

U.S. Department of Labor

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



BRB No. 23-0314

IVAN KITAKA)

Claimant-Petitioner)

v.)

SOC, LLC)

and)

CONTINENTAL INSURANCE COMPANY)

Employer/Carrier-
Respondents)

NOT-PUBLISHED

DATE ISSUED: 10/30/2024

DECISION and ORDER

Appeal of the Decision and Order Granting Benefits in Part, and Denying Benefits in Part of Jerry R. DeMaio, Administrative Law Judge, United States Department of Labor.

Karoli Ssemogerere (KNA Pearl), Silver Spring, Maryland, for Claimant.

Krystal L. Layher and Rebecca R. Sonne (Brown Sims), Houston, Texas, for Employer/Carrier.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Jerry R. DeMaio’s Decision and Order Granting Benefits in Part, and Denying Benefits in Part (2021-LDA-01385) 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). 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 worked as a security guard for Employer in Iraq from June 8, 2007, through October 2010.¹ JXs 1 at 28-29, 14. He alleges he developed back, hearing loss, and psychological injuries while in Iraq around 2009.

Claimant first asserts he injured his back when climbing guard towers while carrying containers of water. JX 1 at 32-33. While working for Employer, he claims he visited a clinic once for his alleged back injury at which time he was prescribed medicine to treat his symptoms. *Id.* at 33.

Claimant next alleges he experienced hearing loss due to bombings and other noise exposure while working for Employer. JX 1 at 72. Claimant reported to Dr. Festo Bwambale on September 16, 2021, for an audiogram. Dr. Bwambale indicated Claimant had hearing loss as the result of his workplace exposures to bombings, gun shots, and noise from military aircraft. *Id.*; JX 7 at 54-55.

Finally, Claimant asserts he developed psychological problems as a result of his working conditions. During one particular incident, Claimant stated he learned that a convoy of soldiers whom he had allowed to exit the base's Entry Control Point were later ambushed and killed, and he saw their bodies when they were returned to the base. JX 1 at 35-36.

Claimant opted to not renew his contract and returned to his home in Uganda in October 2010. After returning to Uganda, Claimant sought treatment for all of his alleged injuries at various times.

He first sought psychological treatment in 2011 with Dr. Godfrey Mubangizi. JX 1 at 38-39. During his deposition, Claimant stated he was hospitalized from February 17, 2011, to May 2011, and then again from November 4, 2011, to December 22, 2011, due to his back and psychological injuries. *Id.* at 38-46. Claimant stated he returned to the hospital in December 2019, where he was seen by a clinical psychiatrist, Dr. Alex Musuto,

¹ This case arises within the jurisdiction of the United States Court of Appeals for the Second Circuit because the office of 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 (2011); *see also Global Linguist Solutions, L.L.C. v. Abdelmeged*, 913 F.3d 921 (9th Cir. 2019).

who diagnosed him with post-traumatic stress disorder (PTSD).² *Id.* at 52. On July 30, 2021, Claimant reported to Dr. Nshemerirwe Sylvia, a licensed psychiatrist, for a medical evaluation. Dr. Nshemerirwe agreed with Dr. Musuto's PTSD diagnosis based on Claimant's workplace exposures in Iraq. JX 7 at 62.

Regarding his back injury, between 2011 and 2021, Claimant sought treatment for his back pain with Dr. Fred Ntululme. JX 1 at 48-51. He also received periodic back treatment from different medical centers during this same period. *See* JXs 7, 23.³

Claimant reported to Drs. Nicholas Wisdom for further psychological examination, at Employer's request. Dr. Wisdom, a licensed psychiatrist, evaluated Claimant by video call on October 19, 2021, during which he performed several tests and interviewed Claimant. JX 10 at 1-2. From his interview and testing, Dr. Wisdom reported that Claimant did not meet the threshold criteria to support any psychiatric diagnoses. *Id.* at 10. He also stated Claimant's self-reported symptoms are "incongruent" with his behavioral presentation and descriptions of his traumatic history. *Id.* at 12.

Next, Dr. Hebert, a licensed audiologist, reviewed Claimant's audiogram and evidence regarding his hearing loss. JX 8. Although she stated Claimant's September 16, 2021 audiogram is consistent with hearing loss, she concluded it was "not related to noise exposure during employment." *Id.* at 2-3. Further, Dr. Hebert stated that Claimant's complaints of otalgia and vertigo would not have been caused by noise exposure but by some other underlying medical condition. *Id.* at 2.

Procedurally, on June 2, 2020, Claimant filed his claim, seeking benefits for a work-related psychological injury. JX 2. He amended his claim twice to include work-related hearing loss and back injuries. JX 3. Employer controverted the claims as untimely and lacking nexus between Claimant's employment and his alleged conditions based on the medical evidence. JX 4. The case was forwarded to the Office of Administrative Judges (OALJ), where the parties opted for a decision on the record in lieu of a formal hearing.

² Claimant provided medical records dating from 2011 to 2018 which included a PTSD diagnosis on October 15, 2011. *See* JX 7 at 1-4. However, Claimant alleged during his deposition that he was unaware of his PTSD diagnosis until December 2019. *See* JX 1 at 51-53. Similarly, while his medical records indicate he received treatment for back injuries between 2012 and 2019, Claimant contends he was first aware of his back injury in 2019. *See* JX 7 at 9-12, 14, 20, 24. 28-31.

³ Claimant provided medical records indicating he received repeated orthopedic treatment for a back-related condition. Several of these records are not completely legible. JX 7 at 1-14.

On April 26, 2023, the ALJ issued his Decision and Order Granting Benefits in Part, and Denying Benefits in Part (D&O), finding Claimant is only entitled to medical benefits for his back injury.

The ALJ first found Claimant's credibility to be "seriously limited" because his testimony that he was unaware of his psychological condition until 2019 is belied by more than thirty notes in his medical records documenting psychological visits and consultations dating from 2011, including a PTSD diagnosis dating from October 2011. D&O at 22-24. The ALJ also found inconsistencies between Claimant's reporting of various incidents to his doctors and those he described in his deposition testimony. *Id.* at 22-23.

Turning to the respective injuries, the ALJ found Claimant should have been aware of the relationship between his psychiatric injury and his employment no later than sometime in 2011. D&O at 26. Thus, he concluded the claim for the alleged psychiatric injury filed in 2020 was untimely.⁴ *Id.*

Because a claim for medical benefits is never time-barred, the ALJ next addressed whether Claimant's psychological injury is work-related. He found Claimant invoked the Section 20(a) presumption that his psychological injury is work-related, 33 U.S.C. §920(a), but found Dr. Wisdom's opinion rebutted the presumption. Considering the record as a whole, the ALJ gave great weight to Dr. Wisdom's opinion that Claimant does not have a psychiatric condition and denied all benefits for this alleged injury. *Id.* at 28-30.

Regarding Claimant's back injury, the ALJ concluded Claimant knew or should have known that it was work-related and impacted his ability to earn wages by at least 2014, if not earlier in 2011. Thus, he similarly held Claimant's 2021 claim for his back injury was untimely.⁵ However, with respect to medical benefits, the ALJ found Claimant invoked the Section 20(a) presumption that his back injury is work-related, and Employer did not rebut the presumption. Therefore, the ALJ awarded Claimant medical benefits for reasonable and necessary back treatment. D&O at 32.

With respect to the hearing loss claim, because Employer did not challenge its timeliness, the ALJ only addressed the issue of causation. Although he found the submitted audiogram does not qualify as a presumptive audiogram under the Act, 33 U.S.C. §908(c)(13)(C), he nevertheless found it sufficient to invoke the Section 20(a) presumption

⁴ The ALJ found Claimant's notice of the psychiatric injury under Section 12 of the Act, 33 U.S.C. §912, was also untimely filed. D&O at 26 n.6.

⁵ The ALJ also found Claimant's notice of the back injury was untimely filed. D&O at 32 n.7.

that Claimant's hearing loss is work-related. D&O at 33. However, the ALJ found Dr. Hebert's opinion that Claimant's hearing loss is not work-related rebutted the presumption. According greatest weight to Dr. Hebert's opinion, the ALJ found, based on the record as a whole, that Claimant's hearing loss is not work-related. Consequently, he denied all benefits for this injury. *Id.* at 32-35

Claimant appeals the ALJ's decision. He contends the ALJ erred in: 1) finding him not fully credible; 2) assigning less weight to his medical evidence compared to Employer's; 3) finding his psychiatric and hearing loss injuries are not work-related; 4) determining his notices of injuries and claims were not timely filed; and 5) failing to award reimbursement for out-of-pocket medical expenses. In addition, Claimant asserts the ALJ's pre-hearing order declaring he would not address illegible documents is prejudicial to Claimant's claims. Employer responds, urging affirmance.

Section 20(a) Presumption: Rebuttal and Weighing the Evidence as a Whole

Claimant contends the ALJ erred in finding the opinions of Drs. Hebert and Wisdom rebutted the Section 20(a) presumption in his hearing loss and psychological injury claims, respectively. He also argues that when addressing causation of these injuries based on the record as a whole, the ALJ improperly weighed Employer's medical evidence more favorably than his own evidence. In this regard, Claimant asserts the ALJ erred in finding his credibility questionable and in giving great weight to Dr. Wisdom's opinion in finding he does not have a psychological condition. He also asserts the ALJ improperly accorded greatest weight to Dr. Hebert's opinion in his hearing loss claim, particularly given that Dr. Hebert did not personally examine him.

When a claimant invokes the Section 20(a) presumption, as here, by producing some evidence of a harm and working conditions that could have caused, aggravated, or accelerated the harm, his injury is presumed to be work-related. *Rose v. Vectrus Systems Corporation*, 56 BRBS 27 (2022) (en banc), *appeal dismissed* (M.D. Fla. Aug. 24, 2023); *see also Rainey v. Director, OWCP*, 517 F.3d 632, 634 (2d Cir. 2008). Once the presumption of causation has been invoked, the burden shifts to the employer to rebut it by producing substantial evidence that the claimant's condition was not caused or aggravated by his employment. *Rainey*, 517 F.3d at 634; *American Stevedoring Ltd. v. Marinelli*, 248 F.3d 54, 65 (2d Cir. 2001); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39, 41 (2000).

Substantial evidence is the amount of evidence which a reasonable mind could accept as adequate to support a conclusion.⁶ *Rainey*, 517 F.3d at 637.

If the employer successfully rebuts the presumption, the claimant is no longer entitled to it, and the issue of causation must be resolved on the evidence of record as a whole with the claimant bearing the burden of persuasion by a preponderance of the evidence. *Rainey*, 517 F.3d at 634; *Marinelli*, 248 F.3d at 65; *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 262 (4th Cir. 1997). The ALJ is entitled to weigh the evidence and draw his own inferences from it; he is not bound to accept the opinion or theory of any particular expert. See *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 1042 (2nd Cir. 1997); *Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 323 (2d Cir. 1993); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). The Benefits Review Board is not free to re-weigh the evidence or make credibility determinations but must affirm the ALJ's findings if they are rational and supported by substantial evidence. *Gasparic*, 7 F.3d at 323; *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 700 (2nd Cir. 1982); *Perini Corp. v. Hyde*, 306 F. Supp. 1321, 1325-1326 (D.R.I. 1969).

Psychological Injury

Claimant first contends the ALJ erred in finding his psychological injury is not work-related. He argues the ALJ erred in finding Dr. Wisdom's report is sufficient to rebut the Section 20(a) presumption. Further, Claimant argues the ALJ's improper assessment of his credibility impacted his weighing of the evidence on causation as a whole. He maintains this resulted in the ALJ erroneously finding Dr. Wisdom's opinion, that Claimant does not have PTSD or any psychological condition related to his work, more persuasive than Dr. Nshemerirwe's contrary opinion. We disagree.

Following an interview and testing, Dr. Wisdom stated: "Claimant's endorsements across separate measures of symptom validity strongly indicate symptom amplification." JX 10 at 2. He found discrepancies between Claimant's "self-reported symptoms and his behavioral presentation," and concluded that the severity of Claimant's reported symptoms "was incongruent" with his presentation. Consequently, Dr. Wisdom opined that Claimant does not have PTSD or any psychological condition related to his work because the "evaluation does not support a psychiatric diagnosis." JX 10 at 2, 8-12. We affirm the

⁶ Rebuttal is an "objective test" which requires the ALJ to decide, as a legal matter, whether the employer produced "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; see also *Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 55 (1st Cir. 2010); *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642 (9th Cir. 2010).

ALJ's finding that Employer rebutted the Section 20(a) presumption regarding Claimant's alleged psychological injury as Dr. Wisdom's unequivocal opinion is sufficient to satisfy its burden of production. *Rainey*, 517 F.3d at 637; *Marinelli*, 248 F.3d at 64-65; *Rose*, 56 BRBS at 30.

In regard to the ALJ's weighing of the evidence as a whole, we reject Claimant's assertions that the ALJ erred in finding his testimony undermined by several inconsistencies which the ALJ found "suspect" and a "cause [for] concern." D&O at 21-24. Specifically, the ALJ found Claimant's testimony problematic because he claimed he had been receiving psychiatric treatment since 2011 but did not learn basic information about his condition until Dr. Musuto's PTSD diagnosis years later in 2019. *Id.* at 22. The ALJ found Claimant's assertion that his wife and brother withheld from him information related to his psychological condition for those eight years while still managing to get him psychological treatment is "completely incomprehensible." *Id.* Further, the ALJ questioned Claimant's descriptions of the traumatic events he allegedly experienced and his symptoms because they "var[ied] with each telling" and were sometimes omitted altogether.⁷ *Id.* As questions of witness credibility are reserved for the ALJ and may not be overturned unless they are patently unreasonable, we affirm the ALJ's credibility assessment of Claimant's testimony. *Pietrunti*, 119 F.3d at 1042; *Gasparic*, 7 F.3d at 323.

⁷ We reject Claimant's assertion that the ALJ erred in questioning his reliability and placed an impossible standard on him to have superb memory of events that occurred more than ten years ago. Claimant mischaracterizes the issues the ALJ raised about his credibility. The ALJ found unbelievable Claimant's assertion that despite having received psychiatric treatment since 2011, he did not learn basic information about his condition until 2019, including the diagnosis for which he had allegedly been receiving that treatment. *See* JX 7 at 38-40, 43-53. The ALJ concluded: "[Claimant] cannot have it both ways. Either these [treatment] notes [dating back to 2011] are illegitimate, or he had knowledge of what was going on. And, in either event, his story is suspect." D&O at 22. Additionally, the ALJ noted that Claimant identified three incidents that caused him harm: the ambushed convoy, a rocket that hit his sleeping quarters, and a head injury he witnessed his roommate suffer while taking cover during an alarm. The ALJ found Claimant described the ambushed convoy incident multiple ways, indicating a potential exaggeration to try to help his case. D&O at 22-23; *compare* JX 1 at 36 with JX 10 at 4-5 (to Dr. Wisdom), with JX 7 at 58 (to Dr. Nshemerirwe). The ALJ found Claimant's description of the rocket attack was more consistent, but he did not report it to Dr. Wisdom. D&O at 23; JX 7 at 58, 64. Finally, the ALJ noted the incident regarding his roommate's head injury was not reported by either doctor. D&O at 23.

In regard to the medical evidence, the ALJ correctly noted that Dr. Nshemerirwe only reviewed Claimant’s psychiatric treatment records dated November 27, 2020, January 8, 2021, June 1, 2021, and July 18, 2021, but not any of Claimant’s records dating back to 2011. D&O at 22; JX 7 at 60. Further, the ALJ noted Dr. Nshemerirwe’s statement that Claimant’s score of “52 on the [PTSD Checklist for DSM-5] . . . indicates he still needs PTSD treatment,” but found that conclusion lacking in detail and unexplained. D&O at 22; JX 7 at 62. In contrast, the ALJ noted Dr. Wisdom’s report discussed the psychometric tests he administered along with the test results and included a review of Claimant’s medical records dating from 2011. D&O at 15, 30; *Id.* at 6. Thus, the ALJ found Dr. Wisdom’s opinion “well-reasoned and supported by [his] history, testing, and analysis” and “more well-documented and well-reasoned” than Dr. Nshemerirwe’s opinion. D&O at 30. As these findings are supported by substantial evidence, we affirm the ALJ’s decision to give Dr. Wisdom’s opinion greater weight than Dr. Nshemerirwe’s opinion. *Gasparic*, 7 F.3d at 323.

Consequently, we affirm the ALJ’s finding that Claimant did not establish he has a work-related psychological condition.⁸ *Rainey*, 517 F.3d at 634; *Marinelli*, 248 F.3d at 65.

Hearing Loss

⁸ As we affirm the ALJ’s determination that Claimant’s alleged psychological injury was not caused by his work with Employer, we need not address his remaining contentions regarding timeliness under Sections 12 or 13 of the Act, 33 U.S.C. §§912, 913, with respect to this claim. We also do not address timeliness as it relates to Claimant’s back injury claim, as he did not challenge that ruling on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57, 58 (2007); *see* Cl. Brief at 31-37 (only addressing timeliness with respect to psychological and hearing loss claims); *but see* D&O at 32 (ALJ found hearing loss claim was timely filed). Even if we were to hold that Claimant “raised” the timeliness of his back injury claim in his general list of contentions, he did not adequately brief the issue. *Plappert v. Marine Corps Exch.*, 31 BRBS 109, 111 (1997), *aff’g on recon. en banc*, 31 BRBS 13 (1997).

Similarly, we reject Claimant’s challenge that the ALJ’s pre-hearing order indicating he would not address any illegible documents is prejudicial to his case, because that issue is inadequately briefed. *Montoya v. Navy Exch. Serv. Command*, 49 BRBS 51 (2015). Further, he did not raise this issue before the ALJ and therefore may not raise it for the first time before the Board on appeal. *Swain v. Bath Iron Works Corp.*, 14 BRBS 657, 660 (1982).

Claimant contends the ALJ erred in finding he does not have a work-related hearing loss. Specifically, Claimant argues the ALJ erred in crediting the report of Dr. Hebert, who reviewed Claimant's audiogram, over the report of Dr. Bwambale, who administered the audiogram. We disagree.

Addressing these reports, the ALJ accurately found Claimant submitted a September 16, 2021 audiogram and accompanying report signed by a "Festo Bwambale," which lacked any certification or credentials. D&O at 33-34; JX 7 at 53-55. The ALJ also noted that while the audiogram report indicates Claimant has "bilateral mild non organic [sic] hearing loss" caused by "strong gun sounds and noise of fighting weapons," it provides no further details. D&O at 33-34; JX 7 at 54-55.

The ALJ observed Dr. Hebert's report summarizes the September 16, 2021 audiogram as indicating a binaural hearing impairment of 24.4% under the American Medical Association (AMA) *Guidelines for the Evaluation of Permanent Impairment* (6th Edition). D&O at 34-35; JX 8 at 2. Nonetheless, the ALJ further noted that Dr. Hebert concluded Claimant's hearing loss is not related to noise exposure at work based in part on Dr. Bwambale's description of the hearing loss as "non-organic."⁹ D&O at 35. He further found Dr. Hebert indicated noise exposure normally creates a sensorineural hearing loss between 2000-8000Hz rather than the 500-1000Hz level indicated in the audiogram. *Id.*; JX 8 at 2. In addition, the ALJ stated Dr. Hebert opined Claimant's otologic symptoms of otalgia (earache) and vertigo are not caused by noise exposure. *Id.* Further, the ALJ stated Dr. Hebert found the audiogram did not include objective tests to validate Claimant's subjective responses. D&O at 35; JX 8 at 2-3. Thus, Dr. Hebert's opinion is sufficient to rebut the Section 20(a) presumption. *Rainey*, 517 F.3d at 634.

⁹ As the ALJ found, Dr. Hebert stated a "non-organic" notation "would only be used where the pure tone test results are not physiologically possible." D&O at 35; JX 8 at 2. She stated the term is properly used when there are "other, contradictory results that could not exist in conjunction with the reported results." JX 8 at 2. The ALJ found:

[Dr. Hebert's] logical conclusion is that [use of the term "non-organic" in an audiogram report indicates] there must be other, contradictory results that could not exist in conjunction with the reported results; however, there is no other result in the record, leading to the assumption that the term "non-organic" was misused.

D&O at 35. The ALJ also credited Dr. Hebert's "alternative" explanation that Claimant's hearing loss is not work-related assuming "the term non-organic was used in error by the audiologist." *Id.* at 34; JX 8 at 2.

Weighing the evidence as a whole, the ALJ found Dr. Hebert’s report details how noise exposure normally creates a high frequency sensorineural hearing loss between 2000-8000Hz, as opposed to the hearing loss at the lower frequencies of 500-1000Hz found in the September 16, 2021 audiogram. D&O at 35. He determined several factors negatively impacted the weight he attributed to the September 6, 2021, audiogram -- the lack of credentials or licensure information for Dr. Bwambale, the lack of explanation regarding the conclusions in the audiogram report, Dr. Hebert’s credible interpretation that the audiogram does not reflect a “noise induced hearing loss pattern,” and her “logical” explanation regarding its use of the term “non-organic.” *Id.* As the ALJ explained his reasons for weighing the evidence and substantial evidence supports his determination, we affirm his findings that Dr. Hebert’s report is better reasoned and more persuasive than Dr. Bwambale’s 2021 audiogram report and Claimant, therefore, did not establish his hearing loss is work-related. *Pietrunti*, 119 F.3d at 1042; *Gasparic*, 7 F.3d at 323; *Volpe*, 671 F.2d at 700.

Accordingly, we affirm the ALJ’s Decision and Order Granting Benefits in Part, and Denying Benefits in Part.¹⁰

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

¹⁰ Claimant also contends he is entitled to reimbursement for out-of-pocket medical expenses for his psychological and hearing loss injuries under Section 7, 33 U.S.C. §907. As we affirm the ALJ’s determination that there is no causal relationship between these injuries and Claimant’s employment with Employer, he is not entitled to medical benefits for these conditions. *See generally* *Huntington Ingalls, Inc. v. Director, OWCP*, 70 F.4th 245, 248 (5th Cir. 2023); *Raiford v. Huntington Ingalls Indus., Inc.*, 49 BRBS 61 (2015).