U.S. Department of Labor

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

BRB No. 20-0431

PATRICK R. WEINERT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
XE SERVICES, LLC	)	
	)	DATE ISSUED: 09/27/2021
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Order Denying Employer/Carrier's Motion for Reconsideration and to Re-Open the Record of Timothy J. McGrath, Administrative Appeals Judge, United States Department of Labor.

Stephen P. Moschetta (The Moschetta Law Firm, P.C.), Washington, Pennsylvania, for Claimant.

James M. Mesnard (Postol Law Firm, P.C.), McLean, Virginia, for Employer/Carrier.

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

ROLFE, Administrative Appeals Judge:

Employer appeals Administrative Law Judge (ALJ) Timothy J. McGrath's Decision and Order Awarding Benefits and Order Denying Employer/Carrier's Motion for

Reconsideration and to Re-Open the Record (2018-LDA-00442) 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.* (Act). The Benefits Review Board 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 applicable 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 2004 and was deployed to Afghanistan in October 2009. On July 29, 2010, he was travelling as a passenger in a convoy when his vehicle stalled and was hit with small arms fire. Claimant was shot twice in the left elbow and the driver was severely wounded. HT at 30-31, 33; *see also* Decision and Order at 4. Another vehicle in the convoy turned back, retrieved them both, and returned to the base. *Id.* The driver died shortly thereafter. *Id.*

Claimant received extensive treatment for his left elbow wound, including several surgeries in Afghanistan and Germany, before returning to the United States. Decision and Order at 4-5, 7-12. He then moved to South Africa in late October 2010 to be with his wife and daughter. *Id.* at 4. Once there, he began abusing alcohol as a means to cope with insomnia, anxiety, and nightmares, and reported that the combination of those factors caused a deterioration of his marriage, which ended in divorce in November 2012. *Id.* After the divorce, Claimant remained in South Africa to be near his daughter. *Id.* at 5. Claimant returned to the United States in August of 2017 because his retirement visa expired and he needed to "come back and work." *Id.*; *see also* EX 26, Dep. at 52.

To treat his psychological condition, Claimant visited Finney Psychotherapy in Virginia on August 23, 2010, where Michael Prince, LCSW, diagnosed anxiety and post-traumatic stress disorder (PTSD) and provided Claimant psychotherapy. CX 5; EX 11; Decision and Order at 7. Upon his arrival in South Africa in October 2010, Claimant was referred to a clinical psychologist, Dr. Colin Wilford, for mental health treatment. CX 9; EX 12; Decision and Order at 7. Dr. Wilford diagnosed PTSD and provided Claimant with Cognitive Behavioral Therapy. *Id.* In September 2012, Dr. Wilford reported some improvement, but noted Claimant still experienced insomnia and anxiety, though with less frequency. *Id.* He also opined Claimant "will never be psychologically fit to return to a combat situation." *Id.* Dr. Albert R. Sciarappa then briefly provided Claimant with mental health treatment between August 1 and September 4, 2014, while Claimant was visiting the United States, and saw him again on October 7, 2017. CXs 10, 11; EX 20; Decision and Order at 9. He diagnosed PTSD, recommended continued psychotherapy, and opined Claimant should not return to his previous war-related overseas employment. *Id.*

The record also contains reports from Dr. Henk R. Swanepoel and Dr. Ira K. Packer dated July 4, 2015 and April 26, 2018, respectively. EXs 21 and 22; Decision and Order at 9-12. Dr. Swanepoel diagnosed PTSD caused by Claimant's July 29, 2010 work incident. EX 21; Decision and Order at 9. He opined Claimant has recovered from his work-related PTSD and is not presenting any *Diagnostic and Statistical Manual of Mental Disorders* diagnosis, that psychologically he is at maximum medical improvement (MMI) with regard to his work-related psychological condition without any impairment, and he can return to work on a full-time basis from a psychological point of view. *Id.* In contrast, Dr. Packer opined Claimant continues to exhibit genuine symptoms of PTSD related to his traumatic work incident, which render him incapable of returning to his pre-injury job in Afghanistan. EX 22; Decision and Order at 11-12. Dr. Packer, however, opined that Claimant is capable of working outside a war zone without any psychological restrictions, so long as he receives appropriate therapy and support to help him deal with the stressors that provoke irritable and angry responses from him. *Id.*

Claimant supported himself during his time in South Africa with insurance benefits from a retirement visa. HT at 38; Decision and Order at 5. Since his return to the United States in 2017, Claimant has held three jobs and applied, albeit unsuccessfully, for at least four more. Decision and Order at 6. He worked approximately for three months each with United Parcel Service (UPS) and then Innox, before those employers terminated him, respectively, for an altercation with a co-worker and because a background check revealed Claimant has a felony assault charge. HT at 47; EX 26, Dep. at 73-76, 78-79; Decision and Order at 6. He thereafter secured a job as a van driver with McLaughlin Transportation Systems, Incorporated (Mayflower) in March 2018, a position he held through the date of the hearing. HT at 18, 51; Decision and Order at 6. Claimant stated he has had altercations with co-workers at all three jobs, EX 26, Dep. at 75-76, 79-80, 84-85, continues to struggle emotionally and must restrain himself in order to get through each work day, HT at 51-52.

Employer voluntarily paid Claimant temporary total disability benefits from July 29, 2010 to October 13, 2015, the date his physical injuries reached MMI, and permanent partial disability benefits under the schedule for a 28 percent impairment of his left arm from October 14, 2015 to June 22, 2017. HT at 19; Decision and Order at 3. On November 10, 2017, Claimant filed a claim, alleging he sustained a disabling psychological injury as a result of his work in Afghanistan. CX 1. Employer controverted the claim, asserting Claimant is not disabled. EX 5.

The ALJ found Claimant made a prima facie case of total disability, as the record shows his work-related psychological injury precludes him from returning to his previous overseas employment, and Employer did not meet its burden to establish the availability of suitable alternate employment. Decision and Order at 22. Finding Claimant has not yet reached MMI for his psychological injury, he awarded Claimant ongoing temporary total

disability benefits from July 29, 2010.[1] *Id.* at 19, 27. He also held Employer liable for all medical benefits relating to Claimant's psychological condition.[2] The ALJ denied Employer's motion for reconsideration and request to reopen the record.

On appeal, Employer challenges the ALJ's award of total disability benefits, as well as his refusal to reopen the record on reconsideration. Claimant responds, urging affirmance of the ALJ's decision.

Prima Facie Case of Total Disability

Employer contends the ALJ erred in finding Claimant totally disabled as of October 14, 2015. It maintains there is no medical evidence showing Claimant was incapable of full-duty work as of that date. Rather, it posits Dr. Swaenpoel's 2015 opinion that Claimant was "able to maintain a regular workload at a regular pace from a psychological view" and "fit to return to his prior employment," EX 21 at 27, and Dr. Sciarappa's opinion, that only restricted Claimant from returning to "war-related employment overseas," constitutes substantial evidence that Claimant was capable of full-time work. Additionally, it asserts Claimant's actions from October 2015 -- his general failure to seek regular treatment of his psychological condition, his activities with the Hell's Angels[3] and not looking for work while in South Africa,[4] his return to the United States in August 2017 because he needed a job, and his actual full-duty employment from September 2017 -- directly conflict with the ALJ's conclusion that he is totally disabled.

In order to establish a prima facie case of total disability, the claimant must establish he is unable to perform his usual work due to the injury. *See CNA Ins. Co. v. Legrow*, 935

[1]The ALJ found Employer entitled to a credit under 33 U.S.C. §914(j) for advanced compensation payments made to Claimant since July 29, 2010. Decision and Order at 27.

[2]The parties agreed Employer has paid all medical benefits relating to Claimant's work-related left elbow injury.

[3]Claimant joined the Hell's Angels Durban Chapter while in South Africa and served for a time as Chapter president. As a member, he engaged in what Employer described as "extensive social activity" through his attendance at weekly motorcycle club meetings and social functions, particularly in his role as president. Emp. Br. at 11, 18.

[4]Employer points to Claimant's testimony that he did not think he could find a job in South Africa "due to discrimination" and not because he felt he was incapable of working. *See generally* EX 18 at 5.

F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991). A claimant's "usual" employment for purposes of determining whether he established a prima facie case of total disability is defined by his regular duties at the time of his injury. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). The Board is not empowered to reweigh the evidence, but must affirm the administrative law judge's findings that are rational and supported by substantial evidence. *See generally Sea-Land Services, Inc., v. Director, OWCP* [*Ceasar*], 949 F.3d 921, 54 BRBS 9(CRT) (5th Cir. 2020); *Bath Iron Works Corp. v. Director, OWCP* [*Jones*], 193 F.3d 27, 34 BRBS 1(CRT) (1st Cir. 1999); *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. 1994); *Sealand Terminals v. Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT) (2d Cir. 1993).

Contrary to Employer's contentions, Claimant need only show an inability to return to his usual employment -- not that he cannot perform any work. *Elliott v. C & P Tel. Co.*, 16 BRBS 89 (1984). Therefore, Dr. Sciarappa's restricting Claimant from returning to "war-related employment overseas" supports Claimant's prima facie case, as his usual job was in Afghanistan. *Service Employees Int'l, Inc. v. Director, OWCP*, 595 F.3d 447, 44 BRBS 1(CRT) (2d Cir. 2010) (if claimant cannot return to usual war zone work, prima facie case established); *Rice v. Service Employees Int'l, Inc.*, 44 BRBS 63 (2010) (same). Moreover, that Claimant engages in social activities does not preclude finding he cannot return to his usual work. *See generally Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997).

The ALJ extensively reviewed the evidence of record and his crediting Dr. Packer's opinion over Dr. Swanepoel's is rational and within his discretion as factfinder. *See, e.g., Care v. Washington Metro. Area Transit Auth.*, 21 BRBS 248 (1988) (a physician's opinion that the employee's return to his usual work would aggravate his condition is sufficient to support a finding of total disability). The ALJ found Claimant's credible testimony regarding his ongoing symptoms,[5] Dr. Packer's opinion, and the consistent treatment records of Mr. Prince and Drs. Wilford and Sciarappa, support the finding that Claimant is precluded from returning to his usual work in Afghanistan. Decision and Order at 20-22; CXs 5, 9, 10, 11; EX 22. We therefore affirm the ALJ's conclusion that Claimant established his prima facie case of total disability as it is supported by substantial evidence. *Service Employees Int'l, Inc.*, 595 F.3d 447, 44 BRBS 1(CRT); *Rice*, 44 BRBS 63.

[5]Claimant stated he struggles each day emotionally and must restrain himself in order to get through the work day, HT at 51-52. He further explained he has had altercations with co-workers at all three of his post-2017 jobs, EX 26, Dep. at 75-76, 79-80, 84-85. The ALJ found Claimant exhibited agitated behavior at the formal hearing, consistent with his testimony. Decision and Order at 20; HT at 32.

Total Disability While Working

Employer next contends the ALJ erred in finding Claimant entitled to total disability benefits despite having worked full-time since September 2017.[6]

The fact that a claimant is working after an injury will not forestall a finding of total disability if he works only with extraordinary effort and in spite of excruciating pain, although an award of total disability while working is the exception, rather than the rule. *See Legrow*, 935 F.2d 430, 24 BRBS 202(CRT); *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988); *Haugton Elevator Co. v. Lewis*, 572 F.2d 447, 7 BRBS 838 (4th Cir. 1978); *Reposky v. Int'l Transp. Serv.*, 40 BRBS 65 (2006).

The ALJ rejected Employer's contention that Claimant's actual post-injury employment as a driver with Mayflower constitutes suitable alternate employment. He found the record silent as to whether Claimant is able to perform the job adequately and that Claimant's testimony indicates the job "causes him significant emotional distress." Decision and Order at 24. In this regard, the ALJ found Claimant convincingly testified: he has had numerous altercations with co-workers, which the ALJ found demonstrated "his tendency to respond disproportionately to a perceived affront;" he "struggle[s]" to get through each day emotionally and has to restrain himself from lashing out; and he has not yet received the necessary treatment Dr. Packer recommended to render him able to work. *Id.* (citing HT at 52-53). He therefore concluded Claimant "suffered through significant emotional and psychological pain to perform the job," such that "this is one of the rare circumstances" where the actual post-injury job Claimant holds does not constitute suitable alternate employment. *Id.*

Although the ALJ recited the correct standard prior to finding Claimant entitled to total disability benefits, Decision and Order at 24, he did not adequately address whether Claimant works only with extraordinary effort.[7] The ALJ found the evidence establishes Claimant suffers "through significant emotional and psychological pain to perform" his job

[6]We affirm the ALJ's finding that Claimant "is not suited for any jobs listed in [Ms.] Rapant's vocational survey[s]" as it is not challenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

[7]Instead, the ALJ found Claimant's job with Mayflower is not suitable alternate employment because there is no evidence as to Claimant's ability to perform the job and because Claimant had not yet received the treatment necessary to render him able to work. As discussed below, the ALJ did not address Claimant's testimony that could support a finding that he is capable of performing this job.

with Mayflower,[8] but the ALJ did not discuss the contrary evidence or determine whether Claimant expends "extraordinary effort" to work given his psychological injury. Contrary to the finding that the "record is silent" as to whether Claimant can perform his job, the record contains evidence from which it can be inferred that Claimant has been successfully performing the duties of his job with Mayflower. Claimant testified: he continues to perform his present job with Mayflower despite having had "a few altercations with employees there," *id.*, Dep. at 84-85; he believes Mayflower views him as a good employee, HT at 64; he is capable of working, EX 26, Dep. at 97-98; and he "want[s] to keep that job." HT at 68.

Moreover, Claimant generally described his work duties with Mayflower, which could be viewed as undermining a claim for total disability. EX 26, Dep. at 83-84. Claimant testified he maintains a regular and active schedule, shows up for work on time, and gets his work done in a regular and consistent fashion. HT at 74-75. Asked to explain a typical day, Claimant stated he gets up at about 4:00 am and goes to the gym before work, he arrives at work between 6:30 and 7:00 am to get his assignments, and usually works until sometime between 4:00 and 7:00 pm. *Id.* He also stated that depending on when he finishes his work day, he may go back to the gym for a second workout. *Id.* at 74. Claimant further testified he is normally in charge of his daily work crew and while he primarily does local moves, he has also occasionally done a long haul overnight move as well. *Id.* This evidence is relevant to the consideration that Claimant requires extraordinary effort to perform his work. *See generally* 5 U.S.C. §557(c)(3)(A); *H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000) (the Administrative Procedure Act requires the fact-finder to address all relevant evidence on material issues of fact); *Gremillion v. Gulf Coast Catering Co.*, 31 BRBS 163 (1997) (Brown, J., concurring) (the Board vacated the administrative law judge's finding because it was unable to determine on the record whether he simply "disregarded significant probative evidence or reasonably

[8]The ALJ cited the following testimony as support for his conclusion: Claimant was asked how he gets through his work days emotionally at Mayflower, to which he responded, "I struggle" because "when you go there, the employees, they're so miserable. It kind of brings you down. So instead of me going down to their level, I have to actually force myself to be not them. It just drains on me for a while. I can't do it every day." HT at 51-52. Claimant further stated he has to restrain himself from "losing it" on a daily basis because "[p]eople in general, I can't be around them." *Id.* at 52. Dr. Packer opined that Claimant's angry outbursts at work "are related to symptoms of his PTSD that are triggered in an indirect manner" through his "increased sensitivity to feeling attacked (in both a physical and psychological sense), and to his unresolved guilt feelings from the traumatic [work] event." EX 22 at 14.

failed to credit it"); *Williams v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 61 (1985).

As the ALJ did not fully address all the relevant evidence and determine if Claimant expended "extraordinary effort" to work, we vacate his finding that the Mayflower job is not suitable alternate employment and that Claimant is entitled to total disability benefits from March 12, 2018, and remand this case for further consideration.[9] *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). If he finds Claimant is not totally disabled, the ALJ should calculate Claimant's loss of wage-earning capacity. In this respect, Claimant's actual post-injury wages need not be the basis for any loss, as the ALJ has the discretion under Section 8(h), 33 U.S.C. §908(h), to take into account Claimant's psychological pain in awarding a greater partial award than which would be calculated by use of Claimant's actual wages alone. *Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46 (1999).

Denial of Employer's Motion to Reopen the Record

Employer contends the ALJ erred in denying its motion to reopen the record, which it submitted as a motion for reconsideration. It maintains the discussion it had with Claimant's counsel regarding Claimant's move to Virginia and his employment there, around the time the ALJ issued his decision in late May 2020, establishes a fact that "destroys the entire underpinning" of the ALJ's finding that Claimant is totally disabled despite his gainful employment.[10]

We affirm the ALJ's rejection of Employer's request to re-open the evidentiary record, as it has not established the ALJ abused his discretion in reaching this conclusion. *Ezell*, 33 BRBS 19. As the ALJ stated, if Employer believes there is a mistake in fact or a

[9]We affirm, as supported by substantial evidence, the ALJ's finding that Claimant's inability to continue in his post-injury jobs with UPS and Innox was due to his difficulty in getting along with others, which is a direct consequence of his work-related psychological condition. We therefore affirm his finding that these short-term jobs do not constitute suitable alternate employment and the resulting award of total disability benefits up through the time Claimant began working with Mayflower on March 12, 2018. *Armfield v. Shell Offshore, Inc.*, 30 BRBS 122 (1996).

[10]The formal hearing was held on October 3, 2018. The ALJ issued his decision on May 29, 2020. Employer had a conversation with Claimant's counsel after the decision was issued and learned Claimant had moved to Virginia and was employed there. Employer sought to reopen the record to submit evidence of Claimant's continued employment and to be given the opportunity to depose him about this employment.

change in Claimant's condition, the proper remedy is to seek modification under Section 22 of the Act, 33 U.S.C. §922.[11]

Accordingly, we vacate the ALJ's finding that Claimant is entitled to ongoing total disability benefits from March 12, 2018, and remand this case for further consideration consistent with this decision. In all other respects, we affirm the ALJ's decisions.[12]

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

I concur:

DANIEL T. GRESH
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring and dissenting:

I concur in the majority's decision to affirm Administrative Law Judge (ALJ) Timothy J. McGrath's findings that Claimant established his prima facie case of total

[11]Employer can file a petition for modification with the ALJ. *See L.H. [Henderson] v. Kiewit Shea*, 42 BRBS 25 (2008); *Williams v. Nicole Enterprises, Inc.*, 19 BRBS 66 (1986).

[12]Given the nature of our colleague's dissent, it bears emphasizing the actual narrow scope of this remand. We have affirmed the ALJ on all points except for the issue of whether Claimant worked through "extraordinary effort and in spite of excruciating pain" to qualify for total disability benefits despite having worked full-time since September 2017. *See CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991). And on that point, we have not reversed the ALJ, but remanded the case for him to consider plainly relevant evidence that he did not discuss in his initial decision. *See generally H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000) (the Administrative Procedure Act requires the fact-finder to address all relevant evidence on material issues of fact); *Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 5, 33 BRBS 162,

disability. I also concur with its decision to affirm the ALJ's award of temporary total disability benefits from July 29, 2010 through March 12, 2018, as well as his denial of Employer's request to reopen the record.

However, I respectfully dissent from the majority's decision to vacate the ALJ's determination that Claimant is entitled to total disability benefits. The Benefits Review Board must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). Because the ALJ applied the correct legal standard in finding Claimant totally disabled, and his determination is supported by the record, I would affirm.

Claimant worked for Employer as a logistics manager in Afghanistan. On July 29, 2010, he was riding in a multi-vehicle convoy that was attacked by five to ten men armed with a rocket-propelled grenade launcher, several AK-47 style weapons, and a light to

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165(CRT) (1st Cir. 1999) ("Substantial evidence" is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.").

Should the ALJ reasonably find this evidence does not change his conclusion, he may reinstate his original finding on remand. *Id.* We however are not empowered to make that finding for him. While our colleague is correct that the Ninth Circuit has held that credible complaints of severe pain can establish a prima facie case of disability, even if the claimant can perform his past work, it stressed the exclusive role of "ALJs to determine, *based on consideration of all the facts and circumstances of a particular case*, whether a claimant's complaints of pain are (1) credible and (2) if so, whether the level of pain described is so severe, persistent, and prolonged that *it significantly interferes with the claimant's ability to work*." *See Jordan v. SSA Terminals, LLC*, 973 F.3d 930, 937-938, 54 BRBS 57, 60(CRT) (9th Cir. 2020) [emphasis added]. The ALJ, demonstrably, has not considered "all of the facts and circumstances" here in wrongly determining that the "record is silent" regarding Claimant's ability to work performing the Mayflower job. And the undiscussed evidence regarding the Mayflower job and Claimant's personal life to the contrary -- along with the undisputed fact that he has worked full-time throughout the period in question -- could belie the selective narrative our colleague constructs in order to support affirming the ALJ's conclusion. Whether unexamined facts that could indicate to a reasonable trier-of-fact Claimant has performed the Mayflower job on a regular and consistent basis "are irrelevant to the inquiry" thus rests squarely with the ALJ -- not us. *See, e.g., Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *LaFaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS 108(CRT) (2d Cir. 1989), *rev'g LaFaille v. Gen. Dynamics Corp.*, 18 BRBS 88 (1986).

medium machine gun. EX 7; *see* Hearing Transcript (HT) at 32. One vehicle was hit with a grenade while Claimant's vehicle was hit "8-12 times" with small arms fire. EX 7; HT at 33. The driver of Claimant's vehicle was "shot pretty bad" and later died of his injuries. HT at 33; EX 7. Claimant was shot in the elbow and thought he "was dead" while "[thinking] about [his] daughter" during the attack. HT at 33. The convoy was able to regroup and return to base, but Claimant's gunshot wound was severe, requiring several surgeries to repair the damage. HT at 33-34.

Claimant's injuries did not end here, however. After returning to his family in South Africa in October 2010, Claimant struggled with insomnia, anxiety, and nightmares, and self-medicated with alcohol. HT at 25-26. That month, he began seeing Dr. Wilford, a clinical psychologist, for his symptoms; his continued struggles with alcohol and post-traumatic stress disorder (PTSD), however, led to his marriage ending in 2012. *Id.* at 36. Claimant remained in South Africa to be near his daughter and began seeing Dr. Breedt to help with his anxiety and insomnia. *Id.*

Claimant returned to the United States in August 2017 after his South African visa expired, and moved in with his father. HT at 38-39. He stopped drinking, but this only "made things worse" because "[a]s soon as you sober up a bit you actually think about [the ambush]." *Id.* Claimant struggled to find a doctor to treat his psychological issues stemming from the traumatic incident; physicians' offices were often not taking new patients or had long waiting lists. *Id.* at 40-41.

Claimant's condition has made him prone to violent outbursts that have negatively impacted his medical care, family life, and ability to hold down a job. He would become "enraged" and "los[e] [his] mind" on medical personnel, for example, when he was misquoted for a consultation or required to sign a waiver allowing the doctor to contact the police in certain instances. HT at 42. In September 2017, he violently attacked his father, leading to a felony assault charge, yet "never recall[ed] ever doing it to him" even though he "basically, near[ly] killed him."[13] HT at 65.

That same month, Claimant was hired by United Parcel Service (UPS) to work in inventory control, but was fired after only three months for accosting another employee. HT at 48. When the coworker failed to give him parts he needed for an engine, Claimant "started yelling at him," prompting another coworker to report Claimant to the human resources department. *Id.* After leaving the scene to try to calm himself down, Claimant

[13]Claimant was able to plead the felony to a misdemeanor because his father did not press charges. HT at 47.

returned to further accost the coworker because he "had to get the rest of it out," but by that time the human resources manager was there. *Id.*

Claimant next worked as a salesman at a company called Innox beginning in January 2018, but was again fired after about a month and a half because of several altercations with coworkers, supervisors, and customers.[14] HT at 49. In the first incident, Claimant "lost [his] mind" on a coworker who made a "derogatory remark" about Claimant's work as a military contractor. *Id.* In a second incident, Claimant again "lost it" on a customer, which led to a verbal altercation with his supervisor. *Id.*

Claimant's troubles and violent outbursts have continued in his current job with McLaughlin Mayflower, where he has worked as a driver since March 2018. HT at 50. In one incident that took place in front of a customer, Claimant tried to hit a coworker with his car because the coworker was allegedly "talk[ing] down to" him. *Id.* Claimant ultimately "swiped" the coworker with the car's side mirror and then got out of the car and pinned the coworker against the vehicle. *Id.* In another incident, Claimant picked up a coworker and "threw him through a tree bush." *Id*. at 50-51. At the hearing, Claimant testified that he has to restrain himself from "losing it" on a daily basis. *Id*. at 52.

Claimant has undergone psychological evaluations by several different doctors since being attacked and shot in Afghanistan. Dr. Wilford noted symptoms of "panic attacks, insomnia, flashbacks, intense anxiety around people that appear to be Muslim, severe anger towards [the attackers], lack of motivation, and episodes of depression." CX 12 at 1; EX 12. He stated that in spite of counseling and medication, Claimant's symptoms persisted and "his irrational and anxious/panic response has become deeply engrained." CX 9 at 1-5. A psychiatrist, Dr. Packer, noted Claimant has a "low tolerance for frustration," a "tendency to respond somewhat impulsively," and is "opposed to recognizing nuance." EX 22 at 9.

Generally, a claimant is not totally disabled if he is currently working and able to perform his job. In those circumstances, the claimant's current job is proof of suitable alternate employment, thus entitling him to, at most, partial disability benefits. The ALJ accurately observed, however, that having a job after a work injury will not preclude a finding of total disability if the claimant is able to work only "with extraordinary effort and in spite of excruciating pain." *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51 (CRT) (11th 1988); *Haughton Elevator Co. v. Lewis*, 572 F.2d 447, 7 BRBS 838 (4th Cir.1978), *aff'g* 5 BRBS 62 (1976); *Everett v. Newport News Shipbuilding & Dry Dock*

[14]Claimant also attributes his firing, in part, to the company's discovery of the assault charges stemming from his attack on his father. HT at 49.

Co., 23 BRBS 216 (1989). Thus, under the "extraordinary effort and excruciating pain" standard, courts have held that employees can establish entitlement to total disability benefits despite the fact that they are able to perform all of the duties of their current, post-injury job. *See Jordan v. SSA Terminals, LLC*, 973 F.3d 930, 54 BRBS 57(CRT) (9th Cir. 2020) (being able to perform past work will not preclude a finding of total disability in the case of severe, persistent, and prolonged pain); *Newport News Shipbuilding and Dry Dock CO. v. Wiggins*, 27 F. App'x 184 (4th Cir. 2001) (though claimant could literally execute the duties of her job as a paper carrier, it was due to extraordinary effort and perseverance).

After reviewing the record and weighing the evidence, the ALJ awarded Claimant total disability benefits. Decision and Order at 24. The majority's holding – that the ALJ erred by failing to adequately address the "extraordinary effort" element – is inconsistent with the record and the ALJ's findings. The ALJ evaluated Claimant's numerous outbursts at work, Claimant's own testimony that he struggles every day at work, and the fact that Claimant does not currently have adequate psychological treatment. *Id*. He acknowledged that a claimant working post-injury is usually considered to have secured suitable alternative employment, but concluded that this is one of the "rare circumstances" to award total disability benefits because Claimant "suffer[s] through significant emotional and psychological pain to perform the job." *Id.* In fact, the psychological pain that is causing Claimant problems at his current job is the very pain that caused him to be fired from at least two previous jobs, in addition to being charged with felony assault for a violent outburst in his private life. Thus, notwithstanding that the ALJ's concluding sentence does not explicitly restate the "extraordinary effort and excruciating pain" standard that he properly cited at the outset of his analysis, his finding of total disability is clearly supported by the facts and is uncontradicted by any other evidence. That the ALJ identified this as a "rare exception" underscores that he did not casually find total disability based merely on evidence of some pain and some effort.

While the majority concludes that the ALJ did not adequately discuss certain aspects of Claimant's testimony, the facts it identifies are irrelevant to the inquiry. The ALJ, as the factfinder, is responsible for weighing the evidence and determining the credibility of witness testimony. *See generally Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT) (2d Cir. 1993). Acting within his discretion, he found Claimant's testimony regarding his pain and difficulties getting through the workday credible. Decision and Order at 24. As the majority holds, he also permissibly credited the physicians who identified Claimant's persistent psychological problems, including that of Dr. Packer who stated Claimant could not return to work without appropriate therapy to help him deal with stressors that provoke violent, angry outbursts. *Id.* at 22. The ALJ's finding that Claimant is totally disabled based on his violent altercations at home and work – as well as a lack of steady, continued therapy – is hardly undermined by the additional facts the majority cites. *Id.* at 24. Claimant's statements that he thinks he is a good employee, has social relations

through a motorcycle club, and exercises regularly have no bearing on whether he is actually struggling through immense psychological pain to get through work each day. The record includes many examples, credited by the ALJ, of Claimant's psychological pain causing verbally and physically violent outbursts at work that led to his being fired from two previous jobs; these problems have continued in his current job and Claimant credibly testified that he has to restrain from "losing it" on a daily basis. HT at 52. Claimant's continued dedication to working despite immense psychological pain is admirable, but is not a basis to overturn the ALJ's findings.

As the ALJ applied the correct legal standard, considered the relevant evidence of the record, and acted within his discretion in determining that Claimant is able to work only with extraordinary effort and through excruciating pain, I would affirm the ALJ's finding of total disability.

I therefore dissent.

GREG J. BUZZARD
Administrative Appeals Judge