

U.S. Department of Labor

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Issue Date: 03 May 2010

Case Nos.: 2009-LDA-00029
2009-LDA-00030

OWCP Nos.: 02-146411
02-155611

In the Matter of:

GORDON A. DREHER
Claimant

v.

SERVICE EMPLOYEES INTERNATIONAL
Employer

and

**INSURANCE COMPANY OF THE STATE
OF PENNSYLVANIA**
Carrier

Appearances: GARY B. PITTS, Esquire
For the Claimant

JOHN L. SCHOUEST, Esquire
For the Employer

Before: ADELE HIGGINS ODEGARD
Administrative Law Judge

DECISION AND ORDER
AWARDING BENEFITS

This is a claim for benefits under the Defense Base Act, 42 U.S.C. § 1651, *et seq.*, and implementing regulations found at 20 C.F.R. part 704, brought by the Claimant against his former Employer and his Employer's insurance carrier. Except where specifically modified, the Defense Base Act incorporates the provisions of the Longshore and Harbor Workers' Compensation Act, ("LHWCA") 33 U.S.C. § 901 *et seq.*, with regard to the payment of medical expenses and compensation for disability of employees engaged in employment outside the United States pursuant to a contract with the United States or an executive department thereof.

I conducted a hearing on this claim on June 12, 2009, in Cherry Hill, New Jersey. All parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative

Law Judges, 29 C.F.R. part 18. At the hearing, Claimant's Exhibits ("CX") 1 through 15 and Employer's Exhibits ("EX") 1 through 23 were admitted (Hearing Transcript ("T.") at 9-10). The record was held open after the hearing to allow the parties to provide evidence that was not yet ready for submission.¹ The parties submitted post-hearing briefs.

In reaching my decision, I have reviewed and considered the entire record pertaining to the claim before me, including all exhibits, the testimony at hearing, and the arguments of the parties.

ISSUES

The issues before me are:²

1. Whether the claimant suffered post-traumatic stress and tinnitus injuries, in the course of the Claimant's employment with Employer.³
2. The nature and extent of the Claimant's disability.
3. Whether the Employer is responsible for payment for medical care.
4. Claimant's applicable average weekly wage.

¹ These items are as follows: Employer's Exhibits 13 [medical records – Jersey Shore Medical Center], 21 [tax records], and 22 [Social Security records]; and the results of a hearing test, to be administered post-hearing. By Order dated January 28, 2010, I directed the parties to submit these items within 15 days. I also informed the parties that, in the event such items were not submitted, I would presume the proffer of the evidence was withdrawn. Order at 2. On February 13, by fax, the Claimant submitted a narrative report and test results from an audiologist. I denominate this item as CX 16 (Claimant's counsel's cover letter denominated the item as CX 14; however, Claimant's Exhibits up through 15 were admitted at the hearing). I presume that the Employer has withdrawn the proffer of EX 13, 21, and 22, as these items were never submitted.

² See T. at 5-8 for a discussion of the issues, as framed by the parties. The written stipulation from the parties filed at the hearing indicates that the Claimant received temporary total disability compensation at the rate of \$990.37 per week for the period from 01/27/2008 to 10/31/2008; and thereafter received permanent partial disability compensation at the rate of \$596.40 per week, which continues. The record, however, indicates the employer paid compensation from 01/27/2007 (not 01/27/2008). EX 4. I find, therefore, that the written notation regarding 01/27/2008 as the inception of payment to the Claimant is erroneous, and that the Employer commenced payments on 01/27/2007. I note this date is shortly after the Claimant stopped working as a truck driver for the Employer and is approximately the date the Claimant returned to the United States.

³ At the hearing, Employer's counsel indicated that the claimant's claim of injury to his back has been accepted, and therefore the only alleged injuries for which adjudication was necessary were the Claimant's post-traumatic stress disorder and tinnitus claims. T. at 7.

5. Whether the Employer is responsible for Claimant's attorney fees and expenses.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Stipulations

The parties were able to reach the following stipulations:

1. The parties are subject to the jurisdiction of the Defense Base Act, 42 U.S.C. §§ 1651 et seq.⁴
2. The Claimant sustained injuries to his ears (hearing); back and spine; and nerves and body generally, including stress symptoms, between the following dates: October 21, 2005, and January 18, 2007.⁵
3. The Claimant's injuries occurred in Iraq, in the course of his employment with the Employer.
4. There was an employee-employer relationship at the time of the injuries.
5. A timely notice of the injury was given by the Claimant to the Employer.
6. The Claimant filed a timely claim.
7. Notice of controversion was timely filed.
8. There was an informal conference on September 9, 2008.
9. The Claimant reached maximum medical improvement (MMI) as of July 16, 2008.

These stipulations have been admitted into evidence, and are therefore binding upon the Claimant and Employer. See 29 CFR § 18.51; Warren v. National Steel & Shipbuilding Co., 21 BRBS 149, 151-52 (1988). I have carefully reviewed the foregoing stipulations and find that

⁴ In their written stipulations and at the hearing the parties agreed that the Longshore and Harbor Workers' Compensation Act applies to this claim. The issue of jurisdiction of the Defense Base Act was not discussed. However, as the parties agreed to the application of the LHWCA, and the evidence shows the Claimant was employed by a contractor in the U.S. Army Central Command area of operations overseas, I find that the Defense Base Act is applicable to this claim. See EX 1. Additionally, the Employer's brief reflects the Employer's recognition that there is jurisdiction under the Defense Base Act. Employer's brief at 1.

⁵ At the hearing, the parties clarified that the October 2005 date is the date of an IED [improvised explosive device] explosion, and the January 2007 date is the Claimant's last day of exposure in Iraq. T. at 6-7. The Claimant stated he received 10 days of sick pay. T. at 7. The Employer commenced paying compensation on January 27, 2007. T. at 7; EX 4; see also n. 2, above.

they are reasonable in light of the evidence in the record. As such, they are hereby accepted as findings of fact and conclusions of law.

Factual Background and Procedural History

The Claimant was born in January 1959. EX 8. The Employer is a contractor who has held contracts with the Department of Defense for work in overseas locations. EX 1. In August 2004, the Claimant accepted an offer from the Employer for employment as a Heavy Truck Driver in Iraq. EX 1. According to the record, the Claimant had prior experience as a truck driver. EX 9.

According to the terms of the Employer's employment offer, the Claimant was to be paid base pay at the rate of \$3,000.00 per month, plus overtime at the hourly rate for hours worked in excess of 40 hours per week.⁶ There was no guarantee of any work in excess of 40 hours per week. In addition, the Claimant was to be paid various bonuses totaling 55% of base pay. According to the employment contract, the duration of the contract was "approximately 12 months;" however, the contract also specified that it was terminable "at any time by either party." EX 1. The employment contract did not indicate how many days per week the Claimant was expected to work.

Prior to entering into his employment, the Claimant underwent a physical examination, on August 10, 2004, at the employer's direction. EX 8. The Claimant deployed from the United States in late August 2004. CX 10; EX 9. The Claimant worked for the Employer overseas, primarily in Iraq, from the date of his arrival until January 2007, a period of three years and five months.

The Claimant filed his initial claim on March 29, 2007. EX 3. Per the parties' written stipulation, the Employer paid temporary total disability payments, at the rate of \$990.37 per week, from January 27, 2007 to October 31, 2008, and has paid permanent partial disability since that time, at the rate of \$596.40 per week effective November 1, 2008. The Claimant's temporary total disability payments were based on a weekly wage of \$1,485.56 per week. CX 3.

Testimonial Evidence

Claimant's testimony. T. at 15-54; EX 20.

The Claimant testified under oath at the hearing. He stated that he held many jobs in his lifetime, and that he had experience as a truck driver prior to his deployment to Iraq in August 2004. He stated his job overseas was as a heavy truck driver. T. at 16-19.

The Claimant recounted an incident, in October 2005, in which he was a convoy commander, on a night run to another base to deliver fuel, and an IED [improvised explosive device] detonated a few feet away from his truck. The Claimant stated that the cab of the truck

⁶ According to the formula in the Claimant's employment agreement, the hourly rate of pay was \$17.30.

was immediately enveloped in black smoke; he said he was unable to see the driver, and thought the driver had been blown out of the truck. The Claimant said he grabbed the steering wheel, because the vehicle was still moving, and the truck traveled another 20 kilometers, until he reached a location where they could pull over and check for damage. On inspection, they saw jet fuel (the cargo) was coming out of the truck, and it was also blowing onto the engine, the batteries, and the exhaust; additionally, there were many shrapnel holes in the cab and trailer. The Claimant said that, since that incident, he has had ringing in his ears, which he was told was tinnitus. The Claimant stated that the Employer has not authorized medical treatment for his tinnitus, so he has not received any medical care for this condition. T. at 19-22.

The Claimant stated that his convoys were also attacked on later occasions, but he did not receive any physical injuries as a consequence of those attacks. He remarked that he was required, whenever he left the perimeter of his base, to wear body armor, which he estimated to weigh 45 to 50 pounds. Later, the Claimant stated, his employer directed an additional level of self-protection, so the body armor increased, and its weight was then about 65 pounds. Regarding the conditions under which he drove vehicles, the Claimant stated that the roads were sometimes unimproved (sand and dirt), and were sometimes paved, but the paved roads had craters and potholes in them. He said the trucks he drove did not have "air ride," because he did not have seniority, and that he had been instructed not to wear his seatbelt, because seatbelts made quick exits from vehicles more difficult. T. at 22-26.

The Claimant confirmed he had been involved in a motorcycle wreck in 1995, and had surgeries as a result, including one in 1997 where his spine was fused. He stated he had recovered well from the surgery, and had thereafter been employed driving trucks cross-country, which included loading and unloading cargos. The Claimant noted he had passed the Employer's pre-employment physical. The Claimant remarked that, while his pre-employment physical was being processed, the Employer's physician telephoned him to discuss his history of back surgery. T. at 26-28.

The Claimant confirmed that he worked in Iraq for more than two years without any limitations. He stated that one day his back was a little sore, and the next morning he woke up with extreme pain. He stated he went to the medic, who gave him some medication, and he went back to work. The Claimant stated he worked for several days, and then reported back to the medics that his back was getting worse, so he was then referred to the military medical facility. According to the Claimant, the physician at the military facility prescribed Vicodin and put him on light duty for 10 days, and told him to come back after that. Upon his return, the Claimant stated, he was still in a lot of pain, so the physician put him on total bed rest and directed that he return to the United States. The Claimant confirmed the date he was sent to the medical facility was January 18, 2007, and that he did not do any truck driving after that date. T. at 28-30.

According to the Claimant, he believed that his back problems are due to "banging around" inside the truck while driving. He stated that he had a six-level spinal fusion surgery, and said that the medical procedure required the removal of a rib and the implanting of "steel rods." The Claimant stated that he is under "pain management" and currently takes multiple medications, including narcotics, to relieve his pain. The Claimant detailed his medications, and stated that they sometimes make him "loopy." He stated he has trouble sleeping due to his pain,

and his condition makes it difficult for him to walk. The Claimant stated he did not believe he could keep a job, because of his physical limitations and his need for pain medications. He stated that light tasks such as walking the dog or vacuuming were very taxing to him. T. at 31-37.

The Claimant testified that, had he not been injured, he would have continued working overseas. He stated that, prior to going overseas, he had never seen a mental health professional for stress problems. He also indicated that, prior to going to Iraq, he had never been told he had post-traumatic stress disorder. The Claimant indicated that the Employer has not agreed to pay for any treatment related to post-traumatic stress disorder, which Dr. Kay had diagnosed. He stated that he was sent to Dr. Kay to determine his suitability for long-term pain medications, and did not suggest post-traumatic stress disorder to Dr. Kay. The Claimant stated he “is not real trusting right now” and does not go out of his house except when necessary. The Claimant indicated that, on more than a few occasions, people were seriously injured or died during attacks on his convoys. T. at 37-40.

On cross-examination, the Claimant stated that the incident of October 21, 2005, was not the only occasion that his truck was hit by shrapnel or he experienced the concussion of an explosion, but it was the most serious event he experienced, with the IED detonation only a few feet from his truck. He agreed this was the first traumatic event he could recall that occurred after his back surgery, and he also remarked that “it wasn’t that bad.” The Claimant stated that he was “very restricted” at present, because of his physical limitations and his pain levels. He stated he would like to be able to work, and said he enjoyed working with animals. Regarding his work history, the Claimant stated that he got his CDL [commercial driving license] in 1998 or 1999, and that he basically drove trucks full time from the time he obtained his license until he departed for Iraq in 2004. He stated that his actions as a driver in Iraq were always under military control and direction, and noted that he drove at the speed he was directed to drive, even though the roads may not have been suitable for high-speed driving. The Claimant indicated he understood that the need for speed was dictated by the risk of attacks. T. at 41-49.

Regarding his medical treatment, the Claimant agreed that the cost of treatment with his pain management physician was being covered by the Employer, and the Employer had also covered his back surgery. The Claimant also agreed the Employer was continuing to pay him some compensation. T. at 49-50.

In response to my questions, the Claimant stated that the IED blast came from the left side, and he was in the passenger’s seat on the right side, and that his left ear gives him trouble. He stated that he woke up with a sore back in January 2007, and indicated he could not attribute his condition to any specific event but rather to just doing his job. He stated he was advised to restrict his driving, and indicated he would not be able to pass the physical examination for a CDL because of his medications. T. at 50-52. In response to additional questions from his counsel, the Claimant recounted that he reported having trouble hearing in his left ear immediately after the IED blast, and had reported a hard time hearing out of that ear shortly thereafter. T. at 52-53.

Prior to the hearing, in March 2009, the Claimant testified by deposition.⁷ EX 20. In general, the Claimant's deposition testimony was consistent with his hearing testimony. At his deposition, he stated that the Employer has not paid all his medical expenses for his back medication. He described in some detail a motorcycle accident in 1995 in which he sustained multiple injuries, including a broken back, hip, leg, ribs, and foot. The Claimant stated he had multiple surgeries because of his injuries, but had not had any surgery since 1996 or 1997. The Claimant discussed his work history, focusing on his experience as a truck driver after he received his CDL in 1998 or 1999. EX 20 at 5-22.

The Claimant stated that one of the factors that caused him to apply for a job with the Employer was that he wanted to do his part for the country, because of the war. He stated that he earned about \$91,000 to \$92,000 per year in Iraq, and agreed that the weekly wage based on that income was about \$1,769. The Claimant stated that, in Iraq, he drove only tanker trucks that were hauling jet fuel or gasoline. He stated that he was targeted by hostile forces on 30-40% of the missions he drove, and was shot at multiple times. The Claimant testified that he was hit with an IED once, in October 2005; had bullet holes in the truck "multiple times;" and sustained "multiple shrapnel holes in the truck."⁸ As a result of the IED blast, the Claimant stated, he sustained hearing loss, and he said that "a psychiatrist said the post traumatic stress could have been caused by that." The Claimant stated that he only saw Dr. Kay, the doctor who diagnosed post traumatic stress disorder, one time. EX 20 at 22-27.

The Claimant stated he initially planned on staying in Iraq for one year, but he got used to being over there and stayed on. He confirmed the first time he sought medical attention for his back in Iraq was in January 2007. The Claimant stated he got an "R&R" period every four months, and that his most recent R&R was in early December 2006, when he went to Thailand. He returned to the United States, the Claimant stated, because he was sent home due to his back pain. The Claimant stated he sought medical treatment for his back pain, and underwent surgery in May 2007. He stated he has been unable to work since his return to the United States, and that he would like to work, but is unable to work as a truck driver due to the medications he is taking. The Claimant remarked that he does not have the training for any other type of job, except physical labor, and he is unable to do physical labor because of his back problems and other limitations. He stated he is able to drive a car, but does not drive very far. The Claimant stated that his surgeon (Dr. Blecher) told him that he was not a candidate for more surgery, and that he currently sees a physician (Dr. Bram) for pain management. He said the insurance company refused to authorize treatment for his hearing loss. EX 20 at 28-42.

⁷ The Claimant did not authenticate the copy of the deposition transcript that is in the record. EX 20. However, the document was admitted without any objection. T. at 9-10.

⁸ The deposition transcript mistakenly reflects "IUD" instead of "IED." See, e.g., EX 20 at 26.

Medical Evidence⁹

Claimant's Medical Records. CX 1, 1a, 16.

The Claimant presented approximately 100 pages of “medical records,” covering the time period from August 2004 to January 2009. CX 1. These records include a copy of the Claimant’s pre-deployment physical, administered by the Employer.¹⁰ Also included are records relating to the Claimant’s medical treatment while deployed and Claimant’s treatment after his return to the United States, consisting of treatment notes and medical test reports. The Claimant’s medical treatment included treatment from Dr. Haim Blecher, of “University Spine Associates, P.A.” of Princeton, New Jersey. According to his letterhead, Dr. Blecher is a Board-certified spine surgeon. Also included in this exhibit are treatment notes from Dr. Harris Bram, of the “Spine & Pain Centers of New Jersey & New York.” According to Dr. Bram’s letterhead, he is Board-certified in Anesthesiology and Pain Medicine. A copy of an evaluation from Robbin J. Kay, Ph.D., a clinical psychologist, dated March 2008 and addressed to Dr. Bram, is also included.

The records at CX 1 indicate the Claimant received a hearing test on August 10, 2004, before he deployed to Iraq. CX 1 at 15. The records show the Claimant initially reported hearing problems relating to the IED explosion on October 22, 2005, the day after the incident. At that time, the Claimant reported “muffled hearing” in the right ear. CX 1 at 19. Subsequently, on November 5, 2005, he reported tinnitus in the left ear. On physical examination, the left tympanic membrane (“L TM”) was red and appeared slightly inflamed. CX 1 at 20. On November 22, 2005, the Claimant reported “ringing” in his left ear and that he had a “hard time hearing” out of that ear. He was referred to an audiologist. CX 1 at 21-23. An audiologist examination on December 5, 2005, reflected the following diagnoses: “Right mild sensorineural hearing impairment in the frequencies from 308 KHz; left sensorineural dip at 4 KHz and 40dB – Bilateral tinnitus (lft more than rt.)” Medication was prescribed. CX 1 at 24-28. On April 11, 2006, the Claimant reported swelling and soreness in his left ear, related to an insect bite. He did not mention tinnitus or hearing loss at that time. CX 1 at 26.

The Claimant returned to the United States and sought treatment for his back pain in early 2007. CX 1 at 27-43. The Claimant underwent surgery in mid-2007. The surgery was successful, but the Claimant continued to experience “intractable” or “persistent” thoracic pain more than six months after the surgery. CX 1 at 52-84. He was referred to a psychologist, Dr. Robbin Kay, for evaluation in conjunction with pain management, which was to include the prescribing of opioids. In February 2008, Dr. Kay evaluated the Claimant; in addition to stating that the Claimant would be an appropriate candidate for long-term opioid intervention, Dr. Kay diagnosed post-traumatic stress disorder relating to the Claimant’s experiences in Iraq. CX 1 at 90-93. According to Dr. Kay, the Claimant would benefit from psychological treatment for a period of three to six months. Dr. Kay also opined the Claimant’s psychological status was

⁹ Because the parties have stipulated to the Claimant’s work-related back injury, I will not discuss medical evidence relating to the Claimant’s back condition, unless it relates to the contested issues (PTSD and tinnitus/hearing loss).

¹⁰ Another copy of the Claimant’s pre-deployment physical is at EX 8.

related to “this accident” (which I presume meant the Claimant’s physical injury to his back). The Claimant’s subsequent treatment with opioid medications has brought some relief, but according to his physicians his back condition, and accompanying pain, presents significant limitations on his employment. CX 1 at 74-76, 102. The Claimant also complained of “nightmares” to his physician. CX 1 at 107.

The Claimant also presented nine pages of medical records, consisting of matters relating to his treatment from Dr. Bram, covering the time period from February 2009 to May 2009. CX 1a. Dr. Bram’s notes indicated the Claimant’s chief complaint was “intractable back pain in the thoracic region” and that the Claimant had been diagnosed with post-traumatic stress disorder. On one occasion, Dr. Bram’s notes indicated the Claimant reported “having nightmares about the war.” The Claimant was prescribed various medications for pain, including narcotics.

Medical Records Submitted by the Employer. EX 8, 11, 12, 14, 15, 16.

The Employer submitted various medical records pertaining to the Claimant. These included the Claimant’s pre-employment physical (EX 8), as well as records relating to his treatment while deployed (EX 11); records from Wall Family Medical (EX 12); reports from the New Jersey Diagnostic Imaging and Therapy Center (EX 14); and treatment notes and records from the University Spine Associates, including records relating to the Claimant’s 1995 surgery (EX 15); and physical therapy records (EX 16).^{11,12}

The Employer’s medical records indicate the Claimant disclosed the medical consequences of his 1995 motorcycle accident, which included broken bones and surgeries, at the time of his pre-employment physical. An X-ray taken at the pre-employment physical reflected “lower thoracic spinal fusion.” As noted above, the Claimant’s pre-deployment medical examination included a hearing test. EX 8.

In general, the medical records the Employer submitted are the same records as the Claimant submitted. In addition, however, the Employer submitted extensive records relating to the Claimant’s back surgeries in the 1990s, as well as his 2007 back surgery. EX 15. In addition, the Employer submitted records relating to the Claimant’s physical therapy for his back, both before and after his 2007 surgery. EX 16.

Claimant’s Post-Hearing Medical Evidence. CX 16.

On February 13, 2010, in response to my Order of January 28, 2010, the Claimant submitted audiology test results and an accompanying narrative report, for hearing testing administered in February 2010 by a Board-certified audiologist. CX 16. The audiologist’s

¹¹ The first three pages of EX 12 contain records of the Claimant’s treatment while deployed. These items should properly be included in EX 11.

¹² Missing from the Employer’s medical records submission are the records from Dr. Bram, as well as Dr. Kay’s report. Some (but not all) of the Employer’s medical records are also included in CX 1 (the Claimant’s medical records submission).

report indicated the Claimant has “borderline normal hearing to 1000Hz to a mild-moderate high frequency sensorineural hearing loss bilaterally.” Changes from the Claimant’s 2004 pre-deployment hearing test were noted. The Claimant’s “hearing handicap” was calculated at 7.5%. No mention was made of tinnitus.

Documentary Evidence

The parties also submitted several items of documentary evidence. These are summarized below.

Personnel and Pay Records. CX 9, 10, 15/EX 1, 9, 10.

The Employer submitted the Claimant’s employment agreement, as well as 54 pages of the Claimant’s personnel records, maintained by the Employer.¹³ EX 1, 9. The Claimant’s personnel records include his application for employment and employment contract. The Claimant submitted multiple commendations from military authorities documenting his exemplary job performance, as well as a certificate from the Employer marking one year of service in the deployment zone. CX 15.

The Claimant submitted copies of the Claimant’s W-2 forms for 2005 and 2006; the Employer submitted a one-page document showing gross pay, by month, for the period from March 2006 (“03/2006”) to February 2007 (“02/2007”). CX 10; EX 10. The W-2 form for 2005 showed earnings of \$92,487.29, paid by the Employer; the Claimant’s earnings for 2006, also paid by the Employer, were \$91,915.39. CX 10. The Employer’s gross pay reports listed the Claimant’s gross pay, broken down by month. Monthly gross pays ranged from a low of \$6,087.26 (October 2006) to a high of \$10,782.71 (August 2006). EX 10.

Evidence Relating to Alternate Employment. EX 19; CX 14.

The Employer submitted a Labor Market Survey and report, dated August 2008, from Kay McLaughlin, vocational case manager. EX 19. Ms. McLaughlin reviewed unspecified medical records and met with the Claimant, in June 2008. The Claimant reported to Ms. McLaughlin that he had back surgery and was taking multiple medications.¹⁴ He also stated that he had a hearing loss and PTSD. According to Ms. McLaughlin, the Claimant reported that he could not return to work until he had received the recommended treatment for PTSD, specifically, three to six months of psychotherapy. Ms. McLaughlin’s report refers to a Functional Capacity Evaluation, conducted in November 2007, that concluded the Claimant could perform light to medium category work with occasional lifting of up to 35 pounds. The report also stated the Claimant indicated he could perform various physical tasks within his physical limitations.

¹³ The Claimant also submitted portions of his personnel file. CX 9.

¹⁴ Ms. McLaughlin’s report reflects the Claimant’s most recent surgery occurred on June 4, 2008; the record reflects, however, that the Claimant underwent surgery on June 4, 2007. See EX 15.

In the report, Ms. McLaughlin identified six jobs that she stated were available within the Claimant's "geographical location," and that the Claimant could perform, given his physical limitations. The jobs included assistant store manager, truck dispatcher, and customer service representative, with pay listed from \$9.62 to \$18.00 per hour. Ms. McLaughlin concluded that the Claimant's pre-injury wage in Iraq was about \$22.62 per hour, and he could be expected to find a position that paid about 80% of his pre-injury wage.

The Claimant submitted a matrix of companies he had contacted for jobs, from December 2008 to March 2009. CX 14. This matrix indicates that some companies did not contact him, and that others informed him that the jobs about which he inquired required heavy lifting.

Additional Evidence. CX 5, 6.

The Claimant submitted photographs of the Claimant's truck after an IED [improvised explosive device] blast (CX 5), and a copy of the Employer's "Serious Incident Report" of the IED blast, with additional photographs (CX 6). The Employer's report was dated October 22, 2005, and related to an incident that occurred the previous day, October 21, 2005. It indicated that the Claimant reported "loud ringing in the ears" after the IED explosion. CX 6.

Miscellaneous Items of Documentary Evidence.¹⁵ CX 2-4, 7, 8, 11, 12, 13; EX 2-7.

The Claimant submitted copies of various administrative documents relating to his claims. These include, among others, his initial LS-203 [claim form], dated March 8, 2007 (CX 7), as supplemented by a later LS-203 dated March 29, 2007 (CX 2). The Claimant also submitted records of medical-related expenses that he asserts the Employer has not paid. CX 11.

The Employer submitted copies of documents from its administrative files pertaining to the Claimant's claims, including the Employer's LS 202 [first report of injury], dated January 29, 2007 (EX 2); its form LS-206 [payment of compensation without award], dated March 6, 2007 (EX 4), as supplemented by its LS-207 [notice of controversion], dated April 13, 2007 (EX 5).

The parties both submitted LS-18s [pre-hearing statements]. CX 13; EX 6,7. Each party also submitted its opponent's responses to interrogatories, requests for admission, and similar discovery requests. CX 12; EX 10.

Injury Arising Out of Employment

Section 2(2) of the LHWCA, 33 U.S.C. § 902(2), defines an "injury" as an "accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from

¹⁵ The parties both submitted additional copies of administrative documents prepared by the opponent (e.g., CX 3-4 are the Employer's LS-206 of March 6, 2007, and LS-207 of April 13, 2007; EX 3 is the Employee's LS-203 dated March 29, 2007; EX 17-18 are the Claimant's LS-18s of September 25, 2008). In discussing administrative documents, I have relied on the copy of the document that the party who prepared the document submitted into evidence.

such accidental injury ...”. Section 20(a) provides a presumption that a claim comes within the provisions of the Act “in the absence of substantial evidence to the contrary.” To establish a prima facie claim for compensation, a claimant has the burden of establishing that: (1) the claimant sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Kier v. Bethlehem Steel Corp., 16 BRBS 128, 129 (1984). Once this prima facie case is established, a presumption is created under § 20(a) that the employee’s injury or death arose out of employment. A claimant’s subjective credible complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a prima facie case and the invocation of the § 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236, aff’d sub nom Sylvester v. Director, OWCP, 681 F.2d 359 (5th Cir. 1982).

In order to establish the second element, that is, to show that conditions at work could have caused, aggravated or accelerated the harm or pain, a claimant needs to show specifically that conditions existed at work that could have caused or aggravated the harm or pain. A claimant under the Defense Base Act must satisfy the same requirements to prove causation as any other claimant under the LHWCA. See Piceynski v. Dyncorp, 31 BRBS 559 (ALJ), remanded at BRB No. 97-1451 (July 17, 1998), reconsidered at 36 BRBS 134 (ALJ) (1999). In Defense Base Act cases, the “condition or course of employment” standard has been subsumed into the “zone of special danger” doctrine. O’Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504 (1951). As first enunciated by the Supreme Court: “The test of recovery is not a causal relationship between the nature of employment of the injured person and the accident [citation omitted]. Nor is it necessary that the employee be engaged at the time of the injury in activity of benefit to his employer. All that is required is that the ‘obligations or conditions’ of employment create the ‘zone of special danger’ out of which the injury arose. Id., at 506-07.

Once the presumption is invoked, the burden of proof shifts to the Employer to rebut it with substantial countervailing evidence that the Claimant’s condition was not caused or aggravated by his employment conditions. Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. Id. In such instance, the administrative law judge must weigh all of the evidence relevant to the causation issue. If the record evidence is evenly balanced, then the employer must prevail, because the claimant has not met the ultimate burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994).

Discussion

The evidence of record establishes that Dr. Robbin Kay, a state-licensed psychologist, diagnosed the Claimant with PTSD (post-traumatic stress disorder).¹⁶ CX 1 at 90-93. Although Dr. Kay’s opinion is not entirely clear as to whether the IED explosion in October 2005 or other events in Iraq constituted the trigger for the Claimant’s PTSD, she did opine that the Claimant’s

¹⁶ Dr. Kay’s professional qualifications are not of record. However, Dr. Kay’s letterhead indicates that Dr. Kay holds a Ph.D. degree; a New Jersey license number is also given on the letterhead. CX 1 at 90.

PTSD was related to his back injury. As the parties have stipulated that the Claimant's back injury is occupational in origin, I infer that Dr. Kay's opinion is sufficient to assert a connection between the Claimant's employment and PTSD. Based on the evidence of record, specifically including Dr. Kay's opinion, I find that the Claimant has established the elements of a prima facie case regarding PTSD. That is, he has established, through Dr. Kay's opinion, that he has suffered a "harm." I specifically note that Dr. Kay identified symptoms (such as nightmares and flashbacks, as well as self-isolating behaviors) which, in her estimation, pointed to PTSD.

In addition, I find that the Claimant has also established the second element of a prima facie case: that is, that an accident occurred, or conditions existed, that could have caused, accelerated, or aggravated the harm. The parties have already stipulated that the Claimant experienced an IED blast in October 2005. Indeed, in addition to the Claimant's testimony there is ample documentation of the incident, in which the Claimant was in the proximity of the detonation. CX 5, 6. I find that this IED blast, in itself, may be sufficient to establish the second element of the Claimant's prima facie case. In the event that the IED explosion is not sufficient, I find that the Claimant's un rebutted testimony, in which he recounted multiple times when he was subjected to hostile fire as he drove his truck in a convoy, is sufficient to establish this element. T. at 41-42; EX 20 at 25-26.

The Employer has provided no expert evidence to rebut the Claimant's contention that he suffered PTSD related to his employment in Iraq. In the post-hearing brief, the Employer argued that Dr. Kay's report is "flawed" because the Claimant told Dr. Kay, incorrectly, that he did not have any substance abuse issues in his past. Employer's brief at 7. The Employer asserts that, because the Claimant's credibility thus is questionable, any diagnosis based on information provided by the Claimant is not reliable. Id.

Upon my review of Dr. Kay's report, I find that the Claimant did address, at least in part, a past history of substance abuse, including a stint in rehabilitation. CX 1 at 91. As the Employer noted, however, in his deposition, the Claimant also admitted to past use of illegal drugs.¹⁷ He also stated that any use of such substances was more than 10 years in the past. EX 20 at 10-11. Although the Claimant may not have been entirely forthcoming with Dr. Kay regarding past drug use, I cannot conclude – based on Dr. Kay's report – that the Claimant failed to disclose all drug use problems. In addition, although the Employer has posited that Dr. Kay's report is of little value because of a misapprehension about the Claimant's drug history, the Employer has not provided any expert opinion evidence regarding the effect of an undisclosed remote (more than 10 years past) drug use history would have on a diagnosis of PTSD related to more recent experiences. At the hearing, which last for approximately 90 minutes, I observed the Claimant during his testimony. Based on my observation, I find the Claimant's testimony to be credible; I did not discern any attempt by the Claimant to minimize or conceal his past.

Based on the foregoing, I find that the Employer has failed to rebut the presumption that the Claimant has PTSD that arose from his covered employment. Therefore, I also find the

¹⁷ Contrary to the Employer's implied contention, I find the Claimant did not admit to use of any specific illegal drugs.

Claimant has established that he has PTSD, and that his PTSD is causally related to his employment.

Regarding the Claimant's allegation of damage to his hearing, the evidence establishes that the Claimant underwent a pre-deployment physical examination, which included a hearing test, in August 2004, before he departed for Iraq. CX 1 at 15; EX 8 at 15. These results constituted a "baseline" from which the Claimant's change in hearing, in February 2010, was determined based on audiogram testing. CX 16. In addition, the evidence of record indicates the Claimant complained of damage to his hearing, immediately after the IED blast in October 2005, and continued to seek medical treatment relating to hearing problems ("tinnitus") for some time thereafter.¹⁸ CX 1 at 19-24. I find that the Claimant's failure to indicate a continuing problem with his hearing, when he sought treatment for an insect bite to his ear in April 2006, is not material to the issue of whether his hearing loss is occupationally-related. The record of his medical treatment at that time indicates the Claimant reported an acute problem, which was appropriately treated.¹⁹ CX 1 at 26.

As is required under the Act, the Claimant's most recent audiogram was conducted by a certified audiologist. § 908(c)(13)(C). In addition, there is no contrary evidence regarding the Claimant's hearing levels, as of February 2010.²⁰ This test record supports the Claimant's assertion of bilateral hearing loss. There is no evidence from the Employer contravening the Claimant's assertion on this point. I find, therefore, that the Claimant has established a bilateral hearing loss. I also find there is no medical evidence to establish that the Claimant currently exhibits tinnitus.

Maximum Medical Improvement

The Act does not provide standards to distinguish between classifications or degrees of disability. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Care v. Washington Metro Area Transit Authority, 21 BRBS 248, 251 (1988).

The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI). The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. Seidel v. General Dynamics Corp., 22 BRBS 403, 407 (1989); Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155, 157 (1989). Any disability

¹⁸ Notably, the Claimant's claim alleges unspecified injury to "ears" and "hearing." CX 7, 13. I find the Claimant's claim can be construed to encompass both tinnitus and hearing loss.

¹⁹ The medical credentials of the health care provider are not noted in the record.

²⁰ I note there is an additional hearing test record, dated December 5, 2005, which was shortly after the IED incident in which the Claimant complained of hearing difficulties. CX 1 at 24-25; EX 11 at 2-3. These records also indicate the Claimant had a bilateral hearing loss, when compared with his pre-deployment baseline test.

before reaching maximum medical improvement is considered temporary in nature. See Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231, 234 (1984).

Discussion

The parties have stipulated to the Claimant's work-related back injury, and also have stipulated that the Claimant reached MMI as of July 16, 2008, which was approximately one year after his back surgery. T. at 7.

The issue of an impairment or injury to the Claimant's hearing or ears is in contention; so I infer that there is no stipulation regarding any MMI as to the Claimant's hearing. Although there is evidence presented regarding the Claimant's hearing loss, this evidence does not indicate whether the Claimant's hearing loss is permanent. CX 16. However, the most recent hearing test of record test was conducted three years after the Claimant returned from Iraq. Due to the length of time between the Claimant's return from Iraq and the most recent hearing test, I find that this test establishes that the Claimant has attained MMI regarding any hearing loss. Consequently, I find that the date of MMI is February 3, 2010, the date of the most recent test.

Disability

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." § 902(10). The claimant bears the initial burden of establishing a prima facie case of disability. Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial).

In order to establish a prima facie case of total disability under the Act, a claimant must establish that he can no longer perform his former job due to his job-related injury. Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339, 342-43 (1988). He need not establish that he cannot return to any employment, only that he cannot return to his former employment. Elliot v. C&P Telephone Co., 16 BRBS 89, 91 (1984). Once the claimant has established he cannot return to his usual work, he has established a prima facie case of disability, and the burden shifts to the employer to establish the availability of suitable alternate employment. Caudill v. Sea Tac Alaska Shipbuilding, 25 BRBS 92, 96 (1991), aff'd mem sub nom., Sea Tac Alaska Shipbuilding v. Director, OWCP, 8 F.3d 29 (9th Cir. 1993).

Under the Act, exclusive compensation for certain types of permanent partial disability is set forth in § 908(c) as "scheduled" injuries. Compensation for bilateral hearing loss is a type of scheduled injury. Under appropriate circumstances, a Claimant may receive compensation for a scheduled injury in addition to permanent disability compensation. Frye v. Potomac Electric Boat Co., 21 BRBS 194, 197 (1988). See also Green v. ITO Corp of Baltimore, 32 BRBS 7, rev'd at 185 F.3d 239 (4th Cir. 1999). However, compensation may never exceed the statutory maximum for permanent total disability. § 908(a); Padilla v. San Pedro Boat Works, 34 BRBS 49, 52-53 (2000).

Discussion

Records from Dr. Blecher, the Claimant's treating physician, dated July 16, 2008 (the stipulated date of MMI), indicate that the Claimant was unable to return to his usual employment and that the Claimant also had significant restrictions on his ability to work (e.g., breaks required for posture changes, limited length of driving). CX 1 at 102. There is no evidence that these restrictions are no longer applicable to the Claimant.

In addition, subsequent to the date of the stipulated MMI, the Claimant continued treatment with Dr. Bram for pain management. The record indicates that Dr. Bram provided Dr. Blecher with copies of his treatment notes, at least intermittently. I presume, therefore, that Dr. Blecher was aware of the Claimant's pain management issues. According to the records of Dr. Bram's treatment, the Claimant continued to experience "intractable thoracic pain" even after reaching MMI, and was continuing treatment for his pain. Dr. Bram's treatment records do not indicate the Claimant is unable to work. Indeed, the most recent medical treatment notes, dated January 2009, indicate the Claimant has shown "functional and social improvement," notwithstanding a PTSD diagnosis. CX 1 at 107.

As set forth above, compensation for hearing loss is a scheduled injury under § 908(c)(13). Compensation for bilateral hearing loss is based on 200 weeks of compensation, and determinations of the degree of hearing loss are to be made in accordance with the guides for evaluation of permanent impairment promulgated by the American Medical Association. §§ 908(c)(13)(B), (E). I have reviewed the determination of hearing loss calculated in CX 16. I find this calculation, 7.5%, is equivalent to the level of disability set forth in the American Medical Association's Guides to the Evaluation of Permanent Impairment, 5th edition (2001) ("Guides"), based on the results of the Claimant's baseline hearing test (of August 2004) and his test of February 2010.²¹ Consequently, I find compensation for the Claimant's hearing loss is 15 weeks of compensation at the appropriate rate.

Alternative Employment

Once a prima facie case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. Clophus v. Amoco Prod. Co., 21 BRBS 261, 265 (1988). Total disability becomes partial on the earliest date on which the

²¹ Neither party has submitted the applicable sections of the Guides into evidence. However, per 29 C.F.R. § 18.201, I may take official notice of adjudicative facts, including matters "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." 29 C.F.R. § 18.201(a)(2). The criteria for assessment of hearing loss are found at Sections 11.1 through 11.2a of the Guides, and include Table 11-2. Per table 11.2, computation of binaural (both ears) hearing loss based on the sums of measurements taken at 500, 100, 2000, and 3000 Hz of 120 in each ear, as in the Claimant's case, is 7.5%. I also have taken into consideration that the sums of these measurements taken in the Claimant's pre-deployment testing was less than 100, which per Table 11-2 indicates no hearing impairment. See LINDA COCCHIARELLA ET AL., GUIDES FOR THE EVALUATION OF PERMANENT IMPAIRMENT, 246-251 (5th ed. 2001).

employer establishes suitable alternative employment. Palombo v. Director, OWCP, 937 F.2d 70, 73 (2d Cir. 1991); Rinaldi v. General Dynamics Corp., 25 BRBS 128, 131 (1991). Suitable alternative employment must take into consideration factors such as the relevant labor market, the Claimant's educational background and skills, and the Claimant's physical limitations based on his disability. American Stevedores v. Salzano, 538 F.2d 933 (2d Cir. 1976), aff'g 2 BRBS 178 (1975).

The Employer submitted a labor market survey from Kay McLaughlin, a vocational case manager and rehabilitation counselor, dated August 5, 2008. Ms. McLaughlin examined some medical records pertaining to the Claimant, and also interviewed him in June 2008. In her report, Ms. McLaughlin listed several jobs, which she stated were "located and available in [the Claimant's] geographical location." It is not entirely clear, from her report, what she determined the geographic location to be. Notably, although business names are mentioned, addresses and telephone numbers are not provided, so the locations of these businesses are not known.²²

In Ms. McLaughlin's report, she noted that the Claimant has a GED diploma and has worked in various industries. She also noted he holds a Commercial Driving License and reported he is able to drive his own vehicle. Ms. McLaughlin referred to a Functional Capacity Evaluation (which is not of record), dated November 2007, which indicated the Claimant could perform light to medium work and could lift up to 35 pounds occasionally.

Ms. McLaughlin compiled a listing of jobs which, in her opinion, the Claimant could perform, based on the Claimant's work experience, skills, and limitations. There is no indication that the Claimant has any work-related limitations based on PTSD or hearing loss, and none were addressed in Ms. McLaughlin's report. I find, therefore, that the only injury-related limitations to the Claimant's employment are limitations based on his back injury.

Except for two jobs, the pay Ms. McLaughlin cited was the "NJ DOL wage information" and not the wage the employer was offering. The exceptions were positions at Eveready Express and Teksystems, Inc. The pay listed for these jobs was \$16.00-\$18.00 per hour (Eveready Express) and \$9.62-\$11.06 per hour (Teksystems). The Teksystems job included work from home.

The Claimant presented a handwritten matrix showing attempts to contact employers about job openings. CX 15. For Eveready Express, the Claimant's notation reads, "2 HR [hour] commute each way. Not hiring. Insurance regs. Meds." I infer from this information that this company is located two hours from the Claimant's home. I also infer that the company would not hire the Claimant, possibly due to insurance concerns with his multiple medications. Regarding Teksystems, the Claimant's notations indicated he contacted the company online and the company never contacted him.

²² In addition, some of the businesses listed (Family Dollar Stores, Comcast Corporation, Coca-Cola Enterprises) could have multiple locations.

Discussion

The Employer is required to show that jobs for the Claimant are available in the “local community.” “Local community” has been interpreted to comprise the area in which the Claimant was working at the time of the injury. See Palombo v. Director, OWCP, 937 F.2d 70 (2d Cir. 1991). Upon his return from Iraq the Claimant relocated to Brick, New Jersey, where he owns a home. EX 20 at 5-6. I find, therefore, that it is appropriate to consider the area in which the Claimant currently resides as the “local area” for purposes of job availability. See See v. Washington Area Metropolitan Transportation Authority, 36 F.3d 375 (4th Cir. 1994).

Based on the evidence submitted by the Employer, and considering the Claimant’s physical condition, job skills and work experience, I find that the Employer’s labor market survey is minimally sufficient to provide information about job opportunities for the Claimant and the potential salaries that he could expect to earn. With regard to the positions for which nonspecific salary information was listed (such as information from the New Jersey Department of Labor (“NJ DOL”), I find the information is insufficient to establish the Claimant’s potential earnings. The salaries that are listed are salaries for the particular job category and are not the wages at which the employer is offering any position.

For the remaining two positions, at Eveready Express and Teksystems, I find that the Employer’s labor market report provides sufficient information to establish specific wage information for those employers. However, I also find that the Claimant has established that a position at Eveready Express is not available to him. The Claimant’s evidence, set forth at CX 15, indicates that he contacted the company, spoke with a particular person, and was informed the company would not hire him (it is unclear, from the Claimant’s written notes, whether the company was not hiring at all or merely was not interested in hiring him, but in either event the Claimant has established that there is no job available for him there).

With regard to the position at Teksystems, I find that the Claimant’s evidence is insufficient to counter the evidence proffered by the Employer, which is that a position was available at a specified wage. Because the Employer’s report indicates this is a “work from home” position, I find that performance of this job is possible, within the Claimant’s physical limitations. I find, therefore, that the Employer has established suitable alternate employment exists, at a wage of \$9.62 per hour (the minimum wage cited for the position at Teksystems), as of August 5, 2008, the date of the Labor Market Survey Report.

I find therefore, that the Claimant’s wage-earning capability in alternate employment is \$384.80 per week, representing 40 hours of work at \$9.62 per hour, commencing on August 5, 2008.

Average Weekly Wage

Compensation for permanent partial disability is based on the difference between the claimant’s pre-injury average weekly wage and post-injury wage earning capacity. Section 908(c)(21) states: “the compensation shall be 66 2/3 per centum of the difference between the average weekly wages of the employee and the employee’s wage-earning capacity thereafter in

the same employment or otherwise, payable during the continuance of partial disability.” Under § 906(b)(1), the maximum amount of disability compensation payable is 200% of the applicable national average weekly wage, as determined by the Secretary of the Department of Labor. For the period encompassing the date of the Claimant’s injury, January 2007, the maximum amount payable is \$1,114.44 per week.

In this case the parties have not stipulated as to the Claimant’s average weekly wage. Consequently, I must determine the applicable average weekly wage. The evidence before me indicates the Claimant was employed by the Employer in Iraq from August 2004 to January 2007. EX 20 at 23 to 31. The Claimant was paid a “base wage” by the Employer of \$3,000 per month, and also was eligible for additional bonuses, differentials, and hazard pays. EX 1 at 4. These additional pays are included in the computation of average weekly wage. Denton v. Northrop Corp., 21 BRBS 37 (1988); S.K. v. Service Employees Int’l, Inc., 41 BRBS 123 (2007).

Section 910(a) of the Act bases the average weekly wage calculation on the claimant’s daily wage for the one year period prior to the injury. The Claimant’s average daily wage is not of record. However, I am satisfied that sufficient information regarding his yearly wages for the employer is of record. The object of § 910(c), which may be used when the method prescribed in § 910(a) is not feasible, is to arrive at a sum that reasonably represents a claimant’s annual earning capacity at the time of his injury. Story v. Navy Exchange Service Center, 33 BRBS 111 (1999). This section permits the aggregate annual wage to be used as a basis for a determination of average weekly wage.

The record establishes that the Employer paid the Claimant \$92,847.29 in 2005 and \$91,915.39 in 2006. CX 10. In addition, the record establishes the Employer paid the Claimant a total of \$92,611.03 in gross wages for the period from March 2006 to February 2007. EX 10. I am satisfied, based on the record, that all of the Claimant’s earnings during these periods were for substantially the same type of work: that is, driving trucks in Iraq. Although the wage records are not detailed, I am satisfied that the record establishes the Claimant’s annual wage, for the period from January 2006 to January 2007, was approximately \$92,300.00.²³ Consequently, I find that the Claimant’s applicable average weekly wage was \$1,775.00.

Based on an average weekly wage of \$1,775.00, I also find that the Claimant’s compensation rate is limited by statute to the maximum rate, which is \$1,114.44, based on the date of the injury.

²³ The record includes wages for three separate periods of one year: January to December 2005, \$92,487.29; January to December 2006, \$91,915.39; March 2006 to February 2007, \$92,611.03. If these periods are presumed to be equal, the Claimant’s average earnings per year were \$92,337.90. If February 2007 is excluded (because the evidence indicates the Claimant left Iraq at the end of January 2007), the annual rate for the Claimant’s earnings, for the period from March 2006 to January 2007, inclusive, is \$92,691.76.

Medical Treatment

Section 7(b) of the Act authorizes the Secretary through her designees to oversee the provision of health care. § 907(b); see 20 CFR § 702.407. Administrative Law Judges have authority to order payment for medical expenses already incurred, and generally to order future medical treatment for a work-related injury. The record in this case indicates that the Employer has paid for most of the medical expenses incurred by the Claimant to date related to his back, but may not have paid for all medications and additional out-of-pocket expenses. CX 11. The Employer is responsible for payment for the Claimant's medications relating to his back injury. In addition, the Employer is also responsible for out-of-pocket expenses (such as car mileage) related to the Claimant's occupationally-related medical treatment. Day v. Ship Shape Maintenance Co., 16 BRBS 38 (1983).

The record also indicates that the Employer has not paid for any treatment related to PTSD. CX 1a at 1. As I have found the Claimant's PTSD to be work-related, I also find that the Employer shall be responsible for the reasonable costs of treatment for this condition. The Employer shall be responsible for the reasonable costs of such treatment.

Attorney's Fees

Having successfully established the Claimant's right to compensation, the Claimant's attorney is entitled to an award of fees under § 28(a) of the Act. The regulations address attorney's fees at 20 CFR §§ 702.132–135. The Claimant's attorney has not yet filed an application for attorney's fees. The Claimant's attorney is hereby allowed thirty (30) days to file an application for fees. A service sheet showing that service has been made upon all parties, including the Claimant, must accompany the application. The parties have ten days following service of the application within which to file any objections. The Act prohibits the charging of a fee in the absence of an approved application.

Conclusion

In summary, I conclude that the Claimant's occupational disability commenced in January 2007, when he returned from Iraq. Consistent with the parties' stipulation, I find the Claimant attained maximum medical improvement relating to his back injury on July 16, 2008, and has work-related limitations due to his condition. I also find the Claimant has established that he has PTSD and a permanent partial bilateral hearing loss, related to his employment.

Commencing on August 5, 2008, the Claimant has an alternate earning capacity of \$384.80 per week. The Claimant's average weekly wage, at the time of his injury, was \$1,775.00.

ORDER

The claim for benefits filed by the Claimant is **GRANTED**. I therefore **ORDER**:

1. The Employer shall pay temporary total disability compensation to the Claimant effective from January 27, 2007, based on an average weekly wage of \$1,775.00, in accordance with § 908(b).
2. Commencing on July 16, 2008, the date of maximum medical improvement, the Employer shall pay permanent total disability compensation to the Claimant, based on an average weekly wage of \$1,775.00. Effective August 5, 2008, the date suitable alternate employment was established, the Employer shall pay permanent partial disability compensation, based on an average weekly wage of \$1,775.00 and an alternate earning capacity of \$384.80 per week. See §§ 908 (a), (e)
3. The Claimant shall receive compensation for loss of hearing in both ears at a rate of 7.5%, per § 908(c)(13)(B). See also § 908(c)(23). As necessary, compensation payments for this injury shall be adjusted to ensure that payments to the Claimant do not exceed the statutory maximum set out in § 908(a); see also § 906(b).
4. Employer shall receive a credit for amounts of compensation already paid to the Claimant.
5. The Claimant is entitled to interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated in accordance with 28 U.S.C. § 1961.
6. The District Director shall make all calculations necessary to carry out this order.
7. Employer shall pay the Claimant for all reasonable and necessary medical care and treatment arising out of his occupationally related conditions, pursuant to § 7(a) of the Act, 33 U.S.C. § 907(a). Specifically, the Employer shall pay for reasonable treatment for Claimant's PTSD, in accordance with Dr. Kay's recommendation.
8. The Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy on the Claimant and opposing counsel, who shall have ten (10) days to file any objections.

A

ADELE H. ODEGARD
Administrative Law Judge

Cherry Hill, New Jersey