

## Evaluation and Weighing of Medical Opinion Evidence in Longshore Cases

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[This article is also scheduled to be published in the Benefits Review Board Service Longshore Reporter (April 2015). It was prepared by Ms. Zaslavskaya in her capacity as a member of the Advisory Board of the BRBS Longshore Reporter, and it does not constitute the official opinion of the Department of Labor or the Office of Administrative Law Judges.]

This paper highlights some of the considerations relevant to the determination of the probative value and relative evidentiary weight of medical opinions.<sup>1</sup> As a trier-of-fact, an administrative law judge (ALJ) is entitled to evaluate the credibility of all witnesses and to weigh the evidence and draw his or her own inferences and conclusions therefrom.<sup>2</sup> In so doing, the ALJ is not bound to accept the opinion or theory of any particular medical examiner but may, instead, draw his or her own inferences and conclusions from the evidence.<sup>3</sup> Further, it is solely within the discretion of the ALJ to accept or reject all or any part of any testimony according to his or her judgment.<sup>4</sup> The Benefits Review Board must affirm a decision if the findings of the ALJ are supported by substantial evidence in the record considered as a whole, if they are rational, and if the decision is in accordance with law.<sup>5</sup> Substantial evidence has been defined as

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<sup>1</sup> For more information on this topic and pertinent case law, see Parts XXIV, XXV, and XXVI of the BRB's *Longshore Deskbook*. Available at: [http://www.dol.gov/brb/References/Reference\\_works/lhca/lodesk/main.htm](http://www.dol.gov/brb/References/Reference_works/lhca/lodesk/main.htm).

<sup>1</sup> See *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), cert. denied, 372 U.S. 954, 9 L.Ed. 2d 978, 83 S. Ct. 950 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Pittman Mechanical Contractors, Inc. v. Director*, OWCP, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994).

<sup>2</sup> See *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), cert. denied, 372 U.S. 954, 9 L.Ed. 2d 978, 83 S. Ct. 950 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Pittman Mechanical Contractors, Inc. v. Director*, OWCP, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994).

<sup>3</sup> *Id.*; *Hice v. Director*, OWCP, 48 F. Supp. 2d 501, 504 (D. Md. 1999) (The ALJ is not required to give determinative weight to the opinion of any particular physician, including the treating doctor, but may examine the logic or lack thereof behind the physician's conclusion).

<sup>4</sup> *Perini Corp. v. Heyde*, 306 F. Supp. 1321, 1327-1328 (D.R.I. 1969). See also *Poole v. National Steel & Shipbuilding Co.*, 11 BRBS 390 (1979); *Grimes v. George Hyman Constr. Co.*, 8 BRBS 483 (1978), *aff'd mem.* 600 F.2d 280 (D.C. Cir. 1979) (ALJ acted within his authority in choosing between conflicting medical opinions); *Tyson v. John C. Grimberg Co., Inc.*, 8 BRBS 413 (1978) (same).

<sup>5</sup> *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, 467, 201 L. Ed. 2d 30, 37, 88 S. Ct. 1140, 1145, *reh'g denied*, 391 U.S. 929, 20 L. Ed. 2d 671, 88 S. Ct. 1800 (1968); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 361-362, 13 L. Ed. 2d 895, 897-898,

“more than a mere scintilla,” or “such relevant evidence that a reasonable mind might accept as adequate to support a conclusion.”<sup>6</sup> Further, the Board will not interfere with credibility determinations unless they are “inherently incredible or patently unreasonable.”<sup>7</sup>

## Legal sufficiency

When a medical opinion is proffered in support of a proposition, it must be determined whether the opinion is legally sufficient to support the proposition. For example, in determining causation, case law prescribes the following framework of shifting burdens:<sup>8</sup>

Claimant’s prima facie case: In order for § 20(a) presumption of compensability to arise (33 U.S.C.S. § 920(a)), claimant must establish a *prima facie* case by proving that he or she suffered some harm or pain and that working conditions existed or an accident occurred which could have caused the harm or pain. Claimant is not required to introduce affirmative medical evidence establishing that the working conditions in fact caused the alleged harm.

Employer’s rebuttal: If claimant succeeds, § 20(a) places the burden on the employer to go forward with substantial countervailing evidence to rebut the presumption that the injury was caused by claimant’s employment. Employer’s burden is one of production, not one of persuasion; once employer produces substantial evidence of the absence of a causal relationship, the § 20(a) presumption is rebutted.<sup>9</sup> Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate” to support a conclusion.<sup>10</sup> Thus § 20(a) is not rebutted by “any” evidence; it must be substantial.<sup>11</sup> When aggravation of or contribution to a

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85 S. Ct. 1012, 1014 (1965); *O’Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 95 L. Ed. 483, 71 S. Ct. 470 (1951); *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469, 474, 91 L. Ed. 1028, 1034, 67 S. Ct. 801, 805 (1947). The standard of review for the court of appeals is the same as that used by the Board. *Presley v. Tinsley Maintenance Service*, 529 F.2d 433, 436, 3 BRBS 398 (5th Cir. 1976).

<sup>6</sup> *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 95 L. Ed. 456, 462, 71 S. Ct. 456, 459 (1951); *Abosso v. D. C. Transit System, Inc.*, 7 BRBS 47 (1977).

<sup>7</sup> *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911, 59 L. Ed. 2d 459, 99 S. Ct. 1223 (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. (Roberson)*, 620 F.2d 60, 12 BRBS 344 (5th Cir. 1980).

<sup>8</sup> For a detailed discussion of the relevant case law, see Parts XXV of the BRB’s *Longshore Deskbook*.

<sup>9</sup> *See, e.g., Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *American Grain Trimmers, Inc. v. OWCP (Janich)*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187, 146 L. Ed. 2d 98, 120 S. Ct. 1239 (2000).

<sup>10</sup> *See, e.g., Rainey*, 517 F.3d at 637 (quoting *Richardson v. Perales*, 402 U.S. 389, 401, 28 L. Ed. 2d 842, 91 S. Ct. 1420 (1971)); *American Grain Trimmers*, 181 F.3d at 818, 33 BRBS at 76(CRT); *Sprague v. Director, OWCP*, 688 F.2d 862, 15 BRBS 11(CRT) (1st Cir. 1982), *aff’g* 13 BRBS 1083 (1981).

<sup>11</sup> *See, e.g., Rainey*, 517 F.3d 632, 42 BRBS 11(CRT) (Rejection of vague and speculative evidence is appropriate); *American Grain Trimmers*, 181 F.3d 810, 33 BRBS 71(CRT) (To

pre-existing condition is alleged, the § 20(a) presumption applies, and in order to rebut it, employer must establish that claimant's condition was not caused or aggravated by the employment. In such cases, a medical opinion that does not address the aggravation claim is legally insufficient to overcome the presumption.<sup>12</sup>

A growing body of case law warns against excessively elevating employer's burden on rebuttal.<sup>13</sup> The Board and several Circuits have held that employer need not "rule out" the possibility that there was a causal connection in order to rebut the presumption.<sup>14</sup> The opinion of

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establish rebuttal, employer had to introduce evidence that, if believed, would have supported a finding in its favor; employer's medical expert's testimony was so qualified and speculative that it did not, even taking it at face value, rebut the presumption).

<sup>12</sup> See, e.g., *Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 44 BRBS 13(CRT) (1st Cir. 2010) (Evidence legally insufficient for rebuttal where doctors addressed whether there was a connection between claimant's working conditions and his underlying osteoarthritis, but not his pain).

<sup>13</sup> See *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir. 2003), cert. denied, 540 U.S. 1056, 157 L. Ed. 2d 711, 124 S. Ct. 825 (2003) (To rebut the presumption, employer need only submit substantial evidence that the injury was not work-related; requiring medical opinions that "affirmatively state" or "unequivocally state" creates a higher evidentiary standard than that stated in the statute); *Ceres Gulf, Inc. v. Director, OWCP (Plaisance)*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012) (On rebuttal, employer cannot be made to "demonstrate" the absence of a causal connection; the BRB's "demonstrate" requirement heightens the substantial evidence standard by making the employer prove the deficiency in claimant's *prima facie* case, when all it must do is advance evidence to throw factual doubt on the *prima facie* case; evidence supporting an alternative cause of hearing loss is sufficient to rebut); *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 651, 44 BRBS 47, 50(CRT) (9th Cir. 2010) (Weighing of credibility has no proper place in determining whether employer met its burden of production on rebuttal; instead, ALJ's task is to decide, as a legal matter, whether employer submitted evidence that could satisfy a reasonable fact-finder that claimant's injury was not work-related); *Bath Iron Works*, 599 F.3d at 55, 44 BRBS at 17(CRT) (The rebuttal analysis is an "objective test" which requires employer to produce the degree of evidence which could satisfy a reasonable fact-finder of non-causation; the determination that the employer has or has not produced sufficient evidence is a legal judgment and is not dependent on credibility); *Truczinskas v. Director, OWCP*, 699 F.3d 672, 46 BRBS 85(CRT) (1st Cir. 2012) (At the rebuttal stage, the credibility of the witnesses is not in issue; the requirement that employer identify "substantial evidence" to rebut the presumption merely requires evidence that could satisfy a reasonable fact-finder that the employee's death was attributable to a cause not covered under the Act); see also *Leone v. Sealand Terminal Corp.*, 19 BRBS 100 (1986) (The conclusion that an opinion is "unpersuasive" is not relevant to rebuttal if it disproves causation).

<sup>14</sup> In *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 298, 23 BRBS 22(CRT), 24 (11th Cir. 1990), the Eleventh Circuit stated that the presumption was not rebutted because "none of the physicians expressed an opinion ruling out the possibility that there was a causal connection between the accident and Brown's disability." Subsequent BRB and court decisions have disapproved a "ruling out standard," holding that employer need not "rule out" the possibility of a causal connection in order to rebut the presumption. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000) (In a case arising in 11th Circuit, the Board held that a physician's testimony

a physician, given to a reasonable degree of medical certainty, that no relationship exists between an injury and an employee's employment is sufficient to rebut the presumption.<sup>15</sup>

Weighing evidence as a whole: If the employer rebuts the § 20(a) presumption, the claimant must establish causation by a preponderance of the evidence.<sup>16</sup>

## Drawing inferences

As stated above, ALJs are entitled to draw inferences and conclusions from the evidence. As a fact-finder, the ALJ is entitled to consider all credible inferences.<sup>17</sup> As the Fifth Circuit observed, “[t]hat the facts may permit diverse inferences is immaterial. The [ALJ] alone is charged with the duty of selecting the inference which seems most reasonable and his choice, if supported by the evidence, may not be disturbed.”<sup>18</sup> Further, the ALJ may draw an adverse

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regarding the lack of a causal nexus, rendered to a reasonable degree of medical certainty, is sufficient to rebut the presumption; the doctor's statement regarding “possibilities” reflects his opinion that in the medical profession there is no absolute certainty); *Conoco, Inc. v. Director, OWCP (Prewitt)*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Bath Iron Works Corp. v. Director, OWCP (Shorette)*, 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997). Thus, employer meets its burden with evidence demonstrating the absence of a causal relationship and need not prove another agency of causation to rebut the presumption. *See, e.g., O'Kelley*, 34 BRBS 39; *Stevens v. Todd Pacific Shipyards*, 14 BRBS 626 (1982), *aff'd mem.*, 722 F.2d 747 (9th Cir. 1983), *cert. denied*, 467 U.S. 1243, 82 L. Ed. 2d 823, 104 S. Ct. 3515 (1984); *Champion v. S & M Traylor Brothers*, 14 BRBS 251 (1981), *rev'd and rem.*, 690 F.2d 285, 15 BRBS 33(CRT) (D.C. Cir. 1982).

<sup>15</sup> *See O'Kelley*, 34 BRBS 39; *see also Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 618, 33 BRBS 1(CRT), 3 (9th Cir. 1999), *aff'g* 31 BRBS 98 (1997).

<sup>16</sup> *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 129 L. Ed. 2d 221, 114 S. Ct. 2251, 28 BRBS 43(CRT) (1994), rejected the rule that all factual doubts must be resolved in claimant's favor (the “true doubt” rule).

<sup>17</sup> *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91, 24 BRBS 46(CRT) (5th Cir. 1990).

<sup>18</sup> *Presley*, 529 F.2d at 436; *see also Todd Shipyards*, 300 F.2d 741; *Hullinger Industries, Inc. v. Carroll*, 650 F.2d 750, 759, 14 BRBS 373, 380 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163, 71 L. Ed. 2d 319, 102 S. Ct. 1037 (1982) (“[ALJ] is not bound to accept the opinion of any particular medical expert; he is entitled to weigh the medical evidence including the relative credibility of the competing experts and to draw from that evidence the inferences he deems most reasonable in light of the evidence as a whole and the common sense of the situation.”); *Hall v. Consolidated Employment Sys., Inc.*, 139 F.3d 1025, 1029, 32 BRBS 91(CRT) (5th Cir. 1998) (The requirement of substantial evidence is less demanding than that of preponderance of the evidence, and the ALJ's decision need not constitute the sole inference that can be drawn from the facts); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991), *rev'g in part* 19 BRBS 15 (1986); *Plaquemines Equipment & Machine Co. v. Neuman*, 460 F.2d 1241, 1242 (5th Cir.), *cert. denied*, 409 U.S. 914, 34 L. Ed. 2d 175, 93 S. Ct. 232 (1972) (sustaining credibility determination which was “tenuous, credulous and unwise,” but corroborated by substantial evidence). *See also Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994) (The Board must accept the ALJ's findings even where it believes that a finding is not the more reasonable of two opposite inferences, as long as it is

inference against a party who fails to submit evidence within its control.<sup>19</sup> Conversely, an inference not supported by substantial evidence will not stand up on appeal.<sup>20</sup>

### **Discretion to credit all or part of any witness's testimony; claimant's credibility**

As stated above, it is solely within the discretion of the ALJ to accept or reject all or any part of any testimony according to his or her judgment. A judge is not bound to render an opinion consonant only with testimony of doctors if rational inferences lead in the other direction.<sup>21</sup> The leading workers' compensation treatise recognizes potential tension between medical opinion evidence and the fact-finder's assessment of other evidence in the record and/or claimant's credibility. *See* 12-128 *Larson's Workers' Compensation Law* § 128.01; *id.* at §§ 128.02-128.03 (Discussing awards without definite medical testimony and awards contradicting medical testimony, whether dealing with causation or extent of disability, in state-level workers'

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supported by substantial evidence); *Pittman*, 35 F.3d 122, *aff'g sub nom. Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993) (ALJ's findings may not be disregarded on the basis that other inferences might have been more reasonable).

<sup>19</sup> *Cioffi v. Bethlehem Steel Corp.*, 15 BRBS 201 (1982) (Adverse inference drawn against employer where employer had claimant examined by a physician of its choice and failed to submit the doctor's report); *Hansen v. Oilfield Safety, Inc.*, 8 BRBS 835, *aff'd on recon.*, 9 BRBS 490 (1978), *aff'd sub nom. Oilfield Safety & Machine Specialties, Inc. v. Harman Unlimited, Inc.*, 625 F.2d 1248, 14 BRBS 356 (5th Cir. 1980).

<sup>20</sup> In *Calbeck*, 306 F.2d 693, the Fifth Circuit stated that, although findings of triers of fact who reached conclusions contrary to the weight of the medical testimony could be upheld, the award of death benefits was not supported by substantial evidence. Claimant's medical expert's testimony that exposure to fertilizer hastened employee's death from lung cancer "was uncertain and contradictory," "was based upon surmise and conjecture," and "was the result of piling presumption upon presumption and drawing inference from inference." *Id.* at 696. Doctors who examined the employee testified as to the absence of a causal relationship.

<sup>21</sup> *See Heyde*, 306 F. Supp. 1321 (Affirming the award of temporary total disability (TTD) benefits, where all medical experts agreed claimant was able to do light work, but the deputy commissioner credited claimant's uncontradicted testimony as to his incapacity and inability to find work, and employer did not show suitable alternate employment); *Todd Shipyards*, 300 F.2d at 742 ("[I]f the issue is one of disability, the testimony of laymen who may have observed a claimant over a long period of time at any hour of the day may be more trustworthy than medical testimony. If the issue is one of causal relationship, medically, between injury and employment, medical testimony may be more trustworthy than lay testimony; still, fact-finders are not bound to decide according to doctors' opinions if rational inferences lead in the other direction."); *Avondale Indus., Inc. v. Director, OWCP (Cuevas)*, 977 F.2d 186, 189, 26 BRBS 111(CRT) (5th Cir. 1992) (In affirming determination of responsible employer in a hearing loss case, the court stated that the judge is not required to accept the opinion or theory of a medical expert that contradicts the findings of the adjudicator which are based on common sense); *Ennis v. O'Hearne*, 223 F.2d 755, 758 (4th Cir. 1955) (Fact-finder is permitted to disregard medical testimony and rely upon his or her own observation of claimant and other evidence before him or her in making a decision; however, the record contained no evidence to support ALJ's finding that claimant recovered from his injury).

compensation cases); *id.* at § 128.03 (Stating that cases where “a conclusion supported by no medical testimony may stand in defiance of medical testimony to the contrary” represent relaxation of the general rule); § 128.04 (*Reasons for Relaxing Rule*); § 128.05 (*When Medical Testimony Indispensable*);<sup>22</sup> *see also* 100A C.J.S. Workers’ Compensation § 1101 (*Expert Medical Opinions*) (collecting cases). By the same token, the judge may rely upon his or her personal observation and judgment to resolve conflicts in the medical opinion evidence.

At the same time, the ALJ must assess the weight to be accorded to the medical evidence of record, without substituting his or her judgment for that of the physicians. *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997);<sup>23</sup> *S.K. [Kamal] v. ITT Industries, Inc.*, 43 BRBS 78 (2009), *aff’d in part and rev’d in part mem.*, No. 4:09-MC-348, 2011 U.S. Dist. LEXIS 21721 (S.D. Tex. Mar. 1, 2011). This principle appears most prominently in psychological injury cases involving the issue of claimant’s credibility. *Id.*<sup>24</sup> In *Pietrunti*, the court held that the ALJ improperly substituted his own medical judgment for that of uncontradicted medical record in denying compensation for future psychiatric treatment. The ALJ’s finding that claimant’s symptoms were subjective and not credible ignored testimony of several doctor-witnesses, almost two years of medical records documenting claimant’s illness, and claimant’s continued treatment on powerful anti-depressant.<sup>25</sup> More generally, *Pietrunti*

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<sup>22</sup> Stating that “reliance on lay testimony and administrative *expertise* is not justified when the medical question is no longer an uncomplicated one and carries the factfinders into realms that are properly within the province of medical experts.” *Id.* at § 128.05 (Citation omitted; emphasis in original).

<sup>23</sup> The court stated that ALJ “cannot arbitrarily substitute his own judgment for competent medical evidence.” *Id.* at 1042 (quoting *McBrayer v. Secretary of Health & Human Svcs.*, 712 F.2d 795, 798 (2d Cir. 1983)).

<sup>24</sup> *See also Walkley v. Service Employees Int’l, Inc.*, BRB No. 09-0573 (Apr. 23, 2010) (unpub.) (ALJ erred in finding no *prima facie* case; ALJ improperly substituted his judgment for that of medical professionals in concluding claimant does not have PTSD under the DSM-IV criteria; ALJ ignored the fact that a mental health expert has evaluated claimant’s subjective complaints and arrived at a diagnosis; ALJ “is not free to independently evaluate claimant’s subjective reportings to the physicians and substitute his own interpretation;” while employer’s expert denied PTSD, ALJ did not rely on his opinion); *Huffman v. Stevedoring Services of Am.*, BRB No. 99-0102 (Sept. 20, 1999) (unpub.) (On remand, ALJ stated that “Dickensian result from the Board’s exegesis is an award of benefits to a Claimant whose mendacity cannot be reasonably disputed;” BRB responded by stating that “the award of benefits here is the result of employer’s failure to defend a psychological injury claim with any medical evidence” and that it did not interfere with the ALJ’s determinations that claimant and his lay witnesses are not credible, but rather held that notwithstanding those credibility determinations, the ALJ was not entitled to disregard uncontradicted medical evidence); *Wells v. Dep’t of the Navy/NAF*, BRB No.03-0272 (Oct. 31, 2003) (unpub.) (Claimant’s depression is work-related where employer offered no contrary evidence; ALJ erred in finding no *prima facie* element of harm; it is the role of the medical experts to evaluate the sincerity of claimant’s symptoms, and both doctors agreed she had symptoms; both doctors diagnosed psychiatric disorder and surveillance did not contradict several reported symptoms).

<sup>25</sup> The court observed that “as the Seventh Circuit recently noted in *Wilder v. Chater*, 64 F.3d 335, 337 (7th Cir.1995), ‘severe depression is not the blues. It is a mental health illness; and

provides a reminder that, in all cases, caution must be exercised when characterizing claimant's reported symptoms as "subjective" and/or "not credible," or when characterizing medical opinions as based solely on subjective reporting, as any such findings must be supported by the evidence.<sup>26</sup>

Further, because an ALJ may accept or reject all or any part of a witness's testimony,<sup>27</sup> the ALJ can base one finding on a physician's opinion and, then, on a different issue, find contrary to the same physician's opinion on that issue.<sup>28</sup>

### **Well-reasoned and well-documented opinion; evaluating medical opinions in light of other evidence of record**

The Fourth Circuit, in particular, has emphasized that, in considering medical opinions of record, an ALJ must examine the logic of a physician's conclusions and the evidence upon which

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health professionals, in particular psychiatrists, not lawyers or judges, are the experts on it." *Id.* at 1044.

<sup>26</sup> See, e.g., *Meeks v. BIS Salamis, Inc.*, BRB No. 13-0478 (July 29, 2014) (unpub.). In *Meeks*, the BRB reversed the ALJ's findings that claimant's spinal conditions were not aggravated by work incident, that he was able to return to work, and that he did not establish the necessity of treatment for his "pain." ALJ discredited claimant's complaints of pain, based on claimant's tax evasion and criminal history, which he attempted to conceal, his denial of prior injuries, and surveillance evidence. The ALJ also rejected medical opinions that he found to be based on claimant's subjective complaints. The BRB stated that, in this case, ALJ's finding that claimant's complaints of pain are not credible did not support the denial of compensation (noting ALJ did not reconcile this finding with claimant's decision to undergo multi-level back surgery). Citing *Pietruni*, the BRB stated that, considering ample objective findings of spinal harm, ALJ erred in finding that doctors' opinions were based solely on subjective complaints and therefore the § 20(a) presumption was not invoked. The BRB again cited *Pietruni* in holding that the ALJ impermissibly substituted his own opinion regarding the extent of claimant's disability for that of the physicians and vocational consultants. See also *Wayne v. Dillingham Ship Repair*, BRB No. 91-1085 (Mar. 30, 1993) (unpub.) (ALJ erred in substituting her judgment for that of the professionals on the issue of whether claimant suffers from back pain, either from physical or psychological causes; ample evidence, including back surgery, contradicted ALJ's finding of no abnormality; although no physician could find objective evidence of pain, and some providers found some feigning, none disbelieved some degree of pain). Cf. *Young v. Newport News Shipbuilding & Dry Dock Co.*, 45 BRBS 35 (2011) (ALJ did not err in finding that, despite claimant's non-credible testimony about his criminal conviction, his testimony regarding his knee pain and disability had been consistent for over 25 years and was credible).

<sup>27</sup> *Banks*, 390 U.S. at 467 (While some of the medical expert's testimony was arguably inconsistent with other parts of his testimony, the fact-finder may credit part of the witness' testimony without accepting it all); *Avondale Shipyards*, 914 F.2d at 91; see also *Heyde*, 306 F. Supp. 1321; *Mijangos*, 948 F.2d 941, 25 BRBS 78(CRT).

<sup>28</sup> *Pimpinella v. Universal Maritime Service, Inc.*, 27 BRBS 154 (1993) (ALJ did not err in relying on a doctor's opinion to deny disability benefits after having rejected that doctor's opinion in finding causation established; causation and disability are separate issues and ALJ may accept or reject all or any part of any witness's testimony according to his or her judgment).

those conclusions are based, and evaluate the physician's opinion in light of the other evidence in the record.<sup>29</sup>

A well-reasoned and documented opinion may be entitled to greater evidentiary weight. A "documented" opinion sets forth the clinical findings, observations, facts, and other data upon which the physician based the opinion. *See generally Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987). A "reasoned" opinion is one in which the ALJ finds the underlying documentation and data adequate to support the physician's conclusions. *Id.* Recent Board decisions highlight these important concepts. In *Jackson v. Ceres Marine Terminals, Inc.*, 48 BRBS 71 (2014), the Board affirmed the ALJ's finding, based on the record as a whole, that claimant suffers from PTSD stemming from an incident when claimant, while operating a forklift, accidentally struck and killed a fellow employee; the award of TTD benefits was also affirmed. The Board concluded that the ALJ properly found that the opinions of claimant's treating psychologist, Dr. Newfield, and of employer's own psychiatric expert, Dr. Thrasher, that claimant suffers from disabling PTSD resulting from the work accident, outweighed the contrary opinion of Dr. Mansheim, DOL independent medical examiner.<sup>30</sup> The ALJ "appropriately examined the logic of Dr. Mansheim's conclusions and evaluated the evidence upon which they were based, and he found the physician's opinion to have a questionable basis."<sup>31</sup> Specifically, the ALJ rationally accorded Dr. Mansheim's "opinion less weight based on the limited nature of the doctor's contact with claimant and the [ALJ's] concerns regarding one of the premises for the doctor's view that claimant does not have PTSD, and, less significantly, on the doctor's reliance on a standardized personality assessment inventory administered to claimant."<sup>32</sup> The ALJ properly

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<sup>29</sup> *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. (Carmines)*, 138 F.3d 134, 140 & n.5, 32 BRBS 48(CRT), 52 & n.5 (4th Cir. 1998) (ALJ may not merely credulously accept a physician's assertions, but must examine the logic of the physician's conclusions and evaluate the evidence upon which those conclusions are based); *see also Newport News Shipbuilding & Dry Dock Co. v. Ward*, 326 F.3d 434, 441-442 & n.4, 37 BRBS 17(CRT), 22 & n.4 (4th Cir. 2003); *Newport News Shipbuilding & Dry Dock Co. v. Winn*, 326 F.3d 427, 433, 37 BRBS 29(CRT), 33 (4th Cir. 2003); *see also Jackson v. Ceres Marine Terminals, Inc.*, 48 BRBS 71 (2014). *See generally Gunderson v. U.S. Dep't of Labor*, 601 F.3d 1013, 1024 (10th Cir. 2010) (In a BLA case, the court stated that, when confronted with conflicting expert opinions, an ALJ is required to give careful consideration to many factors, including the qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses; the ALJ's task is not to resolve general scientific controversies, but instead to determine the facts of the case at hand and apply the law accordingly).

<sup>30</sup> *See* 33 U.S.C.S. § 907(e).

<sup>31</sup> Slip op. at 8 (citing *Winn*, 326 F.3d at 433, 37 BRBS at 33(CRT)).

<sup>32</sup> The Board elaborated that:

"Moreover, the [ALJ] properly examined the logic of Dr. Mansheim's opinion that claimant does not meet the criteria for a PTSD diagnosis, and rationally found that the doctor did not adequately support his opinion. . . . Specifically, Dr. Mansheim testified on deposition that the work incident does not qualify as a traumatic event under the PTSD diagnostic criteria. . . . Dr. Mansheim reasoned in this regard that if every person who was 'presented with that sort of image were diagnosed with post-traumatic stress disorder, more than half the population would meet the criteria for the diagnosis.' . . . The



accorded greater weight to the opinion of Dr. Newfield, which he found to be supported by Dr. Thrasher's opinion and by claimant's credible complaints.<sup>33</sup> The ALJ found that both credited doctors provided well-reasoned and well-documented reports explaining their respective opinions.<sup>34</sup>

In determining the probative value or relative evidentiary weight to be given to a medical opinion, the ALJ may consider both its internal consistency<sup>35</sup> and external consistency with the other evidence of record.<sup>36</sup> If an apparent inconsistency is adequately explained by the expert to the ALJ's satisfaction, the opinion may be given full evidentiary weight.<sup>37</sup> Medical opinions that are determined to be better supported by the objective evidence of record (e.g., medical tests, clinical findings) may be given greater weight.<sup>38</sup> The timing of the evidence may also be

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[ALJ] reasonably exercised his discretion as trier-of-fact to question the logic of Dr. Mansheim's rationale, and correctly observed that the doctor offered no evidence to support his assumption that more than half the population has witnessed an image as traumatic as that experienced by claimant."

Slip op. at 8, n.8 (citations to record omitted). Further, the ALJ did not abuse his discretion in according slightly less weight to Dr. Mansheim's opinion based on the doctor's reliance on the computer-graded results of the standardized personality assessment inventory which had not been interpreted.

<sup>33</sup> The BRB noted that, contrary to employer's assertion that the ALJ failed to address claimant's credibility, the ALJ specifically found that claimant's complaints were credible and that claimant gave consistent accounts of both the work-related accident and his psychological symptoms. *Id.* at 10 n.9.

<sup>34</sup> *Id.* at 10 (citing *Kamal*, 43 BRBS 78).

<sup>35</sup> *See, e.g., Calbeck*, 306 F.2d at 696 (Award of death benefits unsupported by substantial evidence where claimant's medical expert's testimony was "uncertain and contradictory").

<sup>36</sup> *See, e.g., Hughes*, 289 F.2d at 405 (Deputy commissioner properly resolved the dispute in the testimony of the medical experts in favor of the claimant; this resolution was supported by the non-expert testimony of the claimant and his daughter, and was not so inherently improbable that it was unworthy of belief as a matter of law).

<sup>37</sup> *See, e.g., Ogawa*, 608 F.3d at 649-650. In *Ogawa*, the court rejected employer's contention that the ALJ erred in crediting Dr. Keller's report because the doctor admitted to strengthening the conclusions in his revised report after he talked to claimant's attorney. The ALJ's reasons for crediting Dr. Keller's explanation about the changes to his report were not "inherently incredible" or "patently unreasonable" – the ALJ accepted Dr. Keller's testimony at trial that he changed the language to more accurately reflect his opinion, but did not change the substance of his opinion because he was unfamiliar with how medical reports are used in litigation.

<sup>38</sup> *See generally Flanagan v. McAllister Brothers, Inc.*, 33 BRBS 209 (1999) (In finding that claimant suffers from work-related asbestosis, ALJ rationally credited medical opinion that claimant suffers from restrictive lung disease secondary to asbestos exposure as it was predicated on the credited x-ray reading and pulmonary function studies); *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000) (In concluding that claimant's hearing loss was unrelated to his employment based on the record as a whole, it was within ALJ's discretion to rely on the medical opinion that claimant's hearing loss was not due to noise, as opposed to the contrary opinions of examiners who did not review all the audiograms of record and did not discuss other factors such as non-noise notch audiogram patterns, speech receptions thresholds and speech

significant in some cases;<sup>39</sup> e.g., more recent evidence may sometimes be deemed more probative. In appropriate cases, the ALJ may also give greater weight to the opinion of a doctor who performed a more thorough (and/or more recent) examination. See “*Treating physician*,” discussion *infra*. Negative evidence also may be considered.<sup>40</sup>

Where physicians of record disagree as to the applicable diagnostic criteria, or offer competing interpretation of objective criteria or medical data, the choice between the conflicting opinions is within ALJ’s discretion, as long as it is supported by substantial evidence.<sup>41</sup> A finding that a medical opinion is based on a discredited theory undermines its probative weight.<sup>42</sup>

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discrimination results); see also *Wright v. Connolly-Pacific Co.*, 25 BRBS 161 (1991), *aff’d mem. sub nom. Wright v. Director, OWCP*, 8 F.3d 34 (9th Cir. 1993) (ALJ’s finding of supervening cause was supported by a doctor’s testimony, objective medical data, and the fact that claimant was capable of working until the incident). Cf. *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986) (in a BLA case, stating that it is error for an ALJ to interpret medical tests and thereby substitute his/her conclusions for those of the physician); *Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984) (same).

<sup>39</sup> See, e.g., *Hensley v. Washington Metropolitan Area Transit Authority*, 655 F.2d 264, 13 BRBS 182 (C.A.D.C. 1981), *cert. denied*, 456 U.S. 904, 72 L. Ed. 2d 160, 102 S. Ct. 1749 (1982) (For purpose of job relatedness, testimony of two treating physicians is normally entitled to greater weight than the testimony of one physician who examines a claimant only once, many months later).

<sup>40</sup> See, e.g., *Holmes v. Universal Maritime Service Corp.*, 29 BRBS 18 (1995) (Decision on Recon.) (In affirming ALJ’s determination that claimant’s 1985 condition was not caused by his 1979 work injury, BRB noted that this case contained an unequivocal medical opinion of no causation, a rational credibility determination crediting that doctor, and negative evidence of the absence of back pain for six years following the initial injury); see generally BRB’s Longshore Deskbook, Part XXV (discussing use of “negative” evidence).

<sup>41</sup> See generally *Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff’d mem.*, 202 F.3d 259 (4th Cir. 1999) (table). In *Parks*, the BRB affirmed the ALJ’s award of death benefits, holding that the ALJ rationally credited medical opinions that decedent did have asbestosis as a result of his work-related exposure to asbestos which was a substantial contributing factor to his ultimately fatal lung cancer. The ALJ acted within his discretion in giving less weight to the opinion of another doctor based on the ALJ’s finding that this doctor applied objective criteria in an overly rigid manner in determining whether decedent had asbestosis under the CAP/NIOSH criteria. In weighing this evidence, the ALJ looked at the premises supporting the opposing opinions and elected between the two distinct scientific interpretations to determine the medical evidence necessary to establish a causal connection between asbestos exposure and cancer. See also *Mixon v. Willard*, 120 F. Supp. 232 (S.D.N.Y. 1954) (The limits of cross-examination to impeach medical expert witness by using other authorities in the field was within discretion of deputy commissioner).

<sup>42</sup> See *Rainey*, 517 F.3d 632, 42 BRBS 11(CRT) (§ 20(a) presumption not rebutted by an opinion based on the medical theory that lung cancer develops not from asbestos but rather from the scarring caused by asbestosis, a theory that ALJ found had been widely discredited by the medical community); cf. *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990) (Regardless of the absence of a definitive study regarding the relationship between certain chemicals and claimant’s type of cancer, the opinions of physicians that, based upon existing

Several considerations may warrant giving medical opinions less weight, or rejecting them altogether. A medical opinion may be rejected if it has no clear basis, lacks an evidentiary foundation,<sup>43</sup> or relies on a faulty factual premise.<sup>44</sup> Similarly, failure to consider relevant evidence may diminish a medical opinion's probative value.

A physician's failure to adequately explain his or her conclusions undermines the opinion's probative value.<sup>45</sup> Further, a medical opinion that is based on hypothetical possibilities or generalities, rather than on the evidence specific to claimant, may be discounted.<sup>46</sup> Indeed, in several cases, the Board has held that mere hypothetical probabilities or speculation are

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scientific evidence, claimant's cancer is not related to his exposure to hazardous chemicals are a result of their professional assessment of the current available scientific evidence regarding the cause of claimant's injury and therefore are adequate to constitute specific and comprehensive evidence sufficient to rebut the § 20(a) presumption).

<sup>43</sup> See, e.g., *Hice*, 48 F. Supp. 2d 501 (Affirming denial of benefits for a heart attack based on weighing evidence as a whole; ALJ properly relied on the opinion of employer's expert and found the opinion of claimant's treating doctor less persuasive, as not supported by the relevant facts); *American Grain Trimmers, Inc.*, 181 F.3d 810, 33 BRBS 71(CRT) (Employer failed to rebut the § 20(a) presumption; although the doctor stated that decedent's work did not cause his death, he did not know what work the decedent had been performing).

<sup>44</sup> See, e.g., *Rainey*, 517 F.3d 632, 42 BRBS 11 (ALJ/BRB erred in finding § 20(a) presumption rebutted where ALJ had rejected the reasoning underlying the medical report she relied on; ALJ explicitly discounted that aspect of the opinion, as derived from a false factual premise concerning the nature and extent of claimant's asbestos exposure and as depending on discredited medical theories); *Compton v. Pennsylvania Avenue Gulf Service Center*, 14 BRBS 472 (1981) (§ 20(a) presumption not rebutted where employer's doctor had inadequate information on the amount of employee's past exposure to benzene and employer failed to show that employee's level of exposure could not or did not cause leukemia); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990) (In finding the § 20(a) presumption unrebutted, ALJ rationally discredited physician who relied on the erroneous assumptions that the specific incident at work did not occur and that claimant was doing the same work for employer for her entire period of employment).

<sup>45</sup> *Winn*, 326 F.3d at 433, 37 BRBS at 33(CRT) (ALJ was entitled to discount evidentiary value of doctor's opinion, where the doctor neither authored nor explained the basis for his adoption of another physician's opinion at the request of employer's attorney); *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989) (§ 20(a) presumption not rebutted with respect to psychological injury stemming from a physical reaction caused by exposure to chemicals; ALJ properly rejected employer's expert's opinion which 1) failed to adequately explain why claimant's psychiatric condition was disabling only when she was around art materials; and 2) did not explain the accuracy with which claimant's symptoms matched those described by the relevant literature as characteristic effects of chemical exposure.)

<sup>46</sup> See, e.g., *Cotton v. Army & Air Force Exchange Services*, 34 BRBS 88 (2000) (It is within the ALJ's discretion to give more weight to the opinion of a doctor who was able to provide an explanation for the claimant's pain than to a doctor who could offer several possible theoretical reasons but could not relate the possible causes specifically to the claimant and did not have an independent recollection of her.)

insufficient to rebut the § 20(a) presumption.<sup>47</sup> Thus, the presumption was not rebutted where employer did not provide concrete evidence but merely suggested alternative ways that claimant's injury might have occurred, where there was no evidence of another cause, and where the medical evidence was inconclusive as to causation.<sup>48</sup>

Another relevant consideration is the ALJ's determination of the level of certainty and persuasiveness of a medical report or opinion. Thus, highly equivocal evidence is not substantial

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<sup>47</sup> *Smith v. Sealand Terminal, Inc.*, 14 BRBS 844 (1982) (Affirming ALJ's finding of no rebuttal where employer's doctor opined that decedent's death was probably not related to his employment, but admitted that he did not know the cause of death and work-related cause was at the top of the list of possibilities; employer's evidence amounted to a "mere hypothetical probability"); *Dower v. General Dynamics Corp.*, 14 BRBS 324 (1981) (Evidence which is inconclusive regarding causal connection between asbestos exposure and rectal cancer is insufficient to rebut the § 20(a) presumption; both testifying doctors agreed with a study that suggested, albeit did not conclusively establish, a causal link); *Taylor v. Smith & Kelly Co.*, 14 BRBS 489 (1981) (Evidence is insufficient to rebut the presumption that claimant's pain was due to his work-related fall where a doctor testified that there was no way to say that any current problems could not possibly be related to the fall and there was no way of ruling out the fall in any current pain); *Dixon v. John J. McMullen & Associates, Inc.*, 13 BRBS 707 (1981) (Where employer did not offer direct evidence to rebut § 20(a) presumption but only relied on speculative testimony of a medical witness, ALJ erred in finding rebuttal; the physician commented that it was extremely unusual for a patient to have upper back symptoms that were due to an underlying lower back problem and, thus, it was difficult to state with "absolute certainty" that work injury caused the lower back problem; however, he also stated that supporting claimant's theory that the injury caused the lower back problem was the fact that he had temporary relief of upper back pain following his back surgery); *see also Swinton v. J. Frank Kelly, Inc.*, 55 F.2d 1075, 1085, 4 BRBS 466 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 820, 50 L. Ed. 2d 81, 97 S. Ct. 67 (1976) (quoting *Steele v. Adler*, 269 F. Supp. 376, 379 (D.D.C. 1967) ("reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by the Act")).

<sup>48</sup> *Williams v. Chevron U.S.A., Inc.*, 12 BRBS 95 (1980) (Employer submitted no concrete evidence to rebut the presumption, rather, he merely suggested alternative ways that claimant's injury might have occurred; while there was a lack of consensus as to the diagnosis of claimant's back condition, the majority of the doctors did recognize that claimant was suffering from some type of back problem); *Eller & Co. v. Golden*, 620 F.2d 71, 12 BRBS 348 (5th Cir. 1980), *aff'g* 8 BRBS 846 (1978) (None of the doctors who examined claimant was able to say that his knee condition was not caused by the accident); *Gunter v. Parsons Corp. of California*, 6 BRBS 607 (1977), *aff'd sub nom. Parsons Corp. of California v. Director, OWCP*, 619 F.2d 38, 12 BRBS 234 (9th Cir. 1980) (Blinding disease was caused by exposure to toxic substances at work; employer's expert did not rule out the possibility of some causal connection though he limited the possibility as being very remote).

and will not rebut the § 20(a) presumption.<sup>49</sup> By contrast, a physician's unequivocal testimony regarding the lack of a causal nexus between claimant's employment and his or her harm, rendered to a reasonable degree of medical certainty, is sufficient to sever the causal relationship and rebut the § 20(a) presumption, even when the physician admits that in the medical profession there is no absolute certainty.<sup>50</sup> A finding that an opinion is "equivocal" or "unsupported and unpersuasive" must be explained.<sup>51</sup>

### **Numerical superiority; physician's credentials and specialized expertise**

An ALJ is not obligated to rule in favor of a party simply because his or her medical experts are more numerous or more highly trained.<sup>52</sup> At the same time, physician's credentials

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<sup>49</sup> *Dewberry v. Southern Stevedoring Corp.*, 7 BRBS 322 (1977), *aff'd mem.*, 590 F.2d 331, 9 BRBS 436 (4th Cir. 1978) (Highly equivocal expert testimony does not rebut presumption that heart damage was caused at least in part by work); *see also Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968) (*en banc*) (Claimant's medical expert testified urinating in the cold at work could have brought on heart attack in claimant with pre-existing arteriosclerosis, and employer's expert agreed; in the absence of an opinion based on reasonable medical probability that claimant's action was not the factor bringing on the heart attack, § 20(a) presumption was not rebutted); *cf. Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988) (Affirming ALJ's finding of no causation based on record as a whole; ALJ relied on one doctor who stated there is an absence of a causal relationship, and another doctor who stated that claimant's condition was "perhaps" related to a prior disease – the latter opinion, while insufficient for rebuttal purposes, may properly be considered in support of a finding that causation is not established). *See generally Arch Mineral Corp. v. Director, OWCP*, 798 F.2d 215, 222 (7th Cir. 1986) (A physician's opinion must be based on a "reasoned medical judgment," and ALJ decides if it is).

<sup>50</sup> *O'Kelley*, 34 BRBS 39 (Reversing ALJ's finding that employer failed to rebut § 20(a) presumption; the doctor's statement regarding "possibilities" reflects his opinion that in the medical profession there is no absolute certainty); *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001); *see generally Holmes v. Universal Maritime Service Corp.*, 29 BRBS 18 (1995) (Decision on Recon.). *See also Arends v. Service Employees Int'l, Inc.*, 47 BRBS 943 (ALJ) (2013) ("The term 'unequivocal' may be defined as: 'Clear, plain; capable of being understood in only one way, or as clearly demonstrated; free from uncertainty, or without doubt.' See Black's Law Dictionary. 'Unequivocal medical evidence' has been described as evidence produced by a competent medical expert who, with reasonable certainty, will give evidence of facts which, if accepted by the fact finder, will support an award.' *In re Dobrowsky*, 735 F.2d 90, 93 (3rd Cir. 1984).").

<sup>51</sup> *Leone*, 19 BRBS 100.

<sup>52</sup> *See, e.g., Avondale Shipyards*, 914 F.2d 88, 24 BRBS 46 (CRT). *Cf. Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22 (CRT) (5th Cir. 1994) (ALJ's finding of causation was patently unreasonable where ALJ relied on one doctor to the exclusion of six others and failed to note significant problems with the testimony of the credited doctor; ALJ's decision on remand finding no causation was affirmed); *Hensley*, 655 F.2d 264 (For purpose of job relatedness,

and specialized expertise (or lack thereof) may be considered in determining the opinion's evidentiary weight.<sup>53</sup> A physician's lack of specialized expertise generally will not preclude admission of the medical opinion addressing the issues presented by the case, but is relevant to the determination of the opinion's evidentiary weight. *See* 33 U.S.C.S. § 923(a); 20 C.F.R. § 702.339.<sup>54</sup>

### **AMA Guides and DSM**

It is well-established that the ALJ is not bound by any particular standard or formula and may base his or her determination of the extent of disability under the schedule on credible medical opinions and observations as well as claimant's testimony regarding the symptoms and the physical effects of the injury.<sup>55</sup> The Act (Longshore and Harbor Workers' Compensation Act, 33 U.S.C.S. § 901 *et seq.*) does not require impairment ratings based on medical opinions

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testimony of two treating physicians is normally entitled to greater weight than the testimony of one physician who examines a claimant only once, many months later). *See generally Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996) (Preponderance of the evidence standard is not a quantitative standard, but rather, it is a standard which denotes a superiority of weight -- the rule requires that the party having the onus must prove his or her position by more convincing evidence than the opposing party's evidence).

<sup>53</sup> *See generally Monta v. Navy Exchange Service Command*, 39 BRBS 104 (2005).

<sup>54</sup> *See Dower*, 14 BRBS 324 (Rejecting claimant's argument that ALJ erred in permitting physician to testify as an expert witness because he is an allergist specializing in chest diseases and does not possess the necessary expertise to opine on the relationship between asbestos exposure and cancer of the rectum; claimant's objection goes to the weight to be given to the doctor's testimony rather than its admissibility; ALJs are not bound by common law rules of evidence pursuant to § 23(a) and § 702.339; it was within ALJ's discretion to admit this testimony as both relevant and material to matters at issue and to determine the weight to be given to such testimony); *see also Casey v. Georgetown Univ. Med. Ctr.*, 31 BRBS 147 (1997) (§ 23(a) provides that the ALJ is not bound by formal rules of evidence in admitting and considering evidence; thus, ALJ had greater latitude to admit evidence than did the district court which, in hearing claimant's wrongful death claim, held the testimony of claimant's expert was inadmissible pursuant to Rules 702 and 703 of the Federal Rules of Evidence and the *Daubert* standard, as it lacked "scientific reliability;" ALJ had different evidence before him and was not required to give the district court's decision on the issue of causation collateral estoppel effect); *see generally Ogawa*, 608 F.3d 642, 44 BRBS 47 (Any error by ALJ in "decertifying" post-hearing employer's medical witness as an expert in cardiology was harmless, as ALJ discussed his opinion and provided numerous valid reasons why the doctor's opinion was not credible).

<sup>55</sup> *See, e.g., Cotton*, 34 BRBS 88; *Pimpinella*, 27 BRBS 154.

using the criteria of the *AMA Guides to the Evaluation of Permanent Impairment* except in compensating hearing loss and voluntary retirees. 33 U.S.C.S. §§ 902(10), 908(c)(13), (23).<sup>56</sup>

Further, in cases involving psychological injury, the Board has held that the Act does not require use of the *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed. (DSM-IV) in assessing whether a claimant has any particular psychological injury either in establishing a *prima facie* case or in proving the work-relatedness of an injury based on the record as a whole. *Kamal*, 43 BRBS at 79-80.<sup>57</sup> Accordingly, in *Kamal*, the Board rejected employer's argument that claimant failed to establish a psychological injury because his doctors did not analyze his condition using the DSM-IV. At the same time, if a physician bases a diagnosis on the criteria in the DSM-IV, then he or she must either support those elements<sup>58</sup> or adequately explain why deviation from the diagnostic criteria is appropriate under the facts presented.

### **Treating physician; DOL-appointed IME**

Whether a doctor is the claimant's treating physician is one factor to consider when resolving conflicts in medical opinion evidence. In *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), reported at 1998 U.S. App. LEXIS 33883, *amended* 164 F.3d 480, 32 BRBS

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<sup>56</sup> *Id.*; see generally *Jones v. I.T.O. Corp. of Baltimore*, 9 BRBS 583 (1979) (Affirming ALJ's application of a doctor's objective findings to the *AMA Guides*, and his rejection of the doctor's impairment rating; ALJ had properly used the *AMA Guides* as an interpretative device; that the *Guides* were not admitted into evidence was not problematic as it is a standard reference widely used by physicians in testimony before ALJ).

<sup>57</sup> In affirming this determination in *Kamal*, the U.S. District Court for the Southern District of Texas found no appellate court decision directly on point, but noted that the U.S. Supreme Court and the Fifth Circuit have cautioned against a strict application of the DSM-IV in other contexts; thus, the Supreme Court reasoned that science has not reached finality of judgment with respect to knowledge and therapy regarding mental disease, and also noted that the DSM-IV itself cautions against total reliance on its contents. The district court noted that "[this] ruling is in no way meant to diminish the importance of the DSM-IV in assessing the existence of psychiatric injury. The court only rules that the DSM-IV, a non-legal authority, is not binding and need not be referenced or have its criteria strictly applied in every decision made by an ALJ or the BRB." 2011 U.S. Dist LEXIS 21721, at \*36 n.122. At the same time, reversing the BRB, the court overruled the ALJ's finding that claimant suffered from PTSD (and corresponding award of medical benefits), as the credited medical opinions were unsupported by the evidence. One of the two physicians who diagnosed PTSD provided no opinion as to its cause. The second physician claimed to base his diagnosis of PTSD on the DSM-IV, but failed to state why the requirement of actual or threatened physical harm was unnecessary to his diagnosis. The court stated that "if a physician explicitly claims to base his diagnosis on the criteria in the DSM-IV, then he must either support those elements or state why, in his opinion, a particular element need not be supported under the facts of the particular diagnosis." *Id.* at \*37-38. The court affirmed ALJ's finding that claimant was inflicted with depression as a result of harassment by his coworkers.

<sup>58</sup> See *Jackson*, 48 BRBS 71.

144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809, 145 L. Ed. 2d 36, 120 S. Ct. 40 (1999), the Ninth Circuit stated that according special weight to a treating physician's opinion is premised on the reasoning that the treating physician is employed to cure and has a greater opportunity to know and observe the patient as an individual (citing SSA cases).<sup>59</sup> In cases arising under the Act, the opinions of treating physicians are not accorded automatic deference. While the courts have recognized that a treating physician's opinion may be entitled to special weight if it is not contradicted,<sup>60</sup> the ALJ is entitled to weigh conflicting medical opinions and determine which view is most persuasive.<sup>61</sup> Accordingly, in weighing a treating physician's opinion, the ALJ must also consider its underlying rationale, as well as the other medical evidence of record.<sup>62</sup> While

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<sup>59</sup> 1998 U.S. App. LEXIS 33883, at \*9. In *Amos*, the court held that the ALJ was required to credit the claimant's treating physician's opinion regarding a proposed course of treatment since his opinion was entitled to special deference and since it was not shown by the testimony of other doctors to be unreasonable. Claimant is entitled to choose her course of treatment when presented with reasonable options.

<sup>60</sup> *See, e.g., Amos*, 1998 U.S. App. LEXIS 33883, at \*9; *Pietruni v. Director, OWCP*, 119 F.3d 1035, 1042, 31 BRBS 84(CRT) (2d Cir. 1997) (Stating that the expert opinion of a treating physician as to the existence of disability is binding unless contradicted by substantial evidence to the contrary).

<sup>61</sup> *See, e.g., Duhagon*, 169 F.3d at 618,; *see also Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 155 L. Ed. 2d 1034, 123 S. Ct. 1965 (2003). In *Monta v. Navy Service Exch.*, 39 BRBS at 107 n.2, the BRB rejected employer's assertion that *Nord* proscribes a fact-finder from giving special weight to a treating physician. Rather, the Court held that the Employee Retirement Income Security Act, unlike the Social Security Act, does not require special deference to the opinions of treating physicians. The BRB concluded that "the Court did not proscribe a fact-finder from giving such deference, but rather stated that it was not appropriate to have a rule **requiring** such deference in the administration of a voluntary contractual plan. *Nord* thus does not overrule the holding in *Amos*." (Emphasis in original); *see also Jackson*, 48 BRBS 71, slip op. at 8 n.6.

<sup>62</sup> *See Brown v. Nat'l Steel & Shipbuilding Co.*, 34 BRBS 195 (2001) (ALJ did not commit a reversible error by citing *Amos* for the principle that a treating physician's opinion is entitled to "special weight," as the court's opinion states this; ALJ properly did not summarily credit the treating physician's opinion, but fully discussed his opinion and its underlying rationale, as well as the other medical evidence of record); *Young v. Newport News Shipbuilding & Dry Dock Co.*, 45 BRBS 35 (2011) (In concluding that claimant's condition is work-related, ALJ rationally gave claimant's doctor's opinion greater weight as he was the most familiar with claimant's condition and his opinion was supported by medical records; ALJ rationally rejected the opinion of employer's expert, who examined claimant only twice); *see also Monta*, 39 BRBS 104 (ALJ did not err in concluding that surgery was reasonable based on his finding that the opinion of claimant's treating physician is entitled to greater weight; when presented with two valid treatment options, the decision should be left with the claimant to choose between them; ALJ discussed the opinions of claimant's doctor, employer's doctor and independent examiner



the ALJ is allowed to give special weight to a treating physician's opinion, he or she is not required to do so where there is contrary probative evidence in the record.<sup>63</sup>

Similarly, in *Jackson*, 48 BRBS 71, the Board held that while it is permissible for an ALJ to give greater weight to the opinion of a § 7(e) independent medical expert, the ALJ is not required to do so. The Board stated that, while it is true that § 7(e) medical examinations are intended to provide a reliable, independent evaluation of a claimant's medical condition, this does not mandate that the ALJ is obligated to give greater weight to the opinion of § 7(e) independent physicians. In so holding, the Board reiterated the Fourth Circuit's admonition that in considering the medical opinions of record, an ALJ must examine the logic of a physician's conclusions and the evidence upon which those conclusions are based, and evaluate the physician's opinion in light of the other evidence in the record.

In sum, while ALJs have considerable discretion in evaluating medical opinion evidence, the factors noted above provide guidance and delineate the boundaries of that discretion.

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(noting their credentials) and rationally found that employer is liable for claimant's choice of treatment).

<sup>63</sup> *Id.*; *Pietrunti*, 119 F.3d at 1042-1044.