U.S. Department of Labor

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

BRB Nos. 19-0485
and 19-0485A

ROBER M. PARIHUAMAN CARRASCO	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
TRIPLE CANOPY, INCORPORATED	)	
	)	DATE ISSUED: 09/29/2020
and	)	
	)	
CONTINENTAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits of Paul R. Almanza, Administrative Law Judge, United States Department of Labor.

David C. Barnett and Samuel Frankel (Barnett, Lerner, Karsen, Frankel & Castro, P.A.), Fort Lauderdale, Florida, for Claimant.

Alexandra E. Grover and Krystal L. Layher (Brown Sims), Houston, Texas, for Employer/Carrier.

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

BOGGS, Chief Administrative Appeals Judge:

Claimant appeals, and Employer cross-appeals, Administrative Law Judge Paul R. Almanza's Decision and Order Awarding Benefits (2017-LDA-00269) rendered on a claim

filed pursuant to 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.* (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 applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, a Peruvian citizen, began working for Employer as a security guard in the Green Zone of Baghdad, Iraq, in October 2005. JX 2 at 27, 38. He worked the night shift, 7 p.m. to 7 a.m., between 72 and 84 hours per week, until his termination in October 2010. *Id*. at 37-38. He testified he was exposed to mortar and rocket attacks and small arms fire, but was never struck. *Id*. at 45-46, 49-50, 58. Upon his termination, Claimant returned to Peru and has since been working independently as a taxi driver. *Id*. at 27.

Claimant asserted he developed sleeping problems due to his work schedule, nightmares, hypervigilance, loneliness, anxiety, negative thoughts, and distrust of others. JX 2 at 28, 39, 44, 45. Claimant never sought medical attention while working for Employer. *Id*. at 61. He believed his problems would "go away somehow," but they continued to grow "worse and worse." He first sought medical attention on August 19, 2016, with Dr. Carmen Ciuffardi, who diagnosed work-related post-traumatic stress disorder (PTSD). *Id*. at 29-31; JX 10. Claimant subsequently filed a written claim on October 14, 2016, alleging a "psychological injury" resulting from "living and working in a war zone;" this was the first indication of injury he gave Employer. JX 4. During the course of his April 2017 deposition, Claimant testified to multiple symptoms including work-related sleep irregularities, which he asserted are a "mental" condition. JX 2 at 44-45. In his Closing Brief,[1] he stated his psychological injury claim should not be narrowly construed as a claim for PTSD only, but rather more broadly for a "harm in the form of psychological symptoms," including sleep deprivation, hypervigilance, and anger, with sleep issues being his "primary concern." Cl. Br. at 16, 19, 38.

The administrative law judge found Claimant sufficiently asserted a psychological injury claim encompassing both PTSD and a "sleep disorder"[2] and Employer had adequate

[1] No oral hearing was held in this matter as the administrative law judge granted Employer's unopposed motion for trial by submission. *Carrasco v. Triple Canopy Inc.*, Case No. 2017-LDA-00269 (May 31, 2017); 20 C.F.R. §702.346.

[2] The administrative law judge explained his use of the term "sleep disorder" referred to Claimant's "sleep difficulties" within the context of his claim for a

notice of both alleged injuries and suffered no undue prejudice. Decision and Order at 23, 25. Addressing each alleged injury separately, he found Claimant invoked the Section 20(a), 33 U.S.C. §920(a), presumption that his PTSD and "sleep disorder" are causally related to his working night shifts for Employer in war zone conditions, the existence of which Employer conceded. However, he found the opinion of Employer's expert, Dr. Gloria Morote, rebuts the presumption with respect to both alleged injuries. He found Claimant established a work-related "sleep disorder" based on the record as a whole, but did not establish a compensable psychological condition apart from the "sleep disorder." Decision and Order at 25, 27. Further, the administrative law judge found Claimant was aware of his work-related "sleep disorder" no later than October 2010, he first notified Employer of his work-related injury in October 2016 when he filed his claim, and Employer did not have knowledge of the condition prior to receiving the claim.[3] With respect to the timeliness of the claim, the administrative law judge found no basis for tolling the Section 13(b)(2), 33 U.S.C. §913(b)(2), statute of limitations[4] and concluded Claimant's claim for compensation was untimely filed. Decision and Order at 35. Accordingly, he awarded medical benefits only. *See Siler v. Dillingham Ship Repair*, 28 BRBS 38 (1994) (decision on recon. en banc) (a claim for medical benefits is never time-barred).

On appeal, Claimant challenges the administrative law judge's denial of disability benefits for his sleep problems, asserting error in failing to toll the Section 13 statute of limitations. Employer responds, urging affirmance on this issue. Employer cross-appeals, asserting it did not have sufficient notice of a claim for a separate and distinct sleep disorder

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psychological injury. He was not using the term to refer to a "specific diagnosis" by a medical professional. Decision and Order at 23 n. 16.

[3] The administrative law judge found Claimant's failure to timely notify Employer of his injury did not bar his claim under Section 12(a), 33 U.S.C. §912(a), because Employer was not prejudiced by the delay. 33 U.S.C. §912(d); Decision and Order at 33-34. We affirm this finding as unchallenged on appeal. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

[4] Notwithstanding his finding that the onset of Claimant's disability was not latent, *see* n.5, *infra*, the administrative law judge applied the more favorable two-year statute of limitations applicable to occupational disease claims under Section 13(b)(2), rather than the one-year statute of limitations applicable to traumatic injury claims under Section 13(a), because Employer stipulated that any psychological condition Claimant sustained is an occupational disease. Decision and Order at 30, n.26; *see* 33 U.S.C. §913(a), (b)(2); Emp. Closing Br. at 30.

and the administrative law judge erred in resolving the merits of this claim. Claimant responds, urging affirmance on these issues.

We first address Claimant's appeal. Claimant contends the administrative law judge erred in finding his October 2016 claim for compensation is time-barred under Section 13(b)(2), 33 U.S.C. §913(b)(2), which precludes his claim for disability benefits. He asserts substantial evidence does not support the administrative law judge's finding Employer lacked knowledge of his alleged "sleep disorder" such that Sections 30(a) and (f), 33 U.S.C. §930(a), (f), are inapplicable and do not toll the statute of limitations. Specifically, Claimant contends his uncontroverted testimony establishes Employer was aware of his sleep problems during his employment and this fact, in conjunction with Employer's concession that working conditions could have caused psychological injury, is sufficient to infer Employer had knowledge of a work-related injury in October 2010 when it terminated his employment.[5]

A claim for compensation for an occupational disease must be filed within two years of the date the claimant becomes aware, or should have become aware, of the relationship between his employment, his disease and his disability. 33 U.S.C. §913(b)(2).[6] However, the time for such filing may be tolled pursuant to Section 30(f) if the employer or its agent receives notice of the injury, or has knowledge of the injury and its work-relatedness, and

[5] Within the context of his appealing the administrative law judge's failure to toll the Section 30(f) statute of limitations, Claimant asserts that Employer's responses to his discovery requests concerning his personnel file were inadequate. Cl. Pet. for Review at 3. As Claimant did not raise this discovery issue before the administrative law judge, we decline to address it in the first instance. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989).

[6] Section 13(b)(2), 33 U.S.C. §913(b)(2), provides:

> Notwithstanding the provisions of subsection (a) of this section, a claim for compensation for death or disability due to an occupational disease which does not immediately result in such death or disability shall be timely if filed within two years after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability, or within one year of the date of the last payment of compensation, whichever is later.

fails to file a report of injury as required under Section 30(a). 33 U.S.C. §930(a), (f).[7] Knowledge of the work-relatedness of an injury may be imputed where the employer knows of the injury and has facts that would lead a reasonable person to conclude liability is possible and further investigation is warranted. *Stark v. Washington Star Co.*, 833 F.2d 1025, 1028, 20 BRBS 40, 44(CRT) (D.C. Cir. 1987); *Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991); *Kulick v. Continental Baking Corp.*, 19 BRBS 115, 117 (1986). Moreover, Section 20(b) of the Act, 33 U.S.C. §920(b), presumes the claimant's claim was timely filed unless the employer presents substantial evidence to the contrary. *See Stevenson v. Linens of the Week*, 688 F.2d 93 (D.C. Cir. 1982); *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989). In order to rebut the Section 20(b) presumption, an employer must establish it complied with Section 30(a), or did not receive notice or obtain knowledge of the work-related injury by the end of the Section 13 filing period. *Blanding v. Director, OWCP*, 186 F.3d 232, 33 BRBS 114(CRT) (2d Cir. 1999) (Section 30(a), (f), applies to Section 13(b)(2)).

Absent application of a tolling provision under the Act, the statute of limitations for filing a claim in this case expired in October 2012, and Claimant's 2016 claim for compensation was untimely filed.[8] In addressing whether Employer received notice or had knowledge of a work-related injury such that Section 30(a), (f) applied to toll the

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[7] Section 30(f), states:

> Where the employer or the carrier has been given notice, or the employer (or his agent in charge of the business in the place where the injury occurred) or the carrier has knowledge, of any injury or death of any employee and fails, neglects, or refuses to file report thereof as required by the provisions of subdivision (a) of this section, the limitations in subdivision (a) of section 913 of this title shall not begin to run against the claim of the injured employee or his dependents entitled to compensation, or in favor of either the employer or the carrier, until such report shall have been furnished as required by the provisions of subdivision (a) of this section.

33 U.S.C. §930(f). Section 30(a), 33 U.S.C. §930(a), requires the employer to file a first report of injury within ten days from the date of any injury or its knowledge of the injury.

[8] We affirm, as unchallenged on appeal, the administrative law judge's findings that Claimant was aware of the relationship between his employment, disease, and disability as of October 2010, when his employment was terminated, and that he first gave Employer written notice of his work-related injury on October 14, 2016, when he filed his claim. Decision and Order at 31; *see Scalio*, 41 BRBS 57.

Section 13(b)(2) statute of limitations,[9] the administrative law judge credited Claimant's uncontroverted testimony as establishing Employer was aware he had difficulty waking up, was late for work on two occasions in 2005, and fell asleep on the job in 2006. Decision and Order at 33, 35. However, he found Employer's awareness of Claimant's sleep issues in conjunction with its later concession of potentially causative working conditions is not sufficient to impute to Employer knowledge that Claimant could have suffered a work-related injury earlier than October 2016. In this respect, Claimant testified he did not seek medical treatment in the five years he worked for Employer, and he "repeatedly" "downplay[ed]" his sleep problems while working for Employer. Decision and Order at 33; JX 2 at 30-31, 40, 44; Cl. Br. at 24.

In appealing the administrative law judge's conclusion, Claimant does not challenge the characterization of his testimony or assert the administrative law judge failed to consider relevant evidence; rather, he invites the Benefits Review Board to draw a different conclusion from the same evidence, which is outside the Board's scope of review. *Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT) (2d Cir. 1993); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961) (administrative law judge is entitled to draw inferences and to make credibility assessments; his findings may not be disturbed if they are rational and supported by substantial evidence of record). As the administrative law judge accurately characterized Claimant's testimony, he rationally found Employer did not have notice or knowledge of Claimant's alleged injury until he filed his claim. *Stark*, 833 F.2d at 1029, 20 BRBS at 44(CRT) (stating that, without more, an employer's knowledge of generalized workplace hazards coupled with the employee's suffering an injury of a type associated with that hazard, is insufficient to impute to the employer knowledge that the employee's injury is work-related); *Kulick*, 19 BRBS at 117 (holding employer's knowledge that the employee fell at work is insufficient to confer knowledge of a work-related injury where the employee told the employer he was not injured in the fall at work). Consequently, we affirm the administrative law judge's findings that Employer rebutted the Section 20(b) presumption because it had no notice or knowledge of a work injury prior to 2016, the Section 13 statute of limitations period was not tolled pursuant to Section 30(f), and Claimant's 2016 claim was untimely filed. *Stark*, 833 F.2d at 1028, 20 BRBS at 44(CRT); *Wendler v. American Nat'l Red Cross*, 23 BRBS 408, 413 (1990) (McGranery, J., dissenting); *Kulick*, 19 BRBS at 117. As Claimant's claim was not filed in a timely manner, the administrative law judge properly denied disability benefits. *Stark*, 833 F.2d at 1028, 20 BRBS at 44(CRT). If Claimant's claim is otherwise compensable, he is limited to an award of medical benefits only. *See Siler*, 28 BRBS 38.

[9] Employer filed the requisite LS-202 form, First Report of Injury or Occupational Illness, on October 31, 2016. 33 U.S.C. §930(a); JX 5.

We next address Employer's cross-appeal. Employer asserts the administrative law judge erred in finding Claimant's claim for a "psychological injury" encompassed a claim for an independent sleep disorder injury. Employer contends it did not have adequate notice of a claim for an independent sleep disorder because Claimant alleged only that his sleep issues were a "consequence of" a psychological injury; he never alleged or was diagnosed with a sleep disorder separate and apart from his alleged psychological condition. Emp. Cross-Pet. at 9. Employer additionally asserts the administrative law judge, in assessing the merits of this claim, impermissibly substituted his opinion for that of the medical experts and failed to adequately explain his findings. *Id*. at 7, 10.

In this case, despite finding the scope of Claimant's claim was limited to a psychological injury, the administrative law judge resolved this claim by finding Claimant established a "sleep disorder" independent of any psychological condition. In order to establish a prima facie compensable claim, a claimant must affirmatively establish he sustained a harm or pain and that conditions existed or an accident occurred at his place of employment which could have caused the harm or pain. *See Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008); *Gencarelle v. Gen. Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13(CRT) (2d Cir. 1989); *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326 (1981). It is well established that a psychological injury constitutes a "harm" within the meaning of the Act. *Ceres Marine Terminals, Inc. v. Director, OWCP*, 848 F.3d 115, 50 BRBS 91(CRT) (4th Cir. 2016); *American Nat'l Red Cross v. Hagen*, 327 F.2d 559 (7th Cir. 1964); *R.F. [Fear] v. CSA, Ltd.*, 43 BRBS 139 (2009). If the claimant establishes the two elements of his prima facie case, the Section 20(a), 33 U.S.C. §920(a), presumption applies to relate the injury to the employment, and the employer can rebut this presumption by producing substantial evidence that the injury was not related to the employment. *See Rainey*, 517 F.3d 632, 42 BRBS 11(CRT); *American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001). If the employer rebuts the presumption, it no longer controls and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT); *see Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

With respect to whether Claimant established a psychological injury, the administrative law judge invoked the Section 20(a) presumption and found it rebutted by Dr. Morote's opinion.[10] He then weighed the medical opinions of Dr. Ciuffardi, who

[10] We affirm this finding as supported by substantial evidence. *Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT). We also affirm, as uncontested, the administrative law judge's determination that Claimant failed to establish a harm in the form of PTSD or any other mental condition, other than "sleep disorder". *Scalio*, 41 BRBS 57.

diagnosed PTSD caused by "constant exposure to situations where his life was in danger of death and to strong experiences of stress" during his employment with Employer in Iraq, JX 10 at 1-2, and Dr. Morote, who opined Claimant does not satisfy the diagnostic criteria for PTSD or any other mental disorder.[11] He found Dr. Morote's opinion more persuasive on this issue because she demonstrated a better understanding of the specific war-related traumas to which Claimant was exposed, whereas Dr. Ciuffardi described Claimant's war experience generally and did "not accurately convey the nature and extent of Claimant's specific traumatic experiences."[12] Decision and Order at 28-29. He therefore found Claimant failed to establish PTSD or any other mental disorder by a preponderance of evidence.

Without making any further finding as to the existence of an actual psychological condition, the administrative law judge went on to find Claimant credibly testified to the existence of sleep problems that began during his employment with Employer, and Dr. Ciuffardi testified that Claimant's sleep issues are a psychological symptom of PTSD. JX 11 at 18. She further testified:

[11] Dr. Morote administered multiple psychological tests to assess Claimant's emotional and personality functions, including a Trauma Symptom Inventory (TSI-2), which she used to assess specific symptoms of PTSD. She stated: the test results were "valid" but at the "cutoff score" indicating "some over-endorsement of symptoms;" the scales that tap Post-Traumatic Stress and Externalization were in the clinical or problematic range; and, the scales that tap anxious arousal, depression, intrusive experiences, and defensive avoidance were in the clinical or problematic range as well. JX 13 at 10; JX 15 at 45. Based on this testing and her evaluation of Claimant against DSM-5 diagnostic criteria, Dr. Morote opined Claimant has "lingering adjustment problems;" however, they do not rise to the level of a DSM-5 mental disorder, and there is no evidence that the difficulties are directly or causally related to "actual war events" in Iraq. JX 13 at 10-11; JX 15 at 30. She explained that Claimant maintains "full mental control" when angry and his behavior is not "predatory." JX 13 at 11; JX 15 at 47. Further, while he may legitimately have emotional difficulties, his "emotional reactions" during the examination when discussing "actual war events very much paled in comparison" to his reaction when discussing Employer's alleged mistreatment and unfair labor practices. JX 13 at 11.

[12] The administrative law judge explained, "[w]hile generalized statements regarding the underlying causes of PTSD are not in and of themselves suspect, they have limited probative value in the absence of case-specific and accurate descriptions of traumatic events encountered by Claimant." Decision and Order at 29-30.

> Q: In general, Doctor, can trouble sleeping be caused by other issues, such as physical problems with the body?
>
> A: No, because tiredness does not create insomnia.
>
> Q: . . . [I]n general, Doctor, can tiredness be caused by other physical issues in the body?
>
> A: Usually, it's associated with depression.
>
> Q: In [Claimant's] case, did you consider whether there may be a physical cause for his sleeplessness?
>
> A: No. The sleeping disorder that he has is because he gets up at the minimal noise he hear [sic]. So, he cannot have a deep sleep. He is in a constant state of alertness.

Id. at 19. The administrative law judge found this evidence sufficient to establish a compensable harm, explaining, "[t]he fact that Dr. Ciuffardi's opinion with respect to Claimant's sleep issues was given in the broader context of her PTSD diagnosis does not negate its probative value [as to the existence of a work-related psychological condition]." Decision and Order at 24. The administrative law judge failed to adequately explain this finding.

To the extent the administrative law judge's finding implies Claimant suffers from an independent "sleep disorder," he erred in resolving this issue as Claimant did not make such a claim. Decision and Order at 23; *see Bukovac v. Vince Steel Erection Co., Inc.*, 17 BRBS 122 (1985); *Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 182, 184 (1984). Similarly, to the extent he found Claimant's sleep symptoms are compensable separate and apart from an underlying condition, this, too, is error as Claimant first must affirmatively establish the alleged harm in order to suffer from symptoms allegedly connected to such harm. *See Rainey*, 517 F.3d 632, 42 BRBS 11(CRT); *Kelaita*, 13 BRBS 326. Although the administrative law judge is entitled to assess the medical evidence in terms of weight and credibility, he may not substitute his judgment for that of the physicians. *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997). As he did not find Claimant established the existence of a psychological condition and as Dr. Ciuffardi diagnosed Claimant's sleep problems as symptoms of PTSD, a condition which Claimant does not have, it is unclear how Dr. Ciuffardi's opinion, alone, or in conjunction with Claimant's lay testimony, establishes Claimant's sleep problems manifest a psychological condition distinct from PTSD. *See generally Everson v. Stevedoring Servs. of America*, 33 BRBS 149 (1999) (lay testimony cannot establish facts beyond the realm of common knowledge); *Cummins v. Todd Shipyards Corp.*, 12 BRBS 283 (1980) (administrative law judge erred in taking judicial notice of the significance of

hearing loss at various frequency levels, which is not a fact of common knowledge, without setting forth the sources of his knowledge concerning this fact and without giving the employer the opportunity to rebut the fact). We thus vacate, for lack of sufficient explanation, the administrative law judge's finding Claimant established a psychological sleep disorder and remand the case for further findings. 5 U.S.C. §557(c)(3)(A) (adjudicatory decision must include 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"); *see Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982); *Gremillion v. Gulf Coast Catering Co.*, 31 BRBS 163, 168 (1997).

On remand, the administrative law judge must determine whether Claimant established that Claimant's sleep symptoms are a psychological harm resulting from a compensable psychological condition or that his sleep disorder constitutes a discrete psychological harm. *See Rainey*, 517 F.3d 632, 42 BRBS 11(CRT); *Kelaita*, 13 BRBS 326; *see also Ceres Marine Terminals*, 848 F.3d 115, 50 BRBS 91(CRT). If he so finds, he must also determine whether Claimant has established the necessary connection of that psychological harm to the hazards of war to which he was subjected during his employment by Employer. *Rainey*, 517 F.3d 632, 42 BRBS 11(CRT); *see Sewell v. Noncommissioned Officers' Open Mess, McChord Air Force Base*, 32 BRBS 127, 128-129 (1997) (McGranery, J., dissenting), *aff'd on recon. en banc*, 32 BRBS 134 (1998) (Brown and McGranery, JJ., dissenting). He must base his determinations on the evidence adduced and may not substitute his judgment for that of the experts. *Pietrunti*, 119 F.3d 1035, 31 BRBS 84(CRT).

Accordingly, we affirm in part and vacate in part the administrative law judge's Decision and Order Awarding Benefits. We remand the case for further consideration consistent with this decision.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

ROLFE, Administrative Appeals Judge, concurring and dissenting:

I concur with my colleagues' determination to affirm the administrative law judge's finding Claimant's claim for disability benefits is time-barred under Section 13(b)(2), 33

U.S.C. §913(b)(2). I respectfully dissent, however, from their decision to vacate Claimant's entitlement to medical benefits for his work-related sleep disorder. Claimant adequately pleaded and developed his claim, and substantial evidence readily supports the administrative law judge's decision working conditions caused his sleep disorder.

The resolution of this issue is not nearly as complicated as the majority suggests. Claimant plainly alleged on his claim form, "As a result of living and working in a war zone and experiencing the horrors of war [I] suffered psychological injury." CX 4. Claimant's statement meets the pleading requirements under the Act by giving Employer notice of a harm and the circumstances giving rise to it. *U.S. Industries/Federal Sheet Metal, Inc., v. Director, OWCP*, 455 U.S. 608, 613 n.7, 14 BRBS 631, 633 n.7 (1982) ("[p]rocedure is generally summary and informal": under the Act, pleadings need only allege "essential elements" of a compensable claim -- the "time, place, nature, and cause of the injury").[13]

Through the development of his claim, it became indisputable a sleep disorder comprised a component of the psychological harm Claimant alleged. Claimant testified his working conditions caused his sleep disorder, JX 2 at 25, 28, 39, 44-45; Dr. Ciuffardi testified Claimant's "sleep disorder" was caused by a work-related "constant state of alertness," JX 10 at 1-2; JX 11 at 19; and Claimant's pre-hearing statement and Closing Argument Brief reiterated he sought benefits for a "harm in the form of psychological symptoms," with his sleep disorder comprising his "primary concern." Cl. Br. at 16, 38. No reasonable person would conclude under these circumstances that Claimant's sleep disorder was "completely different" than the psychological injury he originally pleaded and subsequently developed below. *U.S. Industries/Federal Sheet Metal, Inc.*, 455 U.S. at 613 n.7, 14 BRBS at 633 n.7 (wide variance is permitted between pleading and proof, unless the employer is prejudiced by having to defend at the hearing an injury "completely different" than the one pleaded). Claimant therefore was not required to amend his original claim to provide Employer additional notice. *Id.*

But even if he were required to amend his claim, undisturbed precedent permits it in his brief under the Act's no-fault worker's compensation scheme. *Pool Co. v. Cooper*, 274

[13] As noted, Claimant filed this claim pursuant to the Defense Base Act (DBA) extension of the Longshore and Harbor Workers' Compensation Act (LHWCA). *See, e.g., G4S Int'l Employment Servs. (Jersey) v. Newton-Sealey*, ___ F.3d ___, No. 19-2471, 2020 WL 5553815 (2d Cir. Sept. 17, 2020). Except for specifically identified instances not at issue here, the DBA was "designed to adopt the LHWCA" and the case law interpreting it. *Service Employees Int'l, Inc. v. Director, OWCP [Barrios]*, 595 F.3d 447, 454, 44 BRBS 1, 4(CRT) (2d Cir. 2010).

F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001) (claimant amended disability period); *Meehan Seaway Serv. Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998) (cumulative trauma theory raised prior to hearing); *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), *aff'd on recon.*, 26 BRBS 32 (1992), *aff'd mem. sub nom. Argonaut Ins. Co. v. Mikell*, 14 F.3d 58 (11th Cir. 1994) (new theory under Section 9).[14]

The administrative law judge thus correctly held "I find that Claimant has sufficiently asserted a claim that encompasses a psychological injury/PTSD *as well as a sleep disorder*" and "his claim should not be construed solely as a PTSD claim." Decision and Order at 23 & n.16 (emphasis added). Whether (accurately) considered satisfied by his original claim form, or, alternatively, subsequently amended by his brief, Claimant thus met the Act's pleading requirements. *U.S. Industries/Federal Sheet Metal, Inc.*, 455 U.S. at 613 n.7, 14 BRBS at 633 n.7; *Meehan Seaway Serv. Co.*, 125 F.3d 1163, 31 BRBS 114(CRT); *see also* 20 C.F.R. §702.336(b). As a result, nothing required Claimant to prove he suffered from what the majority terms a "psychological condition distinct from PTSD" to receive medical benefits for his work related sleep disorder -- and the majority cites no applicable authority otherwise. *U.S. Industries/Federal Sheet Metal, Inc.*, 455 U.S. at 613 n.7.

That is because the Act covers *work-related* sleep conditions whether they are considered a distinct disorder or merely symptoms of a broader disorder, whether "psychological" or "non-psychological" in nature. *See generally Gardner v. Bath Iron Works Corp.*, 11 BRBS 556 (1979), *aff'd sub nom Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981) (work-related manifestation of symptoms compensable; no distinction between work-related symptoms and actual worsening of underlying condition); *Konno v. Young Brothers, Ltd.*, 28 BRBS 57 (1994) (suicide as secondary to work-related depression compensable); *see also Vogel v. Gunderson Marine, Inc.*, BRB No. 13-0048 (Sep. 26, 2013) (unpub.) (work-related hypersomnia compensable); *Vane v. East Coast Cranes & Electrical*, 47 BRBS 129(ALJ) (2012), *aff'd*, BRB No. 13-

[14] Indeed, the posture of this case, in particular, reinforces the need for such liberal amendment. No dispositive motions were filed. No hearing was held. Instead, the claim was decided on the written record, with the parties' briefs filed simultaneously. Claimant's brief was his first opportunity (and only requirement) to assert his case. To the extent Employer could have claimed it was surprised that Claimant alleged a sleep disorder after discovery made his contention clear, it had the obligation to raise the issue with the administrative law judge after receiving Claimant's brief. *See, e.g.*, *Esposito v. Universal Terminal & Stevedoring Corp.*, 9 BRBS 796 (1978) (administrative law judge authorized to determine if a new issue raised at hearing requires additional time for preparation). It had ample time to do so. It did not.

0119 (Sept. 20, 2013) (unpub.) (shift work sleep disorder compensable). All that matters is that the condition, however classified, be a work-related harm. *Ceres Marine Terminals, Inc. v. Director, OWCP*, 848 F.3d 115, 122, 50 BRBS 91, 95(CRT) (4th Cir. 2016), *aff'g Jackson v. Ceres Marine Terminals, Inc.*, 48 BRBS 71 (2014) (Act "does not distinguish between psychological and physical injuries; Act "defin[es] 'injury,' without limitation as 'any accidental injury or death arising out of and in the course of employment'"); *Wheatley v. Adler*, 407 F.2d 307, 313 (D.C. Cir. 1968) (en banc) (a harm occurs when "something unexpectedly goes wrong within the human frame"); *S.K. [Kamal] v. ITT Industries, Inc.*, 43 BRBS 78, 79-80 (2009), *aff'd in part and rev'd in part mem.*, No. 4:09-MC-348, 2011 WL 798464 (S.D. Tex. Mar. 1, 2011) (Act does not define psychological harm in terms of DSM diagnoses; all physicians diagnosed a psychological harm); *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 59 (1989) ("harm" is not defined in terms of degree of impairment, specific disease, or illness; specific anatomic change is sufficient to establish a "harm" within the Act).

And substantial evidence easily supports the administrative law judge's decision Claimant's sleep disorder *is* work-related. Employer concedes the existence of working conditions that could have caused a psychological injury. Decision and Order at 24; Emp. Hearing Br. at 24. Regardless, Dr. Ciuffardi linked Claimant's sleep disorder -- evidenced by his waking at the sound of minimal noises and his "constant state of alertness" -- to his working in a war zone and experiencing its horrors. Decision and Order at 26; JX 11 at 19. The administrative law judge correctly recognized Dr. Ciuffardi's testimony, if credible, establishes a compensable "harm" under the Act and cases cited above. Decision and Order at 26; *see Wheatley*, 407 F.2d at 313; *Kamal*, 43 BRBS at 79-80; *see also Sewell v. Noncommissioned Officers' Open Mess, McChord Air Force Base*, 32 BRBS 127, 128-129 (1997) (McGranery, J., dissenting), *aff'd on recon. en banc*, 32 BRBS 134 (1998) (Brown and McGranery, JJ., dissenting) (work stressors caused depression); *American Nat'l Red Cross v. Hagen*, 327 F.2d 559 (7th Cir. 1964) (work caused acute schizophrenia reaction); *Urban Land Institute v. Garrell*, 346 F. Supp. 699 (D.C.D.C. 1972) (work aggravated underlying obsessive and compulsive state, precipitated a marked worsening in existing emotional condition, and required claimant to receive institutionalized psychiatric care). [15]

To determine its credibility, the administrative law judge exhaustively weighed Dr. Ciuffardi's testimony with the only other relevant evidence of record: Claimant's

[15] Similarly, the opinion of Employer's expert, Dr. Morote, that Claimant has post-employment "lingering adjustment problems," supports a psychological "harm" under the Act. JX 13 at 10; *see Romeike v. Kaiser Shipyards*, 22 BRBS 57, 59 (1989). In this regard, the existence of a non-DSM-5 classified psychological harm is undisputed.

testimony regarding his employment and the onset of his sleep disorder, and Dr. Morote's opinion she does not know whether Claimant has a sleep disorder, or, if he does, the extent it relates to his work exposures. Decision and Order at 25-27. He found Claimant's testimony credible and consistent with the evidence of record, and Dr. Morote's opinion "equivocal" and "ambivalent" as to the existence of a sleep disorder or the conditions that could have caused it. *Id.* at 25-26.[16]

As Dr. Ciuffardi specifically explained Claimant's sleep troubles are symptomatic of a constant state of alertness caused by work exposures, and as Dr. Morote offered only an equivocal opinion as to a general psychological harm, the administrative law judge acted well within his discretion in concluding "Claimant has established by a preponderance of the evidence that he suffers from a sleep disorder causally related to his work for Employer in Iraq from 2005 to 2010." Decision and Order at 25-26; *American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961) (administrative law judge is entitled to determine the weight to be accorded to the evidence of record); *see also Kamal*, 43 BRBS at 79-80; *c.f. Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997) (administrative law judge may not substitute his judgment for that of the physicians).

Contrary to the majority's holding, no more (or less) is required to affirm the administrative law judge's decision. *Ceres Marine Terminals*, 848 F.3d at 122, 50 BRBS at 95(CRT); *Sewell*, 32 BRBS at 128-129. The majority asserts the administrative law judge inadequately explained his statement "the fact that Dr. Ciuffardi's opinion [attributing Claimant's sleep symptoms to a work-related constant state of alertness] was given in the broader context of her PTSD diagnosis does not negate its probative value." But the statement is consistent with law and logic and requires no additional explanation. It merely recognizes Dr. Ciuffardi's identification of a work-related change in Claimant's cognitive state is probative evidence of a legal "harm" and its causal relationship to work.

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[16] The administrative law judge observed Claimant testified he first developed sleep difficulties while working for Employer, and, despite some minor variations:

> consistently reported that he does not get a full night's sleep, that his sleep pattern is disrupted, and that he feels sleepy during the day. Further Dr. Morote noted that Claimant was taking Clonazepam which is prescribed for sleep issues. Additionally, as Claimant points out, Employer has provided no documentation to refute Claimant's credible testimony that he was repeatedly disciplined for tardiness and sleeping on the job.

Decision and Order at 25, 26 (internal citations omitted).

Ceres Marine Terminals, 848 F.3d at 122, 50 BRBS at 95(CRT); *Kamal*, 43 BRBS at 79-80; *Romeike*, 22 BRBS at 59.

Most significantly, the majority's heightened pleading and proof requirements plainly misconstrue the Act's requirements. Without ever addressing why the administrative law judge erred in finding Claimant adequately pleaded a claim for a sleep disorder under the law discussed above, the majority nonetheless requires Claimant to somehow establish on remand that his disorder is secondary to an unidentified "compensable psychological condition." But it never explains what it means by a "compensable psychological condition" and its holding Claimant's work-related sleep disorder cannot be compensated on its own contradicts fundamental law under the Longshore Act. The result is an unworkable set of remand instructions that defies both reason and law.[17]

Claimant adequately alleged working conditions caused his sleeping disorder, which indisputably constitutes a compensable harm under the Act. Substantial evidence easily supports the administrative law judge's determination Claimant met his burden to establish the sleep disorder is work-related. I therefore would affirm entitlement to medical benefits for Claimant's sleep disorder.[18]

JONATHAN ROLFE
Administrative Appeals Judge

[17] *Kamal* is particularly instructive here. In affirming the Board's decision in relevant part, the district court stated that rigid use of the Diagnostic and Statistical Manual of Mental Disorders is not required to diagnose a compensable injury under the Act. *ITT Industries, Inc. v. S. K. [Kamal]*, No. 4:09-MC-348, 2011 WL 798464 at *12-13 (S.D. Tex. Mar. 1, 2011), *aff'g in part and rev'g in part mem. S.K. [Kamal] v. ITT Industries, Inc.*, 43 BRBS 78 (2009). Instead, a physician's opinion, like Dr. Ciuffardi's here, that a Claimant suffers psychological harm can serve as substantial evidence to support an award. *Id.* The majority's unexplained implication that there must be something more formal to establish what at various times it terms a "compensable psychological injury" or "actual psychological condition" thus misconstrues the concept of harm as applied to emotional injuries under the Act.

[18] An employer is liable for reasonable and necessary medical treatment of a claimant's work-related condition. *Pietrunti*, 119 F.3d 1035, 31 BRBS 84(CRT); *Kelley v. Bureau of Nat'l Affairs*, 20 BRBS 169 (1988). In this case, compensable treatment

encompasses all reasonable and necessary treatment for Claimant's sleep disorder. 33 U.S.C. §907(a); 20 C.F.R. §§702.401(a), 702.402; *see Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979); *see generally Kamal*, 43 BRBS at 79-80. To the extent Dr. Ciuffardi treated/treats this condition, regardless of whether she considers it under a PTSD diagnosis, Employer is liable. Employer is not liable for psychological treatment for anything other than Claimant's sleep disorders.