's request to depose him and to enter that deposition into the record. Instead, with his counsel present, Claimant participated in the deposition, did not object to its admission into the record, and relied upon the testimony therein to establish the elements of his claim. Additionally, the record establishes Claimant, through his own counsel, called himself as a witness at the hearing. Moreover, Claimant's post-hearing brief explicitly cited to his deposition testimony 37 times as evidence in support of his claim. Therefore, as Claimant is only now belatedly raising this issue for the first time on appeal, he has waived his right to object to the legality of his deposition testimony. 29 C.F.R. §18.55(d)(3)(ii). For these reasons, we shall not address the issue. *Id.*; *see also Johnston*, 48 BRBS 59; *Turk*, 34 BRBS at 32; *Boyd*, 30 BRBS at 223. Furthermore, we affirm the ALJ's admission of Claimant's deposition testimony, as well as his hearing testimony and the medical reports of his physicians, into the record as it represents a reasonable exercise of his broad discretion as a factfinder.[9] 33 U.S.C. §923(a);[10] *see generally Patterson v. Omniplex World Services*, 36 BRBS 149 (2003);

[9] It is significant that Claimant, of his own volition, filed a claim seeking benefits under the Act. In so doing, he agreed to have his claim adjudicated in accordance with the Act, its accompanying regulations, and the general rules, procedures and practices encountered in the American administrative benefits process. This involves providing all parties an opportunity to be heard in a meaningful manner and at a meaningful time, *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976); *see also Goldberg v. Kelly*, 397 U.S. 254 (1970), including the ability to present their respective cases through the submission of evidence on the relevant issues, rebuttal evidence, and cross-examination of witnesses. *See generally Richardson v. Perales*, 402 U.S. 389, 401-402 (1971). Both parties exercised these rights by submitting evidence into the record in support of their respective cases. Following a formal hearing and the submission of post-hearing briefs, the case was then fully adjudicated, and the claim resolved in accordance with the Act and the provisions of the Administrative Procedure Act. 5 U.S.C. §557(c)(3)(A); *see Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996). Claimant, therefore, had his claim completely considered within the framework and scope of the very Act under which he filed it. Given this, it is unacceptable for Claimant, who was at that point represented by counsel, to not object to the legality of Employer's deposition request, to present his own evidence, which arguably is equally illegal under the same grounds he now presents, to have his claim fully adjudicated, but then object to the legality of his testimony only after his claim has been denied.

[10] Section 23(a) of the Act, 33 U.S.C. §923(a), provides in pertinent part that:

Compton v. Avondale Industries, Inc., 33 BRBS 174 (1999); *Casey v. Georgetown Univ. Med. Ctr.*, 31 BRBS 147 (1997).

Sections 12 and 13

Section 12(a) of the Act requires a notice of injury, in a case involving an occupational disease which does not immediately result in disability,[11] to be filed within one year after the employee 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 disability. 33 U.S.C. §912(a). The date a claimant becomes aware of the relationship between his work and his disabling injury is often the date a doctor states there is a connection. However, a doctor's opinion relating the condition to the employment is not necessarily controlling; the ALJ may consider other facts as to when the claimant should have been aware of that relationship. *See generally Ceres Gulf, Inc. v. Director, OWCP [Fagan]*, 111 F.3d 17, 31 BRBS 21(CRT) (5th Cir. 1997); *Wendler v. American Red Cross*, 23 BRBS 408 (1990); *see also V.M. [Morgan] v. Cascade General, Inc.*, 42 BRBS 48 (2008), *aff'd mem.*, 388 F. App'x 695 (9th Cir. 2010). Failure to give timely notice will bar the claim unless one of the exceptions under Section 12(d) applies. 33 U.S.C. §912(d); 20 C.F.R. §702.216. Under Section 12(d), untimely notice will not bar the claim if, *inter alia*: (1) the employer had actual knowledge of the injury or death; or (2) the employer was not prejudiced by the claimant's late notice. *See* 33 U.S.C. §912(d); 20 C.F.R. §702.216. Pursuant to the Section 20(b) presumption, an employer must establish it had no knowledge of the injury and was prejudiced by the late notice. *Bustillo v. Southwest Marine, Inc.*, 33 BRBS 15 (1999).

> In making an investigation or inquiry or conducting a hearing the [administrative law judge] shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties.

See also 33 U.S.C. §919(d); 20 C.F.R. §702.339. Consistent with Section 23(a), the adjudicative inquiry functions primarily to ascertain the rights of the parties without the constraint of common law, statutory rules of evidence or technical rules of procedure.

[11] The ALJ's finding that "Claimant's alleged PTSD is an occupational disease" is unchallenged on appeal. D&O at 13.

Section 13(b)(2), which governs the filing of claims, states that in the case of an occupational disease that does not immediately result in disability, a claim shall be timely "if filed within two years after 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, or within one year of the date of the last payment of compensation, whichever is later." 33 U.S.C. §913(b)(2). Generally, the courts have held the employee is aware of the full character, extent, and impact of the injury when he knows or should know the injury is work-related and will impair his earning power. *Dyncorp Int'l v. Director, OWCP [Mechler]*, 658 F.3d 133, 45 BRBS 61(CRT) (2d Cir. 2011); *Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130(CRT) (9th Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98(CRT) (4th Cir. 1991); *see Suarez v. Service Employees Int'l, Inc.*, 50 BRBS 33 (2016).

It is the ALJ's prerogative to weigh the evidence and to draw inferences from it; the Board's inquiry is limited to whether his findings are supported by substantial evidence and in accordance with law. *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Claimant's reported symptoms, which he stated began during his overseas work for Employer and continued after he returned to Kosovo, EX 12, Dep. at 52; HT at 52-53, and Dr. Bekteshi's 2014-2017 treatment of Claimant's "chief complaints" of "insomnia, distress, and state of anxiety," CX 5 at 6, 8, 10, 12, and resulting diagnosis of, and treatment for, depression, *id.*, constitute, as the ALJ found, evidence of a relationship between Claimant's DBA employment and those symptoms. Additionally, Claimant's statements regarding his difficulties in performing his work at ProCredit, which included a "lack of concentration," in the three to four years leading up to his 2017 termination, EX 12, Dep. at 16; HT at 10, is evidence that Claimant's symptoms may be of a disabling nature. From this evidence, the ALJ could reasonably infer Claimant was, or should have been, aware of the full relationship between his employment, disease, and disability on April 7, 2015, when Dr. Bekteshi diagnosed him with a major depressive disorder. We therefore affirm this finding as it is rational and supported by substantial evidence of record. *Morgan*, 42 BRBS; *see also Paducah Marine Ways v. Thompson*, 82 F.3d 130, 30 BRBS 33(CRT) (6th Cir. 1996); *Duluth, Missabe & Iron Range Ry. Co. v. Director, OWCP [Heskin]*, 43 F.3d 1206 (8th Cir. 1994). Claimant did not file his claim for benefits until 2019; nevertheless, it may be presumed timely, unless Employer establishes under Section 12(d) that it had no knowledge of the injury and it was prejudiced by the late notice. *Bustillo*, 33 BRBS 15.

The ALJ's decision is flawed on this matter as he did not cite Section 12(d) or otherwise address whether Employer had knowledge of the injury prior to the filing of Claimant's 2019 claim. Moreover, his conclusory statement that Claimant's missing "the deadline by three years" prejudiced Employer under Section 12(d)(2) is legally insufficient. *ITO Corp. v. Director, OWCP [Aples]*, 883 F.2d 422, 22 BRBS 126(CRT) (5th Cir. 1989)

(Court rejects an employer's general claim that it was prejudiced by lack of timely notice of injury by an inability to investigate the claim when fresh, finding such a conclusory claim unpersuasive); *Bustillo*, 33 BRBS 15 (A conclusory allegation of prejudice or of an inability to investigate the claim when it was fresh is insufficient to meet employer's burden). In light of this, the ALJ erred in his consideration of the evidence under Section 12(d). Nevertheless, we hold the ALJ's error is harmless as he otherwise addressed the merits of Claimant's claim because he concluded the claim was timely.

Section 20(a)

To be entitled to the Section 20(a) presumption linking his injuries to his employment, a claimant must sufficiently allege: 1) he has sustained a harm; and 2) an accident occurred or working conditions existed which could have caused or aggravated the harm. *Rose v. Vectrus Systems Corporation*, 56 BRBS 27 (2022) (Decision on Recon. en banc); *see, e.g., American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); *O'Kelley v. Dep't of the Army/NAF,* 34 BRBS 39 (2000). If the Section 20(a) presumption is invoked, the burden shifts to the employer to produce substantial evidence that the claimant's condition was not caused or aggravated by his employment. *Rainey v. Director, OWCP*, 517 F.3d 632, 634, 42 BRBS 11, 12(CRT) (2d Cir. 2008); *Marinelli*, 248 F.3d at 64-65, 35 BRBS at 49(CRT). If the employer rebuts the Section 20(a) presumption, it no longer controls and the issue of causation must be resolved on the evidence of the record as a whole, with the claimant bearing the burden of persuasion by a preponderance of the evidence. *Rainey*, 517 F.3d at 634, 42 BRBS at 12(CRT); *Marinelli*, 248 F.3d at 65, 35 BRBS at 49(CRT); *Santoro v. Maher Terminal, Inc.*, 30 BRBS 171 (1996); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In finding Claimant did not invoke the Section 20(a) presumption, the ALJ improperly injected Claimant's lack of credibility into his analysis and otherwise incorrectly weighed the relevant evidence of record at the invocation stage.[12] *Rose*, 56

[12] In this case, the ALJ found the opinions of Dr. Bekteshi, Dr. Zubaku, and Ms. Maxhuni "less probative" because each "relied heavily," if not entirely, on Claimant's subjective, uncredible reporting. D&O at 19-20, 22. He instead accorded greatest weight to the "persuasive" opinions of Drs. Friedman and Ashai, that Claimant does not have PTSD, to conclude Claimant did not establish the requisite harm element of his prima facie case. *Id.*, at 16-21. The ALJ's analysis does not comport with the Board's decision in *Rose*, wherein it held credibility can play no role in addressing whether a claimant has established a prima facie case, as the Section 20(a) invocation analysis "does not require examination of the entire record, an independent assessment of witness' credibility, or weighing of the evidence." *Rose*, 56 BRBS at 37.

BRBS at 38-39. Contrary to the ALJ's finding, Claimant presented diagnoses of major depression, persistent depressive disorder, or PTSD, respectively, from Dr. Bekteshi, Dr. Ashai, Dr. Zubaku, and Ms. Maxhuni to support the harm element. He testified to his work experiences which included exposure to rocket attacks on several occasions. Therefore, he also showed working conditions which could have caused his psychological symptomatology and precipitated the aforementioned psychological diagnoses. Consequently, we reverse the ALJ's finding that Claimant did not invoke the Section 20(a) presumption, *Rose*, 56 BRBS at 39, and consider the ALJ's alternative findings on causation.

Despite having found Claimant did not establish a harm and invoke the Section 20(a) presumption, the ALJ continued his analysis as if Claimant had established his prima facie case. He concluded "a reasonable person" could rationally find the "well-documented and well-reasoned" opinions of Drs. Friedman and Ashai, that "Claimant was malingering, or purposefully exaggerating his symptoms for some secondary motive," are sufficient to rebut the presumption that Claimant's symptoms were caused by his work with Employer and were "rather feigned to fulfill some other motive." D&O at 21; EXs 4, 9. These opinions constitute substantial evidence showing either Claimant's symptoms are not related to his work for Employer or he has no harm. *Rochester v. George Washington Univ.*, 30 BRBS 233 (1997). We therefore affirm the ALJ's finding that Employer rebutted the Section 20(a) presumption. *Id.*

Because Employer has rebutted the Section 20(a) presumption, it drops from the case, and Claimant bears the burden of persuading the ALJ that he has a compensable claim. Recognizing the ALJ's broad discretion in weighing the evidence and making credibility determinations, we affirm his finding that Claimant did not establish his symptoms are connected to his DBA work for Employer by a preponderance of the evidence. *Sealand Terminals v. Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT) (2d Cir. 1993); *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982). The ALJ rationally found Claimant's testimony "unreliable" and the opinions of Dr. Bekteshi, Ms. Maxhuni, and Dr. Zubaku, diagnosing PTSD related to his work, "less persuasive" because they relied heavily on Claimant's "uncredible, subjective reporting of his own symptoms."[13] D&O at 22. In contrast, he found the opinions of Drs. Friedman and Ashai persuasive because they "used objective testing and compared Claimant's interview with his previous testimony." *Id.*; EXs 4, 9. We affirm the ALJ's rational conclusion, based on

[13] The ALJ found Claimant's hearing testimony inconsistent with his deposition testimony and other medical and employment records. D&O at 16-17.

the opinions that Claimant does not have PTSD or any psychological condition related to his DBA employment with Employer, that Claimant has not established a compensable injury. *Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988); *see also Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT).

Accordingly, we affirm the ALJ's Decision and Order Denying Benefits.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge