U.S. Department of Labor

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

BRB No. 20-0279

TALISHA K. ROSE Claimant-Petitioner v. VECTRUS SYSTEMS CORPORATION and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: 12/29/2022 DECISION and ORDER on RECONSIDERATION EN BANC

Appeal of the Decision and Order Denying Benefits of Monica Markley, Administrative Law Judge, United States Department of Labor.

Lara D. Merrigan (Merrigan Legal), Sausalito, California, and Jon B. Robinson (Strongpoint Law Firm, LLC), Mandeville, Louisiana, for Claimant.

Michael W. Thomas (Thomas Quinn, LLP), San Francisco, California, and Edwin B. Barnes (Thomas Quinn, LLP), San Diego, California, for Employer/Carrier.

Steven Winkelman (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Jennifer L. Feldman, Deputy Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Amie C. Peters (Blue Water Legal PLLC), Edmunds, Washington, and Jeffrey P. Briscoe (The Brewster Law Firm, LLC), Metairie, Louisiana, for Workers' Injury Law & Advocacy Group, New Port Richey, Florida, as amicus curiae, in support of Claimant.

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

ROLFE, GRESH and JONES, Administrative Appeals Judges:

Claimant has requested reconsideration en banc of the Benefit Review Board's decision in this case, *Rose v. Vectrus Systems Corp.*, BRB No. 20-0279 (May 25, 2021) (unpub.) (Buzzard, J., dissenting), which affirmed the Administrative Law Judge's (ALJ) denial of benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act), as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq*. (DBA). 33 U.S.C. §921(b)(5); 20 C.F.R. §§801.301, 802.407. The Board granted Claimant's motion for reconsideration en banc on October 29, 2021. *Rose v. Vectrus Systems Corp.*, BRB No. 20-0279 (Oct. 29, 2021) (unpub. Order).

The Director, Office of Workers' Compensation Programs (the Director), and the Workers' Injury Law and Advocacy Group (WILG), as amicus curiae, have filed response briefs in support of Claimant's position.[1] All three parties assert a claimant bears only a burden of production in establishing a prima facie case to invoke the Section 20(a) presumption, 33 U.S.C. §920(a), and the ALJ improperly held Claimant to a higher burden. Because the ALJ fully addressed Claimant's credibility at invocation in this case, they assert the Board's affirmance of the ALJ's finding that Claimant is not entitled to the Section 20(a) presumption and corresponding denial of benefits cannot stand. Employer responds, urging the Board to reject Claimant's contentions and uphold its decision affirming the ALJ's denial of benefits in this case because a claimant's burden at Section

[1] When it granted Claimant's motion, the Board also granted WILG's motion to file an amicus brief and ordered the Director "to file a brief addressing the invocation of Section 20(a)."

20(a) invocation is one of persuasion, not production. Upon reconsideration en banc, the Board has voted to grant the relief requested. Therefore, for the reasons stated below, we vacate the Board's original decision, reverse the ALJ's finding that Claimant did not produce evidence to establish her prima facie case, and remand the case for further consideration of the causation issue consistent with this decision.

To reiterate the pertinent facts, Claimant filed a claim seeking benefits for a "psychological injury" due to her overseas work with Employer in Afghanistan.[2] The ALJ found Claimant's testimony lacked credibility and therefore undermined the opinions of Dr. Asad Naqvi, therapist Ms. Monica Bell-Callahan, and Dr. Geralyn Datz, who all relied on Claimant's reporting of her symptoms in diagnosing Claimant with post-traumatic stress disorder (PTSD) related to her employment in Afghanistan.[3] *See* Decision and Order (D&O) at 25-26. In contrast, the ALJ gave probative weight to Dr. Steve Shindell's opinion that Claimant does not have PTSD or any other mental health diagnosis,[4] finding he is well-

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[2] Because the ALJ's order was filed and served by the Office of the District Director located in Jacksonville, Florida, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *McDonald v. AECOM Technology Corp.*, 45 BRBS 45 (2011); Decision and Order (D&O) at 2.

[3] Claimant's psychiatrist, Dr. Naqvi, diagnosed her with PTSD and Generalized Anxiety Disorder in November 2016. CX 4 [Vol. 2]. As the basis for his diagnosis of PTSD, he listed Claimant's direct experience of suicide bombings and mortar attacks, nightmares, anxiety, and isolation from people. CX 4 at 22-25. Claimant's therapist, Ms. Bell-Callahan, reported Claimant's problems with loud noises and crowds. Tr. at 67-70; CX 3 at 4-5, 11. She also diagnosed Claimant with PTSD related to her employment in Afghanistan. CX 3 at 1-2. Dr. Datz, a licensed clinical health psychologist, found Claimant had significant attention and concentration issues. CX 5 at 13. She disagreed with Dr. Steve Shindell's opinion that Claimant does not have PTSD and is malingering, stating the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-V) requires all other psychiatric diagnoses to be effectively ruled out before malingering is diagnosed. *Id.* at 15.

[4] Dr. Shindell, a Board-certified neuropsychologist, examined Claimant. His examination included administering a number of neuropsychological tests and a review of some of her records. Dr. Shindell testified Claimant did very poorly on various tests, which he attributed to her not making a full effort. Tr. at 144. He repeatedly opined he could not actually determine her abilities "due to her failure on tests of cognitive effort." JX 4 at 4. Reviewing the criteria for a PTSD diagnosis under the DSM-V, he concluded Claimant does not have PTSD because she was not exposed to any death or violence to herself or a loved one (stressors) and did not report negative alterations in cognitions and mood. *See*

qualified, and his opinions are supported by Claimant's test results and the record. *Id.* She therefore found Claimant did not establish any psychological harm, did not establish a prima facie case, and therefore did not invoke the Section 20(a) presumption. Accordingly, she denied benefits. *Id.* at 27.

Claimant appealed the denial of benefits to the Board, arguing the ALJ applied the wrong standard in concluding she did not establish a prima facie case because the ALJ improperly weighed the evidence at that first stage of the analysis. In a split decision, the Board affirmed the ALJ's denial of benefits, with the majority holding the ALJ did not err in weighing Claimant's credibility at the initial stage of determining whether she established a prima facie case, noting it is Claimant's burden to prove each element of her prima facie case. *Rose*, slip op. at 5. The majority also affirmed the ALJ's finding that Claimant was not credible and her discrediting of the opinions of Drs. Naqvi and Datz, and Ms. Bell-Callahan, as their opinions were based on Claimant's subjective reports. *Rose*, slip. op. at 5-7. In contrast, the dissent maintained the ALJ applied the wrong legal standard for invoking the Section 20(a) presumption and stated Claimant is entitled to the Section 20(a) presumption as a matter of law.[5] Thus, he would have remanded the case for the ALJ to address the remaining steps on the causation issue: whether Employer established rebuttal through Dr. Shindell's opinion and, if so, whether Claimant established causation based on the record as a whole.

<u>Parties' Respective Positions</u>

In her motion for reconsideration, Claimant asserts the Board should clarify that a claimant's initial burden to invoke the Section 20(a) presumption is similar to an employer's burden on rebuttal: it is one of production, not persuasion. She contends requiring a claimant to prove her case by a preponderance of the evidence at the initial

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id. at 7-9; EX 40 at 8-9. Instead, he opined malingering was the only possible explanation for Claimant's test results and the inconsistencies between her records and her own self-reporting. *See* EX 40 at 16. Thus, he determined "[t]here is no evidence of any mental health diagnosis either at present or in the past." JX 4 at 9.

[5] Judge Buzzard's dissent stated the record contains sufficient evidence to invoke the presumption, as Claimant's testimony and the diagnoses of her physicians established the first element (harm), and evidence of her exposures to the hazards of war in her overseas work established the second element (working conditions). *Rose* (dissent), slip. op. at 8-9. He stated he also would have held the ALJ's negative determination of Claimant's credibility was irrational because it was based on mischaracterizations of her testimony and the record. *Id.* at 9-10.

stage of invoking the presumption is inconsistent with the language of the statute and with the lesser burden employers have on rebuttal. With respect to the credibility determinations, Claimant urges the Board to adopt the position espoused in Judge Buzzard's dissenting opinion that the ALJ's finding was based on mischaracterizations of the evidence. She therefore asks the Board to reverse or vacate the denial of benefits and remand the case for a calculation of benefits.

Employer asserts ALJs should be permitted to make credibility determinations in assessing whether a claimant has established a prima facie case under Section 20(a) because the claimant must show a harm and working conditions that could have caused the harm. In this regard, Employer predominantly relies on the United States Court of Appeals for the Fifth Circuit's statement in *Bis Salamis, Inc. v. Director, OWCP [Meeks]*, 819 F.3d 116, 50 BRBS 29(CRT) (5th Cir. 2016), that an ALJ may make credibility determinations and choose between inferences in ascertaining whether a claimant has established her prima facie case. It also argues the United States Court of Appeals for the Eleventh Circuit's decisions in *Universal Maritime Service Corp. v. Director, OWCP [Lewis]*, 137 F. App'x 210 (11th Cir. 2005), and *Ceres Marine Terminals, Inc. v. Director, OWCP [Miller]*, 512 F. App'x 1014 (11th Cir. 2013), uphold and tacitly endorse an ALJ making credibility determinations at the prima facie stage. Additionally, Employer notes a number of decisions where the Board has permitted ALJs to make credibility determinations when addressing a claimant's evidence at Section 20(a) invocation and asserts they should continue to make that assessment at that stage of the analysis.[6]

WILG, like Claimant, requests the Board reconsider its ruling and hold a claimant's burden for purposes of Section 20(a) invocation is one of production. It maintains the United States Supreme Court, in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994), detailed the difference between the burden of production and the burden of persuasion, and "charge[d] courts to be diligent in defining and applying those terms." WILG Br. at 3. But it states the Board has yet to explicitly define whether Section 20(a) invocation involves a burden of production or burden of persuasion. WILG

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[6] For example, Employer cites *Murphy v. SCA/Shayne Brothers*, 7 BRBS 309 (1977), *aff'd* 600 F.2d 280 (D.C. Cir. 1979) (unpub. table decision), *Kelaita v. Triple A. Machine Shop*, 13 BRBS 326 (1981), and *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990), for the proposition that a claimant must prove both elements of her prima facie case "without the benefit of the Section 20(a) presumption," and notes *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996), and *Mackey v. Marine Terminals Corp.*, 21 BRBS 129 (1988), as examples of cases where the Board affirmed findings that the claimants did not establish their prima facie cases, in part, because the ALJs found they were not credible.

acknowledges this confusion extends to courts who use varying terms like "prove" or "proof" in describing a claimant's burden to establish a prima facie case, but then also use "show," "offer," or "allege." Nevertheless, it asserts a plain reading of *Greenwich Collieries* establishes the claimant's burden of persuasion applies only after the presumption is rebutted.[7] Moreover, WILG contends its position is supported by public policy considerations, including the humanitarian purpose of the Act and an underlying need to prevent "unconscious bias from influencing the initial assessment of whether benefits should be awarded."[8]

The Director also agrees with Claimant's position and urges the Board to hold a claimant bears only a burden of production at the prima facie stage. He provides three reasons in support of his position: 1) it is consistent with the "some evidence" standard that the Board and several courts of appeals already recognize for invoking the Section 20(a) presumption; 2) it is supported by law developed in other burden-shifting schemes; and 3) it promotes the Longshore Act's humanitarian purposes. In terms of the first reason, the Director notes at least two courts of appeals have set forth the standard as requiring a claimant to offer "some evidence" to invoke the Section 20(a) presumption.[9] *See Albina Engine & Machine v. Director, OWCP [McAllister]*, 627 F.3d 1293, 44 BRBS 89(CRT) (9th Cir. 2010); *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990); *see also United States v. Mayweather*, 991 F.3d 1163, 1176 (11th Cir. 2021) (to satisfy a burden of production, "the [claimant] must merely come forward with some evidence") (internal quotation marks omitted); *United States v. Hurtado*, 779 F.2d 1467, 1470 (11th Cir. 1985) (a burden of production is a "burden of coming forward with some evidence"); *United States v. Gonzales*, 606 F.2d 70, 75 (5th Cir. 1979) (to satisfy a burden of production, a party "must produce some evidence," which is "more than a scintilla") (internal quotation marks omitted).

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[7] WILG states the Board and circuit courts have repeatedly held the substantial evidence standard does not require the weighing of credibility – which occurs only after the Section 20(a) presumption "has fallen away from the case." WILG Br. at 2.

[8] "[T]he historical purpose of workers' compensation benefits shows that workers should be allowed to present evidence of a claim without dealing with credibility" in order to establish a prima facie case at Section 20(a). WILG Br. at 16.

[9] The Director notes the Board has applied the "some evidence" standard in several of its own unpublished decisions. *Schindler v. Kellogg Brown & Root Services*, BRB No. 10-0563 (Aug. 20, 2021); *Curran v. Thorpe Insulation Corp.*, BRB No. 16-0099 (Nov. 10, 2016); *Blevins v. Ecco Electrical & Instrumentation, Inc.*, BRB No. 12-0078 (Sept. 19, 2012); *Rubidoux v. Oregon Shipbuilding Corp.,* BRB No. 11-0510 (Mar. 21, 2012).

The Director further states the Board effectively imposed a burden of production when it applied the "some evidence" standard in *Wilson v. Fluor Federal Global Projects, Inc.*, BRB No. 18-0254 (June 18, 2019), to reverse an ALJ's finding that the claimant did not invoke the Section 20(a) presumption. He maintains the Board essentially held the claimant invoked the Section 20(a) presumption by proffering evidence which, if credited or believed, would establish the elements of his prima facie case.[10]

Related to the second reason, the Director points to the long-standing, three-part burden-shifting scheme that the Supreme Court first enunciated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), to apply in discrimination claims under Title VII of the Civil Rights Act. He states this scheme, commonly referred to as the *McDonnell Douglas* framework, is relevant to this case because several courts have recognized it "functions similarly" to the statutory presumption that Section 20(a) of the Act created. Akin to Section 20(a) of the Act, the *McDonnell Douglas* framework proceeds in three stages: 1) the plaintiff (employee) must first establish a prima face case of discrimination; 2) if the plaintiff succeeds, the defendant (employer) must produce evidence of a legitimate non-discriminatory reason for its actions – if this occurs, then the presumption of discrimination is rebutted; 3) the plaintiff must then prove by a preponderance of the evidence that the defendant's nondiscriminatory reason was dubious or spurious. He states although the Supreme Court suggested, early on in its application of the *McDonnell Douglas* framework, that a Title VII plaintiff bore the burden of persuasion to establish a prima facie case, the Court has since plainly articulated the determinations at steps one and two of the *McDonnell Douglas* framework "can involve no credibility assessment" because "the burden-of-production determination necessarily *precedes* the credibility-

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[10] In *Wilson*, the Board framed "the questions for invocation" as follows:

> Because the medical opinions on which claimant relies tie his multiple myeloma diagnosis to benzene, the questions for invocation thus become whether claimant introduced sufficient evidence to establish that his handling and breathing of JP8 jet fuel could have exposed him to benzene and, if so, whether it could have caused his multiple myeloma.

Wilson, slip op. at 5. It addressed the ALJ's non-invocation findings in terms of these questions and the evidence of record prior to concluding that, "[b]ecause claimant introduced sufficient evidence that benzene exposure could have caused his myeloma, he met his burden of establishing a prima facie case." *Id.*, slip op. at 5-9.

assessment stage." *Johnson v. California*, 545 U.S. 162, 171 n.7 (2005), (citing *St. Mary's Honor Center* v. *Hicks*, 509 U.S. 502, 509-510, and n. 3 (1993)).[11]

Finally, the Director maintains the Act's humanitarian purpose likewise weighs heavily in favor of a burden of production standard at invocation. Recognizing it is well established that the employer's burden on rebuttal is merely one of production, not persuasion, he states "[i]t would defy logic" and run "directly contrary to the humanitarian purpose of the Act" to require a claimant to bear a heavier burden at invocation. Thus, the Director asserts both parties should bear the same burden of production standard in terms of their respective initial proffers relating to the Section 20(a) presumption.

For these reasons, the Director urges the Board hold that a claimant bears only a burden of production in establishing a prima facie case to invoke the Section 20(a) presumption. He further urges the Board to hold: 1) a claimant need only produce "some evidence" which, if believed later at the weighing of the evidence-as-a-whole stage, would establish both elements of the claimant's prima facie case; and 2) critically, as the claimant's burden is only one of production, the fact-finder is not permitted to make any credibility determinations in addressing whether the claimant has established a prima facie case and, therefore, invoked the Section 20(a) presumption. In the instant case, the Director maintains the Board should vacate the ALJ's decision because she made credibility determinations in finding Claimant did not invoke the Section 20(a) presumption. Instead, on remand, the Director asserts the ALJ must assess whether Claimant produced some evidence which, if "believed later at the evidence-as-a-whole weighing stage," would show she suffered a harm and workplace conditions existed that could have caused the harm. Dir. Br. at 12.

In reply to the Director's brief, Employer argues the applicable law conclusively establishes a claimant's burden at Section 20(a) invocation is one of persuasion, not production. It states a "review of Supreme Court, Court of Appeal, and Board decisions" unequivocally reveals a claimant, at the prima facie stage, must "establish" or "prove by a preponderance of the evidence" the elements of the claim. Specifically, it maintains the Supreme Court and circuit courts have rejected the contention that to "establish" equates to a burden of production in cases arising under the Administrative Procedure Act (APA), 5 U.S.C. §557, but rather have clearly held to "establish" equates to a burden of persuasion. Additionally, Employer asserts caselaw at all levels has consistently upheld an ALJ's authority to deny benefits due to a non-credible claimant's failure to establish one or more of the two essential elements based on credibility determinations made at the outset.

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[11] The Court has further explained the burden-shifting framework is essentially just "a means of 'arranging the presentation of evidence.'" *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 986 (1988).

Employer also contends the Director's rationale that the humanitarian purpose of the Act mandates a burden of production standard for invocation is without merit. Specifically, it asserts Congress was not concerned with protecting persons who cannot bring themselves into the category of persons the legislation was meant to protect, and such "humanitarian" arguments fall contrary to the APA's requirement that the proponent of an order bears the burden of the persuasion at all times. It also contends the Director's litigation position is not entitled to any deference because there is no regulation or rulemaking involved, and the Director is not participating in the litigation through any lawmaking function. Thus, Employer submits the Director's involvement in this case "could conceivably be construed as [a] request for the Director to review the Board's decision, which would be an ultra vires unlawful delegation of the Board's power." Reply Brief of Respondents at 45.

Section 20(a) Burdens of Proof

Section 20(a) of the Act states:

> In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary –
>
> (a) That the claim comes within the provision of this chapter.

33 U.S.C. §920(a). Section 20(a) aids a claimant in establishing injury causation under Section 2(2) of the Act, 33 U.S.C. §902(2).[12] In this regard, when the Section 20(a) presumption is invoked, it links a claimant's harm with her employment.

The Supreme Court has held that in order to invoke the Section 20(a) presumption, the claimant must *allege* she suffered an injury which "arose in the course of employment as well as out of employment." *U.S. Indus./Fed. Sheet Metal, Inc. v. Director, OWCP,* 455

[12] Under Section 2(2) of the Act, the term "injury" means:

> accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

33 U.S.C. §902(2).

U.S. 608, 14 BRBS 631 (1982).[13] Subsequently, the Court held the "true doubt" rule violated the APA, 5 U.S.C. § 556(d), and concluded the Act requires the claimant bear the ultimate burden of persuasion. *Greenwich Collieries*, 512 U.S. 267, 271 28 BRBS 43(CRT).[14] Nevertheless, the Court stated:

> In part due to Congress' recognition that claims such as those involved here would be difficult to prove, *claimants in adjudications under these statutes benefit from certain statutory presumptions easing their burden. See 33 U.S.C. § 920*; 30 U.S.C. § 921(c); *Del Vecchio v. Bowers,* 296 U.S. 280, 286, 56 S.Ct. 190, 193, 80 L.Ed. 229 (1935).

Id., 512 U.S. at 280, 28 BRBS at 47(CRT) (emphasis added).[15]

In *American Grain Trimmers v. Director, OWCP [Janich]*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000), the United States Court of Appeals for the Seventh Circuit discussed, at length, the nature of the burden that shifts from a claimant to her employer upon invocation of the Section 20(a) presumption. It first stated:

> As early as 1935, the Supreme Court used language in a decision under § 20 of the LHWCA that strongly suggested that the statute shifts a production

[13] The Court explained the "mere existence of a physical impairment is plainly insufficient to shift the burden of proof to employer." *U.S. Indus.*, 455 U.S. at 616, 14 BRBS at 633.

[14] In *Greenwich Collieries*, the Supreme Court addressed the validity of the Department of Labor's "true doubt" rule, which traditionally found for the claimant in cases where the evidence (***apart from presumptions***) was evenly balanced, and concluded it violated Section 7(c) of the APA. *Greenwich Collieries*, 512 U.S. at 281, 28 BRBS at 48(CRT). In reaching this conclusion, the Court necessarily decided that both APA Section 7(c) and the Act require the claimant to bear the ultimate burden of persuasion and could not win if the evidence was in equipoise. *See id.*, 512 U.S. at 271, 28 BRBS at 44-45(CRT).

[15] In *Holmes v. Universal Mar. Serv. Corp.*, 29 BRBS 18, 21 (1995) (Decision on Recon.), the Board acknowledged *Greenwich Collieries* "did not discuss or affect the law regarding invocation and rebuttal of the Section 20(a) presumption" and therefore did not alter the employer's burden to rebut the Section 20(a) presumption "upon ***the production*** of specific and comprehensive evidence severing the presumed causal connection."

> burden to the employer, not a persuasion burden, albeit in the context of the section of the Act forbidding compensation if an injury is self-inflicted.

Janich, 181 F.3d at 816-817, 33 BRBS at 75(CRT) (citing *Del Vecchio v. Bowers,* 296 U.S. 280 (1935)). Recognizing the burden-shifting approach of Section 20(a) is "analogous" to that used in employment discrimination cases, the Seventh Circuit next discussed the Supreme Court's *McDonnell Douglas* decision, 411 U.S. 792. Applying the *McDonnell Douglas* framework and the holding of *Greenwich Collieries* that the ultimate burden of persuasion rests at all times on the claimant, the Seventh Circuit held "the burden in LHWCA cases that shifts to the employer is a burden of production only." *Janich*, 181 F.3d at 816-817, 33 BRBS at 75(CRT).

This approach has been followed, in varying degrees, by other circuits. In this regard, the United States Courts of Appeals for the First, Second, Third, Fourth, Fifth, Ninth, and District of Columbia (D.C.) Circuits have, at the very least, identified an employer's burden at rebuttal as one of production.[16] Several courts have further elaborated on that issue.[17] For instance, the Third Circuit, in *Maher Terminals, Inc. v.*

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[16] The First and Second Circuits have issued decisions explicitly identifying an employer's burden on rebuttal, without making any specific statement regarding a claimant's initial burden for invocation. *See*, *e.g.*, *Bath Iron Works Corp. v. Fields,* 599 F.3d 47, 44 BRBS 13(CRT) (1st Cir. 2010) (the employer's burden on rebuttal is one of production, not persuasion; it is an "objective test," and the determination of whether the employer has produced sufficient evidence is a legal judgment and not dependent on credibility); *Rainey v. Director, OWCP*, 517 F.3d 632, 637, 42 BRBS 11, 14(CRT) (2d Cir. 2008) ("As the Seventh Circuit has helpfully explained, the employer's burden in rebutting the Section 20(a) presumption is a burden of production, not a burden of persuasion.").

[17] These include the Fourth and D.C. Circuits, which have used language inferring a claimant's initial burden at invocation is likewise one of production. *See*, *e.g.*, *Metro Machine Corp. v. Director, OWCP*, 846 F.3d 680, 50 BRBS 81(CRT) (4th Cir. 2017) (To invoke the Section 20(a) presumption, the claimant bears a "fairly light burden" to produce evidence raising the elements of his prima facie case; once the prima facie case is established, ***the burden of production shifts*** to the employer); *see also Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997) (ALJ properly invoked presumption regarding a claim for back problems when the claimant testified that he experienced back pain immediately after his accident even though other evidence cast significant doubt on the credibility of that testimony and the claimant had acknowledged that he had suffered back pain as a result of another prior injury); *Brown v. I.T.T./Cont'l Baking Co. & Ins. Co. of N. Am.,* 921 F.2d 289, 296 n. 6 (D.C. Cir.1990) ("In order to come within the section 20 presumption, all the claimant need adduce is ***some evidence*** tending

Director, OWCP, 992 F.2d 1277, 27 BRBS 1(CRT) (3d Cir. 1993), *aff'd sub nom. Director, OWCP v. Greenwich Collieries*, 512 U.S. 167, 28 BRBS 43(CRT) (1994), stated:

> In bringing a claim pursuant to the Act, *the claimant bears the initial burden of production*, i.e., to establish a *prima facie* case that he suffered an injury and that employment conditions were sufficient to cause the injury.

Id., 992 F.2d at 1279, 27 BRBS at 4(CRT) (emphasis added). After a lengthy discussion of the APA, the Third Circuit further stated:

> [w]e now see that this party, if it meets both its burden of production (*prima facie*) and burden of persuasion (where "substantial" is construed as standing for the preponderance standard), it will succeed, unless its evidence is unconvincing. Thus, the party initiating the proceeding, i.e., the proponent of the order for relief (the claimant in the present case), has both elements of the burden of proof. Although the burden of producing evidence may be shifted during the progress of a proceeding from one party to the other, the burden of persuasion remains with the proponent of the order for relief, and it cannot be shifted on the issues raised by the proponent.

Id., 992 F.2d at 1283, 27 BRBS at 10(CRT).[18]

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to establish the prerequisites of the presumption.") (emphasis added); *see also Storey v. Dep't of Employment Servs.*, 162 A.3d 793, 797 (D.C. 2017) (a claimant under the D.C. Workers' Compensation Act, an extension of the Longshore Act, need only present "some evidence" to establish a prima facie case of a work-related injury. As such, an ALJ may not assess the credibility of a claimant's evidence at the initial stage in the presumption of compensability; nor should the ALJ make credibility determinations in assessing whether an employer may rebut that presumption – evidence is weighed only after the employer has rebutted the presumption).

[18] *See also Universal Mar. Servs. Corp. v. Ricker*, 186 F. App'x 266, 271 (3d Cir. 2006) ("Once a claimant invokes the § 920(a) presumption, ***the burden switches to the employer to produce*** substantial evidence that the claimant's injury is not work-related" (emphasis added)); *but see Gindville v. Dir., Off. of Workers' Comp. Programs*, 524 F. App'x 784, 788 (3d Cir. 2013) ("Our review of the record confirms that the ALJ's decision to discredit Gindville's testimony, and conclusion that he was not entitled to the § 20(a) presumption, were rational, extensively explained, and supported by substantial evidence").

In *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010), the Ninth Circuit held that "although the burden of persuasion remains on the disability claimant throughout the administrative process," it is the "burden of production [which] shifts in the course of determining whether a claimant's injury is work-related." *Id.*, 608 F.3d at 650-651, 44 BRBS at 50(CRT); *see also McAllister*, 627 F.3d at 1302, 44 BRBS at 93(CRT) (A claimant must offer "some evidence" of both factors to establish a prima facie case under Section 20(a)). The court stated the "weighing of credibility, however, has no proper place in determining" whether an employer "met its burden of production at step two."[19] Taken together, these statements support the position that a claimant's burden at invocation is one of production and a weighing of credibility is improper at the invocation stage. *Id.*

The Fifth Circuit, however, has seemingly adopted a different approach. In *Meeks*, the court stated:

> Meeks argues that this court has incorrectly imposed on claimants a burden of proving a prima facie case, rather than simply alleging a compensable injury, at the first step of the LHWCA analysis. This argument is unavailing. A claimant for benefits under the LHWCA faces a fairly light burden, but our court and other courts have consistently required prima facie proof of a compensable injury.
>
> Additionally, we conclude that an ALJ may make credibility determinations in ascertaining whether a claimant has made a prima facie case. We have approved such credibility determinations in the past. *See, e.g., Ramsay Scarlett & Co. v. Dir., Office of Workers' Comp. Programs,* 806 F.3d 327, 331 (5th Cir.2015) (upholding an ALJ's finding that a claimant made a prima facie case based partly on the ALJ's credibility determinations).

Meeks, 819 F.3d at 127-128, 50 BRBS at 35-36(CRT).[20] In this regard, the Fifth Circuit's statement that the claimant's "burden" argument was "unavailing" and the court's use of

[19] The Ninth Circuit further stated: "at the second step the ALJ's task is to decide, as a legal matter, whether the employer submitted evidence that could satisfy a reasonable factfinder that the claimant's injury was not work-related." *Ogawa*, 608 F.3d at 650-651, 44 BRBS at 50(CRT). Arguably, it may be inferred from the language stating the "burden of production" "shifts" to the employer for rebuttal that the claimant faces a similar limited burden of production in invoking the Section 20(a) presumption.

[20] In *Ramsay Scarlett*, 806 F.3d 327, 49 BRBS 87(CRT), the ALJ found the claimant established the harm element through his asbestosis diagnosis and the working conditions

the phrase "prima facie proof" suggests, as Employer posits, its belief that a claimant's burden at invocation, though "fairly light," is one of persuasion as well as production. This position is bolstered by the court's conclusion that "an ALJ may make credibility determinations" at that initial stage in considering Section 20(a) invocation. *But see Conoco Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).[21] *Meeks* arguably indicates a claimant must do more than just produce "some evidence" in order to prove each element of a prima facie case, with credibility coming into play.

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element through his testimony, combined with the testimony of an industrial hygienist, which showed he worked with brake parts that exposed him to significant concentrations of asbestos. The employer challenged the ALJ's invocation finding, arguing, among other things, that the claimant's testimony lacked credibility. The Fifth Circuit rejected the employer's "credibility attack" and affirmed the ALJ's invocation finding, observing the ALJ is entitled to assess the relevance and credibility of evidence, the evidence in support of invocation constituted "more than a scintilla" and substantial evidence of record in support of that finding.

[21] The *Prewitt* court stated:

> Prewitt made a prima facie case by proving (1) a harm and (2) a condition of work or workplace injury that could have caused the harm, even if her testimony was inconsistent at times. The ALJ, as affirmed by the BRB, was within his discretion to discount Conoco's attacks on Prewitt's credibility based on her inconsistent statements regarding the exact location of the impact of the turnbuckle on her body, particulars about the accident scene, and description of symptoms to various medical professionals. Such inconsistencies will not undermine automatically the relatively light burden of establishing a prima facie case.

Prewitt, 194 F.3d at 691, 33 BRBS at 191(CRT). The court also rejected the employer's assertion that the ALJ and the Board violated *Greenwich Collieries* and erroneously shifted the burden of persuasion, and not the burden of production, to it to establish rebuttal. *Id.* (citing *Pennzoil Co. v. FERC,* 789 F.2d 1128 (5th Cir.1986) (affirming that under a "'bursting bubble' theory of presumptions, [the] *only* effect of a presumption is to shift the burden of producing evidence [to challenge] the presumed fact")).

Early on, the Board indicated claimants bore a dual burden of production and persuasion in establishing a prima facie case under Section 20(a).[22] For example, in *Jones v. J.F. Shea Co.*, 14 BRBS 207, 210 (1981), it affirmed an ALJ's conclusion that the Section 20(a) presumption did not apply because he permissibly discredited the claimant's testimony in finding no work incident occurred. The Board discussed the claimant's burden for purposes of invoking the Section 20(a) presumption:

> Claimant's burden of proving that a work incident or accident occurred is not met simply because he has introduced corroborative evidence supporting such a conclusion. The term "burden of proof" encompasses two separate burdens. The first is the burden of going forward with the evidence. In order to meet this burden, claimant must produce evidence, satisfactory to the judge, that a particular fact in issue exists. The second burden is the burden of persuasion, which consists of persuading the trier of fact that the alleged fact is true. Thus, *claimant's satisfaction of the ultimate burden of proof on a particular issue consists of meeting both the burden of going forward with the evidence and the burden of persuasion*.

Jones, 14 BRBS at 210 (emphasis added). In affirming the ALJ's findings, the Board explained that although the claimant's evidence "may satisfy [his] burden of going forward with the evidence," it "does not mean that claimant has satisfied his burden of persuasion." *Id.* at 211. Consequently, the Board held the claimant's evidence "failed to convince" the

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[22] *Kelaita*, 13 BRBS 326, seems to be an exception. In that case, the Board suggested a claimant's burden in establishing his prima facie case is one of production, rather than persuasion, stating:

> While claimant need not establish causation, he must prove these initial allegations which are the very basis of his claim and constitute his *prima facie* case. Requiring claimant to prove these initial elements of his claim permits employer to investigate the circumstances of claimant's alleged injury so that it can defend the claim properly. Moreover, such a requirement does not place an onerous burden on claimant since these are issues on which the claimant *is more capable of producing evidence* than the employer, and therefore they are issues properly litigated without the benefit of the presumption.

Kelaita, 13 BRBS at 331 (emphasis added).

ALJ and also "did not satisfy his ultimate burden of proving that a work incident did occur."[23] *Id.*

Subsequently, in discussing a claimant's requirements for establishing a prima facie case, the Board has used a variety of terms such as "allege," "demonstrate," "prove," "show," or "establish," without addressing whether the initial burden is one of production, persuasion, or both. Though it has not since directly addressed the production versus persuasion issue regarding a claimant's burden on invocation, the Board has applied the various courts' positions, including the "some evidence" standard espoused by the D.C. and Ninth Circuits,[24] as well as the principle that the burden on rebuttal is one of production, not persuasion, and is not dependent on credibility. *Victorian v. International-Matex Tank Terminals*, 52 BRBS 35 (2018), *aff'd sub nom. International-Matex Tank Terminals v. Director*, OWCP, 943 F.3d 278, 53 BRBS 79(CRT) (5th Cir. 2019); *Suarez v. Serv. Employees Int'l, Inc.*, 50 BRBS 33 (2016); *Cline v. Huntington Ingalls, Inc.*, 48 BRBS 5 (2013). On the other hand, the Board has also affirmed decisions in which ALJs have made credibility determinations in deciding whether a claimant established her prima facie case.[25] *See*, *e.g.*, *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Mackey v. Marine Terminals Corp.*, 21 BRBS 129 (1988); *Murphy v. SCA/Shayne Bros.*, 7 BRBS

[23] In *Mock v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 275, 277 (1981) (citing *Jones*, 14 BRBS 207), when indicating the Section 20(a) presumption "does not aid claimant in establishing" the elements of his prima facie case, the Board similarly stated:

> Claimant must first meet the burden of going forward with the evidence, which requires him to produce evidence, satisfactory to the judge, that a particular fact exists. Claimant must next meet the burden of persuasion, which consists of convincing the administrative law judge that the alleged fact is true. Satisfaction by claimant of the ultimate burden of proof regarding a particular issue therefore requires meeting the burden of going forward with the evidence as well as the burden of persuasion.

[24] *McAllister*, 627 F.3d at 1303, 44 BRBS at 91(CRT); *Brown*, 921 F.2d at 296, 24 BRBS at 80(CRT).

[25] The Board has also held invocation established as a matter of law in cases where "uncontradicted evidence" established the requisite elements. *See e.g.*, *Hargrove v. Strachan Shipping Co.*, 32 BRBS 11, *aff'd on recon.*, 32 BRBS 224 (1998); *Peterson v. Gen. Dynamics Corp.*, 25 BRBS 71 (1991), *aff'd sub nom. INA v. U.S. Dep't of Labor*, 969 F.2d 1400, 26 BRBS 14(CRT) (2d Cir. 1992), *cert. denied*, 507 U.S. 909 (1993)

309 (1977), *aff'd mem.*, 600 F.2d 280 (D.C. Cir. 1979). This review demonstrates an inconsistent standard over the years.[26]

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[26] In the Board's original decision in this appeal, the panel majority's holding relied on established precedent, citing to the Fifth's Circuit's decision in *Meeks*, 819 F.3d at 127, 50 BRBS at 36(CRT), and the Board's holdings in *Bolden*, 30 BRBS at 73, and *Mackey*, 21 BRBS 129, that an ALJ may make credibility determinations in determining whether a claimant has established a prima facie case. But on reconsideration en banc, a review of relevant circuit court case-law and the variety of decisions the Board has issued demonstrates the Board has applied an inconsistent standard over the years which the majority of the Board, including Judge Gresh who was part of the original panel majority, agrees now requires the Board to clarify the standard and therefore grant the relief requested. To summarize: first, the proper burden of proof for a claimant's prima facie case is one of production; second, if the claimant produces "some evidence" to support her prima facie case, she is entitled to the presumption that her injury is work-related and compensable; finally, credibility does not come into play in addressing whether a claimant has established a prima facie case.

In reaching this determination, we recognize the Fifth Circuit in *Meeks* summarily stated ALJs may make credibility determinations at the prima facie stage; a position the Board has, on occasion, also applied in affirming an ALJ's finding that a claimant did not invoke the Section 20(a) presumption. However, upon further review, we note the *Meeks* statement is purely conclusory, as there is no underlying rationale provided for the position taken. Additionally, that case, as well as the underlying decisions the court cited in support of its statement, does not address the legal standard for invoking the presumption. Critically, in cases involving credibility determinations at invocation, neither the Fifth Circuit, the Eleventh Circuit, nor the Board to date has addressed the salient issue that the parties raise in this case as to the nature of the burden the claimant bears at the prima facie stage; these decisions do not consider, much less answer, whether a claimant bears a burden of production or persuasion at invocation. Consequently, we distinguish *Meeks* and the other cases Employer cites because they lack an underlying explanation for the conclusory position cited, and more importantly because those cases do not address the specific issue resolved here.

Nevertheless, even the Fifth Circuit has consistently indicated a "burden of production" "can involve no credibility assessment." *See, e.g., Abbt v. City of Houston*, No. 21-20085, 2022 WL 764999 (5th Cir. Mar. 11, 2022); *Squyres v. Heico Companies, L.L.C.*, 782 F.3d 224, 231 (5th Cir. 2015); *Jackson v. Cal-W. Packaging Corp.*, 602 F.3d 374, 378 n.12 (5th Cir. 2010).

Burden of Proof Required to Invoke the Section 20(a) Presumption

As the parties agree, the Section 20(a) presumption is the starting point for determining the compensability of an injury in all Longshore claims and is frequently an issue in dispute. The precise issue the parties present in this case involves the burden of proof claimants face to invoke the Section 20(a) presumption, as well as the ancillary issues of the standard of proof required to meet that burden and whether credibility should factor into determining if a claimant's evidence is sufficient to establish the prima facie case. We agree it is therefore necessary to address the issue of Section 20(a) invocation and clarify the standard. For the reasons stated below, we adopt a position akin to the one espoused by Claimant, WILG, and the Director, and we reject Employer's position to the contrary.[27]

While the phrase "burden of proof" accurately describes the onus placed upon the parties, it refers to two distinct obligations with regard to the law and evidentiary procedure. Generally, depending upon the context, it may signify the burden of production, the burden of persuasion, or both. In terms of the Section 20(a) presumption and causation analysis, it is clear the claimant and employer each bear particular burdens of proof. Case law establishes the employer's burden on rebuttal is one of production. It is also clear the claimant, as the proponent seeking benefits under the Act, bears the ultimate burden of persuasion on causation by proving the facts by a preponderance of the evidence and, after a weighing of the evidence as a whole, establishing she sustained a work-related injury. *Greenwich Collieries,* 512 U.S. 267, 28 BRBS 43(CRT); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996).

Upon review of the Act, its purposes, and relevant case law, we hold Claimant bears an initial burden of production in order to invoke the Section 20(a) presumption. Thus, the Section 20(a) shifting burdens under the Act are: Claimant bears a burden of production to invoke; Employer bears a burden of production to rebut; and Claimant then bears burden

[27] We also reject Employer's assertion that the Director's participation in this case is suspect; such argument is spurious in light of the case's facts and procedure. First, the Board requested the Director's participation because the Director, as the administrator and policymaking entity under the Act, has the "power to resolve legal ambiguities in the statute." *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 134, 29 BRBS 87, 92(CRT) (1995). Second, the Director has not asked for deference in this case. Rather, he is acting in his capacity as the administrator of the Act, and not as a litigant, and is presenting information in an effort to resolve a legal ambiguity in Section 20(a) of the Act. Third, the Director has no review authority over the Board.

of persuasion to establish a work-related injury by a preponderance of the evidence.[28] This conclusion gives true meaning to the Supreme Court's recognition in *Greenwich Collieries* that the Act's statutory presumptions, including Section 20(a), are meant to benefit claimants in adjudications by "easing their burden."[29] *Greenwich Collieries*, 512 U.S. at 280, 28 BRBS at 47(CRT); *Maher Terminals, Inc.*, 992 F.2d at 1279, 1283, 27 BRBS at 4, 10(CRT) ("the claimant bears the initial burden of production, i.e., to establish a prima facie case that he suffered an injury and that employment conditions were sufficient to cause the injury."); *Metro Mach. Corp.*, 846 F.3d at 688, 50 BRBS at 85(CRT) (acknowledging that to invoke the Section 20(a) presumption, a claimant has a "fairly light burden" to produce evidence raising the possibility that exposure had permanently aggravated his pulmonary disease); *Fields*, 599 F.3d at 52, 44 BRBS at 15(CRT) (Congress created the presumption set forth in Section 20(a) "to ease the claimant's burden" in "mustering evidence of causation."). At the same time, it comports with the declaration in *Greenwich Collieries* and the APA mandate that claimants, as the proponents of the order, bear the ultimate burden of persuasion on causation.

Additionally, as the Director posits, a burden of production standard at invocation is in line with other burden-shifting schemes, most notably those in employment discrimination cases. We are persuaded by the Supreme Court's decision in *McDonnell*

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[28] In light of this holding, we comment on our earlier decisions in *Jones* and *Mock*. In those decisions, the phrase "ultimate burden of proof regarding a particular issue" references the claimant's burden in ultimately establishing causation based on the record evidence as a whole. At that stage of the analysis, as the Board held in *Jones* and *Mock*, the claimant bears a dual burden of production and persuasion. It does not refer to the initial burden required to invoke the Section 20(a) presumption. To the extent those cases indicate the claimant bears a burden of persuasion at invocation, they are overruled. Our current holding also renders WILG's potential-for-bias contention moot, and we need not deliberate on it.

[29] A common thread in the case law on which courts agree is that, while claimants bear the ultimate burden of persuasion on causation, they nevertheless bear a lesser burden in putting forth their prima facie case. A burden of production, in contrast to a burden of persuasion, is a "lighter burden." The burden of production requires the party bearing the burden to present evidence to support a prima facie case. If the Section 20(a) presumption is rebutted, the burden of persuasion requires the party bearing the ultimate burden throughout the adjudication of the claim to bear the risk of establishing she sustained a work-related injury by a preponderance of the evidence based upon an evaluation of all the evidence in the record. We reject Employer's contention that a burden of persuasion at the outset equates to a light burden.

Douglas, 411 U.S. 792, as that case contained analysis of a similarly functioning presumption and burden shifting scheme. We also agree with the Director's position that declaring the burden at invocation to be one of production preserves the humanitarian purpose of the Act. *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983) (the Act must be liberally construed in conformance with its purpose to deliver benefits to injured workers); *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998) (the Act has "beneficent purposes and [a] humanitarian nature."); *Greathouse v. Newport News Shipbuilding & Dry Dock Co*., 146 F.3d 224, 32 BRBS 102(CRT) (4th Cir. 1998) (the Act must be liberally construed in conformance with its purpose); *Holcomb v. Robert W. Kirk & Assoc., Inc.*, 655 F.2d 589, 13 BRBS 839 (5th Cir. 1981) (the Act is to be liberally construed in favor of injured workers); *Garvey Grain Co. v. Director, OWCP,* 639 F.2d 366, 12 BRBS 821 (7th Cir. 1981) (the Act is to be liberally construed in favor of injured workers); *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968) (en banc) (the Section 20(a) presumption is grounded in the humanitarian purpose of the Act, favoring awards in arguable cases).

Therefore, as a burden of production rather than persuasion "eases" Claimant's initial burden and places a similar burden on both claimants and employers with respect to their initial proffers under Section 20(a), we clarify the proper burden of proof for a claimant's prima facie case is one of production. Moreover, we hold this burden of production applies equally to both physical and psychological injury claims under the Act because the Act does not differentiate between these types of injuries with respect to the causation analysis. *See generally Jackson v. Ceres Marine Terminals, Inc.*, 48 BRBS 71 (2014), *aff'd sub nom. Ceres Marine Terminals, Inc. v. Director, OWCP*, 848 F.3d 115, 50 BRBS 91(CRT) (4th Cir. 2016) (33 U.S.C. §902(2) does not distinguish between physical and psychological injuries); *Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994) (the Section 20(a) presumption is applicable to psychological injury cases).

Standard of Proof Required to Invoke the Section 20(a)

We next address what type of evidence satisfies Claimant's initial burden of production. For the reasons stated below, we hold if a claimant produces some evidence to support her prima facie case, she is entitled to the presumption that her injury is work-related and compensable.[30] In other words, "all the claimant need adduce is some evidence tending to establish the pre-requisites of the presumption." *Brown*, 921 F.2d at 296 n.6; *see also McAllister*, 627 F.3d at 1298, 44 BRBS at 91(CRT) (A claimant must offer "some evidence" of both factors). That is, a claimant must produce "some evidence" of a harm

[30] At its essence, "prima facie" means "such as will prevail until contradicted and overcome by other evidence." Black's Law Dictionary 1071 (5th ed. 1979).

and "some evidence" of either a work accident or working conditions which has the potential of resulting in or contributing to that harm. *See, e.g., Ramey v. Stevedoring Services of Am.*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998) (claimant showed a hearing loss and exposure to injurious noise that could have caused that harm); *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989) (claimant showed the existence of carpal tunnel syndrome and the undisputed use of work tools that could have caused that harm).

While "some evidence" is a light burden, we wish to be very clear: the mere filing of a claim for benefits, in and of itself, is insufficient to invoke the Section 20(a) presumption.[31] In particular, we reiterate our longstanding position that the claimant's theory as to how the injury arose must go beyond "mere fancy."[32] *See generally Champion v. S & M Traylor Bros.*, 690 F.2d 285, 295 (D.C. Cir. 1982); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990); *Sinclair*, 23 BRBS at 152; *Devine v. Atl. Container Lines, G.I.E.*, 23 BRBS 279 (1990).

Credibility does not come into play in addressing whether a claimant has established a prima facie case.[33] Application of a "some evidence" standard at invocation, in the

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[31] We further note the threshold jurisdictional requirements of situs and status under the Act, 33 U.S.C. §§902(3), 903(a), "must be resolved before [Section] 20(a) can be applied." *Wilson v. Director, OWCP*, 984 F.3d 265, 270, 54 BRBS 91, 92(CRT) (3d Cir. 2020); *see also Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983) (for the Longshore Act to apply, a worker must satisfy both a "situs" requirement and a "status" requirement); *Crowell v. Benson*, 285 U.S. 22, 39 (1932) (jurisdictional requirements are those whose "existence is a condition precedent to the operation of the statutory scheme.").

[32] For instance, recently in *Brown v. Global Integrated Security, Inc.*, BRB No. 20-0435 (Sept. 24, 2021) (unpub.), the Board affirmed the ALJ's finding that the claimant did not invoke the Section 20(a) presumption. The Board, in essence, held the claimant's claim did not go beyond "mere fancy" because, although he established a harm to his back, he "did not testify to *any* incidents or working conditions that could have caused or aggravated his back condition." *Id.*, slip op. at 11.

[33] The question of whether the claimant's showing is "contradicted and overcome by other evidence[,]" 33 U.S.C. §920(a), is not to be addressed at invocation; rather, such an inquiry necessarily involves the subsequent stages of rebuttal and weighing of the evidence as a whole of the Section 20(a) analysis. Similarly, by general definition a "burden of production" is "the obligation of a party to introduce sufficient evidence to make out a prima facie case, though [ultimately] the cogency of the evidence may fall short

presence of a burden of production rather than persuasion analysis, does not require examination of the entire record, an independent assessment of witness' credibility, or weighing of the evidence at step one. Rather, it involves having a claimant present some evidence or allegation that if true would state a claim under the Act. This requirement is consistent with the Supreme Court's statement in burden-shifting cases that "determinations at steps one and two of the *McDonnell Douglas* framework 'can involve no credibility assessment' because 'the burden-of-production determination necessarily precedes the credibility assessment state.'" *Johnson*, 545 U.S. 162, 171 n.7 (2005); *Hicks*, 509 U.S. at 509; *see also Ogawa*, 608 F.3d at 651, 44 BRBS at 50(CRT) ("Th[e] weighing of credibility . . . has no proper place in determining whether [a party] met its burden of production…."); *Storey*, 162 A.3d at 807 ("Credibility determinations are not an appropriate consideration at this initial stage…. Only if the employer is able to rebut the presumption and the burden returns to the claimant is the ALJ entitled to make credibility determinations.").

Therefore, if the claimant produces some evidence to support her prima facie case, she is entitled to the presumption that her injury is work-related and compensable.[34] The burden of proof then shifts to the employer to produce substantial evidence showing otherwise. If the employer satisfies its burden on rebuttal, the presumption drops from the case, and the claimant must bear the overall burden of persuasion and establish her injury is work-related by a preponderance of the evidence. At this third step of the analysis, the ALJ may weigh the evidence, assess the credibility of the witnesses, and make any reasonable inferences. *Santoro*, 30 BRBS 171. If the evidence proffered at step one is ultimately found to be incredible at step three when weighing of the evidence comes into play, and that conclusion is supported by substantial evidence, then so be it.

The Act states the claimant is entitled to a presumption. To get the presumption, the courts have held the claimant bears a light burden. The burden of production or "some evidence" standard which we have set forth here is a light burden – being no greater than an employer's burden on rebuttal – meant to give the claimant the benefit of the statutory

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of convincing the trier of fact to find for him." Black's Law Dictionary 178. In contrast, the "burden of persuasion" requires "the party with the burden of proof to convince the trier of fact of all elements of his case," *id.*, which by its very nature involves some sort of credibility determination regarding or weighing of the produced evidence.

[34] We recognize our position on invocation of the Section 20(a) presumption seemingly conflicts with that of the Fifth Circuit. *See generally Meeks*, 819 F.3d at 127, 50 BRBS at 36(CRT). We will apply this holding in all cases except those arising within the jurisdiction of the Fifth Circuit.

framework. Whether the claimant's evidence fails or carries the day is a matter to be resolved at step three when weighing the evidence, not at step one invocation.[35]

Section 20(a) Invocation in this Case

In this case, the ALJ improperly discussed and analyzed Claimant's credibility in addressing whether she established the elements of her prima facie case for invocation of the Section 20(a) presumption. D&O at 20-23. Noting "instances of dishonesty; the numerous inconsistencies within her statements; the withholding of critical information from medical professionals, the bankruptcy court and Employer; and the conflicts between parts of her testimony and the other evidence of record," the ALJ found "Claimant is not credible, and her statements, testimony, and reports to others are not trustworthy or reliable." *Id.* at 23. She determined Claimant did not establish the harm element of her prima facie case because she "is not credible, and her testimony and reports of symptoms to her treating providers and the medical experts are unreliable." *Id.* at 25. Thus, she found the opinions that Claimant's treatment providers offered, from Dr. Naqvi, Ms. Bell-Callahan, and Dr. Datz, in support of her prima facie claim were "questionable" and entitled to "little weight." *Id.* at 26. The ALJ then compounded her error by weighing the conflicting evidence, still while considering invocation, and finding Dr. Shindell's reports are, in contrast, "entitled to substantial evidentiary weight." *Id.* Therefore, the ALJ concluded Claimant has not established a psychological injury and/or a prima facie case to

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[35] In this regard, we specifically reject the view that the ALJ must weigh and evaluate the credibility of evidence on invocation based on a review of all or part of the record to decide whether a claimant has provided substantial evidence of a genuine issue for a hearing akin to surviving a motion for summary judgment in a civil trial under FED. R. CIV. P. 56. Or, alternatively, that the ALJ must decide invocation based on a review of all of the record to determine whether a claimant could meet her ultimate burden. In our view, a claimant's burden on invocation must instead be viewed as akin to surviving a motion to dismiss under FED. R. CIV. P. 12(b): the ALJ should assume a claimant's allegations are true, and if they state a claim for relief, a claimant has satisfied her initial burden. While it is a low hurdle, not all allegations will clear it -- as in other civil litigation, there are allegations that, even if taken as true, still do not state a claim for relief. Those claims can be decided at invocation. But -- as we have discussed throughout this decision -- an ALJ cannot evaluate credibility by weighing evidence to determine a claimant has not met her initial burden of production at invocation. If the credibility of evidence is a factor, the ALJ must instead decide the case after invocation and, if met, after rebuttal, pursuant to the claimant's overall burden of persuasion. Such a framework does not reduce a claimant's ultimate duty, nor act as a barrier to the full consideration of her case under the guise of a presumption enacted for her benefit.

invoke the Section 20(a) presumption. *Id.* at 27. Because the ALJ improperly considered Claimant's credibility and weighed the conflicting evidence at the initial invocation stage, effectively applying a burden of persuasion standard, her conclusion that Claimant did not establish her prima facie case cannot stand.

Claimant testified and submitted doctors' and therapist's statements regarding her psychological symptoms and diagnoses. As such, she has produced "some evidence" to support her allegation that she sustained a harm.[36] Similarly, Claimant has produced "some evidence" that she encountered working conditions which could have caused her psychological injury, as the undisputed evidence establishes repeated occurrences of terror attacks and explosions at the base where she worked in Afghanistan for Employer. *See* JX 2 (list of incidents at Bagram Airfield); CX 2 (Claimant's supervisor testified about attacks during her residency on the base). Therefore, she has produced "some evidence" of the requisite harm and working conditions necessary to establish a prima facie case. *See generally Brown*, 921 F.2d at 296 n.6; *see also McAllister*, 627 F.3d at 1298, 44 BRBS at 91(CRT).

Consequently, we reverse the ALJ's finding that Claimant did not establish a prima facie case. As a matter of law, we hold Claimant satisfied her initial burden of production under Section 20(a) and, therefore, is entitled to invoke the Section 20(a) presumption that her psychological injuries are work-related. *See generally Hargrove v. Strachan Shipping Co.*, 32 BRBS 11, *aff'd on recon.*, 32 BRBS 224 (1998); *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989). Thus, we remand this case for the ALJ to address whether Employer's evidence, notably Dr. Shindell's opinion, is sufficient to rebut the Section 20(a) presumption with regard to all of Claimant's diagnosed and claimed psychiatric conditions. *See generally Brown*, 893 F.2d 294, 23 BRBS 22(CRT); *see also C&C Marine Maint. Co. v. Bellows*, 538 F.3d 293, 42 BRBS 37(CRT) (3d Cir. 2008); *Rainey*, 517 F.3d 632, 42 BRBS 11(CRT). If Employer satisfies its burden, the ALJ must then weigh the evidence on the record as a whole, with Claimant retaining the ultimate burden of persuasion by establishing, by a preponderance of the evidence, a causal relationship between her employment exposures and her injuries. *See generally Meeks*, 819 F.3d at 127, 50 BRBS at 35(CRT); *see also Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT) (1994). If the ALJ finds Claimant's psychological condition is work-related, she should conduct further proceedings on any additional disputed issues.

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[36] As previously noted, Dr. Navqi diagnosed PTSD and anxiety disorder, CX 4, Dr. Datz diagnosed PTSD and panic attacks, CX 5, and Claimant's therapist, Ms. Bell-Callahan, diagnosed PTSD, CX 3.

Accordingly, we grant Claimant's motion for reconsideration en banc and the relief requested. 20 C.F.R. §802.409. We vacate our affirmance of the ALJ's Decision and Order denying benefits, reverse the ALJ's finding that Claimant is not entitled to the Section 20(a) presumption linking her psychological injuries to her work, and remand this case for further consideration consistent with this opinion.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring and dissenting:

As explained below, I concur in the majority's decision to reverse the ALJ's finding that Claimant did not invoke the Section 20(a) presumption linking her psychological condition to her dangerous employment in Afghanistan. However, unlike the majority, I would specifically address, and vacate as irrational and unsupported, the ALJ's discrediting of Claimant's testimony and the opinions of her medical experts.

Section 20(a) Presumption

As set forth in my dissent from the initial panel decision, Claimant met her "low burden" to establish a prima facie case that she suffered a harm and was exposed to working conditions that could have caused the harm by "present[ing] evidence" of frequent terror attacks and explosions at the base where she worked in Afghanistan along with diagnoses from two doctors and a therapist. *Rose v. Vectrus Systems Corp.*, BRB No. 20-0279, slip op. at 8-9 (May 25, 2021) (unpub.) (Buzzard, J., dissenting), *citing Ramsay Scarlett & Co. v. Director, OWCP [Fabre]*, 806 F.3d 327 (CRT) (5th Cir. 2015) (a claimant's burden to establish a prima facie case is "low").

My earlier dissent thus comports with the majority's holding that a claimant's burden to invoke the Section 20(a) presumption, like an employer's burden to rebut it, is one of production. I write separately, however, to express my views on the type and quality of evidence that must be produced and the role of "credibility" findings in assessing that evidence at the invocation and rebuttal stages.

It is well-settled that to rebut the Section 20(a) presumption an Employer bears the burden of producing "substantial evidence establishing the absence of a connection between the injury and the employment." *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 288 (5th Cir. 2000); 33 U.S.C. §920(a). To the extent a claimant's burden at invocation is "no greater than an employer's burden at rebuttal," *see* p. 22 *supra*, it follows that a claimant establishes a prima facie case by producing substantial evidence of a harm and working conditions that could have caused the harm. *See Fabre*, 806 F.3d at 331 (the claimant met his "low burden" to invoke the presumption with evidence that was "more than a scintilla," *i.e.*, substantial evidence); *Brown v. I.T.T./Cont'l Baking Co. & Ins. Co. of N. Am.*, 921 F.2d 289, 296 n.6, (D.C. Cir. 1990) (a claimant need only adduce "some" evidence to establish a prima facie case).

"Substantial evidence," in turn, is defined as "more than a scintilla but less than a preponderance." *Fabre*, 806 F.3d at 330. Such evidence need not prove a litigant's theory of the case is "more likely than not" to have occurred, "it need only provide enough facts to support one rational conclusion." *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 226 (4th Cir. 2009). Thus, under the substantial evidence standard, a party must "produce 'not the degree of evidence which satisfies the [ALJ] that the requisite fact . . . exists, but merely the degree which *could* satisfy a reasonable factfinder.'" *Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 55 (1st Cir. 2010), *quoting Allentown Mack Sales and Serv., Inc. v. NLRB,* 522 U.S. 359, 377 (1998). In the present claim, rather than basing her invocation analysis on the proper "objective test," *i.e.*, whether Claimant produced evidence that *could* satisfy a reasonable factfinder that she suffered a harm and was exposed to working conditions that could have caused the harm, the ALJ based her finding on whether she, personally, was persuaded by a preponderance of that evidence when weighed against the other evidence of record. *Id.*

While the majority generally describes the burden of production analysis as involving no assessment of credibility, *see* p. 21 *supra*, that statement should not be construed to negate the ALJ's role in evaluating the sufficiency of a claimant's evidence at invocation or an employer's evidence at rebuttal. As the case law confirms, not all evidence is substantial evidence. *See*, *e.g.*, *Bis Salamis, Inc. v. Dir., Off. of Workers' Comp. Programs* [*Meeks*], 819 F.3d 116, 129 (5th Cir. 2016) (inherently contradictory testimony and conclusory medical opinions are not substantial evidence to invoke the presumption);

Fabre, 806 F.3d 327 (speculative evidence is not substantial evidence to rebut the presumption); *Fields*, 599 F.3d at 56 (medical opinions that fail to address the cause of the relevant injury are not substantial evidence rebutting the presumption); *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 651 (9th Cir. 2010) (only "specific and comprehensive" evidence satisfies an employer's burden to produce substantial evidence rebutting the presumption); *Holiday*, 591 F.3d at 226 (evidence that addresses an initial injury but not an alleged aggravation thereof is "no evidence at all" that could rebut the presumption); *see also Biestek v. Berryhill*, 139 S. Ct. 1148, 1160 (2019) (J. Gorsuch, dissenting) ("clearly mistaken evidence, fake evidence, speculative evidence, and conclusory evidence aren't substantial evidence").

Therefore, the substantial evidence standard necessarily allows for a limited credibility assessment, one that considers not whether the ALJ is subjectively persuaded by the evidence or finds it outweighed by other evidence, but whether, objectively speaking, the evidence presented "*could* satisfy a reasonable factfinder" that the "requisite fact exists." *Fields*, 599 F.3d at 55.

This conclusion helps explain two seemingly incongruous approaches to credibility set forth by the Fifth Circuit in *Meeks* and the Ninth Circuit in *Ogawa*. The Fifth Circuit's holding in *Meeks*, that "an ALJ may make credibility determinations in ascertaining whether a claimant has made a prima facie case," arose in a claim that hinged almost exclusively on the statements of a claimant whom the ALJ concluded was the least credible witness he had encountered in fifteen years on the bench. As the Fifth Circuit explained, among other acts of dishonesty, the claimant provided inherently contradictory accounts of his alleged workplace accident and gave demonstrably untruthful testimony regarding his subsequent pain and physical limitations. *Meeks*, 819 F.3d at 129-130. Additionally, his treating physicians offered only "bare conclusions, unsupported by explanations of how the [alleged workplace accident] might aggravate [the claimant's] preexisting degenerative spinal condition." *Id.* at 129. Meanwhile, the Ninth Circuit's holding in *Ogawa*, that "it was error for the ALJ to weigh the evidence and consider questions of credibility" in determining whether the employer rebutted the Section 20(a) presumption, related to an ALJ's finding of no rebuttal based not on whether the employer produced substantial evidence, but solely on his assessment that the employer's evidence was less credible than the claimant's. *Ogawa*, 608 F.3d at 651.

Taken together, these cases reflect a straightforward, consistent application of the substantial evidence standard at invocation and rebuttal. In *Meeks*, the ALJ concluded that the claimant was "such an unreliable witness and dishonest individual" that his contradictory accounts of his alleged workplace accident and untruthful statements regarding his subsequent physical condition "had virtually no probative value or evidentiary weight." *Meeks*, 819 F.3d at 129. In other words, the claimant failed to produce substantial evidence of a harm, and working conditions that could have caused the harm,

because no reasonable factfinder *could* credit his testimony as establishing those facts, nor could a reasonable factfinder credit the wholly conclusory, unexplained opinions of his treating physicians.[37] *Id.* Conversely, in *Ogawa*, the ALJ failed to consider that the employer did, in fact, submit substantial evidence "that could satisfy a reasonable factfinder that the claimant's injury was not work-related," instead errantly finding no rebuttal because he, personally, was more persuaded by the claimant's contrary evidence. *Ogawa*, 608 F.3d at 651.

ALJ's Credibility Findings

As a final point, I disagree with the majority's decision to not address the valid allegations of error Claimant has raised with respect to the ALJ's discrediting of her testimony and medical evidence. While the majority has held this evidence is sufficient to invoke the presumption, judicial economy weighs in favor of addressing Claimant's additional arguments because, if Employer rebuts the presumption on remand, the ALJ's irrational and unsupported findings that Claimant's evidence is not credible, left unaddressed, will undoubtedly affect her weighing of the evidence as a whole. Thus, for the reasons set forth in my original dissent, quoted here for ease of reference, I would vacate the ALJ's discrediting of Claimant's testimony and medical opinions:

> [T]he administrative law judge's finding that Claimant is not credible is irrational and unsupported by the evidence because it is based on a number of mischaracterizations of Claimant's testimony and the record. For example, with regard to the frequency of the terror attacks at Bagram, the administrative law judge inaccurately found claimant's testimony inconsistent because at her deposition she stated the attacks occurred "every day," whereas at the hearing, she agreed with her supervisor's recollection

[37] Notably, despite the claimant's "total lack of credibility," the Fifth Circuit nevertheless described *Meeks* as a "difficult case." *Meeks*, 819 F.3d at 129. This suggests that while an ALJ is permitted to consider the inconsistency and untruthfulness of a claimant's testimony, denying a claim at invocation on those grounds is the exception, reserved only for instances in which the claimant's testimony is, by definition, not substantial evidence because his outright dishonesty on the elements of his prima facie case (harm and working conditions) deprives it of any "probative value" that could be credited by a reasonable factfinder. *Id.* Again, this inquiry at invocation or rebuttal (whether a reasonable factfinder could credit the evidence as supporting one rational conclusion) is separate and distinct from the inquiry when weighing the evidence as a whole (whether the ALJ is persuaded that the claimant established her claim by a preponderance of the evidence).

that attacks occurred every other day or week. Decision and Order at 21. To the contrary, Claimant testified at her deposition that the attacks at Bagram were "more frequent [than her prior posting at Kandahar], *like* every day." JX 8 at 28 (emphasis added). Claimant was making an approximation of the frequency of attacks, not a definitive statement that attacks occurred daily.

Claimant further testified that Bagram experienced "numerous terrorist attacks and suicide bombers" which caused her to fear for her life. JX 8 at 109. This is wholly consistent with her supervisor's statement that the base "came under attack often." CX 2 at 1. Her supervisor elaborated that he and Claimant "worked right off the flight line and there [were] always mortars directed that way." *Id.* He also described other incidents in which an explosive device detonated at the bus stop next to their office, killing several people; local Afghans working on the base were caught trying to poison food in the dining hall; and the base had to be locked down for a week until several suicide bombers that had gotten onto the base were captured.[38] CX 2 at 1-2. Finally, he stated that he and Claimant had to wear body armor to prepare for incoming attacks and witnessed aircraft crashes and other employees being injured.[39] *Id.*

Thus, contrary to the administrative law judge's mischaracterization of the evidence, Claimant's description of the frequency of attacks at Bagram is consistent with the other evidence in the record.[40] *See* JX 2 (showing a list

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[38] According to Claimant's supervisor, the suicide bombers' goal was to "go after . . . anyone that they could target." CX 2 at 1.

[39] In light of this uncontradicted evidence regarding Claimant's frequent exposure to terror attacks and witnessing others' injuries, the administrative law judge failed to explain her crediting of Dr. Shindell's opinion that Claimant does not meet the criteria for PTSD (or suffer any other psychological condition, for that matter) because she allegedly was not "directly exposed" to trauma "other than being in a zone of conflict," witness or learn about another's trauma, or experience "extreme indirect exposure to adverse events." EX 40 at 8-9; Tr. at 151-153 (Dr. Shindell describing his belief that although Claimant's worksite was in a "war zone" and "had been shelled at times," Claimant was not "specifically in a severe amount of harm's way, other than what you would expect, given being in [a war zone]").

[40] Moreover, even if the administrative law judge had not mischaracterized the evidence, she failed to explain how being subjected to bombings and related terror attacks every other day, instead of every day, defeats Claimant's prima facie case. Under either

> of incidents at Bagram where attacks often occurred multiple times per week); CX 2 (supervisor stating the base "came under attack often"). In addition, the administrative law judge's statement that Claimant was not truthful during her bankruptcy proceeding – and thus not trustworthy in this Defense Base Act claim – is also inaccurate. At the hearing, Claimant explained that she misinterpreted the question on the bankruptcy paperwork as to whether she had any other cases pending, and that she did in fact tell the bankruptcy court about her workers' compensation claim. *See* Tr. at 129-130 ("[t]hey asked me do I have any open cases. And I told them about this one . . . So I had to make them aware of the case that I had open with you all.").
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> While it is the administrative law judge's prerogative to assess the credibility of the witnesses, that authority is not absolute. The administrative law judge's finding that Claimant is not credible is based on numerous mischaracterizations of her testimony and the other evidence in the record and, therefore, cannot be affirmed. *See Howell v. Einbinder*, 350 F.2d 442 (D.C. Cir. 1965). This error in turn affected the administrative law judge's consideration of the medical opinions supportive of Claimant's prima facie case, and therefore her rejection of these medical opinions as relying on Claimant's allegedly untrustworthy reporting of her symptoms also cannot be affirmed.
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> I would reverse the administrative law judge's finding that Claimant did not establish a prima facie case and hold Claimant is entitled to the Section 20(a) presumption. I would remand the case for the administrative law judge to address whether Dr. Shindell's opinion is sufficient to rebut the Section 20(a) presumption with regard to all of Claimant's diagnosed psychiatric conditions and if so, to weigh the evidence as a whole. *See Hargrove v. Strachan Shipping Co.*, 32 BRBS 11, *aff'd on recon*, 32 BRBS 224 (1998).

Rose, BRB No. 20-0279, slip op. at 9-11 (Buzzard, J., dissenting).

I therefore would hold Claimant's burden to invoke the presumption is to produce substantial evidence of a harm and working conditions that could have caused the harm. Accordingly, I concur in part and respectfully dissent in part from the majority opinion.

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frequency, Claimant established working conditions that *could have* caused her psychological condition. *See Sewell*, 32 BRBS at 136-37.

GREG J. BUZZARD
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision, including its analysis of a claimant's burden in establishing entitlement to the Section 20(a) presumption, 20 U.S.C. §920(a). I would affirm the ALJ's finding that Claimant did not establish the requisite harm element of her prima facie claim and, therefore, affirm her resulting denial of benefits.

As stated in the Board's prior decision, relevant case precedent states it is the claimant's burden to "establish" each element of her prima facie case. *Bis Salamis, Inc. v. Director, OWCP [Meeks]*, 819 F.3d 116, 127, 50 BRBS 29, 35-36(CRT) (5th Cir. 2016); *Gooden v. Director, OWCP*, 135 F.3d 1066, 1068, 32 BRBS 59, 61(CRT) (5th Cir. 1998). Establishing the elements of a prima facie case requires that the claimant produce substantial credible/reliable evidence that: (1) she suffered a harm; and (2) a condition of the workplace could have caused, aggravated, or accelerated the harm. *See Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996). In this regard, the ALJ is entitled to assess the sufficiency of a claimant's evidence supportive of her prima facie case and she may make credibility determinations and draw reasonable inferences in deciding whether a claimant has met her burden and invoked the Section 20(a) presumption. *See Meeks*, 819 F.3d at 127, 50 BRBS at 36(CRT); *Bolden*, 30 BRBS at 73; *see also generally Del Monte Fresh Produce v. Director, OWCP [Gates]*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009). The ALJ's duties, therefore, necessarily involve some inquiry into the quality of the evidence submitted by a claimant in her efforts to invoke the Section 20(a) presumption. *See generally E.E.O.C. v. Avery Dennison Corp.*, 104 F.3d 858, 861 (6th Cir. 1997); *Biestek v. Berryhill*, 139 S. Ct. 1148, 1160 (2019) (J. Gorsuch, dissenting) ("clearly mistaken evidence, fake evidence, speculative evidence, and conclusory evidence aren't substantial evidence").

For the reasons expressed in the original decision, I would again hold the ALJ permissibly found Claimant's testimony not credible and, consequently, the opinions of Drs. Naqvi and Datz and Ms. Bell-Callahan, all of whom relied on Claimant's self-reported symptoms, are tainted. *See Rose v. Vectrus Systems Corp.*, BRB No. 20-0279 (May 25, 2021) (unpub.) (Buzzard, J., dissenting), slip op. at 5-7. The ALJ, acting within her discretion, accorded no weight to this evidence, rationally concluding Claimant's evidence is insufficient to establish the requisite harm element of her prima facie case. Her findings

in this regard are supported by substantial evidence. Accordingly, "[b]ecause the [ALJ] permissibly found Claimant failed to establish an essential element of her prima facie case," *id.*, slip op. at 7, I would affirm the ALJ's Decision and Order denying benefits.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge