**U.S. Department of Labor**

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

BRB No. 21-0495

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| BASSIM ALBONAJIM | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
| | ) | |
| AECOM | ) | DATE ISSUED: 9/30/2022 |
| | ) | |
| and | ) | |
| | ) | |
| ACE AMERICAN INSURANCE COMPANY | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | DECISION and ORDER |
| | ) | |
| Respondent | ) | |

Appeal of the Order Granting Summary Decision / Awarding Benefits of Paul C. Johnson, Jr., District Chief Administrative Law Judge, United States Department of Labor.

Lara D. Merrigan (Merrigan Legal), Sausalito, California, and John D. Hafemann and Paul Murray (Hafemann, Magee & Thomas, LLC), Savannah, Georgia, for Claimant.

Matthew W. Boyle (Seema Nanda, 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: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals District Chief Administrative Law Judge (ALJ) Paul C. Johnson Jr.'s Order Granting Summary Decision / Awarding Benefits (2021-LDA-01516) rendered on a claim filed pursuant to 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). We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

From October 2010 until August 2011, Claimant worked as a translator for Employer in an active warzone in Iraq where he was exposed to enemy activity, attacks, and fatalities. In August 2011, Employer informed Claimant the program he was assigned to was being terminated. Claimant's Exhibit (CX) 10 at 3. Claimant returned to the United States in 2011 and has worked in multiple jobs and been gainfully employed ever since. CX 1 at 2. On July 1, 2020, after years of working stateside, Dr. Jennifer Eldridge, a clinical psychologist, evaluated Claimant and diagnosed post-traumatic stress disorder (PTSD).[1] CX 1 at 1. Dr. Eldridge recommended Claimant never return to his workplace overseas because doing so would aggravate his PTSD symptoms. *Id.* at 8. Claimant filed

[1] Dr. Eldridge assessed Claimant using four assessment tools: the Beck's Depression Inventory (BDI), Beck's Anxiety Inventory (BAI), the PCL-5 (PTSD checklist), and the Adverse Childhood Experiences Questionnaire (ACE). Claimant scored a 43 on the BDI, placing "him within the 'extreme' range of clinical depression," a 35 on the BAI, "indicating moderate levels of anxiety," a 69 on the PCL-5 (PTSD), "indicating a need for PTSD treatment and probable diagnosis of PTSD. His overall score on the PCL-5 strongly suggests he requires treatment for PTSD." He scored a 0 on the ACE. Furthermore, Dr. Eldridge stated there is no indication of malingering or untruthfulness because "[i]f he were attempting to malinger, one would expect higher scores on the Beck Depression and Anxiety Scales, and on the PCL-5." Dr. Eldridge recommended that Claimant should never return to his overseas employment, stating: "NO, Mr. Albonajim is not able to ever return to contracting work in war zones due to being permanently compromised by the PTSD he suffered while working on the job as a contractor overseas. Returning to work in war zones would exacerbate his symptoms and significantly reduce the efficacy of treatment." CX 1 at 8.

a claim for compensation (LS-203 form) on August 18, 2020, seeking benefits under the DBA. CX 2. Employer did not respond, prompting Claimant to file a motion for summary decision on June 1, 2021. Again, Employer did not respond.

On June 17, 2021, the ALJ issued his order granting Claimant's motion. He found, *inter alia*, the following undisputed facts: 1) Claimant's usual work for Employer was inherently dangerous; 2) Claimant was diagnosed with anxiety, depression, and PTSD and required mental health treatment; 3) the working conditions and Claimant's traumatic experiences while working for Employer caused his condition; 4) Claimant became aware of his work-related condition and its effect on his wage-earning capacity on July 31, 2020; 5) Claimant is unable to return to his usual work; and 6) Claimant has a significant decrease in his future wage-earning capacity resulting from his inability to deploy for work as a result of his mental health condition. D&O at 2-3.

Despite concluding Claimant is permanently partially disabled, the ALJ denied disability benefits. He reasoned that Claimant's average weekly wage (AWW) for purposes of determining the amount of disability benefits must be determined as of the date Claimant became aware of his injury in 2020. Because Claimant was gainfully employed at that time and continues to be, the ALJ determined Claimant suffered no actual loss in his wage-earning capacity.[2] However, the ALJ awarded Claimant medical benefits. D&O at 5-6.

Claimant appeals, urging the Board to reverse the ALJ's denial of disability benefits and to modify his order to award full compensation. Claimant's Brief (Cl. Br.) at 32.[3] The Director, Office of Workers' Compensation Programs (Director), responds, urging the Board to vacate the ALJ's decision and remand the case for an award of benefits. Employer has not responded.

Claimant first contends the ALJ erred by ignoring Section 10(c), 33 U.S.C. §910(c), and basing his AWW solely on his stateside post-diagnosis salary pursuant to Section 10(i)

[2] The ALJ relied on language from Section 10(i) and stated it "specifically provides that 'the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation.'" D&O at 5 (quoting and emphasizing 33 U.S.C. §910(i)).

[3] In his Petition for Review, Claimant asks the Board to reverse the ALJ's denial of disability benefits and remand the case for a determination of the amount of benefits due. But in his supporting memorandum, he asks the Board to modify the ALJ's decision by awarding the full amount of benefits he requested.

of the Act, 33 U.S.C. §910(i), rather than considering his salary from his overseas employment that caused his PTSD. Second, he argues the ALJ erred in granting summary decision but then denying benefits before giving him a chance to respond to the application of Section 10(i).[4] Finally, Claimant argues Section 10(i) is unconstitutional if it mandates a denial of disability benefits under these circumstances, and it should be unenforceable as to "delayed expression" PTSD claims.

The Director responds, agreeing with Claimant's position that the ALJ erred in interpreting Section 10(i) as requiring Claimant's AWW be determined using his lower stateside earnings as opposed to his higher earnings from his overseas employment that caused his PTSD. Director Brief (Dir. Br.) at 3. The Director argues the ALJ's decision is contrary to both Board and circuit court precedent, and Congressional intent, and produces an "untenable result" that is not in accordance with the purpose of the Act. Dir. Br. at 7-8. Because the ALJ found Claimant had a decreased earning capacity in excess of $120,000 and was no longer employable in a theater of war due to his PTSD, the Director argues Claimant's DBA injury deprived him of his economic choice to return to overseas employment. Therefore, the Director urges the Board to hold that Claimant should receive disability compensation based on his overseas earnings.

In ruling on a party's motion for summary decision, the ALJ must determine, after viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the moving party is entitled to summary decision as a matter of law. *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006); *see also O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002); *Brockington v. Certified Elec., Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *R.V. [Villaverde] v. J. D'Annunzio & Sons*, 42 BRBS 63 (2008), *aff'd sub nom. Villaverde v. Director, OWCP*, 335 F. App'x 79 (2d Cir. 2009); *Buck v. General Dynamics Corp.*, 37 BRBS 53 (2003); *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990); 29 C.F.R. §18.72. To defeat a motion for summary decision, the non-moving party must "come forward with specific facts" to show "there is a genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd., v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). If the ALJ *could* find for the non-moving party, or if it is necessary to weigh evidence or make credibility determinations on the issue presented, summary decision is inappropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986); *Walker v. Todd Pac. Shipyards*, 47 BRBS 11 (2013), *vacating in pert. part on recon.*, 46 BRBS 57 (2012).

[4] Claimant asserts the ALJ effectively considered the issue *sua sponte*, as if Employer had filed a motion for summary decision.

Section 10 of the Act provides three alternative methods for calculating an employee's average annual earnings, which serve as the basis for determining his AWW "at the time of the injury:" (a) the employee's earnings from the previous year, if the employee worked in the field in which he was injured for "substantially the whole of the year immediately preceding his injury;" (b) if (a) does not apply, the average daily wage of a similarly-situated employee, working in the same or similar employment, in the year preceding the employee's injury; or (c) if (a) or (b) "cannot reasonably and fairly be applied," a combination of factors, namely the employee's previous earnings in the job he was performing when he was injured, his other employment, and previous earnings of similarly situated employees. 33 U.S.C. §910; *see Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 40 BRBS 13(CRT) (9th Cir. 2006); *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004). The ALJ has significant discretion when calculating AWW under Section 10(c) of the Act. *Hall v. Consol. Emp't Sys., Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998).

We first address Claimant's contention that the ALJ erred in applying Section 10(i) to define "time of injury" for purposes of calculating his AWW. Section 10(i) does not provide a method for calculating AWW but defines the "time of injury" in occupational disease cases. It states:

> For purposes of this section with respect to a claim for compensation for death or disability due to an occupational disease which does not immediately result in death or disability, the time of injury shall be deemed to be the date on which 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.

33 U.S.C. §910(i). Claimant and the Director assert Section 10(i) does not require use of an injured employee's wages at the time of his diagnosis in cases involving delayed onset PTSD and argue the ALJ's decision is contrary to the Board's holding in *Robinson v. AC First, LLC*, 52 BRBS 47 (2018).[5]

[5] The Board, in *LaFaille v. General Dynamics Corp.*, 18 BRBS 88 (1986), held applying Section 10(i) to certain occupational disease cases can result in unwarranted under-compensation. The *LaFaille* claimant became aware of the causal connection between his employment and his injury after the date of last exposure. The Board held the ALJ erred in denying benefits and stated "[w]e therefore hold that in cases where the disability predates awareness of the relationship between disability and employment, the average weekly wage should reflect earnings prior to the onset of disability rather than the

In *Robinson*, the claimant worked in Kuwait and Afghanistan, resigned from his position and, after returning to in the United States, was diagnosed with PTSD caused by his overseas employment. Citing the Act's definition of "disability," 33 U.S.C. §902(10),[6] the ALJ concluded that because the claimant voluntarily left his overseas employment for reasons unrelated to his PTSD, the decrease in his wage-earning capacity between his overseas and domestic employment was not compensable. The Board reversed. Relying on the United States Court of Appeals for the Fourth Circuit's decision in *Moody v. Huntington Ingalls, Inc*., 879 F.3d 96, 51 BRBS 45(CRT) (4th Cir. 2018), and the United States Court of Appeals for the Ninth Circuit's decision in *Christie v. Georgia-Pacific Co*., 898 F.3d 952, 52 BRBS 23(CRT) (9th Cir. 2018), it determined "economic harm under the Act has been defined as the lost capacity to earn wages" and "the law compensates for deprivation of economic choice when it is caused by a workplace injury."[7] *Robinson*, 52 BRBS at 48.

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subsequent earnings at the later time of 'awareness.'" *LaFaille*, 18 BRBS at 91; *see* H.R. Rep. No. 1027, 98th Cong., 2d Sess. 30 (1984).

[6] Section 2(10) states in part: "'Disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment…."

[7] In *Moody*, the claimant voluntarily retired and gave his employer a 90-day notice of his retirement. During the 90-day period, the claimant tore his rotator cuff while entering his truck. The claimant continued working and ultimately filed for disability benefits. The ALJ awarded the claimant benefits, and on appeal the Board denied benefits because he "voluntarily retired before the onset of his workplace injury's debilitating effects." *Moody*, 879 F.3d at 98, 51 BRBS at 46(CRT). The Fourth Circuit reversed the Board's decision and held the claimant was disabled under 33 U.S.C. §902(10) because "[h]is shoulder injury and the resulting surgery took that choice away from him for at least two months. The law compensates that deprivation of economic choice when it is caused by workplace injury." *Id.*, 879 F.3d at 100, 51 BRBS at 47(CRT). So, his retirement did not diminish his inability to return to work because of a work injury.

Similarly, in *Christie*, the claimant injured his back in 1999, underwent surgery in 2004, was reassigned to a less demanding position in 2006, and voluntarily retired in 2010 before the employer eliminated the early retirement option in 2011. The ALJ awarded benefits, and the Board held the claimant was not entitled to benefits because his loss of wages was due to his retirement not his work-related injury. *Christie*, 52 BRBS at 26. The Ninth Circuit followed *Moody* and held a claimant's retirement status is not dispositive of disability as "retirement is not inherently debilitating" and there is a difference between

Thus, the Board held that if a "claimant is unable to return to his former work for [his] employer, he is entitled to compensation for any loss of wage-earning capacity based on the 'deprivation of economic choice' due to his work-related PTSD." *Id*. In addition, the Board specifically rejected the employer's argument that the claimant suffered no loss of his wage-earning capacity because he remained employed by the same stateside employer for whom he worked when his PTSD became manifest. *Id.* at 48 n.5.

We agree with Claimant's and the Director's position that the ALJ's decision is contrary to *Robinson*. It is undisputed Claimant suffers from work-related PTSD after being exposed to traumatic events working as an interpreter in an Iraqi warzone, and he is unable to return to his usual employment with Employer because of his PTSD. CX 12 at 3. As in *Robinson*, the fact that Claimant stopped working overseas prior to developing and becoming aware of his work-related PTSD is not a basis for the denial of benefits. Claimant has been deprived of the economic choice to return to any work overseas, including for Employer, because of his work-related PTSD. He therefore is "entitled to compensation for any loss of wage-earning capacity based on the 'deprivation of economic choice' due to his work-related PTSD." *Robinson*, 52 BRBS at 48; *see also* H.R. Rep. 98-1027, 98th Cong., 2d Sess. 30, 1984 U.S. Code Cong. & Admin. News 2771, 2780 (1984).[8]

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being "unwilling" to work and "unable" to work. It concluded there is "[s]ubstantial evidence in the record therefore to support the ALJ's findings that Christie is disabled within the meaning of the Act: … he can no longer return to his previous employment …." *Christie*, 898 F.3d at 958-959, 52 BRBS at 26(CRT). Thus, the Ninth Circuit reversed the Board's holding and held the claimant was entitled to benefits as his retirement was irrelevant to his earning capacity and disability under the Act.

[8] The ALJ's decision is also contrary to Congressional intent as is evident from the Conference Committee Report accompanying the 1984 Amendments enacting Section 10(i). While Section 10(i) effectively overruled pre-1984 Board decisions which held the date of last exposure was the time of injury, the Committee expressly stated it did not intend to deprive a claimant of benefits. Where application of Section 10(i) could result in a claimant not being compensated for a wage loss attributable to an occupational disease, the Committee stated the intent is to apply Section 10(c)'s "other employment of such employee" so as to base compensation on wages prior to the disabling employment. H.R. Rep. 98-1027, 98th Cong., 2d Sess. 30, 1984 U.S. Code Cong. & Admin. News 2771, 2780 (1984); *see also Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151(CRT) (1993) (Supreme Court declined to apply Section 10(i) where the claimant's hearing loss became manifest after his retirement); *LaFaille*, 18 BRBS at 91.

In light of the flexibility and discretion an ALJ has in applying Section 10(c), which incorporates the phrase "other employment of such employee," and for the reasons set forth in *Robinson*, we vacate the ALJ's denial of disability benefits and remand the case for reconsideration.[9] On remand, the ALJ must award compensation by calculating Claimant's disability benefits under Section 10(c) of the Act without applying the Section 10(i) "time of injury" definition, pursuant to *Robinson*.[10]

[9] Unlike in *Robinson*, the ALJ here has already made findings which establish Claimant's entitlement to disability benefits.

[10] Although the ALJ did not specifically address any of the Section 10 subsections for calculating Claimant's AWW, he used Section 10(i) to define "time of injury" to limit Claimant's AWW to the annual wage he earned from stateside employment in July 2020. D&O at 5. As we have determined Section 10(i) does not apply because it does not capture Claimant's loss of earning capacity from his inability to work overseas, the 52 weeks preceding Claimant's July 2020 knowledge of his injury, when Claimant did not work overseas, does not accurately or equitably compensate for his injury.

The evidence of record establishes Claimant worked seven days per week during his overseas employment, not the five or six days contemplated by subsections 10(a) and (b), CX 10; therefore, Section 10(c) must be used because the other sections cannot be "fairly and reasonably applied." *Id.*; *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011); *Proffitt v. Serv. Employers Int'l, Inc.*, 40 BRBS 41 (2006). Section 10(c), the catch-all section, is to be used where there is insufficient information to apply the other subsections, and its flexible calculation of AWW permits consideration of the wages Claimant earned overseas when his injurious exposure occurred. *See Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000); *Taylor v. Smith & Kelly Co.*, 14 BRBS 489 (1981).

Accordingly, we vacate the ALJ's denial of disability benefits and remand the case for further proceedings in accordance with this opinion. In all other respects, we affirm the ALJ's Order Granting Summary Decision / Awarding Benefits.[11]

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

[11] In light of our decision, we need not address Claimant's remaining contentions.