U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 06 January 2012

CASE NO.: 2008-LDA-00331
OWCP NO.: 02-161987

In the Matter of:

TODD WALKLEY,
Claimant,

v.

SERVICE EMPLOYERS INTERNATIONAL
Employer,

and

INSURANCE COMPANY OF THE STATE
OF PENNSYLVANIA,
Carrier.

Appearances: Ralph R. Lorberbaum, Esq.
For Claimant

Jerry R. McKenney
Legge, Farrow, Kimmitt, McGrath & Brown, LLP
For Employer/Carrier

Before: Paul C. Johnson, Jr.
Associate Chief Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. § 1651(a). In this case, Claimant Todd Walkley alleges that he suffered a compensable psychological injury while working for a defense contractor in Iraq in May of 2007.

I held a formal hearing in this matter on October 14, 2008. At that time, Administrative Law Judge Exhibit 1, Claimant's Exhibits ("CX") 1-21, and Employer's Exhibits ("EX") 1-22, were received. Subsequent to the hearing, the court reporter who recorded the proceedings disappeared, along with the tapes of the hearing; consequently, no transcript was prepared or received. At the suggestion and with the agreement of counsel for the parties, post-hearing depositions were conducted of the two witnesses who had testified at the formal hearing:

Claimant and John W. Griffith, MD. [EX 26 and 27]. Claimant's deposition was preserved on a digital video disk which is part of the record.

In my Decision and Order Denying Benefits, issued on March 31, 2009, I determined that, as Claimant failed to substantiate his claim that he suffers from PTSD, he did not establish the "harm" element necessary for the invocation of the Section 20(a) presumption. Consequently, I denied his claim for disability and medical benefits under the Act. As detailed below, on appeal to the Benefits Review Board ("the Board" or "BRB") vacated my finding that Claimant did not establish the harm element of his *prima facie* case, and remanded the case for consideration in accordance with the Board's instructions. *Walkley v. Service Employees Int'l, Inc.*, BRB No. 09-0573 (Apr. 23, 2010)(unpub.).

On remand, by Order of September 14, 2010, the parties were afforded an opportunity to submit additional relevant evidence, and any objections thereto, and to file supplemental written closing arguments. Both parties subsequently filed supplemental written arguments; no additional evidence was submitted by the parties on remand. The pertinent factual background and medical evidence were summarized in my Decision and Order of March 31, 2009, and are hereby incorporated by reference.[1]

Issues

Employer did not controvert, and the parties stipulated to, the following:

1. Claimant's alleged injury occurred on May 20, 2007;
2. The alleged injury occurred in Iraq while Claimant was working in support of U.S. military operations;
3. Employer was timely notified of the alleged injury;
4. Claimant timely filed his claim for benefits; and
5. An employer/employee relationship existed between Claimant and Employer at the time of the alleged injury.

The following issues remain for resolution:

1. Fact of injury;
2. Causation;
3. Nature and extent of disability;
4. Average weekly wage;
5. Entitlement to temporary total disability benefits; and
6. Entitlement to medical benefits.

[1] The entire record was thoroughly reviewed on remand in light of the Board's instructions and the parties' supplemental written arguments submitted on remand.

Findings of Fact and Conclusions of Law

A. Fact of Injury and Causation

The Longshore and Harbor Workers' Compensation Act ("LHWCA" or "Longshore Act") provides that an employee may recover for a disability resulting from a personal injury incurred in the course of employment. A psychological impairment can be an injury under the LHWCA if work-related. *See, e.g., Dir., OWCP v. Potomac Elec. Power Co. (Brannon)*, 607 F.2d 1378, 10 BRBS 1048 (D.C. Cir. 1979). Section 20(a) of the LHWCA creates a presumption that the injury is causally related to the worker's employment if the worker makes a *prima facie* showing of causation. *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000). A *prima facie* case of causation consists of evidence that "(1) an injury was suffered, and (2) the injury occurred in the course of employment or was caused, aggravated or accelerated by conditions at the work place." *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 287 (5th Cir. 2003); *Ketaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Claimant has sustained an "injury" where he has some harm or pain, or if "something unexpectedly goes wrong within the human frame." *Wheatley v. Adler*, 407 F.2d 307, 313 (D.C. Cir. 1968)(en banc). The § 20(a) presumption does not apply to the issue of whether an injury occurred. *See Devine v. Atlantic Container Lines, G.I.E.*, 25 BRBS 15 (1990); *Murphy v. SCA/Shayne Bros.*, 7 BRBS 309 (1977), *aff'd mem.*, 600 F.2d 280 (D.C. Cir. 1979). In order to satisfy the second prong of the *prima facie* case, the claimant is not required to introduce affirmative medical evidence that the working conditions in fact caused his harm; rather, the claimant must show that working conditions existed which could have caused his harm. *See generally U.S. Indus./Fed. Sheet Metal, Inc.*, 455 U.S. 608, 14 BRBS 631 633 (1982). The claimant's theory of causation must go beyond "mere fancy." *See Champion v. S&M Traylor Bros.*, 690 F.2d 285, 295 (D.C. Cir. 1982); *Wheatley v. Adler*, 407 F.2d 307, 313 (D.C. Cir. 1968).

A work-related aggravation of a pre-existing condition is an injury pursuant to § 2(2) of the LHWCA. *See, e.g., Preziosi v. Controlled Indus.*, 22 BRBS 468 (1989); *Janusziewicz v. Sun Shipbuilding & Dry Dock Co.*, 22 BRBS 376 (1989) (Decisions and Order on Remand); *Gardner v. Bath Iron Works Corp.*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981); *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986). The employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. *Strachan Shipping v. Nash*, 782 F.2d 513, 18 BRBS 45 (5th Cir. 1986)(en banc); *Indep. Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Kooley v. Marine Indus. N.W.*, 22 BRBS 142 (1989); *Mijangos v. Avondale Shipyards*, 19 BRBS 15 (1986); *Rajotte v. Gen. Dynamics Corp.*, 18 BRBS 85 (1986).

Once an employee makes a *prima facie* case, it is the employer's burden to rebut it by substantial evidence establishing that claimant's condition was not caused or aggravated by his employment. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000);[2] *James v. Pate*

[2] In this case, arising in the Eleventh Circuit, the Board discussed what constitutes adequate rebuttal and found that substantial evidence was sufficient, even though the Board stated that the Eleventh Circuit "espouses a 'ruling out' standard when addressing the issue of rebuttal of the Section 20(a) presumption" (citing *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990)).

Stevedoring Co., 22 BRBS 271 (1989); *Peterson v. Gen. Dynamics Corp.*, 25 BRBS 71 (1991); *Rajotte v. Gen. Dynamics Corp.*, 18 BRBS 85 (1986). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. *E & L Transp. Co. v. N.L.R.B.*, 85 F.3d 1258 (7th Cir. 1996). Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). *See Smith v. Sealand Terminal*, 14 BRBS 844 (1982). Rather, the presumption must be rebutted with specific and comprehensive evidence proving the absence of, or severing, the connection between the harm and employment. *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990). If the employer rebuts the Section 20(a) presumption, the evidence in its entirety is weighed and a determination is made accordingly. *John W McGrath Corp. v. Hughes*, 264 F.2d 314 (2nd Cir. 1959); *Am. Grain Trimmers, Inc. v. OWCP*, 181 F.3d 810 (7th Cir. 1999) *cert. denied*, 528 U.S. 1187 (2000).

In my initial decision, I credited the opinions of Drs. Marshall and van Holla that Claimant experienced several traumatic events sufficient to support a diagnosis of PTSD under the DSM-IV (Criterion A1). I observed that while Dr. Griffith initially opined that Claimant had not identified any stressor significant enough to cause PTSD, he revised this finding in the course of his deposition [EX 26 at 117]. I, nevertheless, found that Claimant did not establish, either by his own deposition testimony or other evidence, that he felt the requisite intense fear, helplessness, or horror from his exposure to these traumatic events, which must be present in order to satisfy the PTSD definition under DSM-IV (Criterion A2). In particular, I refused to credit Dr. Marshall's opinion that Claimant suffered the requisite horror, intense fear, or helplessness, in light of the absence of such a statement by Claimant at his depositions. I further rejected the opinions of Drs. van Holla, Reppuhn, and Oram that Claimant suffers from PTSD, based on my finding that they did not address Criterion A2. I therefore concluded that Claimant did not establish the "harm" element necessary for invocation of the Section 20(a) presumption and denied benefits.

On appeal, the Board vacated my findings that Claimant did not establish that he has PTSD and that he, therefore, did not establish the "harm" element for purposes of invoking the Section 20(a) presumption. *Walkley v. Service Employees Int'l, Inc.*, BRB No. 09-0573 (Apr. 23, 2010)(unpub.). The Board agreed with Claimant that my decision focused too narrowly on whether or not he suffers from PTSD. In this regard, the Board observed that Claimant "has received diagnoses of PTSD, depression, and personality disorder, and his claim for benefits sufficiently encompasses his allegation that he has a psychological disorder related to his employment in Iraq." Slip op. at 4, citing *S.K.* [*Kamal*] *v. ITT Industries, Inc.*, 43 BRBS 78 (2009). The Board also vacated my finding that Claimant does not have PTSD. The Board noted its prior holding that the Act does not require use of the DSM-IV in assessing whether a claimant has suffered a psychological injury, either in establishing a *prima facie* case or in proving the work-relatedness of an injury based on the record as a whole. *Id.*, citing *Kamal*, 43 BRBS at 79-80; and it further noted that Drs. Marshall and van Holla discussed Claimant's diagnosis in terms of the DSM-IV criteria. The Board concluded that, in rejecting the medical opinions that Claimant has PTSD, I exceeded my authority by independently determining that Claimant's reaction to the events in Iraq was insufficient to result in PTSD, rather than relying on the expertise of the physicians. Rather, interpretation of Claimant's reaction to the events in

Iraq and whether it was sufficient to result in PTSD is "a function which should be left for the medical experts." *Id.*, citing *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997). The Board instructed me to address on remand the "harm" element in terms of all of Claimant's diagnosed psychological conditions. The Board further instructed that "in weighing the evidence of record, the administrative law judge cannot substitute his opinion for that of the mental health experts, *see Pietrunti*, 119 F.3d at 1042-1044, 31 BRBS at 90-91(CRT), but must evaluate the bases and rationales for their conclusions." Slip op. at 5.

On remand, the Claimant argues that "PTSD was not the initial injury suffered by Walkley;" rather his "initial injuries" consisted of "homicidal ideation, headaches and neck pain." *Id.* at 25, 29. Claimant "identified his supervisor's constant harassment as the reason for his homicidal thoughts and psychiatric condition." *Id.* at 27. Claimant argues that these initial injuries satisfy the definition of "injury" for purposes of invoking Section 20(a) presumption, and asserts that Employer has presented no evidence to rebut their existence. *Id.* at 29. Claimant further argues that "the initial diagnosis of homicidal ideation has morphed into Walkley's current diagnosis of PTSD." *Id.* at 28. Claimant maintains that his psychiatric condition arose in the "zone of special danger" created by conditions of his employment. Claimant elaborates that he "was subject to constant harassment by his supervisor, repeated exposure to mortar fire, and witnessed gruesome deaths. The employment conditions created an environment of extreme stress and fear which caused Walkley's homicidal ideations and ultimately his PTSD." *Id.* at 28. Claimant asserts that he is temporarily totally disabled, citing the opinions of Drs. van Holla, Marshall and Reppuhn. *Id.* at 30. Claimant further argues that his AWW should be determined based on his actual earnings of $1,603.43 from July 2006 to July 2007. *Id.* at 31. Claimant also seeks medical benefits under Section 7 of the Act. *Id.* at 32.

Employer, for its part, argues on remand that "Claimant failed to prove any injury to support PTSD or other psychological harm, and has failed to make a *prima facie* case. Further, Claimant has failed to prove that he has met the criteria for PTSD, his sole remaining basis for compensability. Alternatively, Employer/Carrier have rebutted the *prima facie* case with substantial evidence." Emp. Br. on Rem. at 43, 35-40. Employer further contends that Claimant has failed to prove any disability arising from the alleged work-related incidents. Rather, "Claimant's current complaints are those of paranoia which is unfounded. Claimant's problems that led to repatriation were murder threats, not PTSD and were not disabling except for being arrested." *Id.* Employer states that Claimant left Iraq fully functional except for having been arrested for making death threats. Yet, "[h]e now claims to be non-functional in employment and unable to venture outside his house comfortably. This is neither PTSD nor work related. This is fabricated." *Id.* Employer argues that Claimant is not entitled to future medical benefits under the Act, and states that "any reasonable and necessary treatments were carried out in the past." *Id.* at 43.

***Prima Facie* Case**

In reviewing the evidence on remand in light of the Board's instructions, I find that Claimant has established that he sustained a "harm" and is, therefore, entitled to the invocation of the Section 20(a) presumption. As the Board observed, it is undisputed that all of the physicians of record diagnosed Claimant with some sort of psychological disorder. Thus, Drs.

van Holla, Reppuhn, Oram and Marshall diagnosed Claimant with PTSD. *See* EXs 9, 10, 16, 26 at ex. 3. In addition, Drs. Marshall, Oram, and Reppuhn diagnosed Claimant with depression. EXs 9, 10, 26 at ex. 3. These are clinical, Axis I, disorders that may respond to medication. EX 15, Dep. at 19. Further, Dr. Griffith, Employer's expert, diagnosed Claimant with "personality disorder, NOS," which is an Axis II disorder, and malingering. EX 17. Thus, while Dr. Griffith stated Claimant does not have PTSD or depression, his diagnosis of a personality disorder may support a finding that Claimant established a harm for purposes of Section 20(a). *See generally Wheatley v. Adler*, 407 F.2d 307, 313 (D.C. Cir. 1968) (*en banc*) (a harm occurs when "something unexpectedly goes wrong within the human frame"). As all the doctors, including Employer's expert, opined that Claimant suffers from some psychological condition, whether PTSD, depression, or personality disorder, Claimant has established a psychological harm for purposes of invoking the Section 20(a) presumption. *Kamal*, 43 BRBS at 80.

Further, as the Board observed, I had previously found that Claimant was subject to mortar attacks and witnessed deaths and injuries at Camp Danger, and that he had to assist in cleaning areas where casualties occurred. These incidents are sufficient to establish the "working conditions" element of Claimant's *prima facie* case. *Walkley*, *supra*, slip op. at 6, n.4, citing *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT)(1st Cir. 2004). Accordingly, I must afford Claimant the benefit of the Section 20(a) presumption that his psychological condition is work-related. *Walkley*, *supra*, slip op. at 5, citing *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *see* n. 4, *supra* (working conditions element met).

Rebuttal

Next, I must determine whether Employer has rebutted the *prima facie* case. I find that Dr. Griffith's opinion constitutes substantial evidence sufficient to rebut the Section 20(a) presumption, *i.e.*, such evidence that a reasonable mind might accept as establishing that Claimant sustained no work-related psychological injury. *See, e.g.*, Rainey v. Director, OWCP, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008), quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *American Grain Trimmers, Inc. v. Director, OWCP [Janich]*, 181 F.3d 810, 818, 33 BRBS 71, 76(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000). Dr. Griffith, a board-certified psychiatrist, examined Claimant on behalf of Employer on 10/19/07. Based on his interview with Claimant and the results of the Minnesota Multiphasic Personality Inventory-2 ("MMPI-2"), Dr. Griffith opined that Claimant does not have PTSD, but rather is malingering, has a personality disorder, and also has certain stressors unrelated to his work for employer, including a pending lawsuit, marital difficulties and child-support issues. [EX 17 at 4.] Although Dr. Griffith initially found that Claimant had not identified any stressor significant enough to cause PTSD, he revised that finding in the course of his deposition, admitting that seeing deaths caused by enemy attack could qualify. [EX 26 at 117.] Nevertheless, Dr. Griffith adhered to his conclusion that Claimant does not have PTSD, because Claimant denied having a sense of horror in reaction to these events, which, according to Dr. Griffith, is required for a diagnosis of PTSD under the DSM-IV. *Id.* Dr. Griffith indicated that his diagnosis of malingering essentially subsumed the need to evaluate the possibility of work-related psychological conditions other than PTSD. *Id.* at 70. Finally, while Dr. Griffith diagnosed Claimant with a personality disorder, he did not consider it to be work-related. *Id.* at 90-91.

Evidence Weighed In Its Entirety

As I have determined that Employer rebutted Claimant's *prima facie* case, the Section 20(a) presumption no longer controls and I must resolve the issue of causation on the evidence of record as a whole, with Claimant bearing the burden of persuasion. As framed by the parties, a threshold issue in this case is whether Claimant suffers from a work-related psychological condition or, alternatively, is a malingerer motivated by secondary gain. In reviewing the record in light of the Board's instructions, I find that Claimant has established by a preponderance of the evidence that he sustained a work-related psychological injury, namely homicidal ideation, PTSD and depression.

Homicidal Ideation, Post-Traumatic Stress Disorder and Depression

In reviewing the evidence in light of the Board's instructions, I find that the weight of the medical evidence establishes that Claimant suffered from homicidal ideation, PTSD and depression causally related to his work environment in Iraq.

As detailed in my Order of March 31, 2009, Claimant worked as a labor foreman for employer in Iraq commencing in February 2005, and worked, in succession, at Camp Remagen for eight or nine months, at Camp Danger for about a year, and then at Camp Warrior until May 20, 2007, when he was forcibly repatriated after threatening the life of his camp manager, Vic Torino. Claimant consistently reported that he was exposed to occasional mortar attacks and small arms fire while at Camp Remagen [EX 27 at 44-45]; mortar and rocket attacks three times a day, on average, throughout his stay at Camp Danger [EX 13 at 67-68; EX 27 at 50-51]; and occasional mortar attacks at Camp Warrior [EX 27 at 125-26]. At Camp Danger, Claimant witnessed three soldiers come under mortar fire, resulting in the immediate death of one soldier and the immediate injury of the others, with a second soldier eventually dying [EX 13 at 64-65; EX 27 at 53-54]. He also was part of the response in the aftermath of a mortar attack that killed six third-country nationals, and helped in the cleanup of the area [EX 27 at 52-53]. Claimant also testified that, while at Camp Danger, he drove a convoy truck to Camp Speicher (sic) "[q]uite a few times" and repeatedly came under attack. EX 13 at 58-64. On two occasions, bullets hit the unarmored cab of his truck and penetrated the door; Claimant was aware that his truck was being hit. Claimant completed incident reports and took pictures of the truck. On another occasion, a Military Humvee three vehicles ahead of his truck was involved in an IED incident and blew up. *Id.*

Additionally, Claimant consistently stated to the medical providers and at his depositions that he was harassed by the camp manager, Vic, at Camps Remagen and Warrior. Claimant stated that Vic disliked him because he was a "Yankee," while many of the other workers were southerners, and because of Claimant's friendship with an African-American co-worker. [EX 13 at 48-53; EX 27 at 39-40]. Claimant stated that Vic called him names, including racially-charged epithets ("nigger lover"); and also precluded Claimant from getting a promotion while at Camp Remagen. [EX 13 at 48-53; EX 27 at 39-40]. Claimant requested a transfer to Camp Danger because of his conflict with Vic. [EX 13 at 55-56; EX 27 at 43]. At Camp Warrior, Vic routinely assigned to Claimant (and other foremen) more local nationals to supervise than was allowed by the Air Force policy. Claimant objected verbally and in writing and got into yelling

matches with Vic, believing that the camp manager was setting him up for disciplinary action and placing him in personal danger. [EX 13 at 81-82; EX 27 at 62-69, 71-76, 158]. Eventually, Claimant developed the intent to kill the camp manager. Claimant stated that he made several unsuccessful attempts to obtain help from Employer's Employee Assistance Program ("EAP") and from medical personnel at Camp Warrior, so that he would not in fact hurt the camp manager; and that Vic refused to provide the required approval for Claimant to receive medical help. [EX 13 at 89-91; EX 27 at 77-79]. Claimant stated that when he made his last phone call to the EAP on May 19, 2007, the person he spoke with laughed at him, which "put the final push on it" [EX 27 at 163]. Between that time and about 4:00 the following morning, Claimant called the United States and spoke with two of his brothers about his intention to kill the camp manager. Thereafter, at about 4:00 in the morning, Claimant was taken into custody by Air Force and Employer's security forces. [EX 13 at 97-101; EX 27 at 80]. He was hand-cuffed, sedated, and removed from Iraq to Greece, Germany, and ultimately to Cheboygan, Michigan. [EX 13 at 101-05; EX 27 at 84-89]. The medical records of acute treatment reflect initial diagnosis of "Homicidal/Suicidal/Anger." [EX 6; *see also* CX 9]. Once in the U.S., Claimant was told by Carrier to go to a hospital, or else Carrier would call the police. [EX 27 at 88]. Claimant initially went to an emergency room and a community health center, and then began treatment with Dr. Marshall. *Id.* at 90.

At his depositions, Claimant consistently described feeling stressed, fearful and on edge due to his work environment in Iraq. He testified that he slept fitfully the majority of the time in Iraq, stating that "I never really slept because I was always worried about incoming coming." [EX 27 at 161-62]. When asked to describe the most stressful event he encountered in Iraq, Claimant testified it was "[w]orry about mortar coming in at any given time" [EX 27 at 125]. He added that at Camp Warrior, he was under stress from both the physical danger of mortar attacks and his conflict with Vic, at a ratio of "50/50." *Id.* at 126. He also described feeling stressed, angry and unsupported as a result of his confrontations with Vic, stating "[I] thought I was being harassed. Felt I was being dumped on. And I, actually, didn't want to really kill anybody, so I want to get that fixed." *Id.* at 102.

In reviewing the evidence in light of the Board's instructions, I credit Dr. Marshall's and Dr. van Holla's assessments that stressors experienced by Claimant in Iraq and his reactions to such stressors support a diagnosis of PTSD under the DSM-IV, as I find these opinions to be well-reasoned and rationally based on their underlying documentation. On remand, Employer asserts that Claimant's testimony "belie[s] his claims of workplace trauma and a terror, horror, or helplessness response." Emp. Br. on Rem. at 14. In my initial decision, I refused to credit Dr. Marshall's opinion that Claimant suffered the requisite horror, intense fear, or helplessness, in light of the absence of such a statement by Claimant at his depositions. However, as the Board made clear, interpretation of Claimant's reaction to the events in Iraq and whether it was sufficient to result in PTSD is "a function which should be left for the medical experts," who have evaluated Claimant's subjective complaints and arrived at a diagnosis. *See Walkley*, *supra*, slip op. at 4, citing *Pietrunti*, 119 F.3d 1035, 31 BRBS 84(CRT). My inquiry must focus on

whether the physicians' opinions are rationally based on their underlying documentation, *Kamal*, 43 BRBS at 79-80, without substituting my own judgment, *Pietrunti*, *supra*.[3]

I find that Dr. Marshall's opinion that Claimant sustained work-related PTSD and depression is rationally based on his underlying documentation, and is entitled to full probative weight. Dr. Marshall, a clinical psychologist who treated Claimant in the course of 24 counseling sessions between June 11, 2007 and January 2008, diagnosed Claimant with PTSD, as did Drs. van Holla, Reppuhn, and Oram. *See* EXs 9, 10, 16, 26 at ex. 3. Dr. Marshall also diagnosed Claimant with depression, as did Drs. Oram and Reppuhn. EXs 9, 10, 26 at ex. 3. Dr. Marshall indicated that his diagnosis is based on the DSM-IV. *See, e.g.*, EX 9 at 55; EX 15 at 29. Drs. Marshall opined that Claimant's PTSD was triggered by working in a combat zone where his life was threatened on numerous occasions [EX 9 at 1]. Dr. Marshall's treatment notes document the experiences described by Claimant, his reported reactions, and his ongoing symptoms. The treatment reports state that Claimant was experiencing moderate "distressing and intrusive memories of trauma." EX 9 at 5, 8, 11, 14, 17, 21, 25, 28, 32, 37, 40, 42, 44. On 6/11/07, Dr. Marshall recorded that Claimant "doesn't trust anybody" and "reports thinking about Iraq a lot. He has thoughts about gun fire, incoming missiles, and fears of being hit by shrapnel" [EX 15, ex. at 8]. On 8/3/07, Dr. Marshall noted that Claimant "felt the Iraqis he worked with were pretty young. He felt the military folks were also very young and he didn't feel too secure." *Id.* at 22. On 8/23/07, Dr. Marshall recorded that, while in Iraq, Claimant "felt he couldn't relax, felt suspicious of others especially the Iraqis & foreign workers. In addition, felt mislead by the company. Said he was told he could receive medical attention while he was over there. Once there he was threatened with job loss and he tried to see medical doctors" [EX 15, ex. at 27.] On 8/31/07, Dr. Marshall recorded that "[Claimant] saw many people get killed and one time he was saved by a truck when an explosive fell close to him. The metal of the truck shield him from the blast." *Id.* at 30. On 10/29/07, Claimant "began to talk about Iraq where he saw a video of captives being beheaded. Very gruesome, reports when he was in a convoy he rather be killed than be captured." *Id.* at 46. On 11/26/07, Claimant talked "about not talking about Iraq puts it in a box" and "[w]anted to know was that normal;" he also talked about "close calls where others were killed" and "not knowing who to trust over there." *Id.* at 55. On

[3] The Board further stated that, "as claimant correctly contends, the credibility of his testimony cannot be assessed in this case, as there was no live testimony before the administrative law judge. *See generally Pigrenet v. Boland Marine & Manufacturing Co.*, 656 F.2d 1091, 13 BRBS 843 (5th Cir. 1981) (*en banc*), *vacating* 631 F.2d 1190, 12 BRBS 710 (5th Cir. 1980)." Employer takes issue with this statement by asserting that a video deposition was taken to make up for the unavailability of a hearing transcript (due to a disappearance of the court reporter) and that, more generally, out-of-court testimony is subject to credibility assessment. I note that, in *Pigrenet*, the court indicated that objections of this sort should be raised at the trial level or they will be deemed waived. As noted in my initial decision, the parties agreed to the use of a videotaped deposition as a means of filling the evidentiary gap created by the absence of the transcript. Thus, I question the propriety of Claimant now implying that his credibility as a witness may not be judged based on the video recording of his second deposition. Furthermore, it is not inappropriate for the undersigned to assess whether Claimant's deposition testimony is consistent with his statements to the medical providers and evidence as a whole. At the same time, Employer challenges Claimant's credibility as a witness on essentially the same grounds that underlie Employer's contentions that Claimant lied about harassment by the camp manager and homicidal ideation and that he is generally malingering; these contentions are addressed below in light of the medical opinions that directly addressed these issues.

1/14/08, Claimant reported that he "continues to worry that someone from Iraq is going to invade his home and kill everybody." *Id.* at 70.

By letter dated February 20, 2008, Dr. Marshall explicitly responded to Dr. Griffith's criticism that his diagnosis of PTSD does not conform to the DSM-IV criteria [EX 9 at 1]. Dr. Marshall stated that "[t]he DSM-IV requires that an individual be exposed to a single event or events," and that based on that it is sufficient that claimant "was working in a combat zone for a number of years" where "his life was threatened on numerous occasions by incoming rockets and hidden bombs." EX 9 at 1. Dr. Marshall also responded to Dr. Griffith's criticism regarding insufficiency of Claimant's reaction; he acknowledged that the DSM-IV contains a response requirement and stated that, in this case, "claimant responded with intense fear and helplessness." *Id.*

I also find it significant that, unlike Dr. Griffith who evaluated Claimant on one occasion, Dr. Marshall evaluated Claimant during 24 counseling sessions over the course of several months. *See generally Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999)(proper to accord the treating physician's opinion special weight because he is employed to cure and has a greater opportunity to know and observe the patient as an individual); *Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195 (2001); *see also Loza v. Apfel*, 219 F.3d 378 (5th Cir. 2000)(same in a Social Security administrative law decision); *Cossey v. Sea-Land Servs., Inc.*, BRB No. 03-0689 (July 13, 2004)(unpub.)(citing *Amos* and *Brown* in a case arising in the Fifth Circuit). Further, in arriving at his diagnoses, Dr. Marshall administered psychological testing, *i.e.*, the Millon Clinical Multiaxial Inventory-III ("MCMI-III"), which provided an assessment of Claimant's reported symptoms in terms of both external precipitants and his personality makeup.[4] EX 15, ex. at 11-12. I also note Claimant's testimony, supported by Dr. Marshall's treatment notes, that since returning from Iraq he has been suffering from teeth grinding and has missing and loose teeth as a result; and that he had been told by Drs. Marshall, Oram and van Holla that the grinding was related to stress and PTSD [EX 27 at 181; EX 15, ex. at 19]. The record of Claimant's deposition indicates that Claimant in fact had visibly missing teeth [*id.*], and there is no indication that he had stress-related teeth grinding prior to Iraq.

Dr. van Holla, a board certified psychiatrist who conducted an independent medical examination of Claimant on April 26, 2008, similarly indicated that his diagnosis of PTSD was based on the DMS-IV-TR, 4th edition. [EX 15 at 15, 29]. Like Dr. Marshall, Dr. van Holla identified Claimant's "work environment" in Iraq as the most significant stressor, and he clarified this to mean "traumatic exposure to … possible loss of life while in Iraq" [EX 14 at 23-

[4] The report of the MCMI-III states, *inter alia*: "His homicidal symptoms are likely as a consequence of experiencing maltreatment from persons to whom he turned for support or security. He feels abused by what he sees as their betrayal …;" "[e]vidence indicates the presence of a prominent anxiety disorder in this man;" "[r]elated to but beyond his characteristic level of emotional responsivity, this man appears to have been confronted with an event or events in which he was exposed to a severe threat to his life, a traumatic experience that precipitated intense fear or horror on his part. Currently the residuals of this event appear to be persistently reexperienced with recurrent and distressing recollections … Where possible he seeks to avoid such cues and recollections. Where they cannot be anticipated and actively avoided, as in dreams or nightmares, he may become terrified, exhibiting a number of symptoms of intense anxiety. Other signs of distress might include difficulty falling asleep, outbursts of anger, panic attacks, hypervigilance, exaggerated startle response, or a subjective sense of numbing and detachment."

24, 30]. He opined that "being in a combat zone contributes to kind of cumulative effect" [*Id*. at 65]. Dr. van Holla related Claimant's PTSD to his employment in Iraq based on Claimant's reported lack of pre-employment psychiatric problems[5] and "an intense adjustment reaction he developed while in Iraq" that "led to anxiety and homicidal ideation" and also referred to "near miss events" [EX 16; EX 14 at 65].[6] Although Dr. van Holla did not expressly reference Criterion A2 of the DSM-IV definition, I find on remand that his IME report and testimony reflect that he did consider Claimant's reaction to work-related stressors in arriving at a diagnosis of PTSD. Thus, Claimant reported that, while at Camp Warrior, he began "losing it" in May of 2007. Dr. van Holla further recorded:

> "He says he began to experience a building hatred towards people. He began to not care about his own sense of self. He did not care if he lived or died. He began to cry at nighttime. He began to have profound dysfunction with the obtaining of sleep in a restful fashion. He began to develop panic attacks, poor concentration, outbursts of anger, irritability, nightmares on an ongoing fashion, and he began to feel on guard and hypervigilant at all points in time. He says if anybody dropped any piece of equipment behind him or made any sudden movement or loud noise in his periphery or behind him, he had a very intense and profound exaggerated startle response.
>
> He says he thinks and knows that it was from the type of environment that he was living in while in these camps. He says that the camp that he stayed in was always subject to mortar attacks morning, noon, and night. He says the level of combat and the potential for bodily harm and victimization and loss due to death was on a daily basis. He says he began to feel very unsupported by those that were military based in their background, because he himself did not have a military background. He could certainly see that he was called a 'Yankee.' He was not from the south. He says there was a Louisville clan and there was also a more Deep South kind of Louisiana clan of workers there and he did not seem to fit in. He says there were a number of them that did not fit into this and this was his first sign of not feeling supported.
>
> When he began to experience these symptoms; [*sic*] however, he began to feel even more unsupported and he pursued treatment with a military M.D. However, the medics there had given him a denial, telling him that he was not allowed to in pursuit of the symptoms described above. He went to visit Vic, the camp manager, and received yet another denial or permission for seeing the military physician for treatment. Then he had pursued human resources and was denied again. He says at this point in time, he began to 'lose it.'
>
> He says he began to feel as though he needed help, was unable to get it, and began to devise a plot to kill the camp manager. He says he no longer cared for himself or for whatever would happen to him, so he believed that this would have been

[5] Claimant's failure to report his history of depression is addressed below.

[6] At his deposition, Dr. van Holla stated that "being in a combat zone contributes to kind of cumulative effect rather than a single case event"

> done without any remorse. He began to watch his camp manager's every move in what he thinks was probably an attempt at suicide [*sic*]. He states that he certainly knows now, in hindsight, that he was not in his right mind. One of the days in which he was doing this, he began to talk with his 'brothers' and his 'brothers' had recognized the concern or the plot that was going on in his mind. At 4:00 a.m. in the morning, when he was asleep, the forestry police,[[7]] the equivalent of the military police, arrived at his door and handcuffed him and brought him to an army psychiatrist."

[EX 16 at 2-3]. Although Dr. van Holla only evaluated Claimant over the course of one hour and acknowledged the paucity of records available to him [EX 14 at 13, 37], I find his opinion to be well-reasoned and adequately documented. I also find it significant that Dr. Reppuhn, who was tasked with evaluating Claimant's entitlement to SSDI, and Dr. Oram, who had been Claimant's treating physician for many years prior to his deployment in Iraq (and thus was able to compare his presentation before and after Iraq), also diagnosed Claimant with PTSD.

The only medical opinion concluding that Claimant has no work-related psychological condition is that of Dr. Griffith, who examined Claimant on behalf of Employer/Carrier. I find, however, that multiple flaws in the reasoning and documentation undermine the probative value this opinion.[8] Dr. Griffith opined that Claimant is malingering, and that he has a personality disorder and certain stressors including a pending lawsuit, marital difficulties and child-support issues, which are unrelated to his work for employer. Dr. Griffith's diagnosis of malingering is treated in detail (and rejected) below.[9] In his report of 12/23/07, Dr. Griffith provided the following explanation for his conclusions:

> "Dr. Marshall's diagnosis of [PTSD] cannot be supported because Mr. Walkley cannot identify a trauma sufficient to warrant that diagnosis. Furthermore, if compensation is at issue, DSM-IV requires that examiner to rule out symptom magnification and malingering. Dr. Marshall ignored evidence of malingering and symptom magnification. Neither does the diagnosis allow for a 'thin skull' hypothesis.
>
> Although Mr. Walkley attempts to present as a paranoid with homicidal ideas that arose *de nouveau* during and because of his Iraq experience, this is at odds with his claim that he has not experienced similar symptoms in the past. (A common exception is a paranoid psychosis secondary to amphetamine and cocaine abuse.). He attempts to repair this by claiming to have heard voices all of his life but has always been aware that such voices are not real. If true, this is more a function of a paranoid personality and would have been evidenced long before he went to Iraq. Mr. Walkley also claims he is unable to connect his ideas with the behavior of others, a connection that paranoids have no difficulty making even if the

---

[7] *Sic*; probably the "force police," or uniformed Air Force security.
[8] As my initial decision was based on a threshold finding that Claimant failed to meet his *prima facie* case, it did not provide a detailed assessment of Dr. Griffith's opinions.
[9] *See Malingering and Symptom Magnification, infra*.

> premise they assume is wrong. Mr. Walkley's 'illness' is also one that is connected with considerable secondary gain as well as to avoid responsibility for his behavior.
>
> The diagnosis of malingering is further buttressed by the MMPI-2 findings consistent with personality disorder, malingering, symptom magnification, and bogus symptom claims. For example, his FBS (fake bad scale) was 35."

[EX 17 at 4-5.]

Dr. Griffith's initial conclusion in his 12/23/07 report as to the absence of PTSD rested heavily on his finding that Claimant "cannot identify a trauma sufficient to warrant that diagnosis." [EX 17]. In his report, Dr. Griffith stated that, as Claimant made a claim of PTSD, he "was questioned in detail relative to a stressor as required by this diagnosis." EX 17 at 2. Yet, the report provides only a perfunctory discussion of work-related stressors. Without any explanation, Dr. Griffith did not include any work-related stressors in his list of Axis IV stressors, noting only "[l]awsuit, marital difficulties, child support" [EX 17 at 2]. I note in this regard Dr. van Holla's opinion that Dr. Griffith's failure to list Claimant's exposure to work environment among relevant stressors is a "grave error" which "is very invalidating for the patient and only helps to heighten symptoms and distrust in the medical community." [EX 14 at 30.] The narrative portion of Dr. Griffith's report provides only a brief description (less than one page) of the reported work-related stressors.[10] With respect to work-related stressors, Dr. Griffith's report states that "[h]is answers were vague and he lost his temper and left the room but returned later." [*Id.* at 2]. However, Claimant's descriptions to Dr. Griffith can hardly be characterized as "vague." For example, Dr. Griffith recorded that "while [Claimant] was at Camp Danger he was subjected to mortar fire of three or more times a day. He said he was in his hooch when a bus exploded nearby and debris fell, some of which was human parts. He also has a bullet that he carries in a necklace which he said penetrated his living quarters, his pillow, and became stuck in a nearby wall. …. When asked to describe the worst of the several mortar attacks, he said he could not decide." [*Id.* at 3.] At his deposition, Dr. Griffith added that Claimant also told him that he observed a soldier "standing next to a helicopter evaporated by some explosion" and saw other people killed [EX 26 at 39]; without any explanation, these incidents are absent from the 12/23/07 report. Finally, in the course of his deposition, Dr. Griffith revised his initial finding when he acknowledged that witnessing death and daily mortar attacks at Camp Danger "could be" sufficient traumatic events under the DSM (EX 26 at 117). I find that these deficiencies in Dr. Griffith's analysis of the relevant stressors undermine the probative value of his opinion that Claimant does not suffer from PTSD.

While acknowledging that Claimant identified several extreme traumatic stressors (Criterion A1), Dr. Griffith, nevertheless, continued to maintain that they were not qualifying events for PTSD because "first of all, he wasn't injured, second, he didn't have a sense of horror observing other people being injured." *Id.* at 117. With respect to the response requirement under the DSM-IV (Criterion A2), Dr. Griffith repeatedly stated that a traumatic event must be associated with "a sense of horror" [EX 26 at 22-25; 47-50; 68; 117-18; 131-32] and that one "[c]an't have cumulative trauma that is below the level necessary to qualify to become a

[10] Claimant testified that Dr. Griffith only asked a few questions about his experience in Iraq.

qualifying event."[11] *Id.* at 49; *see also* Emp. Br. at 33. Dr. Griffith did not reconcile this view with the description of the required response in n the DSM-IV as consisting of "intense fear, helplessness, *or* horror." At no time did Dr. Griffith acknowledge that "intense fear" and "helplessness" may constitute a sufficient response, nor did he address whether Claimant in fact experienced such reactions. Thus, based on the record before me, I find that Dr. Griffith was overly restrictive in his interpretation of the response requirement of the DSM-IV,[12] and that the diagnostic criteria applied by Drs. Marshall and van Holla are more consistent with the DSM-IV definition upon which all three doctors relied.

As noted above, Dr. Marshall also diagnosed Claimant with major depression secondary to PTSD [EX 9 at 50-56; EX 15 at 22, 86]; Drs. Oram and Reppuhn also diagnosed depression. EXs 9, 10, 26 at ex. 3. Throughout his treatment sessions, Dr. Marshall recorded symptoms of depression, which he rated as 3-Moderate or 2-Mild. [EX 15, exs.] By contrast, Dr. Griffith did not address in a meaningful way the possibility of Claimant suffering from a psychological condition other than PTSD (either work-related or not). When Dr. Griffith was asked to elaborate on his testimony that, in his capacity as a defense expert witness, he had never diagnosed PTSD in the many cases he had handled, Dr. Griffith stated "[b]ut some are depressed, some might be more appropriately talked as chronic stress syndrome, but that wasn't an issue because nobody had mentioned that." *Id.* at 26. This testimony would seem to indicate that Dr. Griffith deliberately did not address the possibility of Claimant suffering from a psychological condition other than PTSD. Elsewhere, Dr. Griffith explained that he saw no need to address this possibility in light of his diagnosis of malingering [*id.* at 70];[13] however, this diagnosis is considered and rejected below. Thus, the weight of the medical authority supports a conclusion that Claimant suffers from depression related to his employment with Employer in Iraq.

---

[11] As noted by the Board, in my initial decision, I applied the 1994 version of the DSM-IV. The Board observed that in 2000, the American Psychiatric Association revised the PTSD diagnostic criteria to include in Criterion A1, that it could be exposure to "an event *or events*" that involve actual or threatened death or serious injury, or a threat to the physical integrity of oneself or others." *See* http://ncptsd.kattare.com/ncmain/ncdocs/fact_shts/fs_DSM-IV_iv_tr.html. While both Dr. Marshall and Dr. van Holla pointed out the possibility of several "events" resulting in PTSD [EX 15 at 4-6; EX 13 at 65], Dr. Griffith testified that there must be a singular terrifying event (or "several horrible events") and did not address the revision to the DSM definition [EX 26 at 47-50]. The record before me does not address whether or not the revision to the DSM-IV signaled recognition by the American Psychiatric Association of the theory, rejected by Dr. Griffith [EX 26 at 47-50] and by Employer [Emp. Br. at 33], that cumulative trauma from "non-qualifying" events may result in PTSD. However, I need not resolve this issue, as I credit the medical opinions that Claimant experienced stressors and a reaction thereto sufficient for purposes of a PTSD diagnosis under the DSM-IV.

[12] Indeed, in discussing what may constitute a qualifying event, Dr. Griffith apparently indicated his disagreement with the current formulation of the PTSD diagnosis in the DSM when he stated that "[l]ots of experts in the PTSD field write articles in which they are uncomfortable with PTSD diagnosis as it's now formulated in the manual, and you have your acute, you have your chronic forms, you have your delayed forms. All of these give experts a feeling that maybe we're not talking about something that's real, maybe it's something we've made up …." EX 26 at 48. While use of the DSM is not required in addressing the injury requirement, I find it problematic that, while admittedly applying the DSM definition, Dr. Griffith did not explain his use of what appears to be an overly restrictive interpretation of that definition.

[13] He opined that "once you have malingering, it's awfully hard to believe any of it, so it's difficult to make a diagnosis. Now, … I could on the basis of the symptoms that he gave me said anxiety disorder, phobic disorder, acrophobia, depression, all going down through a list of possible syndromes, but that certainly is not the way to make a diagnosis".

On remand, Employer seeks to "impeach[] … Claimant with records indicating similar symptoms and treatment in 2003." ER at 14. Specifically, while Claimant indicated to Drs. Marshall and van Holla that he had no prior history of psychological problems, medical records reveal that Claimant had been treated for depression with Lexapro in 2003. [EX 12 at 3-4, 12]. The records reflect that Claimant complained of sharp headaches with associated dizziness and blurred vision; significant increased stress; anger, irritability, mood swings, feeling sad and tearful frequently for no reason; decreased motivation, ambition and interest in his normal activities; being less active and noticing significant increased thoughts and guilt. The diagnosis by the nurse practitioner was (1) headaches, (2) depression with mild anxiety, and (3) multiple somatic complaints. Approximately one week after starting Lexapro, Claimant reported improvement in symptoms and he requested more samples, which were provided to him. The record reflects three instances of Lexapro prescriptions during this time. [EX 12 at 12].

While this evidence indicates that Claimant may have concealed his history of depression from the medical providers and at his deposition [EX 13 at 120-21], I do not find this to materially undermine the probative value of the credited medical opinions, based on the record before me. At his deposition, Dr. van Holla was questioned extensively about the significance of Claimant's medical and family history (including his brother's suicide) and the possibility of "biological propensity toward mental illness" or "genetically encoded" depression and anxiety. [EX 14 at 53-55]. Dr. van Holla testified that "[i]n this case I'm considering [PTSD] as a result of situational stressors he may have been part of. He may have a predisposition to mental illness, but which were aggravated precipitated by his time spent in Iraq;" he added that "his environmental factors would have contributed significantly." *Id.* at 54. Although Dr. Marshall was not similarly questioned about the significance of Claimant's history of depression, he stated that Claimant's family history of suicide is "[a] risk factor for him being at risk for depression," but remained of the opinion that Claimant's work in Iraq is a causal factor in his psychological condition. [EX 15 at 53]. Notably, neither Employer, nor Dr. Griffith has expressed the view that Claimant's 2003 history of depression indicates the absence of a causal relationship between his alleged psychological condition and his work in Iraq. Rather, Dr. Griffith referenced Claimant's lack of candor on this issue as one of the factors underlying his diagnosis of malingering, addressed and rejected below. [EX 26 at 81-82; EX 15 at 76-77]. Based on the foregoing, I credit Dr. van Holla's opinion that Claimant's psychological problems are causally related to his employment in Iraq, although his history of depression may have been a contributing factor.

Finally, while Dr. Griffith diagnosed Claimant with a personality disorder, he did not clearly explain whether this condition was in any way affected or aggravated by his experiences in the war zone. [EX 26 at 90-91]. Dr. Griffith did not want to specify the type of personality disorder without a more extensive evaluation, but noted as possibilities Claimant being "passive dependent," "passive aggressive," "paranoid person," or "a little sociopathic." *Id.* at 71. Regarding possible effect of various work-related stressors on Claimant's personality disorder, Dr. Griffith stated merely that "[g]enerally, personality stays the same even in stressful situations." EX 26 at 90. Once again, Dr. Griffith did not clearly explain why he deemed several non-work related stressors to be significant, while dismissing the role of work-related stressors. I, therefore, give little weight to Dr. Griffith opinion on this issue.

Adverse Treatment by the Camp Manager

As noted above, Claimant asserts that his psychological condition arose as a result of being "subject to constant harassment by his supervisor, repeated exposure to mortar fire, and witnessed gruesome deaths. The employment conditions created an environment of extreme stress and fear which caused Walkley's homicidal ideations and ultimately his PTSD." Cl. Br. on Rem. at 28. Employer denies that the camp manager's actions resulted in a psychological injury, stating that "[t]he actions Claimant recites[] were administrative actions and he was not singled out. He was not humiliated or harmed. These actions do not precipitate PTSD because they did not horrify or terrify Claimant." Emp. Br. at 39. In particular, "[t]he allegation of extra people being dropped off does not elicit horror and presents no increased practical danger as between 7 or 13 LNs." *Id.* at 33. Employer further asserts that Claimant "made up a story about wanting to kill Vic and got sent home" [Emp. Br. on Rem. at 10; 38].

As noted above, a psychological impairment can be an injury under the LHWCA if work-related. *See, e.g., Reilly v. Washington Metro. Area Transit Auth.*, 20 BRBS 8 (1987)(benefits awarded for a psychiatric injury as a result of harassment by a supervisor); *see also Konno v. Young Bros. Ltd.*, 28 BRBS 57, 61 (1994) (decedent's suicide was due to depression resulting from work-related pressures associated with a supervisor's management style which made the decedent feel unappreciated and not trusted); *Wheatley v. Adler*, 407 U.S. 307 (D.C. Cir. 1968); 1B Larson, Workmen's Compensation Law, §42.25(f), (g) (1996). However, a psychological injury resulting from a legitimate personnel action is not compensable under the Act. *See Marino v. Navy Exchange*, 20 BRBS 166, 168 (1988) (personnel actions are not "working conditions" under the Act; to hold otherwise would unfairly hinder employer in making legitimate personnel decisions and in conducting its business); *Army & Air Force Exchange Service v. Drake*, 172 F.3d 47, No. 96-4229 (6th Cir. 1998) (table).

As the discussion above makes clear, in arriving at their respective diagnoses, both Drs. Marshall and van Holla gave much consideration to Claimant's conflict with the camp manager and his removal from Iraq due to homicidal ideation. [EX 15, ex. at 8; EX 9 at 54; EX 16 at 2-3]. For example, Dr. Van Holla opined that "an intense adjustment reaction [Claimant] developed while in Iraq … led to anxiety and homicidal ideation." [EX 16; EX 14 at 65]. I, therefore, reject Employer's assertions that "[t]here is no medical or psychological evidence in this case connecting workplace stress to an illness or injury that causes homicidal intent" and that "assuming arguendo that Claimant did experience PTSD or another stress related condition, there is no evidence whatsoever connecting that to the homicidal intent and hence the forced repatriation." Emp. Br. on Rem. at 37.

By contrast, Employer's expert, Dr. Griffith, opined that Claimant fabricated his allegations of harassment and homicidal ideation so as to "get out of Iraq" and obtain "a gain of some sort" [EX 26 at 40-41, 44, 46, 53-54]. With respect to Claimant's account of his plan to kill the camp manager and his attempts to seek help from the EAP, Dr. Griffith testified that "I don't believe anything that he told me. I mean, he comes across to me as a person who is making something up." [EX 26 at 54]. Dr. Griffith opined that Claimant "attempts to present as a paranoid with homicidal ideas that arose *de nouveau* during and because of his Iraq

experience" [EX 17 at 4] and that Claimant "wants to come across as a homicidal maniac" [EX 17 at 85].

I find that the record supports the opinions of Drs. Marshall and van Holla that mistreatment by the camp manager played a causal role in Claimant's psychological condition. I further find that Dr. Griffith's contrary opinion is contradicted by the record and is neither well-reasoned nor properly substantiated. Ample evidence supports Claimant's consistent testimony and reports to medical providers regarding his conflict with Vic and resulting homicidal ideation. Thus, it is undisputed that Claimant requested a transfer from Camp Remagen to a substantially more dangerous location at Camp Danger as a result of perceived harassment; Claimant's acute care records reflect a diagnosis of homicidal ideation; and no medical provider, other than Dr. Griffith, questioned the truthfulness of Claimant's reports [EX 6; CX 8]. Further, Employer has not disputed Claimant's testimony that it was the policy of the Air Force and KBR to have unarmed foremen escort no more than seven local nationals, or that military escort had been provided by other supervisors; nor has Employer offered any evidence refuting Claimant's testimony that he was written up for the policy violation [EX 27 at 63-76]. Further, the evidence supports Claimant's assertion that he repeatedly called the EAP and requested medical help. Thus, Employer' First Report of Injury (Amended), dated 5/21/07, states in response to a question as to "How was Knowledge of Accident or Occupational Illness Gained?: **Reported to KBR EAP**." [CX 7.] Further, Claimant's job site medical records state "[MAY-20-2007 Charlotte Lawrence] Requested this am to standby for a patient that is considered a level 1 psychiatric emergency. …. Pt was in contact with EAP." [EX 6 at 10.] Additionally, an emergency care intake sheet, dated 5/20/07, says "Report from KBR supervisor on COB Speicher is brother of patient made call to Houston to alert them to problem … his brother stated he might hurt someone. Pt did not mention this during interview." [EX 15-3 at 6.] Indeed, it is undisputed that Claimant's phone call (either to EAP or to his brothers in the U.S.) led to his removal from Iraq. I am not persuaded by Employer's assertion that "[r]ecords of EAP contacts were kept. Had Claimant's contacts actually occurred he would have requested these records." Emp. Br. on Rem. at 10. Rather, an adverse inference is more appropriately drawn against Employer, who admits possession of the records and did not provide an affidavit or other evidence to substantiate its assertion that Claimant lied about calling the EAP.

Several additional flaws undermine the probative value of Dr. Griffith's opinion on this issue. While Dr. Griffith opined that Claimant fabricated his account of harassment for "a gain of some sort," there is no indication Claimant was aware that a psychological injury due to mistreatment by a supervisor is compensable under the Act. Further, in his report, Dr. Griffith stated that Claimant's description of his conflict with Vic and other supervisors "lacked specificity. He could not describe a single act for which he has been reprimanded but had a long list of 'policies' that he (among others) was expected to follow such as not fraternizing with soldiers." [EX 17 at 4.] The report further states that Claimant "was eager to discuss his delusions of persecution but these delusions were vague and not systematized. For example, he felt persecuted by his bosses in Iraq but could never explain what the persecution was."[14] EX 17 at 4. However, this characterization stands in stark contrast to Claimant's detailed and consistent accounts of his conflict with Vic. I am also not persuaded by Dr. Griffith's statement that he did

[14] Dr. Griffith discussed Claimant's reports of harassment together with his reported hypervigilance upon returning to the U.S.

not believe that Vic used racial slurs at an air base based on Dr. Griffith's "being in the Air Force" and, specifically, his belief that those who join the Air Force must attend lectures on "treating people correctly" and risk being written up for using racial slurs [EX 26 at 40, 129-30]. Again, I note that Employer presented no evidence to challenge Claimant's specific testimony that he and his black friend (whom Claimant identified by first and last name) made HR complaints regarding racial name-calling while at Camp Remagen, that his friend "got sent out the next day after he did his complaint," and that Claimant was ultimately transferred to a more dangerous location at Camp Danger to escape the conflict with his supervisors [EX 27 at 39-40].

Dr. Griffith further opined that, even assuming Claimant was treated by the camp manager as alleged, mistreatment by a supervisor does not qualify as a trigger event for PTSD because there would have to be a horrendous event to trigger PTSD [EX 26 at 45-46]. In particular, the camp manager's alleged violation of the policy on the maximum number of local nationals would not rise to the level of trauma sufficient for a PTSD diagnosis [EX 26 at 44-46]. In this regard, Dr. Griffith speculated that "if part of that group was part of the enemy, that they would be there more as spies than … to knock off some guy … unloading the stuff from the latrines and whatnot." I need not decide whether or not Claimant's conflict with the camp manager constituted a traumatic event that, standing alone, could be regarded as a qualifying event for purposes of a PTSD diagnosis under the DSM-IV. Rather, I credit Dr. Marshall's and Dr. van Holla's assessment that the totality of the stressors experienced by Claimant in Iraq played a causal role in his psychological condition. Indeed, as noted above, Dr. Griffith acknowledged that several other stressors experienced by Claimant in Iraq were significant enough to satisfy the traumatic event requirement under the DSM-IV [EX 26 at 117], and that a non-qualifying event may be a contributing factor in PTSD [*id.* at 48].

As I have rejected Employer's and its medical expert's assertion that Claimant faked homicidal ideation and lied about his efforts to obtain medical help while in Iraq, I also reject Employer's assertion that Claimant was "fully functional while in Iraq." Emp. Br. on Rem. at 14. Finally, to the extent Employer contends that adverse treatment by the camp manager constituted legitimate personnel actions, I reject this contention, as those actions (e.g., racially charged name-calling, causing Claimant to violate company policy with resulting discipline, refusing to authorize medical treatment, yelling matches) clearly fall outside the bounds of a legitimate personnel action. Further, it is not determinative for purposes of this claim whether or not the camp manager's adverse actions amounted to harassment or whether Claimant was singled out in the process. Rather, my inquiry must focus on the evidence concerning the effect of Claimant's working conditions, including his conflict with the camp manager, on this specific Claimant. *See generally Konno, supra*; *Wheatley, supra*; *see also Walkley*, BRB No. 09-0573, slip op. at 5, citing *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 1042-44, 31 BRBS 84, 90-91(CRT) (2 d Cir. 1997).

<u>Malingering and Symptom Magnification</u>

At his more recent deposition, Claimant described his ongoing symptoms as being always jumpy; feeling as if someone might "[c]ome out and harm me" accompanied by sweating; being easily startled; fear of going out in public "since returned from Iraq, possibly in Iraq,"

accompanied by headaches, dizziness, nervousness, nausea, and feeling hot; feeling sick and dizzy while driving; nightmares; and teeth grinding.[15] [EX 27 at 103-07; 124; 177-79; 181]. Dr. Marshall's treatment notes reflect that at every therapy session he assessed the following symptoms: depressed mood, difficulty falling asleep, diminished interest in activities, distressing and intrusive memories of trauma, exaggerated startle response, feelings of detachment from others, generalized anxiety, impaired concentration, irritable mood, narrowed range of affect responsiveness, and subjective sense of numbing; all these symptoms were rated as either 3-Moderate or 2-Mild, with most improving from 3 to 2 in the course of treatment. EX 15, exhibits.

On remand, Employer argues that "Claimant was not injured or disabled. He got himself fired by coming up with a story about murdering Vic. The PTSD appeared after repatriation and was fabricated to (a) rationalize his ridiculous reason for having been apprehended, and (b) to collect generous benefits for life which will provide a better living for him in Cheboygan than he could ever hope for by working as a pit boss and part time carpenter." Emp. Br. on Rem. at 37. In the same vein, Employer argues that Claimant lacks credibility, as he "testified falsely about his pre-deployment condition, he offered no corroborating evidence about his EAP contacts, he admits smoking dope and drinking heavily while whining about having no money, and he admits being fully functional while in Iraq but then claims lifetime disability benefits stateside." Emp. Br. on Rem. at 14. It is undisputed that Employer initially paid benefits to Claimant for PTSD, but controverted the claim after Dr. Griffith opined that Claimant is malingering and has no work-related psychiatric injury or disability.

For reasons detailed below, I give more probative weight to the opinions of Drs. Marshall and van Holla that Claimant suffers from work-related psychological conditions than to Dr. Griffith's diagnosis of malingering. Notably, the report of Dr. Marshall's initial evaluation stated that Claimant's responses "may indicate a tendency to magnify the level of experienced illness or a characterological inclination to complain or to be self-pitying. On the other hand, the response style may convey feelings of extreme vulnerability that are associated with a current episode of acute turmoil." EX 15, ex . 9 at 52. Dr. Marshall testified that he attributed any symptom magnification to Claimant "really crying out for help" and "struggling." *Id.* at 34. Similarly, in his letter of 2/20/08, Dr. Marshall expressly responded to Dr. Griffith's criticism regarding the need to rule out symptom magnification, stating that "my initial assessment did indicate symptom magnification, which I attribute to his feelings of extreme vulnerability associated with acute turmoil, since he was brought home in handcuffs." EX 15, ex. 3 at 76. At his deposition, Dr. Marshall further elaborated that when Claimant initially sought treatment, he did not see malingering as an issue, as Claimant had been told that he had to get treatment when he was sent back from Iraq and wanted to be in treatment, and he viewed Claimant as "someone that really needed help." [EX 15 at 35.] Importantly, during subsequent 23 treatment sessions, Dr. Marshall found no evidence of symptom magnification. *Id.* at 72. Although Dr. Marshall was initially unaware of the workers' compensation claim, he learned about it one or two months into the treatment. *Id.* at 72. While acknowledging that malingering is a possibility in a workers' compensation setting, Dr. Marshall testified that he "wasn't seeing that" in Claimant

[15] It is not disputed that the symptoms reported by Claimant are consistent with the definition of PTSD under the DSM-IV. Indeed, while Dr. Griffith questioned the truthfulness of Claimant's self-reporting, he acknowledged that many of the symptoms reported by Claimant are consistent with a diagnosis of PTSD [EX 26 at 52].

who was "trying to put his life together." *Id.* at 30-31. When asked about his method for assessing truthfulness, Dr. Marshall stated that he relies on a "working relationship with the client, if the person is following through with what we talked about." *Id.* at 35. Indeed, Dr. Marshall's treatment records reflect that Claimant took prescribed medication, maintained a journal, did cognitive and breathing exercises, and worked on increasing his socialization, as directed by Dr. Marshall. [EX 15, exhibits]. I give probative weight to Dr. Marshall's opinion on this issue, as it is well-reasoned and documented, and consistent with the evidence of record; I note, in particular, that he had the benefit of observing Claimant and his response to treatment over the course of 24 treatment sessions.

Dr. Marshall's opinion is also consonant with the opinions rendered on this issue by Dr. van Holla and Dr. Reppuhn. Dr. van Holla disagreed with Dr. Griffith's assessment that Claimant is malingering with regard to his PTSD claim, based on his findings that Claimant presents similar to other PTSD patients, meets symptoms criteria in revised DMS, and improved with treatment; he also deemed Dr. Griffith's omission of work-related stressors to be a "grave error" [EX 14 at 29-30]. Notably, Dr. van Holla specifically addressed the results of the MMPI-II administered by Dr. Griffith, including The Fake Bad Scale ("FBS"), stating that he had used this test in the past, and believes that it should never be used to arrive at a diagnosis, but only as a source of additional information to be considered as part of a psychological evaluation [*id.* at 43-45]. Consistent with his role as a DOL independent medical evaluator, Dr. van Holla testified that he took steps to rule out malingering by "rendering a clinical opinion after having completed … a fairly thorough psychiatric evaluation;" this assessment was based on "[t]he account of the historical facts and information that took place, based on [Claimant's] report … as well as his presentation." [EX 14 at 46-47]. Moreover, like Dr. Marshall, Dr. van Holla did not find evidence that Claimant was motivated by secondary gain, as he believed Claimant's statements that he was interested in rehabilitating and getting better. *Id.* at 37. Dr. van Holla also observed that Claimant reported improvement in his social interactions, which "showed incentive and improvement in making gains, which argues against the malingering point." *Id.* at 60. While acknowledging an element of subjectivity in his assessment [*id.* at 46-48], Dr. van Holla observed that his years of experience and training are as important as the patient's presentation *[id.* at 61-62]. I find that Dr. van Holla's opinion is well-reasoned and documented, and entitled to full probative weight.

Dr. Griffith, is the only physician of record to opine that Claimant is malingering. I find that this opinion is entitled to diminished weight. Dr. Griffith testified that the DSM-IV requires that malingering be ruled out where there is secondary gain involved [EX 26 at 24]. Dr. Griffith based his diagnosis of malingering on "[c]linical presentation, MMPI consistent with malingering and a motive." [EX 26 at 140]. With respect to the MMPI-2 results, he specified that Claimant's personal injury interpretive report "had the inverted W or M," and he obtained a score of 35 on FSB test,[16] both of which are indicative of malingering. [EX 26 at 17-19, 25, 63-66]. Dr. Griffith elaborated that multiple elevated scales indicate that Claimant is "claiming a log of symptoms" and therefore "wants to appear sick." *Id.* at 66-67. He acknowledged that the FBS is regarded as controversial in the medical field in that it "identifies false positives" and "doesn't identify those that do, and tends to call people who are not malingering that they have."

[16] The MMPI-2 report enclosed with Dr. Griffith's expert report states that The Fake Bad Scale is described on the Pearson Assessments web site, available at: www.pearsonassessments.com/tests/mmpi_2.htm

Id. at 18-19, 64, 97-102. At the same time, Dr. Griffith acknowledged that the MMPI-2 should not be used as the basis for a diagnosis, but only as one piece of data to be considered if the clinical evidence – in this case, the psychiatric interview -- suggests malingering. *Id.* at 18. Similarly, when asked whether it is possible that Claimant was exaggerating symptoms to get help, he testified "[c]ould be" but noted other evidence of malingering. *Id.* at 67.

While Dr. Griffith acknowledged that the MMPI-2 results must be considered in the context of clinical evidence, his conclusion that Claimant exhibited several other indicators of malingering is fraught with flaws. Clearly, Dr. Griffith's assessment of malingering was influenced by his determination that Claimant did not meet the DSM-IV criteria for PTSD because he did not experience a "horrifying" event. However, for reasons detailed above, this underlying premise is flawed. Similarly, it is clear that Dr. Griffith's opinion was also influenced by his conclusion that Claimant fabricated his account of harassment by the camp manager and homicidal ideation. However, I have previously rejected this opinion; and, accordingly, I also reject Employer's assertion that Claimant was "fully functional" until his departure from Iraq. Further, in evaluating Claimant's clinical presentation, Dr. Griffith relied on the indicators of malingering described in a medical study by Hall and Hall.[17] [EX 26 at 81-84; 140-41]. I find several deficiencies in Dr. Griffith's consideration of these indicators, addressed in turn below.

Calls attention to symptoms early and frequently in interview: Dr. Griffith opined that willingness to talk about symptoms is atypical for PTSD sufferers, because people who talk about their symptoms are eager to be sick, while PTSD suffers typically do not want to invoke the memory of "horror" and are "ashamed of his … either cowardness or his inability to live with the horrors of war" [EX 26 at 68-70]. However, Dr. Griffith did not address the fact that Claimant was directly questioned about his experiences and symptoms; that the interview took place after Claimant had undergone several months of treatment and counseling; and that Dr. Marshall's records indicate that Claimant was initially more reserved in discussing the war trauma. Nor did Dr. Griffith reconcile this assessment with his own observation that Claimant denied having a "horror" response to witnessing casualties [EX 26 at 39-40; EX 17]. Relatedly, I give little weight to Dr. Griffith's statement that Claimant becoming angry with him during the interview evidenced malingering [EX 26 at 86], particularly in view of Dr. Marshall's consistent findings that symptoms of Claimant's work-related psychological condition include irritable mood. EX 15, exhibits.

Overtly and frequently blames others for the condition: Dr. Griffith relied heavily on this indicator, stating that it was "very exaggerated in his case." [EX 26 at 81] This opinion was evidently based on Dr. Griffith conclusion that Claimant lied about mistreatment by the camp manager and his homicidal ideation in order to "get out of Iraq;" yet, I have previously rejected this conclusion as unsubstantiated and contradicted by the record.

Exaggerates severity of symptoms and often presents classic textbook examples in a rehearsed manner: While Dr. Griffith noted the presence of this indicator [EX 26 at 81], he

[17] Ryan C.W. Hall, M.D., Richard C. W. Hall, M. D., *Malingering of PTSD: forensic and diagnostic considerations, characteristics of malingerers and clinical presentation, in* GENERAL HOSPITAL PSYCHIATRY 28 (2006) 525-35 (EX 26, ex. 4).

repeatedly contradicted himself by stating that Claimant's presentation is highly atypical for a PTSD sufferer. [EX 17; EX 26]. Further, for reasons noted above, I give more weight to the opinion of Claimant's treating psychologist, Dr. Marshall, that Claimant's initial evidence of symptom magnification was due to factors other than malingering and that subsequent treatment sessions did not indicate symptom magnification.

Exaggerates role of involvement in trauma to the extent of making self the hero: Dr. Griffith based this finding on Claimant wearing a bullet that had penetrated his trailer while he was asleep around his neck "like a medal." EX 26 at 81. Yet, while Claimant stated that wearing the bullet made him feel better, there is nothing to indicate that he regarded it as a medal. On the contrary, nothing in Claimant's testimony indicates exaggeration of his role in the traumatic events and he repeatedly used self-deprecating terms to describe his mental state and actions leading to his removal from Iraq and after returning stateside.

Reports no problems before the event: This particular factor appears to be present, as I have previously determined that Claimant failed to disclose his history of depression.

Seeks treatment in the context of litigation: I find it significant that both Dr. Marshall and Dr. van Holla were aware of Claimant's workers' compensation claim, and expressly rejected Dr. Griffith's opinion that Claimant was malingering in an effort to obtain secondary gain.

Reports chronic, non-fluctuating symptoms that do not improve to some extent with time or treatment: Relatedly, Dr. Griffith testified that failure to improve with treatment also suggested malingering, and noted that he would have expected spontaneous recovery [EX 26 at 87]. Dr. Griffith' findings are contradicted by Dr. Marshall's treatment records, which reflect fluctuation in symptoms, as well as improvement with treatment, with several symptoms improving from moderate to mild. EX 15, exhibits. Dr. Griffith did not explain his opinion as to the likelihood of spontaneous recovery, which is contrary to Dr. Marshall and van Holla's conclusions that Claimant needs further treatment.

Unstable work history: It is troubling that Dr. Griffith erroneously believed this factor to be applicable and only changed his assessment when Employer's counsel pointed out to him at deposition that Claimant, in fact, had had a stable work history prior to his employment in Iraq. [EX 26 at 82].

Reports frequent nightmares that are always the same every time and occur every time one sleeps or dreams. Dr. Griffith stated that while on 10/19/07 Claimant reported to him having no nightmares [EX 17; EX 26 at 82-83], Claimant subsequently testified that he does suffer from nightmares, but could not remember what they were [EX 27 at 176-79]. Dr. Griffith believed that Claimant simply added this symptom after looking up PTSD on the internet; and further noted that he had never heard of someone with PTSD not being able to remember nightmares. *Id.* at 83. However, Claimant reported having nightmares to Dr. Marshall ("[h]ad a dream about bombs hitting his home. When he was awaken by this dream he was waiting to hear the alarm")[EX 17 at 46]. Further, nothing in the record indicates that Claimant reported nightmares "that are always the same every time and occur every time one sleeps or dreams." I also note that, in completing the MMPI-2 test administered by Dr. Griffith, Claimant indicated that he

does suffer from recurrent nightmares. Further, at the time of his depositions on 9/5/08 and 1/30/09, Claimant had been out of treatment since January 2008 due to Employer's controversion of the claim, a factor that Dr. Griffith did not address. I also note that while the medical study relied upon by Dr. Griffith references another medical study indicating that "it was rare for PTSD sufferers to awaken from sleep in terror with no memory of their dreams" (EX 26, ex. 4 at 5), this is in conflict with Dr. Griffith's statement that he had never heard of such a phenomenon.

Finally, I note that Dr. Griffith did not address the fact that several of the indicators of malingering noted in the same study were not present and, conversely, several indicators of PTSD noted by the authors were present in this case. EX 26, ex. 4 at 8, Table 5. In sum, I give diminished weight to Dr. Griffith's diagnosis of malingering, and find, accordingly, that the weight of medical authority in this case establishes that Claimant suffers from PTSD and depression causally related to his employment in Iraq.

B. Nature and Extent of Disability

A disability may be either temporary or permanent in nature. *See* 33 U.S.C. § 908. There are two tests for determining the nature of a disability. *Eckley v. Fibrex and Shipping Inc.*, 21 BRBS 120, 122 (1988). Under the first test, an employee is permanently disabled if he reaches maximum medical improvement and still has some residual disability. *Id.*; *James v. Pate Stevedoring Co*., 22 BRBS 271 (1989). Under the second test, if maximum medical improvement has not yet been reached, "an employee [is] permanently disabled when his condition has continued for a lengthy period, and it appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period." *Newport News Shipbuilding and Dry Dock Co. v. Director, OWCP (Chappell)*, 592 F.2d 762, 764, 10 BRBS 81, 83 (4th Cir. 1979). If neither of these tests is met, the claimant is temporarily disabled, rather than permanently disabled. The point at which a claimant's condition changes from temporary to permanent disability is based on the medical evidence, in particular the claimant's date of maximum medical improvement, and is not based on economic factors. *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56, 61 (1985).

"Maximum medical improvement" is the point at which competent medical opinion has determined that a claimant is not likely to achieve any further improvement in his physical condition, or when his condition is likely to be long-lasting and of indefinite duration. Whether a claimant has reached maximum medical improvement is a question of fact based upon medical evidence. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Eckley v. Fibrex & Shipping Co., Inc.*, 21 BRBS 120 (1988). In the ordinary case, the point at which a claimant reaches maximum medical improvement is the point at which his disability is characterized as permanent, rather than temporary. *See James, supra,* 22 BRBS 271 at 274.

In this case, I cannot conclude that Claimant's disability is permanent. Dr. van Holla, the only physician to address maximum medical improvement explicitly, stated that Claimant "would continue to improve if he continues to be able to participate in an appropriate line of therapy and treatment." [EX 16, p. 10.] He reiterated that opinion in his deposition of September 5, 2008. [EX 14, p. 28.] Dr. Marshall testified that whether Claimant would ever improve to the point that he is no longer disabled, were he to be awarded benefits, would be a matter of

speculation. [EX 15, p. 32.] He additionally testified generally that Claimant could be moved toward an improvement in his condition. [*Id.*, pp. 71-72.] Dr. Marshall's notes from his last session with Claimant reflect that Claimant was making "some progress" toward each of his treatment goals, which implies that additional progress was possible. [EX 9, p. 5.] Drs. Marshall, Reppuhn, Oram, and van Holla did not opine at any time that Claimant had reached maximum medical improvement, or that he would not benefit from further treatment. Likewise, Dr. Griffith did not render an opinion on maximum medical improvement. As he found that Claimant did not suffer a psychological injury, he would not be expected to recommend treatment for it. However, as discussed above, I have discounted Dr. Griffith's opinion with respect to injury, and to the extent that his findings can be characterized as a determination that Claimant has reached maximum medical improvement, I discount them for the same reasons. Accordingly, I find that Claimant has not reached maximum medical improvement, and his disability is temporary in nature.

The extent of disability can be either partial or total. Total disability is a complete incapacity to earn pre-injury wages in the same work as at the time of injury or in any other employment. To establish a prima facie case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work-related injury. *See Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989); *Harrison v. Todd Pac. Shipyards Corp*., 21 BRBS 339 (1988). It is not necessary that the work related injury be the sole cause of the claimant's disability. Therefore, when an injury accelerates, aggravates, or combines with the previous disability, the entire resulting disability is compensable. *Independent Stevedore Co. v. Alerie,* 357 F.2d 812 (9th Cir. 1966).

If Claimant establishes a prima facie case of total disability, the burden shifts to the employer to establish the availability of suitable alternative employment. *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991). Should the employer fail to satisfy its burden, the extent of a claimant's disability will be deemed to be total. *See Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988).

In this case, Drs. van Holla, Reppuhn, and Marshall all found that Claimant is unable to return to his previously employment with Employer due to his psychological impairment. Dr. Griffith did not address that issue. I find, therefore, that Claimant has established a prima facie case of total disability.

With respect to suitable alternative employment, Employer has submitted the report of a vocational rehabilitation specialist, Wallace Stanfill, M.Ed., C.R.C. Mr. Stanfill reviewed a number of records relating to Claimant's work history, the medical reports of Drs. Marshall, van Holla, and Griffith, the depositions of Claimant and of Drs. Marshall and van Holla, and certain labor market information. He was not permitted to conduct a personal interview and assessment of Claimant. Based on Dr. van Holla's opinion, Mr. Stanfill concluded that Claimant was unable to return to his previous employment. Based on Dr. Marshall's belief that Claimant should gradually be introduced to the work force as part of his treatment, Mr. Stanfill concluded that Claimant could work at some low-stress, entry-level, unskilled jobs that do not require working in crowds or with the public. Mr. Stanfill conducted a labor market survey as of the fall of 2008 and identified five jobs that he believed were suitable for Claimant. The hourly wage for the

jobs ranged from $7.00 to $9.00, averaging just over $8.00 per hour. I find, however, that the jobs identified by Mr. Stanfill do not show that there was suitable alternative employment available to Claimant. First, Dr. Marshall's treatment plan was to encourage Claimant's eventual and gradual return to the workforce; Dr. Marshall did not make a determination that Claimant was psychologically ready to work as of his last visit in November of 2007. Second, even if Dr. Marshall believed that Claimant was ready to work in November of 2007, he planned a gradual return to the work force. That plan implies that Claimant would initially work part-time and gradually move on to full-time employment. None of the jobs identified by Mr. Stanfill indicates whether part-time employment was available. Third, Mr. Stanfill did not appreciate Claimant's diagnosed difficulties in leaving the home, and did not take into account whether he could in fact travel to the jobs that were identified. Claimant testified in January of 2009 that he has "a hard time getting out" of the house; he gets "sick [and] nervous"; that he has dizziness, sickness, and headaches, and "can't get out of the house." [EX 27, pp. 115, 124.] He further testified that he is "locking [himself] up more" because he "[doesn't] want to go see anybody." [*Id.*, p. 130.] He occasionally needs to call his sister to go to the grocery store for him because he gets dizzy just thinking about leaving the house. [*Id.*, p. 131.] He gets dizzy and nauseous when he leaves the house to go to the store, the doctor, or anywhere else. [*Id.*, p. 132.] On the occasions that he is able to leave the house, he has to hurry home because it is his comfort zone. [*Id.*, p. 134.] Based on Claimant's testimony, I am not persuaded that Claimant has the psychological capacity to report for work in any occupation. Furthermore, all of the positions identified by Mr. Stanfill are at least 15 miles away from Claimant's residence, and three of the jobs – those located in Onaway, Gaylord, and Charlevoix, Michigan – are 30 or more miles away. In light of Claimant's clear inability to leave his home for any extended period of time, I find that Employer has not established the availability of suitable alternative employment, and that Claimant's disability is therefore total.

C. Average Weekly Wage

The evidence shows that Claimant earned $83,378.57 in the 52-week period before sustaining his injury. The parties disagree on whether the average weekly wage should be determined under Section 10(a) of the Act (Employer's position) or Section 10(c) of the Act (Claimant's position). I find that Section10(a) of the Act does not apply to this case, because Claimant was a seven-day-a-week employee and Section 10(a) applies to five- or six-day-a-week workers. Section 10(b) does not apply because Claimant worked substantially the entire year prior to his injury. Accordingly, Section 10(c) applies to this case. The parties do not dispute the amount of Claimant's pre-injury earnings, and I find that those earnings represent Claimant's wage-earning capacity at the time of his injury. When those earnings are divided by 52 weeks, Claimant's average weekly wage is $1,603.43, and I so find.[18]

[18] The parties made separate mathematical errors in their calculations, but the differences are insignificant, amounting to four dollars per week. They agree on the amount of annual earnings, however, and therefore the amount calculated herein is correct.

D. Medical Care

Eligibility for an award for medical expenses is determined independently of eligibility for Section 8 compensation. *Union Stevedoring Corp. v. Norton*, 98 F.2d 1012 (3d Cir. 1938); *see Ingalls Shipbuilding, Inc. v. Director, OWCP*, 991 F.2d 163 (5th Cir. 1993) (medical benefits available for work-related hearing loss even where injury does not satisfy requirements for payment of compensation). In this case, Claimant has established that his psychological injury arose out of his employment in Iraq. He is therefore entitled to medical benefits under Section 7 of the Act. He is specifically entitled to all medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of Claimant's injury or the process of his recovery may require.

E. Conclusion

Based on the foregoing, I find that Claimant Todd Walkley has established that a temporary total disability arising from his employment with Employer in Iraq. He is entitled to compensation payments and medical benefits for that injury.

ORDER

Based on the foregoing, IT IS ORDERED:

1. Employer shall pay Claimant compensation for temporary total disability from May 20, 2007 to the present based on an average weekly wage of $1,603.43, with credit for any compensation payments previously made;
2. Employer shall pay all associated medical care and treatment arising out of this claim for benefits to which Claimant is entitled as a result of his injury under Section 7 of the Act. This care and treatment shall include but is not limited to reimbursement Claimant for all medical care related to the May 20, 2007 injury up to the present and continuing;
3. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated immediately prior to the date of this Decision and Order in accordance with 28 U.S.C. §1961;
4. The District Director shall make all calculations necessary to effect the terms of this Decision and Order; and
5. Not later than 30 days from the date of this Decision and Order, counsel for Claimant may submit a fully-supported application for fees and costs associated with his representation of Claimant in this matter, and Employer is allowed 21 days after receipt thereof to respond to that application and to the application filed by Claimant's previous attorney.

SO ORDERED.

A

PAUL C. JOHNSON, JR.
Associate Chief Administrative Law Judge