

AWATIF N. MISHO)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
GLOBAL LINGUIST SOLUTIONS)	
)	
and)	
)	
ZURICH AMERICAN INSURANCE)	DATE ISSUED: <u>Apr. 7, 2014</u>
COMPANY)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Order Granting Motion for Reconsideration But Denying Relief of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and Stephen P. Moschetta (The Moschetta Law Firm, P.C.), Washington, Pennsylvania, for claimant.

Monica F. Markovich and Alexandra E. Grover (Brown Sims), Houston, Texas, for employer/carrier.

Jonathan Rolfe (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: DOLDER, Chief Administrative Appeals Judge, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits and the Order Granting Motion for Reconsideration But Denying Relief (2012-LDA-279) of Administrative Law Judge Richard A. Morgan 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 findings of fact and conclusions of law of the administrative law judge which 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).

Claimant, a linguist, commenced employment as a translator with employer on March 5, 2009. Claimant was deployed to Iraq, where she was assigned first to Camp Echo and then to Camp Tallil. On August 15, 2009, claimant dislocated her right shoulder when she slipped and fell on the sidewalk at Camp Tallil. Claimant immediately reported this incident to employer and her shoulder was set back in place at the camp hospital. However, claimant had an adverse reaction to her anesthesia and she soon returned to the United States.

On September 12, 2009, an MRI revealed that claimant had sustained a torn rotator cuff, torn labrum, and torn biceps tendon. On October 15, 2009, claimant underwent shoulder surgery at the Detroit Medical Center. She continued to experience shoulder symptoms for which she sought medical care; additionally, claimant asserted she had sustained an injury to her thumb and was experiencing psychological problems, including nightmares and an inability to concentrate. Claimant was subsequently diagnosed with major depressive disorder, recurrent, with anxiety and elements of post-traumatic stress disorder. Employer voluntarily paid claimant temporary total disability benefits from September 18, 2009, through August 11, 2011. 33 U.S.C. §908(b). On October 20, 2011, claimant filed a claim for benefits under the Act alleging that her physical and psychological conditions are related to the injury she sustained while working for employer in Iraq.

In his Decision and Order, the administrative law judge accepted the parties' stipulation that claimant sustained work-related physical and psychological injuries as a result of her fall on August 15, 2009. Decision and Order at 25. The administrative law judge found that claimant is totally disabled by her psychological condition, as she is unable to return to her former employment as a linguist with employer and employer did not establish the availability of suitable alternate employment. *Id.* at 27-32. The

administrative law judge further found that claimant's psychological condition reached maximum medical improvement on May 3, 2012, but that claimant's work-related physical injuries have not yet reached maximum medical improvement. *Id.* at 34-35. The administrative law judge awarded claimant temporary total disability benefits from August 12, 2011, and continuing, 33 U.S.C. §908(b), and medical benefits, 33 U.S.C. §907. *Id.* at 39-40.

Claimant filed a motion for reconsideration, alleging that she is entitled to permanent total disability benefits as of May 3, 2012, the date on which her psychological condition reached maximum medical improvement. The administrative law judge acknowledged that unpublished case law supported claimant's contention, but he nonetheless upheld his finding that claimant is entitled only to temporary total disability benefits because her work-related physical injuries had yet to reach maximum medical improvement. Thus, he denied claimant's motion for reconsideration.

On appeal, claimant challenges the administrative law judge's award of temporary, rather than permanent, total disability benefits as of May 3, 2012. Claimant additionally asserts the administrative law judge erred in failing to commence the award of benefits on September 18, 2009. Employer responds, agreeing with claimant that benefits should commence on September 18, 2009, but urging the Board to affirm the administrative law judge's finding that claimant's disability remains temporary in nature. The Director, Office of Workers' Compensation Programs (the Director), has filed a brief in support of claimant's position that she is entitled to permanent, rather than temporary, total disability benefits as of May 3, 2012. Claimant filed a reply brief.

Employer, in its response brief, asserts the administrative law judge erred in relying on the opinion of Dr. Ajluni to find that claimant's psychological condition has reached maximum medical improvement and is, thus, permanent in nature.¹ Specifically, employer asserts that since Dr. Ajluni recommended further treatment and medication for claimant, his report can be interpreted to mean that claimant has not yet received the maximum benefit of psychiatric treatment. *See* Emp. brief at 13. A permanent disability exists when a "condition has continued for a lengthy period, and it appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period." *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). A claimant also may be considered permanently disabled under the Act if she suffers any residual disability after achieving

¹ Although employer did not file a cross-appeal, we will address employer's contention as the Board may address an issue raised in a response brief that provides an alternate avenue of affirming the administrative law judge's finding that claimant's disability remains temporary. *See Reed v. Bath Iron Works Corp.*, 38 BRBS 1 (2004).

maximum medical improvement. *See Gulf Best Electric v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004). The prognosis of future improvement does not preclude a finding of permanency. *Watson*, 400 F.2d at 655; *Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007).

In concluding that claimant's psychological condition is permanent, the administrative law judge credited the opinion of Dr. Ajluni who, as claimant's treating psychiatrist, the administrative law judge found was best able to determine whether her condition had reached maximum medical improvement. Additionally, the administrative law judge found Dr. Ajluni's opinion to be supported by claimant's treatment records; these indicate that claimant's psychological condition was persisting. *See* Decision and Order at 34-35; CX 11. In this regard, Dr. Ajluni stated on May 3, 2012, that claimant's psychological condition, which he diagnosed as a major depressive disorder, had reached maximum medical improvement. CX 12 at 1, 2. His recommendation for further treatment does not undermine this conclusion. *See Watson*, 400 F.2d at 655. Accordingly, as substantial evidence supports the administrative law judge's determination on this issue, we affirm the finding that claimant's psychological condition became permanent on May 3, 2012. *See Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999), *aff'd*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000).

We next address claimant's appeal of the administrative law judge's decision to award ongoing temporary total disability benefits subsequent to May 3, 2012. The parties do not challenge the administrative law judge's findings that claimant sustained two distinct work-related injuries, one physical and one psychological, and that claimant's psychological injury alone has rendered her incapable of returning to her prior employment as a linguist for employer.² *See* Decision and Order at 25-26, 30-31. The administrative law judge additionally found that while claimant's psychological injury had reached maximum medical improvement on May 3, 2012, her non-totally disabling right upper extremity injuries had not yet become permanent; consequently, the administrative law judge found claimant entitled to an award of ongoing temporary total disability commencing on August 12, 2011. *Id.* at 35. On claimant's motion for

² The administrative law judge found that claimant's psychological injury prevents her from returning to her usual work as a linguist and that employer did not establish the availability of suitable alternate employment. Thus, claimant is totally disabled from her psychological injury. With respect to claimant's physical injury, the administrative law judge found that claimant is not at maximum medical improvement because further surgery is anticipated on her shoulder and thumb, but that claimant failed to establish that these two conditions prevent her from returning to her usual work. Therefore, claimant did not establish a prima face case of total disability with regard to her two physical conditions. Decision and Order at 29-32.

reconsideration, the administrative law judge cited *Jenkins v. Kaiser Aluminum & Chemical Sales, Inc.*, 17 BRBS 183 (1985), and *Porter v. Dix Shipping Co.*, BRB No. 99-443 (Jan. 24, 2000) (unpub.), for the proposition that an award of temporary, as opposed to permanent, disability benefits is appropriate in cases where all of a claimant's injuries have not yet reached maximum medical improvement. See Order at 1. The administrative law judge acknowledged that the United States Court of Appeals for the Fifth Circuit, in *Wilson v. Atlas Wireline Serv.*, No. 00-60511 (5th Cir. June 1, 2001), and the Board, in *Stein v. Navy Exch.*, BRB No. 12-0177 (Dec. 17, 2012) (unpub.), in addressing the precise issue raised by claimant, had affirmed an award of permanent total disability benefits where a claimant was permanently totally disabled physically, but had not reached maximum medical improvement with regard to a psychological condition. However, as *Wilson* and *Stein* are unpublished decisions, the administrative law judge declined to rely on them as they are not precedential. Consequently, he denied claimant's motion for reconsideration. Order at 2.

We agree with claimant and the Director that the cases relied on by the administrative law judge, *Jenkins* and *Porter*, are distinguishable from this case, and that the administrative law judge erred in awarding claimant ongoing temporary, as opposed to permanent, total disability benefits subsequent to May 3, 2012. In *Jenkins*, the administrative law judge awarded the claimant ongoing temporary total disability benefits as a result of his work-related physical and psychological injuries. On appeal, the employer challenged, and the Board addressed, only the nature and extent of the claimant's disability attributable to his psychological injury; in this regard, the Board affirmed, as supported by substantial evidence, the administrative law judge's finding that the claimant was temporarily totally disabled due to his work-related psychological condition. *Jenkins*, 17 BRBS at 186-187. The Board did not address any issues relating to the claimant's physical injury. Thus, at a minimum, claimant *Jenkins* was both temporarily and totally disabled by his work-related psychological condition. In *Porter*, the claimant was found to be totally disabled as a result of the combination of his work-related back and neck injuries, and the claimant's disability was determined to be permanent only when both of the conditions that resulted in his total disability had reached maximum medical improvement. *Porter*, slip op. at 11-12. The Board's decisions in *Jenkins* and *Porter* are thus distinguishable from this case, wherein the administrative law judge found that, while claimant sustained two distinct injuries, one physical and one psychological, only one injury, claimant's psychological condition, has rendered her disabled. See Decision and Order at 31.

On these facts, we hold that where a claimant has established her inability to perform her usual work due to only one work-related condition, rather than to a combination of work-related injuries, the nature of that disabling condition governs the award of benefits. As discussed by the administrative law judge on reconsideration, unpublished cases have reached this result. In *Wilson*, the Fifth Circuit, within whose

jurisdiction this case arises, remanded the case for clarification, but held that the administrative law judge had committed legal error if he had awarded the claimant temporary disability benefits for a temporary psychological condition notwithstanding the existence of a permanently totally disabling physical injury.³ *Wilson*, No. 00-60511, slip op. at 3. Similarly, in *Stein*, the claimant had a totally disabling physical injury that was permanent in nature, as well as a temporary work-related psychological condition. The Board rejected the employer's contention that the administrative law judge's award of permanent total disability benefits was in error. As the award of total disability benefits was premised on the finding that only the physical injury rendered the claimant incapable of returning to her usual work, the Board affirmed the administrative law judge's finding that only the nature of the physical injury was relevant to the award of benefits. *Stein*, BRB No. 12-0177, slip op. at 6.

³ In *Wilson*, the claimant had sustained a temporary psychological condition and a permanent physical injury to his back. The court stated that it was unable to determine what the administrative law judge had held on the issue of whether the claimant was entitled to temporary or permanent total disability benefits. In remanding the case for clarification, the court addressed the inter-relationship of the claimant's two conditions, stating:

If the ALJ held that, based on [claimant's] physical back injury alone, he was permanently and totally disabled, then we agree . . . that [claimant] should not be deemed temporarily and totally disabled simply because his additional psychological disability is temporary. If [claimant] is permanently and totally disabled due to a physical injury standing alone, he should not be penalized because he also suffers from a psychological injury. If the ALJ awarded the lesser relief of temporary disability based on the temporary psychological injury, despite finding that the physical back injury rendered [claimant] permanently and totally disabled, then the ALJ legally erred.

If, on the other hand, the ALJ found that [claimant's] physical back injury and psychological impairments, only *in combination*, rendered him totally disabled, and that the psychological impairments were temporary, then the ALJ did not legally err in concluding that such circumstances would entitle [claimant] to temporary total disability benefits.

Wilson, No. 00-60511, slip op. at 3 (emphasis in original).

Moreover, our holding herein is consistent with Section 8 of the Act which states:

Compensation for disability shall be paid to the employee as follows:

- (a) Permanent total disability: In case of **total** disability adjudged **to be permanent**. . .
- (b) Temporary total disability: In case of **total** disability in character but **temporary** in quality. . .

33 U.S.C. §908(a), (b) (emphasis added). In this case, the administrative law judge found that claimant's total disability is due solely to her inability to return to her former employment as a linguist due to her work-related psychological injuries and the lack of suitable alternate employment with respect to that condition. This total disability has been adjudged to be permanent. Thus, it is apparent that the statute contemplates compensation for permanent total disability. In accordance with our holding, we modify the administrative law judge's decision to reflect claimant's entitlement to permanent total disability benefits as of May 3, 2012, the date on which her totally disabling psychological condition became permanent.⁴

Claimant also requests that the Board modify the administrative law judge's decision to reflect her entitlement to temporary total disability benefits from September 18, 2009 to August 12, 2011. In response, employer agrees that the administrative law judge's decision may be modified to reflect the period of temporary total disability for which employer previously paid compensation and for which employer has received an appropriate credit.⁵ See 33 U.S.C. §914(j). As the parties are in agreement as to the periods and types of compensation due claimant, we modify the administrative law judge's award to reflect claimant's entitlement to temporary total disability benefits from September 18, 2009 to August 11, 2011, subject to employer's credit for benefits paid.

⁴ Contrary to employer's contention that no "manifest injustice" has occurred to claimant due to the administrative law judge's award of temporary rather than permanent total disability benefits, an award of permanent total disability benefits may entitle claimant to the new maximum compensation rate pursuant to Section 6, 33 U.S.C. §906, or to annual cost-of-living adjustments pursuant to Section 10(f) of the Act, 33 U.S.C. §910(f), so long as two-thirds of her average weekly wage is lower than the maximum compensation rate. *Lake v. L-3 Communications*, 47 BRBS 45 (2013).

⁵ In his decision, the administrative law judge accepted the parties' stipulation that employer paid claimant temporary total disability during this period and he ordered that employer receive a credit for all compensation previously paid. See Decision and Order at 3, 40.

Accordingly, the administrative law judge's award is modified to reflect claimant's entitlement to temporary total disability benefits from September 18, 2009 through May 2, 2012, and to permanent total disability benefits commencing May 3, 2012, and continuing. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge