



BRB No. 21-0634

CURTIS S. MATTHEWS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 11/29/2022
	)	
C P & O, LLC,	)	
PORTS AMERICA	)	
	)	
Self-Insured Employer-	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Dana Rosen, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Klein Camden, L.L.P.), Norfolk, Virginia, for Claimant.

Christopher R. Hedrick (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for Self-Insured Employer.

Before: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Dana Rosen’s Decision and Order (2019-LHC-00321) rendered on a claim filed pursuant to the Longshore and Harbor Workers’ Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act). 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. 33 U.S.C. §921(b)(3); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant was working as a lasher for Employer on November 23, 2015, when his left thumb was crushed between two containers. Decision & Order (D&O) at 3-4. He required immediate surgery and came under the care of plastic surgeon Dr. Glenn R. Carwell. D&O at 4; CX 1. Claimant's left thumb injury reached maximum medical improvement (MMI) on June 14, 2018, with a permanent impairment rating of 30%. D&O at 2-3; JX 1. Employer terminated temporary total disability (TTD) benefits and paid Claimant scheduled permanent partial disability (PPD) benefits in accordance with Section 8(c)(6) of the Act, 33 U.S.C. §908(c)(6). *Id.*

Claimant's left thumb injury is not at issue in this appeal. Rather, the issue is whether he suffers from post-traumatic stress disorder (PTSD) and/or anxiety as a result of his work-related left thumb injury. JX 1; Claimant's Post-Hearing Brief (Cl. Post-H Br.) at 2; Employer's Post-Hearing Brief (ER Post-H Br.) at 6.

The ALJ issued her Decision and Order denying benefits on September 14, 2021. D&O at 1. She summarized Claimant's psychological medical treatment (D&O at 6-24) and, after considering his testimony, his left thumb accident, and the diagnoses of psychologist Dr. Errol Liebowitz and psychiatrist Dr. Patrick Thrasher, found Claimant successfully invoked the Section 20(a) presumption, 33 U.S.C. §920(a), with respect to his PTSD. D&O at 26. Next, the ALJ discussed the medical evidence Employer presented in rebuttal. She found Employer successfully rebutted the Section 20(a) presumption of compensability through the medical reports of its experts, psychologist Dr. David Hess and psychiatrist Dr. Laura Dabney, both of whom opined Claimant did not suffer from PTSD. D&O at 26-27. Subsequently, she weighed the evidence as a whole, focusing on the reports and qualifications of each party's medical experts. She gave greater weight to the medical opinions of Employer's medical experts, Dr. Hess and Dr. Dabney, over those of Claimant's treating providers, Dr. Liebowitz and Dr. Thrasher, whose reports she found to be conclusory, vague, and inconsistent. Consequently, she found Claimant did not meet his burden of establishing work-related PTSD by a preponderance of evidence and denied his claim for benefits.<sup>1</sup> D&O at 28-36.

Claimant appeals the denial, contending the ALJ erred in: failing to address whether he suffered from work-related anxiety; mischaracterizing Dr. Thrasher's opinion; and

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<sup>1</sup> Also at issue before the ALJ was the extent of Claimant's disability as a result of his psychological condition, Employer's establishment of suitable alternate employment, and Claimant's post-injury residual wage-earning capacity. However, as the ALJ found Claimant's alleged psychological condition was not work-related, she did not address these issues.

failing to address relevant conflicting medical evidence in weighing Dr. Dabney's opinion.<sup>2</sup> Employer responds, urging affirmance. We will address each of Claimant's contentions in turn.

#### Failure to Address an Issue Raised by the Parties

The parties' Joint Exhibit, as well as their post-hearing briefs, identify the issue before the ALJ as whether Claimant suffers from "PTSD and/or anxiety" as a result of his workplace injury of November 23, 2015. JX 1; ER Post-H Br. at 6; Cl. Post-H Br. at 2. The ALJ acknowledged this at the formal hearing. Tr. 5. However, in her decision, she reframed the issue as limited to whether "Claimant suffer[s] from post-traumatic stress disorder due to his left thumb injury." D&O at 3. Claimant correctly maintains this was error.

Whether Claimant suffers from work-related anxiety has been at issue since he first sought psychological treatment. In January 2016, Dr. Carwell recommended he obtain a referral for a psychological evaluation, following his self-reported symptoms of PTSD. CX 1 at 52-53; CX 7 at 3. Employer controverted this recommendation and sent Claimant to neuropsychologist Dr. Hess for a second medical opinion (SMO). EX 3. Dr. Hess issued a report on August 8, 2017. He found no evidence Claimant suffered from PTSD, diagnosed an anxiety disorder, and recommended psychological treatment. EX 3 at 11.

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<sup>2</sup> Claimant also claimed two additional errors the ALJ allegedly committed: failure to address whether Employer established suitable alternate employment and failure to credit the PTSD credentials of Dr. Liebowitz. We do not address either here. Whether Employer established suitable alternate employment, and the evidence both sides presented to address it, became irrelevant upon the ALJ's holding Claimant failed to establish a compensable work-related psychological injury. *H.B Zachary Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000). The second alleged error involves the ALJ's credibility determinations in weighing the credentials and qualifications of two medical experts. The Board will not interfere with credibility determinations unless they are "inherently incredible or patently unreasonable." *Cordero v. Triple A Mach. Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Phillips v. California Stevedore & Ballast Co.*, 9 BRBS 13 (1978); *Roberson v. Bethlehem Steel Corp.*, 8 BRBS 775 (1978), *aff'd sub nom. Director, OWCP v. Bethlehem Steel Corp.*, 620 F.2d 60, 12 BRBS 344 (5th Cir. 1980). Here, the ALJ's comparison of the credentials of Dr. Hess and Dr. Liebowitz is not "inherently incredible or patently unreasonable," but instead is supported by evidence in the record, and thus the Board cannot disturb it.

Contrary to what the ALJ found,<sup>3</sup> Dr. Hess explicitly and unequivocally related Claimant's anxiety to his November 2015 workplace accident. CX 14 at 27. Employer subsequently accepted Claimant's anxiety disorder as compensable under the Act and authorized psychological treatment; the parties entered into a stipulation to that effect. D&O at 25; CX 3 at 5.

Claimant thereafter came under the care of a psychologist of his own choosing, Dr. Liebowitz. CX 17. Unlike Dr. Hess, however, Dr. Liebowitz diagnosed Claimant with PTSD. Because Employer's stipulated acceptance of the claim was limited to Claimant's previously diagnosed anxiety disorder, Employer revoked authorization for Claimant to continue treating with Dr. Liebowitz, resulting in the dispute that led to this adjudication. CX 7.

Consequently, while the parties dispute whether Claimant suffers from work-related PTSD, they also dispute Employer's liability for continued treatment of Claimant's anxiety disorder, in accordance with Dr. Hess's diagnosis and causation opinion, to which Employer stipulated. Both parties raised this as an issue in their Joint Stipulations submitted to the ALJ and in their Post-Hearing Briefs, yet the ALJ failed to address it. Instead, she confused the issue by acknowledging Employer's initial acceptance of Claimant's anxiety disorder (D&O at 25), while simultaneously and erroneously indicating Dr. Hess did not find Claimant's anxiety disorder to be work-related (D&O at 3).

The ALJ must inquire into all matters at issue before her. 20 C.F.R. §702.338. As the compensability of Claimant's anxiety disorder was clearly an issue for which both parties sought resolution, and as the issue of whether Claimant suffers from an anxiety disorder as a result of his workplace accident could impact his entitlement to both disability and medical benefits under the Act regardless of the ALJ's finding with respect to his alleged PTSD, her failure to address it requires we vacate her denial of benefits and remand the case for consideration of this unresolved issue.

#### ALJ's Discrediting of Dr. Thrasher's Opinion Not Supported by Substantial Evidence

About two months into his psychological treatment of Claimant, Dr. Liebowitz referred him to Dr. Thrasher for medication management. CX 18. Dr. Thrasher agreed with Dr. Liebowitz's diagnosis of PTSD and began regularly treating Claimant. CX 24 at 7-8.

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<sup>3</sup> According to the ALJ, "Dr. Hess diagnosed anxiety disorder not related to his 2015 work accident." D&O at 3.

The ALJ discredited Dr. Thrasher's opinion, based largely on the doctor's 2011 medical report indicating he had previously evaluated Claimant for PTSD related to a 2009 workplace knee injury. D&O at 20, 29. According to the ALJ, Claimant reported the same symptoms to Dr. Thrasher in 2011 as he did in 2018, but Dr. Thrasher came to inexplicably different diagnoses: in 2011, he opined Claimant's symptoms did not rise to the level of PTSD, but in 2018 he found they did. D&O at 24, 29, 35. Because Dr. Thrasher did not explain the reason for his different diagnoses despite being presented with identical symptoms, the ALJ found his medical opinion inconsistent and discredited it in favor of Employer's psychiatrist, Dr. Dabney. D&O at 29, 35. She also discredited Dr. Thrasher based on his failure to provide specific examples of how Claimant's 2018 symptoms met the criteria for PTSD. D&O at 35.

The record does not support a finding that the symptoms Claimant reported to Dr. Thrasher were the same in 2011 as in 2018. In 2011, Claimant reported job-related stress, panic attacks when going up a ladder, irritability, depression, confrontational behavior, and reactivity. CX 12 at 4-5. He also reported stressors unrelated to his job,<sup>4</sup> including financial problems; he was afraid he was going to lose his home. CX 12 at 5. Dr. Thrasher confirmed Claimant was experiencing anxiety and hypervigilance traversing gangways, symptoms which were among the criteria for PTSD; however, he did not believe Claimant's symptoms met enough of the criteria to warrant a PTSD diagnosis. CX 12 at 6-7. Instead, he diagnosed Claimant with Adjustment Disorder with Anxious Mood. CX 12 at 7.

When Dr. Thrasher saw Claimant in 2018, Claimant reported irritability, confrontational behavior, insomnia, nightmares, hypervigilance, avoidance, and panic attacks. CX 24 at 1-2. Dr. Thrasher conducted several tests, including a Posttraumatic Check List (PCL), which indicated moderately severe PTSD. CX 24 at 6. In support of this, he noted Claimant reported the following symptoms: disturbing memories; repeated disturbing dreams; feeling upset upon being reminded of the stressful event; feeling as though the stressful event was re-occurring; physical reactions such as heart pounding, trouble breathing, and sweating; irritability; angry outbursts; difficulty concentrating; watchfulness; and feeling jumpy or easily startled. CX 24 at 6. Claimant also reported feeling cut off from others, having trouble sleeping, and a loss of interest in activities he previously enjoyed. *Id.*

The ALJ's finding that Claimant's symptoms were "the same" in 2011 and 2018, D&O at 29, 35, is not supported by the medical evidence. CXs 12, 24. Although many of the symptoms Claimant reported in 2018 were the same as those he reported in 2011 (*e.g.*,

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<sup>4</sup> At the time of Dr. Thrasher's 2011 evaluation, Claimant had returned to work.

panic attacks, irritability, confrontational behavior, and hypervigilance), he reported additional symptoms in 2018 (*e.g.*, insomnia, nightmares, and avoidance).

Also, we note the ALJ's use of the terms "stressors" and "symptoms" interchangeably in weighing Dr. Thrasher's medical opinion regarding the diagnosis of PTSD and its cause. D&O at 23, 24, 29, 35. Each time he evaluated Claimant, Dr. Thrasher noted which of eight different "stressors," or "areas of stress," Claimant was then experiencing: family, occupational, legal, health, friends, relationships, economic and/or educational. CX 24 at 17, 21, 25, 29, 34, 38, 43, 48, 53, 58, 63, 68. Notably, these changed from week to week. *Id.* But nowhere in his records did Dr. Thrasher indicate these stressors were the cause of Claimant's PTSD symptoms. However, the ALJ found he did and that these stressors failed to support a PTSD diagnosis. D&O at 23, 24, 29, and 35. Rather, Dr. Thrasher consistently reported Claimant's PTSD symptoms were caused by his workplace injury of November 23, 2015. CX 24 at 7; CX 30 at 1, 2.

As factfinder, the ALJ is entitled to consider all credible inferences and can accept or reject any part of an expert's testimony. Questions of witness credibility are for the ALJ as the trier-of-fact, and the Board must respect her evaluation of all testimony, including that of medical witnesses. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). However, the Board is not bound to accept the ALJ's ultimate finding or inference if it is not supported by substantial evidence. *Goins v. Noble Drilling Corp.*, 397 F.2d 392 (5th Cir. 1968). Here, the ALJ's findings regarding Dr. Thrasher's medical reports as summarized above are not supported by the record. As such, we vacate the ALJ's finding that Claimant does not suffer from work-related PTSD and remand the case for reconsideration of the medical evidence in accordance with Section 20(a) of the Act.

#### Failure to Address Contradictory Evidence in Weighing Medical Opinions

In response to Dr. Thrasher's reports and recommendations, Employer sent Claimant to Dr. Dabney. In a report dated August 16, 2019, Dr. Dabney concluded Claimant's symptoms did not meet the criteria for PTSD, as articulated in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-V), and diagnosed him with pre-existing personality disorder unrelated to his workplace injury. EX 9 at 15. The ALJ assigned great evidentiary weight to Dr. Dabney's medical opinion and determined Claimant did not suffer from work-related PTSD. D&O at 36.

Claimant argues the ALJ improperly credited Dr. Dabney's medical opinion without evaluating conflicting evidence provided by Dr. Liebowitz. Cl. Br. at 29. We agree. On October 15, 2019, Dr. Liebowitz wrote a letter responding to Dr. Dabney's report, specifically challenging each of her explanations for why Claimant's symptoms did not

meet the PTSD criteria found in the DSM-V. CX 28. While the ALJ summarized this letter (D&O at 19-20), she failed to address it in making her credibility evaluation. D&O at 33-35.

While it is within an ALJ's discretion to weigh and ultimately credit one physician's testimony over another's, there must be a consideration of conflicting medical opinions of record, with clear acceptance or rejection of each. *Powell v. Serv. Employees Int'l, Inc.*, 53 BRBS 13 (2019); *Williams v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 61 (1985); *Frye v. Potomac Elec. Power Co.*, 21 BRBS 194 (1988). Here, the ALJ failed to consider all of the medical opinions of record on the issue of whether Claimant suffered from PTSD; specifically, she failed to address Dr. Liebowitz's direct and conflicting response to Dr. Dabney's report. Consequently, we vacate the ALJ's determination that Claimant does not suffer from work-related PTSD. On remand, the ALJ must specifically address the conflicts between Dr. Liebowitz's letter of October 15, 2019 (CX 28) and Dr. Dabney's report (EX 9).

Accordingly, we vacate the ALJ's Decision and Order and remand the case for reconsideration in accordance with our decision. If the ALJ finds any of Claimant's conditions are work-related, she must address any remaining unresolved issues.

SO ORDERED.

GREG J. BUZZARD  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge

DANIEL T. GRESH  
Administrative Appeals Judge