U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 08 October 2014

CASE NO.: 2013-LDA-00295
OWCP NO.: 02-165183

IN THE MATTER OF:

JAMES DAVID BRESHEARS,
Claimant

v.

BROWN AND ROOT SERVICES/
SERVICE EMPLOYEES
INTERNATIONAL, INC.,
Employer

and

INSURANCE COMPANY
OF THE STATE OF PENNSYLVANIA/AIG,

Carrier

APPEARANCES:

Gary Pitts, Esq.
Joel S. Mills, Esq.,
For The Claimant

Robyn A. Leonard, Esq.
Julie N. Michelsen, Esq.,
For The Employer/Carrier

Before: CLEMENT J. KENNINGTON
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq*., (herein the Act), and its extension the Defense Base Act, (DBA) 42 U.S.C. § 1651, brought by James David Breshears (Claimant) against Brown and Root Services/Service Employees International, Inc. (Employer), and Insurance Company of the State of Pennsylvania (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, a Notice of Hearing was issued scheduling a formal hearing on June 24, 2014, in Houston, Texas.

All parties were afforded a full opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs.[1] Claimant testified and offered 14 exhibits.[2] Employer submitted 55 exhibits, including the post-hearing depositions of physicians Drs. Bernie McCaskill and Peter Foox, psychologist Randall Rattan, and vocational expert William Quintanilla.

Post-hearing briefs were received from Claimant and Employer/Carrier. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated and I find:

1. On July 23, 2007, Claimant was injured.

2. The injury occurred in the course and scope of his employment with Employer.

3. There was an employer-employee relationship at the time of the injury.

4. Employer was advised of the injury on July 23, 2007.

5. An informal conference was held on February 25, 2010 and October 16, 2012.

6. Claimant's average weekly wage (AWW) at the time of injury was $1,547.25.

7. Claimant reached maximum medical improvement (MMI) for his physical injury by November 7, 2011.

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[1] References to the transcript and exhibits are as follows: Transcript: Tr.___ ; Claimant's Exhibits: CX-___; Employer/Carrier Exhibits: EX-__; and Joint Exhibit: JX-__.

[2] As noted by Employer, Claimant's exhibit was admitted for the purpose of showing an informal conference was held and possible attorney fees.

8. Since his injury, Claimant has not returned to his usual and customary job of ammunitions handler/logistics warehouseman.

II. ISSUES

The unresolved issues presented by the parties are:

1. Whether Claimant suffered and continues to suffer from psychological impairments as a result of the traumatic injury he experienced on July 23, 2007, when he sustained multiple shrapnel wounds to his body caused by three 60mm mortar rounds that impacted in his work area.

2. Whether Claimant is entitled to disability compensation and, if so, at what rate and time period.

3. Whether Employer established suitable alternative employment for Claimant at any time following his injury and, if so, when.

4. Whether Employer is entitled to a credit for overpayment of compensation.

5. Attorney's fees and expenses.

III. STATEMENT OF THE CASE

1. Claimant's Testimony and Related Documentation

Claimant is a 43-year-old male with a 12th-grade education. Claimant graduated from high school in 1989. Before being employed by Employer, Claimant worked as a bar manager and served 10 years in the U.S. Army, specializing in ammunition and demolition. Upon his honorable service discharge, Claimant worked as a detention officer and deputy marshal in Denton and Mansfield, Texas. Following this, he worked as a driver, inside salesman, and store manager for Airgas. a welding supply company, ordering inventory and dealing with customers. He then drove a truck for Republic Disposal for a year picking up and returning waste materials containers to construction sites and earning from $55,000 to $60,000. (Tr. 11-18, 41, 42, 47-51).

On June 29, 2006, Claimant began working for Employer in Iraq as an ammunition handler/logistics warehouseman. (EX-16). On July 23, 2007, while assigned to work at Camp Anaconda in Balad, Iraq at an ammunition compound, Claimant suffered multiple shrapnel wounds to the abdomen, thighs, left lower leg, upper back, and buttocks when three 60mm mortar rounds impacted in his work area. Claimant received first aid and was taken to an Army theatre hospital, where shrapnel was removed. Claimant returned to his quarters for several days and then flew to Kuwait, where he was evaluated over a 10-day period and then flown back to the U.S. for four months, where he received therapy and steroid shots in the hand, wrist, and spine from Drs. Anthony Brentlinger and Joseph Kay. (CX-1, pp.4-9). He returned to Iraq on November 5, 2007. (*Id.*). Claimant stayed in Iraq for about four months until February 21,

2008, whereupon he experienced a return of pain from his July 23, 2007 injuries as the injections wore off, and he was sent home again. (CX-1, pp. 5-12; EXs-1,5, 6,13; Tr. 20-29, 62-64).

On April 7, 2008, Claimant returned to Dr. Brentlinger complaining of numbness in the right hand with frequent awaking at night and proximal brachialgia and locking of the right long finger. (CX-1, p. 10). On May 22, 2008, Dr. Brentlinger performed an endoscopic right carpal release and flexor tenosynovectomy on Claimant's right finger. (CX-1, pp. 13-14). On September 8, 2008, Dr. Brentlinger released Claimant, telling Claimant he could do nothing further for him. On October 6, 2008, Dr. Brentlinger issued a medical evaluation of Claimant's right hand finding a 10% whole body permanent impairment and a 16% upper extremity impairment. (CX-1, pp. 23-25). Claimant has had no further treatment on his right hand since then.

On May 15, 2008 Claimant returned to Dr. Kay. He examined Claimant, issued an impression of recurrent right L4 and L5, recurrent lumbar discogentic low back pain, left lower extremity numbness and tingling, multiple shrapnel injuries, mild lumbar spinal and foraminal stenosis, and neurogenic claudication, and recommended transforaminal epidural injections. (CX-2, pp. 11-12). On July 31, 2008, Claimant saw Dr. Kay again with complaints of continued spinal pain with minimal relief from therapy or injections. (CX-1, pp. 16-18). On November 13, 2008, Claimant saw Dr. Eric Wieser, who worked at the same orthopedic facility. Dr. Wieser examined Claimant, issued an impression of L5-S1 internal disk disruptions with severe pain, and recommended a lumbar interbody fusion. (CX-1, p. 28).

On July 28, 2009, Carrier had Claimant evaluated by Dr. Robert Viere, who issued an impression of minimal retrolisthesis at L5-S1 with bulges at L3-4 and L4-5 and recommended no surgery but rather a work conditioning program. (CX-1, p. 30). This was followed by an exam by Dr. G. Peter Foox on November 23, 2009. Dr. Foox evaluated Claimant for complaints of low back pain, pain in both hips with a grinding sensation, right leg pain with a stiff right wrist, and a locking of the long finger. Dr. Foox diagnosed an internal disc disruption at L5-S1 and status post carpal tunnel release with chronic pain directly related to Claimant's July 23, 2007 injury. He recommended treatment by over-the-counter medication and a psych evaluation to evaluate issues he was experiencing from the mortar shell explosions. (CX-1, pp. 35-38). Dr. Foox issued the following limitations of two hours twisting, two hours of bending, pulling and lifting 25 pounds and kneeling two hours and six hours of climbing with five-minute breaks every two to three hours. (CX-1, p. 39).

On January 29, 2010, Claimant again saw Dr. Wieser for continued complaints of radicular back and shoulder pain. (CX-1, p. 40). Despite this pain, Claimant assisted a friend in temporarily "managing" a restaurant and bar at Harbor House in Wiley, Texas for several months from April 2010 to approximately July 17, 2010, during which he "supervised" a staff of six to seven employees and made a total of $8,776.44. (Tr. 68-69).[3] On August 4, 2010, he

[3] Claimant described his management duties as "just being there and keeping an eye on things…." Claimant never worked a shift, and he ordered merchandise when the staff told and showed him what they needed. The restaurant was located 300 yards from the boat where he lived. The record does not show the actual dates of his employment at the restaurant, but Claimant's pay check stubs show in a two-week period from June 1, 2010 to June 14, 2010 he made $742.80, or about $371.40 per week. By that time, Claimant made $7,076.00 of his total income of $8,776.44, leaving him with only 4.58 weeks to earn the remaining $1,699.96, or until approximately July 17, 2010. When

underwent a lumbar fusion performed by Dr. Wieser. (CX-1, pp. 69-75).[4] Following surgery, Claimant used a bone stimulator for about a month. Dr. Wieser determined that Claimant reached MMI for his low back as of November 7, 2011. (Tr. 72; CX-1, pp. 15, 28). After reaching MMI, Claimant continued to do physical therapy exercises at home. (Tr. 74; CX-1, pp. 61-82).[5]

Claimant testified that before going to Iraq he did not drink much because he had a wife and two children, and during the 10 years he was married had been inebriated maybe three times. When he was sent back from Iraq a second time, he could not do his job and could not even lift small objects with his right hand. When he found himself unable to work, he began to self-medicate with alcohol. (Tr. 30-33). At one point he stayed on a couch for four months and did not interact even with his wife. In the last several years, Claimant's alcohol consumption has improved. (Tr. 35). In addition, Claimant testified that when he becomes stressed, he gets dyslexic and yells at people without reason. (Tr. 39-40).

Claimant admitted receiving no treatment for his hand since September 8, 2008, when Dr. Brentlinger told him there was nothing further he could do for him. (Tr. 68). Concerning his back since reaching MMI in 2011, he has not had further back treatment but continues to do therapy exercises at home and exercises three to four times a week at a gym at 2 a.m. using an elliptical machine and pool because he has sleep difficulties and does not like to be around a bunch of people. (Tr. 75, 96). When Claimant last saw Dr. Wieser on November, 15, 2012, Claimant was complaining of low back and right hip pain at a level 4 out of 10 most of the day with weakness in both legs. Dr. Wieser restricted Claimant to lifting no more than 50 pounds and sitting no more than 30 minutes at a time. (CX-1, pp.100-105).

Concerning his psychological impairments, the record shows Claimant seeing Dr. Kyle Babick on February 19, 2010. Dr. Babick is a clinical psychologist who performed a psychological evaluation of Claimant at the request of Carrier. The evaluation consisted of an interview and administration of a variety of psychological tests, including Minnesota Multiphase Personality Inventory-2 (MMPI-2), Beck Depression Inventory, Beck Anxiety Inventory, and others. Claimant reported being depressed and isolated with increasing use of alcohol at moderate to severe levels of clinical severity and ongoing general anxiety with symptoms of PTSD associated with his injury, along with intrusive recollections and occasional flashbacks. Dr. Babick diagnosed major depression, single episode; anxiety disorder, NOS, anxiety reaction; PTSD, moderate; alcohol abuse; pain disorder associated with psychological factors; and a

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questioned by Employer/Carrier's counsel about this job, Claimant stated he did not earn his pay but accepted the job when asked by the restaurant owner to replace him when he went to Washington to deal with a family matter. (Tr. 69).

[4] In response to a question from Employer/Carrier's Counsel, Claimant incorrectly testified he had a fusion on October 4, 2010.

[5] On March 16, 2010, the DOL claims examiner had Claimant evaluated by orthopedic surgeon Dr. William H. Mitchell for an IME. Dr. Mitchell examined Claimant and diagnosed degenerative disc disease with internal disc disruption; status post release of trigger finger and right third finger; and status post carpal tunnel release, right hand, related to Claimant's July 23, 2007 injury. Dr. Mitchell recommended a lumbar fusion at L5-S1 with the ability to do light to sedentary work. (CX-1, pp. 54-60). As stated previously, Claimant underwent fusion surgery on August 4, 2010.

general medical condition at a severe level with a global assessment of function (GAF) at 45-55, and with moderate to severe impairments of functioning. (CX-1, pp. 41-53).

On June 26, 2011, Claimant underwent a psychological evaluation by Dr. Jesse Ingram, which included a clinical interview and mental status evaluation and testing (Beck Depression Inventory, McGill Pain Questionnaire, Pain Patient Profile and Post-Traumatic Diagnostic Scale). Dr. Ingram diagnosed "pain disorder associated with psychological factors and general medical condition, chronic"; PTSD; "depressive disorder, NOS, moderate to severe" with severe psychosocial stressors and a GAF of 55. (CX-1, pp. 83-86). Thereafter, Claimant saw Dr. Ingram on July 21, 2011; September 12, 2011; and September 22, 2011. (CX-1, pp 87-89). On October 13, 2011, Dr. Wieser assessed Claimant as unable to work due to continued low back pain. (CX-1, p. 90). By November 7, 2011, Dr. Wieser placed Claimant at MMI. As of December 12, 2011, Dr. Ingram found Claimant unable to work because of difficulty focusing, concentrating, and maintaining adequate work pace. (CX-1, p. 95). In a subsequent evaluation regarding Claimant's psychological status on December 12, 2012, Dr. Ingram found Claimant to be suffering from PTSD, chronic pain, and depression, and that he was unable to work in environments on any jobs that were stress related. (CX-1, p 106)

Claimant testified that all the jobs listed on the labor market survey were either filled when he applied for them or he found he was not qualified for them when he told employers what he was able to do. Claimant agreed with Dr. Foox's lifting restrictions of lifting no more than 40 pounds and no repetitive motions with the right hand, and with Dr. McCaskill's restrictions of lifting 50 pounds occasionally and 25 pounds repetitively. (Tr. 38).

Concerning his ability to use Microsoft Word and Excel, Claimant admitted he was fair at it. (Tr. 76). Claimant testified that he applied for Allied Barton Security Services in July 2013 and was told to apply online. When applying for this job or others on CX-9, his restrictions would always come up, and Claimant did not get these jobs that VE William Quintanilla listed. (Tr. 80, 81-92). Besides these jobs, Claimant looked for other jobs and would have taken them if he could have filled them.

Concerning VE Quintanilla's May 27, 2014 labor market survey, Claimant, as of the hearing, had not received this list. (Tr. 94, EX-44). Claimant testified he has not looked into a Department of Labor vocational rehabilitation program.[6] Further, Claimant admitted he could occasionally bend, stoop and squat, lift up to 25 pounds occasionally, and carry up to 50 pounds occasionally, and that he uses a gym (pool and elliptical) three to four times a week. (Tr. 95). As of August 5, 2014, Claimant had applied for the jobs listed on the May 27, 2014 labor market survey either by email, sending his resume, or talking with the employers listed, but had not been hired. (CX-15).

[6] Claimant was given 30 days after the hearing to apply for and to attempt to get these jobs, and to inform the undersigned of his success or lack of success in getting them. Employer was allowed an additional 30 days to file her response to Claimant's success or lack of success in securing these positions.

Concerning psychological counseling, Claimant saw Dr. Babick in 2010 and Dr. Ingram several times in 2011, but nothing further. (Tr. 99-100). Claimant has not gone to additional counseling because, in his opinion, these counselors do not care what he has to say and thus it does not help to see them. (Tr. 102-105).

2. Testimony of Bernie McCaskill, MD

Dr. Bernie McCaskill, a board certified orthopedist, was retained by Employer to perform a medical evaluation of Claimant. Dr. McCaskill evaluated Claimant on December 9, 2013.[7] As part of Dr. McCaskill's evaluation, he reviewed Claimant's medical records showing that Claimant had a right carpal tunnel release on May 25, 2008, followed by an anterior and posterior fusion at L5-S1 on August 4, 2010. Dr. McCaskill reviewed the pre-surgery diagnostic studies and found no abnormalities of either the right upper extremity by Drs. Joseph Kay and Dr. Todd Daniels or spinal nerve root compromise or segmental instability. (EX-51, pp. 12-14). Dr. McCaskill interviewed Claimant and found him to be cooperative. He also learned that Claimant had not worked since February 2008 or had been treated for either condition including medication since November 2012. (*Id*. at pp. 19-20).

Dr. McCaskill examined Claimant and had him undergo x-rays of the lumbar spine and pelvis. He found the fusion to be solid with normal hip joints with no anatomic basis for either lumbar or right hand complaints. (*Id*. at pp. 23-24). He also found Claimant to have lumbar spondyhlosis/lumbar sprain with Claimant at MMI as of November 12, 2011. (*Id*. at pp. 26-27). Claimant described his subjective complaints as continuous and having diffuse lower back pain, intermittent right buttock pain, and deep seated right hip pain, and having intermittent right middle finger pain and right hand weakness dysfunction and tightness that had decreased by 65% since the time of the injury. He rated his pain at a level 4 to 8 on a 0 to 10 scale. (*Id*. at p. 28). Dr. McCaskill found Claimant capable of lifting up to 50 pounds on an occasional basis and stated he found no medical basis to support his self-reported limitations of sitting or standing for only one hour and no basis for further medical treatment. (*Id*. at pp. 29-31).

Dr. McCaskill opined that Claimant could perform all of the jobs listed in vocational expert Quintanilla's labor market survey of 2014 and that he was able to work full time since he reached MMI on November 12, 2011 providing he observe the lifting restrictions he imposed. (*Id*. at p. 33). Overall, Dr. McCaskill found Claimant's complaints to be credible for a lower back condition. (*Id*. at 39-40).

3. Testimony of Gerald Peter Foox, MD

Dr. Gerald Peter Foox, a specialist in physical medicine, was retained by Employer to perform an examination of Claimant. Dr. Foox first evaluated Claimant on November 23, 2009. This evaluation consisted of a review of Claimant's prior medical records showing a shoulder injury and surgery before July 13, 2007 and diagnostic studies, including a lumbar MRI, showing no significant neuroforaminal narrowing at L3-4 or L5-S1, which indicated no nerve root involvement at those levels. As of the date of this evaluation, Claimant was not and had not been treated for 11 months for any injury. (EX-54, pp. 9-11). Claimant described his July 13, 2007

[7] That evaluation is marked as EX-42 and contains 15 pages.

injury and his subsequent right carpal tunnel release but stated that was not taking any medication.

When Dr. Foox examined Claimant, he noted no abnormal neurological findings and concluded there was intermittent radiation into the lower extremities with a lack of strength in his right hand. (*Id*. at pp. 13-16). Dr. Foox found Claimant could return to work but not to his former job as ammunitions handler with no permanent impairment of the right upper extremity and no need for further medical treatment including back surgery.

Dr. Foox next examined Claimant on November 8, 2012 following his August 2010 L5-S1 lumbar fusion. Dr. Foox found no changes in Claimant's right upper extremity. Concerning his spine, Dr. Foox agreed with an MMI date of November 7, 2011 because of the spinal surgery, and he imposed restrictions against frequent bending, stooping, kneeling, squatting, pushing and pulling. He restricted these activities, as well as lifting 25 pounds, to occasional. By his third examination of Claimant on November 4, 2013, Dr. Foox issued restrictions for Claimant's right hand regarding repetitive motion activities. (*Id*. at pp. 24-28).[8]

Concerning VE Quintanilla's labor market surveys of 2012 and 2014, Dr. Foox approved all jobs listed except for the envelope stuffer position in the 2012 market survey because it involved repetitive hand motion. (*Id*. at pp. 29-31).

4. Testimony of Randall Rattan, Ph.D.

Dr. Randall Rattan, a board certified forensic psychologist, was retained by Employer to evaluate Claimant on two occasions. The first evaluation was on May 9, 2010. (EX-5, p. 9; EX-41). That evaluation included a review of Claimant's medical records and an interview of Claimant that lasted 3½ hours and included a discussion of his **(a)** military experiences; **(b)** injury of July 23, 2007 in detail, without evidence of anxiety or depressed mood; **(c)** subsequent work as a bartender, which he enjoyed doing four days a week with no psychological difficulties or use of psychotropic medications; **(d)** use of alcohol in social situations; **(e)** current romantic relationship; **(f)** occasional nightmares and back problems; and **(g)** lack of psychiatric or psychological records reflecting his attitude toward physicians and mild symptoms. (EX-53, pp. 10-25).

Dr. Rattan reviewed Dr. Kyle Babick's psychological evaluation of Claimant on February 19, 2012, which contained questionnaires of doubtful validity in Dr. Rattan's opinion, including pain drawings, a pain and impairment test, fear avoidance belief questionnaire, coping strategies questionnaire, and health opinion survey. Dr. Rattan testified that when Dr. Babick administered a widely accepted test, MMPI-2, he reported results in an abstract way, such as having inconsistent responding without any raw rata or T-scores, thus precluding any independent verification. In contrast, Dr. Rattan used a word memory test, which is widely used to measure effort on cognitive tests and WASI, showing average to high average intelligence; MMPI; and PAI, showing some anxiety. In essence, Dr. Rattan assessed Claimant as having some mild problems with alcohol confirmed by a GAF score of 65 and anxiety, NOS not arising to the level of PTSD. He ruled out alcohol dependence and reading disorder, which pre-existed Claimant's

[8] Dr. Foox's evaluation of November 8, 2012 appears in CX-1 at pp. 96-99.

work injury, and thus did not result in any occupational impairment. (*Id*. at 26-43).

Dr. Rattan testified he reevaluated Claimant on October 25, 2013. (EX-41). As part of this evaluation, Dr. Rattan reviewed additional medical reports and conducted another interview during which he indicated another romantic relationship and that he had not worked because his "earnings" were sufficient without work, but that he would return to his former employment in Iraq except for safety issues related to physical limitations. Further, Claimant reported fewer problems with alcohol and that he was eating well, exercising regularly, and interacting with the public without remarkable anxiety. In fact, during a potential gas leak in Dr. Rattan's building, Claimant reacted in a reserved and calming manner and did not display any signs of PTSD. Regarding Dr. Jessie Ingram's report that Claimant had PTSD which prevented him from working, Dr. Rattan disagreed and stated that Claimant met the criteria "A" (life threatening event) of PTSD but did not meet criteria "B" of having flashback or hallucinations or recurrent dreams. Claimant did not meet criteria "C" of persistent avoidance of stimuli associated with the trauma or a numbing of general responsiveness, as there was no evidence of avoidance of activities, places, or people that arouse recollection of the trauma, no inability to recall aspects of the trauma, and no evidence of showing a diminished interest in significant activities. (EX-53, pp. 56-60). Moreover, there was no evidence of criteria "D" of increased arousal not present before the trauma. (*Id*. at pp. 61-67).

Dr. Rattan also did not agree with Dr. Ingram's assessment of moderate to severe depression, as he stated that a score of 13 on the BAI reflects mild symptoms and Claimant never presented with moderate to severe depression. In fact, based upon Dr. Rattan's reevaluation, he ruled out an ongoing diagnosis of alcohol abuse, found some symptoms of anxiety, and noted an absence of psychological factors showing a pain disorder. (EX-53, pp. 69-73). Further, Dr. Rattan found no need for psychotherapy or psychotropic medications, and, if Claimant had suffered any psychological impairment from his July 2007 work injury, at most it was over in a short period and had since resolved. (*Id*. at 87-89).

5. Testimony of William Quintanilla, Vocational Expert

William Quintanilla, a vocational expert (VE) retained by Employer, testified about a vocational assessment he made of Claimant on December 17, 2012. In making this assessment, he reviewed Claimant's past medical records and interviewed Claimant on November 15, 2012. The interview lasted about 1½ hours and included a social and work history which showed his pre-injury, injury, and post-injury employment. In making this assessment, VE Quintanilla considered the restrictions of Dr. Foox (40-pound maximum lifting, occasional lifting of 25 pounds, and occasional bending, stooping, squatting, pushing, and pulling as of reaching MMI on November 7, 2011). (EX-55, pp. 1-13).

VE Quintanilla classified Claimant's job with Employer as heavy work with the restrictions imposed by Dr. Fox putting him in the sedentary to light category. Quintanilla found Claimant to be articulate, cooperative, and a person who had not returned or attempted to return to work as of the evaluation. VE Quintanilla assessed Claimant as having management skills to lead and direct people based upon his prior management jobs, along with having clerical, computer, communication skills. Based upon his labor market survey, he identified eight full

time jobs he considered appropriate for Claimant, including: unarmed security officer for Allied Barton Security Services, paying $8.15 per hour with reporting and no arrest responsibilities at a light physical demand level (PDL); courtesy officer for Boxer Property, paying $10 per hour with the responsibilities of giving direction to individuals at a light PDL; linen service technician and cashier clerk at Parkland Hospital, paying $8.61 and $10.67 per hour and at a light PDL; unarmed security officer for Wheelan Security, paying $8.15 per hour with reporting and no arrest responsibilities at a light PDL; receiving clerk for DPD Superior Solutions Staffing Service, paying $10 to $12 per hour at a sedentary to light PDL; front desk clerk at Westin Stonebriar, paying $11 to $11.50 per hour at a light PDL; envelope stuffer at Texas Workforce Solutions, paying $11.82 per hour at a sedentary PDL. (*Id*. at 14-29; EX-44).

On May 27, 2014, VE Quintanilla provided an updated labor market survey based upon additional reports from Dr. Foox, who issued restrictions of occasional lifting of 40 pounds, no repetitive motion activity of the right hand, and no frequent and persistent bending and lifting. VE Quintanilla also considered the restrictions of Dr. Weiser, his treating orthopedic physician, who issued restrictions of sitting for no more than four hours per day or 30 minutes at a time and lifting or carrying objects. He also considered Dr. McCaskill's imposed restrictions of lifting or carrying no more than 50 pounds occasionally, 25 pounds repetitively, and sitting more than 30 minutes at a time. (*Id*. at pp. 30-32). VE Quintanilla found the following jobs appropriate: shipping and receiving clerk at Carlton Strategic Staffing, paying $13 to $14 per hour at a medium PDL; shipping associate at Costex Tractor Parts, paying $12 per hour at a medium PDL; distribution specialist for Office Max, paying $13.25 per hour at a medium PDL; assembler/packer for Eclipse Profession Services paying $8.09 per hour at a light PDL and a customer service/shipping clerk for the same employer paying $9.73 per hour at the same PDL; inside sales representative for GXA Network Solutions, paying $12 per hour at a sedentary PDL; non-commissioned security guard for Force One Security Solutions, paying $9.50 per hour at a light PDL; non-commissioned security guard for Whelan Security Co., paying $8.09 per hour at a light PDL; and a cashier for Standard Parking, paying $8.03 to $8.20 per hour at a light PDL. (*Id*. at pp. 33-43; EX-44).[9]

IV. DISCUSSION

1. Burden of Proof and Credibility

It has been consistently held that the Act must be construed liberally in favor of the Claimant. *Vori v. Eikel*, 346 U.S. 328, 333 (1953); *J. B. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 225(1994), *aff'g*. 990 F.2d 730 (3rd Cir. 1993).

[9] On May27, 2012, Dr. McCaskill approved all the jobs listed on both labor market surveys of VE Quintanilla (EX-51). Dr. Foox approved all these jobs, except envelope stuffer, on May 21, 2014. (EX-50).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. *Duhagon v. Metropolitan Stevedore Company*, 31 BRBS 98, 101 (1997); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91 (5th Cir. 1988); *Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Bank v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467, *reh'g denied*, 391 U.S. 929 (1968).

After reviewing the entire record and observing Claimant's demeanor while testifying, I find him to be, despite what Employer says, a credible witness. I was impressed with his demeanor and straightforward testimony of being unable to work because of psychological problems. Employer relies upon the deposition testimony of Dr. Rattan, who evaluated Claimant on two occasions, May 9, 2010 and October 24, 2013, and disagreed with the analysis of both the psychologist hired by Employer/Carrier, Dr. Kyle Babick, and Claimant's treating psychologist, Dr. Jesse Ingram.

In Employer's lengthy, 75-page, post-hearing brief, Employer's counsel details Claimant's physical problems and medical treatment for them overseas and in the U.S., including treatment and evaluation records from Dr. Hubbell, Surgery Center of Arlington (Dr. Brentlinger); Advanced Imaging; Pinnacle Pain Management; Select Pain Procedure Center; Outpatient Diagnostic Center; Tina Neuwirth (FCE); Texas Spine Consultants (Dr. Viere); Dr. William Mitchell; Baylor Health System (Dr. Wieser); Insight Imaging; Arlington Orthopedic Associates (Dr. Joseph Kay). Employer's counsel also discusses the expert reports and deposition testimony of Dr. Peter Foox and Dr. Bernie McCaskill related to such treatment. Employer's counsel then discusses Claimant's psychological problems and treatment by Drs. Babick and Ingram, including Dr. Ingram's assessment of Claimant's inability to work, followed by Dr. Rattan's assessments of May 16, 2010 and November 15, 2013, and deposition to the contrary finding no psychological impairments to work, with Claimant not meeting the DSM-IV criteria "B," "C," and "D" and showing an improvement on alcohol abuse going from mild to no impairment. Employer's counsel then details the job VE Quintanilla found appropriate based upon Dr. Foox's physical assessment, with Claimant having the capacity to earn between $321.20 and $560.00 per week in his first report of December 2012 and his second report of May 2014.

Employer's counsel attacks Claimant's credibility not as being deceitful, but rather as one with a tendency to exaggerate or embellish symptoms with secondary gain motivation to maintain current level of compensation. After reviewing the record, I find no credible evidence to support Employer's assertions. Rather, I find Claimant at times underestimating, rather than overstating, his problems and the need for continuing psychological counseling. Employer cites Claimant's underestimation of his work at Harbor House for a couple of months following his start in either March or April 2010. (EX-20, p. 25). However, a review of his paycheck for June 1 2010 to June 14, 2010 showed Claimant making, as of that date, $7,076.48, out of a total of $8,776.44 for the entire year for minimal work overseeing Harbor House operations with no evidence that Claimant returned to Harbor House after his back surgery. Employer's counsel attacks Claimant's version of the facts as against the totality of record evidence but cites no evidence to support such. (Post. Hrg. Br., p. 46). From April, 1 2010 to August 3, 2010, when Claimant worked at Harbor House he made $8,776.44 with an AWW of $495.56.

2. Section 20 (a) Presumption

Under the Act, Claimant has the burden of establishing the *prima facie* case of a compensable injury. The claimant must establish a *prima facie* case by proving that he suffered some harm or pain, and that an accident occurred or working conditions existed which could have caused the harm. *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326 (1981). *See U.S. Industries/Federal Sheet Metal v. Director, OWCP* (Riley), 455 U.S. 608, 14 BRBS 631, 633 (1982), *rev'g Riley v. U.S. Industries/Federal Sheet Metal*, 627 F.2d 455, 12 BRBS 237 (D.C. Cir. 1980); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59 (CRT) (5th Cir. 1998); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996). It is the claimant's burden to establish each element of his *prima facie* case by affirmative proof. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT) (1994). In *U.S. Industries*, the United States Supreme Court stated, "[a] *prima facie* 'claim for compensation,' to which this statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." *U.S. Industries*, 455 U.S. at 615, 14 BRBS at 633.

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained a 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. *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *O'Kelly v. Department of the Army*, 34 BRBS 39, 40 (2000); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984). In establishing a causal connection between the injury and claimant's work, the Act should be liberally applied in favor of the injured worker in accordance with its remedial purpose. *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 406 (5th Cir. 2000), *on reh'g*, 237 F.3d 409 (5th Cir. 2000); *Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 371 (6th Cir. 1998)(quoting *Brown v. ITT/Continental Baking Co.*, 921 F.2d 289, 295 (D.C. Cir. 1990)); *Wright v. Connolly-Pacific Co.*, 25 BRBS 161, 168 (1991).

Section 2(2) of the Act defines injury as an accidental injury or death arising out of and in the course of employment. 33 U.S.C. § 902(2) (2003). In order to show the first element of harm or injury, a claimant must show that something has gone wrong with the human frame. *Crawford v. Director, OWCP*, 932 F.2d 152, 154 (2nd Cir. 1991); *Wheatley v. Adler*, 407 F.2d 307, 311-12 (D.C. Cir. 1968); *Southern Stevedoring Corp. v. Henderson*, 175 F.2d. 863, 866 (5th Cir. 1949). An injury cannot be found absent some work-related accident, exposure, event or episode, and while a claimant's injury need not be caused by an external force, something still must go wrong within the human frame. *Adkins v. Safeway Stores, Inc.*, 6 BRBS 513, 517 (1978). "[T]he mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." *U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP*, 455 U.S. 608 (1982). *See also Bludworth Shipyard Inc., v. Lira*, 700 F.2d 1046, 1049 (5th Cir. 1983) (stating that a claimant must allege an injury arising out of and in the course and scope of employment); *Devine v. Atlantic Container Lines*, 25 BRBS 15, 19 (1990) (finding the mere existence of an injury is insufficient to shift the burden of proof to the employer). A claimant's uncontradicted, credible testimony alone may constitute sufficient proof of physical injury.

Hampton v. Bethlehem Steel Corp., 24 BRBS 141, 144 (1990) (finding a causal link despite the lack of medical evidence based on the claimant's reports); *Golden v. Eller & Co.*, 8 BRBS 846, 849 (1978), *aff'd*, 620 F.2d 71 (5th Cir. 1980).

For a traumatic injury case, the claimant need only show conditions existed at work that could have caused the injury. Unlike occupational diseases, which require a harm particular to the employment, *Leblanc v. Cooper/T. Stevedoring, Inc.*, 130 F.3d 157, 160-61 (5th Cir. 1997) (finding that back injuries due to repetitive lifting, bending and climbing ladders are not peculiar to employment and are not treated as occupational diseases); *Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 177-78 (2nd Cir. 1989) (finding that a knee injury due to repetitive bending stooping, squatting and climbing is not an occupational disease), a traumatic injury case may be based on job duties that merely require lifting and moving heavy materials. *Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6, 7 (2000), *aff'd on other grounds*, 206 F.3d 474 (5th Cir. 2000). A claimant's failure to show an antecedent event will prohibit the claimant from establishing a *prima facie* case and his entitlement to the Section 20 presumption of causation.

For an injury to be compensable under the Act, it must have "arose out of" and occurred "in the course of employment." 33 U.S.C. § 902(2). These are separate elements that must both be proven. "Arising out of" refers to the activity in which the claimant was engaged when the injury occurred. "Course of employment" refers to the time, the place, and the circumstances surrounding the injury. *Mulvaney v. Bethlehem Steel Corp.*, 14 BRBS 593, 595 (1981). The general rule as established by the Board is that an injury occurs in the course and scope of employment if it occurs within the time and space boundaries of employment and in the course of an activity the purpose of which is related to the employment. *Alston v. Safeway Stores*, 19 BRBS 86, 88 (1986), citing *Wilson v. WMATA*, 16 BRBS 73 (1984); *Willis v. Titan Contractors*, 20 BRBS 11 (1987). The Board further defined their position in *Boyd v. Ceres Terminals*, 30 BRBS 218 (1997), holding that the employee's action would be found within the "scope of employment" if it was of some benefit to the employer. However, the Act does not require that the employee, at the time of injury, be engaged in activity of benefit to the employer. *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 507 (1951).

In establishing that an injury occurred in the course and scope of his employment, a claimant is entitled to rely on the presumption provided by Section 20(a) of the Act. *Willis*, 20 BRBS at 12; *Mulvaney*, 14 BRBS at 595; *Wilson*, 16 BRBS at 75. Section 20 provides that "[i]n any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary - - (a) that the claim comes within the provisions of this Act." 33 U.S.C. § 920(a). Once a *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of his employment. *Hunter*, 227 F.3d at 287.

Claimant's counsel correctly states that the Section 20(a) presumption applies to psychological injuries, citing *Konno v. Young Bros. Ltd*, 28 BRBS 57 (1994). Further, to meet this presumption, Claimant need not establish his doctor's analysis met the requirement of the DSM for the Act does not mandate use of the DSM to establish that Claimant suffered a psychological injury, citing *S.K. [Kamal] v ITT Industries, Inc.*, 43 BRBS 78 (2009). All that Claimant need show that he suffers some psychological injury (harm) and that work conditions

exist which could have caused, aggravated, or accelerated that condition. In this case, I find that Claimant established that presumption for both physical impairments (hand and back) and psychological impairments (major depression, anxiety disorder NOS, and anxiety disorder with symptoms of PTSD).

Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts – not mere speculation – that the harm was not work-related. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 687-88 (5th Cir. 1999). Thus, once the presumption applies, the relevant inquiry is whether the employer has succeeded in establishing the lack of a causal nexus. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1068 (5th Cir. 1998); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84, 89-90 (1995) (failing to rebut presumption through medical evidence that claimant suffered prior, unquantifiable hearing loss); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144-45 (1990) (finding testimony of a discredited doctor insufficient to rebut the presumption); *Dower v. General Dynamics Corp*., 14 BRBS 324, 326-28 (1981) (finding a physician's opinion based on a misreading of a medical table insufficient to rebut the presumption). The Fifth Circuit further elaborated:

> To rebut this presumption of causation, the employer was required to present substantial evidence that the injury was not caused by the employment. When an employer offers sufficient evidence to rebut the presumption--the kind of evidence a reasonable mind might accept as adequate to support a conclusion--only then is the presumption overcome; once the presumption is rebutted it no longer affects the outcome of the case.

Noble Drilling v. Drake, 795 F.2d 478, 481 (5th Cir. 1986); *see also, Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 290 (5th Cir. 2003) *cert. denied* 124 S.Ct. 825 (Dec. 1, 2003) (the requirement is less demanding than the preponderance of the evidence standard); *Conoco, Inc.*, 194 F.3d at 690 (the hurdle is far lower than a ruling out standard); *Stevens v. Todd Pacific Shipyards Corp.*, 14 BRBS 626, 628 (1982), *aff'd mem*., 722 F.2d 747 (9th Cir. 1983) (the employer need only introduce medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove another agency of causation to rebut the presumption of Section 20(a) of the Act); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18, 20 (1995) (the "unequivocal testimony of a physician that no relationship exists between the injury and claimant's employment is sufficient to rebut the presumption.").

In this case, I find that Employer has not rebutted the presumption for physical impairments. In fact, Employer admits Claimant had hand and back injuries that reached MMI by November 7, 2011, and that as such Claimant could not return to his former employment. Regarding Claimant's psychological impairment, Employer claims it rebutted that presumption through Dr. Rattan's testimony that Claimant has not shown he meets the clinical diagnosis for PTSD as set forth in the DSM-IV or established any other disabling psychological disorder. Employer asserts that Dr. Rattan diagnosed anxiety disorder, NOS. and ruled out alcohol abuse while stating neither reported symptoms prevented Claimant from functioning occupationally. As such, I find Employer has met the minimal requirements rebutting the presumption.

Since the presumption is rebutted, it no longer controls, and the record as a whole must be evaluated to determine the issue of causation. *Del Vecchio v. Bowers*, 296 U.S. 280, 286-87 (1935); *Port Cooper/T Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 288 (5th Cir. 2000); *Holmes v. Universal Maritime Serv. Corp*., 29 BRBS 18, 20 (1995). In such cases, 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. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281 (1994). Ordinarily, the claimant bears the burden of proof as a proponent of a rule or order. 5 U.S.C. § 556(d) (2002). By express statute, however, the Act presumes a claim comes within the provisions of the Act in the absence of substantial evidence to the contrary. 33 U.S.C. § 920(a) (2003). Should the employer carry its burden of production and present substantial evidence to the contrary, the claimant maintains the ultimate burden of persuasion by a preponderance of the evidence under the Administrative Procedures Act. 5 U.S.C. § 556(d) (2002); *Director, OWCP v. Greenwich Collieries*, *supra*; *American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 816-17 (7th Cir. 1999).

Regarding Claimant's condition, I find no reason to ignore, disregard, or devalue two psychologists' reports showing Claimant as having disabling psychological impairments, especially since one of those reports comes from a psychologist retained by Carrier to evaluate Claimant's condition. In fact, Claimant's counsel correctly notes, Dr. Rattan has not treated patients since 2002, instead doing full-time assessment work since 2002. (EX-53, p.2). While Employer asserts Claimant is not credible as seen in his reports on sleep disturbance, interpersonal relationships, use of alcohol, Dr. Rattan stated that Claimant's self-report in most instances was credible. As such I credit, Drs. Babick and Ingram's assessments of disabling psychological impairments of major depression, single episode; anxiety disorder, NOS, anxiety reaction; PTSD, moderate; alcohol abuse; pain disorder associated with psychological factors; and a general medical condition at a severe level with a global assessment of function at 45-55 with moderate to severe impairments of functioning. (CX-1, pp. 41-53). Indeed, administration of the MMPI-2 objective test by Dr. Babick showed no evidence of exaggeration but of an individual in acute psychological distress.

3. Nature and Extent of Injury

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial).

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss, or a partial loss of wage-earning capacity.

The permanency of any disability is a medical rather than an economic concept. Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a

normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, *pet. for reh'g denied sub nom. Young & Co. v. Shea*, 404 F.2d 1059 (5th Cir. 1968)(per curiam), *cert. denied*, 394 U.S. 876 (1969); *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59-60 (1980). Any disability suffered by a claimant before reaching MMI is considered temporary in nature. *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984); *SGS Control Services v. Director, OWCP, supra*, at 443.

The question of extent of disability is an economic as well as a medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940); *Rinaldi v. General Dynamics Corporation*, 25 BRBS 128, 131 (1991). To establish a *prima facie* case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988); *Louisiana Insurance Guaranty Association v. Abbott*, 40 F.3d 122, 125 (5th Cir. 1994).

The claimant bears the initial burden of establishing the nature and extent of any disability sustained as a result of a work-related injury without the benefit of the Section 20 presumption. *Lombardi v. Universal Maritime Serv. Corp.*, 32 BRBS 83 (1998); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985); *Hunigman v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 141 (1978). However, once the claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities that claimant is capable of performing and that he could secure if he diligently tried. *Greenwich Terminals, LLC v. OWCP*, 309 Fed. Appx. 658 (3d Cir. 2008) (unpublished); *Lentz v. Cottman Co.*, 852 F.2d 129, 131 (4th Cir. 1988); *New Orleans [Gulfwide] Stevedores, Inc. v. Turner*, 661 F.2d 1031 (5th Cir. 1981); *Air Am. v. Dir.*, 597 F.2d 773 (1st Cir. 1979); *Am. Stevedores, Inc. v. Salzano*, 538 F.2d 933 (2d Cir. 1976); *Preziosi v. Controlled Indus., Inc.*, 22 BRBS 468, 471 (1989); *Elliott v. C & P Tel. Co.*, 16 BRBS 89 (1984).

Since Claimant has established an inability to return to his former employment and thus makes a *prima facie* showing that he is totally disabled, the burden shifts to employer to show suitable alternative employment. *Turner*, 661 F.2d at 1038. The Fifth Circuit has developed a two-part test by which an employer can meet its burden of showing suitable alternative employment:

1. Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?

2. Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Id. at 1042. The employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." *P & M Crane Co.* 930 F.2d at 431; *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039 (5th Cir. 1992).

A failure to prove suitable alternative employment results in a finding of total disability. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). To establish suitable alternative employment, the employer must show the existence of realistically available job opportunities within the geographical area where the claimant resides which he is capable of performing, considering his age, education, work experience and physical restrictions, and which he could secure if he diligently tried. *Turner*, 661 F.2d at 1038. An employer is not required to place a claimant in an actual job. *Id.* Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for special skills which the claimant possesses and there are few qualified workers in the local community. *P & M Crane Co.*, 930 F.2d at 424, 430.

The Fifth Circuit permits an ALJ to average the hourly wages of jobs found to be suitable employment for a claimant in order to calculate wage-earning capacity. The court reasoned that averaging ensures that the post-injury wage earning capacity reflects each job that is available. *See Avondale Industries v. Pulliam*, 137 F.3d 326 (5th Cir. 1998). The Fifth Circuit has also determined that an administrative law judge must consider the claimant's physical condition, age, education, industrial history, the number of hours/weeks actually worked per week/year, and availability of employment which he can perform after the injury. *Abbott v. Louisiana Ins. Guaranty Ass'n.*, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122 (5th Cir.1994). The Board has held that the loss of overtime is a factor in determining the claimant's loss of wage-earning capacity. *See Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316, 320 (1989); *Brown v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 110, 112 (1989).

In this case, the undersigned finds, and Employer admits, that Claimant was unable to return to his regular employment as a ammunitions handler/logistics warehouseman because of his physical injuries. Employer, however, contends that since Claimant reached MMI on November 7, 2011, it has shown suitable alternative employment within Claimant's admitted physical limitations and that Claimant has not established any psychological limitations since that date which would preclude Claimant from performing the jobs identified by VE Quintanilla.

If the employer has established suitable alternate employment, the employee can nevertheless establish total disability if he demonstrates that he diligently tried and was unable to secure employment. *Turner*, 661 F.2d at 1042-43; *P & M Crane Co.* 930 F.2d at 430. The claimant must establish reasonable diligence in attempting to secure some type of suitable alternate employment within the compass of opportunities shown by the employer to be reasonably attainable and available, and must establish a willingness to work. *Turner*, 661 F.2d at 1043, 14 BRBS at 165. If an employee does not meet this burden, then at most, his disability is partial. 33 U.S.C. § 903(c); *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985).

A claimant may rebut evidence of suitable alternative employment if he demonstrates that he diligently searched for a job but was unable to obtain a position. *Ceres Marine Terminal v. Hinton*, 243 F.3d 222 (5th Cir. 2001); *Turner*, 661 F.2d at 1040. A diligent job search "involves an industrious, assiduous effort to find a job by one who conveys an impression to potential employers that he really wants to work." *Livingston v. Jacksonville Shipyards, Inc.*, 33 BRBS 524, 526 (A.L.J. July 7, 1999) (claimant's use of a brace and/or cane when visiting prospective employers persuaded the administrative law judge that claimant was conveying the impression to potential employers that his injury left him even less able to perform the potential jobs than his real limitations might have otherwise conveyed). The claimant need not prove that he was turned down for the exact jobs that the employer showed was available, but must demonstrate diligence in attempting to secure a job within the compass of opportunities that the employer reasonably showed was available. *Palombo v. Director, OWCP*, 937 F.2d 70, 74 (2nd Cir. 1991). *See also Martin v. Marine Terminals Corp.*, 32 BRBS 338, 340 (A.L.J. 1998) (finding a diligent job search when the claimant submitted a list of twenty-four prospective employers that he contacted over a four-month period with whom he inquired about job opportunities, sent resumes and applications, conducted follow-up inquires to a vast range of potential employers, and credibly testified that he wanted a job to support his family but no employer would not hire him because he had to use a cane).

In assessing whether a claimant has used due diligence in his job search, it is appropriate to look at both the number of jobs claimant applied for and the enthusiasm he evidenced in seeking these jobs. *Edmonds v. Al Salam Aircraft Co., Ltd.*, 35 BRBS 168 (A.L.J. January 24, 2001). Although applying to a large number of jobs is evidence of due diligence, it is not dispositive of the issue; a claimant may not mechanically go through the motions of applying for jobs with no apparent desire to actually gain employment. *Livingston*, 33 BRBS at 526; *Simmons v. I.T.O. Corp.*, 24 BRBS 442 (A.L.J. 1991) (finding no due diligence where claimant applied for jobs but gave the impression to employers that he was not interested in working); *Edmonds*, 35 BRBS at 177 (finding no due diligence where claimant could not name any of his potential employers and failed to maintain a suitable record of his job search, which made it impossible for him to follow up on initial contacts). Credibility problems with a claimant can also cast doubt on whether he has actually undergone a diligent search for employment. *Jones v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 830 (A.L.J. November 7, 2001). If an employee does not meet this burden, then at most, his disability is partial. 33 U.S.C. § 903(c); *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985).

In this case, I find that Employer has not established suitable alternative employment for Claimant, notwithstanding VE Quintanilla's vocational assessment, because such an assessment never factored in the credible assessments of severe psychological problems as detailed by psychologists, Drs. Babick and Ingram, or Claimant's credible testimony of being unable to work in a competitive employment situation because of his anger outbursts where, without reason, he yells at those around him. Regarding the work at Harbor House for a short period of time from April 2010 to August 3, 2010, I find minimal supervisory or manual work performed during this period, with Claimant, at most, serving as a caretaker earning little of what was paid to him. However, notwithstanding this assessment, Claimant seeks only partial disability during this period, giving Employer credit for all earnings during this period.

Accordingly, I find Claimant entitled to temporary total disability benefits from August 8, 2007 to November 15, 2007 and from February 22, 2008 to March 31, 2010. From April 1, 2010 to August 3, 2010, when he worked for Harbor House, he was entitled to temporary partial disability benefits based a weekly wage earning capacity of $495.56. From August 4, 2010 to November 6, 2011, Claimant was entitled to temporary total disability benefits. From November 7, 2011 to present, and continuing, Claimant is entitled to permanent total disability benefits.

6. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed percentage rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982)." *Grant v. Portland Stevedoring Company, et al.*, 16 BRBS 267 (1984). Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director.

7. Attorney's Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[10] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

[10] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. *Revoir v. General Dynamics Corp.*, 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. *Miller v. Prolerized New England Co.*, 14 BRBS 811, 813 (1981), *aff'd*, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after February 20, 2013, the date this matter was referred from the District Director.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following **ORDER**:

1. Employer/Carrier is responsible for and should pay Claimant temporary total disability benefits under Section 8(b) of the Act from August 8, 2007 to November 15, 2007, February 22, 2008 to March 31, 2010, and August 4, 2010 to November 6, 2011, based upon an average weekly wage of $1,547.25 and a compensation rate of $1,031.51.

2. Employer/Carrier is responsible for and should pay Claimant temporary partial disability benefits under Section 8(e) of the Act from April 1, 2010 to August 3, 2010, when he worked for Harbor House, based a weekly wage earning capacity of $495.56 and a compensation rate of $701.13.

3. Employer/Carrier is responsible for and shall pay Claimant permanent total disability benefits under Section 8(a) of the Act from November 7, 2011 to present, and continuing, based upon an average weekly wage of $1,547.25 and a compensation rate of $1,031.51 as increased on October 1 of each year thereafter by Section 10(f) of the Act.[11]

4. Employer shall receive credit for all compensation heretofore paid, as and when paid.

5. Employer shall pay interest on any sums determined to be due and owing from August 8, 2007 to present at the rate provided by 28 U.S.C. § 1961 (1982*); Grant v. Portland Stevedoring Co., eal.*, 16 BRBS 267 (1984).

[11] *NAWW Information*, Department of Labor – Office of Workers' Compensation Programs, *available at*: http://www.dol.gov/owcp/dlhwc/NAWWinfo.htm (last visited October 3, 2014). On October 1, 2012 the percentage increase was 2.31%. On October 1, 2013 the percentage increase was 1.62%. On October 1, 2014, the percentage increase was 2.25%. However, even with these increases and the above determination it still appears as though Claimant has been overpaid by Employer by almost $8,000.00

6. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

SO ORDERED this 8th day of October, 2014 at Covington, Louisiana.

Digitally signed by Clement Kennington
DN: CN=Clement Kennington,
OU=Administrative Law Judge, O=Office
of Administrative Law Judges,
L=Covington, S=LA, C=US
Location: Covington LA

CLEMENT J. KENNINGTON
Administrative Law Judge