BRB No. 11-0825

SCOTT T. SMITH		
Claimant-Respondent	)	
v.	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	DATE ISSUED: 07/24/2012
and	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Jerry R. McKenney and Karen A. Conticello (Legge, Farrow, Kimmitt, McGrath & Brown, L.L.P.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2010-LDA-00199) of Administrative Law Judge Joseph E. Kane rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On January 15, 2005, claimant commenced employment for employer as a fuel specialist at Forward Operating Base Falcon, Iraq, where he worked seven days a week, 12 hours per day.[1] While deployed there, claimant experienced rocket attacks. On March 12, 2006, claimant transferred to the position of food service specialist and, in July 2006, he was redeployed to Camp Kalsu. On October 3, 2006, claimant sought shelter in a bunker when Camp Kalsu came under rocket attack. On October 4, 2006, claimant experienced severe back pain which prevented him from working for four days. Claimant returned to the United States on November 8, 2006, whereupon he obtained other employment. In December 2006, claimant began to experience psychological symptoms; in February 2007, he commenced medical treatment for those symptoms, which he believed were related to his experiences in Iraq. Claimant sought medical treatment for back complaints in November 2008, for a hearing loss in January 2009, and for wrist complaints in April 2009. Employer declined to pay claimant disability or medical benefits for any of these conditions, contending that they were not related to his employment with employer in Iraq. Claimant sought benefits under the Act for injuries to his back and wrist, for his hearing loss, as well as for his psychological conditions.

In his Decision and Order, the administrative law judge found that claimant established that his working conditions and employment activities in Iraq could have caused or aggravated his hearing loss, and back, wrist, and psychological conditions. The administrative law judge thus invoked the Section 20(a), 33 U.S.C. §920(a), presumption, found that employer did not establish rebuttal of the presumption, and concluded that claimant's conditions are related to his employment with employer. The administrative law judge found that claimant's back, wrist and psychological conditions had not yet reached maximum medical improvement, that claimant is incapable of returning to his employment duties with employer in Iraq due to his psychological conditions, and that claimant has performed suitable alternate employment in the United States since December 1, 2006. The administrative law judge found that claimant has a .6 percent hearing impairment for which he is entitled to 1.976 weeks of permanent partial disability. 33 U.S.C. §908(c)(13). After calculating claimant's average weekly wage at the time of his October 3, 2006, work injury to be $1,434.62, and claimant's post-injury wage-earning capacity to be $531.51, the administrative law judge awarded claimant temporary partial disability benefits from December 1, 2006, and continuing, for his loss in wage-earning capacity due to his psychological injuries. 33 U.S.C. §908(e), (h).

On appeal, employer contends that the administrative law judge erred in finding that claimant's psychological condition is related to his employment with employer in Iraq. Alternatively, employer challenges the administrative law judge's award of temporary partial disability benefits to claimant, contending that the administrative law

[1]Claimant's employment duties as a fuel specialist involved the refueling of Humvees and other military vehicles.

judge erred in determining the extent of claimant's work-related disability. Claimant responds, urging affirmance of the administrative law judge's decision in its entirety.

Employer contends that the administrative law judge erred in invoking the Section 20(a), 33 U.S.C. §920(a), presumption. In order to be entitled to the benefit of the Section 20(a) presumption, claimant must establish a prima facie case by showing that he sustained a harm and that an accident occurred or working conditions existed which could have caused the harm. *See Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once claimant has established his prima facie case, he is entitled to invocation of the Section 20(a) presumption linking his harm to his employment. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000).

Employer contends that claimant's psychological conditions do not constitute a harm as defined by the Act. Specifically, employer avers that since claimant's claim is based on psychological conditions that existed prior to claimant's deployment to Iraq, such conditions cannot be considered a harm for purposes of invoking Section 20(a) of the Act. Employer's contention is without merit. For purposes of establishing the first element of a prima facie case, a "harm" has been defined as "something [that] unexpectedly goes wrong within the human frame," *Wheatley v. Adler*, 407 F.2d 307, 313 (D.C. Cir. 1968)(en banc), and it is well-established that a psychological injury can constitute a "harm" under the Act. *See American Nat'l Red Cross v. Hagen*, 327 F.2d 559 (7th Cir. 1964); *R.F. [Fear] v. CSA, Ltd.*, 43 BRBS 139 (2009); *S.K [Kamal] v. ITT Industries, Inc.*, 43 BRBS 78 (2009), *aff'd in pert. part and rev'd in part*, No. 4:09-MC-348, 2011 WL 798464 (S.D.Tex. Mar. 1, 2011); 33 U.S.C. §902(2). In finding that claimant established the harm element of his prima facie case, the administrative law judge acknowledged claimant's pre-existing psychological conditions, then relied on the worsening of claimant's conditions upon his return to the United States, which included, inter alia, bad dreams, anxiety, anger, rage, and hostility towards people. Decision and Order at 44. In this regard, the administrative law judge found that all the medical reports recognized that something had "gone wrong" within claimant's body "above and beyond" his pre-existing conditions. *Id.* Thus, as claimant established a worsening of his psychological conditions, we affirm the administrative law judge's finding that claimant established the existence of a harm under the Act for purposes of establishing the first element of his prima facie case.[2]

[2]Contrary to employer's contention on appeal, the decision in *U.S. Industries*, 455 U.S. 608, 14 BRBS 631, does not support reversal of the administrative law judge's finding on this issue. In *U.S. Industries*, the Court stated that "A prima facie 'claim for

Employer also contends that the administrative law judge's finding that working conditions existed in Iraq which could have caused, aggravated, or accelerated claimant's psychological conditions cannot be affirmed since such a finding of working conditions is based solely on claimant's testimony. In establishing this element of his prima facie case, claimant is not required to prove that his employment activities did, in fact, cause his harm, but he must show only that working conditions existed which *could have* caused or aggravated the harm. *See Hunter*, 227 F.3d 285, 34 BRBS 96(CRT). An accident has been defined as an exposure, event or episode. *Perry v. Carolina Shipping Co.,* 20 BRBS 90 (1987). In finding that claimant established the second element of his prima facie case, the administrative law judge credited claimant's testimony that he had been present during rocket and mortar attacks in Iraq, and that he observed the remains of individuals killed by these attacks. Decision and Order at 44-45. It is well established that, in arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. *Calbeck v. Strachan Shipping Co.,* 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 371 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). In this case, the administrative law judge found that working conditions existed in Iraq that could have resulted in a worsening of claimant's pre-existing psychological conditions. The administrative law judge's decision to rely upon the testimony of claimant in this regard is neither inherently incredible nor patently unreasonable. *See Cordero v. Triple A Machine Shop,* 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Thus, we affirm the administrative law judge's finding that claimant established

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compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." 455 U.S. at 615, 14 BRBS at 633. Thus, proof that "something has gone wrong within the human frame," which demonstrates the existence of physical impairment, is insufficient alone to invoke Section 20(a), as claimant must also demonstrate the existence of employment conditions sufficient to bring the claim within the course of employment. *Id.* Accordingly, consistent with *U.S. Industries,* claimant must prove *both* a harm and the occurrence of an accident or the existence of working conditions which could have caused it. In this case, since the administrative law judge did not invoke Section 20(a) based solely upon proof of a harm, his decision is not inconsistent with *U.S. Industries. See* discussion, *infra.*

the second prong of his prima facie case, and his consequent invocation of the Section 20(a) presumption.[3] *Hunter*, 227 F.3d 285, 34 BRBS 96(CRT).

Employer next contends that, if claimant is entitled to invocation of the Section 20(a) presumption, it presented substantial evidence to rebut the presumption. Upon invocation of the presumption, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Hunter*, 227 F.3d 285, 34 BRBS 96(CRT); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). Where aggravation of a pre-existing condition is at issue, employer must present substantial evidence that work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury. *Conoco, Inc.,* 194 F.3d 684, 33 BRBS 187(CRT); *see Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986)(en banc). If employer establishes rebuttal of the Section 29(a) presumption, the administrative law judge must weigh all of the relevant evidence and resolve the causation issue based on the record as a whole, with claimant bearing the burden of persuasion. *See Ceres Gulf, Inc. v. Director, OWCP,* ___ F.3d ___, No. 11-60456, 2012 WL 1977908 (5th Cir. June 4, 2012); *see also Director, OWCP v. Greenwich Collieries,* 512 U.S. 257, 28 BRBS 43(CRT) (1984).

We affirm the administrative law judge's finding that employer did not rebut the Section 20(a) presumption. Although employer argues that the evidence of record demonstrates that claimant had previously-diagnosed psychological conditions, evidence of pre-existing conditions alone cannot rebut the presumption in view of the aggravation rule. *See Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009). Employer also avers that the opinion of Dr. Griffith, who opined that claimant is overreporting his symptoms and that claimant's claim of mental difficulties is an attempt to obtain compensation without working, is sufficient to establish rebuttal of the Section 20(a) presumption. *See* EX 16. The administrative law judge rationally found the opinion of Dr. Griffith insufficient to establish rebuttal because it was based upon test results not contained in the record.[4] Moreover, the administrative

[3]Employer further argues that claimant did not establish his prima facie case since claimant's psychological condition does not prohibit him from working. Employer's assertion is without merit, as the issues of whether claimant sustained a harm, and the existence of an accident or working conditions which could have caused that harm, concern the cause of claimant's malady, and not whether he is disabled thereby.

[4]Specifically, Dr. Griffith administered the MMP1-2 test to claimant and based his diagnosis in part on the results of the test. The test results were not admitted into the record. Decision and Order at 35, 52.

law judge rationally found that Dr. Griffith was not justified in downplaying the significance of the rocket and mortar attacks that claimant experienced; in this regard, the administrative law judge properly noted that the pertinent issue is the stress the working conditions put on claimant, and not whether such experiences are universally stressful. *See Wheatley*, 407 F.2d at 311. Thus, the administrative law judge found that Dr. Griffith's opinion is too unreliable to support rebuttal of the Section 20(a) presumption. This finding is within the purview of the administrative law judge. *See Ceres Gulf, Inc.*, 2012 WL 1977908 at *4 (court holds that it is for the administrative law judge to determine if the evidence produced by employer constitutes "substantial evidence to the contrary"); Decision and Order at 52. Accordingly, in the absence of any other evidence that claimant's psychological conditions were not caused or aggravated by his employment, we affirm the administrative law judge's finding that the Section 20(a) presumption was not rebutted and his consequent finding of a causal relationship between claimant's employment and his psychological conditions. *Holiday*, 591 F.3d 219, 43 BRBS 67(CRT).

Employer next challenges the administrative law judge's award of ongoing temporary partial disability compensation. In order to establish a prima facie case of total disability, claimant must demonstrate that he is unable to return to his usual work due to his work-related injury. *See Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *Devor v. Dep't of the Army*, 41 BRBS 77 (2007).

In his decision, the administrative law judge summarily stated that claimant "voluntarily" left employer's employ in Iraq after working in that country for 22 months. *See* Decision and Order at 4. In addressing the extent of claimant's work-related disability, the administrative law judge relied on the opinions of Drs. Reynolds and Sacks in concluding that claimant's present psychological conditions render him incapable of returning to his prior employment duties with employer in Iraq. *Id.* at 60-61. Consequently, the administrative law judge found that claimant established his prima facie case of total disability. *Id.* at 61. As claimant was working in alternate employment, the administrative law judge awarded him partial disability benefits based on his loss in wage-earning capacity.

We agree with employer that the administrative law judge's findings regarding claimant's work-related disability following his return to the United States cannot be affirmed, and that the case must be remanded for reconsideration of this issue. Employer contends that claimant voluntarily left his position with employer in Iraq prior to the manifestation of his alleged work-related psychological conditions; consequently, employer asserts that any loss of wage-earning capacity sustained by claimant results from claimant's decision in November 2006 to voluntarily leave employment in Iraq. The Act defines the term "disability" as "*incapacity because of injury* to earn the wages which the employee was receiving at the time of injury …." *See* 33 U.S.C. §902(10)

(emphasis added). In this case, therefore, the seminal issue is whether claimant removed himself from his employment in Iraq for reasons unrelated to the work incidents and their aftereffects which form the basis of his claim for benefits under the Act, or whether claimant's inability to earn his prior wages with employer results from his work injury. Specifically, if claimant terminated his employment relationship with employer for reasons unrelated to the work injury, claimant's subsequent inability to earn those wages can be attributable to his decision to voluntarily end his employment relationship. Conversely, if claimant terminated his employment in November 2006 due to the work incidents and the injuries caused thereby, the subsequent manifestation of claimant's psychological symptoms result in his inability to earn the wages which he was receiving at the time of the incidents.

In his decision, the administrative law judge did not discuss claimant's testimony regarding the reasons for his decision to leave Iraq in November 2006. Rather, the administrative law judge stated that claimant "voluntarily" left Iraq in November 2006, after working for employer for 22 months, *see* Decision and Order at 4, and he subsequently addressed the extent of any compensable disability resulting from claimant's work-related psychological conditions by considering claimant's ability to return to that employment. *Id.* at 60-62. Claimant, however, offered testimony regarding the events culminating in his November 2006 departure from Iraq. Specifically, at his February 13, 2009 deposition, claimant testified that at the time he voluntarily submitted his written resignation to employer following the October 3, 2006, rocket attack, he had symptoms of anxiety and back strain but was fully capable of performing his employment duties; claimant further stated that, at that time, he was ready to go home and that he had no intention of returning to Iraq. *See* EX 22 at 71-74. In testifying during the formal hearing, claimant stated that it was the October 3, 2006, rocket attack and its consequences that resulted in his decision to leave his employment with employer. *See* Tr. at 38. Specifically, claimant testified that following this specific work incident he walked around "injured," that he "was not right mentally," and that he experienced back pain and was "scared." *Id.* at 98-100. Although he had planned on completing a 24 month period of employment with employer, claimant instead sought to return to the United States after 22 months in Iraq. *Id.*. Claimant further testified, however, that he did not inform employer of his "true" reasons for leaving Iraq and, moreover, 30 days after his return to the United States he reapplied for work with employer, but employer did not respond to his application. *Id.* at 44. He also testified that he had planned to leave Iraq for good and to obtain work in a nursing home in the United States. Tr. at 60, 67-68. Claimant began this employment shortly after his return and before the onset of his psychological symptoms.

The administrative law judge did not discuss this evidence in determining whether claimant's "inability . . . to earn wages" is due to claimant's work injury or to a voluntary decision to leave Iraq for reasons unrelated to his injury. Therefore, we must vacate the administrative law judge's award of disability benefits and remand this case for further consideration. As it is well established that the administrative law judge is entitled to

evaluate the credibility of all witnesses and to draw his own inferences from the evidence, *see Calbeck*, 306 F.2d 693; *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962), the administrative law judge on remand must address claimant's testimony and determine the reason or reasons for claimant's decision to leave employer's employ and, consequently, the cause of claimant's inability to return to work for employer as of December 2006. Specifically, if claimant's departure from Iraq was not related to his work injuries, his present lower wage-earning capacity in his employment in the United States is not due to his work injury. On the other hand, if claimant's injury caused the claimant to leave his work in Iraq, his loss in wage-earning capacity is compensable as it is due to his injury.[5]

Employer contends, in the alternative, that the administrative law judge erred in relying on the opinions of Drs. Reynolds and Sacks to conclude that claimant's psychological conditions render him unable to return to his work in Iraq. *See* Decision and Order at 60-61. While we have vacated the administrative law judge's award of temporary partial disability benefits, we will address employer's contention as a matter of judicial efficiency in the event that the administrative law judge finds claimant left his employment in Iraq due to his injury. Dr. Reynolds, who examined claimant on behalf of the Department of Labor, opined that claimant's current psychological symptoms would not enable claimant to be successful in a combat setting or a setting that involved a risk for conflict; Dr. Reynolds therefore concluded that claimant is not competent to perform his usual employment duties with employer, and that consequently claimant should not return to Iraq. *See* CX 18 at 40-42. Dr. Sacks similarly opined that, since a return to Iraq or any other war zone would most probably result in an increased risk for the aggravation of claimant's psychological symptoms, claimant should not return to his usual employment duties in Iraq. *See id.* at 18-19. In giving these opinions probative weight, the administrative law judge found each to be consistent with claimant's testimony, claimant's treatment records, and the other medical opinions of record. Decision and Order at 61. As these opinions constitute substantial evidence in support of the administrative law judge's finding that claimant is incapable of returning to his usual employment duties with employer, we reject employer's contention of error. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Rice v. Service Employees Int'l, Inc.*, 44 BRBS 63 (2010). Thus, if claimant's injury is the cause of his inability to perform his usual work, the administrative law judge's reliance on these medical opinions is affirmed.

[5] We note that the former situation would not preclude an award of total disability benefits if claimant was incapacitated for all work because of his work injury.

Accordingly, the administrative law judge's award of ongoing temporary partial disability benefits is vacated, and the case remanded for further consideration in accordance with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge