BRB No. 09-0785

LYNETTE M. RICE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	DATE ISSUED: 06/25/2010
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

David C. Barnett (Barnett & Lerner, P.A.), Ft. Lauderdale, Florida, for claimant.

Monica F. Markovich and Cynthia A. Galvan (Brown Sims, P.C.), Houston, Texas, for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2007-LHC-00345) of Administrative Law Judge Steven B. Berlin rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*., as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965).

In 2004, claimant began working as a truck driver for employer in Kuwait and Iraq. A few months after starting to work, claimant alleged that a coworker raped her, causing psychological trauma. Military officials investigated the allegation, but did not file charges against the coworker. Employer also investigated the allegation, and terminated claimant's employment because she had violated the prohibition against alcohol consumption in the war zone. After returning to the United States, employer arranged for claimant to receive treatment for alcohol abuse, after which claimant was rehired. Claimant was terminated again a few months later due to insubordination, but was hired again in February 2006. In May 2006, claimant witnessed a corporal's fatal injury. She attempted to provide aid to the corporal who was injured when a sharp piece of metal from a broken chain lodged in his neck, but he died from his wounds.[1] Claimant also witnessed mortar and rocket attacks and the explosion of improvised explosive devices throughout her employment. On July 27, 2007, claimant sought treatment at employer's clinic complaining of headaches, vomiting, diarrhea, and because she "just [kept] getting so upset." Cl. Exs. 1, 8. Employer returned claimant to the United States in July 2007 for a psychiatric evaluation and there is no evidence that she has been offered her former job. Claimant began working in the United States on December 8, 2007, and sought permanent partial disability benefits under the Act for a cumulative psychological condition that caused a loss in wage-earning capacity.

In his decision, the administrative law judge found that claimant gave employer timely notice of her injury pursuant to Section 12, 33 U.S.C. §912, and that claimant established a *prima facie* case of a compensable injury, 33 U.S.C. §920(a), which employer did not rebut. However, the administrative law judge also found that claimant's current inability to perform her former duties is unrelated to the psychological

[1] Claimant gave varying accounts of the incident She reported that she attended the bleeding corporal until he was removed by helicopter and not long afterward learned that the had died, but she told Dr. Ashworth that he died in her arms.

condition she suffered while working for employer, but rather is related to her pre-existing psychological impairments, as her work-related condition had reached maximum medical improvement and resolved by November 5, 2007. Thus, the administrative law judge awarded claimant temporary total disability benefits from July 28, 2007 through November 4, 2007, and denied continuing disability benefits.[2]

On appeal, claimant contends that the administrative law judge erred in finding that her work-related disability ceased in November 2007. Thus, claimant contends that the administrative law judge erred in denying permanent disability benefits. Employer responds, urging affirmance of the administrative law judge's finding that claimant's short-term work-related psychological condition had resolved. Claimant has filed a reply brief.

It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1980). In order to establish a *prima facie* case of total disability, claimant must establish that she is unable to perform her usual work due to the injury. *See Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005); *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998).

The administrative law judge found that claimant suffered from a work-related psychological injury that resulted in short-term symptoms that no longer troubled claimant by November 2007. He reviewed the opinions of the two psychologists, according greater weight to the opinion of Dr. Klein. Emp. Exs. 18, 36, 37. Dr. Ashworth diagnosed post-traumatic stress disorder (PTSD) and depressive disorder due to her experiences overseas, including the sexual assault. He opined that claimant should not return to work in a war zone. The administrative law judge found that Dr. Ashworth

[2] In the event that his finding that claimant's work-related psychological condition resolved in November 2007 is reversed on appeal, the administrative law judge made alternate findings. He found that employer established the availability of suitable alternate employment which pays $363 per week. Thus, the administrative law judge found that claimant would be entitled to permanent total disability benefits from November 5, 2007 to December 8, 2007, the date she returned to work, and permanent partial disability benefits from December 8, 2007, and continuing. The administrative law judge also found that employer would be entitled to relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). These findings have not been challenged on appeal.

did not have an accurate description of claimant's background including her substance abuse, psychosocial history and criminal history. Cl. Exs. 2, 3, 14, 15. In addition, the administrative law judge found that Dr. Ashworth did not explain why claimant's persistent distortions had no effect on his opinion, and he noted that Dr. Ashworth's opinion was based in part on the occurrence of the sexual assault in 2004, which the administrative law judge did not believe had occurred. Dr. Klein opined that claimant does not have PTSD, but does have dysthymic disorder and mixed personality disorder with antisocial and borderline features. The administrative law judge relied on Dr. Klein's opinion that claimant's desire to return to work in Iraq is counter-indicative of PTSD. Emp. Ex. 37. Dr. Klein stated that the work-related aggravation of claimant's underlying condition ended a few months after she left Iraq. He stated, however, that claimant should not return to work in Iraq because she may endanger others if she were to panic under conditions of war. The administrative law judge found that Dr. Klein was more fully apprised of claimant's psychosocial history, and therefore credited his opinion over that of Dr. Ashworth.

Although the administrative law judge rationally credited Dr. Klein's opinion over that of Dr. Ashworth, *see generally Walker v. Rothschild Int'l Stevedoring Co.*, 526 F.2d 1137, 3 BRBS 6 (9th Cir. 1975), Dr. Klein's opinion is legally insufficient to support a finding that claimant is not disabled from her work injury. Employer expressly returned claimant to the United States for a psychiatric evaluation and there is no evidence that she has been offered her former job in Iraq or Kuwait. Cl. Ex. 8. Claimant told the psychologists that she needed a release to return to work and neither Dr. Klein nor Dr. Ashworth would provide a release as both believed claimant should not work in a war zone as such work could cause a return of symptoms. *See* Emp. Ex. 18 at 1174-1175; Cl. Ex. 2 at 319; Cl. Ex. 3 at 366. The administrative law judge found that exposure to stimuli in claimant's employment made her psychiatric condition symptomatic. Decision and Order at 51. Thus, while claimant's work-related symptoms abated upon her return to the United States, this fact does not establish that claimant is not disabled by her symptoms. Rather, claimant sustains a work-related injury when the conditions of employment cause her to become symptomatic, regardless of whether the underlying condition is altered or permanently aggravated. *Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981); *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986). Moreover, an employee may be disabled if her employment is medically contraindicated, even if she is not currently in pain or symptomatic, due to her work-related condition. *Crum v. General Adjustment Bureau*, 738 F.2d 474, 16 BRBS 115(CRT) (D.C. Cir. 1984); *Bath Iron Works Corp. v. White*, 584 F.2d 569, 8 BRBS 818 (1979); *Care v. Washington Metro. Area Transit Auth.*, 21 BRBS 248 (1988); *Boone v. Newport News Shipbuilding & Dry Dock Co.*, 21 BRBS 1 (1988); *Lobue v. Army & Air Force Exch. Serv.*, 15 BRBS 407 (1983); *Sweitzer v. Lockheed Shipbuilding & Constr. Co.*, 8 BRBS 257 (1978).

On the facts of this case, claimant has established a *prima facie* case of total disability. Both psychologists stated that claimant should not return to work in the war zone. The fact that Dr. Klein's opinion in this regard is based on a concern for claimant's co-workers is immaterial. The premise for his concern is that claimant's work would cause her to become symptomatic, *i.e.*, that she would sustain a work-related injury.[3] Thus, a return to her usual work is medically contraindicated, which establishes claimant's *prima facie* case. *White*, 584 F.2d 569, 8 BRBS 818. In addition, in *McBride v. Eastman Kodak Co.*, 844 F.2d 797, 21 BRBS 45(CRT) (D.C. Cir. 1988), the United States Court of Appeals for the District of Columbia Circuit held that where employer made claimant's pre-injury job unavailable following a release to work after an employment injury, the injury had resulted in claimant's inability to return to his usual employment. *See also Service Employees Int'l, Inc. v. Director, OWCP*, 595 F.3d 447, 44 BRBS 1(CRT) (2d Cir. 2010). Similarly, in *Wilson v. Todd Shipyards Corp.*, 23 BRBS 24 (1989), the Board cited *McBride* and stated that the claimant established his *prima facie* case where none of the doctors who examined claimant gave him a full release to return to work and his employer refused to give claimant his job back without such a release. In this case, claimant's job is unavailable without a medical release, which the psychologists will not provide. In addition, both psychologists state that a return to work in the war zone is contraindicated due to the likely recurrence of work-related symptoms of claimant's underlying condition. Claimant has therefore established a *prima facie* case of total disability, and the administrative law judge's finding to the contrary is reversed. *McBride*, 844 F.2d 797, 21 BRBS 45(CRT); *Crum*, 738 F.2d 474, 16 BRBS 115(CRT); *White*, 584 F.2d 569, 8 BRBS 818; *Wilson*, 23 BRBS 24.

In his alternate findings, the administrative law judge found that employer established the availability of suitable alternate employment as of December 8, 2007, and that claimant has a post-injury wage-earning capacity of $363 per week. These findings were not appealed, and therefore we modify the administrative law judge's decision to award claimant permanent total disability benefits from November 5 to December 7, 2007, and to ongoing permanent partial disability benefits of $976.39 per week thereafter. 33 U.S.C. §908(a), (c)(21), (h). In addition, employer is entitled to relief from continuing

[3] Dr. Klein stated it "would be unwise for [claimant] to be returned overseas to her previous employment because the cumulative impact of her life long psychological stresses could create a safety risk for those working around her (i.e. if she were to panic under enemy attack conditions and possibly violate protocol, she could theoretically endanger the security of others)…." Emp. Ex. 18 at 1174-1175. As Dr. Klein stated that claimant could work elsewhere internationally or in the United States, his opinion can be interpreted to mean that only the specific conditions of employment in a war zone could cause claimant to become symptomatic.

disability benefits pursuant to Section 8(f) pursuant to the administrative law judge's alternate findings.[4]

Accordingly, the administrative law judge's denial of benefits after November 4, 2007 is reversed. Claimant is entitled to permanent total and partial disability benefits pursuant to the administrative law judge's alternate findings. Employer is entitled to Section 8(f) relief.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

[4] The Director, Office of Workers' Compensation Programs, stated in a letter dated January 23, 2008, that the Special Fund's liability pursuant to Section 8(f) was accepted under the facts in this case if disability benefits were awarded. *See* ALJ Ex. 2.