U.S. Department of Labor

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

BRB No. 20-0520

DAVID MORONI CCANTO RODRIGUEZ Claimant-Petitioner v. TRIPLE CANOPY, INCORPORATED and CONTINENTAL INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	))))))))))))))))))))	**PUBLISHED** DATE ISSUED: 05/27/2021 DECISION and ORDER

Appeal of the Decision and Order Denying Disability Compensation and Awarding Medical Benefits, Decision and Order Denying Motion for Reconsideration, and Decision and Order Denying Second Motion for Reconsideration of Stephen R. Henley, Chief Administrative Law Judge, United States Department of Labor.

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

Ann Marie Scarpino (Elena S. Goldstein, Deputy Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore),

Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals Chief Administrative Law Judge Stephen R. Henley's Decision and Order Denying Disability Compensation and Awarding Medical Benefits, Decision and Order Denying Motion for Reconsideration, and Decision and Order Denying Second Motion for Reconsideration (2018-LDA-01062) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act (DBA), 42 U.S.C. §1651 *et seq.* (Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, a citizen of Peru, worked for Employer in Iraq from November 25, 2006 to February 2010, performing security duties at United States military bases.[1] EX 1 at 21, 24-27, 31. In 2008, an explosion damaged his hearing and killed two persons next to him, and a mortar attack hit his bunker and rendered him unconscious. *Id.* at 32-33, 44-45. He sought medical treatment following the mortar attack and later when his ears started bleeding. *Id.* at 33-35. Claimant also testified at his February 7, 2019 deposition that he could hear mortars, rockets, bullets and car bombs throughout 2009. *Id.* at 49. He stated he had work-related bilateral hearing loss, vision problems and psychological symptoms.[2] *Id.* at 32. Claimant first sought psychological treatment in 2016 and treatment for his hearing loss in 2018. *Id.* at 36-37, 41; CXs 8, 10 at 2. Claimant filed a claim for benefits under the Act in March 2018 for his hearing loss and psychological condition. CX 1; Cl. Br. at 6-7.

The administrative law judge found Employer did not rebut the Section 20(a) presumption, 33 U.S.C. §920(a), that Claimant's hearing loss is work-related and, after

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[1] Employer declined to renew Claimant's employment contract in February 2010. EX 1 at 30-32, 49-50.

[2] Specifically, Claimant testified he has trouble sleeping, isolates, is easily irritated, constantly wants to get in fights, and feels like killing people when he sees blood. EX 1 at

32.

Employer rebutted the presumption with respect to his psychological injury claim, Claimant established he has work-related Post-Traumatic Stress Disorder (PTSD).[3] Decision and Order at 14, 16. He determined Claimant did not provide timely notice to Employer of his work injuries, but Employer was not prejudiced by the delay. *Id.* at 16-18; *see* 33 U.S.C. §912(a), (d). The administrative law judge found Claimant timely filed a claim for his hearing loss on March 13, 2018, since he did not receive an audiogram documenting his hearing loss until January 22, 2018. Decision and Order at 20; 33 U.S.C. §§908(c)(13)(D), 913(a); *see* CXs 1 at 1, 8. The administrative law judge found Claimant's PTSD claim, also filed on March 13, 2018, was not timely because he should have known in 2014 that he had work-related PTSD.[4] 33 U.S.C. §913(b)(2); Decision and Order at 20; Decision and Order Denying Reconsideration at 3-4.[5] The administrative law judge found Claimant entitled to past and future medical treatment for his work injuries. *See* 33 U.S.C. §907.

On appeal, Claimant challenges the administrative law judge's determination that his PTSD claim was untimely filed. Employer responds that the administrative law judge's finding should be affirmed. The Director, Office of Workers' Compensation Programs,

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[3] The administrative law judge denied Claimant compensation for his hearing loss because he did not establish the extent of his loss. Decision and Order at 20-21. The Act provides that hearing loss determinations must be made in accordance with the American Medical Association *Guides to the Evaluation of Permanent Impairment*. 33 U.S.C. §908(c)(13)(E). The administrative law judge awarded Claimant medical benefits for this injury. Decision and Order at 20-21.

[4] The administrative law judge agreed with Employer that Claimant's PTSD is an occupational disease and therefore he had two years to file a claim under the Act. Decision and Order at 16, 18-19; Emp. Post-hearing Br. at 28-32; *see* 33 U.S.C. §913(b)(2).

[5] In his Decision and Order Denying Motion for Reconsideration, the administrative law judge rejected Claimant's contention that Employer should be estopped from contending his PTSD claim was untimely filed because Employer misrepresented the availability of benefits under the DBA. Although Claimant alleged Employer knew of the 2008 mortar attack when it occurred, the administrative law judge found Claimant cannot rely on the 2008 mortar attack to trigger the requirement under Section 30(a), 33 U.S.C. §930(a), that Employer file a notice of injury because there is no evidence Employer was aware of any injury to Claimant at that time. He reiterated Claimant should have known he had disabling PTSD in 2014. In his Decision and Order Denying Second Motion for Reconsideration, the administrative law judge again found Claimant failed to establish Employer deliberately misled him concerning his entitlement to claim compensation; he also found, in this regard, that Claimant never testified Employer deliberately misled him.

responds, agreeing with Claimant that the administrative law judge erred in finding his claim untimely.

Section 13(b)(2) of the Act states that in an occupational disease case that does not immediately result in disability, a claim shall be timely:

> if filed within two years after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability, or within one year of the date of the last payment of compensation, whichever is later.

33 U.S.C. §913(b)(2). Section 20(b) of the Act, 33 U.S.C. §920(b), provides a presumption that the claim was timely filed. *See DynCorp Int'l v. Director, OWCP*, 658 F.3d 133, 45 BRBS 61(CRT) (2d Cir. 2011), *aff'g E.M.* [*Mechler*] *v. DynCorp Int'l*, 42 BRBS 73 (2008); *Stark v. Washington Star Co.*, 833 F.2d 1025 (D.C. Cir. 1987). Thus, the burden is on Employer to produce substantial evidence that the claim was untimely filed, i.e., in this case, that Claimant's date of awareness was more than two years prior to March 13, 2018. *Bath Iron Works Corp. v. U.S. Dep't of Labor* [*Knight*], 336 F.3d 51, 37 BRBS 67(CRT) (1st Cir. 2003); *Blanding v. Director, OWCP*, 186 F.3d 232, 33 BRBS 114(CRT) (2d Cir. 1999).

The administrative law judge determined Claimant was first diagnosed with work-related PTSD on October 21, 2016.[6] Decision and Order at 19; *see* CX 10 at 2 at 185. He found Claimant was denied employment in 2010 on the basis of having worked in Iraq and in 2014 because he failed the prospective employer's psychological examination. Claimant testified at his deposition that six months after leaving work for Employer he sought employment with Prosegur, a security company. EX 1 at 17-18. He stated he was informed he was not hired because "they said I was crazy, that all of those who had been in Iraq were crazy . . . ." *Id.* at 17. Claimant testified he applied for another security job in 2014 with Vipsa Andina, which did not hire him because he did not pass their psychological examination, although he was told he could apply at a later date. He was not provided a copy of the results of the examination. *Id.* at 18. The administrative law judge found Claimant should have filed his PTSD claim no later than some point in 2016 because, by

[6] The administrative law judge determined Claimant established he was unaware of the connection between his PTSD and his employment until after he stopped working for Employer in 2010. Decision and Order at 20.

this time, Claimant was aware or should have been aware that he had a loss in wage-earning capacity due to a work-related psychological condition.[7] *Id*. at 19-20.

We cannot affirm the administrative law judge's determination that Claimant's PTSD claim was not timely filed. Employer has not produced substantial evidence to rebut the Section 20(b) presumption that Claimant was aware of the relationship between his employment, his PTSD, and his disability more than two years prior to filing his claim on March 13, 2018.[8] The administrative law judge erred in finding Claimant was aware of his work-related disabling injury after being rejected for jobs in 2010 and 2014 due to his working in Iraq and failing a psychological examination, respectively. The rejection in 2010 was not based on a diagnosis of an actual work-related psychological condition, but merely due to his prospective employer's perception of former overseas workers. Claimant was not provided a copy of the 2014 psychological examination and thus, even assuming it did contain a diagnosis, "awareness" within the meaning of the Act could not be imputed to Claimant. *See DynCorp Int'l*, 658 F.3d at 139-140, 45 BRBS at 64-65(CRT). The administrative law judge's finding Claimant should have been aware of a psychological injury related to his employment by 2014 based on a prospective employer telling him in 2010 that contractors in Iraq were "crazy" and his failing the psychological examination in 2014 is not substantial evidence of a work-related psychological injury sufficient to rebut the Section 20(b) presumption that his March 2018 PTSD claim was timely filed.[9]

At his deposition, Claimant was asked why he decided to seek a psychological examination in October 2016. He replied, "[B]ecause I was not well. I was sick. The process had started." EX 1 at 36-37. In her October 21, 2016 report, Ms. Carmen Ciuffardi

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[7] In his decision on reconsideration, the administrative law judge also relied on Claimant's unemployed status since 2010. Decision and Order on Reconsideration at 4. In this regard, Claimant testified he has not applied for other jobs, but works at his mother's grocery store when it is open two to three days per week and washes his father's commercial vehicle in the morning and evening four or five days per week. EX 1 at 19-21.

[8] Claimant does not challenge the administrative law judge's determination that Employer could not have known Claimant was injured before he filed his claim and, therefore, the time for filing a claim was not tolled under Section 30(f) of the Act. *See* 33 U.S.C. §930(a), (f).

[9] We note that an employer's burden to rebut the Section 20(b) presumption that the claimant was aware of a disabling work-related injury can, by their nature, be especially problematic in psychological injury cases. *See generally Blankenship v. Bowens*, 874 F.2d 1116 (6th Cir. 1989); *see also DynCorp Int'l,* 658 F.3d at 139, 45 BRBS at 65(CRT) (denial of symptoms often associated with PTSD).

Montoya, a psychologist, diagnosed Claimant with work-related PTSD. CX 10 at 2. This is the first medical opinion diagnosing a psychological injury related to Claimant's employment. *See Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS 154, 156 (1996) (claimant not aware of work-related asbestosis until diagnosed by physician); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84, 87-89 (1995) (awareness of injury insufficient to rebut Section 20(b) presumption; claimant must be aware of its relation to his employment); *Martin v. Kaiser Co., Inc.*, 24 BRBS 112 (1990) (Dolder, J., concurring in result only). There is no evidence prior to Ms. Montoya's report which linked Claimant's psychological injury to his employment in Iraq. *Bezanson v. General Dynamics Corp.*, 13 BRBS 928 (1981) (medical diagnosis irrelevant when diagnosis does not link the injury to the employment). While a medical diagnosis is not a statutory prerequisite to "awareness" for Section 13 purposes, *see, e.g., V.M. [Morgan] v. Cascade Gen., Inc.*, 42 BRBS 48 (2008), *aff'd*, 388 F. App'x 695 (9th Cir. 2010), in this case there is not substantial evidence of the "full character, extent, and impact" of Claimant's work-related injury prior to his PTSD diagnosis in October 2016.[10] *See Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130(CRT) (9th Cir. 1991).

The record supports only the conclusion that the earliest date Claimant could have been aware of a work-related psychological injury was on October 21, 2016, when Ms. Montoya diagnosed Claimant with PTSD related to his employment in Iraq. As Claimant's claim was filed in March 2018, within two years of this time, his claim is timely as a matter of law. *Bechtel Associates v. Sweeney*, 834 F.2d 1029, 20 BRBS 49(CRT) (D.C. Cir. 1987). Thus, the administrative law judge's finding to the contrary is reversed.[11] *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990). We therefore remand this case for the administrative law judge to address the remaining contested issues.

Accordingly, we reverse the administrative law judge's determination that Claimant's PTSD claim was not timely filed and remand the case for further findings on this claim. In all other respects, we affirm the administrative law judge's Decision and Order Denying Disability Compensation and Awarding Medical Benefits, Decision and Order Denying Motion for Reconsideration, and Decision and Order Denying Second Motion for Reconsideration.

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[10] At this time, Claimant arguably had a loss in wage-earning capacity due to his PTSD.

[11] Accordingly, we need not address Claimant's contentions that Employer is estopped from contesting the timeliness of his claim because of its alleged misrepresentations to employees about their employee status and lack of posted notice regarding the right to file a claim for a work-related injury. *See* 33 U.S.C. §934; 20 C.F.R. §702.211.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

CERTIFICATE OF SERVICE

2020-0520-LDA Mr. David Moroni Ccanto Rodriguez v. Triple Canopy, Inc., Continental Insurance Company, (Case No. 18-LDA-01062) (OWCP No. 02316447)

I certify that the parties below were served this day.

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