



Issue Date: 30 September 2010

In the Matter of:
MARK D. OPIE
Claimant,

v.

Case No. 2010-LDA-00011

SERVICE EMPLOYEES INTERNATIONAL, INC.
C/O KBR
Employer,

And

INSURANCE CO. OF THE STATE OF PENN.
Carrier

Appearances: Gary Pitts, Esquire
For Claimant

Jerry R. McKenney, Esquire, Billy J. Frey, Esquire and Karen A. Conticello, Esquire
For Employer¹

Before: Daniel F. Solomon
Administrative Law Judge

DECISION AND ORDER

AWARD OF TEMPORARY DISABILITY BENEFITS

This case came to hearing under the Defense Base Act extension to the Longshore and Harbor Workers' Compensation Act on April 13, 2010 in Oklahoma City, Oklahoma. At that time, testimony was taken from Claimant, Mark Opie, and one administrative law judge exhibit, "ALJ" 1, was entered into evidence, eighteen (18) Claimant's exhibits, "CX" 1-CX 18, and the following Employer's exhibits were entered: "EX" 1-EX 3, EX 5, EX 7, EX 9-EX 26 and EX 28. I left the record open for further post hearing development and on July 19, 2010, I held a telephone conference, when I entered CX 19 and EX 31, EX 51 and EX 52.

The parties stipulated that the date of accident was February 19, 2008, the employer/employee relationship at that time is established, and notice of the accident was given to Employer on that date. (d) The date of controvert was April 3, 2008. Transcript, "Tr," pp. 5-6.

¹ Mr. McKenney represented Employer at hearing and during the telephone conferences, while Mr. Frey and Ms. Conticello submitted the Employer's brief in this matter.

Claimant is forty-eight years old, born in Oakland, California and raised in Fresno, California and vicinity. After completing high school he attended college for three years, studying criminology. Prior to completing the requirements of a bachelor's degree, Claimant left college to work at a hardware store. Following several years of working in hardware, Claimant began driving trucks for a living, beginning in 1985 or 1987. As a truck driver Claimant travelled throughout the United States and Canada, at times driving to Mexico as well. He performed this work until he left for Iraq on April 28, 2005 to work for the Employer as a truck driver ("Tr.," pp. 19-20, 22).

Claimant testified that he injured his back in 1982 or 1983, when he fell and hurt his tailbone (Tr., p. 38). He stated the injury did not cause him to miss any work, though he did complete a program of physical therapy. *Id.* On cross-examination, Mr. Opie, on questioning regarding a motorcycle accident, stated that he did not injure his back in that incident, nor did he recall sustaining any neck injury at that time (Tr., p. 46). He further stated that following the motorcycle accident he presented to an emergency room, stayed in the hospital on a Friday night and was discharged the next day, returning to work the following Monday (Tr., pp. 47-48). He testified that he had no psychological issues prior to working for the Employer in Iraq, nor had he experienced any pulmonary problems (Tr., p. 48). He stated that he never had any concussion-related problems, nor had he received any treatment from a psychologist or psychiatrist prior to working in Iraq (Tr., p. 51). He stated that prior to deployment he never injured his back in any way that affected his ability to work (Tr., pp. 38-39, 48, 56).

Claimant passed the Employer's physical examination prior to deployment (Tr., p. 39). The medical questionnaire Claimant completed for the Employer on 04/26/05 shows that he listed issues in his medical history (CX-1, pp. 2-3). On that same date, the Employer's medical administrator found Claimant to be medically cleared for respirator use with no restrictions (CX-1, p. 4). Claimant's spine and lungs were within normal limits, and a chest X-ray showed no active disease (CX-1, pp. 10, 14). An audiometric examination and interpretation were performed, and the administrator declared Claimant qualified to perform any work consistent with his skills and training (CX-1, pp. 10, 13).

In a pre-deployment physical form, which Claimant signed on April 25, 2005, Claimant stated he had suffered back, knee, and neck injuries in a 1983 motor vehicle accident. (Ex. 5 at 3). He also stated that he had been knocked out once in 1976, injured in a snow skiing accident in 1981, involved in motorcycle accidents in 1982 and 1983, been in car accidents in 1983 and 2002, injured in a truck accident in 2003 in which he tore his rotator cuff, and suffered a knee injury in 1995. (Ex. 5 at 3-4). He wrote that he had been taking Celebrex, Darvocet, and Vicoden but had stopped taking those the prior year. (*Id.* at 4, 11). He also stated that he was taking a diet pill, Aslynax. (Ex. 5 at 4). He was found to have mild hearing loss in his left ear at high frequencies and moderate hearing loss in his right ear at high frequencies. (Ex. 5 at 16).

Claimant testified that he left the U.S. for Iraq on April 28, 2005, to be stationed at Camp Anaconda ("Balad"), Iraq (Tr., p. 22). He stated that he worked in Iraq for thirty-four months, hauling bulk fuel for the first year and a half (Tr., p. 23). After that initial period, he began hauling bulk fuel, bulk water and flatbed trailers (Tr., pp. 23-24). Claimant testified that he was subject to multiple enemy attacks on his vehicles and that he could not recall the number of attacks on his convoys (Tr., pp. 24-28). He testified that during his tenure in Iraq his convoy vehicles were hit with twelve improvised explosive devices ("I.E.D.s"), three rocket-propelled grenades ("RPGs"), three independent rockets ("IRLs"), two landmines, three hand grenades and several rounds of small-arms fire, two of which hit him in the back while he was wearing

personal protective equipment (“PPE”) (Tr., pp. 28-30). Claimant's Exhibit 12 displays several photographs of Mr. Opie's vehicles following enemy attacks. Claimant related that he banged his head on the truck window and experienced ringing in the ears following an I.E.D. attack on his truck in June 2005 (Tr., p. 26).

Claimant stated that apart from those enemy attacks occurring while he was “outside the wire,” his camp was also subject to mortar fire 40 to 50 times per day on occasions (Tr., p. 30). Two mortar attacks knocked him off his tanker, he testified. Id. He testified that during his stay in Iraq he was exposed to smoke and fumes from burning fuel tanks and trucks, inhalation of fire extinguisher powder, exposure to multiple dust storms and exposure to open burn pits (Tr., pp. 40-42, 54). He stated that he was required to drive through a mobile X-ray machine once or twice per day (Tr., p. 25).

On February 19, 2008, as Claimant was tying down some signal units on a truck, he lost his balance and fell face-down some five feet, landing on his face, chest and stomach (Tr., pp. 33-34). He presented to the medics a couple days later, he stated (Tr., p. 34).

Jobsite medical records

During 2005², Claimant presented with complaints following one I.E.D. blast; a field medic provided Motrin and recommended Claimant return to full duty (CX-1, p. 15).

On 01/11/06, Claimant complained about a runny nose, productive cough, head congestion and chest congestion, a symptom which had endured for ten days by that time (CX-1, p. 16). The medic assessed Claimant as having sinusitis and prescribed Allegra, Sudogest, Mucinex and a Z-Pack. Id. His next documented visit to the medics, on 05/14/07, involved an incident in which he was sprayed in the left eye with glass cleaner (CX-1, p. 17).

On 07/17/07, Claimant again presented to the medics with symptoms similar to those he experienced in 2006: sinus congestion, chest congestion, runny nose, decreased appetite and a cough, symptoms which had lasted for three days by the time he saw the medic (CX-1, p. 19). On this visit, the medic assessed Claimant as having bronchitis and prescribed Motrin, guaifenesin, Claritin and Zithromax. Id. The medic recommended bed rest for one day. Id. The following day, the medic again saw Mr. Opie, who stated he had been up all night coughing (CX-1, p. 21). The medic administered a nebulizer using albuterol and ipratropium bromide, again recommending one day bed rest. Id.

On 07/19/07, Claimant saw the medic twice. On the first visit, the medic noted Claimant continued to wheeze, so the medic administered the albuterol/atrovent nebulizer once more (CX-1, p. 22). The medic recommended another day of bed rest. Id. At the second visit of 07/19/07, the medic noted Claimant to have bronchitis for five days, though the wheezing remained only on the left side (CX-1, p. 23). The medic again administered the nebulizer treatment. Id. On 07/20/07, the medic saw Claimant and noted the wheezing remained in the left lower lobe; the medic administered another nebulizer treatment (CX-1, p. 25).

Claimant presented to the medics on 01/06/08 following an incident in which his truck caught fire and he extinguished the fire with eight fire extinguishers (CX-1, p. 26). He told the medic he was taken to the medics due to exposure to fire extinguisher inhalation. Id. The medic noted Claimant to have wheezing with an infrequent unproductive cough. Id. The medic administered an albuterol/atrovent nebulizer treatment, opining Claimant had sustained mild smoke inhalation. Id.

The Department of the Air Force issued a memorandum 12/20/06 that the burn pit at Balad Air Base “has been identified as a health concern for several years.” (CX-11, p. 1). The

² The month is illegible.

memorandum lists 21 possible contaminants associated with the burn pit, the author opining there is an acute health hazard for individuals and the possibility of chronic health hazards associated with the smoke. Id. M. Opie testified he was stationed at Balad and the air did not smell good near the pit (Tr., pp. 22, 42).

On February 21, 2008, Claimant presented to the medics complaining of low back pain, groin pain and chest pain (CX-1, p. 33). He told the medic that he fell from a truck on February 19, 2008, landing on his chest and stomach. Id. The medic notified Claimant's supervisor and TTM safety immediately upon his presentation to the clinic. Id. The medic noted Claimant's weight as 275 pounds. Id. The medic assessed Claimant as having low back pain and administered ibuprofen. Id. Claimant left Iraq, arriving in the U.S. on February 26, 2008 for further back treatment (Tr., pp. 34-35).

After his return, Claimant sought medical treatment for his back injury from Dr. Michael Smith on March 7, 2008 (CX-1, pp. 36-38). Dr. Smith noted the complaints of back pain radiating down the leg and up into his mid-thoracic area, as well as Mr. Opie's description of the falling incident (CX-1, p. 36). Dr. Smith performed a physical examination, assessing Claimant as having lumbar-thoracic strain and prescribing physical therapy and 800mg Motrin (CX-1, pp. 37-38). Claimant saw the therapist for an evaluation on March 10, 2008, telling her that he thought his symptoms were worsening (CX-1, p. 39). The therapist opined that Claimant appeared to have lumbar and thoracic strain, recommending Claimant attend physical therapy two times per week for four to six weeks (CX-1, p. 40).

Claimant underwent an MRI of his lumbar spine on 04/03/08 (CX-1, p. 41). The radiologist opined that Claimant had some mild disc bulging and very mild left neural foraminal narrowing at L5-S1. Id. On 04/10/08, Dr. Smith opined that the MRI was a "clean study," giving Claimant a "spine clearance" (CX-1, p. 42).

Dr. Michael Murray, an assistant professor of spine disorders at New York University School of Medicine, performed a peer review of Claimant's medical records on 05/19/08 (E/C EX-26). Dr. Murray noted that Claimant has disc bulging in the low back, on the left side (E/C EX-26, p. 1). Dr. Murray opined back surgery would not be in Claimant's best interest, stating that there was no evidence of instability or any compressive lesion. Id. Dr. Murray opined that Claimant should undergo a program of physical therapy lasting six to eight weeks and that Claimant may need occasional analgesic pain medication. Id.

As surgery was not contemplated, Dr. Smith referred Claimant to Dr. Paul Steurer (Tr., pp. 36-37; CX-1, p. 43), who examined him on April 14, 2008 for a consultation on referral (CX-1, pp. 43-44). Claimant presented to Dr. Steurer with complaints of back pain, leg pain and numbness, tingling and paresthesias at times into his legs (CX-1, p. 43). Dr. Steurer performed a physical examination, noting Claimant weighed 275 pounds with tenderness, soreness and pain to palpation across his lumbar spine. Id. Dr. Steurer assessed Claimant as having lumbosacral strain with disc degeneration (CX-1, p. 44). The doctor recommended epidural steroid injections and medications, including Skelaxin and Vicodin. Id. Dr. Steurer noted Claimant's injury date as 02/19/08 and opined the condition was work-related (CX-1, p. 45).

Dr. Steurer opined in his 07/02/08 narrative that Claimant's diagnosis of back strain and degenerative disc disease "are causally related to his injury that occurred in his back" (CX-1, p. 49). Dr. Steurer opined in his 07/07/09 narrative that at the time he saw Claimant in April 2008, he did present with a work injury and was off-work from February 2008 until the date of Dr. Steurer's examination (CX-1, p. 60). Dr. Steurer further opined that as of April 2008, Claimant had not reached maximum medical improvement ("MMI"). Id.

On 09/18/09, Claimant underwent another lumbar MRI, which showed him to continue to have a mild left protrusion of the L5-S1 disc, “which, although minimal to mild in character is strategically positioned to abut and slightly compress the descending left S1 nerve root...” (CX-1, p. 63). Claimant had low back and bilateral leg pain, as well as left leg numbness and giving out. Id. Dr. Steurer saw Claimant again on 09/28/09, noting there had been no change in the condition, with complaints of back pain, leg pain, numbness, tingling and paresthesias (CX-1, p. 64). Dr. Steurer noted on that date that Claimant was “indefinitely unable to work.” Id.

Claimant saw Dr. John Knudsen for treatment of his back injury (E/C EX-13). On 10/07/09, Dr. Knudsen diagnosed lumbar radiculopathy and herniated nucleus pulposus at L5-S1 as found by MRI (E/C EX-13, pp. 16-17). Dr. Knudsen recommended lumbar epidural steroid injections. Id. He opined that Claimant's history, symptoms and radiographic findings are consistent with a diagnosis of lumbar radiculopathy, and that conservative therapy had not helped (E/C EX-13, p. 16). Dr. Knudsen performed a lumbar epidural steroid injection on 10/08/09 (E/C EX-13, p.15). Dr. Knudsen noted in his 11/23/09 letter to Dr. Eric Hansen, who referred Claimant to Dr. Knudsen, that he had completed a series of three epidural steroid injections with a left L5-S1 transforaminal injection on Claimant (E/C EX-13, p. 12). Dr. Knudsen opined on 11/23/09, “my impression is that his history and symptoms are still consistent with the diagnosis of lumbar radiculopathy and he may benefit more from a transforaminal injection and I did so as above.” Id.

Dr. James Smith stated in his 02/25/10 narrative that Claimant needs to have bariatric surgery prior to undergoing surgery on his lower back (CX-1, p. 67). Claimant testified that he has been unable to exercise to any degree due to his back pain and pulmonary problems (Tr., p. 44). Claimant contends that the weight gain is a natural and unavoidable consequence of the 02/19/08 injury.

Claimant saw Dr. Sami Framjee on 04/28/10 at the request of the Employer/Carrier (E/C EX-51). He took a history, noting the falling incident of 02/19/08 (E/C EX-51, p. 1). Dr. Framjee noted that Mr. Opie's physicians had recommended epidural steroid injections but none had been performed (E/C EX-51, p. 2). Dr. Framjee, upon reviewing the 04/03/08 MRI, opined that the scan showed a bulging disc at L5-S1 (E/C EX-51, p. 3). Dr. Framjee stated that the 09/18/09 MRI scan performed by Freeman Health also showed a bulging disc at L5-S1. Id.

Dr. Framjee concluded that he is unable to identify any evidence of an organic injury to Claimant's spine of a permanent nature secondary to the fall of 02/19/08 (E/C EX-51, p. 7). He also opined: “at the present time are indicative of nonspecific mechanical low back pain,” which Dr. Framjee opines is “primarily due to his morbid obesity.” Id. He does not find any evidence of a permanent impairment to Claimant's lumbar spine secondary to the accident of 2/19/08. Id.

Pulmonary Treatment

Claimant testified that his friends took him to Freeman Health Care in 2008 because he could not breathe (Tr., p. 40). Dr. Curtis King, the physician who saw Claimant at Freeman, opined that Claimant had acute bronchitis and prescribed Pro Air (Tr., p. 40; CX-1, pp. 54-55). On 05/28/09, Claimant saw Dr. Sitaraman Subramanian for treatment of his pulmonary condition (E/C EX-31, pp. 39-41). Dr. Subramanian noted Claimant's account of a chronic cough since 2005 and his exposure to “burn pits” (E/C EX-31, p. 39). Dr. Subramanian recommended that Claimant undergo a CT scan of the chest and of his sinuses to further investigate his chronic cough (E/C EX-31, pp. 40-41). On 08/20/09, Dr. Subramanian recommended Claimant undergo a pulmonary function study with methacholine challenge (E/C EX-31, p. 37). At that time, Dr. Subramanian also prescribed Zithromax and ProAir as needed. Id.

In his 09/15/09 report, Dr. Subramanian noted the pulmonary function study showed Claimant to have mild to moderate obstructive and restrictive type of ventilatory impairment (E/C EX-31, p. 31). Dr. Subramanian assessed Claimant as having COPD with predominant small airway disease, recommending Claimant undergo a sleep study “as he has excessive daytime somnolence and sleep disturbance” (E/C EX-31, pp. 31-32). The pulmonary function study showed Claimant to have restricted lung capacity (E/C EX-31, p. 8).

Dr. Subramanian saw Claimant again on 11/10/09, noting Claimant to have increased coughing at night, at times to the point of losing consciousness (E/C EX-31, p. 28). Dr. Subramanian stated that the sleep study showed Claimant to have sleep apnea and that a CT scan showed Claimant to have chronic sinusitis. Id. Dr. Subramanian referred Claimant to Dr. Hilton McDonald for a sinus evaluation “which may be causing his coughing and drainage especially when he is lying down” (E/C EX-31, p. 29).

Claimant saw Dr. McDonald on 08/19/09 for treatment of his sinus symptoms and for treatment of hearing loss and ringing in the ears (E/C EX-10, p. 16). Dr. McDonald took a history, noting the exposure to an IUD (sic) in Iraq in June 2005. Id. Dr. McDonald diagnosed Claimant as having sustained sensorineural hearing loss related to bomb explosion exposure and multiple other loud noises related to his work in Iraq (E/C EX-10, p. 17). Dr. McDonald recommended hearing testing and hearing aids. Id. The 09/09/09 audiogram results show Claimant to have mild-to-moderately severe sensorineural hearing loss at 2000-8000 Hz and that he is a candidate for hearing aids (E/C EX-10, p. 3). Compared to hearing tests performed in 1994 and 1996, Mr. Opie's hearing appears to have worsened in the higher frequencies (E/C EX-40, pp. 213-214).

Dr. McDonald stated in his 8/19/09 narrative that Claimant has symmetrical, mild-to-moderate hearing loss which is symmetrical, worsened in the higher frequencies and consistent with noise exposure (E/C EX-10, p. 18).

Claimant contends the record establishes a prima facie case of compensable hearing loss which the Employer/Carrier has failed to rebut, offering no evidence to the contrary.

Neuropsychological Injury

Dr. Taylor Bear, Claimant's neurologist referred him to a neuropsychologist for treatment for his reported memory problems and mood swings. (Ex. 8 at 47-49). Claimant said that he “used to get along with everybody. And I mean everybody. Now I don't.” (Ex. 8 at 49). He said he used to talk more to other people than he does now and he sometimes gets nervous about going out in public. (Ex. 8 at 49). He said he first noticed these issues when his friends pointed them out to him in May, June, or July of 2008. (Ex. 8 at 49).

Since returning from Iraq, Claimant has had trouble sleeping and experienced nightmares; the bad dreams, however, usually do not have anything to do with the war zone. (Tr. 32). He wakes up coughing and/or vomiting several times a week. (Tr. at 32). He has taken the muscle relaxer Skelaxin, hydrocodone, and ibuprofen to sleep. He also finds some relief with a sleep apnea machine. (Tr. at 31-32).

On 03/19/10, Claimant saw Dr. Paul Iles for neuropsychological testing as recommended by neurologist Dr. Taylor Bear (CX-19). Dr. Iles took a history, noting Claimant's work in Iraq (CX-19, p. 2). Claimant related his experiences with enemy fire, including small arms fire, rockets and roadside bombs. Id. Claimant told Dr. Iles that he experienced some head trauma as a result of the enemy attacks on his truck and that he began to experience ringing in the ears while in Iraq. Id. He alleged racing thoughts, bad dreams, depression and memory problems. Id. Dr. Iles noted that Claimant showed evidence of depression, anxiety and some symptoms related

to Post Traumatic Stress Disorder. Id. He also alleged deficits in balance and coordination, suffering from dizzy spells which has resulted in several falls (CX-19, p. 8). Following the administration of multiple tests, Dr. Iles opined, “vestibular disorders appear approximately 47% of the time after a traumatic brain injury, such as Mark received in the cab of his truck in Iraq on more than one occasion.” Id. Dr. Iles also stated, “the vestibular system influences the autonomic nervous system, which explains why individuals may have problems breathing, or may develop nausea, dizziness or an irregular heart rate when this system is overwhelmed” (CX-19, p. 9). psychological distress. (Id.).

Dr. Michael Murrell, Psy.D. evaluated Claimant on March 19, 2010. Dr. Murrell found Claimant had anxiety and mild to moderate depression. (Cx. 19 at 9). Claimant also exhibits somatic symptoms. Therefore, “it is possible that he may tend to amplify any physical and/or cognitive problem that he may be experiencing at this time.” (Id.). He stated that Claimant “has experienced or seen a severe traumatic event that still bothers him. This is related to his several near death experiences in Iraq. He is exhibiting many symptoms related to a Post Traumatic Stress Disorder. However, his symptoms have decreased over time and he no longer meets the diagnostic criteria for a Diagnosis of a Post Traumatic Stress Disorder.” (Id.) He concluded that “There is no evidence of significant cerebral dysfunction and/or a neuro-degenerative brain disorder at this time.” (Id.). Dr. Murrell’s recommendations included psychotropic medication and therapy to treatment the depression, increased physical activity, and memory aides. (Id. at 10).

Dr. Russell L. Adams examined Claimant on June 2, 2010. (Ex. 53 at 16). Dr. Adams also reviewed and analyzed Claimant’s medical records and radiological tests. (Ex. 53 at 1-11). Dr. Adams performed numerous psychological tests on Claimant during that time and evaluated the results. (Ex. 53 at 12). Based on his review of Claimant’s records, test results, and the examination, Dr. Adams opined:

Mr. Opie’s current neuropsychological test performance was within normal limits on measures of cognitive functioning including tests of intelligence, attention/concentration, memory, language, visuospatial skills, and executive functioning. His overall neuropsychological test results are not suggestive of mild traumatic brain injury or Post-Traumatic Stress Disorder.

(Ex. 53 at 16).

He further found that results suggest Claimant is suffering from a Major Depression Disorder, which is exacerbating his reported back complaints. (Id.). Dr. Adams found that Claimant’s depression is treatable and “would not and does not prevent him from working.” (Ex. 53 at 18-20). Dr. Adams found that from a psychiatric/psychological perspective, Claimant is not considered occupationally impaired. (Ex. 53 at 21). Finally, Dr. Adams recommended that Claimant engage in psychotherapy to help him in developing healthier coping mechanisms; Dr. Adams also suggested that Claimant may benefit from psychopharmacological intervention.

Vocational Testimony

Wallace A. Stanfill, a certified rehabilitation counselor, conducted a vocational rehabilitation assessment. In his assessment, Mr. Stanfill first noted that once Claimant’s medical conditions have been successfully treated, it is hoped he will be able to return to his prior occupation with no permanent loss of wage earning capacity. (Ex. 56 at 6). He further determined that, given the medical information presently available, if Claimant’s medical recovery results in some physical limitations, his significant work background in the transportation industry and his associated skills would readily transfer to a variety of jobs in that

industry that involve either light or medium demands. (Ex. 56 at 6). Mr. Stanfill identified ten such jobs including commercial truck driver, street sweeper operator, courier, and form grader operator, among others. (Ex. 56 at 6).

Mr. Stanfill then conducted a Labor Market Survey of the Joplin, Missouri, and international areas. He identified jobs including:

- (1) Heavy truck driver in Afghanistan for ITT Corporation paying \$3,950 per month;
- (2) Truck driver based out of Geismer, Louisiana, for Honeywell International, Inc. making \$450 per week plus \$150 per load for trips less than 331 miles and \$0.213 per mile for trips above \$331 miles;
- (3) Heavy Truck Driver (two positions available) for Fluor in Afghanistan making \$4,100 per month;
- (4) Regional truck driver working out of Kansas City, Missouri, for J.B. Hunt Transport Services, Inc. making \$.32 per mile with an average of 2500 miles per week (company-estimated annual pay of \$42,000);
- (5) Regional truck driver out of Kansas City, Missouri, which involves short trips averaging up to 500 miles making \$34,000 to \$49,000 plus mileage and accessorial pay plus potential for \$.02-\$.03/mile based on performance bonus;
- (6) Airport maintenance worker for the City of Joplin making \$10.62 per hour; and
- (7) Parts runner for Roper Honda in Joplin, Missouri, which involves driving a pickup truck to deliver parts and automobile accessories to various area locations, making \$9.00 per hour.

(Ex. 56 at 7-10).

Finally, Mr. Stanfill noted that Missouri's governmental data concerning vehicle operation wages posted on a statewide basis revealed that in 2009 the average salary of experienced drivers employed as heavy truck drivers was \$43,990, while the average annual salary for light truck drivers was \$33,870. (Ex. 56 at 7).

FINDINGS OF FACT AS TO MEDICAL CONDITION BACK INJURY

To invoke the Section 20 (a) presumption a claimant need only establish that (1) he suffered an injury or harm, and (2) employment conditions existed which could have caused, aggravated, or accelerated his condition. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 287 (5th Cir. 2003) (citing *Conoco v. Director, OWCP*, 194 F.3d 684, 687 (5th Cir. 1999)). The presumption then operates to link the harm with the employment. *Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6(CRT) (5th Cir. 1986). An injury need not be traceable to a definite time, but can occur gradually, over a period of time. *Gardner v. Bath Iron Works Corp.*, 11 BRBS 556 (1979), aff'd sub nom. *Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). In order to invoke Section 20(a), a claimant is not required to introduce affirmative medical evidence establishing that the working conditions in fact caused the alleged harm. Claimant's theory must go beyond "mere fancy" - he need only show the existence of working conditions which could conceivably cause the harm alleged. *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989).

Once claimant establishes his prima facie case, the Section 20(a) presumption applies to link the harm or pain with claimant's employment. *Lacy v. Four Corners Pipe Line*, 17 BRBS 139 (1985); *Graham v. Newport News Shipbuilding & Dry Dock Co.*, 13 BRBS 336 (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 Section 20(a) presumption is also applicable in psychological injury cases. *Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994).

Once the Section 20(a) presumption has been invoked, the Employer/Carrier, in order to rebut the presumption, must present substantial evidence that the claimant's work conditions did not cause the injury. *Ortco*. “Substantial evidence” has been defined as “such evidence as a reasonable mind might accept as adequate to support a conclusion.” *Sprague v. Director, OWCP*, 688 F.2d 862, 865 (1st Cir. 1982) (quoting *Parsons Corp. v. Director, OWCP*, 619 F.2d 38, 41 (9th Cir. 1980). If the employer is able to meet this burden, he rebuts the Section 20(a) presumption, and I must then weigh all the evidence and render a decision supported by substantial evidence. *Noble Drilling Co. v. Drake*, 795 F.2d 478, 481 (5th Cir. 1986).

I find that Employer has offered no evidence to rebut that a physical back injury occurred. Employer’s records show treatment in-country, Cx1, p.33, and Employer has stipulated that the accident occurred. Although Employer also argues that Claimant left Iraq on his own accord and was not on a medical leave of absence, but was still employed and believed he could go back to work once he improved. (Citing to Ex. 8 at 107; Tr. 34-35). However, I find that the medical evidence substantiates Claimant’s rendition of the facts. In fact, Employer can not dispute that the Claimant was injured in Iraq, although it is reasonable that I should scrutinize the extent of injuries sustained.

I accept that the Claimant’s job was “medium” exertionally as there was lifting and carrying of items weighting at least fifty pounds involved. In fact, the job is listed as “Heavy Truck Driver” and the vocational expert, Mr. Stanfill cited to Dictionary of Occupational Titles Number 904.383-010. Ex.56, p.4. That reference is to medium work.³

Subsequently, Claimant was treated for a back impairment from Dr. Michael Smith beginning March 7, 2008 (CX-1, pp. 36-38). Dr. Smith noted the complaints of back pain radiating down the leg and into his mid-thoracic area, as well as Claimants description of the falling incident (CX-1, p. 36). Dr. Smith performed a physical examination, assessing Claimant as having lumbar-thoracic strain and prescribing physical therapy and 800mg Motrin (CX-1, pp. 37-38). An MRI of his lumbar spine disclosed some mild disc bulging and very mild left neural foraminal narrowing at L5-S1. Id. On 04/10/08, Dr. Smith opined that the MRI was a “clean study,” giving Claimant a “spine clearance” (CX-1, p. 42).

As surgery was not contemplated, Dr. Smith referred Claimant to Dr. Paul Steurer (Tr., pp. 36-37; CX-1, p. 43), who examined him on April 14, 2008 for a consultation on referral (CX-1, pp. 43-44). Dr. Steurer assessed Claimant as having lumbosacral strain with disc degeneration and recommended epidural steroid injections and medications, including Skelaxin and Vicodin. Dr. Steurer noted Claimant's injury date as 02/19/08 and opined the condition was work-related (CX-1, p. 45). Dr. Steurer opined in his 07/02/08 narrative that Claimant's diagnosis of back strain and degenerative disc disease “are causally related to his injury that occurred in his back” (CX-1, p. 49). Dr. Steurer opined in his 07/07/09 narrative that at the time he saw Claimant in April 2008, he did present with a work injury and was off-work from February 2008 until the date of Dr. Steurer's examination (CX-1, p. 60). Dr. Steurer further opined that as of April 2008, he did not declare Claimant to have reached maximum medical improvement (“MMI”). Id. On 09/18/09, Claimant underwent another lumbar MRI, which showed him to continue to have a mild left protrusion of the L5-S1 disc, “which, although minimal to mild in character is strategically positioned to abut and slightly compress the descending left S1 nerve root...” (CX-1,

³ *Department of Labor Dictionary of Occupational Titles* (4th Ed., Rev. 1991)

p. 63). The history noted Claimant had a low back and bilateral leg pain, as well as left leg numbness and giving out. Id. Dr. Steurer saw Claimant again on 09/28/09, noting there had been no change in Claimant's condition; back pain, leg pain, numbness, tingling and paresthesias (CX-1, p. 64). Dr. Steurer noted on that date that Claimant was "indefinitely unable to work." Id.

Although Employer argues that nothing in the record "other than Claimant's speculation indicates that his work caused or was related to his back pain, Claimant also directs me to Dr. Murray: "it would appear from the history and notes presented to me that the specific incident described in detail that caused his pain is consistent with a lumbar strain," and, "...his history is consistent with a lumbar strain." Id. Dr. Murray states no opinion on Claimant's work status, and did not release Claimant to return to work.

Dr. Knudsen opined that Claimant's history, symptoms and radiographic findings are consistent with a diagnosis of lumbar radiculopathy, and that conservative therapy had not helped (E/C EX-13, p. 16). Dr. Knudsen performed a lumbar epidural steroid injection on 10/08/09 (E/C EX-13, p.15). Dr. Knudsen noted in his 11/23/09 letter to Dr. Eric Hansen, who referred Claimant to Dr. Knudsen, that he had completed a series of three epidural steroid injections with a left L5-S1 transforaminal injection on Claimant (E/C EX-13, p. 12). Dr. Knudsen opined on 11/23/09, "my impression is that his history and symptoms are still consistent with the diagnosis of lumbar radiculopathy and he may benefit more from a transforaminal injection and I did so as above." Id.

Employer also produced a report from Dr. Framjee who examined Claimant on April 28, 2010, and reviewed his medical records and radiological results. He determined that Claimant is morbidly obese, found no evidence "of an "organic" injury to the patient's lumbar spine of a permanent nature secondary to the fall of 02-19-2008. That patient's symptoms at the present time are indicative of nonspecific mechanical low back pain primarily due to his morbid obesity. The MRI scan of the lumbar spine does not indicate any prosttraumatic pathology. He found no need for treatment and no rating based on the AMA Guidelines, 5th edition. "I am unable to find any evidence of permanent impairment to the lumbar spine secondary to the accident of 02-19-2008."

Claimant contends that the Employer/Carrier has failed to rebut the Section 20(a) presumption that the fall of 02/19/08 could have caused his back injury or aggravated a preexisting condition. If I were to accept the opinion of Dr. Framjee, there would have been no impairment as of April, 2010. However, I note that he did not specifically comment on whether the Claimant had been fit to work when he was treated by the other physicians. I note that both Drs. Steuer and Murray agree that there was a residual sprain resulting from the accident, and therefore, Dr. Framjee's diagnosis and prognosis is a minority opinion. I note further that Dr. Knudsen determined that there is lumbar radiculopathy, and that conservative therapy had not helped. Dr. Knudsen opined on 11/23/09, "my impression is that his history and symptoms are still consistent with the diagnosis of lumbar radiculopathy and he may benefit more from a transforaminal injection and I did so as above." Id. Dr. Hansen would rely on Dr. Knudsen's diagnosis.

In reviewing Dr. Franjee's report, although the other readers of the MRI exams found some positive findings that are consistent with other findings that confirm the alleged back and leg pain, numbness, tingling and paresthesias, Dr. Franjee did not. He did not comment on whether the injections had been medically necessary, and if so whether they were necessitated due to the 2008 injury from Iraq. Moreover his statement that any impairment is due to morbid obesity does not consider whether the Claimant's weight had been affected by his service in Iraq.

Claimant testified that his back hurts “all the time,” and the ankles are swollen so much that he has to elevate them, and the feet “tingle,” and sometimes the legs give way and he falls. Tr, pp. 32-33, 44.

I noted at hearing that the legs looked swollen and that the Claimant sat in a “guarded” position, as if he needed to avoid pain. I also noticed that his movements and gait were slow.

Neither party elicited from the physicians exactly what the limitations on work related activities might have been since the date of onset, or set forth a date at which the alleged impairment might have stabilized. When he was a patient in Akron in 2008, a physical therapist evaluated Claimant; however, that was in March, 2008, before therapy, and the injections were initiated. EX 52, pp. 21-22 and CX 1 pp. 39-41.

Neurologist Dr. Taylor Bear evaluated Claimant on December 21, 2009. (Ex. 12 at 11-13). Claimant was found to have chronic back pain with intermittent numbness bilaterally in the lower extremities. (Id.).

Claimant argues that Dr. Framjee also reviewed the medical records, including records relating to an involvement in a motor vehicle accident in 2003, but no mention is made of a history of Claimant having a back problem in those records prior to 2/19/08. Id.

Dr. Framjee does not state what is causing Mr. Opie's mechanical back pain other than to state that it is primarily due to Mr. Opie's weight. He does not opine in his report that Mr. Opie's back pain is due solely to his weight, nor that the accident of 02/19/08 did not cause the pain or aggravate a preexisting condition. Id. This does not equate to a “ruling out” standard, only that Dr. Framjee's report does not constitute substantial evidence to the contrary that the fall of 02/19/08 could have caused or aggravated Mr. Opie's back condition, as there is no evidence in the record that Claimant was symptomatic prior to 02/19/08.

Brief.

Claimant argues further that similarly, Dr. Framjee relates the current pain entirely to obesity, and Dr. Framjee notes the weight as 394 pounds (E/C EX-51, pp. 3, 7). Claimant directs me to the record showing that he was asymptomatic prior to 2/19/08, complained of back pain to the medics on 02/21/08, when he weighed 275 pounds, or 119 pounds less than he weighed on 04/28/10 (Tr., pp. 38-39; CX-1, p. 33). Claimant was asymptomatic on 04/26/05, the date the Employer completed his pre-employment physical, and on 01/06/08, 44 days prior to the fall, when he saw the medics for his pulmonary problem (CX-1, pp. 10, 26). At the time of the pre-deployment physical, Claimant weighed 300 pounds (CX-1, p. 10). I am further directed to the fact that when Claimant saw Dr. Steurer, he weighed 275 pounds (CX-1, p. 43).

In order for a pre-existing condition to be manifest it must be clearly diagnosed and identified in medical records available to the employer; if a diagnosis is unstated, there must be a sufficiently unambiguous, objective and obvious indication of a disability reflected by the factual information contained in the available medical records in existence at the time of injury. *Currie v. Cooper Stevedoring Co.*, No. 88-3574, 1990 WL 284089 at *5 (BRB, July 31, 1990). Also see *Eymard & Sons Shipyard v. Smith*, 862 F.2d 1220, 1224 (5th Cir. 1989)

There is no dispute that the Claimant was injured and that he was placed on restricted duty from an injury when still in Iraq. If the conditions of the claimant's employment cause him to become symptomatic, even if no permanent harm results, the claimant has sustained an injury within the meaning of the Act, it then becomes Employer's burden on rebuttal to produce substantial evidence severing the connection between claimant's disability and the work injury. Moreover, where a claim is based on aggravation of an underlying condition, employer must

produce substantial evidence that claimant's work did not aggravate the underlying condition. An opinion that allows for claimant's employment to have a role in the manifestation of claimant's underlying disability is insufficient to rebut the Section 20(a) presumption.

I find that Dr. Franjee's report did not lay the foundation to dispute that an injury occurred and that obesity is paramount. Moreover, I reject Employer's argument that the Claimant's pre-existing back condition merely worsened. Therefore I find that Employer has not established that obesity is an independent intervening cause of impairment

I also find that as latest treating physicians, Drs. Steuer, Knudsen and Hansen obtained better insight about the Claimant than Dr. Franjee. I find that Dr. Franjee selectively elevated certain facts, such as the manner and the weight of the Claimant during his interview, that do not represent the remainder of this record, especially the reported MRIs and especially after Dr. Bear tested the extremities.⁴ I accept Claimant's argument that Dr. Franjee's logic is not rational. Therefore, I find that Dr. Franjee's opinions do not constitute substantial evidence in this record. *Pietrunti v. Director*, OWCP, 119 F.3d 1035, (2d Cir. 1997) (I may accept the expert opinion of a treating physician as to the existence of a disability unless contradicted by substantial evidence to the contrary). See also *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962).

I see no reason to discount Claimant's testimony that he remains symptomatic, or that his weight has increased due to inactivity. No evidence has been produced to rebut this point. Therefore, I accept that from an Orthopedic standpoint the Claimant has established that is impairments stem from his injury in Iraq.

PULMONARY ALLEGATIONS

Claimant contends that the record establishes a prima facie case of a compensable pulmonary and sinus injury which the Employer/Carrier has failed to rebut, offering no evidence to the contrary.

Claimant attributes his pulmonary issues to exposure to burning vehicles, campsite burn pits, and dust storms. (Tr. at 41-42, 48). The Department of the Air Force issued a memorandum 12/20/06 that the burn pit at Balad Air Base "has been identified as a health concern for several years." (Cx-11, p. 1). The memorandum lists 21 possible contaminants associated with the burn pit, the author opining there is an acute health hazard for individuals and the possibility of chronic health hazards associated with the smoke. Id. M. Opie testified he was stationed at Balad and the air did not smell good near the pit (Tr., pp. 22, 42).

Since returning from Iraq, Claimant wakes up coughing and occasionally throwing up once or twice a week. (Ex. 8 at 95; Tr. at 32). There is no evidence to contradict these allegations.

Claimant filed his claim for pulmonary problems on February 27, 2009. (CX 3 at 1). Claimant stated that his pulmonary problems in Iraq began around June 2005 and that he last suffered breathing or pulmonary problems in November or December 2007. (Ex. 8 at 93-94). Employer argues that he provided no evidence that he incurred any pulmonary injuries within the previous 12 months.

⁴ Although Dr. Bear found that involuntary movements were absent and ordered an EMG, a nerve conduction study, to determine the extent of the damage, none was done. Id. However, I accept that his opinion as to the extremities is better reasoned as he documents his procedure. See Ex 14, where a follow-up MRI was performed and the EMG was not.

To invoke the Section 20 (a) presumption a claimant need only establish that (1) he suffered an injury or harm, and (2) employment conditions existed which could have caused, aggravated, or accelerated his condition. Once the Section 20(a) presumption has been invoked, the Employer/Carrier, in order to rebut the presumption, must present substantial evidence that the claimant's work conditions did not cause the injury.

Employer reminds me that Claimant amended his claim on February 27, 2009, to include pulmonary problems. (CX 3 at 1). The initial claim was filed February 18, 2008. Employer/Carrier filed their Form LS-207 controverting the claim on May 5, 2009. (Id. at 5). Claimant filed a second amended claim for compensation on June 4, 2009, in which he alleged that he also suffered pulmonary problems caused by smoke inhalation. Claimant admits he was a smoker. (Ex. 8 at 103; Tr. at 55).

Employer argues that Claimant gave conflicting testimony on his smoking and tobacco use, first testifying at his deposition:

- Q. Let me ask, are you or have you ever been a smoker?
A. Long time ago.
Q. Long time ago. How long were you a smoker?
A. Three years.
Q. Okay. And how long ago did you quit?
A. 2003.

(Ex. 8 at 103). During the trial, Claimant's story changed:

JUDGE SOLOMON: Again, in the interest of justice, I have to ask a few questions. Were you a smoker before you went through all of this?

THE WITNESS: No sir.

JUDGE SOLOMON: Have you ever used tobacco products on a regular basis?

THE WITNESS: Yes sir. Quite back in >85, I think it was.

JUDGE SOLOMON: What were you – were you smoking at that time?

THE WITNESS: Yes, Sir.

JUDGE SOLOMON: And how many years did you smoke?

THE WITNESS: Maybe a couple of years.

(Tr. at 55). Employer reminds me that Claimant stated in his pre-deployment physical that he had smoked for six years before quitting in 1992. (Ex. 5 at 4).

Claimant alleges continued pulmonary problems including coughing, cold-like symptoms, acute bronchitis, and shortness of breath following multiple bouts with lower respiratory illnesses (“Iraqi crud”) while overseas. (Tr. 41-43). He claims they started a couple of months after he arrived in the country, around June 2005. (Tr. at 43; Ex. 8 at 93). Claimant testified that the last time he had the breathing or pulmonary problems in Iraq was in November or December of 2007. (Ex. 8 at 93-94). Employer argues that those issues cleared up within two to three weeks after he received some medication. (Ex. 8 at 93-94).

Claimant testified that his friends took him to Freeman Health Care in 2008 because he could not breathe (Tr., p. 40). Dr. Curtis King, the physician who saw Claimant at Freeman, opined that Claimant had acute bronchitis and prescribed Pro Air (Tr., p. 40; CX-1, pp. 54-55). On 05/28/09, Claimant saw Dr. Sitaraman Subramanian for treatment of his pulmonary condition (E/C EX-31, pp. 39-41). Dr. Subramanian noted Claimant's account of a chronic cough since 2005 and his exposure to “burn pits” (E/C EX-31, p. 39). Dr. Subramanian recommended that Claimant undergo a CT scan of the chest and of his sinuses to further investigate his chronic cough (E/C EX-31, pp. 40-41). On 08/20/09, Dr. Subramanian recommended Claimant undergo

a pulmonary function study with methacholine challenge (Ex-31, p. 37). At that time, Dr. Subramanian also prescribed Zithromax and ProAir as needed. Id.

In his 9/15/09 report, Dr. Subramanian noted the pulmonary function study showed Claimant to have mild to moderate obstructive and restrictive type of ventilatory impairment (E/C EX-31, p. 31). Dr. Subramanian assessed Claimant as having COPD with predominant small airway disease, recommending Claimant undergo a sleep study “as he has excessive daytime somnolence and sleep disturbance” (Ex-31, pp. 31-32). The pulmonary function study showed Claimant to have restricted lung capacity (E/C EX-31, p. 8).

Dr. Subramanian saw Claimant again on 11/10/09, noting Claimant to have increased coughing at night, at times to the point of losing consciousness (E/C EX-31, p. 28). Dr. Subramanian stated that the sleep study showed Claimant has sleep apnea and that a CT scan showed Claimant to have chronic sinusitis. Id. Dr. Subramanian referred Claimant to Dr. Hilton McDonald for a sinus evaluation “which may be causing his coughing and drainage especially when he is lying down” (E/C EX-31, p. 29).

Claimant attributes his pulmonary issues to exposure to burning vehicles, campsite burn pits, and dust storms. (Tr. at 41-42, 48). Since returning from Iraq, Claimant allegedly wakes up coughing and occasionally throwing up once or twice a week. (Ex. 8 at 95; Tr. at 32). The problems were worse initially, with Claimant awakening with those symptoms three times a week; however, he saw improvement on using a sleep apnea machine. (Id.). He also takes puffs from a “Pro Air” container about four times a day. (Id.)

I note that Employer is correct that Claimant provided some inconsistent testimony about his smoking. However, Employer has offered no medical evidence to rebut Dr. Subramanian’s opinion that the breathing deficit is related to Iraq service. Ex 31.

Claimant believes his pulmonary issues would affect his ability to work because he becomes short-winded when he walks around the block or goes grocery shopping. (Ex. 8 at 104). He alleged shortness of breath in May, 2008 when he started going through physical therapy. (Id.) Notice was given in February, 2009.

I find that the Claimant has established through testimony that there was “crud” in Iraq and that he was exposed to it. I also find that the breathing problem abated and did not resurface until a year after the physical injury, and that it is reasonable that Employer was placed on notice as soon as the breathing deficit became known. Claimant may indeed have had a pre-existing breathing problem, but Employer has offered any probative evidence to show that it was not exacerbated or aggravated by Iraq service.

However, again, neither party elicited from the physicians exactly what the limitations on work related activities might have been since the date of onset, or set forth a date at which the alleged breathing impairment might have stabilized.

HEARING LOSS

Claimant testified that his ears constantly ring. (Ex. 8 at 45). He attributes that to the explosions he experienced while driving his truck when it struck IEDs or rocket propelled grenades. (Ex. 8 at 85-86). He stated in his Answers to Interrogatories that the symptom first occurred in June 2005 when his vehicle was struck with 2 155 mm rounds causing his truck to jack-knife. (Ex. 7 at 2). He was wearing military-style ear plugs at the time, but his ears began ringing after that. (Id.). He said that medics told him it would go away after three to five days. (Id.). He was involved in 11 additional IED incidents, and each time resulted in some ear-

ringing. (Id.). He believes that some of the military test-firing may also have contributed to it. (Ex. 8 at 86, 92).

Claimant reminds me that the time for filing notice under Section 12 or for compensation under Section 13 does not begin to run for a hearing injury until the employee has received an audiogram, with the accompanying report, which indicates that he has suffered a loss of hearing. 33 U.S.C. § 908(c)(13)(D).

Claimant saw Dr. McDonald on 8/19/09 for treatment of his sinus symptoms and for treatment of complaints of hearing loss and ringing in the ears (E/C EX-10, p. 16). Dr. McDonald took a history, noting the exposure to an IUD (sic) in Iraq in June 2005. Id. Dr. McDonald diagnosed Claimant as having sustained sensorineural hearing loss related to bomb explosion exposure and multiple other loud noises related to his work in Iraq (E/C EX-10, p. 17). Dr. McDonald recommended hearing testing and hearing aids. Id. The 09/09/09 audiogram results show Claimant to have mild-to-moderately severe sensorineural hearing loss at 2000-8000 Hz and that he is a candidate for hearing aids (E/C EX-10, p. 3). Compared to hearing tests performed in 1994 and 1996, Claimant's hearing appears to have worsened in the higher frequencies (E/C EX-40, pp. 213-214).

Dr. McDonald stated in his 8/19/09 narrative that Claimant has symmetrical, mild-to-moderate hearing loss which is symmetrical, worsened in the higher frequencies and consistent with noise exposure (E/C EX-10, p. 18).

Claimant contends the record establishes a prima facie case of compensable hearing loss which the Employer/Carrier has failed to rebut, offering no evidence to the contrary.

However, Employer/Carrier alleges that it had no timely knowledge of Claimant's alleged ear-ringing. It argues that Claimant stated repeatedly that the ear-ringing first occurred in June 2005 after an accident. (See, e.g., Ex. 1 at 6-7; Ex. 7 at 2). I am advised that "Indeed, Claimant continued to work after that incident. Further, he provided no evidence that he ever reported to anyone that he had experienced constant ear-ringing. "

After a review of the record, I accept Claimant has a hearing deficit, and although he failed to place Employer on notice, the statute, Section 8(c)(13), as amended in 1984, is liberal in its interpretation and its accompanying regulations provide that a claimant may receive compensation for up to 52 weeks for a loss of hearing in one ear or up to 200 weeks for a loss of hearing in both ears. Where claimants had work-related hearing losses but no impairments under Section 8(c)(13)(E) of the LHWCA, the Fifth Circuit found that Congress, as alleged by Employer, it did not intend to bar medical benefits. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT) (5th Cir. 1993). The Fifth Circuit found that a worker who had suffered work-related hearing loss which did not qualify as disability, while entitled to medical benefits, could not receive an award for benefits absent evidence of medical expenses incurred in the past or treatment necessary in the future. The court further noted that a worker could file a claim for medical benefits if and when treatment became necessary. The claimants were eligible for reimbursement of any medical expenses incurred for their work-related hearing losses, and their attorneys were eligible for attorney fee awards if medical benefits were awarded.

PSYCHOLOGICAL IMPAIRMENT

Employer reminds me that Claimant added the psychological injury after he was referred by Dr. Bear to see a neuropsychologist in March 2010 (CX-19).

Dr. Taylor Bear, Claimant's neurologist referred him to a neuropsychologist for treatment for his reported memory problems and mood swings. (Ex. 8 at 47-49). Claimant said that he "used to get along with everybody. And I mean everybody. Now I don't." (Ex. 8 at 49). He said he used to talk more to other people than he does now and he sometimes gets nervous about going out in public. (Ex. 8 at 49). He said he first noticed these issues when his friends pointed them out to him in May, June, or July of 2008. (Ex. 8 at 49).

Since returning from Iraq, Claimant has had trouble sleeping and experienced nightmares; the bad dreams, however, he admitted that they usually do not have anything to do with the war zone. (Tr. 32). He wakes up coughing and/or vomiting several times a week. (Tr. at 32). He has taken the muscle relaxer Skelaxin, hydrocodone, and ibuprofen to sleep. He also finds some relief with a sleep apnea machine. (Tr. at 31-32).

On 3/19/10, Claimant saw Dr. Paul Iles for neuropsychological testing as recommended by neurologist Dr. Bear (CX-19). Dr. Iles took a history, noting Claimant's work in Iraq (CX-19, p. 2). Claimant related his experiences with enemy fire, including small arms fire, rockets and roadside bombs. Id. Claimant told Dr. Iles that he experienced some head trauma as a result of the enemy attacks on his truck and that he began to experience ringing in the ears while in Iraq. Id. He alleged racing thoughts, bad dreams, depression and memory problems. Id. Dr. Iles noted that Claimant showed evidence of depression, anxiety and some symptoms related to Post Traumatic Stress Disorder. Id. He also alleged deficits in balance and coordination, suffering from dizzy spells which has resulted in several falls (CX-19, p. 8). Following the administration of multiple tests, Dr. Iles opined, "vestibular disorders appear approximately 47% of the time after a traumatic brain injury, such as Mark received in the cab of his truck in Iraq on more than one occasion." Id. Dr. Iles also stated, "the vestibular system influences the autonomic nervous system, which explains why individuals may have problems breathing, or may develop nausea, dizziness or an irregular heart rate when this system is overwhelmed" (CX-19, p. 9).

Claimant contends the record establishes a prima facie case of a compensable vestibular/traumatic brain injury and of a worsened psychological condition, which the Employer/Carrier has failed to rebut, offering no evidence to the contrary.

Dr. Russell L. Adams examined Claimant on June 2, 2010. (Ex. 53 at 16). Dr. Adams also reviewed and analyzed Claimant's medical records and radiological tests. (Ex. 53 at 1-11). Dr. Adams performed numerous psychological tests on Claimant during that time and evaluated the results. (Ex. 53 at 12). Based on his review of Claimant's records, test results, and the examination, Dr. Adams opined:

Mr. Opie's current neuropsychological test performance was within normal limits on measures of cognitive functioning including tests of intelligence, attention/concentration, memory, language, visuospatial skills, and executive functioning. His overall neuropsychological test results are not suggestive of mild traumatic brain injury or Post-Traumatic Stress Disorder.

(Ex. 53 at 16).

He further found that results suggest Claimant is suffering from a Major Depression Disorder, which is exacerbating his reported back complaints. (Id.). Dr. Adams found that Claimant's depression is treatable and "would not and does not prevent him from working." (Ex. 53 at 18-20). Dr. Adams found that from a psychiatric/psychological perspective, Claimant is not considered occupationally impaired. (Ex. 53 at 21). Finally, he recommended that Claimant engage in psychotherapy to help him in developing healthier coping mechanisms; Dr. Adams

also suggested that Claimant may benefit from psychopharmacological intervention for his psychological distress. (Id.).

Dr. Michael Murrell, Psy.D. evaluated Claimant on March 19, 2010. Dr. Murrell found Claimant had anxiety and mild to moderate depression. (Cx. 19 at 9). Claimant also exhibits somatic symptoms. Therefore, “it is possible that he may tend to amplify any physical and/or cognitive problem that he may be experiencing at this time.” (Id.). He stated that Claimant “has experienced or seen a severe traumatic event that still bothers him. This is related to his several near death experiences in Iraq. He is exhibiting many symptoms related to a Post Traumatic Stress Disorder. However, his symptoms have decreased over time and he no longer meets the diagnostic criteria for a Diagnosis of a Post Traumatic Stress Disorder.” (Id.) He concluded that “There is no evidence of significant cerebral dysfunction and/or a neuro-degenerative brain disorder at this time.” (Id.). Dr. Murrell’s recommendations included psychotropic medication and therapy to treatment the depression, increased physical activity, and memory aides. (Id. at 10).

In reviewing Dr. Adams’ report, I note that he takes a tenuous position: although the Claimant needs treatment, psychotropic medication and therapy to treatment the depression, increased physical activity, and memory aides, he opines that he can work. I also note that Dr. Adams responded to interrogatories that include some vocational issues and in the end, he determined that Claimant would benefit from a vocational rehabilitation program. Without defining what any restrictions might be, at this point it is not rational that one would need to rehabilitate them. I note that Dr. Murrell relates symptoms of anxiety and mild to moderate depression, with some evidence of a cognitive impairment. He also suggests medication, individual supportive therapy, and memory aides.

I find that the evidence shows that the Claimant has compensable psychological problems.

RATIONALE

I find that the combination of the Claimant’s impairments have been medically proven to have affected his residual capacity for work related activities. I find that although there has not been a showing of precisely how the exertional and nonexertional deficits affect his capacity to work, it is reasonable that he needs treatment to restore him to work capacity and therefore he is temporarily totally disabled. At this point I do not render a determination whether the Claimant’s back pain and radiculopathy present a residual capacity to work, because there is no probative evidence submitted in this record that accurately reflects the Claimant’s restrictions, for me to do so.

MAXIMUM MEDICAL IMPROVEMENT

A disability is permanent under the Act when it has continued for a lengthy period of time and appears to be of lasting or indefinite duration. See *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996). A claimant’s disability is temporary in nature before he reaches maximum medical improvement (MMI). Id.

As set forth above, neither party has presented any evidence that shows the extent of current restrictions or that the Claimant has reached maximum medical improvement or has a residual capacity to currently work from an orthopedic standpoint. I discount Dr. Franjee’s opinion that there is no evidence of any orthopedic/neurological restriction, as his opinion discloses there is but based it on a false assumption that obesity cannot be legally compensable.

I note that the Claimant has exertional and nonexertional limitations that have yet to be defined, and he is need of treatment in the orthopedic, respiratory, hearing and psychiatric/nuero-psychological spheres and that these have not been coordinated.

The Claimant testified that none of the physicians and psychologists has told him that he had reached maximum medical improvement. Tr., p. 36.

I accept that there is no evidence that shows that Claimant has reached maximum medical improvement.

MEDICAL TREATMENT

Section 7(a) of the LHWCA provides that:

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

33 U.S.C. § 907(a).

Claimant requests treatment, including bariatric surgery, to be provided by his choice of physician. Claimant has received treatment from several physicians and institutions, Cx 10, and Counsel emphasized that none of them have been paid. However, Claimant testified that some of his expenses have been paid by State of Missouri Medicaid. Tr., pp. 37-38.

Although the record shows that Claimant had problems in Iraq when he was sprayed in left eye, there was no further treatment for it, and there is no evidence to show it has been continuing, and therefore request for treatment of the left eye are denied.

However,. I find that the Claimant is entitled to treatment for the back injury and for the radiculopathy, for the pulmonary problems, and for the neuro-psychological/psychiatric problems. I find that the law of supervening independent causes has not been established as to the Claimant's obesity and to pre-existing respiratory impairments.

Dr. James Smith described Claimant's lumbar stenosis, with bilateral lower extremity radiculopathy "that is quite disabling"... [but] he only has a mild amount of stenosis at the L4-L5 level in the neuroforamina and that does not seem serious enough in an isolated instance to warrant operative intervention." However, he stated further:

Mr. Opie weighs upwards of 400 pounds and I do think that a bariatric type procedure would be warranted on him. It would be at least life changing if not life saving for someone his size, and I do believe if he was able to lose some weight that his lumbar stenosis would not be an issue. Further, I cannot even do surgery on him at this point because positioning on the bed is a problem with people of such large size being prone for any extended period of time.

Therefore, I think that he would greatly benefit from the bariatric surgery and it would probably save him an operation on his lumbar spine.

(CX-1, p. 67).

Claimant testified that he has been unable to exercise to any degree due to his back pain and pulmonary problems (Tr., p. 44). Although Dr. Franjee argued that obesity is paramount in Claimant's medical profile, I accept that it is in part, a consequence of his lack of treatment for his other medical problems, as related by Dr. Smith. I accept that the weight gain is a natural and unavoidable consequence of the 2/19/08 injury.

As to the pulmonary issue, Employer argues that any pulmonary problems Claimant experienced in Iraq would have been temporary in nature and resolved. For example, Claimant's post-hiring jobsite medical records show that he sought treatment on January 6, 2008, for what

he claimed was fire extinguisher powder inhalation. (Ex. 3 at 2). He was found to have minimal wheezing in the upper lung lobes, but this cleared up after a nebulizer treatment. (Ex. 3 at 2). However, I find that Claimant has established that he had exposure, needed treatment and is entitled to any further treatment related to it. However, I note further the extensive treatment for sleep apnea; he uses a sleep apnea machine. (Id.). He also takes puffs from a “Pro Air” container about four times a day. Although it may be related to Iraq exposure, no physician has established that the sleep apnea is related and I find that the Claimant’s C-pap machine is not compensable.

As to the hearing loss issue, Employer argues that the results of Claimant’s hearing test showed he has good word and speech recognition, a normal tympanogram, and normal hearing at 250-1500 HZ. (Ex. 9). However, Employer admits that Claimant had some mild hearing loss that worsened at higher frequencies, but the report did not have any support for his claim of ear-ringing and the report directed Claimant to wear hearing protection when exposed to excess noise and that he was a possible hearing aid candidate. (Id.) Therefore, I find that Claimant is entitled to treatment for hearing loss.

AVERAGE WEEKLY WAGE

Claimant testified that he deployed to Iraq on April 28, 2005 and that he worked in Iraq for 34 months, apart from R & R breaks (Tr., p. 22). Claimant left Iraq, arriving in the U.S. on February 26, 2008 for further back treatment (Tr., pp. 34-35). Though Claimant’s employment contract was not submitted as evidence, the Court may take judicial notice that Claimant worked for the Employer/Carrier greater than one year, establishing that the employment was not intended to be short-term.

Claimant earned \$103,228.28 in calendar year 2007 while working for the Employer (CX-17). A printout of Claimant’s wage distribution from the Employer shows he earned \$101,296.95 from 04/06/07 through the last date paid, which would have been on or about 02/26/08 (CX-18). The period from 04/06/07 through 02/26/08 spans 327 days, or 46.71 weeks. His average weekly wage over this period was \$2,168.64. His average wage during 2007 was \$1,985.16 per week. A simple mathematical average of the two rates equates to an average weekly wage of \$2,076.90. Given the absence of the exact amount of earnings from 02/19/07 through 02/19/08, and the ambiguities of the Employer’s wage distribution printout, this figure is the best estimate of Claimant’s average weekly wage at the time of injury.

Claimant testified that his career from 1987 until he deployed to Iraq involved driving trucks long-haul (Tr., p. 20). He testified in his deposition that prior to his deployment he worked for Magnum Transport in North Dakota for two years, earning thirty-five cents per mile and driving up to three-thousand miles per week (E/C EX-8, p. 17). On average, he thus earned no more than \$1,050.00 per week while working for Magnum: $\$0.35 \times 3,000 = \$1,050.00$.

Claimant testified as to the multitude of dangers he faced while working in the war zone in Iraq, and photographs of his damaged trucks were admitted into evidence (Tr., pp. 23-30; CX-12). He stated that he would have continued to work in Iraq but for his injury (Tr., p. 45).

Employer argues that Claimant’s date of his back injury is February 19, 2008; wages from February 19, 2007, to February 19 2008 totaled \$101,296.95. (Ex. 2 at 2). Therefore, his average weekly wage is \$1,948.02.

Claimant contends that the relevant facts in his case are not distinguishable from those the Benefits Review Board, the “Board” or “BRB” discussed in *K.S. v. Service Employees Int’l, Inc.*, 43 BRBS 18 (2009); See also *Proffitt v. Service Employees Int’l, Inc.*, 40 BRBS 41 (2006).

In *K.S.*, the Board established three criteria, as discussed in *Proffitt*, that mandate the exclusive use of overseas wages in calculating the average weekly wage at the time of injury:

- 1.) Employer paid the Claimant substantially higher wages to work overseas than he had earned stateside;
- 2.) Claimant's employment entailed dangerous working conditions; and
- 3.) Claimant was hired to work full-time under a one-year contract.

K.S., 43 BRBS at 20. As the relevant facts are not distinguishable, Claimant contends that his average weekly wage must be calculated solely on the higher wages he was paid in his overseas employment, \$2,076.90 per week.

After a review of the record, I accept that Claimant is correct, as only wages from Iraq service are to be included under *K.S.*

SUITABLE ALTERNATE EMPLOYMENT

As set forth above, Mr. Stanfill, a certified rehabilitation counselor, conducted a vocational rehabilitation assessment. However, he determined that his report is based on an assumption of Claimant's profile post treatment. I find that the Claimant has not reached maximum medical improvement and any opinion as to earning capacity is speculative. Therefore, the report is not probative.

8 F RELIEF

Employer argues that in the alternative, it is entitled to Section 8(f) relief. However, I find that the issue is not ripe at this time.

ORDER

Based upon the foregoing findings of fact, conclusions of law, and upon the entire record, I enter the following **ORDER**:

1. This case falls under the jurisdiction of the Defense Base Act Extension to the Longshore and Harborworkers' Act.
2. The Claimant suffered from an accidental injury on February 19, 2008, while working in Iraq in the course of his employment.
3. The Claimant was an employee of the Employer at the time of the injury.
4. At that time, Claimant was engaged in medium work, as that term is defined by Appendix C to the Dictionary of Occupational Titles.
5. The Claimant received injuries to the back, the respiratory system, and to his hearing and since then has established radiculopathy from the back, psychological/psychiatric problems, hearing loss, and weight gain due to inactivity has made him obese.
6. These impairments, in combination, preclude engaging in work as a Heavy Truck Driver.
7. The Claimant has not reached maximum medical improvement.
8. The Claimant's average weekly wage at the time of his injury was \$2,076.90.
9. The Employer/Carrier shall pay the Claimant compensation for temporary total disability from March 7, 2008 to the present based on an average weekly wage of \$2,076.90, in accordance to 33 U.S.C. § 908(b).

10. The Employer/Carrier shall provide medical benefits under Section 7 of the Act for reasonable and necessary treatment relating to the back injury, the radiculopathy, the respiratory impairment, the hearing loss and other ear problems, psychological/psychiatric problems and the obesity to the extent that bariatric surgery may be necessary to return the Claimant to alternative employment. The Bills set forth in Claimant's Exhibit 10 shall be paid, except those relating to sleep apnea.
11. Claimant has not established compensability for alleged eye impairments and has not established that his sleep apnea is related to his Iraq service, and request for that treatment of these items are denied.
12. If the medical treatment restores Claimant to a residual capacity for less than medium work, and once he has reached maximum medical improvement and if his nonexertional symptoms are resolved, he shall be entitled to vocational rehabilitation services.
13. Section 8(f) relief is premature.
14. The Employer/Carrier shall provide interest at the rate specified in 28 U.S.C. §1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits computed from the date each payment was originally due to be paid. *See Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984).
15. The District Director shall make all necessary calculations to effectuate this **ORDER**.
16. Claimant's attorney shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on the Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

SO ORDERED

A

Daniel F. Solomon
Administrative Law Judge