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Issue Date: 11 January 2018

CASE NO.: 2017-LDA-00210
2017-LDA-00211

OWCP NO.: 02-140409
14-305062

In the Matter of:

VERONICA M. LANDRY,
Claimant,

vs.

SERVICE EMPLOYEES INTERNATIONAL, INC.,
Employer,

and

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,
Carrier.

Appearances:

GARY B. PITTS, Esq.
For the Claimant

JOHN R. WALKER, Esq.
For the Employer

Before:
CHRISTOPHER LARSEN
Administrative Law Judge

DECISION AND ORDER AWARDING MEDICAL BENEFITS

This is a claim for benefits under the Longshore Harbor Workers' Compensation Act, 33 U.S.C. §§ 901, *et seq.* ("the Act" or "LHWCA"), as extended by the Defense Base Act, 42 U.S.C. §§ 1651 *et seq.*

The court held a hearing in this matter on August 21, 2017, at Denver, Colorado. Both parties had the opportunity to present evidence and argument as provided by law and applicable regulations. No representative of the Director, OWCP, appeared at the hearing. The court received in evidence ALJ Exhibit 1 and Joint Exhibits ("JE") 1 through 23, and heard testimony from a single witness, the Claimant, Veronica Landry. Both parties filed post-hearing briefs with the court. The findings and conclusions which follow are based on the court's complete review of the entire record in light of the arguments of the parties, applicable statutes and regulations, and pertinent precedent. Although the court does not specifically discuss every exhibit in the record below, the court carefully considered each in arriving at this decision.

STIPULATIONS

The parties have stipulated (ALJ Exhibit 1), and I find:

1. The Claimant allegedly sustained injuries on May 8, 2004 (post-traumatic stress disorder), and on February 6, 2005 (the alleged last date of exposure with respect to deployment-related lung disease).[1]

2. There was an Employer/Employee relationship at the time of the injuries.

3. Employer filed Notices of Controversion on May 9, 2005; June 21, 2016; and November 11, 2016.

4. The District Director conducted an informal conference on September 29, 2016.

ISSUES

1. Whether the Claimant in fact was injured.

2. Whether the injuries, if any, occurred in the course and scope of her employment with Employer.

3. The nature and extent of the Claimant's disability, if any.

4. The Claimant's average weekly wage at the time of her injuries.

[1] At her deposition, Ms. Landry confirmed she seeks compensation for no other injuries in this action (JX 18, internal page 92, lines 80-12).

5. Whether the Claimant is entitled to medical benefits under Section 7 of the Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. General Standard

I must construe the Act liberally in favor of a claimant. *Voris v. Eikel*, 346 U.S. 328 (1953). But I may not apply the "true-doubt" rule – which resolves factual doubt in favor of the claimant when the evidence is evenly balanced – because it violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), under which the proponent of a rule or order has the burden of proof. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994).

The Benefits Review Board ("Board" or "BRB") will affirm my decision if my findings are supported by substantial evidence in the record, if they are rational, and if the decision conforms to the law. *Banks v. Chicago Grain Trimmers Ass'n., Inc.*, 390 U.S. 459, 467, *reh'g denied,* 391 U.S. 929 (1968). "Substantial evidence" is "more than a mere scintilla," or "such relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477 (1951); *Abosso v. D.C. Transit System, Inc.*, 7 BRBS 47 (1977). The Board will not interfere with my credibility determinations unless they are "inherently incredible or patently unreasonable." *Roberson v. Bethlehem Steel Corp.*, 8 BRBS 775 (1978), *aff'd sub nom. Director, OWCP v. Bethlehem Steel Corp. (Roberson)*, 620 F.2d 60, 12 BRBS 344 (5th Cir. 1980).

I may evaluate the credibility of all witnesses, weigh the evidence, and draw my own inferences and conclusions from the evidence. *See, e.g., John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122 (4th Cir. 1994). It is solely within my discretion to accept or reject all or any part of any testimony according to my judgment. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969); *Poole v. Nat. Steel & Shipbuilding Co.*, 11 BRBS 390 (1979); *Grimes v. George Hyman Constr. Co.*, 8 BRBS 483 (1978), *aff'd mem.* 600 F.2d 280 (D.C. Cir. 1979).

When considering medical testimony, I examine the logic of a physician's conclusions and the evidence upon which those conclusions are based, and I evaluate the physician's opinion in the light of the other evidence in the record. *Newport News Shipbuilding & Dry Dock Co. v. Ward*, 326 F.3d 434, 441-442 & n. 4 (4th Cir. 2003); *Jackson v. Ceres Marine Terminals, Inc.*, 48 BRBS 71 (2014). I may give greater evidentiary weight to a well-reasoned and documented opinion. *Jackson v. Ceres Marine Terminals, Inc.*, 48 BRBS 71 (2014). A "documented" opinion is one which sets forth the clinical findings, observations, facts, and other data upon which the physician bases the opinion. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19

(1987). A "reasoned" opinion is one in which I find the underlying documentation and data adequate to support the opinion. *Id.* I may also give greater weight to opinions I determine better supported by the objective evidence of record (e.g. medical tests or clinical findings). *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000); *Wright v. Connolly-Pacific Co.*, 25 BRBS 161 (1991), *aff'd mem. sub nom. Wright v. Director, OWCP*, 8 F.3d 34 (9th Cir. 1993). I may reject a medical opinion if it has no clear basis, lacks an evidentiary foundation (*Hice v. Director, OWCP,* 48 F.Supp.2d 501 (D. Md. 1999); *Am. Grain Trimmers, Inc. v. Director, OWCP [Janich]*, 181 F.3d 810, 33 BRBS 71 (CRT)(7th Cir. 1999), *cert. denied,* 528 U.S. 1187 (2000), or relies on a faulty factual premise, *Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11 (CRT) (2d Cir. 2008); *Hampton v. Bethlehem Steel Corp.,* 24 BRBS 141 (1990).

B. The Claimant Has Suffered Injury

1. Post-Traumatic Stress Disorder

In March, 2004, Ms. Landry began working as a morale, welfare, and recreation specialist for Employer at two Forward Operating Bases in Mosul, northern Iraq (TR p. 18, line 21 - p. 19, line 18). She was employed in Iraq until February 5, 2005 (JX 7 p. 1). Originally, she ran an internet café and was also involved in the operation of a recreation center and gymnasium for the troops stationed there (TR p. 20, lines 5-14). Those facilities were not protected from enemy fire, and the base was subject to daily indirect enemy fire, including rockets, mortars, rocket-propelled grenades, and car bombs (TR p. 20, line 14 – p. 21, line 4). She was later promoted to Operations Specialist with an emphasis in historical documentation (TR p. 21, line 21 - p. 22, line 18). On one occasion when she was away on leave, a suicide bomber killed 22 people in the dining facility, and Ms. Landry was called back to the base to help with the recovery effort (TR p. 21, lines 5-20). On May 8, 2004, Ms. Landry was running a karaoke event in the dining facility when a mortar attack occurred. The occupants of the dining hall ran to a bunker for shelter. Inside the bunker, Ms. Landry tended to a wounded soldier who had received a shrapnel wound, performing CPR for about eighteen minutes before the soldier succumbed to her wounds (TR p. 28, line 9 – p. 32, line 1).

The record shows Ms. Landry sought counseling with Employer's Employee Assistance Program. Counselors there noted she complained of sleeping problems (JX 2, pp. 1-2), poor appetite, poor concentration, flashbacks when awake (JX 2, p. 3), "PTSD symptoms related to a critical incident that occurred in May, 2004" (JX 2, p. 5), and a "heightened emotional state" after an attack on November 11, 2004 (JX 2, p. 4). A medical record refers to her "PTSD diagnosis" (JX 2, p. 3). Ms. Landry was diagnosed with, and treated as an outpatient for, PTSD at the Bayne-Jones ACH Psychological Clinic at Fort Polk, Louisiana, from September, 2007, to June, 2009 (JX 1, pp. 1-47).

There is no medical evidence in the record to suggest Ms. Landry does not have post-traumatic stress disorder, or that her work in Iraq neither caused nor in any way contributed to it.

This evidence is sufficient to establish she suffers from post-traumatic stress disorder.

2. Deployment-Related Lung Disease

Ms. Landry testified she was exposed to smoke from the burn pits "every day" while working in Iraq (TR p. 24, lines 2-8):

> The burn pit was a huge area that was dug out of the ground that they just burned everything, everything from tires – you know when tires are being burned, because the smoke was black, just really black – vehicle parts, air conditioner parts, hazardous materials, until we had a new HSE, Health Safety Environmental Officer who came in and started separating the hazmat out the best he could. They were just throwing all the hazmat stuff in there – we're talking paint thinner, whatever, it could be any kind of, you know, hazardous materials – even ammunition. We spent hours in the bunker at a time, because there was ammunition just going off everywhere.

(TR p. 23, lines 7-18). She further testified "[e]very plastic water bottle that every solider drank out of was also burned in the burn pits" (TR p. 25, lines 4-6).

Silpa Krefft, M.D. of National Jewish Health in Denver diagnosed Ms. Landry on August 25, 2016, with "deployment-related lung disease" (JX 1, p. 121) after noting her deployment to Iraq had included working outdoors about 33% of the time, frequent dust exposure, and proximity to the burn pits (located about a mile or a mile-and-a-half from where Ms. Landry worked). Dr. Krefft described this disease as "mild" (JX 1, p. 126). Ms. Landry credibly testified at the hearing that her lung disease had been shown by biopsy to be related to her exposure to the burn pits (TR p. 26, line 21 - p. 17, line 1). In deposition, she identified Dr. Beihl as having made the same diagnosis (JX 18, internal p. 101 line 18 - internal p. 102, line 14).

This evidence is sufficient to establish Ms. Landry suffers from deployment-related lung disease.

C. Claimant's Injuries Occurred Within the Scope of Her Employment

A claimant may rely on the presumption of Section 20(a) of the Act to show his or her injury arises out of his or her employment. To do so, the claimant establishes a *prima facie* case by showing both 1) that she has sustained harm and 2)

that the alleged accident occurred, or working conditions existed which could have caused or aggravated the harm. *See, e.g., Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96 (CRT) (5th Cir. 2000); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 29 (2000). If she proves a *prima facie* case, the Section 20(a) presumption applies to connect her harm with her established accident or working conditions. *Lacy v. Four Corners Pipe Line*, 17 BRBS 139 (1985); *Graham v. Newport News Shipbuilding & Dry Dock Co.*, 13 BRBS 336 (1981). A disability is work-related if employment aggravates a pre-existing condition, or causes an attack of symptoms severe enough to incapacitate the employee. *Gardner v. Bath Iron Works Corp.*, 11 BRBS 556 (1979) *aff'd,* 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981); *see also Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986).

To invoke the Section 20(a) presumption, Ms. Landry need not introduce affirmative medical evidence to show the working conditions caused the alleged harm. She need only show working conditions which could conceivably cause the harm alleged. *Sinclair v. United Food & Commercial Workers,* 23 BRBS 148 (1989). And credible complaints of subjective symptoms and pain can suffice to establish the element of physical harm. *Volpe v. Northeast Marine Terminals,* 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982); *Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff'd*, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982); *Golden v. Eller & Co.*, 8 BRBS 846 (1978), *aff'd,* 620 F.2d 71, 12 BRBS 348 (5th Cir. 1980).

When a claimant invokes the Section 20(a) presumption, the burden shifts to the employer to produce substantial evidence that the injury was not caused or aggravated by the employment. *See, e.g., Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60 (CRT) (1st Cir. 2004); *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35 (CRT) (5th Cir.), *cert. denied,* 540 U.S. 1056 (2003); *Hensley v. Washington Metropolitan Transit Authority*, 655 F.2d 264, 13 BRBS 182 (D.C. Cir. 1976), *cert. denied,* 429 U.S. 820 (1976). If the employer does not rebut the presumption, causation is established as a matter of law.

But the Employer's burden is one of production. Once the Employer produces substantial evidence of the absence of a causal relationship, the Section 20(a) presumption is rebutted. *See, e.g., Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11 (CRT) (2d Cir. 2008); *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187 (CRT) (5th Cir. 1999). When the Employer rebuts the Section 20(a) presumption, it falls from the case, and I must weigh the competing evidence of record as a whole, rendering a decision supported by substantial evidence. *See, e.g., Volpe v. Northwest Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982); *Sprague v. Director, OWCP,* 688 F.2d 862, 15 BRBS 11 (CRT) (1st Cir. 1982). The claimant bears the burden of persuasion, and must establish, by a preponderance of the evidence, that her condition is work-related. *Director, OWCP v. Greenwich Colleries,* 512 U.S. 267, 28 BRBS 43 (CRT) (1994).

1. Post-Traumatic Stress Disorder

There is no medical evidence in the record to suggest Ms. Landry does not have post-traumatic stress disorder, and there is no evidence in the record to suggest anything other than her work in Iraq caused it. Whether I analyze it as analogous to a physical injury, or analogous to an employment-related illness, the record supports no other theory with respect to causation. I conclude her post-traumatic stress disorder is work-related.

2. Deployment-Related Lung Disease

As set forth above, Dr. Krefft has opined Ms. Landry's working conditions in Iraq – specifically, working outdoors, dust exposure, and proximity to burn pits – caused or contributed to her deployment-related lung disease. This opinion suffices to support a *prima facie* showing. The Employer has not produced substantial evidence to show Ms. Landry's employment did not cause or contribute to her lung disease, so causation is established as a matter of law.

D. Claimant Is Not Disabled

As Employer/Carrier points out, "disability," under 33 U.S.C. section 902(10), is "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment" (Employer and Carrier's Post-Hearing Brief, p. 14). Disability may be either permanent or temporary in nature, and total or partial in extent. The claimant has the burden of establishing the nature and extent of her disability. *Gacki v. Sea-Land Service, Inc.,* 33 BRBS 127 (1998); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1980). The Section 20(a) presumption does not apply to these issues. *See, e.g., Gardner v. Director, OWCP,* 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981); *Gacki, supra,* 33 BRBS 127.

A claimant first establishes a *prima facie* case of total disability by showing she cannot return to her regular or usual employment due to her work-related injury. If she meets this burden, the burden shifts to the employer to show the availability of suitable alternative employment. If the employer succeeds, the burden shifts back to the claimant, who can rebut the employer's showing of suitable alternative employment by demonstrating she could not secure such work despite her diligent efforts. If claimant cannot show diligent, but unsuccessful, efforts to secure work at that point, her disability is partial, not total. *See* 33 U.S.C. section 908, subsections (c), (e).

In this case, I conclude the evidence does not show Ms. Landry is unable to return to her regular or usual employment, as discussed below.

1. Under the Act, Claimant's "Usual" Work
Is the Work She Performed at the Time of Injury

Initially, Employer/Carrier contends "Claimant's usual employment was working at television stations as a news producer. . . . Claimant returned to her usual employment with no loss in wages following her employment as a Morale, Welfare, and Recreation (MWR) specialist in Iraq" (Employer and Carrier's Post-Hearing Brief, p. 2). Her work for Employer, under a one-year contract, is an anomaly, in Employer/Carrier's view (Employer and Carrier's Post-Hearing Brief, pp. 2-5). Consequently, even if Ms. Landry, by reason of her medical condition, could no longer work as an MWR Specialist in Iraq, she is in fact working at her "usual" occupation, and is "not disabled."

The problem with this argument is that the Board and courts have rejected it. An employee's "usual" employment encompasses his or her regular duties at the time he or she was injured. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). This rule applies even if the employee had been performing those duties for as few as four months. *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689 (1982). In *Moore McCormack Lines, Inc. v. Quigley*, 178 F.Supp. 837 (S.D.N.Y. 1959), a worker's "usual" employment was in the position of a foreman, even though he was promoted only six months before his injury. Employer/Carrier appears to acknowledge this, citing Section 2(10) of the Act, defining "disability" as "incapacity because of injury *to earn the wages which the employee was receiving at the time of injury* in the same or any other employment" (Employer and Carrier's Post-Hearing Brief, p. 14). In this case, Ms. Landry's work in Iraq, however unusual compared to her working life before and after her injuries, is the proper starting point. If, by reason of injury, she cannot earn the wages she earned in Iraq, she may be disabled. Her ability to work as a television producer or otherwise will be relevant to determining the nature and extent of her disability, if she is disabled; but it does not foreclose the inquiry altogether.

2. The Evidence Does Not Show Claimant
Is Disabled By Post-Traumatic Stress Disorder

Often a claimant will prove she cannot return to her usual work by her own direct testimony to that effect. To my surprise, I search the record in vain for any unequivocal statement from Ms. Landry, under oath, that she herself believes her PTSD prevents her from returning to the work she did in Iraq.

Ms. Landry offers the medical opinion of one provider, treating physician Nadine D. Rhodes-Marsh, that Ms. Landry "should never again return to work in support (civilian) positions in hostile-combat environments" (JX 1, p. 59). She also provides opinions from James Durell Tuberville, Ph.D. (JX 1, p. 114) and Mercedes La-

voy (JX 1, p. 115). She also asserts various employees of Employer concluded she could not, or at least should not, work in Iraq. I summarize this evidence below.[2]

2a. Employer's Conduct and Records

i. The Employee Assistance Program (EAP)

At the hearing, Ms. Landry testified that persons associated with Employer's Employee Assistance Program – whom she described as "a team of psychologists" (TR p. 31, lines 9-15) – at one point told her she needed to return to the United States for treatment, and that she did so (TR p. 32, lines 5-18). The EAP records in evidence (JX 2) indicate that on February 7, 2005, "PA Mrs. McKinney recommended EE go home on medical and EAP concurs with recommendation. EE to fly tonight. EE thanked EAP for all services. Brooks gave Houston contact information to employee. Declined needing any other services" (JX 2, p. 3).[3] But nowhere in the EAP records is there any other report that anyone advised Ms. Landry to go home for any reason.

I am willing to assume PA McKinney is qualified to make a medical judgment about Ms. Landry's ability to work, but the record here does not show she ever made one. The EAP records indicate "Brooks referred [Ms. Landry] to Meliane McKinney for medical evaluation" on February 7, 2015, the same day PA McKinney "recommended" Ms. Landry return home.[4] But the record does not disclose what PA McKinney learned in the course of the examination. It does not disclose her reasons for recommending Ms. Landry return to the United States for treatment. It does not show whether she intended Ms. Landry should return to the United States permanently, or temporarily, although in fact Ms. Landry's stay in the United States was temporary, and she came back to Iraq and resumed working thereafter. PA McKinney's "recommendation" is *consistent*, to be sure, with inability to work in Iraq, but does not establish it.

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[2] Claimant and counsel make a number of off-hand references to such a decision at various points in the record. For example, in one question, counsel reminds Ms. Landry "you were told you shouldn't go back overseas to the war zone" (TR p. 35, lines 5-6). In deposition, Ms. Landry, describing her last flight out of Iraq, mentions she "was leaving, you know, for psychological reasons" (JX 18, internal page 67, lines 14-15). Such statements are consistent with their theory of the case, and I am confident neither intended anything untoward by them. But they do not comprise evidence of any medical judgment, or even any personal judgment by her, that Ms. Landry was unable, by reason of her post-traumatic stress disorder, to perform her usual job duties in Iraq.

[3] Elsewhere, the EAP records indicate Ms. Landry, on May 15, 2004, did not want to return to the United States because "she loves what she does" (JX 2, p. 2); on November 12, 2004, was "seriously considering demobilization" (JX 2, p. 4); and on February 4, 2005, had decided to demobilize (JX 2, p. 3) – not that she was being sent home because of a determination by anyone else.

[4] In her brief, Ms. Landry argues PA McKinney "performed a two-hour evaluation of Ms. Landry" at this time (Claimant's Post-Hearing Brief, p. 14), but she does not cite the record in support of this statement. I see nothing in the record to show PA McKinney performed a two-hour examination.

ii. Medications and the HR Department

In her pre-hearing deposition, Ms. Landry testified:

> A: . . . So I came home in December for leave, and the day of the dining facility bombing, I got a phone call from a soldier who I knew over there, and he – he called and said, did you hear what happened, he wanted to know if I was okay, because, you know, of what he saw happening on the news so I started to see – look at the news, and there's everybody I know, you know, everything happening, and I – I did go see – I had, I guess you could say, a panic attack. I don't know. I was hysterical.
>
> And went to an urgent care center, and saw a doctor there. And he told me then, he said, "Yes, you definitely" – you know, he said, "This is like" – "You have PTSD from what you've been through, and this is triggering it," and he put me on medication, and he gave me I think it was like Xanax and Zoloft. And so he gives me all this medication, and he says, "So when you go back, I want you to start upping your dosage," and he gave me enough to get through until what my next R&R would have been.
>
> And so when I got in country, back in country, and I was telling the medics, you know, "Hey, I'm on this medication," they're like, "You can't be on that medication here." And I didn't know I wasn't supposed to be on that medication there, so I took myself off of it. And that's when the HR people kind of found out what was going on, and they were like, "You have to go."

(JX 18, internal page 67, line 23 - internal page 69, line 1). She later explained

> Q: So what happened that you were medically discharged or you returned back to the States? What precipitated that?
>
> A: Well, I just talked to the medics about the medication, just mentioned that, and then they said, "You're not supposed to be on that." And I believe one of them went to the HR personnel and told them.
>
> In the meantime, I'd taken myself off the medication, because I wanted to stay. I wanted to – I just had the determination that they're not going to run me off, this is not happening, I'm staying as long as I can, and – meaning they, being the enemy, is

> not running me off, I'm going to finish this mission, you know, I'm going to stay here, I'm going to – this is what I want to do.
>
> And you're torn between your service and helping people and doing – being there for the soldiers and providing what we were providing for them and then your own mental health, you know, and your own safety and security, and your family and all that, and it's just like this constant – you know, you're struggling back and forth and – but I wanted to stay. And the HR manager said, "I don't know how you've made it this long. You know, you've" – "You need to go home."

(JX 18, internal page 70, line 17 - internal page 71, line 16).

A February 7, 2005, entry in the EAP records recites

> Met face to face with [Ms. Landry] regarding stress related trauma. [Ms. Landry] was sent to Kuwait, regarding medication a physician placed her on for PTSD. EE did not inform company about medications, they are on restricted list for overseas (Iraq) work.

(JX 2, p. 3).

This evidence suggests Employer sent Ms. Landry back to the United States not because of any medical determination that she could not work there, but because of a human-resources decision, if not a practice or policy, to demobilize an employee to whom a doctor had prescribed certain medications on a "restricted list." So far as I can tell, the "medics" to whom she refers made no recommendation based on their own training, medical experience, or examination. They merely snitched on Ms. Landry to the HR Department, which sent her home.

This action is *consistent* with an inability to work in Iraq by reason of a psychological impairment, but it does not *establish* an inability to work in Iraq by reason of a psychological impairment. And the action was not taken by a medical professional, but by the Human Resources manager, whose medical expertise in such matters I am unwilling to assume.

2b. Opinion Evidence

i. Dr. Rhodes-Marsh's Opinion

On August 25, 2015, Nadine D. Rhodes-Marsh, a counseling psychologist, completed a one-page Work Capacity Evaluation, reporting

> Ms. Landry was my patient for psychotherapy from Oct - Dec 2007 (3 sessions) and Dec 2008 - Jun 2009 (24+ sessions, individual & group counseling). While she made good progress in therapy it is my professional opinion that she should never again return to work in support (civilian) positions in hostile-combat environments. While recovery and progress are possible in patients diagnosed with PTSD, returning to stressful similar situations in likely to result in their relapse of symptoms.

(JX 1, p. 59).

I have four reservations about this statement.

First, Dr. Rhodes-Marsh had last seen Ms. Landry more than eight years earlier, on June 11, 2009 (*Id.*). Her opinion of Ms. Landry's condition is not based on Ms. Landry's condition at the time of the report. By the time Dr. Rhodes-Marsh offered this opinion, her treating relationship with Ms. Landry had long since ended. This delay between treatment and opinion is troublesome because there is no medical opinion to this effect anywhere in the record contemporaneous to Ms. Landry's service in Iraq, but there is indirect evidence of a contrary medical opinion. At the hearing Ms. Landry testified she visited Dr. Vigen, a psychologist in Shreveport, in March or April of 2005 "to see if he would give me a letter saying it was okay to go back" to Iraq, and he in fact wrote such a letter (TR p. 79, lines 1-13). In fact, she agreed Dr. Vigen had written she was "fully capable of returning to [her] old job in Iraq," or "[w]ords to that effect" (TR p. 80, lines 3-6; *see also* JX 2, p. 6). I am troubled that one doctor would examine Ms. Landry in 2005 and conclude she could do her old job, while a second doctor would conclude, twelve years later, having not seen the patient in more than eight years, that she could not. As discussed above, Ms. Landry appears not to have left Iraq because of any medical opinion, but because of a human-resources practice or policy denying overseas assignments to employees who had been prescribed certain medications.

Second, Dr. Rhodes-Marsh's opinion does not square exactly with her own earlier treatment records. By my count, on twenty-three occasions when Dr. Rhodes-Marsh was actually treating Ms. Landry, the doctor indicated Ms. Landry was released without limitations (JX 1, pp. 1, 5, 7, 9, 11, 12, 14, 16, 19, 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, 41, 43, 45, 47).[5] Dr. Rhodes-Marsh never suggested Ms.

[5] At the hearing, Ms. Landry identified another treating physician, Dr. Michael Angelo, who like Dr. Rhodes-Marsh never placed any restrictions on her ability to work (TR p. 78, lines 22-25). In fact, until 2015, no physician anywhere in the record limits Ms. Landry's ability to work in any way.

Landry was limited by her medical condition until more than eight years after the treating relationship ended.[6]

Third, Dr. Rhodes-Marsh's opinion is not specific to Ms. Landry. In fact, it is not specific at all. If I read the opinion to conclude Ms. Landry is disabled by her post-traumatic stress disorder, I must also conclude that anyone who suffers post-traumatic stress disorder in a combat zone is forever disabled because of it. Ms. Landry's experience with Dr. Vigen suggests that not all physicians necessarily agree this is true. Dr. Rhodes-Marsh's opinion is a blanket statement, not a well-reasoned or documented medical opinion which sets forth the clinical findings, observations, facts, and other data upon which the physician bases the opinion.

Finally, Dr. Rhodes-Marsh's opinion does not directly address the question of whether Ms. Landry could, in fact, perform the job she had in Iraq. Dr. Rhodes-Marsh opines working in a combat zone is a risk Ms. Landry should avoid. All other things being equal, this is undoubtedly a sensible suggestion, but it does not address the question of whether Ms. Landry could tolerate such conditions if necessary. When Dr. Rhodes-Marsh offered this opinion, Ms. Landry had been successfully working in the United States for the better part of a decade without disabling symptoms. I would expect any doctor to consider it prudent for Ms. Landry to continue doing so rather than return to a combat zone. But that is not the issue I must decide here.

For all of these reasons taken together, I am not persuaded by Dr. Rhodes-Marsh's opinion.

ii. Dr. Tuberville's Opinion

James Durell Tuberville, Ph.D., completed a Work Capacity Evaluation Form on August 10, 2016 (JX 1, p. 114). While he appears to have treated Ms. Landry at one time (*see* JX 18, internal page 72, line 1 - internal page 73, line 16), he expresses no opinion regarding her ability to work. He comments only on the desirability of additional treatment.

[6] Ms. Landry argues Dr. Rhodes-Marsh did not limit her during treatment because "[s]he was treating me as a dependent, not a soldier. She typically only treated soldiers, because she only treated combat related PTSD. I was allowed into the program and into the group therapy program on a special case. So, she would not restrict any – she would not be putting limitations on my duty limitations, because I was not a solider. So that's why there would not be any limitations there. That is reserved for soldiers, for what she would send back to their commanders as to what their limitations are for their duties. There's a difference in military medical records and civilian medical records, and that would be one of the differences" (TR p. 81, line 16 – p. 82, line 2). This argument would be more persuasive if it came from the doctor, rather than the claimant. Meanwhile, Dr. Rhodes-Marsh's records say what they say.

iii. Mercedes Lavoy's Opinion

Mercedes Lavoy completed a Work Capacity Evaluation form on August 22, 2016 (JX 1, p. 115). She writes

> Ms. Landry is currently not competent to perform her usual job. The problematic aspect of the position is its location in a war zone. Ms. Landry is not competent to be employed in an austere environment at this time. However, Ms. Landry is competent to perform her current job duties at the VA, which is located stateside.
>
> . . .
>
> Ms. Landry is capable of working 8 hours a day in a stateside environment. Ms. Landry is capable of performing a variety of tasks, as long as she is employed in a stateside environment.

(*Id.*)

This opinion is at least as conclusionary as Dr. Rhodes-Marsh's, but on top of that, I have no idea what Ms. Lavoy's qualifications are. She lists none on her form, and Claimant identifies none in her brief (Claimant's Post-Hearing Brief, p. 18). For this reason, I give this opinion no evidentiary weight. *See* Employer and Carrier's Post-Hearing Brief, p. 16.

2c. Conclusion

Ms. Landry herself did not testify she cannot, by reason of her post-traumatic stress disorder, perform the work she did in Iraq. After not having examined Ms. Landry in more than eight years, Dr. Rhodes-Marsh opines, in essence, that Ms. Landry *must* be disabled, because anyone who suffers PTSD in a combat zone is. The opinion of Dr. Tuberville does not even address the relevant question, and there is no showing of any qualifications Ms. Lavoy may hold. While Ms. Landry may have undergone some kind of medical examination by a physician assistant on February 7, 2005, after which she was advised to seek treatment in the United States, there is nothing in the record to show she had become unable to do her job in Iraq at that time, and in fact she returned to work in Iraq after a trip home. EAP records even suggest returning to the United States at that time was Ms. Landry's own decision. Ultimately Ms. Landry left Iraq because of a policy or practice of demobilizing anyone who had been prescribed certain medications on a "restricted list." Whether that policy or practice is sound or unsound I cannot tell, because there is nothing in the record to tell me why Employer followed it.

I conclude this evidence does not show that Ms. Landry, by reason of her post-traumatic stress disorder, cannot return to the work she did in Iraq. Thus, on the record before me, Ms. Landry is "not disabled" by post-traumatic stress disorder.

3. The Evidence Does Not Show Claimant Is Disabled By Occupational Lung Disease

As with post-traumatic stress disorder, I find no direct testimony from Ms. Landry anywhere in the record that she personally believes she could not return to her old job in Iraq by reason of her respiratory problems.

As for medical opinions, in a report dated December 12, 2016, Dr. Krefft writes

> . . . Ms. Landry's deployment-related lung disease is mild as evidenced by her normal resting lung function and excellent exercise tolerance although there were nonlimiting ventilator abnormalities and a slight decrease in arterial oxygen saturation and oxygen tension during exercise. There was no evidence of bronchial hyperresponsiveness or inducible laryngeal obstruction on her bronchial challenge and laryngoscopy.
>
> Also, after careful review of her hospital records and based on the information available to me at this time, it is my medical opinion that the recurrent episodes of hematuria, hypotension, and fever that Ms. Landry experience between 2015 and 2016 are not related to her deployment-related lung disease or her occupational exposures to complex inhalational hazards (i.e. desert dust particulate matter, trash-burning emissions) encountered during her overseas deployment to Iraq while employed with KBR.
>
> RECOMMENDATIONS:
>
> 1. I recommend that Ms. Landry refrain from deploying to or working in austere environments that are dusty or that have poor air quality such as southwest Asia.
>
> 2. I also explained that the long-term prognosis for deployment-related lung disease is uncertain at this time at that *[sic]* there are no established or evidence-based treatments for deployment-related bronchiolitis. For this reason, I recommend continued follow-up with a pulmonologist or other medical provider for monitoring of lung function (spirometry, lung volumes, and diffusion testing) and respiratory symptoms every six to 12 months.

(JX 1, p. 126).

To be sure, Dr. Krefft "recommends" Ms. Landry "refrain" from working in "austere" (apparently, dusty or poor-air-quality) environments, such as southwest Asia.[7] But the breadth of this limitation is surprising. Dr. Krefft not only describes Ms. Landry's lung disease as "mild," reporting normal resting lung function and "excellent" exercise tolerance, but she acknowledges the prognosis is "uncertain," and notes there are no established or evidence-based treatments for the condition. She opines Ms. Landry's three respiratory "events" since returning home from Iraq are "not related" to her deployment-related lung disease. And Dr. Krefft does not specifically aver that dust in the air, or poor air quality, is likely to worsen or accelerate Ms. Landry's condition. Like Dr. Rhodes-Marsh, Dr. Krefft seems to suggest Ms. Landry play it safe and minimize her risk. There appears to be no reason, other than an abundance of caution, to restrict Ms. Landry from working wherever air quality may be low, since Ms. Landry's own graphic testimony suggests her lung disease resulted from exposure in Iraq to such nasty pollutants as smoke from burning tires, burning paint thinner, burning plastic, and other hazardous materials (TR p. 23, line 3 - p. 27, line 17; JX 8).

Additionally, Ms. Landry's testimony discounting the effect of dust on her respiratory problems undercuts Dr. Krefft's opinion with respect to limitations:

> Q: All right. And were there, during the time you were in Iraq, also were there dust storms, that sort of thing going on?
>
> A: There weren't many dust storms where we were in Mosul, because we were near the mountains, so they weren't as bad where we were.
>
> Q: Okay. So, it was more burn pits?
>
> A: Correct.

(TR p. 25, lines 21-25). There is no other testimony to suggest dust played any role in Ms. Landry's lung condition.

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[7] Dr. Krefft repeats this recommendation on JX 1, p. 124, with the notation that it is explained more fully in the accompanying report, JX 1, pp. 125-126. She included identical language in her report of August 25, 2016 (JX 1, p. 122) (". . . I recommend that Ms. Landry refrain from deploying to or working in austere environments that are dusty or that have poor air quality such as southwest Asia. I also explained that the long-term prognosis for deployment-related lung disease is uncertain at this time at that *[sic]* there are no established or evidence-based treatments for deployment-related bronchiolitis"). In her brief, Ms. Landry addresses these as separately-stated opinions, as if they had come from two entirely different providers (Claimant's Post-Hearing Brief, p. 17), but they are virtually identical expressions of a single opinion, and both appear in exactly the same context.

Neither Ms. Landry nor Dr. Krefft identifies any specific work-related limitation caused by Ms. Landry's mild lung disease. Her resting lung function is normal and her exercise tolerance is excellent. Dr. Krefft's recommendation that Ms. Landry avoid "austere" environments is too broad to be helpful here. I am left to wonder why Dr. Krefft feels Ms. Landry cannot function anywhere in southwest Asia because of dust and poor air quality when those conditions also occur outside southwest Asia, including in places like Los Angeles, Houston, Indianapolis, Philadelphia, Cleveland, Pittsburg, Fresno, or, for that matter, Denver or Fort Collins. If what Dr. Krefft really meant to say was that Ms. Landry should stay away from burn pits, there is nothing in the record that allows me to conclude Ms. Landry would necessarily have to work near a burn pit if she went back to Iraq. Perhaps there are sites where she could do her job away from burn pits. Perhaps Ms. Landry, armed with what she knows now, could avoid burn pits more effectively, assuming they are still in operation, than she did when she was there originally. After all, she was admittedly unaware of the hazards of exposure at that time (TR p. 74, lines 15-19).[8] What is more, Ms. Landry testified at the hearing that a new Health Safety Environmental officer at some point began diverting hazardous materials from the pits (TR p. 23, lines 7-13). How that change might affect the risk of exposure is a question nobody addresses on the record before me. Instead, Dr. Krefft asserts all of southwest Asia is permanently toxic.

I conclude the evidence of record does not show Ms. Landry is incapable, by reason of her employment-related lung disease, of returning to her old job in Iraq. She accordingly has not shown disability as a result of her lung disease.

E. Average Weekly Wage

Because the evidence does not show Ms. Landry is disabled, either by her post-traumatic stress disorder or by her deployment-related lung disease, she is not entitled to recover disability benefits. There is accordingly no need for me to calculate her average weekly wage.

F. Claimant is Entitled to Section 7 Medical Benefits

Under Section 7(a) of the Act, an employer must furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for such period as the nature of an injury, or the process of recovery, may require. 33 U.S.C. section 907(a); *see also* 20 C.F.R. section 702.401(a). An injury need not be economically disabling in order for a claimant to be entitled to medical expenses. *Weikert v. Universal Maritime Service Corp.*, 36 BRBS 38 (2002).

[8] Ms. Landry testified she first suspected a relationship between her respiratory problems and her service in Iraq in November, 2015, when she was hospitalized for a respiratory episode (TR p. 74, lines 15-25). Ironically, Dr. Krefft opines that episode was in fact unrelated to Ms. Landry's deployment-related lung disease (JX 1, p. 126).

Ms. Landry is accordingly entitled to medical expenses for any treatment she shows is reasonable and necessary for her work-related conditions. *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996). She must show medical expenses are for treatment of a compensable injury. *Pardee v. Army & Air Force Exchange Service,* 13 BRBS 1130 (1981)(Miller, J., dissenting). She establishes a *prima facie* case for compensable medical treatment where a qualified medical physician indicates treatment is necessary for a work-related condition. *Turner v. Chesapeake & Potomac Telephone Co.,* 16 BRBS 255, 257-258 (1984); *Amos v. Director, OWCP,* 153 F.3d 1051 (1998), *amended,* 164 F.3d 480, 32 BRBS 144 (CRT) (9th Cir. 1999), *cert. denied,* 528 U.S. 809 (1999). Since Dr. Krefft opines Ms. Landry's three respiratory episodes in May, 2015; November, 2015; and February, 2016, are not related to her deployment-related lung disease (JX 1, p. 126; *see also* TR p. 74, line 23 - p. 75, line 13), Ms. Landry is not entitled to medical benefits under Section 7 of the Act for treatment related to those episodes.

G. Attorney Fees and Costs

If Claimant's counsel claims an award of reasonable attorney fees and costs for benefits procured on Claimant's behalf, he must file a fee petition under 20 C.F.R. §702.132 within 21 days of the date the District Director serves this order. Employer/Carrier must file its objections within 14 days of service of the fee petition. Within 14 days of service of those objections, the parties must meet in person or voice-to-voice to discuss and attempt to resolve any objections. Both parties are charged with the duty to arrange the meeting. Within seven days of the meeting, Claimant's counsel must file a report identifying the objections that have been resolved, the objections that have been narrowed, and the objections which remain unresolved. The report may also reply to any unresolved objections.

ORDER

Based on the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, the court orders:

1. Employer and Carrier are liable for all past, present, and future reasonable and necessary medical treatment related to Claimant's work-related post-traumatic stress disorder and deployment-related lung disease under Section 7(a) of the Act.

2. Claimant's counsel may seek an award of attorney fees and costs under Section G of this Decision as set forth above.

SO ORDERED.

CHRISTOPER LARSEN
Administrative Law Judge