U.S. Department of Labor

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

BRB No. 23-0327

PEDRO PADILLA MORALES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TRIPLE CANOPY, INCORPORATED	)	DATE ISSUED: 07/03/2024
	)	
and	)	
	)	
CONTINENTAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Granting, in Part, and Denying, in Part, Benefits of Timothy J. McGrath, Administrative Law Judge, United States Department of Labor.

Allison Graber (Attorneys Jo Ann Hoffman & Associates, P.A.), Lauderdale-By-The-Sea, Florida, for Claimant.

Edwin B. Barnes (Thomas Quinn, LLP), San Francisco, California, for Employer and its Carrier.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS, and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Timothy J. McGrath's Decision and Order Granting, in Part, and Denying, in Part, Benefits (2021-LDA-01896) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as

amended, 33 U.S.C. §§901-950 (Act), as extended by the Defense Base Act, 42 U.S.C. §§1651-1655 (DBA). The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law.[1] 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 360-61 (1965).

Claimant allegedly sustained psychological and hearing loss injuries as a result of his work for Employer as a security training manager in Baghdad, Iraq, from October 15, 2005, to sometime in 2010.[2] Hearing Transcript (HT) at 40. As a training manager, he trained guards on explosives, firefighting, and the use of rifles and other weapons. *Id.* at 43. At the hearing before the ALJ, he testified to experiencing a six-hour mortar attack in 2007, during which he was charged with overseeing the care of sixty to seventy people. *Id.* at 60-62. He testified everyone hid in a bunker, and he heard explosions and felt the ground shake. *Id.* at 62-65. In addition, he testified he experienced another mortar attack in 2009, which impacted the shooting range where he was conducting training. *Id.* at 68-69. He testified he saw two or three people suffer wounds to their legs after being hit with gravel and small stones from that mortar attack. *Id.* at 68, 73. Claimant left his employment in 2010 to care for his wife, who was diagnosed with uterine cancer. *Id.* at 45.

Claimant testified he experienced stress and fatigue during the last two years of his job with Employer but did not seek treatment until 2019 when his family noticed changes in his behavior. HT at 49, 81. On November 20, 2019, Claimant went to Dr. Julian Valderrama, a psychiatrist, for psychological treatment. Claimant's Exhibits (CXs) 20, 21 at 2. Dr. Valderrama noted Claimant had symptoms of flashbacks, nightmares, detachment, irritability, and avoidance related to his work with Employer. CX 21 at 2. Further, he noted Claimant's symptoms were accompanied by anxiety, depression, panic attacks, and micro psychotic episodes. *Id.* He diagnosed Claimant with post-traumatic

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Second Circuit because the district director who filed the ALJ's decision is in New York. 33 U.S.C. §921(c); *McDonald v. Aecom Tech. Corp.*, 45 BRBS 45, 47 (2011); Claimant's Exhibit (CX) 2 at 2.

[2] Claimant testified he did not remember exactly when he left Iraq, but he thought it was either in September or October 2010. Hearing Transcript (HT) at 40.

stress disorder (PTSD). *Id.* On February 13, 2020, Claimant filed a claim for compensation for a work-related psychological injury.[3] CX 1.

The ALJ found Claimant invoked the Section 20(a) presumption of compensability, 33 U.S.C. §920(a), with respect to his psychological and hearing loss injuries.[4] Decision and Order (D&O) at 10, 13-14. He found Employer rebutted the presumption as to Claimant's psychological injury but did not present any evidence to rebut his hearing loss injury. *Id.* at 10, 14-15. Weighing the evidence as a whole, the ALJ found Claimant failed to show his psychological condition is a work-related injury. *Id.* at 10-13. Having found Claimant's hearing loss condition is a work-related injury as a matter of law, the ALJ awarded Section 7 medical benefits for that injury.[5] *Id.* at 14.

On appeal, Claimant argues the ALJ erred in finding Employer rebutted the Section 20(a) presumption regarding his alleged psychological injury. He also asserts the ALJ erred in weighing the evidence and in finding he did not establish his psychological condition is a compensable work-related injury. Employer responds, urging the Board to affirm the ALJ's findings. Claimant filed a reply, reiterating his arguments on appeal.

Section 20(a) – Rebuttal

Once, as here, the Section 20(a) presumption is invoked, the burden shifts to the employer to rebut it with substantial evidence that the claimant's condition was not caused or aggravated by his employment. *Rainey v. Director, OWCP*, 517 F.3d 632, 634 (2d Cir. 2008); *American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 64-65 (2d Cir. 2001); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39, 41 (2000). Substantial evidence is evidence that a reasonable mind could accept as adequate to support a conclusion. *Rainey*,

[3] On March 2, 2020, Claimant amended his claim for compensation to include hearing loss injuries. CX 3.

[4] The ALJ found Claimant's claim for disability benefits relating to his hearing loss was time-barred under Section 13 of the Act, 33 U.S.C. §913, but nevertheless he properly addressed causation of the hearing loss claim because a claim for medical benefits is never time-barred, Decision and Order (D&O) at 15. *See Siler v. Dillingham Ship Repair*, 28 BRBS 38, 40 (1994) (decision on recon. en banc); *Ryan v. Alaska Constructors, Inc.*, 24 BRBS 65, 70-71 (1990). We affirm these findings as unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57, 58 (2007).

[5] We affirm, as unchallenged, the ALJ's concluding Claimant's hearing loss condition is a work-related injury as a matter of law and the award of Section 7 medical benefits for that injury. *See Scalio*, 41 BRBS at 58; D&O at 14.

517 F.3d at 637. The employer's burden on rebuttal is one of production, not persuasion, and is not dependent on credibility. *Id.*; *Rose v. Vectrus Sys. Corp.*, 56 BRBS 27, 30 (2022) (Decision on Recon. en banc), *appeal dismissed* (M.D. Fla. Aug. 24, 2023); *Suarez v. Serv. Emps. Int'l, Inc.*, 50 BRBS 33, 36 n.4 (2016); *Cline v. Huntington Ingalls, Inc.*, 48 BRBS 5, 7 (2013). All an employer must do is submit "such relevant evidence as a reasonable mind might accept as adequate" to support a finding that the claimant's injury is not work-related. *Rainey*, 517 F.3d at 637. The presumption may be rebutted with evidence disproving the existence of the alleged injury or a medical opinion of non-causation rendered to a reasonable degree of medical certainty. *See, e.g.*, *Bourgeois v. Director, OWCP*, 946 F.3d 263, 265 (5th Cir. 2020); *see also O'Kelley*, 34 BRBS at 41.

Claimant argues the ALJ erred in finding the opinion of Employer's expert, psychologist Dr. Rose Dunn, is sufficient to rebut the Section 20(a) presumption.[6] Claimant's Brief (CB) at 3-6. We disagree.

Dr. Dunn administered several psychological tests and opined Claimant did not meet the criteria for any psychological diagnosis. Employer's Exhibit (EX) 2 at 7-9, 14-15. Specifically, she opined Claimant tested negative for anxiety, depression, and PTSD. *Id.* at 8-9. She noted Claimant reported a re-emergence of psychological symptoms in 2016, when he lost his job, until 2019, when he began a medication regime with Dr. Valderrama. *Id.* at 6, 10, 13-15. But she further noted Claimant reported his psychological symptoms have "significantly improved and stabilized" since 2019. *Id.* at 6, 15. Based on this timeline, Dr. Dunn concluded Claimant's psychological symptoms were unrelated to his work for Employer, but rather due to losing his job in 2016. *Id.* at 13-15.

Contrary to Claimant's argument, the ALJ permissibly found Dr. Dunn's opinion sufficient to rebut the Section 20(a) presumption that his alleged psychological condition was caused or aggravated by his employment with Employer. *See Rainey*, 517 F.3d at 634; *O'Kelley*, 34 BRBS at 41; D&O at 10; CB at 3-6. Substantial evidence supports this finding. Based on the psychological tests she conducted, Dr. Dunn unequivocally stated Claimant did not and does not have PTSD or any other psychological condition. EXs 2 at 7-9, 14-15, 3 at 4. This evidence is sufficient to satisfy the production required for rebuttal. *See Rainey*, 517 F.3d at 637; *Rose*, 56 BRBS at 30. Claimant's arguments as to why rebuttal was not established go to the weight to be accorded the evidence, not whether rebuttal was established. CB at 3-6. Therefore, we affirm the ALJ's finding that Employer

[6] Dr. Dunn evaluated Claimant via video on December 10, 2021, and issued a report on December 29, 2021. Employer's Exhibit (EX) 2. She issued a supplemental report on February 28, 2022. EX 3.

rebutted the Section 20(a) presumption regarding Claimant's alleged psychological injury.[7] *See Rainey*, 517 F.3d at 637; *Rose*, 56 BRBS at 30; D&O at 10.

Weighing the Evidence as a Whole

Because Employer rebutted the Section 20(a) presumption, it drops out of the analysis, and the issue of causation must be resolved based on the evidence of record as a whole with Claimant bearing the burden of persuasion. *Rainey*, 517 F.3d at 634; *Marinelli*, 248 F.3d at 64-65; *Santoro v. Maher Terminal, Inc.*, 30 BRBS 171, 174 (1996); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 276 (1994). Claimant argues the ALJ erred in finding his credible testimony insufficient to establish his psychological condition is a work-related injury when the medical opinion evidence is in equipoise. CB at 7-9. We disagree.

The ALJ first considered the credibility of Claimant's testimony. D&O at 11. Claimant testified he started experiencing nightmares after a mortar attack in 2007, which increased after a second mortar attack in 2009. HT at 68, 72. Due to his behavior, Claimant testified his wife urged him to seek treatment in 2014 to "evaluate [his] character" and again in 2019. *Id.* at 81, 94, 104. He testified his behavior became aggressive and protective, and he started having night terrors during which he attacked his wife. *Id.* at 81. Once he began treatment with Dr. Valderrama in 2019, he testified his symptoms receded until March 2020, when his eldest daughter unexpectedly died. *Id.* at 14, 115. With continued treatment, however, he testified his symptoms of irritability and nightmares decreased. *Id.* at 105-107, 115-116. The ALJ found Claimant's testimony credible regarding his current mental state because he had consistently described his psychological symptoms and experiences working for Employer during his deposition, to his treating physician, and to the other medical experts. D&O at 11-13.

The ALJ then weighed the medical opinions of Dr. Valderrama, Dr. Dunn, and Claimant's expert, psychologist Dr. Gustavo Benejam.[8] Dr. Valderrama diagnosed Claimant with employment-related PTSD and noted a history of micro psychotic episodes

[7] Although Claimant generally asserts the ALJ deprived him of due process in finding Dr. Dunn's opinion rebuts the Section 20(a) presumption of compensability, we decline to address this argument as it is not adequately briefed. 20 C.F.R. §802.211(b); *see Plappert v. Marine Corps Exchange*, 31 BRBS 109, 111 (1997), *aff'g on recon en banc*, 31 BRBS 13 (1997); *Bonner v. Ryan-Walsh Stevedoring Co.*, 15 BRBS 321, 325 (1983) (the Board will not address an inadequately briefed issue); Claimant's Brief (CB) at 6.

[8] Dr. Benejam evaluated Claimant on January 24, 2022, and authored a report that same day. CX 22.

with a progression towards paranoid personality disorder. CX 21 at 2. The ALJ gave Dr. Valderrama's opinion and PTSD diagnosis no weight, however, as his records lacked information on what diagnostic tests, if any, he relied upon in making his PTSD diagnosis, and as his references to Claimant's history of psychotic episodes and paranoia were not supported by other medical evidence or Claimant's own testimony. D&O at 11.

On the other hand, Dr. Dunn opined Claimant did not have PTSD based on the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-V), nor did he have anxiety based on the Minnesota Multiphasic Personality Inventory-2-Restructured Form (MMPI-2-RF). EX 2 at 8-11. She further opined he did not suffer from any psychological condition. *Id.* at 9-10; EX 3 at 4. However, the ALJ found Dr. Dunn's report flawed because she indicated Claimant first sought psychological treatment in 2013, a statement contradicted by the record and Claimant's testimony,[9] and because she relied on diagnostic testing alone in concluding Claimant does not suffer from PTSD.[10] D&O at 11-12.

Finally, Dr. Benejam retroactively diagnosed Claimant with work-related PTSD that resolved with treatment in 2019 and concluded Claimant presently suffers from generalized anxiety disorder "associated with the Iraq work-related experiences." CX 22 at 12-13. The ALJ gave little weight to Dr. Benejam's retroactive PTSD diagnosis, however, because it was based primarily on Dr. Valderrama's records, and further found his conclusion that Claimant struggled to adjust to family life and had difficulty interacting

[9] The ALJ noted Claimant's testimony, Dr. Valderrama's treatment notes, and Dr. Benejam's report all confirm Claimant did not seek treatment until November 2019. D&O at 11-12. Claimant testified he first sought treatment from Dr. Valderrama in November 2019. HT at 101. Dr. Valderrama's treatment notes indicated he examined Claimant on November 20, 2019. CX 21 at 2. Dr. Benejam also noted Claimant went to Dr. Valderrama on November 20, 2019. CX 22 at 3. Thus, the ALJ discredited Dr. Dunn's opinion insofar as she had an "erroneous understanding" of when Claimant first sought treatment. D&O at 12. Employer does not cross-appeal the ALJ's finding or the weight he afforded Dr. Dunn's report. Employer's Brief at 23; EXs 2-3.

[10] Employer correctly notes that Dr. Dunn did not state Claimant sought treatment in 2013, but rather, that she reported Claimant *told her* that he was treated by Dr. Valderrama in 2013. EB at 23; EXs 2, 3.

with others was contradicted by other evidence and by Claimant's own testimony.[11] D&O at 12. Specifically, the ALJ found Dr. Benejam's generalized anxiety disorder diagnosis was contradicted by Claimant's reports of improved symptoms and was undermined by "disparate results" on the Beck Anxiety Inventory administered by both Drs. Benejam and Dunn about forty days apart. *Id*. Finally, the ALJ gave little weight to Dr. Benejam's opinion relating Claimant's anxiety to his employment in Iraq because Claimant experienced both extended, post-employment periods without symptoms or treatment and other intervening, significant life events such as his job loss in 2016 and the unexpected death of his daughter in 2020. *Id*. at 12-13.

Weighing the medical evidence as a whole, the ALJ found the medical opinions in equipoise as to whether Claimant suffered a work-related psychological injury. D&O at 13.[12] Therefore, the ALJ found that although Claimant is credible as to his reporting of his symptoms and experiences working for Employer, the medical evidence does not support a finding that his current symptoms are causing an impairment related to his work with Employer. *Id*. Consequently, the ALJ determined Claimant failed to prove he suffers from a work-related psychological injury by a preponderance of the evidence. *Id*.

Contrary to Claimant's assertion, it is well-established that when evidence is in equipoise, the party with the burden of persuasion, in this case Claimant, cannot succeed. *Greenwich Collieries*, 512 U.S. at 271; *Santoro*, 30 BRBS at 174-175. In *Greenwich Collieries*, the Supreme Court held the Department of Labor's "true doubt" rule, which traditionally found for the claimant in cases where the evidence was evenly balanced, violated Section 7(c) of the Administrative Procedures Act (APA),[13] which states that "except as otherwise provided by statute the proponent of a rule or order has the burden of proof." 5 U.S.C. §556(d); *Greenwich Collieries*, 512 U.S.at 276. The Court construed "burden of proof" as the burden of persuasion as opposed to the burden of production.

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[11] Rather, the ALJ found Claimant's testimony regarding his relationships with family and friends was consistent with his reporting to Drs. Benejam and Dunn that he had "perfect" relationships with his family, friends, and peers. D&O at 12.

[12] We affirm the ALJ's weighing of the opinions of Drs. Valderrama, Benejam, and Dunn and finding them in equipoise, as Claimant has not challenged these determinations on appeal. *See Scalio*, 41 BRBS at 58; D&O at 11-13.

[13] The Administrative Procedure Act requires every adjudicatory decision include "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), as incorporated into the Act by 30 U.S.C. §932(a).

Thus, once Section 20(a) drops out of the case, the claimant must prove his claim by a preponderance of the evidence. *See Greenwich Collieries*, 512 U.S. at 276; *Rose*, 56 BRBS at 30.

Moreover, it is also well established that the ALJ is entitled to weigh the lay and expert opinion evidence and draw his own inferences and conclusions from it. *See Pietrunti v. Director, OWCP*, 119 F.3d 1035, 1042 (2nd Cir. 1997); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403, 405 (2d Cir. 1961); *see also Calbeck v. Strachan Shipping Co.*, 306 F.2d 693, 695 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741, 742 (5th Cir. 1962). Here, the ALJ fully weighed the evidence in accordance with the APA and permissibly found the medical evidence evenly balanced. *Greenwich Collieries*, 512 U.S. at 271; *Santoro*, 30 BRBS at 174-175; D&O at 13. Despite finding Claimant's testimony credible,[14] the ALJ, in accordance with his discretion, rationally concluded the totality of Claimant's statements, in conjunction with the medical opinion evidence, are insufficient to meet his ultimate burden of persuasion to establish, by a preponderance of the evidence, that his psychological injury is work-related.[15] *Santoro*, 30 BRBS at 174-175; D&O at 13; CB at 7-9.

Therefore, we affirm the ALJ's conclusion as it is rational, supported by substantial evidence, and based on credibility determinations that are neither inherently incredible nor patently unreasonable. *See Pietrunti*, 119 F.3d at 1042; *Sealand Terminals v. Gasparic*, 7 F.3d 321, 323 (2d Cir. 1993); D&O at 13.

[14] We note the ALJ gave "great weight" to Claimant's "consistent accounts of his current mental state" and found credible his symptom reporting and experiences in Iraq. D&O at 13.

[15] We likewise reject Claimant's argument that the ALJ erred by failing to weigh other evidence of record after finding the medical opinion evidence in equipoise. CB at 7. It is clear from the ALJ's analysis that he did consider the "other evidence" Claimant lists in his Petition for Review, including his deposition and employment records, all of which supported his finding Claimant is a credible witness. D&O at 2-5, 11; CB at 7.

Accordingly, we affirm the ALJ's Decision and Order Granting, in Part, and Denying, in Part, Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge