BRB No. 22-0259

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<tr><td>ARDIJAN SYLEJMANI

Claimant-Petitioner

v.

FLUOR CONOPS, LTD.

and

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA c/o AIG GLOBAL CLAIMS

Employer/Carrier-Respondents

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Respondent</td><td>)
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DATE ISSUED: 05/26/2023

DECISION and ORDER</td></tr>
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Appeal of the Decision and Order Denying Benefits of Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

Ardijan Sylejmani, Ferizaj, Kosovo.

Lawrence P. Postol and Frederick J. Wolf (Postol Law Firm, P.C.), McLean, Virginia, for the Employer/Carrier.

Ann Marie Scarpino (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: GRESH, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant, without representation, appeals Administrative Law Judge (ALJ) Jonathan C. Calianos's Decision and Order Denying Benefits (D&O) (2020-LDA-02274) 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).[1] In an appeal by a claimant without representation, the Board reviews the ALJ's decision to determine if the findings of fact and conclusions of law 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 Kosovo, worked for Employer as a logistics coordinator in the generator department in Afghanistan from approximately November 15, 2010, through December 14, 2011. Employer's Exhibit (EX) 6 at 10; EX 9 at 1; EX 11. He was terminated when, during a mandatory physical examination, he tested positive for hepatitis C. EX 9 at 2; EX 12 at 1.

On July 24, 2019, clinical psychologist Dr. Bekrije Maxhuni diagnosed Claimant with Post-Traumatic Stress Disorder (PTSD) and opined he was unable to work. Claimant's Exhibit (CX) 7 at 1. Claimant filed a claim for benefits on August 9, 2019, claiming disability due to a psychological injury arising out of his employment in Afghanistan. Joint Exhibit (JX) 1 at 3.

The formal hearing took place on June 15, 2021, with Claimant attending remotely from Kosovo. As a preliminary matter, the ALJ admitted the parties' exhibits into evidence, including Employer's Exhibit 10, the transcript of Claimant's deposition

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Second Circuit because the district director who filed the ALJ's decision is in New York. 33 U.S.C. §921(c); *McDonald v. Aecom Tech. Corp.*, 45 BRBS 45 (2011).

testimony,[2] without objection from Claimant's counsel.[3] Hearing Transcript (HT) at 5-6. During the formal hearing, Claimant testified about traumatic incidents he experienced while in Afghanistan, including frequent rocket attacks. *Id*. at 23-27. He also testified he may have experienced insomnia, nightmares, breathing problems, and stomach problems while in Afghanistan, and these symptoms allegedly continued upon his return to Kosovo; however, he did not immediately seek psychological treatment as he believed them to be related to his hepatitis C diagnosis. *Id*. at 28, 35, 41-49.

Following the hearing, the ALJ issued a Decision and Order Denying Benefits on February 24, 2022, in which he incorporated the transcript from a lengthy bench decision rendered on January 19, 2022. D&O at 1-2. The ALJ found Claimant's lack of credibility prevented him from invoking the Section 20(a) presumption of compensability, 33 U.S.C. §920(a), with respect to his alleged PTSD.[4] Bench Decision Transcript (BD Tr.) at 5, 37. Alternatively, the ALJ assumed Claimant invoked the Section 20(a) presumption and found Dr. Melissa Ogden's medical opinion, that Claimant did not suffer from employment-

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[2] Claimant's deposition was noticed by Employer's counsel and taken remotely on May 6, 2021, while Claimant was located in Kosovo. EX 10 at 1-2.

[3] Claimant was represented by counsel Brian Gillette and Victor Burnette, both of the Gillette Law Firm, Corpus Christi, Texas, before the ALJ, but proceeds without representation on appeal.

[4] The ALJ found Claimant inconsistent and vague with respect to his description of exposure to rocket attacks and other incidents while in Afghanistan (BD Tr. at 16-19, 21-22), his testimony as to the onset, frequency, and nature of his psychological symptoms (*Id*. at 9, 11, 26-27, 29, 31-32), and his explanation as to why he failed to seek psychological treatment until 2019 (*Id*. at 22-24). In addition, the ALJ found Claimant's testimony undermined and unsupported by evidence in the record. *Id*. at 22-25, 28, 30. For instance, Claimant testified that upon returning to Kosovo, he reported his psychological symptoms to the physicians treating his hepatitis C, largely because he believed them to be related to his hepatitis diagnosis. HT at 48-49. Yet nowhere in the medical records do these medical providers note psychological symptoms. EXs 13-17. Moreover, during the physical examination where it was discovered he suffered from hepatitis C, and which was undertaken in order to clear him for continued employment in Afghanistan, Claimant specifically denied suffering from psychological symptoms. EX 8 at 14-17. He explained this was due to his inability to understand the questionnaire, which was in English (HT at 54-55); however, he also testified that his primary job responsibility in Afghanistan involved completing paperwork in English (HT at 54). The ALJ found these inconsistencies undermined the reliability of Claimant's testimony. BD Tr. at 15, 30.

related PTSD, sufficient to rebut it. He thus weighed the medical evidence as a whole to determine whether Claimant established a compensable work-related injury.[5] *Id.* at 37-38. The ALJ found Dr. Ogden's opinion more credible than those of Claimant's treating providers, Dr. Maxhuni and neuropsychiatrist Dr. Aziz Zubaku. *Id.* at 5, 37-38. Consequently, he denied Claimant's claim for benefits. *Id.* at 38; D&O at 2.

Claimant appeals the ALJ's decision, arguing his deposition was taken illegally, and the ALJ improperly applied the Section 20(a) presumption of compensability. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (Director), also responds, agreeing with Claimant as to the potential illegality of his testimony and urging remand.

DISCUSSION

The Legality of Claimant's Testimony

The Parties' Positions

As a citizen of Kosovo, who was located in Kosovo when he was deposed, Claimant maintains his deposition required approval from Kosovar authorities because Kosovo is not a signatory to the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Convention). Petition for Review (PR) at 1. Because no such authority was sought or granted in this case, Claimant generally avers his

[5] After interviewing Claimant, administering tests, and reviewing his medical records, Dr. Ogden concluded Claimant did not meet the criteria for PTSD under the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-V). EX 21 at 1, 9. Specifically, she opined Claimant failed to demonstrate requirements under Criteria C, the avoidance of stimuli associated with the traumatic event. *Id.* at 9. In fact, Claimant told Dr. Ogden he was planning on remaining in Afghanistan if not for his hepatitis C diagnosis and medical disqualification. *Id.* at 10. Moreover, his reported symptoms and their frequency were too vague to "rise to the level of severity typically seen in PTSD." *Id.* Dr. Ogden further found the timing of the onset of Claimant's symptoms was inconsistent with a PTSD diagnosis. *Id.* While most patients suffering from PTSD report the onset of symptoms in close proximity to the trauma, Claimant failed to provide a clear indication of when his symptoms began. *Id.* Dr. Ogden also found it significant that he did not seek treatment until eight years after his return to Kosovo. *Id.* She instead diagnosed Claimant with major depressive disorder unrelated to employment. *Id.* at 9. Specifically, she found it more likely this condition was related to Claimant's diagnosis and "ongoing difficulties" with hepatitis C, rather than his employment. *Id.*

deposition testimony was taken illegally, although he does not identify any specific law that prohibits consideration of his testimony. *Id.*

The Director agrees, asserting Claimant's deposition and hearing testimony may have been obtained without properly following Kosovar law. Director's Response to Claimant's Petition for Review and Brief (Dir. Response) at 2. The Director contends the taking of testimony from a foreign national in a foreign country implicates that country's sovereignty, and therefore parties cannot waive the procedures even where, as here, the foreign sovereign nation has not sought enforcement of its interests. *Id.* at 5-6. The Director further points to the Office of Administrative Law Judges' (OALJ) administrative notice, *In re Cases Involving Foreign Parties, Witnesses, and/or Evidence,* 2021-MIS-00006, issued on October 5, 2021, which mandates that all parties seeking testimony from witnesses located outside the United States certify they abided by all applicable foreign laws.[6] *Id.* at 6. The Director concludes the case should be remanded for the ALJ to determine whether Claimant's deposition was taken with permission from Kosovar authorities. *Id.* at 7. If not, he contends it must be excluded from the record.[7] *Id.*

Employer disagrees, arguing Claimant's voluntary testimony did not violate U. S. law or principles of comity, especially considering the OALJ's personal jurisdiction over Claimant by virtue of his voluntarily filing his claim, and the application of the five-factor comity analysis set forth in *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for*

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[6] The Director points out this directive was issued approximately four months before the ALJ issued his decision on the merits of entitlement. Dir. Response at 6. However, as the Director also acknowledges, this directive was issued *after* Claimant testified both by deposition and at the hearing in this case. *Id.* Thus, by the time the directive was issued, Claimant's deposition and hearing testimony had already been admitted into the record, and the parties did not have the benefit of the directive's guidance at the relevant time in the proceedings. *See In re Cases Involving Foreign Parties, Witnesses, and/or Evidence,* 2021-MIS-00006, issued October 5, 2021 (noting parties should meet and confer "early in the proceeding" to determine whether a decision on the written record best serves their interests, and stating parties "should be prepared" to certify compliance with foreign law *prior* to offering testimony or evidence procured outside the United States as "[t]he presiding ALJ may make inquiry into such compliance").

[7] In support of his interpretation of Kosovar's blocking statute, the Director cites a webpage of the United States Department of State – Bureau of Consular Affairs, *Kosovo Judicial Assistance Information* (Nov. 20, 2018), https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-Country-Information/kosovo.html.

S. Dist. of Iowa, 482 U.S. 522, 544 n.28 (1987).[8] Employer also maintains Claimant and the Director waived this issue by failing to timely object at any time while this case was before the ALJ. Employer maintains the United States is not necessarily bound by the laws of a foreign nation when ordering production of discovery from a party subject to its jurisdiction, regardless of whether that country is a signatory to the Hague Convention, and even if that country has specific blocking statutes prohibiting disclosure of a particular type of evidence, citing *Aerospatiale*, 482 U.S. at 543, *In re Sealed Case*, 932 F.3d 915 (D.C. Cir. 2019), and *Inventus Power v. Shenzhen Ace Battery*, 339 F.R.D. 487, 506 (N.D. Ill. 2021).

Waiver of Opposition to Admissibility under OALJ Rules

Once a claim proceeds to the OALJ, the ALJ has broad authority over all aspects of the proceedings, prior to and extending into the formal hearing, 33 U.S.C. §§923, 927, and is to use "all powers necessary to conduct fair and impartial proceedings." 29 C.F.R. §18.12(b).[9] The regulation applicable to the ALJ's duties under the Act, 20 C.F.R. §702.338, provides:

> The administrative law judge shall inquire fully into the matters at issue and shall receive in evidence the testimony of witnesses and any documents which are relevant and material to such matters.... The order in which evidence and allegations shall be presented and the procedures at the hearing generally, except as these regulations otherwise expressly provide, shall be in the discretion of the administrative law judge and of such nature as to afford the parties a reasonable opportunity for a fair hearing.

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[8] The five factors guiding a court's comity analysis with respect to the production of foreign discovery are: (1) the importance to the investigation or litigation of the documents or other information requested; (2) the degree of specificity of the request; (3) whether the information originated in the United States; (4) the availability of alternative means of securing the information; and (5) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located. *Aerospatiale*, 482 U.S. at 544 n.28.

[9] For example, under Section 18.12(b) of the OALJ Rules of Practice and Procedure, the ALJ has the power to "regulate the course of proceedings," "examine witnesses," compel discovery, "receive relevant evidence," "dispose of procedural requests," "issue decisions and orders," and where applicable "take any appropriate action" authorized by the Federal Rules of Civil Procedure. 29 C.F.R. §18.12(b).

To that end, the ALJ's authority includes the power to rule on pre-hearing motions,[10] address evidentiary issues through pre-hearing conferences,[11] oversee discovery of relevant evidence (including the taking of depositions),[12] conduct a hearing,[13] and take witness testimony at a formal hearing.[14]

The OALJ Rules of Practice and Procedure (OALJ Rules) state a party may object to a notice of deposition for reasons that include the qualification of the officer before whom the deposition is to be taken, or to any error or irregularity relating to the manner of the taking of the deposition. 29 C.F.R. §18.55(d)(2), (3)(ii). If a deposition proceeds, any further objection to any aspect of it must be noted on the record at the time the deposition is taken to preserve the objection. 29 C.F.R. §18.64(c)(2). Parties forfeit any objections not timely asserted. 29 C.F.R. §18.55(d)(3)(ii); *see e.g., Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1160 (11th Cir. 2005) (Because a defect could have been cured at the taking of the deposition, a subsequent objection to the defect is considered waived.).

Claimant's deposition took place on May 6, 2021, while he was in Ferizaj, Kosovo. EX 10 at 1-2. Claimant's attorney, Victor Burnette, represented him and participated in the deposition but never raised any concerns or objections about its legality, either upon receipt of the notice of deposition or during the deposition itself.[15] EX 10 at 3.

In the parties' Joint Pre-Hearing Statement, submitted to the ALJ on May 21, 2021, and entered into evidence as ALJX 1 (HT at 6), Claimant's attorney Brian Gillette further agreed Claimant would testify via videoconference at the formal hearing and through his deposition. ALJX 1 at 2.

[10] 29 C.F.R. §18.33.

[11] 29 C.F.R. §18.44(a), (d).

[12] 29 C.F.R. §18.50, §18.51.

[13] 33 U.S.C. §919(d); 20 C.F.R. §702.332.

[14] 29 C.F.R. §18.81(b); *see also* 20 C.F.R. §702.340(a).

[15] Mr. Burnette did not cross-examine Claimant during the three-hour deposition. He raised 42 objections, all related to the form of the questions Employer's counsel asked. EX 10 at 28-29, 35-36, 38, 41-45, 60, 64-68, 70-81. At the conclusion of Employer's examination, he declined to question Claimant, indicating he would reserve his questioning of Claimant for the formal hearing. EX 10 at 82.

Claimant subsequently testified at the formal hearing via videoconference, represented by Mr. Gillette. HT at 2, 4. At the hearing, Mr. Gillette confirmed, in answer to the ALJ's inquiry, that Claimant had no objections to the admission of any of Employer's exhibits, which included Claimant's May 2021 deposition transcript. *Id.* at 6. Thereafter, Mr. Gillette called Claimant as a witness, *id.* at 18, asking him several questions, *id.* at 18-38, before "pass[ing] the witness" on for cross-examination by Employer's counsel, *id.* at 38-70. Mr. Gillette declined to examine Claimant further. *Id.* at 70.

At no point during the hearing did Claimant's attorney object to the legality of the taking of Claimant's testimony. Having failed to object at any point to the admission of either his deposition or hearing testimony, black-letter law firmly establishes Claimant waived any objections under the OALJ rules. 29 C.F.R. §18.55(d)(3)(ii); *Fetting v. Kijakazi*, 62 F.4th 332, 338 (7th Cir. 2023) (claimant forfeited his objections to witness testimony by failing to object at the administrative hearing); *Fernandez-Larios*, 402 F.3d at 1160; *Akinwande v. Ashcroft*, 380 F.3d 517, 521 (1st Cir. 2004) (claimant abandoned objection to telephonic testimony by failing to object at the hearing during which the testimony was taken); *U.S. v. Odom*, 736 F.2d 104, 112 (4th Cir. 1984) (defendants waived their right to object to witness testimony by failing to raise their objection at the time the witness was presented, and by not moving to strike at the conclusion of the testimony).

Kosovo's Alleged Blocking Statute

Counter to Claimant's and the Director's contentions, the mere existence of a blocking statute, a law designed to prevent the transmission of evidence to another country for the purposes of litigation (such as the one alleged but not identified here), would not categorically prevent the consideration of testimony Claimant willingly provided. While it is undoubtedly true, as the Director states, that "[o]btaining testimony of a foreign national who is physically present in another country implicates the sovereignty of the host country," Director's Letter Brief in Sur-reply at 1, that recognition does not end the inquiry regarding the admissibility of Claimant's already-provided testimony. *Aerospatiale*, 482 U.S. at 522 ("[blocking] statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even if the act of production may violate that statute."). Indeed, since the Supreme Court's decision in *Aerospatiale*, the vast majority of courts to consider blocking statutes have found them to be unenforceable in circumstances far more intrusive of another nation's sovereign interests than those at issue here -- where Claimant willingly provided and later relied on his own testimony in an effort to gain entitlement to benefits under a U.S. statute.[16]

[16] Notably, commentators have acknowledged that in the first twenty-five years after *Aerospatiale*, U.S. courts considered whether *to order* at least forty-two individual

Courts have ordered defendants to violate unequivocal blocking statutes, for example, in ordering discovery not yet conducted to take place. *See, e.g.*, *Munoz v. China Export Tech., Inc.*, No. 07 Civ 10531 (AKH) 2011 WL 5346223 S.D.N.Y. (Nov. 7, 2011) (ordering discovery despite a Chinese blocking statute); *Sofar Global Hedge Fund v. Brightport, Inc.*, No. 1:09-CV-01191-TWP-DML, 2010 WL 4701419 (S.D. Ind. Nov. 12, 2010) (ordering discovery despite a French blocking statute); *Gucci Am., Inc. v. Curveal Fashion*, No. 09 Civ 8458 (RIS) (THK) 2010 WL 808639 (S.D.N.Y. Mar. 8, 2010) (ordering discovery despite a Malaysian blocking statute).

Courts have also held that defendants can waive the application of blocking statutes and service requirements through contract or conduct -- both with regard to countries subject to the Hague Convention and those that are not. *See, e.g.*, *Image Linen Serv. Inc. v. Ecolab, Inc.*, No. 5:09-CV-149-OC 10 GRJ, 2011 WL 862226 at *4 (M.D. Fla. Mar. 10, 2011) (potential trial witness agreed "to waive the formalities of the Hague Convention"); *Boss Mfg. Co. v. Hugo Boss AG*, No. 97 CIV 8495 (SHS) (MHD) 1999 WL 20828 at *1 (S.D.N.Y. Jan. 13, 1999) ("Defendant reports that the witness will waive the applicability of the Hague Convention."); *Cooper Indus., Inc. v. British Aerospace, Inc.*, 102 F.R.D. 918, 918-919 (S.D.N.Y. 1994) (defendant waived right to protection from discovery requests through its conduct).

And courts have even ordered non-parties to litigation to produce discovery under the threat of sanction in violation of their own country's banking laws. *See, e.g.*, *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468 (9th Cir. 1992) (affirming order of production notwithstanding Chinese secrecy laws); *Motorola Credit Corp. v. Uzan*, 73 F. Supp. 3d 397, 403 (S.D.N.Y. 2014) (ordering banks in France, the United Arab Emirates, and Jordan to produce documents in violation of their secrecy laws); *British Int'l Co. v. Seguros La Republica, S.A.*, No. 90-cv-2370 2000 WL 713057 (S.D.N.Y. June 2, 2000) (declining to defer to Mexican bank secrecy laws).

Against this backdrop, Claimant and the Director have failed to establish *Aerospatiale* precludes consideration of Claimant's already-provided deposition and hearing testimony. While courts subsequently interpreting *Aerospatiale* have frequently applied a five-factor test in evaluating disputes, the Court itself expressly refused to "articulate specific rules to guide the delicate task" between ordering discovery and

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violations of foreign blocking statutes. Courts ordered violations in thirty-seven of those instances. In each, the relevant foreign blocking statute provided for both civil and criminal penalties. *See* GARY B. BORN AND PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN AMERICAN COURTS 972 (5th ed 2011). Here, no U.S. court or tribunal ordered Claimant to violate Kosovar law; Claimant willingly provided and relied on his testimony in an action he filed under U.S. law in an effort to obtain benefits.

applying blocking statutes. *Aerospatiale*, 482 U.S. at 546. Instead, it instructed lower courts to adjudicate conflicts based on their "knowledge of the case and of the claims and interests of the parties and the governments whose statutes and policies they invoke." *Id.* With that in mind, two fundamental interests compel us not to remand this case.

First, neither Claimant nor the Director has identified a Kosovar law or statute at issue, much less attempted to demonstrate Kosovo has shown any interest in enforcing it. While the Director vaguely points to statements contained on the State Department's website, neither the Director nor the page referenced identifies the operative law giving rise to what the Director refers to as "a mandate." Instead, the State Department information contains a disclaimer that it is for "general information only and may not be totally accurate in a specific case," further advising parties that "questions involving interpretation of specific foreign laws should be addressed to the appropriate foreign authorities or foreign counsel." U.S. Department of State – Bureau of Consular Affairs, *Kosovo Judicial Assistance Information* (Nov. 20, 2018), https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-Country-Information/kosovo.html.

Significantly, U.S. courts have repeatedly held a foreign state's failure to enforce its blocking statute: (1) showed no serious foreign state interest would be undermined by ordering violation of it; and (2) undermined litigants' claims that compelling violation would constitute undue hardship. *See, e.g.*, *Linde v. Arab Bank, PLC*, 706 F.3d 92, 114 (2d Cir. 2013) ("The record . . . does not show that defendant or its employees have been prosecuted for the Bank's voluntary production in other cases."); *Chevron Corp. v. Donziger*, 296 F.R.D. 168, 207 (S.D.N.Y. 2013) ("The record reveals that [the objecting entity] has provided [similar] documents and materials throughout the history of this case when such materials were thought helpful . . . Not once has he been prosecuted or subject to a penalty. The absence of any such evidence weighs against a finding that a party faces hardship[.]"). Claimant and the Director have failed to establish the consideration of Claimant's testimony would violate Kosovar law, much less attempted to show that Kosovo's sovereign interest in enforcing that law would outweigh the need to consider his testimony in his DBA claim.

Second, by contrast, Claimant's testimony is absolutely essential to the adjudication of his DBA litigation. With that recognition, it cannot be overemphasized that Claimant -- of his own volition -- filed his claim seeking benefits under U.S. law. In doing so, he agreed to have his claim adjudicated in accordance with the DBA, its accompanying regulations, and the general rules, procedures, and practices encountered in the American administrative benefits process. This involves providing all parties an opportunity to be heard in a meaningful manner and at a meaningful time, *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976); *see also Goldberg v. Kelly*, 397 U.S. 254 (1970), including the ability to present their respective cases by submitting evidence on the relevant issues, rebuttal evidence, and cross-examining witnesses. *See generally Richardson v. Perales*, 402 U.S. 389, 401-402 (1971). Both Employer and Claimant exercised these rights by submitting evidence into the record in support of their respective positions. Indeed, Claimant called himself as a witness at the hearing and relied on his deposition testimony in his post-hearing brief. The case was then fully adjudicated, and the claim resolved in accordance with the Act, the DBA, and the provisions of the Administrative Procedure Act. 5 U.S.C. §557(c)(3)(A); *see Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996).

Claimant, therefore, had his claim completely considered by the ALJ within the framework and scope of the very U.S. Act he invoked. Given this, it was disingenuous not to object to the legality of Employer's deposition request, to rely on his testimony, and to have his claim fully adjudicated by the ALJ -- only to call foul after it was denied pursuant to an unidentified law he claims was hiding in full sight the entire time. Thus, neither Claimant nor the Director have persuaded us that Kosovar law prohibits the consideration of Claimant's already-provided testimony, particularly since no Kosovar law has been cited and no U.S. court or tribunal ordered Claimant to provide it. *Aerospatiale*, 482 U.S. at 546.

Section 20(a)

Claimant also maintains the ALJ improperly applied the Section 20(a) presumption. He contends the ALJ erred in finding he lacked credibility, as the ALJ failed to consider cultural and language barriers and erred in giving more weight to Dr. Ogden's medical opinion over his treating physicians' opinions. Employer asserts the ALJ acted well within his discretion in denying benefits.

To be entitled to the Section 20(a) presumption linking his injuries to his employment, a claimant must sufficiently allege: 1) he has sustained a harm; and 2) an accident occurred or working conditions existed which could have caused or aggravated the harm. *Rose v. Vectrus Systems Corporation*, 56 BRBS 27 (2022) (Decision on Recon. en banc), *appeal pending*;[17] *see, e.g., American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); *O'Kelley v. Dep't of the Army/NAF,* 34 BRBS 39 (2000). If the Section 20(a) presumption is invoked, the burden shifts to the employer to produce substantial evidence that the claimant's condition was not caused or aggravated by his employment. *Rainey v. Director, OWCP*, 517 F.3d 632, 634, 42 BRBS 11, 12(CRT) (2d Cir. 2008); *Marinelli*, 248 F.3d at 64-65, 35 BRBS at 49(CRT). If the employer rebuts the Section 20(a) presumption, it no longer controls and the issue of causation must be

[17] Appeal pending in the United States District Court for the Middle District of Florida, *Vectrus v. Director, OWCP*, Case No. 3:23-cv-00200.

resolved on the evidence of the record as a whole, with the claimant bearing the burden of persuasion by a preponderance of the evidence. *Rainey*, 517 F.3d at 634, 42 BRBS at 12(CRT); *Marinelli*, 248 F.3d at 65, 35 BRBS at 49(CRT); *Santoro*, 30 BRBS 171; *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In finding Claimant did not invoke the Section 20(a) presumption, the ALJ improperly considered Claimant's lack of credibility as part of his analysis and otherwise incorrectly weighed the relevant evidence of record at the invocation stage.[18] *Rose*, 56 BRBS at 38-39. Contrary to the ALJ's finding, Claimant presented a PTSD diagnosis from both Drs. Maxhuni and Zubaku to support the harm element. CX 7 at 1; CX 8 at 1. He testified to his work experiences which included exposure to rocket attacks on several occasions. HT at 23-27. Therefore, he also showed working conditions which could have caused his psychological symptoms and precipitated his psychological diagnoses. Consequently, we reverse the ALJ's finding that Claimant did not invoke the Section 20(a) presumption, *Rose*, 56 BRBS at 39, and consider the ALJ's alternative findings on causation.

Although the ALJ improperly found Claimant did not establish a harm and invoke the Section 20(a) presumption, any error is harmless as the ALJ alternatively continued his analysis as if Claimant had established a prima facie case. He concluded Dr. Ogden's medical opinion and testimony, that Claimant did not suffer from work-related PTSD, constituted "substantial evidence that's unequivocal, that rebuts the presumption." BD Tr. at 37; EX 21 at 9-10. The ALJ is correct that Dr. Ogden's medical opinion constitutes substantial evidence showing either Claimant's symptoms are not related to his work for Employer or he does not suffer from the claimed harm. *Rochester v. George Washington Univ.*, 30 BRBS 233 (1997); n.3, *supra*. We therefore affirm the ALJ's finding that Employer rebutted the Section 20(a) presumption. *Id.*

Because Employer has rebutted the Section 20(a) presumption, it drops from the case, and Claimant bears the burden of persuading the ALJ he has a compensable claim. Recognizing the ALJ's broad discretion in weighing the evidence and making credibility determinations, we affirm his finding that Claimant did not establish by a preponderance of the evidence that his symptoms are connected to his DBA-related work for Employer.

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[18] The ALJ found Claimant's testimony to be so inconsistent and vague on such a variety of topics as to preclude him from establishing a prima facie case of compensability under Section 20(a). BD Tr. at 4-5, 37. The ALJ's analysis does not comport with the Board's decision in *Rose*, where it held that credibility can play no role in addressing whether a claimant has established a prima facie case, as the Section 20(a) invocation analysis "does not require examination of the entire record, an independent assessment of witness' credibility, or weighing of the evidence." *Rose*, 56 BRBS at 37.

Sealand Terminals v. Gasparic, 7 F.3d 321, 28 BRBS 7(CRT) (2d Cir. 1993); *Volpe v. Northeast Marine Terminals,* 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982). The ALJ rationally found Claimant's testimony neither consistent nor credible and his treating physicians' opinions diagnosing work-related PTSD unpersuasive because they failed to provide any details specific to Claimant showing how or why his symptoms met the criteria for PTSD under the DSM-V. BD Tr. at 9, 38. In contrast, he found Dr. Ogden's opinion persuasive because she provided a more comprehensive analysis of Claimant's alleged symptoms under the DSM-V framework for diagnosing PTSD, which she noted was an international diagnostic tool meant to surpass background and/or cultural differences. *Id.* at 34, 38; EX 21. We affirm the ALJ's rational conclusion, based on the medical opinion that Claimant does not have PTSD or any psychological condition related to his DBA employment with Employer, that Claimant has not established a compensable injury. *Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988); *see also Greenwich Collieries,* 512 U.S. 267, 28 BRBS 43(CRT).

Accordingly, we affirm the ALJ's Decision and Order Denying Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge