BRB No. 13-0564

WILLIAM CONSTANTINE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
COMPUTER SCIENCE CORPORATION/ DYNCORP INTERNATIONAL	)	
	)	DATE ISSUED: June 18, 2014
and	)	
	)	
CONTINENTAL INSURANCE COMPANY/ CNA INTERNATIONAL	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Jorden N. Pedersen, Jr. (Javerbaum, Wurgaft, Hicks, Kahn, Wikstrom & Sinins), Elizabeth, New Jersey, for claimant.

Robyn A. Leonard (Laughlin, Falbo, Levy & Moresi, LLP), San Francisco, California, for employer/carrier.

Before: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2011-LDA-00350) of Administrative Law Judge Adele Higgins Odegard 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked for employer as an International Police Liaison Officer in Iraq from July 2004 until January 2006, when he returned to the United States on leave. Claimant sought medical treatment for neuropathic pain while in the United States, and he never returned to Iraq. Claimant filed a claim in January 2008, asserting that he suffers from polyneuropathy caused by his exposure to chemicals and other deleterious substances while working for employer in Iraq. In September 2008, claimant amended his claim to include post-traumatic stress disorder (PTSD) stemming from exposure to war trauma during his tour of duty in Iraq. Employer controverted the claim, alleging that claimant did not sustain any work-related injuries. It has not paid claimant any medical or disability benefits.

In her decision, the administrative law judge found that claimant is entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), linking his neuropathy and PTSD to his work for employer, that employer rebutted the presumption with regard to both conditions, and that, based on the record as a whole, claimant did not establish he sustained any work-related injuries. Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's decision.

Administrative Procedure Act

Claimant contends the administrative law judge's decision does not comport with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), because she did not address inconsistencies in the record or adequately discuss all of the relevant evidence of record. The APA, which applies to hearings of claims arising under the Act, 33 U.S.C. §919(d), requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record." 5 U.S.C. §557(c)(3)(A); *see Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990).

Review of the administrative law judge's decision reflects that she dedicated 27 pages to summarizing the evidence of record in its entirety, *see* Decision and Order at 4-31, including evidence of claimant's exposure to toxic substances in Iraq, *id.* at 4, 12, 14-17, and a review of claimant's Veteran's Administration (VA) medical records, *id.* at 28-30. The administrative law judge addressed the relevant evidence in terms of the appropriate law relating to the Section 20(a) presumption and, where necessary, resolved conflicts in the evidence. The administrative law judge provided the rationale for each of her credibility determinations, findings of fact, and conclusions of law. Consequently, we reject claimant's contention that the administrative law judge's decision does not comport with the APA. *Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000),

aff'd, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001).

Section 20(a)

Claimant contends the administrative law judge erred in finding that employer rebutted the Section 20(a) presumption with regard to both his neuropathy and PTSD. Claimant also avers the administrative law judge's weighing of the evidence as a whole is faulty. Where, as here, claimant establishes a prima facie case, Section 20(a) applies to relate the injury to the employment. Employer can rebut this presumption by producing substantial evidence that the injury is not related to the employment. *Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008). While employer's burden on rebuttal is one of production and not persuasion, employer cannot meet this burden by simply producing "any evidence." Rather, employer must produce "substantial evidence," which is "such relevant evidence as a reasonable mind might accept as adequate" to support a finding that the claimant's injury is not related to his workplace exposures. *Id.*, 517 F.3d at 637, 42 BRBS at 14(CRT) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)). If the employer rebuts the presumption, it no longer controls and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Universal Maritime Corp. v. Moor*e, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

Neuropathy

Claimant contends the administrative law judge erred in finding Dr. Itkin's opinion sufficient to rebut the Section 20(a) presumption. Finding that Dr. Itkin's opinion is unequivocal and that, as a Board-certified neurologist, he has the requisite professional credentials to make a determination of the etiology of neuropathic symptoms, the administrative law judge concluded that Dr. Itkin's opinion rebuts the Section 20(a) presumption that claimant's neuropathy is due to his working conditions in Iraq. The administrative law judge rationally found that Dr. Itkin's opinion, that claimant's diabetes and not his work exposures, is the cause of his neuropathy, EX 24, constitutes substantial evidence to rebut the Section 20(a) presumption.[1] *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Rainey*, 517 F.3d at 637, 42 BRBS at 14(CRT). Accordingly, we reject claimant's contention of error, and we affirm the administrative law judge's finding that employer rebutted the Section 20(a) presumption with regard to claimant's neuropathy.

[1]Dr. Itkin based his opinion on the fact that neuropathy due to toxic exposure improves or remains the same after the exposure ceases, whereas claimant's neuropathy has progressed. EX 24.

Claimant contends the administrative law judge erred in not giving dispositive weight to the opinion of Dr. Alvarez-Prieto that the work exposures caused claimant's neuropathy, and that this condition was *subsequently* aggravated by claimant's diabetes. Addressing the record as a whole, the administrative law judge discussed Dr. Alvarez-Prieto's opinion tying claimant's exposure to toxic substances in Iraq to his neuropathy, *see* CXs 13, 17, as well as claimant's testimony regarding his toxic exposures during his work for employer in Iraq, and the reports of Drs. Crowhurst, Gupta and Itkin. HT at 43-47; EXs 15-17. The administrative law judge found that while the record supports claimant's contention that the Iskandariyah plant burned crude oil, there are no medical records from his period of employment indicating that claimant was having neuropathic symptoms contemporaneously with that exposure. The administrative law judge was "not convinced" that claimant's neuropathic symptoms manifested themselves in 2004, as he had testified and had reported to Dr. Gupta in 2007. Decision and Order at 38; EX 15; HT at 89-111. In this regard, the administrative law judge found that the record shows that claimant's 2004-2006 symptoms were limited to athlete's foot and associated erythema for which he had been seeing Dr. Crowhurst, a podiatrist. EXs 16, 17. While these conditions were painful, the administrative law judge found there is no medical evidence that the pain claimant suffered at that time was the neuropathy that claimant had developed by early 2007, when Dr. Gupta diagnosed him with that condition.[2] EX 15. Noting that it is reasonable to presume that a podiatrist has the medical expertise to diagnose neuropathy, the administrative law judge found it significant that Dr. Crowhurst did not make any such diagnosis. Decision and Order at 38, n.37; HT at 199.

Additionally, the administrative law judge found that Dr. Alvarez-Prieto's opinion should be given little weight because the underlying assumptions upon which it was based, i.e., that claimant's neuropathy manifested itself in 2004 while he was stationed at Iskandariyah and that claimant was not diabetic before his diagnosis with the disease in 2007, are inconsistent with other evidence of record. *Id.* at 38. Specifically, the administrative law judge found that claimant's neuropathy did not manifest itself until after 2004, and most likely did not occur until after he returned from Iraq in 2006. In contrast, the administrative law judge found that while Dr. Itkin also presumed that claimant's neuropathy manifested itself in 2004, several years before he became diabetic, he explained that it is possible for diabetic neuropathy to be present before diabetes is diagnosed. EX 24. Furthermore, the administrative law judge found that Dr. Itkin's credentials as a Board-certified neurologist are more extensive than those of Dr. Alvarez-

[2]The administrative law judge found that the Hines VA Medical Center treatment records indicate that claimant first sought treatment in February 2007 and that Dr. Gupta stated, following EMG testing, that claimant's "diffuse mixed axonal and demyelinating motor sensory polyneuropathy" was compatible with diabetic neuropathy. CX 5; EX 15.

Prieto, who has no Board certifications (but is Board eligible in neurology). Thus, the administrative law judge concluded that Dr. Itkin is in a better position to provide an opinion on the etiology of neuropathy, including the possible effects of toxic substances on the human nervous system. Decision and Order at 39. Accordingly, crediting Dr. Itkin's opinion over the contrary opinion of Dr. Alvarez-Prieto because of the former's superior qualifications and because his opinion is better supported by the medical treatment records, the administrative law judge concluded that claimant did not establish a causal relationship between his neuropathy and his work for employer in Iraq.

The administrative law judge is entitled to determine the weight to be accorded to the evidence of record, and the Board may not reweigh the evidence. *See generally Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT) (2d Cir. 1993); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). The administrative law judge rationally gave less weight to the opinion of Dr. Alvarez-Prieto than to that of Dr. Itkin, *id.*, and thus substantial evidence supports her finding that claimant's neuropathy is not related to his toxic exposures in Iraq. Therefore, we affirm the denial of benefits for that condition. *See generally Sprague v. Director, OWCP*, 688 F.2d 862, 15 BRBS 11(CRT) (1st Cir. 1982).

PTSD

Claimant contends the administrative law judge erred in finding that the opinion of Dr. Obolsky rebuts the Section 20(a) presumption. On the record as a whole, claimant asserts the administrative law judge erred in discrediting Dr. Crain's diagnosis of PTSD, and in ignoring claimant's treatment for PTSD at the VA hospitals, and in particular, the opinion of Dr. Zadecki, a VA psychiatrist, who stated that claimant satisfied all of the requirements of PTSD under the criteria of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM).

We reject claimant's contention that the administrative law judge erred in finding Dr. Obolsky's opinion sufficient to meet employer's burden of producing substantial evidence that claimant's condition was not caused by his employment. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). As the administrative law judge found, Dr. Obolsky's opinion that claimant does not have PTSD constitutes substantial evidence sufficient to rebut the Section 20(a) presumption.[3] Decision and Order at 41. We therefore affirm the administrative law judge's finding that employer rebutted the Section 20(a) presumption that claimant's PTSD is related to his work for employer. *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT); *Rainey*, 517 F.3d at 637, 42 BRBS at 14(CRT).

[3]Dr. Obolsky opined that claimant does not meet the DSM criteria for PTSD and is malingering. EX 22.

Following an extensive review of claimant's testimony and the opinions of Drs. Obolsky, Crain and Zadecki, *see* Decision and Order at 40-46, the administrative law judge credited Dr. Obolsky's opinion that claimant does not have PTSD, over the contrary opinions of Drs. Crain and Zadecki. At the outset, the administrative law judge rationally accorded "minimal weight" to Dr. Zadecki's conclusory diagnosis of chronic, delayed-type PTSD, because the physician did not explain how his testing of claimant led him to his diagnosis, i.e., he did not address the specific diagnostic criteria for PTSD or cite claimant's behaviors that, in his view, demonstrated these criteria. CX 6; *see, e.g., S.K. [Kamal] v. ITT Industries, Inc.*, 43 BRBS 78 (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) (an administrative law judge may assess whether physicians' opinions are rationally based on their underlying documentation).[4] In contrast, the administrative law judge found that both Dr. Obolsky and Dr. Crain addressed the DSM diagnostic criteria for PTSD and based their opinions, at least in part, on claimant's reports of incidents and symptoms. *See* CXs 12, 16; EX 22; HT at 289-313. The administrative law judge thus found herself in the position of weighing these two opinions. Decision and Order at 42-45.

In this regard, the administrative law judge found that while both Dr. Crain and Dr. Obolsky are Board-certified psychiatrists with experience in diagnosing PTSD, Dr. Obolsky's analysis of claimant's condition, based on the criteria set out in the DSM, "was much more thorough than Dr. Crain's." Decision and Order at 45. For example, the administrative law judge examined the findings of both psychiatrists in terms of the initial mandatory threshold criterion for PTSD, diagnostic criterion A, i.e., (1) exposure to a traumatic event which the person experienced, witnessed, or was confronted by that involved actual or threatened death or serious injury, (2) which involved a response, by the person, of intense fear, hopelessness, or horror. Decision and Order at 42; CX 16 at ex. C. The administrative law judge observed that Dr. Crain stated that he presumed that claimant met both aspects of this criterion based on claimant's reports of his experiences. CX 16 at 62-64. The administrative law judge noted that, in contrast, Dr. Obolsky stated that claimant did not meet this criterion because, although claimant may have experienced events that threatened him or others with serious injury, claimant did not demonstrate a response of intense fear, helplessness, or horror, as the criterion requires.

[4]In its unpublished decision in *Kamal*, the district court stated that a diagnosis of psychiatric injury need not be based on the DSM criteria, but that if a physician purports to use the DSM for a diagnosis, he must address the diagnostic elements of that condition. In *Kamal*, the court reversed the finding that the claimant had PTSD because the diagnosis was not supported by the DSM, which the physician had purported to use. This case is not binding precedent here, but the administrative law judge's decision conforms to its holding.

HT at 284-288. The administrative law judge found that Dr. Crain's inability to articulate the circumstances that demonstrated that claimant in fact met this criterion is "certainly troubling," Decision and Order at 45, given claimant's acknowledged desire to return to work for employer in Iraq.[5] The administrative law judge thus concluded that Dr. Obolsky's conclusions "persuasively demonstrated that the claimant did not meet the DSM criteria for PTSD." Decision and Order at 45. Specifically, the administrative law judge found that, as Dr. Obolsky noted, he was the only psychiatrist who interviewed claimant, performed diagnostic testing, and reviewed all of the available records, such that his opinion "is based on the greatest quantum of evidence." *Id.; see* EX 22; HT at 322-323. Consequently, based on the opinion of Dr. Obolsky, the administrative law judge determined, that claimant did not establish that he has PTSD as a result of his work for employer in Iraq.

The administrative law judge thoroughly reviewed the opinions of Drs. Obolsky and Crain, including the underlying bases for their contrary conclusions. Decision and Order at 8-12, 19-27, 42-46. The administrative law judge acted within her discretion in according greater weight to Dr. Obolsky's opinion that claimant does not have PTSD related to his work for employer and less weight to the opinions of Drs. Crain and Zadecki that claimant has PTSD. *See generally Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994); *Kamal*, 43 BRBS 78. We thus affirm the administrative law judge's finding that claimant did not establish that he has PTSD as a result of his work for employer in Iraq as it is supported by substantial evidence of record. *See generally Service Employees Int'l, Inc. v. Director, OWCP [Barrios]*, 595

[5]The United States Court of Appeals for the Second Circuit, within whose jurisdiction this case arises, in *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997), reversed an administrative law judge's finding that a claimant's psychiatric condition was not related to the work injury, holding that the administrative law judge erroneously discredited an uncontradicted doctor's opinion that claimant was experiencing a work-related adjustment disorder because he believed the doctors' opinions were mere restatements of the claimant's complaints which, the administrative law judge stated, were not credible. The court stated that the diagnosis was not based only on claimant's subjective complaints but also on testing, and the fact that the claimant was on a "powerful anti-depressant," which was an indication that the claimant indeed had a psychological condition. This case is distinguishable from *Pietrunti* as the record contains conflicting medical opinions. The administrative law judge found that both Drs. Obolsky and Crain based their opinions, in part, on claimant's subjective reports of incidents/symptoms and the administrative law judge ultimately credited Dr. Obolsky's opinion, that claimant did not meet the DSM criteria for PTSD, because it was "based on the greatest quantum of evidence." Decision and Order at 45.

F.3d 447, 44 BRBS 1(CRT) (2d Cir. 2010); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge