U.S. Department of Labor

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

BRB No. 15-0019

JAMES DAVID BRESHEARS Claimant-Respondent v. BROWN AND ROOT SERVICES/SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA/AIG Employer/Carrier-Petitioners	)	DATE ISSUED: Oct. 19, 2015 DECISION and ORDER

Appeal of the Decision and Order of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Claimant appeals the Decision and Order (2013-LDA-00295) of Administrative Law Judge Clement J. Kennington 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).

On July 23, 2007, claimant sustained shrapnel wounds to his abdomen, thighs, left lower leg, back, buttocks and right arm in a mortar attack that occurred during his employment as an ammunitions handler/logistics warehouseman in Iraq. After receiving treatment for several months, claimant returned to work in Iraq on November 5, 2007. Pain from claimant's work injuries forced him to stop working on February 21, 2008, and he returned to the United States. Claimant underwent right hand and wrist surgeries on May 22, 2008; Dr. Brentlinger opined on October 6, 2008, that claimant had a 16 percent right upper extremity impairment. CX 1 at 25. On August 4, 2010, claimant underwent a lumbar fusion. Dr. Wieser opined that claimant's back condition reached maximum medical improvement on November 7, 2011. CX 1 at 15, 28, 100-105. Claimant received psychological evaluations from Dr. Babick in February 2010 and from Dr. Ingram on five occasions in 2011. They diagnosed, inter alia: pain disorder associated with physical and psychological factors, anxiety disorder, symptoms of post-traumatic stress disorder (PTSD) associated with the work injury, alcohol abuse, and depression. CX 1 at 41-53, 83-39, 96, 106. Claimant filed a claim for permanent total disability benefits commencing November 7, 2011, for physical injuries from the shrapnel wounds and for a psychological condition caused by the work injury.[1] Claimant sought benefits for permanent total disability from November 7, 2011. 33 U.S.C. §908(a).

In his decision, the administrative law judge addressed and rejected employer's assertions that claimant's testimony is not credible. Decision and Order at 11. The administrative law judge found that claimant is entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), for his physical and psychological injuries, that employer did not rebut the presumption with regard to the physical injuries,[2] but that employer did rebut the presumption with respect to the claim for a psychological injury. On the record as a

[1] Employer voluntarily paid claimant compensation for temporary total disability from August 8, 2007 through December 5, 2007, February 5, 2008 through March 10, 2010, and August 4, 2010 through November 6, 2011. 33 U.S.C. §908(b). Employer paid temporary partial disability benefits during a period claimant worked in alternate employment from March 11, 2010 through August 3, 2010. 33 U.S.C. §908(e). Employer began paying permanent partial disability benefits on November 7, 2011, based on claimant's back condition reaching maximum medical improvement and a December 17, 2012 labor market survey establishing a weekly wage-earning capacity of $480. 33 U.S.C. §908(c)(21), (h); EXs 9, 44.

[2] Employer did not contest the work-relatedness of claimant's back and right wrist/hand conditions. *See* Decision and Order at 2.

whole, the administrative law judge credited claimant's testimony and the diagnoses of Drs. Babick and Ingram to find that claimant sustained a work-related psychological injury. *Id*. at 15. The administrative law judge found that employer conceded that claimant cannot return to his usual work due to his physical injuries, and that employer did not establish the availability of suitable alternate employment because its labor market surveys did not account for claimant's work-related psychological condition. *Id*. at 18. Thus, the administrative law judge awarded claimant continuing permanent total disability benefits from November 7, 2011. *Id*. at 19.

On appeal, employer challenges the administrative law judge's findings that claimant has a work-related psychological injury and is permanently totally disabled thereby. Employer contends the administrative law judge's findings in this regard do not accord with the Administrative Procedure Act (APA) and are not supported by substantial evidence. Employer also avers that the administrative law judge failed to address whether claimant's psychological injury is permanent. Claimant responds, urging affirmance of the administrative law judge's decision. Employer filed a reply brief.

We first reject employer's initial contention that the administrative law judge's decision generally does not comport with the APA because it fails to provide a reasoned analysis. The APA 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). The administrative law judge set forth the evidence at length. *See* Decision and Order at 3-10. For each issued raised, the administrative law judge stated the evidence on which he relied in reaching his conclusion. *See id*. at 11, 14-15, 18. This is sufficient to satisfy the requirements of the APA. *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000) (the APA does not require discussion of evidence not credited by the administrative law judge); *H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000) (administrative law judge need only explain his reasoning on all material issues).

We next address employer's contention that the administrative law judge failed to explain why he found credible claimant's testimony concerning his psychological symptoms. The administrative law judge found credible claimant's testimony of being unable to work because of "psychological problems." Decision and Order at 11. An administrative law judge's credibility determinations are not to be overturned unless they are "inherently incredible or patently unreasonable." *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). The administrative law judge fully acknowledged employer's contentions that claimant exaggerated his psychological symptoms with a secondary gain motivation, and the evidence on which employer relied. Decision and Order at 11. The administrative law

judge stated, however, that he "was impressed with [claimant's] demeanor and straightforward testimony" regarding his psychological symptoms, and found that claimant appears to underestimate his psychological problems rather than overestimate them. *Id*. Employer has failed to establish that the administrative law judge abused his discretion in finding claimant to be a credible witness and we reject its contention of error in this regard.[3] *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991).

The administrative law judge found that claimant established he has a work-related, disabling psychological injury based on claimant's testimony and the reports and diagnoses of Drs. Babick and Ingram. Employer contends the findings underlying the award are not supported by substantial evidence because: (1) the administrative law judge erroneously stated that Dr. Babick evaluated claimant on behalf of employer; (2) Drs. Babick and Ingram relied on claimant's exaggerated complaints; (3) the opinions of Drs. Babick and Ingram are outdated in relation to that of Dr. Rattan; and (4) the administrative law judge erroneously rejected the opinion of Dr. Rattan, who is better credentialed than Drs. Babick and Ingram. We reject employer's contentions.

Kyle Babick, Ph.D., a clinical psychologist, evaluated claimant on February 19, 2010, on referral from claimant's "nurse case manager" because several doctors had recommended treatment for psychological concerns. CX 1 at 41.[4] At the time of this examination, claimant had yet to undergo back surgery and was reporting physical pain. Dr. Babick diagnosed: (1) major depression, single episode, moderate; (2) anxiety disorder, NOS, anxiety reaction; (2) posttraumatic stress disorder, moderate, this episode injury related; (3) alcohol abuse; (4) pain disorder associated with psychological factors and a general medical condition; and (5) severe, continuing physical and psychological effects of on-the-job injury, secondary interpersonal, vocational and financial disturbance. *Id.* at 50. Dr. Babick stated that claimant's responses to the administered

[3] We will address *infra* employer's contention that substantial evidence does not support the administrative law judge's finding that claimant is totally disabled by a work-related psychological impairment.

[4] Employer avers that the administrative law judge erred in referring, in several instances, to Dr. Babick as "employer's psychologist." Employer contends that claimant was referred to a psychologist at his own request. Claimant testified at his deposition that he sought psychological help as his behavior was causing strains in his marriage. EX 20 at 23. He also stated that "maybe I got [Dr. Babick's] name from the case manager." *Id*. Any error in the characterization of Dr. Babick as "employer's psychologist" is harmless given that Dr. Babick's assessment of claimant is supported by the assessment of Dr. Ingram.

tests were valid. *Id*. at 48. Dr. Babick recommended psychotherapy and pain management, which claimant did not pursue. Claimant subsequently had back surgery in August 2010.

On June 26, 2011, claimant underwent a psychological evaluation by Jesse Ingram, Ph.D. Dr. Ingram reported that claimant's scores on the tests administered to him were valid and appropriate. CX 1 at 84-85. Dr. Ingram stated claimant has symptoms associated with PTSD but does not meet all the diagnostic criteria for that disorder. Dr. Ingram stated claimant required treatment for the PTSD symptoms, and for depression and anxiety related to his injury, including the pain and physical limitations resulting therefrom. *Id.* Claimant saw Dr. Ingram on four other occasions through the end of 2011. On December 12, 2011, Dr. Ingram filled out Form OWCP-5a entitled "Work Capacity Evaluation Psychiatric/Psychological Conditions." *Id*. at 95. Dr. Ingram stated that "Claimant is not able to perform any job duties at the current time." *Id*. On December 12, 2012, Dr. Ingram filled out another form that stated claimant "is unable to work in environments/on any jobs at current time that are stress-related. Unable to recommend work environments." *Id.* at 106.

Randall Rattan, Ph.D., saw claimant on two occasions on behalf of employer. After a May 9, 2010 examination, Dr. Rattan stated claimant met some, but not all, criteria for a diagnosis of PTSD. He stated claimant likely was abusing alcohol, and had a mild to moderate anxiety disorder. EX 41 at 24, 27. Dr. Rattan found no evidence of secondary gain motivation. He stated that claimant's work injuries may have led to increased alcohol abuse and exacerbated claimant's anxiety disorder. With regard to claimant's ability to work, Dr. Rattan noted that claimant had concerns about his physical functioning and that his anger was poorly controlled. *Id.* at 61-62. Nonetheless, he stated claimant was not disabled from a psychological standpoint. *Id*. at 65.

Dr. Rattan re-evaluated claimant on October 24, 2013, and noted a pattern of improvement. EX 53 at 12, p. 48. Dr. Rattan stated that the prior diagnosis of alcohol abuse was no longer warranted. He stated claimant has an anxiety disorder due to the work injury, but does not meet all the criteria for PTSD. EX 41 at 24-26. Dr. Rattan stated there was no evidence that claimant was disabled from working by any psychological condition. *Id.* at 24-29; EX 53 at 19 p. 74. At his deposition on July 9, 2014, Dr. Rattan stated that it is not probable that claimant's work injury permanently aggravated or exacerbated claimant's underlying anxiety disorder. EX 53 at 21-22 pp. 84-85.

Once, as here, the Section 20(a) presumption has been invoked and rebutted it falls from the case, and claimant bears the burden of establishing by a preponderance of the evidence that he has a psychological condition related to the work injury. *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998). The administrative

law judge recognized that claimant bears the burden of persuasion on this issue, and he credited the opinions of Drs. Babick and Ingram in finding that claimant has psychological conditions related to the work injury. The administrative law judge noted that Dr. Babick reported there was no evidence of conscious exaggeration of psychological or physical symptoms. Decision and Order at 15; CX 1 at 48. As discussed above, Dr. Ingram made a similar finding. CX 1 at 84-85. Employer's contention that the opinions of Drs. Babick and Ingram are not creditable because they relied too heavily on claimant's self-reported symptoms is without merit. *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997). Moreover, the administrative law judge is entitled to determine the weight to be accorded to the evidence of record. *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46(CRT) (5th Cir. 1990). Employer's assertion that Dr. Rattan's opinion is entitled to greater weight because it is more recent and allegedly better supported by the tests he administered is tantamount to a request that the Board reweigh the evidence, which we may not do. *Mijangos*, 948 F.2d 941, 25 BRBS 78(CRT). In any event, Dr. Rattan diagnosed claimant with a work-related psychological condition, although he found it was neither permanent nor disabling. The administrative law judge's finding that claimant has work-related psychological conditions is supported by substantial evidence of record and, therefore, we affirm this finding. *Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002); *Kennel*, 914 F.2d 88, 24 BRBS 46(CRT).

Employer next contends that the administrative law judge erred in finding that it did not establish the availability of suitable alternate employment. Employer alleges that the administrative law judge should have credited its two labor market surveys because there is no creditable evidence that claimant has any psychological condition that prevents him from performing alternate work. Employer contends the administrative law judge's finding in this regard is faulty because it is based on evidence describing claimant's psychological condition before his physical conditions reached maximum medical improvement. Employer states that Dr. Rattan's 2013 opinion demonstrates that any psychological conditions claimant had improved such that he can work.

As claimant is unable to return to his usual work with employer because of the injuries he sustained in the work accident, the burden is on employer to establish the availability of suitable alternate employment. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991). Employer must establish the availability of realistic job opportunities in claimant's community, which, taking into account claimant's restrictions, vocational and educational capabilities, claimant could obtain if he diligently tried. *New Orleans* (*Gulfwide*) *Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert.*

denied, 479 U.S. 826 (1986). In this case, all of claimant's physical injuries had reached maximum medical improvement by November 7, 2011. CX 1 at 91; *see* Decision and Order at 2. Employer's labor market surveys identified eight jobs available on December 17, 2012, and nine jobs available on May 27, 2014. EX 44. Mr. Quintanilla, employer's vocational expert, took into account the physical restrictions placed by Dr. Foox, Dr. Wieser, and Dr. McCaskill.[5] *Id*. at 1-3. The administrative law judge found that employer did not establish the availability of suitable alternate employment because employer's labor market survey did not account for the psychological problems described by Drs. Babick and Ingram or "claimant's credible testimony" that he gets mad very easily and has outbursts. Decision and Order at 18; *see* Tr. at 40, 78

Claimant testified that upon returning home after his injury he had difficulty adjusting to his physical impairments, abused alcohol, had suicidal thoughts and separated from his wife. Tr. at 30-33. Claimant described himself as suffering from working in a war zone and testified that he had been resistant to psychological help because he believed that he could "fix" his condition. *Id*. at 102-107. Claimant also testified that he becomes "dyslexic" under stress and is subject to angry outbursts around others "for no good reason." *Id*. at 35, 39-40.

We reject employer's contention that the administrative law judge erred in finding that employer did not establish the availability of suitable alternate employment. The administrative law judge correctly found that employer's labor market surveys do not account for the December 2011 and December 2012 opinions of Dr. Ingram that claimant is unable to work from a psychological perspective.[6] CX 1 at 95, 106. As discussed above, the administrative law judge was entitled to find this opinion entitled to greater weight than that of Dr. Rattan. *See generally Kennel*, 914 F.2d 88, 24 BRBS 46(CRT). Moreover, based on claimant's demeanor at the hearing, the administrative law judge credited claimant's "straightforward testimony," which the administrative law judge found understated "his problems and need for continuing psychological counseling."

[5] Dr. Wieser restricted claimant from sitting over 30 minutes at a time and for no more than four hours a day, and from lifting over 50 pounds. CX 1 at 105. Dr. Foox opined that claimant could lift over 40 pounds occasionally, and further restricted claimant from frequent bending and lifting and from right-handed repetitive motion. EX 40 at 3. Dr. McCaskill restricted claimant from lifting over 50 pounds occasionally. EX 42 at 13.

[6] The December 2012 labor market survey notes Dr. Ingram's opinion but identifies jobs allegedly compatible with claimant's physical restrictions. EX 44 at 8-15. The May 2014 labor market survey relies on Dr. Rattan's May 2013 opinion that claimant does not have any psychological impediment to returning to work. *Id.* at 1-7.

Decision and Order at 11; *see* Tr. at 102-107. With respect to claimant's inability to work, the administrative law judge relied on claimant's testimony that he is prone to angry outbursts "for no good reason." *Id.* at 18; *see* Tr. at 40. The evidence credited by the administrative law judge constitutes substantial evidence to support the finding that employer did not meet its burden of establishing that the jobs it identified are suitable for claimant given his psychological condition. *See Mijangos*, 948 F.2d 941, 25 BRBS 78(CRT). Therefore, we affirm the administrative law judge's award of total disability benefits. *See J.R.* [*Rodriguez*] *v. Bollinger Shipyard, Inc.*, 42 BRBS 95 (2008), *aff'd sub nom. Bollinger Shipyards, Inc. v. Director, OWCP*, 604 F.3d 864, 44 BRBS 19(CRT) (5th Cir. 2010).

Employer also appeals the administrative law judge's commencing claimant's permanent total disability award on November 7, 2011, which is the date the parties stipulated that claimant's physical injuries reached maximum medical improvement. *See* Decision and Order at 2; Tr. at 5-6. Employer contends there is no evidence that claimant has a permanent psychological impairment and that the permanent total disability award thus is unsupported by any evidence.

A permanent disability exists when a "condition has continued for a lengthy period, and it appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period." *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). A claimant also may be considered permanently disabled under the Act if he suffers any residual disability after achieving maximum medical improvement. *See Gulf Best Electric v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004). The prognosis of future improvement does not preclude a finding of permanency. *Watson*, 400 F.2d at 655; *Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007).

We agree with employer that further findings of fact are necessary with respect to the nature of claimant's total disability. In *Misho v. Global Linguist Solutions*, 48 BRBS 13 (2014), the claimant sustained work-related physical and psychological injuries. The Board affirmed the administrative law judge's finding that the claimant's totally disabling psychological condition reached maximum medical improvement on May 3, 2012. The administrative law judge, however, awarded claimant continuing temporary total disability benefits since her non-totally disabling right shoulder injury had not yet become permanent. The Board held that as the claimant established her inability to perform her usual work due to only one work-related condition, her permanent psychological condition, rather than to a combination of work-related injuries, the nature of that condition governed the award of benefits. *Misho*, 48 BRBS at 15. Thus, the Board modified the award to one for permanent total disability benefits.

In this case, there are not sufficient findings by the administrative law judge to determine if the award of permanent total disability benefits from the date claimant's physical injuries reached maximum medical improvement is in accordance with *Misho*. Employer conceded that claimant is unable to return to his usual work due to his permanent physical injuries. Employer's Post-Hearing Brief at 70. The administrative law judge did not address the nature of claimant's psychological disability. However, the administrative law judge found that employer did not establish the availability of suitable alternate employment based only on the absence of evidence of jobs claimant could perform given his psychological injuries. If claimant is totally disabled due to the combination of his physical and psychological injuries, or if he is totally disabled due only to his psychological injury and if that injury is not at maximum medical improvement, then claimant is not entitled to compensation for permanent total disability; such a disability is properly categorized as a temporary total disability. *Misho*, 48 BRBS at 15-16. However, if claimant is totally disabled due to his physical injuries alone, then commencing a permanent total disability award from the date these injuries reached maximum medical improvement is consistent with *Misho*. Therefore, we vacate the administrative law judge's award of compensation for permanent total disability, and we remand the case for the administrative law judge to address the nature of claimant's total disability and to award benefits consistent with *Misho*.

Accordingly, we vacate the administrative law judge's finding that claimant's total disability is permanent in nature, and we remand this case for further findings consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge