

U.S. Department of Labor

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



BRB No. 22-0498

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| JULIO GUTIERREZ VIVANCO       | ) |                         |
|                               | ) |                         |
| Claimant-Petitioner           | ) |                         |
|                               | ) |                         |
| v.                            | ) |                         |
|                               | ) |                         |
| TRIPLE CANOPY, INCORPORATED   | ) | DATE ISSUED: 02/15/2024 |
|                               | ) |                         |
| and                           | ) |                         |
|                               | ) |                         |
| CONTINENTAL INSURANCE COMPANY | ) |                         |
|                               | ) |                         |
| Employer/Carrier-             | ) |                         |
| Respondents                   | ) | DECISION and ORDER      |

Appeal of the Decision and Order on the Record of Christine Hilleren-Wilkins, Administrative Law Judge, United States Department of Labor.

Julio Gutierrez Vivanco, Independencia, Lima, Peru.

Sherman W. Jones, III, and Sergio A. Reynoso (Brown Sims), Houston, Texas, for Employer/Carrier.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Claimant, without representation, appeals Administrative Law Judge (ALJ) Christine Hilleren-Wilkins’s Decision and Order on the Record (2021-LDA-01583) rendered on a claim filed pursuant to the Longshore and Harbor Workers’ Compensation

Act, as amended, 33 U.S.C. §§901-950 (Act), as extended by the Defense Base Act (DBA), 42 U.S.C. §§1651-1655 (DBA).<sup>1</sup> On appeal, Claimant generally challenges the ALJ's denial of benefits; therefore, the Benefits Review Board will review the findings adverse to him and address whether substantial evidence supports the Decision and Order on the Record (D&O).<sup>2</sup> See *Pierce v. Elec. Boat Corp.*, 54 BRBS 27 (2020). We must affirm the ALJ's decision if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, a Peruvian citizen, alleged he sustained a right eye injury and a psychological injury while working for Employer as a security guard in Iraq from October 2005 to November 2008.<sup>3</sup> Following two one-year renewals, he stated he opted to not renew his contract a third time due to the working conditions.<sup>4</sup> EX 11 at 7, 9. Upon returning to Peru, Claimant worked various car and truck driver positions sporadically between 2008 and 2020. EX 9 at 5-6.

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<sup>1</sup> Claimant was initially represented by Jacob S. Garn of Attorneys Jo Ann Hoffman & Associates, P.A., who filed a notice of appeal to the Benefits Review Board on August 18, 2022. See Acknowledgement Letter, *Vivanco v. Triple Canopy, Inc.*, BRB No. 22-0498 (Sept. 12, 2022). On September 23, 2022, Mr. Garn filed a motion withdrawing his representation. See Motion to Withdraw as Counsel and Motion to Stay Deadlines, *Vivanco v. Triple Canopy, Inc.*, BRB No. 22-0498 (Sept. 23, 2022).

<sup>2</sup> Claimant did not file any brief or statement following counsel's withdrawal of representation; the Board will review this appeal under the general standard of review as pro se claimants are not required to file briefs or statements in support of their appeals. 20 C.F.R. §§802.211(e), 802.220.

<sup>3</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Second Circuit because the district director who filed the ALJ's decision is in New York. 33 U.S.C. §921(c); *McDonald v. Aecom Tech. 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).

<sup>4</sup> Claimant's employment contract lists his end date as November 30, 2008. EX 10 at 62. However, Claimant's amended LS-203 Form indicates his employment ended November 6, 2008. EXs 1-2.

At the urging of his oldest son, Claimant first sought psychological treatment on January 4, 2020, with Ms. Norma Nelida Sanchez Aquino.<sup>5</sup> CX 3. Claimant reported to Ms. Aquino that he suffers from intense headaches, irritability, startle reaction, and insomnia, and that loud noises affect him and trigger memories of past experiences. CX 3 at 106. After performing several behavioral tests, Ms. Aquino opined in her January 14, 2020 report that Claimant has “indicators of post-traumatic stress disorders (PTSD) as a consequence of situations of conflict and violence.” *Id.* at 108. Claimant reported to Dr. Jesus Angel Manrique Galvez on February 14, 2020, for another psychological examination. CX 3 at 29. Dr. Galvez noted Claimant had a depressive tendency and diagnosed him with PTSD “due to war sequelae;” he prescribed a medication regimen for Claimant to manage his symptoms. CX 3 at 31-33.

At Employer’s request, psychiatrist Dr. Moises Valdemar Ponce Malaver examined Claimant on August 19, 2021, performing various tests to assess his psychological condition. EX 6 at 13. Dr. Malaver reported Claimant does not present diagnostic criteria for PTSD, some of his symptoms and behaviors were exaggerated, and he is “a person within normal parameters who has alcohol consumption problems” but does not have “a mental health disorder causally related to his employment.” EX 6 at 15-16, 18-26.

On May 7, 2020, Claimant filed his claim seeking benefits for a work-related psychological condition.<sup>6</sup> Claimant subsequently amended his claim on January 11, 2021, to reflect the date of his psychological injury as November 6, 2008. EXs 1-2. Employer thereafter controverted the claim, EX 5, and the case was forwarded to the Office of Administrative Law Judges (OALJ), where the parties opted for a hearing on the record. The parties then submitted exhibits and filed briefs.

On July 25, 2022, the ALJ issued her Decision and Order on the Record (D&O), finding Claimant did not establish his psychological symptoms were caused by his work

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<sup>5</sup> The report indicates Ms. Aquino is a member of the Peruvian Psychologists Association, but it does not include her educational and professional qualifications. CX 3. Consequently, she will be referred to as Ms. Aquino.

<sup>6</sup> Claimant did not include his eye injury in his claim for compensation. He briefly mentioned his eye injury in his post-hearing brief to the ALJ. Post-H Brief at 5. However, the remainder of the brief addresses the causation, nature, extent, and timeliness of his claim for benefits for his psychological condition and concludes with a request that his psychological condition be found compensable and therefore that he be awarded appropriate disability and medical benefits. *Id.* at 5-23. Because no evidence was presented relating to his eye injury and the ALJ did not address it, we will not consider it.

for Employer. While the ALJ found Claimant invoked a prima facie case of compensable injury under Section 20(a), 33 U.S.C. §920(a), by proffering documentation of a PTSD diagnosis along with evidence that his guard duties in Iraq could have caused his psychological condition, she determined Employer rebutted the presumption with Dr. Malaver's medical opinion stating Claimant does not have PTSD or a psychological condition causally related to his work. D&O at 32-36.

Weighing the evidence as a whole, the ALJ found Dr. Malaver's opinion more thorough and credible, and gave it more weight, than those of Ms. Aquino and Dr. Galvez, who relied on Claimant's statements, which she found were inconsistent with respect to his symptoms and events in Iraq. *Id.* at 36-40. Consequently, she found Claimant did not establish a work-related psychological condition on the record as a whole and denied benefits. Claimant, without representation, appeals the ALJ's decision. Employer responds, urging affirmance.

Where a claimant invokes the Section 20(a) presumption that his injury is work-related, as is the case here, *Rose v. Vectrus Systems Corporation*, 56 BRBS 27 (2022) (Decision on Recon. en banc), *appeal dismissed* (MDFL Aug. 24, 2023); *see also Rainey v. Director, OWCP*, 517 F.3d 632, 634 (2d Cir. 2008); *American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 64 (2d Cir. 2001), the burden shifts to the employer to produce substantial evidence that the claimant's condition is not work-related. Substantial evidence is the amount of evidence which a reasonable mind would accept as adequate to support a conclusion. *Noble Drilling Co. v. Drake*, 795 F.2d 478, 481 (5th Cir. 1986); *see Travelers Insurance Co. v. Belair*, 412 F.2d 297 (1st Cir. 1969). The employer's burden at this stage is one of production, not persuasion. *Rainey*, 517 F.3d at 637; *see also Am. Grain Trimmers, Inc. v. Director, OWCP [Janich]*, 181 F.3d 810, 817 (7th Cir. 1999) (en banc), *cert. denied*, 528 U.S. 1187 (2000).

The ALJ found Dr. Malaver's opinion that Claimant does not have PTSD or any psychological symptoms related to his work for Employer sufficiently rebuts the Section 20(a) presumption. D&O at 35-36. We agree. Dr. Malaver reported in his August 19, 2021 medical evaluation that Claimant displayed traits indicative of his personality rather than a PTSD diagnosis. EX 6 at 6-7. After administering a Morel Emotional Numbing Test, a specific test to identify PTSD, Dr. Malaver concluded Claimant's results did not reflect PTSD symptoms. EX 6 at 14-15. Specifically, from his testing and examination, Dr. Malaver concluded Claimant did not meet any of the criteria for a PTSD diagnosis and did not show any evidence of mental health issues related to his work with Employer. *Id.* at 21-22. Dr. Malaver's opinion constitutes substantial evidence to rebut the Section 20(a) presumption. *Carswell v. E. Pihl & Sons*, 999 F.3d 18, 31 (1st Cir. 2021), *cert. denied*, 142 S.Ct. 1110 (2022). We therefore affirm the ALJ's finding that Employer rebutted the Section 20(a) presumption.

Because Employer successfully rebutted the presumption, Claimant is no longer entitled to it, and the issue of causation must be resolved on the evidence of the record, with the claimant bearing the burden of persuasion by a preponderance of the evidence. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 262 (4th Cir. 1997); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996). In evaluating the evidence as a whole, the ALJ is entitled to weigh the medical evidence, draw her own inferences from it, and is not bound to accept the opinion or theory of any particular medical expert. *Perini Corp. v. Heyde*, 306 F.Supp. 1321, 1325-1326 (D.R.I. 1969). The Board is not free to re-weigh the evidence or to make credibility determinations. *Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 323 (2d Cir. 1993).

In weighing the evidence, the ALJ found Claimant's testimony deserved limited weight because of his inconsistencies in describing his experiences in Iraq to Drs. Galvez and Malaver, at the hearing, and in his deposition. D&O at 19-20, 36. She found the details Claimant provided regarding mortar attacks, including the incident that led to his right eye injury, were contrary to contemporaneous medical records. D&O at 20; CX 2 at 133-139. Further, she concluded his testimony deserved diminished weight due to his inconsistent testimony regarding his war zone experiences, his pre-deployment examination, and his accounts of terrorist attacks. D&O at 20-21.

The record supports the ALJ's determinations. Claimant testified he was injured when a mortar blast caused him to jerk his head, bumping his eye into a stick. Employer's Exhibit 11 at 7-8. He similarly reported to Dr. Malaver and Dr. Galvez that he injured his eye during a mortar attack, but he informed Dr. Malaver that he poked his eye on a stick when the mortar blast threw him to the ground "with great force." EX 6 at 3-4; CX 3 at 29. However, as the ALJ found, the contemporaneous medical records from the time of his injury do not mention a mortar attack, indicate he injured his eye after bumping into a piece of metal protruding from a vehicle he was inspecting, and specifically identify the injury as "not battle related." Decision and Order at 20; Claimant's Exhibit 2 at 131-139. Claimant also reported to Dr. Malaver that upon first arriving in Iraq, his plane's landing was delayed because terrorists were trying to bomb the airport, and he was shelled by mortars within two hours of arriving at the base. Employer's Exhibit 11 at 3. But, as the ALJ found, these incidents were not reported by "any other treatment provider," nor did Claimant testify about them despite being asked to recount his traumatic experiences. Decision and Order at 20-21. Finally, the ALJ noted Claimant's testimony that he did not receive any type of pre-deployment examination before working for Employer was contradicted by his statement to Dr. Malaver that he went through a full physical and psychological evaluation prior to deployment. Compare EX 6 at 2 and EX 11 at 6-8. Thus, the ALJ's determination about Claimant's credibility is rational and supported by substantial evidence. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1339 (9th Cir. 1978), cert. denied, 440 U.S. 911 (1979).

Next turning to the medical evidence, the ALJ gave little weight to Ms. Aquino's and Dr. Galvez's opinions and afforded greater weight to Dr. Malaver's opinion. She noted Ms. Aquino's opinions were heavily based on Claimant's accounts, which the ALJ found not credible, without any contemporaneous treatment notes. D&O at 23. In addition, she observed the record does not contain Ms. Aquino's qualifications or credentials, and the tests she used were not specifically designed to detect PTSD. *Id.* The ALJ found Dr. Galvez's medical records contained notes of Claimant's subjective complaints rather than an objective examination or any consideration of Claimant's history outside of his employment with Employer. *Id.* at 24.

Conversely, she assigned Dr. Malaver's opinion greater weight because he is the most credentialed psychiatrist of record, performed tests specific to detecting PTSD, considered Claimant's employment and social history, as well as the information Ms. Aquino and Dr. Galvez provided, and his responses to the findings of Ms. Aquino and Dr. Galvez were supported by the record evidence. *Id.* at 37-39. In conducting various objective testing,<sup>7</sup> Dr. Malaver concluded Claimant does not meet the diagnostic criteria for PTSD. EX 6 at 21. Rather, he determined Claimant's behavioral issues are part of his personality and related to his alcoholism without a causal relation to his employment with Employer. EX 6 at 21-22.

The record supports the ALJ's findings, she adequately discussed all the relevant evidence, drew reasonable inferences, and permissibly concluded Claimant's psychological condition is not work-related. We therefore affirm her conclusion that Claimant is not entitled to benefits. *Duhagon v. Metro. Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615 (9th Cir. 1999).

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<sup>7</sup> Dr. Malaver administered the Test of Memory Malingering, the Morel Emotional Numbing Test, the Miller Forensic Assessment of Symptoms, and the Structured Inventory of Malingered Symptomatology. EX 6 at 14-16.

Accordingly, we affirm the ALJ's Decision and Order on the Record.

SO ORDERED.

DANIEL T. GRESH, Chief  
Administrative Appeals Judge

JUDITH S. BOGGS  
Administrative Appeals Judge

GREG J. BUZZARD  
Administrative Appeals Judge