U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0364

MILTON BOWMAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FLUOR DANIEL CORPORATION	)	DATE ISSUED: May 10, 2016
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Ronald S. Webster (Webster Law Group), Orlando, Florida, for claimant.

Lawrence P. Postol (Seyfarth Shaw LLP), Washington, D.C., for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD, and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2014-LDA-00002, 2014-LDA-00298) of Administrative Law Judge Paul C. Johnson, Jr., 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 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).

Employer hired claimant in April 2011 to work as a truck driver in Afghanistan. CX 8. When he arrived, he was assigned not only to drive fuel trucks, but also to deliver fuel to generators, requiring him to get out of the truck, walk on hard pavement or deep gravel, drag fuel lines, and squeeze nozzles to pump the fuel. EX 5; Tr. at 31-32. On May 7, 2011, fuel splashed into claimant's eyes. He had his eyes flushed; his pain diminished with eye drops, and he was able to return to work with no vision problems. CXs 9-10. On July 22, 2011, claimant reported to the clinic that he was suffering from pain and numbness in his left wrist due to pumping fuel.[1] On July 23, claimant was referred for treatment in Dubai. Because pain and numbness continued, claimant was returned to the U.S. for additional treatment. CXs 11-13.

Upon commencing treatment state-side on July 29, 2011, claimant complained of pain in both wrists and both Achilles tendons. CX 31. Employer voluntarily paid claimant temporary total disability benefits beginning July 25, 2011, for the CTS injury. EX 3. Dr. Hirsch performed a CTS release on the left wrist on October 13, 2011. CX 29; EX 13. In February 2012, claimant underwent a third operation on his right wrist; however, in May 2012, he continued to complain of pain in both hands/wrists. Dr. Innis recommended against further surgery, declared claimant's CTS condition to be at maximum medical improvement, and assessed a five percent impairment to each wrist. Dr. Innis advised claimant not to return to a job where he would be squeezing a fuel nozzle. EX 24; *see also* EX 69 (employer's expert, Dr. Powell, recommended no long-distance driving). On May 9, 2012, employer filed an LS-208 Notice of Final Payment Form, indicating it would cease paying temporary total disability benefits. Employer paid claimant permanent partial disability benefits for a five percent impairment to each arm. EXs 1, 27; 33 U.S.C. §908(c)(1). In July 2012, claimant was released to return to work. CX 33; EX 69. Claimant continued to have problems with his hands. On July 10, 2014, Dr. Innis reiterated that claimant's CTS condition is at maximum medical improvement, though he continues to have subjective complaints, and that claimant should be able to perform light-to-medium work. EX 103.

In addition to CTS, claimant was diagnosed with healed Achilles tendonitis on October 25, 2011, by Dr. Goldstein. Claimant attributed his pain to his walking on gravel in improper boots in Afghanistan, as he stated it took a long time for employer to provide him with his proper gear. EX 14. Although he continued to have problems with his ankles throughout 2012, and his doctor, Dr. Wadington, initially felt surgery was not warranted, CX 25; EX 40, continued problems resulted in claimant's eventually undergoing debridement and repair surgery on his left Achilles tendon in June 2013. CX

[1] Claimant had had two prior surgeries on his right wrist for carpal tunnel syndrome (CTS) and had begun using his left hand to pump fuel after his right hand became painful. CX 11; EX 5 at 24; Tr. at 36-39.

28; EX 45. Following surgery and recovery in September 2013, Dr. Polk, claimant's surgeon, limited claimant to lifting/carrying less than 10 pounds, standing/walking no more than one hour per day, and occasional climbing, balancing, stooping, crouching, kneeling, crawling, pulling, working at heights, and moving machinery. CX 17.

On his attorney's recommendation, claimant saw Dr. Martinez, a psychiatrist, on November 8, 2013. Dr. Martinez concluded claimant has Major Depressive Disorder. At the time, claimant was homeless, divorced, and unemployed. He claimed financial difficulties for several reasons and stated his frustration culminated when his benefits ceased in 2012, and he was unable to return to work as a truck driver. CX 14. Claimant checked himself into a hospital for his psychiatric problems in February 2014, where he stayed for six days. CX 51. He was evaluated in May 2014 by employer's expert, Dr. Schulman, who agreed that claimant suffers from Major Depressive Disorder. EX 89.

Claimant sought benefits under the Act for injuries to his eyes, wrists, Achilles tendons, and psyche.[2] Pertinent to this appeal, the administrative law judge found that claimant suffered a work-related aggravation of his pre-existing CTS, rendering him unable to return to his usual work. Decision and Order at 34-35. He found this condition reached maximum medical improvement on May 2, 2012. *Id.* at 35. The administrative law judge also found that claimant's Achilles tendonitis is work-related. *Id.* at 36-37. He found it resulted in temporary total disability from July 16, 2012 through October 31, 2013, and permanent total disability thereafter. *Id.* at 38. With regard to the psychiatric injury, the administrative law judge found that claimant filed a letter sufficiently stating a claim for this injury, and that, on the record as a whole, claimant demonstrated his psychiatric impairment is work-related. *Id.* at 40-42. With regard to suitable alternate employment, the administrative law judge found that employer submitted four positions in its July 2014 labor market survey, all of which were one hour from claimant's residence and were not, therefore, suitable. He also found they were not suitable because Mr. Sappington, the vocational expert, did not take into account claimant's psychiatric condition. *Id.* at 42-43. The administrative law judge ordered employer to pay: permanent total disability for CTS commencing May 3, 2012; temporary total disability for Achilles tendonitis from July 16, 2012, through October 31, 2013; permanent total disability for Achilles tendonitis from November 1, 2013, and continuing; temporary total disability for psychiatric injuries from November 8, 2013, and continuing; and future

[2] Doctors attributed claimant's chronic dry-eye condition to allergies. CXs 22, 50, 55. Because he found claimant's eye condition is not work-related or disabling, the administrative law judge denied this claim. Decision and Order at 38-39. This finding has not been appealed.

medical benefits for claimant's work injuries.[3] Decision and Order at 47-48. Employer appeals the administrative law judge's Decision and Order. Claimant responds, urging affirmance, and employer filed a reply brief.

Compensability of Achilles Tendonitis

Employer contends the administrative law judge erred in finding claimant's Achilles tendonitis to be work-related. Specifically, employer contends Dr. Wadington's opinion was not stated with medical certainty and cannot constitute substantial evidence that claimant's work aggravated a pre-existing Achilles tendon condition.

As claimant alleged that walking in gravel in cowboy boots while pulling fuel hoses caused his heel/foot pain, and Dr. Wadington agreed that such activity could lead to Achilles tendonitis, the administrative law judge invoked the Section 20(a), 33 U.S.C. §920(a), presumption. *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000). Based on Dr. Goldstein's opinion that the condition is not work-related, the administrative law judge found employer rebutted the presumption. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). On the record as a whole, the administrative law judge concluded that claimant had a pre-existing Achilles tendon condition, even though claimant did not complain of it while he was in Afghanistan. The administrative law judge found that Dr. Goldstein did not sufficiently explain his opinion that claimant's work did not aggravate his condition, so he declined to credit it over Dr. Wadington's opinion. Accordingly, the administrative law judge found, based on the same evidence he used to invoke the Section 20(a) presumption, that claimant's Achilles tendonitis is compensable. Decision and Order at 36-38.

After the Section 20(a) presumption is invoked and rebutted, as here, the issue of a causal relationship between a claimant's injury and his employment must be decided on the record as a whole, with the claimant bearing the burden of persuasion. *Universal Maritime Corp. v. Moore*, 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). Although the administrative law judge is entitled to determine the weight to accord the evidence of record, to address the credibility and sufficiency of any testimony, and to make the choice among reasonable inferences, *see*, *e.g.*, *Mijangos v. Avondale Shipyards,*

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[3] To the extent claimant is totally disabled by multiple injuries, the administrative law judge correctly prefaced his award by stating that "[c]laimant cannot . . . receive concurrent benefits in excess of 66 2/3 [percent] of his Average Weekly Wage." Decision and Order at 47; *ITO Corp. of Baltimore v. Green*, 185 F.3d 239, 33 BRBS 139(CRT) (4th Cir. 1999); *Brady-Hamilton Stevedore Co. v. Director, OWCP*, 58 F.3d 419, 29 BRBS 101(CRT) (9th Cir. 1995).

Inc., 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991), the claimant must establish his claim by a preponderance of the evidence. *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996). Employer asserts claimant has not done so. We disagree.

In October 2011, Dr. Goldstein examined claimant and found he had symptoms of healed chronic Achilles tendonitis, but that the tendonitis was not bothersome at that time. Dr. Goldstein indicated on a form that the condition was not work-related and noted that the cause was undetermined. EX 14. Dr. Wadington examined claimant on November 29, 2012, and claimant complained of Achilles tendon pain due to having worked/walked on gravel when he was in Afghanistan in 2011. Dr. Wadington stated: "Discussed with patient etiology of the condition and treatment options. Discussed that the duties he performed while on active duty could certainly lead to this issue." EX 40. On June 14, 2013, Dr. Polk performed surgery on claimant's left Achilles tendon.[4] EX 41. Dr. Goldstein saw claimant again on October 31, 2013, and he stated that claimant's bilateral Achilles tendonitis and current pain are unrelated to his work overseas which ended in July 2011, as there were no documented injuries or situations that would have caused him to develop Achilles tendon problems and as claimant had a pre-existing condition dating to at least 2009. *See* EXs 82-83. Because claimant had problems long before and long after his work in Afghanistan, Dr. Goldstein concluded that the work in Afghanistan did not cause or aggravate claimant's Achilles tendonitis. EX 77.

Contrary to employer's contention that Dr. Wadington's opinion conveys merely that claimant's work *could have* caused his tendonitis, and does not constitute substantial evidence on the record as a whole, Dr. Wadington's opinion denotes more than a possible cause, as he stated that claimant's work in Afghanistan "could *certainly* lead to" claimant's Achilles tendonitis. The administrative law judge reasonably credited Dr. Wadington's opinion, in conjunction with claimant's consistent complaints beginning in July 2011, immediately after claimant returned to the United States. EX 40 (emphasis added); *see* Tr. at 41; EXs 1, 5 at 28-30; CXs 31-32. Although Dr. Goldstein's opinion was longer, the administrative law judge was not required to find it was "sufficiently explained." It was rational for the administrative law judge to reject it on the basis that Dr. Goldstein did not recognize that a work-related aggravation of a pre-existing condition constitutes a work-related injury. EX 77; *Presley v. Tinsley Maint. Serv.*, 529 F.2d 433, 3 BRBS 398 (5th Cir. 1976). As the administrative law judge "believe[d] that the existence of [the] fact is more probable than its nonexistence," *see Santoro*, 30 BRBS at 174, claimant established his case by a preponderance of the evidence. Thus, we

[4] Following surgery, complications from sutures, and recovery, in September 2013, Dr. Polk imposed work restrictions; he did not assess the cause of this condition, although he previously had noted that the condition was re-aggravated by camping/hiking. CX 17; EXs 41-43.

affirm the administrative law judge's conclusion that claimant's Achilles tendonitis was aggravated by his employment in Afghanistan because it is supported by substantial evidence. *Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991); *Stevens v. Tacoma Boatbuilding Co*., 23 BRBS 191 (1990).

Compensability of Psychiatric Condition

Employer next contends the administrative law judge erred in finding claimant's psychiatric condition compensable. Initially, we reject employer's assertion that claimant did not file a claim for his psychiatric condition. In late 2013, claimant began exhibiting extreme psychological behavior. At his attorney's urging, claimant saw Dr. Martinez, a psychiatrist, in November 2013. On December 2, 2013, following claimant's deposition, counsel informed employer of claimant's symptoms and of the doctor's appointment by letter and advised employer to set up an evaluation with a doctor of its choice because claimant is "making a claim for authorization for psychiatric care immediately." CX 58. In a letter dated December 9, 2013, counsel informed employer that he had received the report from Dr. Martinez who diagnosed claimant with Major Depressive Disorder due to chronic pain from his work injuries. Counsel's letter said: "Please consider this another claim (a claim for psychiatric treatment and authorization has already been made) for treatment by Dr. Martinez." CX 59. Both letters were copied to the Department of Labor (DOL).

The Board and the courts have held that a "claim" need not be on a particular form in order to satisfy the requirements of Section 13, 33 U.S.C. §913. Any writing will suffice as long as it discloses an intention to assert a right to compensation. *Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998); *Bingham v. General Dynamics Corp.*, 14 BRBS 614 (1982). Counsel's letters, copied to DOL, clearly assert a claim. We affirm the administrative law judge's finding that claimant filed a claim for his psychiatric condition, as it accords with law. *Fireman's Fund Ins. Co. v. Bergeron*, 493 F.2d 545 (5th Cir. 1974).

Employer next contends the administrative law judge erred in finding on the record as a whole that claimant's psychiatric condition is work-related. It argues that claimant's Major Depressive Disorder is not related to his work in Afghanistan because the condition is too far removed from claimant's employment to be considered work-related. We reject employer's assertion and affirm the administrative law judge's finding that claimant's psychiatric condition is work-related.

After evaluating claimant, and based on claimant's statements to him, Dr. Martinez reported:

> The patient stated that his frustration culminated when he was put at full maximum medical improvement and he tried to find jobs and was unable to do the tasks completing the job as a truck driver and lost everything that he had. He became homeless and came to Florida. Financial problems have been the main stressor. Both the inability to function and perform driving the truck has (sic) given him the sensation of hopelessness and helplessness. * * * At the present time he is not suicidal or homicidal.

CX 14 at 1-2. While employer is correct that certain facts given to Dr. Martinez were not entirely accurate,[5] he diagnosed claimant with Major Depressive Disorder, single episode without psychosis, and concluded:

> After several somatic issues with wrists, hands, and eyes, [claimant] gradually started displaying symptoms of depression, which over time developed into a full Major Depression. He has not been able to function; as a result with multiple financial losses, he became homeless and moved to Florida. At the present time he is in need of further psychiatric evaluation and treatment.

CX 14 at 4. In an undated addendum based on his November 2013 evaluation, Dr. Martinez stated there is a direct cause between claimant's wrist injuries and his psychiatric diagnosis, claimant needs psychiatric treatment, and claimant is unable to work due to "severe psychiatric symptoms and other factors such as physical symptoms pertaining to his eyes, hands, wrists, and ankles." *Id.* at 5. There are no other reports from Dr. Martinez in the record.

In February 2014, claimant checked himself into the Lighthouse Care Center in South Carolina. He stayed for six days for treatment of suicidal and homicidal ideation.[6] CX 42. On February 9, 2014, after having undergone multiple evaluations and a change of medication, claimant was reportedly doing better with diminished depression and anxiety as well as a brighter outlook. He was released on February 11, 2014, with

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[5] For example, Dr. Martinez noted that claimant denied any former psychiatric history and the use of any drugs. To the contrary, the medical record reveals that claimant has a history of depression and anxiety disorder and admitted to past use of alcohol and drugs. EXs 80-85.

[6] Claimant admitted he wanted to kill employer's counsel, blaming him for the loss of benefits following the informal conference in 2012. Claimant admitted to bringing a gun to his December 2013 deposition. *See* CX 51 at 2-3; EX 89 at 15; Tr. at 96-97.

instructions to maintain compliance with his medications and commitment to outpatient counseling. He was no longer suicidal and his depression had decreased. *Id.* at 1-2; *see also* EX 89. Claimant returned to Maryland to live with his sister, and he began receiving welfare and state health assistance for his medical and psychiatric problems.[7] Tr. at 55-56. On March 26, 2014, claimant went to the Garrett County Medical Center complaining of a need to get his "head on straight." CX 51. He was diagnosed as having PTSD, Major Depressive Disorder, single episode, Alcohol Abuse, and Cannabis-related disorder. He was advised to be assigned a psychotherapist for individual therapy, medication management, and "psychoeducation." *Id.* at 6-7.

On May 15, 2014, claimant underwent a comprehensive psychiatric evaluation with Dr. Schulman, employer's expert. Dr. Schulman conducted a review of claimant's medical and psychiatric records. EX 89. Dr. Schulman reported that claimant considered himself angry and frustrated rather than depressed and that claimant tested with the mental ability to perform most daily activities. He diagnosed claimant with Major Depressive Disorder, recurrent, mild-to-moderate severity, without psychosis, and with a history of anxiety disorder. *Id.* at 22. Dr. Schulman's impression was that "[t]here was no indication . . . that [claimant] developed a mental or behavioral disorder consequent to his deployment in Afghanistan." *Id.* at 23. Dr. Schulman further reported that, at the time of the examination, claimant "reported/demonstrated a partial, but significant, remission in his Major Depressive Disorder, recurrent, which is an illness-of-life." He concluded: "Within a reasonable degree of medical probability, [claimant] has a history of Major Depressive Disorder and Anxiety Disorder dating back to at least 2006. He did not experience an acceleration or aggravation of those disorders consequent to his employment with Fluor in Afghanistan[,]" and his current disability is not related to "an occupationally-generated mental disorder." *Id.* at 25.

The administrative law judge invoked the Section 20(a) presumption relating claimant's psychiatric condition to his employment, and found it rebutted based on Dr. Schulman's opinion. On the record as a whole, the administrative law judge gave greater weight to Dr. Martinez's opinion and found claimant's condition work-related. We affirm this finding. The administrative law judge rationally found that Dr. Martinez stated that the chronic pain from claimant's work-related injuries led to claimant's depressive disorder, and this established "direct causation between the accident and the psychiatric diagnosis." Decision and Order at 40;[8] CX 14. Although Dr. Schulman

[7] These medical records were not submitted into evidence.

[8] The administrative law judge stated: "Put very simply: the Claimant was injured; because of his injury he could not find a job; because he could not find a job he became destitute; because he is destitute he suffers anxiety and depression." Decision and Order at 41-42. We reject employer's contention that the administrative law judge erred in

stated claimant's condition is not work-related, his findings, nevertheless, tied claimant's depression to his wrist injuries, in that he stated: "[Claimant] did not sustain a mental or behavioral impairment consequent to the aggravation of his Carpal Tunnel Syndrome. Rather, he became frustrated and angry secondary to the persistence of *his symptoms* and his failure to return to work in Afghanistan, which he greatly desired." EX 89 at 26 (emphasis added); *see* Decision and Order at 41 ("As indicated by Dr. Schulman, when the Claimant was unable to find employment and became destitute, he began to suffer from anxiety and depression."). As claimant's symptoms and his inability to return to Afghanistan are due to the work-related CTS and Achilles tendonitis, the administrative law judge permissibly found that claimant established a causal relationship between his work injuries and his depression. *Brannon v. Potomac Electric Power Co*., 607 F.2d 1378, 10 BRBS 1048 (D.C. Cir. 1979); *Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175 (1996); Decision and Order at 41. Accordingly, we affirm the work-relatedness of claimant's psychiatric condition.

Nature and Extent of Disability

Employer contends the administrative law judge erred in finding claimant totally disabled, as it asserts it established the availability of suitable alternate employment. In order to establish a prima facie case of total disability, a claimant must establish that he cannot return to his usual work due to his work injury. *Del Monte Fresh Produce v. Director, OWCP* [*Gates*], 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009); *New Orleans* (*Gulfwide*) *Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). If the claimant meets this burden, the burden shifts to the employer to demonstrate the availability of suitable alternate employment that the claimant is capable of performing and could secure if he diligently tried. *Gates*, 563 F.3d 1216, 43 BRBS 21(CRT). The employer meets its burden if it presents evidence of jobs which, although no longer open when located, were available during the critical period when the claimant was able to work. *Id.*; *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *Hawthorne v. Ingalls Shipbuilding, Inc.*, 28 BRBS 73 (1994), *modified on other grounds on recon.*, 29 BRBS 103 (1995).

The administrative law judge found that claimant established a prima facie case of total disability related to each of his three work-related conditions, as he is unable to return to his commercial truck driving/fuel filling job because: 1) CTS renders him unable to perform repetitive squeezing motions and to drive long distances; 2) Achilles tendonitis restricts him from lifting more than 10 pounds and walking/standing more than

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relying on Dr. Martinez's opinion because it is based on claimant's subjective complaints. *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997).

one hour per day; and 3) Dr. Martinez stated claimant cannot engage in gainful employment due to his psychiatric condition. Decision and Order at 35, 38, 42. The administrative law judge then concluded that employer did not establish the availability of suitable alternate employment. He found the July 2014 labor market survey (LMS) contained only four jobs, all of which were located over one hour away from claimant's home, implicitly deemed to be "long distance," and that Mr. Sappington did not take claimant's psychiatric condition into account. *Id.* at 43; EX 102. Accordingly, the administrative law judge found claimant is totally disabled.[9]

In order to determine whether the administrative law judge properly addressed suitable alternate employment, we must consider, although the administrative law judge did not, the critical time periods when claimant was able to work. That is, employer has the burden to establish the availability of suitable alternate employment during these periods. *Tann*, 841 F.2d 540, 21 BRBS 10(CRT); *Hawthorne*, 28 BRBS 73. First, from the date of injury in Afghanistan, July 22, 2011, through the date the administrative law judge found claimant's CTS reached maximum medical improvement, May 2, 2012, claimant was temporarily totally disabled by his CTS. As doctors advised claimant to avoid jobs requiring repetitive squeezing and long-distance driving, but they did not preclude him from working, the first critical period during which claimant may have been able to work commenced May 3, 2012. Because employer presented evidence of the availability of jobs retroactive to that period, the administrative law judge should have addressed whether those jobs were suitable for and available to claimant.[10] Therefore, we vacate the administrative law judge's finding that claimant was totally disabled by his CTS as of May 3, 2012, and we remand the case for consideration of the extent of claimant's CTS disability as of that date. *Stevens v. Director, OWCP*, 909 F.2d 1256, 23

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[9] The administrative law judge found that claimant's CTS condition reached maximum medical improvement on May 2, 2012. Decision and Order at 35. He found claimant's Achilles tendonitis rendered him temporarily totally disabled from July 16, 2012, when he failed his commercial drivers' license recertification, until October 31, 2013, when the condition reached maximum medical improvement. *Id.* at 38; *but see* discussion, *infra*. The administrative law judge found that claimant's psychiatric condition has not reached maximum medical improvement. Decision and Order at 43.

[10] Employer submitted three LMS reports, and the administrative law judge addressed only the one from July 2014. Previously, on April 18, 2014, Mr. Sappington identified 20 jobs he believed claimant could perform given his background and CTS restrictions. The report included nine jobs in, or within ½ hour of, where claimant lives, and one job an hour away, as well as jobs in Florida, North Carolina, and West Virginia, during the time periods claimant lived in those areas. EX 87; EX 92 at 12. On May 20, 2014, Mr. Sappington added two more jobs in Maryland. EX 93.

BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991) (an employer can meet its burden through retrospective evidence of jobs available at an earlier date using credible and trustworthy evidence); *Tann*, 841 F.2d 540, 21 BRBS 10(CRT); *Turner*, 661 F.2d at 1042-1043, 14 BRBS at 164-165; *Hawthorne*, 28 BRBS 73; *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985); *Villasenor v. Marine Maint. Industries, Inc.*, 17 BRBS 99, *recon. denied*, 17 BRBS 160 (1985). If employer establishes the availability of suitable alternate employment within claimant's wrist restrictions between May 3, 2012 and the close of the first critical period, claimant is not totally disabled during that period.[11] *Stevens*, 909 F.2d 1256, 23 BRBS 89(CRT); *Tann*, 841 F.2d 540, 21 BRBS 10(CRT); *Turner*, 661 F.2d at 1042-1043, 14 BRBS at 164-165; *Hawthorne*, 28 BRBS 73.

Thereafter, claimant underwent two surgeries on his Achilles tendon, and this condition reached maximum medical improvement on October 31, 2013. No doctor precluded claimant from working after this condition reached maximum medical improvement, but two doctors restricted claimant from lifting over 10 pounds and from walking/standing more than one hour per day. Thus, a second critical period commenced on November 1, 2013; however, it was a virtually non-existent period, as, on November 8, 2013, claimant saw Dr. Martinez, who stated that he was totally disabled from working due to his severe psychiatric condition. Claimant's total disability thus would continue until such time as claimant's Major Depressive Disorder was non-disabling, and

[11] Although the administrative law judge found that July 16, 2012, represented the onset of temporary total disability for claimant's Achilles tendonitis, which would represent the closure of the critical period for suitable alternate employment within claimant's CTS restrictions, the record evidence does not support the administrative law judge's rationale for this finding. The administrative law judge reasoned this is the date claimant was disqualified from driving due to his Achilles tendonitis. Decision and Order at 38. However, this was the day claimant falsified his certification application and was recertified for his commercial driver's license. EX 39. Moreover, the truck crash the next day was due to claimant's wrist condition, *not* his Achilles tendonitis. EX 5 at 56-57. On December 13, 2012, claimant truthfully sought recertification and was temporarily disqualified from commercial truck driving due to his diabetes, his CTS, *and* his Achilles tendonitis. EX 39. As the administrative law judge relied on the date of disqualification to show when claimant's total disability due to his Achilles tendonitis began, and as this date affects the critical period for showing the availability of suitable alternate employment within claimant's CTS restrictions, the administrative law judge's finding that temporary total disability for claimant's Achilles tendon injuries started July 16, 2012, is also vacated. On remand, the administrative law judge must reconsider the evidence and make a new finding as to the close of this first critical period.

employer demonstrated the availability of suitable alternate employment within all of claimant's restrictions.

In this case, the most recent LMS report, dated July 11, 2014, was the only one addressed by the administrative law judge. EX 102. Therein, Mr. Sappington indicated he considered the restrictions set by Drs. Innis and Powell for claimant's CTS and by Drs. Johnson and Polk for claimant's Achilles tendonitis. He testified that he did not consider psychiatric restrictions because Dr. Schulman did not set any. EX 92 at 33. The administrative law judge rationally found the four positions identified in this LMS were all located more than one hour from claimant's home and, thus, required "long-distance driving."[12] *Fox v. West State, Inc.*, 31 BRBS 118 (1997); *see generally See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994). As such, he rationally found them to be unsuitable for claimant in light of the restrictions for his CTS and Achilles tendon conditions. Therefore, we affirm the administrative law judge's finding that claimant is entitled to permanent total disability benefits from November 1, 2013, and continuing.[13] *See generally Marathon Ashland Petroleum v. Williams*, 733 F.3d 182, 47 BRBS 45(CRT) (6th Cir. 2013).

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[12] Employer is correct that the record does not contain evidence of how far many of the jobs were from claimant's Maryland home. Employer does not, however, dispute the stated distances. In light of the restriction against long-distance driving, we reject employer's assertion that the administrative law judge erred in determining the distances between the identified jobs and claimant's home, as such information would be in the vein of taking judicial notice of a public fact. *See*, *e.g.*, *Hill v. Avondale Industries, Inc.*, 32 BRBS 186 (1998), *aff'd sub nom. Hill v. Director, OWCP*, 195 F.3d 790, 33 BRBS 184(CRT) (5th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000).

[13] We reject employer's contention that the administrative law judge irrationally rejected Dr. Schulman's opinion with regard to whether claimant's psychiatric condition was totally disabling after May 29, 2014. The administrative law judge gave greater weight to Dr. Martinez's November 2013 opinion that claimant was totally disabled than to Dr. Schulman's May 2014 opinion that claimant is not disabled by his depression. Decision and Order at 43. The administrative law judge also found that claimant has not received the consistent psychotherapy recommended in March 2014 by the Garrett County Mental Health Center. *Id.* The administrative law judge is not required to credit the most recent evidence, and he rationally found Dr. Schulman's opinion undermined by his focus on PTSD and his legally incorrect causation opinion. *See generally Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). Moreover, any error on the part of the administrative law judge in finding claimant unable to work due to his psychiatric condition is harmless, in that employer did not demonstrate the availability of suitable alternate employment in its July 2014 LMS with respect to claimant's other disabling conditions. *See* discussion, *supra*.

Accordingly, we vacate the administrative law judge's findings that claimant was totally disabled by his CTS after May 3, 2012, and that July 16, 2012, represents the date claimant's Achilles tendonitis became totally disabling. The case is remanded for further consideration of the extent of claimant's disability between May 3, 2012, and the onset of total disability due to the Achilles tendonitis. In all other respects, the administrative law judge's Decision and Order is affirmed.[14]

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[14] We reject employer's remaining arguments. A 48-page decision wherein the administrative law judge fully explained his rationale does not violate the Administrative Procedure Act. 5 U.S.C. §551 *et seq*. Further, the administrative law judge addressed claimant's credibility where relevant. *See* Decision and Order at 35, 38.