

U.S. Department of Labor

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



BRB No. 19-0528

DWIGHT L. DAWSON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
FLUOR FEDERAL GLOBAL PROJECTS,)	DATE ISSUED: 06/09/2020
INCORPORATED)	
)	
and)	
)	
INSURANCE COMPANY OF THE STATE)	
OF PENNSYLVANIA, c/o AIG CLAIMS,)	
INCORPORATED)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Loranzo M. Fleming, Administrative Law Judge, United States Department of Labor.

Lara D. Merrigan (Merrigan Legal), San Rafael, California, and Brian C. Karsen (Barnett, Lerner, Karsen, Frankel & Castro, P.A.), Fort Lauderdale, Florida, for claimant.

Mark K. Eckels (Boyd & Jenerette, P.A.), Jacksonville, Florida, for employer/carrier.

Before: BUZZARD, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2017-LDA-00196) of Administrative Law Judge Loranzo M. Fleming rendered on a claim filed pursuant to 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).

Beginning in 2008, claimant worked as a fuel operator for Kellogg, Brown & Root (KBR) in Afghanistan at Bagram Airfield Base. Tr. at 19-20. In 2010, his employment transitioned to Fluor Federal Global Projects, Inc. (employer); he continued to work as a fuel operator until he became a truck driver. *Id.* at 20. As a truck driver, claimant transferred to Forward Operating Base (FOB) Fenty where he delivered fuel to power plants, electric generators, tents with heaters, and larger fuel tanks, all within the base. *Id.* at 20-23. He worked at FOB Fenty for approximately three years; during that time, it was often attacked by incoming mortars and rockets.¹ Claimant testified the attacks were stressful. *Id.* at 25.

Claimant left Afghanistan in 2012 to have neck surgery. Tr. at 30, 57. In November 2013, he returned to work for employer in Afghanistan as a fuel truck driver and was assigned to FOB Shank (nicknamed "Rocket City" due to the high number of air attacks). *Id.* at 31-32. Claimant stayed at FOB Shank until he was transferred to FOB Marmal in 2014. When FOB Marmal closed, claimant relocated to Bagram Airfield where he injured his knee on November 29, 2014. Claimant last worked for employer on December 5, 2014, when he returned stateside to treat his knee injury.

Claimant alleges he started losing his concentration, focus, and memory, and began experiencing symptoms of psychological trauma in February 2015. In April 2015, he began treating regularly at Psychiatric Consultants of Atlanta with Dr. Byron Evans, a psychiatrist, and Dr. Everick Lesane, a therapist/counselor. Dr. Evans diagnosed generalized anxiety disorder and post-traumatic stress disorder (PTSD) due to claimant's experiences in Afghanistan. CX 7. Claimant also underwent psychological evaluations with four other psychiatrists. Dr. Y. Ming Zhang evaluated claimant on April 14, 2015, and diagnosed adjustment disorder and PTSD symptoms. CX 13. Dr. Paul Panchajanya evaluated claimant on October 9, 2017, and diagnosed major depressive disorder, PTSD, adjustment disorder with anxiety, and unspecified personality and behavioral disorder due to known physiological condition. CX 12 at 12. Dr. GERALYN DATZ examined claimant on March 1 and 9, 2018, and diagnosed PTSD, major depressive disorder, unspecified anxiety

¹ The protocol during an attack was to stop, drop to the ground, look for some type of protection such as a bunker or shelter, and get away from the fuel truck containing several thousand gallons of fuel. Tr. at 24-25.

disorder, specific phobia of heights and planes, and she attributed claimant's PTSD to specific traumatic exposures in Afghanistan. CX 6. Claimant additionally sought psychiatric care at Atlanta Veterans Affairs Medical Center with Laura J. Williams, LCSW, who diagnosed persistent depressive disorder, specific phobia, and anxiety.² CX 8.

Employer's expert, Dr. Steve Shindell, evaluated claimant on March 3, 2016. He opined claimant does not satisfy the *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (DSM) Criteria A and C, and possibly G, for PTSD because "there is no evidence that he experienced any actual event that would be seen as traumatic."³ EX 2 at 7. Specifically, claimant did not "see[] any threats to himself or others, other than air raid drills or actual air raids, in which he sought shelter within the bases he was assigned." *Id.* Thus, he opined "there is no evidence of any actual event or series of events that would cause or aggravate [claimant's] condition." *Id.* Dr. Shindell, however, "deferred diagnosis" of claimant's other psychological conditions, conceding claimant "possibl[y] meets the criteria for Anxiety Disorder NOS and Major Depressive Disorder NOS," but he could not make an accurate diagnosis due to claimant's "potential exaggeration and inconsistencies." *Id.*

² In May 2015, claimant stopped taking the medication Dr. Evans prescribed for his psychiatric condition due to its side effects. Tr. at 43-44. On May 18, 2015, claimant began treating with a naturopathic physician, Dr. Bradley Bongiovanni, who diagnosed anxiety and recommended supplements. CX 9. The supplements did not control claimant's condition, and he returned to treat with Dr. Evans because the prior medications were helpful. Tr. at 43-45. Claimant continued to pursue a holistic approach and treated with Dr. Bongiovanni for over a year; however, he switched providers in January 2017 and began treating with Dr. Stephanie Grossman, an internist specializing in holistic integrative medicine. CX 10; Tr. at 44, 48. Dr. Grossman diagnosed PTSD – anxiety/depression, and recommended acupuncture, tapping, hypnotherapy, dietary changes, supplements, and sleep and fitness goals for claimant. CX 10.

³ Dr. Datz explained that under the DSM, PTSD is classified as a trauma and stress-related disorder connected to an external event. The criteria for diagnosing PTSD includes specifying qualifying experiences of traumatic events and meeting four sets of symptom clusters. Criterion A requires exposure to a traumatic event. Trauma survivors must have been exposed to an actual or threatened death and/or serious injury. CX 6 at 9. Criterion C is Avoidance of thoughts/feelings connected to the traumatic event, and/or people/situations connected to the traumatic event. *Id.* at 10. Criterion G requires that symptoms significantly affect one's daily activities, work, and/or school. *Id.* at 11.

Claimant filed this claim on November 10, 2015, alleging a work-related psychological injury. CX 2. The administrative law judge found claimant established a psychological injury, the harm element of his prima facie case, based on the medical evidence diagnosing and treating psychological conditions. Decision and Order at 81. Further finding claimant's accounts of "'stressful exposures' with incoming [attacks] while in Afghanistan" established working conditions that could have caused the harm, the administrative law judge found claimant established both elements of his prima facie case. *Id.* He therefore invoked the Section 20(a) presumption linking claimant's psychological harm to his employment in Afghanistan. 33 U.S.C. §920(a); Decision and Order at 81-82.

The administrative law judge found employer rebutted the Section 20(a) presumption with Dr. Shindell's opinion. Decision and Order at 83. In weighing the evidence as a whole, he credited Dr. Shindell's opinion over that of Dr. Datz to find claimant failed to establish a causal connection between his psychological harm and employment. The administrative law judge gave Dr. Datz's opinion less weight because she predicated her opinion on claimant's accounts of exposures to traumatic events in Afghanistan, and he found claimant is not a reliable witness. *Id.* at 87, 92. By contrast, the administrative law judge found Dr. Shindell "explained why the medical evidence does not support a finding that Claimant suffers from PTSD or psychological injury caused by working conditions with Employer." *Id.* at 93. Accordingly, the administrative law judge denied the claim. *Id.* at 94. Claimant appeals, and employer responds, urging affirmance. Claimant filed a reply brief.

Claimant contends the administrative law judge erred in finding Dr. Shindell's opinion rebuts the Section 20(a) presumption that his PTSD/psychiatric injury is work related. Once the Section 20(a) presumption is invoked, as here,⁴ it is presumed claimant's injury is work-related. The burden shifts to employer to rebut the presumption with "substantial evidence" that claimant's condition was not caused, contributed to, or aggravated by his employment. 33 U.S.C. §920(a); *see Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012); *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 44 BRBS 13(CRT) (1st Cir. 2010); *C & C Marine Maint. Co. v. Bellows*, 538 F.3d 293, 42 BRBS 37(CRT) (3d Cir. 2008); *Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008); *American Grain Trimmers v. Director, OWCP [Janich]*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000);

⁴ The administrative law judge found claimant established a prima facie case, and in its response brief, employer concedes the administrative law judge correctly invoked the presumption. Emp. Br. at 4. Thus, we affirm the finding that the Section 20(a) presumption applies in this case. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

Universal Maritime Corp. v. Moore, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). In *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990), the United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction this case arises, addressed rebuttal and stated, “None of the physicians expressed an opinion ruling out the possibility that there was a causal connection between the accident and Brown’s disability. Therefore, there was no direct concrete evidence sufficient to rebut the statutory presumption.” The Board has held in cases arising in the Eleventh Circuit that the opinion of a physician that, to a reasonable degree of medical certainty, no relationship exists between an injury and the employment accident or exposures alleged to be the cause of the injury is sufficient to rebut the Section 20(a) presumption. *Jones v. Aluminum Co. of America*, 35 BRBS 37, 40 (2001); *O’Kelley v. Dep’t of the Army/NAF*, 34 BRBS 39, 41-42 (2000).

Regardless, whether or not the “rule out” standard applies does not affect the outcome in this case: Dr. Shindell’s opinion does not constitute substantial evidence rebutting claimant’s prima facie case for psychological injury beyond PTSD or the presumed causal relationship between those injuries and claimant’s employment. Although Dr. Shindell opined claimant does not have PTSD and rebuts the presumption with respect to this condition, he “deferred diagnosis” of claimant’s other psychological conditions, conceding claimant “possibl[y] meets the criteria for Anxiety Disorder NOS and Major Depressive Disorder NOS.”⁵ EX 2 at 6; *see generally S.K. [Kamal] v. ITT Industries, Inc.*, 43 BRBS 78, 79-80 (2009), *aff’d in part and rev’d in part mem.*, No. 4:09-MC-348, 2011 WL 798464 (S.D. Tex. Mar. 1, 2011) (Act does not define psychological harm in terms of DSM criteria); *see also Wheatley v. Adler*, 407 F.2d 307, 313 (D.C. Cir. 1968) (en banc) (a harm occurs when “something unexpectedly goes wrong within the human frame”); *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989) (a claimant need not show a specific illness or disease in order to establish an injury under the Act; he need only establish some form of harm). Similarly, although he stated claimant was not exposed to “trauma” in Afghanistan because his life was not “specifically threatened” and he did not “s[ee] people that were injured,” EX 2 at 5, 7; EX 3 at 74-75, Dr. Shindell conceded seeking shelter during “real and scheduled air raids” was a condition of claimant’s employment and his experience working in a war zone was “stressful.” EX 3 at 63, 75. Thus, his opinion

⁵ Dr. Shindell explained his basis for deferring a diagnosis as, “I’m not exactly sure what’s happening;” claimant’s test results yielded atypical profiles on three tests of cognitive effort and indicated “potential” exaggeration of somatic and cognitive complaints; and “given potential exaggeration and inconsistencies [a] diagnosis cannot be accurately made at this time.” EX 2 at 6-7; EX 3 at 62-63.

does not speak to an absence of any psychological injury or working conditions that could have caused the injury.

Moreover, the administrative law judge mischaracterized Dr. Shindell's opinion as stating, "any potential [anxiety or depression] diagnosis would not be related to Claimant's overseas employment." Decision and Order at 83 (referencing EX 2 at 6-7, EX 3 at 61-62, 84), 93 (citing EX 3 at 62-63, 73, 76, 84). Although Dr. Shindell concluded claimant does not have PTSD or a "clear psychiatric disturbance," EX 3 at 62, he explained the basis of his opinion on anxiety and depression as an inability to render a diagnosis.⁶ At his deposition, he stated:

I don't feel comfortable to state that he has a major depressive disorder -- there's certainly a possibility for that -- or an anxiety disorder or a personality disorder. That's possible. He doesn't meet the criteria for post-traumatic stress disorder. That's quite evident and I explain why. But it is possible that he does have some -- an anxiety disorder or a depressive disorder, but there's too much noise in the system. There's too much inconsistency. There's too much other things that are getting in the way for being able to make a clear diagnosis.

EX 3 at 61; *see also* EX 2 at 6.⁷ The one instance Dr. Shindell appeared to suggest claimant's anxiety and depression are not work-related does not reflect the totality of his

⁶ With regard to the portions of the record to which the administrative law judge refers, Dr. Shindell explained his inability to connect claimant's employment to his PTSD, stating: 1) claimant did not see any trauma overseas, *id.* at 75; 2) his treatment notes discuss "flashbacks, but there's no indication of what it was a flashback about," *id.* at 76; and 3) the notes document horror dreams related to traumatic events in Afghanistan, but claimant did not report any such trauma to Dr. Shindell, *id.* These statements support Dr. Shindell's rebuttal of the presumption with respect to PTSD but not the separate anxiety and depression diagnoses. His additional statements identified by the administrative law judge mention other contributors to claimant's depression and anxiety, but do not state they are unrelated to the stressful conditions of his work: 1) VA records document reports of anxiety with respect to heights "which really has nothing to do with his job as a truck driver," *id.* at 73, 75; 2) claimant attributed "some" of his current ups and downs with depression and anxiety to his pending claim and deposition, *id.* at 76; and, 3) the recent deaths of two of claimant's family members "could" cause "some" depression or anxiety. *Id.* at 76-77.

⁷ Dr. Shindell elaborated:

opinion. He merely responded, “That’s correct,” when employer’s counsel’s “paraphrased” his opinion as, “there may or may not be an anxiety disorder or a depressive disorder, but [Dr. Shindell] did not see anything that was related to his work overseas.” EX 3 at 84. Because Dr. Shindell equivocated as to the existence of anxiety and depression, and did not state that either diagnosis is unrelated to the admittedly stressful conditions of claimant’s war zone employment including the need to seek shelter during air raids, his opinion does not rebut the presumed causal connection between claimant’s employment and psychological condition. *Brown*, 893 F.2d at 297, 23 BRBS at 24(CRT); *O’Kelley*, 34 BRBS at 41-42. Claimant’s psychological injury, therefore, is compensable as a matter of law and we reverse the finding to the contrary. *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988).

Accordingly, we reverse the administrative law judge’s finding that employer rebutted the Section 20(a) presumption and hold claimant’s psychological condition is work-related as a matter of law. We vacate the Decision and Order Denying Benefits, and remand the case for consideration of any remaining issues.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[W]hat I’m saying is that it’s possible that he has some depression. It’s possible he has some anxiety. But it’s not fitting any clear diagnosis. And certainly all of the inconsistencies would cause extreme caution in the clarity of the situation.

EX 3 at 63.