

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 12 February 2010

Case No.: 2008-LDA-00386

OWCP No.: 02-143576

In the Matter of

TERRY J. HICKEY,
Claimant,

v.

**BLACKWATER SECURITY CONSULTING, LLC/
FIDELITY & CASUALTY CO. OF NEW YORK/
CNA GLOBAL,**
Employer/Carrier, and

**DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS**
Party-in-Interest.

APPEARANCES:

Gary D. Pitts, Esq., Pitts & Mills, Houston TX
For Claimant

Sean Monaghan, Esq., Laughlin, Falbo, Levy and Moresi, San Francisco, CA
For Employer/Carrier

Peter B. Silvain, Esq., Office of the Solicitor, U.S. Dept. of Labor, Washington DC
For Director

BEFORE: PAMELA LAKES WOOD
Administrative Law Judge

DECISION AND ORDER GRANTING BENEFITS

This is a claim for benefits under the Defense Base Act, 42 U.S.C. § 1651, *et. seq.*, an extension to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et. seq.* ("the Act" or "LHWCA"), brought by Claimant against Blackwater Security Consulting

("Employer") and Fidelity and Casualty Company of New York/CNA Global ("Carrier").¹ As a party-in-interest, the Director of the Office of Workers' Compensation Programs ("Director") also appeared in this case.

The findings of fact and conclusions of law that follow are based upon my analysis of the entire record, including all evidence admitted and arguments made by the parties. Where pertinent, I have made credibility determinations concerning the evidence. As this case falls within the jurisdiction of the district director in Baltimore, Maryland, Fourth Circuit law applies.

PROCEDURAL HISTORY

Employer timely filed an LS-202 form on February 10, 2005, detailing Claimant's accident on February 5, within ten days of the incident, describing the nature of the injury, and signaling that Employer had notified Carrier of the accident (EX 7).² On August 25, 2005, Employer filed an LS-206 form, which triggered the payment of benefits to Claimant without an award under the Act (CX 4). Claimant received compensation in the amount of \$1,047.16 per week, beginning on May 23, 2005; he received the first payment on July 28, 2005. *Id.* Claimant filed an initial claim for compensation, an LS-203 form, on March 2, 2006, describing his injury, his salary and wages, and the medical treatment he had received to that point (CX 6, including later amended forms). On January 9, 2008, Employer filed a notice of controversion, Form LS-207 [under the same OWCP number as the instant case], arguing that Claimant's post-traumatic stress disorder (PTSD) did not result from the February 5, 2005 incident, that no claim for PTSD was ever filed, and that the statute of limitations had run on any such claim (EX 7).

On May 1, 2008, Employer filed a petition for Section 8(f) special fund relief from the Department of Labor's Office of Workers' Compensation Programs (Petition dated May 1, 2008).³ On June 10, 2008, the district director denied the Section 8(f) petition. Employer and Claimant sought a hearing before the Office of Administrative Law Judges, and Employer appealed the denial of Section 8(f) relief. *See* Prehearing statements, Forms LS-18.

On August 20, 2008, the district director referred the matter to the Office of Administrative Law Judges for a hearing and transmitted the LS-18 forms filed by Claimant and Employer, dated July 21, 2008 and August 13, 2008, respectively. In his LS-18, Claimant asserted that he was injured on February 5, 2005 while on convoy in Iraq when the vehicle he was in crashed, "injuring [his] right shoulder and body generally, including PTSD and a worsening of [his] psychological condition." Claimant indicated that the issues to be resolved at the hearing were nature and extent of injury/illness, PTD or PPD, section 7 medical benefits, and attorney's fees and expenses; Employer listed the additional issues of average weekly wage and compensation rate, retained wage earning capacity, credit for overpayment of indemnity, and special fund relief under section 8(f) of the Act.

¹ Unless otherwise indicated, the term "Employer" will encompass both Employer and Carrier.

² Claimant's and Employer's Exhibits will be referenced as "CX" and "EX", respectively, followed by the exhibit number. References to the hearing transcript appear as "Tr." followed by the page number.

³ The Petition and denial letter were included in the file transmitted by the district director, along with the Prehearing Statements, Forms LS-18. Although one of the attachments to the Petition (Claimant's deposition) was incomplete, a complete copy appears at EX 28. (Tr. 5-6, 218). The Petition and denial letter also appear in EX 32 and 33, without attachments.

A hearing was held before the undersigned administrative law judge on January 15, 2009 in Washington, DC . All parties were represented at the hearing, and all were afforded a full opportunity to elicit testimony, offer documentary evidence, and submit post-hearing briefs. Claimant submitted twenty-one exhibits (admitted as CX 1 through CX 21) and Employer submitted forty-five exhibits (admitted as EX 1 through EX 45). Claimant testified at the hearing, and live testimony was also provided by three witnesses on behalf of the Employer/Carrier, who were accepted as experts in their respective fields: Dr. Leonard J. Hertzberg, a psychiatrist; Dr. David Johnson, an orthopedic surgeon; and Beverly Brooks, a vocational expert. The record closed at the end of the hearing with post-hearing briefs from Claimant and Employer due 90 days after the hearing and Director's pos-hearing brief due 30 days thereafter, subject to extension by stipulation.

Claimant, Employer, and Director each submitted post-hearing briefs. The period for submitting post-hearing briefs from Claimant and Employer was extended 30 more days by stipulation and both briefs were timely filed on May 15, 2009. Director's post-hearing brief was timely filed on June 12, 2009.

STIPULATIONS

Claimant and Employer reached stipulations that were read into the record (Tr. 6-9). Employer and Claimant agreed that Claimant injured his right shoulder on February 5, 2005 in Iraq; that the injury arose out of and in the course of Claimant's employment with Employer; and that the Longshore and Harbor Workers' Compensation Act, as extended through the Defense Base Act, applies to the claim. (Tr. 7). They further agreed that Employer was timely notified of the injury and that the claim and notice of controversion were likewise timely filed. It was also stipulated that Claimant has been disabled and receiving temporary total disability (TTD) from May 23, 2005 until January 11, 2007; that the date of maximum medical improvement was January 12, 2007; that, since then, Claimant has not returned to his usual and customary job; that Employer has paid compensation to Claimant at a rate of \$1,047.16 per week [the maximum compensation rate] since May 23, 2005 and continuing; and that Employer has paid total medical benefits in the amount of \$97,764.41.⁴ *Id.* Finally, the parties agreed an informal conference was held on April 3, 2008, when this case was pending before the district director. *Id.*

I find that substantial evidence supports the stipulation regarding the existence of an employer-employee relationship. Despite some initial evidence to the contrary, Employer and Claimant agreed to the existence of an employer-employee relationship, while Director has not taken a formal position. (Tr. 10-12). However, in a January 14, 2009, letter filed prior to the hearing, the Director asserted that the parties' stipulation was inconsistent with evidence of record that suggested Claimant was an independent contractor.⁵ Director pointed to CX 2, an

⁴ At one portion of the transcript, the starting date was mistranscribed as "May 3, 2005." (Tr. 7; CX 21).

⁵ A stipulation, made only between an employer and a claimant, is not binding on Director for purposes of 8(f) special fund relief and does not constitute substantial evidence upon which an award of section 8(f) special fund relief may be premised. *See, e.g., E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341 (9th Cir. 1993). Since the Director is the only party with a real interest in protecting the financial integrity of the fund, agreements between an employer and a claimant that affect the fund's liability cannot be used against the Director. *Id.* Here, the Director did not actually contest the stipulation but, instead, flagged the issue for my consideration. (Tr. 10).

independent contractor service agreement between Employer and Claimant, and EX 3 and 4, which are IRS forms that list “nonemployee compensation.” Notwithstanding these documents, Claimant testified that he received weapons and protective gear from his employer; that he received direct and specific instructions from his supervisors; that his superiors could fire him on the spot; and that major personnel decisions were made at Employer’s headquarters in North Carolina (Tr. 35-37). Regardless of how it may have been characterized by the parties in the pre-employment agreements and IRS forms, the essential nature of the relationship qualifies as one between an employer and an employee for purposes of the Act under any of the permissible tests.⁶ Consequently, I accept the stipulation.

ISSUES

The issues before me are (1) the average weekly wage and corresponding compensation rate; (2) nature and extent of disability; (3) retained wage-earning capacity, including whether Employer has established the availability of suitable alternative employment and whether Claimant has conducted a diligent search for alternative employment; (4) Claimant’s entitlement to the costs of medical treatment for psychological problems including PTSD; (5) Employer’s entitlement to section 8(f) special fund relief; (6) Claimant’s entitlement to attorneys’ fees; and (7) Employer’s right to a credit for overpayment of compensation benefits.

At the hearing, the parties agreed that the issues before me were confined to the February 5, 2005 injury and did not include a potential war hazard claim, based upon any psychiatric or psychological problems that may have resulted from subsequent war zone events.⁷ (Tr. 8-10, 29). Claimant is, however, seeking reimbursement for palliative psychotherapy related to the right shoulder injury and for pain management.⁸ In that regard, Claimant clarified that with respect to the claim for section 7 medical benefits, his claim was based upon adjustment problems from the war and not just from the right shoulder injury. (Tr. 100).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FACTS

Employment History and Aftermath

Claimant was 43 years old at the time of the hearing. (Tr. 15). He was a veteran of the U.S. Army (where he served as a medic from 1985 to 1988) and the National Guard (where he

⁶ The Fourth Circuit has not definitively chosen a test. The Benefits Review Board has, in the past, affirmed three different tests, and noted that an administrative law judge should choose the test most appropriate to the facts of the case. *Marinelli v. American Stevedoring Ltd.*, BRB 99-1135 (BRB Aug. 1, 2000)(pub.)(describing the three tests and the factual scenarios in which each is appropriate). I note that under any of these tests, the “right to control details of work” test, the “relative nature of the work” test, and the hybrid “Restatement of Agency test,” the relationship here is properly categorized as an employer-employee relationship.

⁷ The record contains a report of the later explosion of an Improvised Explosive Device (IED) that Claimant witnessed in Iraq on March 12, 2005 and it was referenced by Dr. Hertzberg in his report (EX 8; CX 10, 17).

⁸ Reflex Sympathetic Dystrophy (RSD) was diagnosed by two of Claimant’s treating physicians, Dr. Gilbert and Dr. Wasserman (CX 1, p. 102-103, 112, 124; EX 42, p. 27; EX 44, p. 36). RSD, discussed below, is a disorder of the nervous system characterized by symptoms including chronic pain.

served from 1989 to 2001, while holding various full time jobs) (Tr. 15-16; EX 1). He received his associate's degree from the joint campus of Indiana University-Purdue University Indianapolis (IUPUI), and his bachelor's degree in business administration (in 1999) and master's degree in management (in 2003) from Indiana Wesleyan University (Tr. 18-19; EX 1). His former employment includes work as a handler at FedEx and as a sales consultant for Administar, a software company, and Andrx Laboratories, a pharmaceutical firm (Tr. 17, 20; EX 1). He first began to work overseas for Blackwater in early February 2004 (Tr. 21). His first year was punctuated by breaks of several weeks, which the company encouraged given the rigorousness of the tours of duty. (Tr. 21). While in Iraq, he worked for Blackwater as part of a security force that he supervised, and he was required to work "outside the wire," under constant threat of enemy attack. (Tr. 22-23).

On February 5, 2005, shortly after he returned to Iraq from a several-month break, he was travelling in a convoy near Al-Hundia when an unauthorized vehicle pulled out in front of one of the convoy vehicles.⁹ The vehicle in front of the truck in which Claimant was riding stopped suddenly from a speed of as much as 80 miles per hour, and the truck in which Claimant was riding struck the vehicle ahead of it in the convoy (Tr. 24). Claimant was thrown forward into the windshield and may have fallen unconscious. He was moved from the vehicle and taken to the nearby town where he saw a treating doctor for shoulder pain, knee pain, and back pain (Tr. 25-26). Claimant continued to serve out his tour of duty, using painkillers and lighter physical activity, until early May 2005, as he felt committed to the job (Tr. 26-27).¹⁰ At the time he left Iraq, he noticed that his right shoulder was hanging below his left shoulder and that he "was really hurt." (Tr. 27).

Prior to returning to the United States, Claimant was involved in an incident involving an explosive device that left several of his colleagues dead or wounded (EX 8). As the team leader, Claimant conducted an extensive debriefing with members of the team. *Id.* As discussed above, the parties have agreed that a possible war hazard claim based upon that incident is not currently before me.

Claimant received medical treatment when he returned home, including a partial shoulder replacement, two other surgeries, and pain management, as further discussed below.¹¹ Nevertheless, he is in constant pain, and although he takes medication to alleviate the pain, it is ineffective. (Tr. 28-29). He is also on medicine for anxiety and to help him sleep. (Tr. 29-30).

Claimant has also received palliative psychotherapy before a psychiatric social worker, Mona Mendelson, beginning in June 2006, as discussed below. He first saw Ms. Mendelson after he got back because of pain and anxiety that aggravated the pain, and he continued the therapy until March 2007. (Tr. 30, 61). However, Claimant testified that he began having mood swings, which produced some friction with his wife, as well as increased nightmares (Tr. 61-62). As a result, he returned to therapy in June 2007. (Tr. 61).

⁹ Given the alternative spellings of the accident site by the court reporters in the depositions and at the hearing, I have adopted the spelling used by the Employer in the original LS-202 filing after Claimant's injury (CX 3).

¹⁰ Claimant described these events in more detail in a deposition dated October 12, 2007 (EX 28, p. 19-31, 45-60).

¹¹ The parties stipulated that the Claimant reached maximum medical improvement (MMI) in January 2007, as stated above.

Medical Treatment

Claimant testified that immediately prior to his employment with Blackwater, on January 27, 2004, he was given a physical examination by Dr. Runkles which disclosed no problems with his right shoulder. (Tr. 72). He denied “Shoulder Trouble” in his pre-employment medical screening form but admitted to a knee injury. (EX 2).

Upon his return to the United States, Claimant began treatment for his right shoulder. Claimant first met with Dr. Steven Bleckner on May 23, 2005 (CX 1, p. 4; EX 9).¹² He had an MRI and a CT scan, which showed significant abnormalities in his shoulder joint and degenerative changes (CX 1, p. 5-7; *also* EX 10). He began physical therapy and was referred for consultations for shoulder surgery (p. 12-16; see also EX 15). On September 28, 2005, Claimant underwent arthroscopic shoulder surgery (by Raymond Carroll, M.D.) with no complications (CX 1, p. 19-20, 25; EX 18). Follow-up reports indicate, however, that Claimant’s pain did not dissipate after the surgery; in addition, Claimant noted reduced ability to lift, reach, sleep on his right side, and drive (CX 1, p. 29, 31, 40). Claimant was referred for a second shoulder surgery, humeral cap replacement (by John J. Klimkiewicz, M.D.) on February 2, 2006 (CX 1, p. 46-48; EX 21).

On April 12, 2006, Claimant consulted with James E. Gilbert, M.D., an orthopedist, complaining of increased pain and decrease in range of motion since the surgery. (CX 1, p. 69-70). Dr. Gilbert recommended physical therapy and referred Claimant to a pain clinic. *Id.* On April 24, 2006, Claimant consulted with Justin Wasserman, M.D. of the Pain Treatment Center of Greater Washington. (CX 1, p. 71-75). Dr. Wasserman’s Assessment was Pain—shoulder, Anxiety syndrome, and Insomnia, and he noted that Claimant had some “clear symptoms of anxiety/PTSD” (improving). (CX 1, p. 74). Dr. Wasserman recommended aggressive treatment with medication (lidoderm and ultram), continued physical therapy, and supportive counseling. (CX 1, 74-75).

On Dr. Wasserman’s referral, Claimant was treated by a licensed clinical social worker, Mona Mendelson, MSW, LCSW (Certified), beginning on April 27, 2006, for anxiety, sleeplessness, nightmares, panic attacks, and other possible symptoms of post-traumatic stress disorder (CX 12, p. 3). The social worker noted Claimant initially had flashbacks, sadness, frustration, withdrawal, and anxiety attacks, but that his condition improved greatly after weekly and later bi-monthly visits (CX 12, p. 1). In her later sessions, initially slated to end March 2007, she noted that Claimant was thinking creatively about actively seeking work, which helped keep him focused (CX 12, p. 20-21). However, he sought further meetings with her irregularly for at least another year, and she reported sadness, irritability, family tension, and loss of direction (CX 12, p. 24-25, 29).

On June 5, 2006, Dr. Gilbert remarked that Claimant was doing better with physical therapy and that his pain was at a level of 3 to 5 out of 10. (CX 1, p. 79). Also in June, 2006, Claimant reported to Dr. Wasserman, his pain management physician, that he was able to perform many functions of daily living and his anxiety began to subside with therapy; his pain ranged from 1 to 3 out of a possible 10, with exacerbations up to 7 to 9 if he was overly active

¹² CX 1 corresponds in substantial part to EX 9 through EX 27, excepting some Department of Labor forms.

(CX 1, p. 77-78). However, in July 2006, Dr. Wasserman noted that Claimant's average pain level was 2 out of 10 but increased to 10 with activity, and he advised Claimant that he might have to modify his activity levels in order to minimize pain. (CX 1, 84-85). Monthly progress reports continued to show the acute pain levels stabilizing, with exacerbations usually linked to activity involving the right shoulder (CX 1, p. 84-87, 93-94). On September 26, 2006, Lester A. Zuckerman, M.D., on referral from Dr. Wasserman, performed an additional procedure, a Right Stellate Ganglion Injection, which was repeated on October 1, 2006. (CX 1, p. 111-113, 119). There was no apparent improvement after either of these sympathetic nerve block procedures. (CX 1, p. 117, 120). In Dr. Wasserman's last record of January 10, 2007, Claimant's pain score was 4/10, with an average 3/10, and Claimant admitted his pain was "livable/manageable/tolerable." (CX 1, p. 129-130).

In a Work Capacity Evaluation of January 12, 2007, Dr. Gilbert stated that Claimant had reached maximum medical improvement (MMI) and placed restrictions on Claimant's reaching, reaching above his shoulder, repetitive movements of his wrists and elbows, pushing, pulling, lifting, operating a motor vehicle at work, and operating a motor vehicle to and from work. (CX 1, p. 131). He indicated that Claimant required five minute breaks every hour. *Id.*

At the time of the January 2009 hearing, Claimant was working out regularly, doing the elliptical machine four to five times per week and rehabilitative exercises once weekly. (Tr. 57). He testified that he took Hydrocodone before and after any type of lifting. (Tr. 57).

Medical Opinions

Two of claimant's treating physicians, Dr. Gilbert (the orthopedist) and Dr. Wasserman (the pain management specialist) provided deposition testimony as to Claimant's physical limitations in the workplace (EX 44; EX 42).

Dr. James Gilbert, M.D., a board-certified specialist in orthopedic medicine, specializing in the shoulder joint, was deposed on November 10, 2008. (EX 44). He testified that he first saw Claimant in April 2006 (EX 44, p. 9, 11-12). Dr. Gilbert saw Claimant four times initially and then performed several minor procedures on his shoulder in July 2006 (p. 14). Dr. Gilbert found Claimant had significant work-related limitations, including weakness in shoulder rotation, although he could likely drive (p. 17, 26). He found all of the positions in the labor market survey generally were within Claimant's physical limitations (p. 26). The main limitation Claimant had, according to Dr. Gilbert, was his RSD [Reflexive Sympathetic Disorder] condition, a complex pathology that manifests itself in different ways, but which has nonetheless improved (p. 28-29). Dr. Gilbert testified that Claimant may not always be able to type at a computer, and his medication might make him drowsy or otherwise affect his work performance (p. 29-31). Reasonable accommodations would include frequent breaks, ability to occasionally miss work and ability to attend therapy sessions (p. 33). Dr. Gilbert also testified that Claimant's RSD could interfere with his ability to write legibly without pain (p. 37).

Claimant's treating pain management specialist, **Dr. Justin Wasserman, M.D.**, was also deposed on November 10, 2008. (EX 42). He testified that he began seeing the Claimant in April 2006 and continued through October 2008 (EX 42, p. 9). Dr. Wasserman agreed with Dr.

Gilbert that Claimant could perform most, and probably all, of the jobs on the Employer's market survey, given his major limitation of inability to lift with his right arm (p. 13-14). Dr. Wasserman also spoke to his PTSD-like symptoms, particularly his anxiety, and the pain medication Claimant was using, which contained a mild narcotic (p. 19). According to Dr. Wasserman, the mildness of the medication and its infrequent use made it unlikely to interfere with Claimant's job abilities (p. 21-22). Dr. Wasserman also found RSD. (p. 27-28). He stated that reaching overhead and shoulder movement typically caused most of the pain for this type of injury, but that writing with a dominant hand could also increase the pain. (p. 29-31). In addition, Claimant's variable levels of anxiety could aggravate his pain (p. 32-33, 38-39). Even though Claimant suffered from an anxiety syndrome, a sleep disorder, and RSD, he has never been shown to have a major depression or anhedonia [inability to enjoy activities] (p. 36-37). Dr. Wasserman opined that Claimant would likely be on pain medication and sleeping medication for the rest of his life (p. 31).

Claimant was examined by two doctors chosen by Employer, a psychiatrist (Dr. Hertzberg) and an orthopedic surgeon (Dr. Johnson). Both doctors testified at the hearing.

Dr. Leonard Hertzberg, M.D., a board-certified psychiatrist, first saw Claimant on October 22, 2007 and provided a report dated October 29, 2007 (CX 10; EX 34; EX 40 [c.v.]). Dr. Hertzberg noted that Claimant had no history of mental health treatment prior to his employment in Iraq (CX 10, p. 8). He determined that Claimant did not have impairment in functioning regarding activities of daily living, social functioning, concentration, persistence and pace of work-related activities, and adaptation to stressful circumstances. (p. 10). After reviewing Mona Mendelson's psychotherapy reports, Dr. Hertzberg agreed that Claimant had symptoms of anxiety, stress, withdrawal, and other psychological trauma following his final tour of duty in Iraq; however, while he had some of the symptoms, he did not meet the all of diagnostic parameters for Post Traumatic Stress Disorder (PTSD) (p. 16). Dr. Hertzberg concluded that Claimant did not have a psychiatric disability and was highly functional, but he continued to experience emotional issues and would be unable to return to his prior employment in Iraq (p. 18-19, 21). Dr. Hertzberg found Claimant to have benefited significantly from Mona Mendelson's sessions, and he recommended that she continue them for another six to nine months (p. 23).

In his testimony at trial, Dr. Hertzberg testified that Claimant had no pre-existing psychiatric impairment and no current psychiatric impairment and he expanded upon the conclusions in his report. (Tr. 86). He indicated that Claimant appeared to have an atypical form of PTSD, and he explained that Claimant did not avoid stimuli relating to the stressor (the Iraq war), as would be typical for the disorder. (Tr. 85-86, 91-93). He stated that, while Claimant had some adjustment issues pertaining to his injuries, those issues would not be likely to impact his capacity for alternative employment in the future (Tr. 85-86). He determined that all of the jobs identified in the labor market survey were within Claimant's capabilities. (Tr. 88-89). Further, he opined that the Claimant would not require any additional therapy from an industrial standpoint or due to the work injury, beyond the six to nine months he recommended in his report, but that there might be future flare ups requiring therapy due to the general Iraq experience, and specifically the subsequent war zone event involving an IED [Improvised Explosive Device] (Tr. 87, 90, 95-96).

Employer's other testifying doctor, **Dr. David C. Johnson, M.D.**, a board-certified orthopedic surgeon, provided an initial medical report dated February 6, 2008 (CX 11; EX 31; EX 30 [c.v.]). He also submitted a supplemental medical opinion dated January 8, 2009 clarifying his diagnosis of a preexisting arthritic condition of Claimant, and elaborated on this point at the hearing (EX 43, Tr. 119-120). In his 2008 report, he opined that Claimant was not physically capable of returning to his usual and customary employment with Blackwater. (CX 11, p. 5). However, he characterized Claimant's physical limitations as allowing a wide range of activities including security work but as preventing him from "very heavy lifting[,]. . . prolonged overhead activities and prolonged reaching forward"; he also noted Claimant's intermittent numbness and decrease in shoulder rotation ability (CX 11, p. 4).

At the hearing, Dr. Johnson indicated that his examination of the Claimant showed that his right shoulder and forearm were functioning normally and the girth of the right upper extremity was greater than the left, reflecting a normal girth differential between the dominant and non-dominant sides. (Tr. 112-118). He found no signs of exaggeration by Claimant. (Tr. 116). Further, he noted that Claimant did not use his right shoulder unless asked to do so, which Dr. Johnson attributed to a "habit" he got into to avoid inducing discomfort to his shoulder. (Tr. 116-117). He questioned the diagnosis of reflex sympathetic dystrophy (RSD) because the sympathetic nerve blocks did not help Claimant and he did not have allodynia [mistranscribed as aladinia]. (Tr. 123-124, 130). He assessed Claimant as having a 27% impairment to the upper extremity (based upon 24% from the arthroplasty, 2% due to numbness or decreased sensation in right forearm, and 2% due to loss of motion and internal rotation, which resulted in 27% under the combined values chart in the AMA Guides). (Tr. 125). He testified that Claimant would be able to drive to and from work. (Tr. 118). When asked about the labor market survey, he opined that all of the listed jobs were within Claimant's physical restrictions. (Tr. 131).

On the issue of Claimant's pre-existing injury, Dr. Johnson indicated that Claimant would not have needed the hemiarthroplasty of his shoulder, an operation usually done for arthritis, were it not for the preexisting arthritis. (Tr. 122-123). However, Dr. Johnson admitted that he knew of no medical reports prior to the injury that referenced a preexisting right shoulder injury or disability and that he was not aware of any diagnostic testing conducted on the right shoulder prior to the accident date (Tr. 136). He also indicated that, during his examination, Claimant had denied any prior injury to his right shoulder. (Tr. 137). Finally, he acknowledged that the injury was "silent" and would not have been discovered by an employer in absence of the later injury (Tr. 139).

Vocational Evidence

Beverly Brooks, the vocational expert retained by the Employer, prepared a Labor Market Survey (dated August 8, 2008) (EX 35) and a Labor Market Survey Addendum (dated January 12, 2009) (EX 45) and she testified at the hearing (EX 35, EX 45; Tr. 153).¹³ In June 2008, she met with the Claimant, performed a vocational assessment, assessed the labor market

¹³ Ms. Brooks' curriculum vitae appears at EX 41. Claimant's resume (predating his employment with Employer) appears at EX 1 and his updated resume (including his sales and management experience) appears at CX 2, pages 60 to 61.

in his area, and created a list of appropriate jobs for him (Tr. 153-54). She contacted additional employers and prepared a supplemental report several days before the hearing. (Tr. 178). Claimant's skills included management skills developed while he was a security consultant; good presentation, communication, and computer skills; coordination and mediation skills; some experience as an instructor and medic; and sales skills developed in his pharmaceutical job (Tr. 156-58). She stated her opinion that Claimant was highly qualified for a large number of positions; however, she asserted that he would have to be "aggressive" in his job search to obtain employment (by making calls, networking, and possibly working with a recruiter), and it was insufficient for him to merely send out resumes or post them on the internet (Tr. 170-172). However, she acknowledged that most applicants would not take those additional steps. (Tr. 173). Her opinion was that his earning capacity was at least \$80,000, and for jobs based on commission, ranging from a minimum salary of \$50,000 to over \$100,000 once "he got up to speed on the products." (Tr. 179).

Beginning in 2007, Claimant submitted a number of job applications via mail and the internet, including all of the positions listed in the labor market survey provided to him by Employer (Tr. 66; CX 20). He received form responses from his resume submissions, and did not make phone calls to follow up with the jobs he applied for (Tr. 66; CX 20). He attended several job fairs, including one for security cleared positions, on his own initiative, and he posted his resume on several job boards (Tr. 59-60, 68). Immediately before the hearing, he met with a Department of Labor vocational specialist (Tr. 59). In addition, Claimant has continued his professional development since returning from Iraq by attending advanced certificate courses at major universities (Tr. 57-58). In late 2007 and early 2008, he did volunteer work one to two days per week for the Smithsonian, building boxes to store gas masks from World Wars I and II, but he had to stop that work because it increased his pain (Tr. 45). He has also had some involvement in professional organizations. (Tr. 62-64). Despite these efforts, he had been unable to obtain employment as of the time of the January 2009 hearing.

Other Evidence

Additional exhibits include discovery responses (CX 18-19, EX 36-39) and miscellaneous forms filed before the district director (CX 3-7, 15-16; EX 7, 16, 29). The memorandum of the informal conference held before the district director was admitted for the limited purpose of establishing that the conference took place and not to prove the contents therein (CX 21; Tr. 12).

Employer's petition for section 8(f) special fund relief and the Director's denial of the requested relief were also admitted (EX 32, 33; DX 1).

DISCUSSION

Average Weekly Wage

As the Defense Base Act incorporates the provisions of the Longshore and Harbor Workers' Compensation Act for computation of a claimant's average weekly wage (AWW), 42 U.S.C. §1651, the Defense Base Act relies on the three alternative methods for determining a

Claimant's AWW delineated in Section 10 of the LHWCA at 33 U.S.C. §910.¹⁴ The three computation methods are generally aimed at establishing a claimant's earning power at the time of his or her injury. See *McKnight v. Carolina Shipping Co.*, 32 BRBS 165 (1998); *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992)(both applying Fourth Circuit law). The first of these methods, contained in Section 10(a), provides a means of computing average annual earnings when an injured employee's work was similar and continuous for substantially the entire year preceding the injury. 33 U.S.C. §910(a). Pursuant to Section 10(b), "[w]here claimant's employment is regular and continuous, but he has not been employed in that employment for substantially the whole of the year, the wages of similarly situated employees who have worked substantially the whole of the year may be used to calculate average weekly wage" *Maldano v. Transcontinental Terminals, Inc.*, BRB No. 98-512 (Dec. 22, 1998) (unpub.). Section 10(c), the third method, is "a catch-all provision to be used in instances when neither Section 10(a) nor Section 10(b) . . . can be reasonably and fairly applied." *Story v. Navy Exchange Service Center*, 33 BRBS 111 (1999). As the Benefits Review Board observed in *Story*:

. . . The object of Section 10(c) is to arrive at a sum which reasonably represents the claimant's annual earning capacity at the time of his injury. [] All sources of income are to be included in determining claimant's average weekly wage. [] The Board will affirm an administrative law judge's determination of claimant's average weekly wage under Section 10(c) if the amount represents a reasonable estimate of claimant's annual earning capacity at the time of the injury. []

Story, slip op. at 14 [citations omitted]. The "annual earning capacity at the time of injury" under Section 10(c) mentioned in *Story* is equivalent to average annual wage and should be distinguished from post-injury "wage-earning capacity" addressed under Sections 8(c)(21), (e), and (h) of the LHWCA (33 U.S.C. § 908). Once a claimant's average annual wage has been computed, that sum is then divided by 52 in order to determine his or her average weekly wage. 33 U.S.C. § 910(d)(1). In cases of total temporary disability (such as the one at bar), 66 and 2/3 per centum of the employee's average weekly wage is payable as compensation for the injury.¹⁵ 33 U.S.C. § 908(b).

¹⁴ Summarized, the three methods of computation are these:

33 U.S.C. §910(a): If a claimant worked in his line of employment for substantially the entire year preceding the injury, "his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage for a five-day worker," earned during the days in which he was employed.

33 U.S.C. §910(b): If a claimant did not work in his line of employment for substantially the entire year preceding the injury, "his average annual earnings, if a six-day worker, shall consist of three hundred times the average daily wage or salary, and, if a five-day worker, two hundred and sixty times the average daily wage or salary" that an employee in a similar position would have earned in the previous year.

33 U.S.C. §910(c): If either of the prior methods cannot reasonably and fairly be applied, the average earnings shall be a sum that reasonably represents his earning capacity, based on "the previous earnings of the injured employee in the employment in which he was working at the time of his injury," and of similar employees working in similar jobs in the locality, or other employment of the claimant if representative.

¹⁵ The parties stipulated to temporary total disability from May 23, 2005 to January 11, 2007 (Tr. 7) [note that a transcript error states May 3, 2005]. Employer paid regular temporary total disability payments. Claimant reached maximum medical improvement (MMI) on January 12, 2005, which was also stipulated to. *Id.*

It is undisputed that Claimant was an employee of Employer averaging seven days per week during the weeks he worked, and thus his employment falls outside of the scope of Sections 10(a) and 10(b) on the face of those provisions (*see* CX 4, CX 6, and Respondent's Post-Trial Brief at 14-15). Because Section 10(a) applies only to workers who regularly work for only five or six days per week, the Board has held that a seven-day-per-week employee is covered under Section 10(c). *Zimmerman v. Service Employers International, Inc.*, BRB No. 05-0580 (BRB Feb. 22, 2006)(unpub.)(“Section 10(a) is inapplicable since claimant in the case at bar was neither a five- or six-day per week worker”). Section 10(b) is inapplicable here because Claimant worked for the preceding year prior to his injury and the parties did not provide evidence of the wages of similarly-situated employees. In addition, *Zimmerman* applies by inference since Section 10(b), like Section 10(a) applies only to five-day and six-day-per-week employees. *See* 33 U.S.C. §910(b).

Having established that neither 10(a) nor 10(b) may be properly applied to the instant case, it is appropriate to consider Claimant's average weekly wages under the rubric of Section 10(c). The definition of “earning capacity” for purposes of section 10(c) is the “ability, willingness, and opportunity to work,” or “the amount of earning the claimant would have the potential and opportunity to earn absent injury.” *Jackson v. Potomac Temporaries Inc.*, 12 BRBS 410 (1980). It is well settled that the administrative law judge has broad discretion in determining a claimant's earning capacity under section 10(c). *See Fox v. West State, Inc.*, 31 BRBS 118 (1997); *Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.* 25 BRBS 88 (1991). Where a claimant only works for a portion of the preceding year in a high-paying but dangerous overseas job, the Board has held that, where 10(c) applies instead of 10(b), a judge may appropriately consider only the higher-paying overseas job as opposed to lower-paying domestic-side prior employment to best calculate a claimant's wage-earning capacity. *Profitt v. Service Employees, International, Inc.*, 40 BRBS 41 (2006). *See also Zimmerman, supra.* Indeed, in *K.S. v. Service Employees International, Inc.*, -- BRBS --, BRB No. 08-0583 (March 13, 2009) (pub.), the Benefits Review Board rejected a “blended” approach, in which the factfinder would consider both stateside and overseas earnings in order to avoid a “windfall” to the employee, in favor of an approach calculating average weekly wage based upon the employee's contractual rate of pay.¹⁶

In *Zimmerman v. Service Employers International, Inc.*, 2004-LHC-00927, *aff'd*, BRB No. 05-0580 (Feb. 22, 2006) (unpub.), the administrative law judge considered an injured truck driver's average weekly wages within the framework of section 10(c) under circumstances similar in part to those involved here. In that case, the claimant was employed in Kuwait for 44 days before becoming injured; the administrative law judge calculated his average daily wages under section 10(c) by dividing total earnings by 44. *Id.* Because the employee worked seven days a week, that figure was then multiplied by seven to arrive at his average weekly wage. *Id.* The Board agreed with the administrative law judge's finding that the claimant's prior employment as a truck driver in the United States “failed to represent work of the same nature and type that claimant performed at the time of his injury while employed in Kuwait” and that, therefore, section 10(a) was not applicable. *Id.* The Board affirmed the administrative law

¹⁶ Employer concedes a “blended” approach has been rejected by the Board and does not argue that it should be applied here. *See* Respondent' Post-Trial Brief at 15-17.

judge's application of section 10(c) and explicitly noted that the administrative law judge's approach was "reasonable and supported by substantial evidence." *Id.*

In determining the appropriate Average Weekly Wage, I note that Claimant was paid a daily wage which varied according to the tasks to which he was assigned. According to his employment contract, Claimant was paid \$100 per day for training, \$150 per day for travel, \$500 for "SST" days, \$515 for sick leave days, \$600 for "PSD" days, \$625 for "AIC" days, \$625 for "C2" days, and \$650 for "C1" days.¹⁷ (CX 2). In total, between February 25, 2004 and February 11, 2005 (the end of the pay period in which the injury occurred), based on the times listed in EX 6, Claimant worked 9 travel days at a rate of \$150 per day (\$1,350), 91 "SST" days at a rate of \$500 per day (\$45,500), 9 "PSD" days at a rate of \$600 per day (\$5,400), 24 "AIC" days at a rate of \$625 per day (\$15,000), 19 "C2" days at a rate of \$625 per day, of which 6 days occurred after the injury (\$11,875 – \$3,750 = \$8,125), and 28 days listed as "deploy" days at a rate of \$625 per day (\$17,500). (EX 6).

Although both parties rely on overseas earnings alone (apart from the Employer's inclusion of stateside training days), they make different assumptions concerning the amount of earnings that should be included. I first note the discrepancy between Claimant's wages as characterized by Employer (\$93,150.00) and as characterized by Claimant (\$96,625.00)(*compare* Respondent's Post-Trial Brief at 5; Claimant's Post-Hearing Brief at 19). Claimant apparently calculated to the nearest pay period, which ended February 11, 2005 (see EX 6, line 9). Employer subtracted Claimant's payment for "7 days for the period 2/5/05-2/11/05" (i.e., the day of the injury, which was February 5, 2005, until six days after the injury), for a total of \$4,375.00, and then added \$900.00 that Claimant received in training fees earned during June to July 2004 (see Claimant's Interrogatory Response No. 2, EX 39, p. 17; Respondent's Post-Trial Brief at 5, n. 3). Employer did not indicate its basis for excluding the day of the injury or for including training time, and Claimant did not indicate his basis for including post-injury earnings.

Employer and Claimant also used different methods for calculating Claimant's AWW. Employer's method for calculating Claimant's AWW was to simply divide Claimant's yearly earnings by the number of weeks in the preceding year (52), to reach \$1,786.44 per week (Respondent's Post-Trial Brief at 18).¹⁸ Claimant's method for calculating the AWW here is to add the daily wages Claimant earned, divide by the number of days for which Claimant was actually reimbursed, and multiply those daily wages by seven (Claimant's Post-Hearing Brief at 18-19). According to Claimant's calculations, Claimant was paid for 180 days from February

¹⁷ These abbreviations are not explained in either the contract or in the pay record (CX 2, p. 4; EX 6), and Claimant did not know what they stood for at the hearing (Tr. 53-54).

¹⁸ Employer has suggested, in the alternative, a second method taking into consideration Claimant's continued work through his departure from Iraq on April 21, 2005, which, dividing 425 days and multiplying by 7 days in a week, would equal \$2,308.08 as the AWW (Respondent's Post-Trial Brief at 19). Since Employer has not established that including the time of employment after the injury would better represent Claimant's AWW, I have not included the wages Claimant earned after his injury.

25, 2004 through February 11, 2005, for a total of \$96,625, which, divided by 180 and multiplied by seven, would equal \$3,757.67.¹⁹

Both Claimant's and Employer's calculation methods have merit. However, given the facts as I have found them here and the policy rationale heretofore expressed by the Board, I find Claimant's calculation method to better fit with the circumstances of this case for several reasons.

First, I note that Claimant took extended vacations from work, lasting from May through August 2004 and October 2004 to January 2005 (*see* EX 6, lines 4, 5, 8, 9). Employer included those periods; Claimant did not. Although such vacations were encouraged by Employer because of the stressful nature of the work, these vacations were not mandatory or for a specific period of time (Tr. 22). Claimant was not required to take that time off, and he was not compensated for it (*see* EX 6). Apart from vague testimony to the effect that employees were encouraged to take vacations, there has been no showing that such lengthy periods were either typical of employment with Employer or likely to recur during the remainder of Claimant's contract with Employer. The effect of including these periods is to reduce Claimant's AWW significantly due to vacation time that was neither fixed nor mandatory.

Second, I note that, while certainly not conclusive, Employer listed a daily rate of \$600 for a weekly wage of \$4,200 on its LS-202 and LS-206 forms (CX 3, 4).²⁰ These numbers are not binding, of course, and Employer should not be penalized in the event that it did overcalculate Claimant's wages. Nevertheless, it is worth noting that Employer relied on the amount Claimant was actually making at the time of the injury to calculate Claimant's temporary compensation amount instead of the approach it is now taking.

The main reason that I select Claimant's calculation method, however, is that it is more consistent with the Board's jurisprudence on AWW calculations. The Board has emphasized in the past that Claimant's annual earning *capacity* at the time of his injury is the standard for determining AWW under Section 10(c). *See Story v. Navy Exchange Service Center*, 33 BRBS 111 (1999)(noting that the object of 10(c) is to arrive at a sum "which reasonably represents the claimant's annual earning capacity at the time of his injury"). As discussed above, the Board has also rejected the so-called "blended AWW approach" where a claimant worked for only part of the year at a risky, high paying job overseas following a lower-paying domestic job, finding instead that Claimant's AWW should be calculated using the earning capacity only of the higher-paying overseas job by determining the daily wage and multiplying by the number of days per week worked. *K.S., supra; Proffitt, supra; Zimmerman, supra*. Indeed, the Claimant's approach is similar to that used in *Zimmerman*. Even though *Zimmerman* involved a claimant who worked under one year for employer in that case, while this case involves a claimant who worked over one year, I note that both calculate wage-earning capacity based on Section 10(c) and not Sections 10(a) or 10(b). Akin to the claimant in *Zimmerman*, Claimant's wage-earning capacity

¹⁹ Claimant's brief cited the outside dates of February 25, 2004 through February 23, 2005 (Claimant's Post-Hearing Brief at 19). Although Claimant used the date Claimant's paycheck was issued (February 23), Claimant was injured on February 5 and the last day of the pay period in which the injury occurred was February 11. (*See* EX 6, line 9).

²⁰ Employer did not explain its use of \$600 as a daily rate. At the time of Claimant's injury, he was being paid \$625 per day, but he was paid at varying rates, as discussed above (*see* EX 6).

is better gauged through calculating his daily wage for days actually worked since his rates varied depending on his tasks, and during significant portions of the year he was not compensated at all. Under these circumstances, I reject Employer's suggestion that Claimant's wages should be treated as a yearly salary to be divided by the number of weeks in a year.

Also, as Employer has made no showing that Claimant would be required to attend more training, I find that the amount he was paid during the training period should not be included.²¹ It is not relevant to the issue of Claimant's earning capacity at the time of the accident. Likewise, I will include Claimant's wages on the day of the injury, but not his wages thereafter.

Accordingly, I accept Claimant's calculation method dividing his earnings by the number of days actually worked and multiplying that number by seven days in a week with one modification. I find that the six days in the pay period ending February 11, 2005 that Claimant worked *after* his February 5 injury should not be included. Claimant calculated a daily wage of \$536.81 (dividing the earnings of \$96,625 by the 180 days worked). If the six days (at \$625 each) in the pay period that included the February 5 injury that were worked after Claimant was injured (\$3,750) are deducted, the total pay would be \$92,875.00 and, divided by the days worked (174), it would translate to an average daily wage of \$533.76, which can be multiplied by 7 to get a weekly wage. As a result, I calculate $(\$92,875/174) \times 7$ to equal an AWW of **\$3,736.32**, with a corresponding compensation rate of 2/3 that amount [2,490.88], which would qualify Claimant for the maximum compensation rate. Accordingly, Claimant's compensation rate should be at the maximum rate, based on 200% of the National Average Weekly Wage from 10/1/2004 to 9/30/2005, or **\$1,047.16**.²² (Tr. 7). See 33 U.S.C. § 906(b)(1).

Nature and Extent of Disability

The Board has held in the past that shoulder injuries are considered unscheduled injuries, compensable under Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21). See *Keenan v. Eagle Marine Svcs.*, BRB 93-1234 (BRB Aug. 14, 1996)(unpub.), later confirmed by *Keenan v. Eagle Marine Svcs.*, BRB 00-1095 (BRB Dec. 4, 2002)(unpub.)(refusing to revisit earlier holding). Unscheduled injury awards are calculated as two-thirds of the difference between a claimant's prior average weekly wage and the employee's post-injury wage-earning capacity. 33 U.S.C. §908(c)(21).

Disability under the Act is defined as "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." 33 U.S.C. §902(10). Total disability is thus complete incapacity to earn pre-injury wages in the same work as at the time of injury or in any other employment. The employee has the initial burden of proving total disability. In order to make a determination of whether a claimant has made a prima facie showing of total disability, the administrative law judge must compare the

²¹ Training period wages are not included in the summary of earnings in EX 6. Employer relied upon Claimant's interrogatory responses to include those amounts. (EX 39, p. 17). The interrogatory responses did not indicate the number of days for which Claimant was compensated for training but merely stated that he was paid \$900. According to Claimant's contract, he was paid \$100 daily for training.

²² The National Average Weekly Wage from 10/1/04 to 9/30/05 was \$523.58, with a minimum compensation rate of \$523.58 and a maximum of \$1,047.16. The tables may be accessed from a link on the Office of Administrative Law Judges website, www.oalj.dol.gov.

claimant's medical restrictions with the requirements of his or her usual employment. *See, e.g., Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988); *Carroll v. Hanover Bridge Marine*, 17 BRBS 176 (1985). Since the parties have stipulated that Claimant is unable to return to his last regular occupation, and Employer's orthopedist has conceded that Claimant is unable to perform his last and usual job for Blackwater due to his physical limitations, Claimant has established a prima facie case of total disability. Claimant and Employer have stipulated that the date of Maximum Medical Improvement (MMI) is January 12, 2007 (Tr. 8). After this date, Claimant is presumed to be permanently and totally disabled unless and until suitable alternative employment is established.

Since Claimant has proven that he is totally disabled from performing his last regular occupation, the burden shifts to Employer to show that suitable alternative employment is available. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP (Chappell)*, 592 F.2d 762 (4th Cir. 1979). If Employer meets that burden, it becomes claimant's burden to establish a diligent search. While Employer has shown the availability of suitable alternative employment on a prima facie basis, I find that Claimant likewise showed that he made a diligent search for alternative employment but was unable to obtain such employment, as more fully discussed below. Accordingly, I find Claimant to be totally disabled.

Employer's Burden to Show Suitable Alternative Employment

To show suitable alternative employment, Employer must show the existence of realistically available job opportunities within the geographical area where Claimant resides which he is capable of performing, considering his age, education, work experience, and physical limitations, and which he could secure if he diligently tried. *Trans-State Dredging v. Benefits Review Board (Tanner)*, 731 F.2d 199 (4th Cir. 1984); *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375 (4th Cir. 1994). To establish that a job is realistically available, Employer must establish the precise nature, terms, and availability of the jobs. *Newport News (Chappell)*, *supra*. As indicated above, if Employer fails to establish suitable alternative employment, then Claimant is deemed to be permanently and totally disabled, but if it does so, then the burden shifts back to Claimant to establish a diligent search and willingness to work. *Newport News Shipbuilding & Dry Dock v. Tann*, 841 F.2d. 540 (4th Cir. 1988).

I find that Employer carried its burden of showing the existence of realistically available job opportunities near where the Claimant resides, on a prima facie basis, and, consequently, the burden returns to Claimant to show a diligent search and willingness to work. An employer has no duty to contact potential employers for claimant; it only needs to show that suitable work is available for which a claimant can realistically compete. *Tann*, 841 F.2d. at 542-544. Ms. Brooks, Employer's vocational expert, took a complete vocational profile of Claimant and identified numerous positions that were within the subjective limitations set by the orthopedic specialists who examined Claimant (Tr. 165-166). Ms. Brooks had positive responses from potential employers who, in the abstract, confirmed that a candidate with Claimant's qualifications would be a match for their positions (Tr. 168-169). She found that employment opportunities in the Washington, DC metropolitan area were relatively expansive for persons with public service experience (Tr. 172-173). Her report adequately stated the precise nature and

terms of the jobs she listed, especially considering the level of detail that she gave (Respondent's Post-Trial Brief at 21; *see contra*, Claimant's Post-Hearing Brief at 8-10).

For the most part, the jobs identified in the Labor Market Survey were within Claimant's physical limitations. According to Dr. Johnson, Employer's orthopedic expert, Claimant should not engage in "heavy lifting, prolonged overhead activities, or physical combat" (CX 11, p. 4). According to Dr. Hertzberg, Employer's psychiatric expert, Claimant has no permanent psychological condition that would inhibit his employment (CX 10, p. 18). Claimant's treating orthopedist, Dr. Gilbert, opined that Claimant should not engage in lifting with his right arm, and even repetitive actions such as typing or writing could cause his pain to flare up (EX 44, p. 32, 37). Both Dr. Gilbert and Dr. Wasserman, his pain management physician, agreed that Ms. Brooks' list of suitable jobs were within Claimant's limitations (EX 44, p. 38; EX 42, p. 14). According to his therapist Ms. Mendelson's notes, Claimant had chronic pain but felt he could manage so long as the jobs were within his physical limitations (CX 12, p. 19).

Claimant objects to several of the positions noted in the Labor Market Survey as being outside of his expertise or physical limitations, and his objections have some merit. One job requires the applicant to have knowledge of security clearance methods; another requires two years experience in a supervisory or financial management capacity; a third requires three years of supervisory or management experience; and a fourth requires knowledge of the United Arab Emirates marketplace, which Claimant argues he does not possess (Claimant's Post-Hearing Brief at 8-10). Ms. Brooks testified that these jobs would require on-the-job training and that Claimant possesses the appropriate experience, albeit not exact experience (Tr. 183). While Claimant is capable of performing these jobs, it is not clear that he could realistically compete for them. Claimant also objected to the educational sales manager position and several of the pharmaceutical positions because they involved driving a vehicle at work (Claimant's Post-Hearing Brief at 9-10). While Claimant testified that he is able to drive, it is not clear that he would be able to do so occupationally without experiencing increased pain. Indeed, Dr. Gilbert restricted Claimant from occupationally using a vehicle in his list of restrictions, although at his deposition, he approved the pharmaceutical sales jobs if there were reasonable accommodations. Claimant also challenged the pharmaceutical jobs as requiring lifting of 25 pounds, which is outside of his restrictions. (Claimant's Post-Hearing Brief at 10). Similarly, Claimant challenged the job of storefront distribution center supervisor for S.A.I.C. as requiring lifting (*Id.* CX 14, p. 14). Since the position is a supervisory one, however, it is unlikely that Claimant himself would have to lift boxes and replenish stocks regularly; the job also permits assistance with lifting. *Id.* Two of the positions, both public affairs specialists of the Department of the Army, are overseas in Germany and Japan, respectively, and appear to require specialized experience (CX 14, p. 18).²³

²³ The relevant labor market for an employee may include overseas jobs in some circumstances. If a claimant's prior employment included extensive travel or periodic relocations, for instance, overseas jobs might be relevant. *See, e.g., Patterson v. Omniplex World Services*, BRB No. 02-0332 (BRB Jan. 21, 2003)(pub.). Unlike in *Patterson*, the two jobs here are for very specialized candidates, not generalist positions like a security guard. Other than a year and a half in Iraq, Claimant has little overseas experience, unlike the claimant in *Patterson*, who was a security guard in Moscow and Nigeria. *See id.* (especially footnote 7). The German "international affairs specialist" job requires Claimant to "orient new Commanders and staff on general political matters and the current Politico-military situation" and "keep abreast of local political activities which could impact on political acceptability of U.S. military presence" (CX 14, p. 18). Ms. Brooks simply stated that Claimant's experience in a foreign country and his prior

On the other hand, there were other positions for which Claimant was apparently qualified, including those in which the hiring official expressed interest to Ms. Brooks when she described Claimant's background. These include Healthcare Business Development Consultant for The Gallup Organization at \$80,000 to \$100,000. (EX 35; Tr. 176; see also Respondent's Post-Trial Brief at 21-23). Indeed, Claimant has not argued that he was unqualified for that position, and there are other positions that he has not challenged as being outside his capabilities (apart from noting that the precise nature and terms of the job have not been listed), such as marketing associate, learning coordinator, and administrative support specialist. (EX 35; Claimant's Post-Hearing Brief at 8 to 9). Thus, even if Claimant's challenge to some of the jobs is accepted, it is clear there are other jobs for which he is both qualified and capable of performing from a physical standpoint.

In view of the above, I find that, while not all of the jobs identified by Ms. Brooks would constitute suitable alternative employment, at least some of the jobs were suitable for Claimant's physical limitations and work experience, on the whole, and he would realistically be capable of competing for them. Not all of an employer's identified employment opportunities must be strictly qualifying to carry the burden. In the Fourth Circuit, an employer simply needs to show that the type of work a claimant can do is available in the community and that claimant could reasonably acquire such job. *Lentz v. The Cottman Co.*, 852 F.2d 129 (4th Cir. 1988)(outlining standard and holding that providing only one job is insufficient as matter of law), *but see P & M Crane Co. v. Hayes*, 930 F.2d 424, *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991)(holding that listing only one job, in certain circumstances, could be enough to carry employer's burden). Thus, I find that the labor market survey substantially identifies suitable alternative employment, and accordingly manages to shift the burden back to Claimant to show a diligent job search.

Claimant's Burden of Showing Diligence in Job Search

Once an Employer has carried his burden of showing suitable alternative employment in the geographical vicinity, a claimant must make a diligent search for work in order to show lost wage-earning capacity, even if ultimately he is unable to find a position. Where a claimant fails to make a diligent search, either by not making an attempt to find work, or seeking work unsuitable for his physical limitations, the claimant has not met his burden, and consequently will not receive full total permanent disability benefits. *Tann*, 841 F.2d at 543-44. In determining whether a claimant exercised diligence in seeking suitable alternate employment, a judge must analyze the claimant's alleged efforts to find employment, making specific findings regarding the nature and sufficiency of claimant's job search. *Palombo v. Director, OWCP*, 937 F.2d 70 (2d Cir. 1991). A claimant need not show he applied to all of the precise jobs that the employer suggested, but simply must establish that he was reasonably diligent in attempting to secure similar jobs. *Id.* at 74-75. Prior decisions have considered elements such as applying to jobs, networking, meeting with vocational counselors, attending job fairs, or working temporary

military service would qualify him. The Japanese "supervisory public affairs specialist" job seems to be an even poorer fit, since it requires establishing "effective working relationships with high level US and Japanese government" officials and serving as a point of contact for Japanese government agencies. Ms. Brooks has not explained why Claimant's experience as a supervisory security guard provided him with sufficient "knowledge of diplomatic affairs" to qualify him for a position as a specialist in international diplomacy. *Id.*

jobs as probative of a diligent job search. *See, e.g., Fortier v. Electric Boat Corp.*, BRB No. 04-0351 (BRB Dec. 14, 2004)(pub.). Simply making cold calls, de-emphasizing one's strengths or exaggerating weaknesses, refusing to work normal hours, or pursuing employment for which one is unqualified or that is outside of one's physical limitations have signified lack of diligence in a job search. *Wilson v. Virginia International Terminals*, BRB No. 05-0966 (BRB Aug. 25, 2006)(pub.)(applying Fourth Circuit law). A failure to make a follow-up to applications already submitted, when coupled with other factors, may suggest lack of good faith in the job search process. *See Wilson, supra; Wainwright v. Jacksonville Shipyards, Inc.*, BRB 99-0124 (BRB Sept. 30, 1999)(unpub.)(listing failure to follow up as one of several factors explaining ALJ's refusal to find diligent search).

Employer argues that Claimant failed to make a diligent job search, especially given the difficult economic situation, adding that Claimant "mechanically went through the motions of firing off resumes" and his "motivation to truly secure employment was lacking" (Respondent's Post-Trial Brief at 34). Ms. Brooks testified that Claimant was not aggressive enough in his job search since he did not follow up in his job search efforts (Tr. 171). Ms. Brooks may be correct that phone calls and personal contacts are the most efficient ways of finding a job. However, Ms. Brooks conceded that most applicants did not take those additional steps. (Tr. 173). Moreover, very few of the job postings to which Claimant applied provided a non-electronic means of contact, and several did not even permit phone calls or follow-up emails (*see generally* CX 20). Employer has not suggested that Claimant sought unsuitable employment or that he in any way downplayed his qualifications or did anything else to jeopardize his chances of being hired by any of the employers.²⁴ Rather, Employer argues that Claimant's efforts were insufficient in what is now a highly competitive job market.

Here, Claimant applied to both the jobs identified by Ms. Brooks and similar jobs he had previously and subsequently identified himself. Most of the jobs Claimant applied to directly related to his pharmaceutical and health sales experience, security and public affairs experience, administrative, and business consulting experience (*see generally*, CX 20). Nearly all of these jobs coincide with the types of experience identified by Ms. Brooks, Employer's vocational specialist. For instance, she recommended he apply as a pharmaceutical sales representative to Eli Lilly, GlaxoSmithKline, and ProEthic (CX 16, 14-15); he also applied for equivalent positions on his own initiative at Pan-Am Laboratories, Kelly Scientific, Victory Pharma, WebMD, Medimetriks, Shire Pharmaceuticals, Abbott Laboratories, OnCall, ICU Medical, MRI Network, Concentra, Novartis, Forest Labs, Kaiser Permanente, and others (*see generally*, CX 20). She recommended he apply to security and public affairs consulting positions at Master Security, Gallup, U.S. Department of Commerce, Omniplex World Services, and USIS (CX 14, p. 9-17). He applied, on his own initiative to similar positions at the Department of Defense, Guardsmark, East Baltimore Development Corporation, and Intertek (CX 20). Finally, Ms. Brooks recommended he apply as an account or sales manager at Porter Novelli, Social and Scientific Systems, and Reznick Group (CX 14, p. 10, 12-13, 15). In addition to these, he also applied to similar jobs at Wilson HR, Echo Communicate, IBA USA, Aerotek, Colonial Surety,

²⁴ This case is distinguishable from *Wilson, supra*, and similar cases, where a lack of diligence was found because a claimant was applying for jobs for which he was underqualified or which were outside his limitations. Employer here argues precisely the opposite, that Claimant was extremely qualified and highly skilled and should have had no problem finding a job (Respondent's Post-Trial Brief at 34; *see also* Ms. Brooks testimony at Tr. 171-172).

SMR Group, and Orioles (CX 20). While the details of some of these positions are not clear, the majority appear to have similar titles as the ones recommended by Ms. Brooks, and Employer does not argue otherwise. I agree with both parties that Claimant is highly skilled and well-qualified. But I do not accept Employer's inference that simply because Claimant does not have a job, this necessarily indicates that Claimant did not want one (see Respondent's Post-Trial Brief at 34).

This issue is not close. I find it clear that Claimant made a diligent job search under any standard.²⁵ Claimant was a very credible witness, and expressed a sincere willingness to work, not only at the hearing (Tr. 31), but to Beverly Brooks, who found him "anxious and willing to return to employment" (CX 14, p. 7), to Mona Mendelson, who observed that his disposition improved as he sought work (CX 12, p. 19-21), and to Dr. Hertzberg, who spoke highly of his motivation (CX 10, p. 18, 20).²⁶ Claimant began applying for jobs soon after reaching MMI, two years prior to the hearing and well over a year before receiving Employer's labor market survey (see CX 20, p. 125). He applied to at least one hundred unique jobs, including every job presented by Employer (*see* CX 20). He used all of Ms. Brooks' points of contact at each of the positions she listed (Tr. 215; compare CX 20, p. 34 with CX 14, p. 13). He attended several job fairs, including one for jobs requiring security clearances, which he formerly possessed (Tr. 59-60). He posted his resume on job boards, and used multiple job search engines to apply; he also applied directly to at least some of the jobs via email (CX 20). He met with a Department of Labor counselor right before the hearing. (Tr. 32-33). He did continuing education programs and participated in some volunteer programs, including at least several months as a volunteer at the Smithsonian until continued pain forced him to quit, which provided networking opportunities and career ideas (Tr. 45-46, 57-58). Claimant's job search must only be diligent; it need not be extraordinary. It was diligent and more in this case.

Medical Benefits

Section 1 of the Defense Base Act states that "the provisions of the Longshore and Harbor Workers' Compensation Act. . . shall apply" to claims – such as this one – for injury or death under 42 U.S.C. § 1651 *et seq.* The requirements relating to medical care are set forth in Section 7 of the LHWCA (codified in 33 U.S.C. § 907), with implementing regulations in 20 C.F.R. Part 702, Subpart D [§ 702.401 through § 702.441]. Section 7(a) of the LHWCA generally requires:

²⁵ That is not to say that Claimant went about the job search in the most efficient or effective way possible. If anything, he overapplied for jobs, and could have more narrowly targeted his search. Indeed, Claimant may have spread himself too thin by applying to so many jobs, including ones for which he was clearly overqualified. Ms. Brooks may be correct when she states that Claimant needed to be more aggressive in the current economic environment by making follow-up phone calls and making personal contacts (Tr. 170-172). By applying to so many jobs, and in so vast of a geographical area (in Baltimore, Washington, DC, and as far west as Winchester, Virginia), he may have hampered his own follow-up efforts. Nevertheless, it is clear that Claimant performed a diligent job search and that he genuinely wanted to find a job, as I have found.

²⁶ Dr. Hertzberg noted that Claimant wanted to begin seeking employment even before he reached MMI release from his physicians (CX 10, p. 20).

The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.²⁷

Section 7(b) of the Act vests the authority to supervise medical care with the Secretary of Labor. 33 U.S.C. §907(a), (b). Under the regulations, “[t]he Director, OWCP, through the district directors and their designees shall actively supervise the medical care of an injured employee covered by the Act.” 20 C.F.R. § 702.407. The district directors’ supervisory functions include requiring periodic medical reporting; determining the necessity, sufficiency, and character of medical care furnished; determining whether change in service providers is necessary; and evaluating medical questions regarding the nature and extent of the covered injury and medical care required. 20 C.F.R. § 702.407; *see also* §702.401-702.422.

Under section 7(d) of the Act, a claimant may be reimbursed for medical expenses already paid if certain criteria are satisfied. 33 U.S.C. § 907(d). Specifically, an employee may not recover amounts he expended for medical or other treatment or services unless either (1) the employer refused or neglected a request to furnish such services (and the employee has complied with the requirements of the Act and regulations); or (2) the nature of the injury required such treatment and services and the employer (having knowledge of the injury) neglected to provide or authorize it. *Id.*; *see also* 20 C.F.R. § 702.421. Although the authority vested by section 7(b) to supervise medical care rests with the delegates of the Secretary—the district directors—an administrative law judge retains the role as factfinder when disputed issues of fact concerning medical benefits arise (such as the need for specific assistance or treatment) and such issues must be resolved by the administrative law judge. *See Sanders v. Marine Terminals Corp.*, 31 BRBS 19, 22-23 (1997). A claimant may obtain reimbursement for medical services if a request was made to his employer for treatment, the employer refused the request, and the treatment procured thereafter was reasonable and necessary; these factual issues are to be resolved by an administrative law judge. *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112, 113 (1996); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). To obtain reimbursement, a claimant must establish that the medical expenses are related to the compensable injury. *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981); *Suppa v. Lehigh Valley R.R. Co.*, 13 BRBS 374 (1981). The employer is liable for medical services for all legitimate consequences of the compensable injury. *Lindsay v. George Washington University*, 279 F.2d 819, 820 (D.C. Cir. 1960).

An injury is defined in the Act as an “accidental injury or death arising out of and in the course of such employment, and such occupational disease or infection as arises naturally out of such employment or as naturally and unavoidably results from such accidental injury....” 33 U.S.C. §902(2). In the absence of substantial evidence to the contrary, it is presumed a claim comes within the provisions of the Act. 33 U.S.C. §920(a). Once a claimant establishes a prima facie case for compensation, through testimony or evidence provided by qualified physicians stating that treatment is necessary, a presumption that an injury arose out of the course of employment arises. *See, e.g., Lacy v. Four Corners Pipe Line*, 17 BRBS 139 (1985). In cases arising under the Defense Base Act, employees may be within the course of employment even if

²⁷ Although the Employer has focused on the need for medical treatment on an *industrial* basis, Section 7 of the Act is not so limited.

the injury did not occur within the space and time boundaries of work, so long as the employment creates a “zone of special danger” out of which the injury arises. *O’Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 507 (1951) (providing coverage to an employee drowned while attempting a rescue in a recreational area for employees in Guam). Courts have traditionally interpreted “zone of special danger” broadly given the realities of hostile work environments, and have held injuries technically outside the scope of employment (as in leisure time, for instance) to be included. *See, e.g., id.; O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 364 (1965)(finding that employee who drowned in a lake over a weekend away from the job to be covered, given the “exacting and dangerous conditions of Korea”). *But cf. Gillespie v. G.E. Co.*, 21 BRBS 56 (1988), *aff’d mem.* 873 F.2d 1433 (1989 1st Cir.) (where no evidence showed that the activity causing death—asphyxiation during autoerotic activity—was related to conditions created by the overseas job, the “zone of special dangers” test was not met).

The parties agree that Claimant’s right shoulder injury and all of its consequences arose out of Claimant’s employment. Specifically, the parties here stipulated that Claimant’s physical injury arose out of the course of employment, and accordingly is compensable under the provisions of the Act. Claimant is therefore entitled to medical benefits related to that injury, including pain management. However, the parties disagree as to whether the extent of that physical injury includes a diagnosis of Reflexive Sympathetic Disorder (RSD), treatment for which would be compensable under 33 U.S.C. §907(a), and they disagree as to psychotherapy expenses already incurred.

Turning first to Reflexive Sympathetic Dystrophy (RSD), I find that Claimant has established an entitlement to medical benefits arising from RSD. RSD is a disorder of the nervous system characterized by severe, chronic pain, a possible burning sensation, and frequent sensitivity to touch, although its symptoms are not stable and diagnoses appear to vary. Dr. Wasserman noted that, while classic symptoms of RSD exist, it “can present itself in many ways—including with just having continued unexplainable constant pain for no rhyme or reason” (CX 1, p. 103).²⁸ Employer, relying on Dr. Johnson’s medical opinion, argues that Claimant did not have RSD as he did not have allodynia (sensitivity to touch), that he had no changes in color or temperature, and that he did not have abnormal swelling in his right arm (Respondent’s Post-Trial Brief at 35-47). Claimant also had good grip strength and motor function and had no muscle atrophy or tenderness. *Id.* Dr. Gilbert, Claimant’s treating orthopedic specialist, diagnosed him with RSD (CX 1, p. 96). As Employer correctly notes, Dr. Gilbert did not comprehensively explain his reasons for this diagnosis, either in his report or in his deposition (see Respondent’s Post-Trial Brief at 38; CX 1, p. 70, 96-97). However, I find the reports of Dr. Wasserman, Claimant’s pain management specialist, to be more helpful (CX 1, p. 74, 103, 117-18, 120-23). While initially noting in April 2006 that Claimant did not have typical characteristics of RSD, Dr. Wasserman later concluded that, even though Claimant had no burning or shooting pain in his arm, the constant pain he was experiencing “could be looked upon as an RSD-like syndrome” (p. 101). He concluded that “RSD is a reasonable working diagnosis” to account for Claimant’s pain. *Id.* Upon Dr. Wasserman’s referral, Dr. Lester Zuckerman confirmed that Claimant had pale discoloration of the right hand, which tended to

²⁸ Like Dr. Wasserman, Dr. Zuckerman also noted that RSD can be present even without all of the typical symptoms since the type of RSD here was joint-specific (CX 1, p. 112).

support a finding of RSD, even though he did not have allodynia or edema (p. 111-12). Even after two rounds of nerve blockers failed to reduce the pain, Dr. Wasserman did not change his conclusion that Claimant suffered from RSD, even though RSD-like symptoms are often assuaged temporarily by nerve blockers (p. 121). Employer contests Dr. Gilbert's diagnosis and his earlier finding of allodynia, and notes the lack of temporary relief with nerve-blockers, but does not account for Dr. Wasserman's continued diagnosis of RSD despite the lack of these two symptoms or the statements by Drs. Wasserman and Zuckerman to the effect that RSD is a complex disease with varying symptoms (Respondent's Post-Trial Brief at 35-38).²⁹ Consequently, I find Employer has not rebutted Claimant's showing of RSD resulting from the shoulder injury. In the future, Claimant would be entitled to any reasonable medical expenses arising out of his RSD.

The main dispute between the parties, however, involves Claimant's entitlement to psychotherapy, which includes palliative psychotherapy related to treatment for his shoulder injury (Tr. 9). As referred to me, based upon the LS-18 forms filed by both parties, this claim includes PTSD and any other psychological manifestations related to the February 5, 2005 accident.³⁰ As discussed above, the parties have agreed that a separate "war hazard" claim, based upon any psychiatric or psychological problems that may have resulted from subsequent war zone events, is not before me. However, Claimant has included in his claim a request for section 7 medical benefits relating to the entire work experience, noting that the injury occurred in the context of a war zone and the medical benefits claim was "for any sort of adjustment problems that come from the war not just because of the right shoulder injury." (Tr. 100). Thus, based on the stipulation between the parties, psychotherapy would be included to the extent that it relates to the shoulder injury and any war events up to and including the time of the injury.

I find that Claimant has established the need for palliative therapy for anxiety, pain, and other symptomatology, and I find the psychotherapy at least through the date of the hearing to be compensable under section 7 (see CX 10, p. 18).³¹ In that regard, Dr. Hertzberg, a highly qualified psychiatrist and credible expert witness, testified that Claimant had no preexisting psychiatric impairment and no current psychiatric impairment, but that he did have adjustment difficulties due to his injuries and his war zone experiences that necessitated psychotherapy extending through the time at which he saw Claimant in 2007, and for an additional six to nine months, with possible flare ups in the future. Furthermore, Dr. Hertzberg diagnosed an atypical form of PTSD, which was not disabling. Claimant testified, and his treating therapist Mona Mendelson agreed, that Claimant had periods of serious anxiety, sleep disturbances, flashbacks, nightmares, ruminations, and withdrawal (Tr. 30, 61-62; CX 12, p. 3, *et. seq.*). The therapy

²⁹ Given the suggestions by Drs. Wasserman and Zuckerman that allodynia is by no means required for an RSD diagnosis, I do not find the absence of allodynia to be conclusive on the question (*see* Wasserman, CX 1 at 103; Zuckerman, CX 1 at 112).

³⁰ Although the issue was raised on Claimant's LS-18, Claimant did not file a separate claim for benefits based upon post-traumatic stress disorder. In his form LS-18, Claimant alleged "PTSD and a worsening of my psychological condition" as a result of the Feb. 5, 2005 automobile accident. See the discussion of the Issues, above. Employer's argument that the statute of limitations has run on a separate PTSD claim is not properly before me (see Tr. 7-9; CX 7). To the extent that the PTSD claim is a part of the instant claim, of course, the statute of limitations has not run.

³¹ Claimant has not, however, established that he has a psychiatric **disability** arising from his tour of duty in Iraq. Indeed, Claimant has conceded that he does not have a disabling psychiatric impairment but is only seeking medical benefits for palliative psychotherapy. (Tr. 100).

Claimant attended with Ms. Mendelson was conducted on referral from Claimant's pain management specialist, Dr. Wasserman, and the pain management specialist was retained on referral from his orthopedist, Dr. Gilbert, as a direct result of Claimant's shoulder injury. (CX 1, 12). Thus, Claimant has established entitlement to psychotherapeutic treatment directly arising from the shoulder trauma, adjustment to the disability caused by it, and consequential pain management related thereto. Likewise, Claimant has experienced symptomatology relating in general to his employment in Iraq, both before and subsequent to the February 5, 2005 accident. Dr. Hertzberg confirmed that Claimant had benefitted significantly from Ms. Mendelson's relaxation techniques, breathing exercises, and counseling sessions, as the nightmares and other symptoms have grown less frequent, and Claimant's pain has subsided as he sleeps better (CX 10, p. 5, 17). It is clear the psychotherapy at issue, as agreed by doctors for both parties, has improved Claimant's physical well-being as much as it has improved his mental and emotional well-being.³²

Claimant has already paid \$552.50 to Ms. Mendelson and owes \$617.50 (CX 13). Dr. Hertzberg found, and Employer has conceded, that Claimant would benefit from an additional six to nine months of continued therapy (Tr. 86-87; Respondent's Post-Trial Brief at 39). Further, Dr. Hertzberg testified that Ms. Mendelson's fees were reasonable for the Washington Metropolitan area at \$130 per session; he also indicated Claimant might experience flare-ups for which additional therapy was advisable after the six to nine months of further therapy that he recommended (Tr. 94-96).³³

I find that Claimant has successfully established entitlement to reimbursement for psychotherapy expenses already paid, payment of his outstanding balance, and continued payment for a successive six to nine months of treatment. Although any palliative psychotherapy that might be required in the future due to the Claimant's shoulder injury and chronic pain would be covered, there has been no showing that such therapy will be required, beyond the six to nine month period envisioned by Dr. Hertzberg. If indeed Claimant experiences flare ups in the future, it will be difficult to separate out whether such flare ups are attributable to the period to and including the accident date as opposed to subsequent war zone events. The former would be covered under this claim; the latter would not.

Section 8(f) Relief

Employer timely submitted a petition for Section 8(f) special fund relief under the Act, in the event Claimant was found to be totally disabled, in part due to a preexisting injury. *See* 33 U.S.C. §908(f). To qualify for Section 8(f) relief, an employer must show the following: (1) the employee had a preexisting partial disability that contributed to the ultimate disability; (2) the preexisting disability was manifest to the employer prior to the subsequent injury; and (3) the second injury alone would not have caused the claimant's total permanent disability. *See*

³² Dr. Wasserman noted that Claimant's anxiety and severe insomnia fueled his pain and needed to be treated aggressively (CX 1, p. 74). Dr. Wasserman also confirmed Dr. Hertzberg's theory that the pain levels and the lack of sleep were related (p. 100).

³³ Dr. Hertzberg clarified that flare ups might occur due to "the issue of the Iraq experience with the IED" but not due to the work related injury of the shoulder, as contrasted with the six to nine month period, which would be related to both. (Tr. 95-96).

Director, OWCP v. Newport News Shipbuilding and Dry Dock Co. (Langley), 676 F.2d 110, 115 (4th Cir. 1982). The Director, on behalf of the special fund which provides Section 8(f) relief, asserts that Employer is not entitled to Section 8(f) relief, and, alternatively, has abandoned the claim since Employer did not raise the issue in its post-hearing brief (Director's Closing Argument at 2). Director contests all three prongs, arguing that Claimant did not have a preexisting injury at all; that a preexisting condition, in any case, was not manifest to the employer; and that, consequently, Claimant's disability must have arisen entirely out of the February 5, 2005 incident. *Id.* I agree with the Director that Employer is not entitled to Section 8(f) relief based upon failure to satisfy the second requirement (that the injury was manifest) so it is unnecessary to consider the other two requirements.

Employer's petition for special fund relief claims that Claimant's preexisting condition was manifest to Employer because it had constructive knowledge of the condition (Petition, p. 6). Employer argued that medical records existed at the time of the injury that could have alerted it to Claimant's injury, even if those records did not detail the nature or severity of the injury; however, Employer produced none. *Id.* As the Fourth Circuit has explained, Section 8(f) itself does not require an employer to have manifest knowledge of the initial precondition, but the court has added this requirement to further the policy behind the limitation provision. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Company (Harcum)*, 8 F.3d 175, 182 n. 5 (4th Cir. 1994). The court noted that Section 8(f) operates to prevent disability-related discrimination based on a person's increased risk of disability-related injuries. If an employer has no knowledge of a preexisting condition, the employer cannot use the condition as a basis for discrimination. *Id.*; see also *Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 550-51 (4th Cir. 1991). As a theoretical matter, a constructive knowledge theory may be sufficient to show that Claimant's preexisting condition was manifest to Employer. See, e.g., *Director, OWCP v. Sun Ship, Inc.*, 150 F.3d 288 (3d Cir. 1998) ("It is the availability of knowledge, rather than actual knowledge, that is relevant to determining manifestation"). An employer must show that it "could readily have discovered the disability by looking at the employee's medical records" in order to be entitled to relief from the fund. *Id.*, citing *Bunge Corp. v. Director, OWCP*, 951 F.2d 1109 (9th Cir. 1991). Employer's evidence here, however, fails under that standard.

Employer argues that it could have discovered Claimant's preexisting injury beforehand, but that argument fails if no medical records were in existence prior to the injury that could have been discovered. In that regard, Employer did not submit a single piece of medical evidence predating Claimant's February 5, 2005 injury with its petition. Rather, Employer has relied heavily on Dr. Bleckner's MRI reading, taken after Claimant's injury, showing degeneration of the joint from an old, apparently undiscovered fracture (EX 10). Employer cannot, however, rely on medical records taken after the fact to show that a preexisting condition could have been discovered prior to the injury. Furthermore, the contradictory evidence, presented by Claimant and Director, is weighty. Claimant testified that he had never had nor been treated for a shoulder injury prior to the incident on February 5, 2005 (Tr. 21). Prior to starting employment with Employer, Claimant had a full and comprehensive examination in which Dr. Runkles found no problems with his right shoulder (Tr. 72-73). Dr. Gilbert flatly stated that Claimant "had no preexisting problem with his right shoulder" prior to the incident (EX 43, p. 19). He further testified that the three surgeries conducted on Claimant's right shoulder did not reveal any actual

sign of preexisting fractures (Tr. 139). Dr. Wasserman testified x-rays and MRIs are not performed unless a person has an injury, and Claimant here has never had prior shoulder treatment (EX 42, p. 16-17). Dr. Johnson testified that Claimant had no history of shoulder problems, and such problems were not documented in medical records predating his injury (Tr. 118). While admittedly Dr. Johnson found that Claimant had a preexisting arthritic condition that was aggravated by the accident on February 5, 2005, requiring more serious surgery than would otherwise have been required, he also noted that it was a “silent” injury that no prior records would have revealed and that Claimant denied any prior shoulder problems (see EX 43). Ex post facto knowledge of a preexisting condition, without prior medical records on which Employer could have relied prior to the injury, is insufficient as a matter of law to establish the “manifest” requirement, even under a constructive knowledge theory. Because the Employer here has made no showing that it could have known about Claimant’s preexisting condition prior to the injury based on documents as they existed at the time of the injury, the minimum standard, Section 8(f) relief is inappropriate.

Attorneys’ Fees

Since Claimant here has substantially prevailed on the disputed issues, he is entitled to reasonable and necessary attorneys’ fees. *See* 33 U.S.C. §928; 20 C.F.R. §§702.131-135. Costs may also be awarded, including witness fees and expenses for transcripts. 33 U.S.C. §928(d). I take notice of the record of the informal conference held between Claimant and Employer, submitted as part of the case for attorneys’ fees pursuant to 20 C.F.R. §134 (CX 21). Claimant’s counsel shall have thirty (30) days from the date of this Decision and Order to submit a fee petition and bill of costs, after which the Employer shall have thirty (30) days to file any objections. The issue of attorneys’ fees and costs will be addressed in a supplemental order.

ORDER

IT IS HEREBY ORDERED that (1) Claimant’s claim for permanent total disability benefits is **GRANTED** payable at the maximum compensation rate, as is more fully set forth above; (2) Claimant’s claim for reimbursement for medical expenses for palliative psychotherapy from Mona Mendelson, LSW, is hereby **GRANTED**, including payment of any outstanding balance and reimbursement of Claimant for amounts previously paid, as more fully set forth above; and (3) Employer’s claim for right to credit for an overpayment is **DENIED**;

IT IS FURTHER ORDERED that counsel for Claimant shall file and serve a Petition for Attorney Fees and Costs within thirty (30) days of the date of this Decision and Order, and within thirty (30) days thereafter the Employer/Carrier shall file and serve any objections; and

IT IS FURTHER ORDERED that Employer's claim for Section 8(f) relief is **DENIED**.

A
PAMELA LAKES WOOD
Administrative Law Judge

Washington, D.C.