United States District Court
Middle District of Florida
Jacksonville Division

NORTHROP GRUMMAN, AND INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,

Petitioners,

v. **NO. 3:23-CV-164-WWB-LLL**

DANIEL HILL,

Respondent.

Report and Recommendation

Before the Court are Northrop Grumman and Insurance Company of the State of Pennsylvania's (Employer)[1] Petition for Judicial Review, doc. 34, claimant/respondent Daniel Hill's (Hill) response, doc. 35, and Employer's reply, doc. 34 at 45–52. Under Section 921(c) of the Longshore and Harbor Workers' Compensation Act (LHWCA), Employer seeks judicial review of the United States Department of Labor Benefits Review Board's (Board) decisions issued on May 27, 2020, and December 29, 2022, doc. 34 at 5, which awarded Hill benefits, *id.* at 4. For the reasons stated below, I recommend the Board's May 27, 2020 and December 29, 2022 decisions be affirmed.

[1] Other than the Background Section, Employer will be in reference to both Northrop Grumman and Insurance Company of the State of Pennsylvania.

Background

Hill worked for Employer as a "maintenance liaison/flight ops manager" at Kandahar Airfield in Afghanistan between 2012 and 2018, where he alleges "he was exposed to burn pits, aviation fuels, and solvents." ADMIN_000154, ADMIN_002105.

Hill testified that living conditions in Afghanistan were "primitive." ADMIN_001842. He lived in a tent with eight other men that had plywood cubicles about six feet tall, with just enough room for a bed and table. ADMIN_001842–43. Hill described the conditions as "dusty" and that he had to be mindful of mice, rats, and snakes. ADMIN_001843. The tent's HVAC system ductwork would expand when turned on, "and dust would go flying everywhere inside the tent." *Id.* Additionally, there was a "poop pond" full of human waste that was one-third to one-half mile from the camp. *Id.*

Employer operated a burn pit in its southwest quadrant, also about one-third to one-half mile away from Hill's camp. ADMIN_002106. Hill testified that the burn pit was mostly used at night, but he could still see smoke when the sun rose. *Id.* Hill testified that "everything" that could be burned was placed in the burn pit, and Hill believes they used aircraft fuel to ignite the fire. *Id.* Hill could smell the burn pit from his office, which he testified smelled mostly like "rubber." *Id.*

Hill's job duties included "oversee[ing] the aircraft maintenance contractor" and "interfac[ing] between the pilots and Northrup Grumman." ADMIN_001844, ADMIN_002105. Hill was also part of a group of individuals responsible for

maintaining the aircrafts, which were required to be "in the air 24 hours a day, seven days a week." ADMIN_001844. Hill spent half of his day outside on the flight line and the remainder in a tent, with a similar HVAC system to his sleeping quarters. ADMIN_002105. Hill worked seven days per week from 1:00 a.m. until 1:30 p.m. *Id.*

Prior to going overseas, Employer required Hill to undergo a physical examination, which revealed he was fit to deploy. ADMIN_002105. Beginning in 2014, Hill experienced episodes of bronchitis and suffered from severe congestion, runny nose, and coughing. ADMIN_002106. He received treatment overseas and was prescribed antibiotics and cough syrup. *Id.* Hill experienced bronchitis two to three times per year and testified "it would get bad." *Id.* At his annual employer-mandated physical exam in 2014 in San Diego, California, the physician found a "spot" on Hill's lung. *Id.* As a result of the spot, the physician did not approve Hill to be re-deployed overseas and referred him to his treating physician, Dr. Randall Rigdon (Rigdon), in Merritt Island, Florida. *Id.* Rigdon ordered a CT and PET scan, consulted with radiologists, and determined "there was not an issue," ultimately approving Hill's overseas deployment. *Id.* Rigdon did not express concerns about the spot on Hill's lung, and he did not prescribe Hill any medication for it. *Id.*

Hill continued to work for Employer primarily in Kandahar, Afghanistan, but also occasionally worked at the Al Dhafra Air Force Base in Abu Dhabi, United Arab Emirates, where he maintained "the payload and a [sic] flight operations physician and in quality assurance." ADMIN_002107. Hill only went to Abu Dhabi for a month or less at a time to fill in when someone was ill or had to leave due to an emergency.

Id. Hill explained that the work environment in Abu Dhabi was "much nicer" than in Afghanistan because he could live off base and have his own transportation. *Id.* Hill estimates that between 2014 and 2018, he spent twenty percent of his time deployed in Abu Dhabi. *Id.*

In July 2018, Hill began having difficulty breathing. *Id.* Hill visited the Cleveland Clinic in Abu Dhabi and was diagnosed with idiopathic pulmonary fibrosis (IPF)/interstitial lung disease (ILD), which required him to return to the United States; he did so on August 6, 2018. *Id.* Thereafter, Hill began treatment with Dr. Sneeringer (Sneeringer), a pulmonologist, and later sought a second medical opinion from Dr. Taylor (Taylor), a different pulmonologist. *Id.* Both Sneeringer and Taylor agreed with Hill's prior diagnosis of ILD. *Id.* As a result, Hill sought treatment from yet another physician, Dr. Lisa Lancaster (Lancaster), who, according to Hill, believed that dust could have either caused or contributed to his ILD. *Id.* On May 16, 2019, at Hill's request, Lancaster provided a Physician Statement of Health Condition in which she stated that, in her medical opinion, Hill was suffering from a progressive fatal lung disease and that continued loss of function was inevitable. ADMIN_000701.

Hill has not worked in any capacity since his return to the United States in August 2018. ADMIN_001440. He stated that he is unable to work because of symptoms that he experiences including shortness of breath, coughing, and fatigue; he also experiences side effects from medication including severe stomach issues, nausea, and dizziness. *Id.*

Administrative Proceedings

On August 27, 2018, Hill filed a claim for benefits under the Defense Base Act (DBA), 42 U.S.C. § 1651, et seq., an extension of the LHWCA, as amended, 33 U.S.C. § 901, et seq. (the Act) alleging pulmonary injuries—specifically, IPF/ILD—that he sustained while working for Employer. ADMIN_000154, ADMIN_002103. On May 23, 2019, ALJ Henderson conducted a hearing with respect to Hill's claim. ADMIN_001433. On October 16, 2019, ALJ Henderson issued a decision finding (1) Hill established a prima facie case "under the Act, having established that he suffered a harm or pain, namely interstitial lung disease . . . and that his working conditions . . . could have caused or contributed to the interstitial lung disease"; (2) "Dr. Rosen's [(Rosen)] medical opinion constitutes substantial evidence sufficient to rebut [Hill']s prima facie case that his idiopathic pulmonary fibrosis was due to work-related exposures such as burn pits, dust, or other pulmonary irritants"; and (3) weighing all the evidence Hill "failed to meet his burden that he suffered a work-related injury resulting in interstitial lung disease." ADMIN_002133, ADMIN_002136, ADMIN_002140. ALJ Henderson relied on record evidence from numerous medical providers, including: Rigdon, Sneeringer, Taylor, Lancaster, Hill's primary care physician, Dr. Lon A. Haskell (a family practitioner Hill visited), and the Cleveland Clinic in Abu Dhabi. ADMIN_002112–22, ADMIN_002140. ALJ Henderson also considered Hill's intake screening form completed with the National Jewish Health Center and a report issued by Rosen, Employer's toxicology expert. ADMIN_002123–25.

Thereafter, Hill appealed to the Board. ADMIN_000083, ADMIN_001434. On May 27, 2020, the Board determined that ALJ Henderson "did not adequately address whether employer rebutted the Section 20(a) presumption[2] that his occupational dust exposure in Afghanistan from 2012 to July 2018 contributed to, aggravated, or hastened his ILD." ADMIN_000088. The Board vacated ALJ Henderson's decision and remanded the case for further proceedings.[3] ADMIN_000089. On remand, the case was reassigned to a new ALJ[4]—ALJ Panagiotis—who determined that Employer was not entitled to a de novo hearing because "credibility determinations are not at issue."[5] ADMIN_001731. He further explained that "experts for both parties submitted testimony through written records," and as a result, "a determination must be made from the cold record, without observing or assessing credibility." *Id.*

On August 2, 2021, ALJ Panagiotis issued a decision Awarding Benefits finding that Employer was afforded notice of "the issue of Claimant's exposure to

[2] The Section 20(a) presumption will be explained in greater detail below.

[3] In its initial Petition for Review, Employer stated that it filed a motion for reconsideration of the Board's May 27, 2020 decision, which was denied. Doc. 1 at 2.

[4] Employer's petition explains that "Judge Henderson retired as an ALJ while the claim was before the Board initially." Doc. 34 at 14. The February 12, 2021 Notice of Case Assignment on Remand reassigned the case to ALJ Daniel Panagiotis (ALJ Panagiotis). ADMIN_002021.

[5] The Board has determined that "[i]n cases that are remanded to an administrative law judge for reconsideration . . . if the credibility of a witness is at issue, and the presiding judge is unavailable to issue a decision, a party has the right to a *de novo* preceding before the new administrative law judge if one is requested." *Williams v. I.T.O. Corp. of Baltimore*, BRB No. 00-450, 2001 WL 36392891, at * 2 (DOL Ben. Rev. Bd. Jan. 18, 2001) (citation omitted); *see also Gregory v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 99-0113, 1999 WL 35135288, at *2 (DOL Ben. Rev. Bd. Sept. 21, 1999) (per curiam).

environmental dust" for several reasons, including statements made by Employer's counsel during an informal conference held on October 9, 2018; the fact the issue was addressed during discovery and at the hearing before ALJ Henderson; and the additional time given to Employer to confer with its expert—Rosen—after the hearing concluded. ADMIN_001437–38. ALJ Panagiotis further determined that (1) Hill is "entitled to rely on the statutory presumption that his IPF/ILD has been aggravated by conditions encountered while working for Employer," (2) Hill has a compensable injury under the Act because Employer failed to rebut the presumption, and (3) Employer failed to meet its burden of establishing suitable alternate employment. ADMIN_001440, ADMIN_001446, ADMIN_001452. ALJ Panagiotis awarded temporary total disability benefits from August 6, 2018, through May 15, 2019, and ongoing permanent disability benefits from May 16, 2019, as well as medical benefits. ADMIN_001457.

Following the issuance of ALJ Panagiotis' decision, Employer appealed to the Board. *See* ADMIN_000092. On December 29, 2022, the Board affirmed ALJ Panagiotis' findings. ADMIN_000102. On February 15, 2023, Employer filed the present lawsuit, doc. 1, requesting that this Court "reverse the 2020 and 2022 Decisions of the Board, affirm the Decision of Judge Henderson, and remand for any further proceedings," doc. 34 at 43.[6]

[6] A review of the docket indicates that Employer filed three Petitions for Judicial Review. Docs. 1, 7, 34. As stated below, the Court recommends that the first two Petitions for Judicial Review docs. 1, 7, be denied as moot.

Authority

The DBA governs this matter because, during Hill's employment, Employer was a private contractor performing work on a United States military facility. *See* ADMIN_000439, ADMIN_002104. In 1927, Congress enacted the LHWCA "to provide workers' compensation coverage to certain maritime employees" and "[s]ubsequently enacted the DBA in 1941 to extend the workers' compensation coverage of the LHWCA to employees working on air, military, and naval bases outside the continental United States." *ITT Base Servs. v. Hickson*, 155 F.3d 1272, 1274 (11th Cir. 1998) (citations omitted); *see* 42 U.S.C. § 1651(a); *Raytheon Eng'rs & Contractors, Inc. v. Sullivan*, No. 3:05-CV-474-J32-MMH, 2005 WL 3445519, at *1 (M.D. Fla. Dec. 14, 2005). This Court exercises jurisdiction under the DBA, which provides for judicial review in federal district courts in the "judicial district wherein is located the office of the deputy commissioner whose compensation order is involved . . . [or] in the judicial district nearest the base at which the injury or death occurs." 42 U.S.C. § 1653(b); *see ITT Base Servs.*, 155 F.3d at 1274.

Under the statutory framework of the DBA and LHWCA,[7] when liability for workers' compensation is disputed, the claim initially is presented to an ALJ, who makes findings of fact and determines the validity of the claim. *See* 33 U.S.C. § 919(d). A party may appeal the ALJ's decision to the Board, 33 U.S.C. § 921(b)(3), whose

[7] The DBA incorporates the provisions of the LHWCA but provides that when a provision of the DBA modifies that of the LHWCA, the DBA controls. *See* 42 U.S.C. § 1651(a); *ITT Base Servs.*, 155 F.3d at 1274.

review is limited and is not authorized to make independent findings of fact. *See* 20 C.F.R. 802.301(a) ("The . . . Board is not empowered to engage in a *de novo* proceeding or unrestricted review of a case brought before it. The Board is authorized to review the findings of fact and conclusions of law on which the decision or order appealed from was based."). "The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole." 33 U.S.C. § 921(b)(3); *see Presley v. Tinsley Maint. Serv.*, 529 F.2d 433, 436 (5th Cir. 1976) (citations omitted).[8]

Section 20(a) of the LHWCA provides that "in the absence of substantial evidence to the contrary" it is presumed that a "claim comes within the provisions of the [Longshore Act]." 33 U.S.C. § 920(a); *see also U.S. Indus./Fed. Sheet Metal, Inc. v. Dir., Off. of Workers' Comp. Programs, U.S. Dep't of Labor*, 455 U.S. 608, 612 (1982). This so-called "Section 20(a) presumption" applies to DBA claims as well. *See* 42 U.S.C. § 1651(a); *see, e.g.*, *Carswell v. E. Pihl & Sons*, 999 F.3d 18, 31 (1st Cir. 2021) (applying presumption in a DBA case); *Ins. Co. of State of Pa. v. Dir., Off. of Workers' Comp. Programs*, 713 F.3d 779, 785 (5th Cir. 2013) (per curiam) (same).

To invoke the Section 20(a) presumption, a claimant must establish a prima facie case of compensability, which requires that claimant "allege an injury that arose in the course of employment as well as out of employment." *U.S. Indus./Fed. Sheet*

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[8] In *Bonner v. City of Pritchard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent the decisions of the former Fifth Circuit made prior to the close of business on September 30, 1981.

Metal, *Inc.*, 455 U.S. at 615. "Not only must the injury have been caused by the employment, it also must have arisen during the employment." *Id.* Once the claimant invokes the Section 20(a) presumption, the burden shifts to the employer to rebut the presumption with evidence that the claimant's employment did not cause or aggravate the claimant's injury. *Brown v. Jacksonville Shipyards Inc.*, 893 F.2d 294, 297 (11th Cir. 1990) (per curiam) (citing *Noble Drilling Co. v. Drake*, 795 F.2d 478, 481 (5th Cir. 1986) (per curiam), *abrogated on other grounds by Dir., Off. of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994) (recognizing that to rebut the claimant's "presumption of causation, the employer was required to present substantial evidence that the injury was not caused by the employment")).

If the employer rebuts the presumption, the claimant is no longer entitled to the presumption, and the burden shifts back to the claimant to prove by a preponderance of the evidence that the claimant's injury is related to the employment. *Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935); *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 139 (1997); *Greenwich Collieries*, 512 U.S. at 277–78. In deciding whether the claimant has shown a work-related injury, the ALJ must weigh and consider the evidence as a whole. *See Del Vecchio*, 296 U.S. at 286–87.

The Court reviews the Board's decision under 42 U.S.C. § 1653(b). The Court must "begin [its] analysis by reviewing the decision of the ALJ." *U.S. Steel Mining Co. v. Dir., OWCP*, 386 F.3d 977, 984 (11th Cir. 2004) (citing *Bradberry v. Dir., Off. of Workers' Comp. Programs*, 117 F.3d 1361, 1365 (11th Cir. 1997)). The ALJ's decision is

"reviewable only as to whether [it is] in accordance with law and supported by substantial evidence in light of the entire record." *Id*. (quoting *Lollar v. Ala. By-Products Corp.*, 893 F.2d 1258, 1261 (11th Cir. 1990)). "The substantial evidence standard limits the reviewing court from deciding the facts anew, making credibility determinations, or re-weighing the evidence." *Stone & Webster Constr., Inc. v. Dep't. of Labor*, 684 F.3d 1127, 1133 (11th Cir. 2012) (internal quotation marks omitted) (quoting *Moore v. Barnhart*, 405 F.3d 1208, 1211 (11th Cir. 2005) (per curiam)).

When a court "review[s] administrative findings of fact under the substantial-evidence test, [it] will reverse such findings only when the record compels a reversal; the mere fact that the record may support a contrary conclusion is not enough." *Indrawati v. U.S. Att'y Gen.*, 779 F.3d 1284, 1304 (11th Cir. 2015) (internal quotation marks omitted), *overruled in part on other grounds by Santos-Zacaria v. Garland*, 598 U.S. 411 (2023). Substantial evidence is evidence that is more than a mere scintilla. *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). The substantial evidence standard is met when there is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Del Monte Fresh Produce v. Dir., OWCP, Dep't of Labor*, 563 F.3d 1216, 1219 (11th Cir. 2009) (quoting *Lollar*, 893 F.2d at 1262).

If the Board affirmed the ALJ's decision, the Court's review "effectively cloaks the Board's decision with the same deference to which the ALJ is entitled." *Id.* (alteration adopted) (quoting *Lollar*, 893 F.2d at 1262 n.4). When reviewing the Board's decision, the Court must "mak[e] certain that the Board adhered to its

statutory standard of review of factual determinations, which is whether the findings of fact are supported by substantial evidence and consistent with the law." *Roger's Terminal & Shipping Corp. v. Dir., Off. of Worker's Comp. Programs, Dep't of Labor*, 784 F.2d 687, 690 (5th Cir. 1986) (citations omitted). The Board's interpretation of law, however, is reviewed de novo. *See Equitable Equip. Co. v. Dir., Office of Workers' Comp. Programs,* 191 F.3d 630, 631 (5th Cir. 1999) ("This court reviews the [Board]'s interpretation of the LHWCA, an issue of law, *de novo*, affording no special deference to the [Board]'s construction because it is not a policymaking agency." (citation omitted)).

Discussion

A. Sufficiency of Notice of Hill's Dust Aggravation Claim and Employer's Entitlement to a De Novo Hearing on Remand

In the first issue on appeal, Employer argues that Hill did not raise a claim for aggravation by dust, or otherwise, and failed to invoke the Section 20(a) presumption as to aggravation. Doc. 34 at 7. According to Employer, because Hill did not raise a claim for aggravation, it did not have sufficient notice of the claim. *Id.* at 16. Employer contends that the Board erred in determining that Hill raised a claim for aggravation; thus, the argument goes, Employer was denied due process and forced to defend a claim that Hill never raised. *Id.* at 12, 14. In addition, Employer argues that ALJ Panagiotis erred in not holding a de novo hearing on remand. *Id.* at 17.

Hill responds that although he did not specifically plead aggravation, Employer had sufficient notice of the claims because Employer acknowledged and litigated the

claim during and after the May 23, 2019 hearing before ALJ Henderson. Doc. 35 at 6–7, 9–10. In addition, Hill argues that Employer was not entitled to a de novo hearing before ALJ Panagiotis because "credibility was not at issue on remand" as Employer "presented no evidence on the issue of occupational dust exposure." *Id.* at 35.

A claimant must timely file a claim with the Department of Labor "[D]eputy [C]ommissioner in the compensation district in which such injury or death occurred." 33 U.S.C. § 913(a). A claimant must give the Deputy Commissioner and his employer notice of his injury, which "shall contain . . . a statement of the time, place, nature, and cause of the injury or death." 33 U.S.C. § 912(b). As noted above, Section 20(a) 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 . . . [t]hat the claim comes within the provisions of this chapter." 33 U.S.C. § 920(a). "A prima facie claim for compensation, to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." *U.S Indus./Fed. Sheet Metal, Inc.*, 455 U.S. at 615 (internal quotation marks omitted). "Even if a claimant has an unfettered right to amend his claim to conform to the proof, the presumption by its terms cannot apply to a claim that has never been made." *Id.* at 613.

As stated in Form LS-203 Employee's Claim for Compensation, Hill's claim is as follows: "Claimant was working for Northrop Grumman as a maintenance liaison/flight ops manager where he was exposed to burn pits, aviation fuels and

solvents. Thereafter, the Claimant was diagnosed with pulmonary fibrosis, interstitial lung disease which he had acquired from his exposure." ADMIN_000154.

In its May 27, 2020 decision, the Board vacated ALJ Henderson's decision because while "[t]he administrative law judge acknowledged [Hill]'s aggravation/contribution theory, . . . his rebuttal findings addressed only Dr. Rosen's rationale for opining that [Hill]'s ILD was not caused by burn pit exposure." ADMIN_000088. ALJ Henderson's decision further found "that Drs. Sneeringer's and Lancaster's opinions . . . are sufficient to show that [Hill]'s working conditions and/or activities in Afghanistan could have caused or *contributed* to his lung disease." ADMIN_002133 (emphasis added). In its December 29, 2022 decision, the Board declined to revisit Employer's argument that it was not afforded an opportunity to respond to Hill's aggravation claim because the issue was "fully considered and resolved by the Board in the prior appeal of this case." ADMIN_000095.

On remand, and after examining the record, ALJ Panagiotis determined that

> [T]he issue of [Hill]'s exposure to environmental dust while employed with Employer in Afghanistan was before the Director, as substantiated by the references made by counsel during the informal conference. Further, the issue of environmental dust was addressed during discovery and at the hearing. Employer was given additional time to confer with its expert on that issue after the hearing. Accordingly, this court finds notice was afforded.[9]

[9] Although ALJ Panagiotis' finding on notice does not explicitly mention aggravation, it references notice of an environmental dust exposure claim because the Board's May 17, 2020 decision, instructed the ALJ on remand "to address whether employer produced substantial evidence to rebut the Section 20(a) presumption that [Hill]'s dust exposure in Afghanistan aggravated, contributed to or hastened his ILD." ADMIN_000088. Additionally, Employer frames its aggravation argument as follows: "[Hill] has never pled

ADMIN_001438. Specifically on the issue of whether Hill sufficiently stated an aggravation claim such that Employer was afforded notice, the Court recommends that ALJ Panagiotis' decision be upheld because it is supported by substantial evidence; likewise, the Board's May 27, 2020 decision remanding ALJ Henderson's decision, as well as the Board's December 29, 2022 decision affirming ALJ Panagiotis are also supported by substantial evidence and consistent with the law.

Employer argues that "[t]here are no written documents in the record showing [Hill] filed a claim for any 'aggravation' of a work-related condition" and that "vague declaration[s] . . . do[] not support the invocation of the Section 20(a) presumption as to aggravation." Doc. 34 at 7, 11–12. In *U.S Indus./Fed. Sheet Metal, Inc.*, the Supreme Court acknowledged that

> [A]n informal substitute for a claim may be acceptable if it identifies the claimant, indicates that a compensable injury has occurred, and conveys the idea that compensation is expected, that considerable liberality is usually shown in allowing amendment of pleadings to correct . . . defects, unless the effect is one of undue surprise or prejudice to the opposing party, and that wide latitude is allowed as to variance between pleading and proof, but if the variance is so great that the defendant is prejudiced by having to deal at the hearing with an injury entirely different from the one pleaded, the variance may be held fatal.

U.S Indus./Fed. Sheet Metal, Inc., 455 U.S. at 613 n.7 (cleaned up) (quoting 3 A. Larson, The Law of Workmen's Compensation § 78.11, pp. 15-9–15-12 (1976)). The Supreme

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aggravation of his ILD/IPF and never presented any evidence that his underlying condition was aggravated, by dust or otherwise." Doc. 34 at 7.

Court also explained that the claimant's claim "was not fairly supported by . . . the evidentiary record." *Id.*

Here, however, the record indicates that the parties understood Hill's claim to include aggravation and litigated the case as such. Rosen's—Employer's expert—April 11, 2018 initial report, stated that Hill "felt dust and burn pits contributed to his symptoms." ADMIN_001063. In Hill's progress notes dated May 19, 2019, Lancaster opined that Hill "has multiple risk factors for dust and occupational dust exposure that could be risk factors for IPF." ADMIN_000714. In Hill's treatment plan contained within the May 19, 2019 progress notes, Lancaster stated that "[f]umes, dust, particulate inhalation could result in worsening disease." ADMIN_000715. On October 9, 2018, an informal conference was held before the South District of the U.S. Department of Labor's Office of Workers' Compensation Programs District Director in Jacksonville, Florida. ADMIN_000848. At the informal conference, counsel for Employer indicated that "[t]here is no evidence [Hill] was exposed to poor air quality, dust, and/or burning pits." ADMIN_000850.

Hill was asked at his March 28, 2019 deposition, "You mentioned the dust. Anything else that you think could have caused this?" Hill responded, "[w]ell, the dust itself, I think, was the - - certainly a contributor." ADMIN_001794.

Moreover, on April 10, 2019, Hill served his answers to Employer's first set of interrogatories. ADMIN_001800. Interrogatory number four asked Hill to "identify and explain in detail all events, exposures, chemicals, fumes, and/or situations that you contend caused, *aggravated*, and/or *worsened* your pulmonary condition."

ADMIN_001803 (emphasis added). Hill responded that during his employment in Afghanistan, he "was exposed to burn pits, wind storms, *dust storms*, jet fumes and waste on a regular basis." *Id.* (emphasis added). Employer acknowledges this response in the instant petition. *See* doc. 34 at 11.

Finally, after the May 23, 2019 hearing, ALJ Henderson provided Employer thirty days for Rosen to review "records from Dr. Lancaster from the May appointment" including "the letter that was sent and the treatment records." ADMIN_001847–48. Finally, in Employer's Post-Hearing Brief, it stated that "[t]he dispute is whether [Hill]'s [IPF] was caused, *aggravated*, or *contributed* to by his employment conditions with Employer." ADMIN_001298–99 (emphasis added).

To the extent Employer argues that the above instances in the record are "vague declaration[s]" which "do[] not support the invocation of the Section 20(a) presumption as to aggravation," doc. 34 at 11–12, "wide latitude is allowed as to variance between pleading and proof." *U.S Indus./Fed. Sheet Metal, Inc.*, 455 U.S. at 613 n.7 (cleaned up) (citation omitted). Such latitude is particularly relevant here because given the above instances in the record that indicate the parties understood Hill's claim to include an aggravation claim, Employer "is [not] prejudiced by having to deal at the hearing with an injury entirely different from the one pleaded." *Id.* (cleaned up) (citation omitted).

The Court finds *Meehan v. Seaway Serv. Co. v. Dir., Off. of Workers' Comp. Programs, U.S. Dep't of Labor*, 125 F.3d 1163 (8th Cir. 1997) particularly instructive here given its similarity to the present case. In *Meehan*, claimant's employer "argue[d] it

was denied due process by the ALJ awarding benefits on a theory that the claimant . . . did not assert." *Id.* at 1167. Claimant's employer further argued "that it was not given adequate notice to defend against a claim of cumulative trauma or aggravation of pre-existing condition which was the finding of the ALJ." *Id.*

The Eighth Circuit concluded, however, that "[t]he record reflects that [claimant's employer] was put on notice prior to the hearing date that there was uncertainty as to the nature of [claimant]'s injury with a possibility of cumulative trauma" and concluded that claimant's employer "was not prejudiced by the lack of specificity as to the nature of the injury." *Id.* at 1168. In reaching its conclusion, the court relied upon evidence in the record, including but not limited to claimant's letter to the Department of Labor prior to the hearing that mentioned aggravation to his knee condition; claimant's testimony at a hearing; and claimant's treatment history. *Id.* at 1167–68.

Similarly, here, record evidence indicates that both parties litigated aggravation such that Employer was on notice of the claim including Rosen's April 11, 2018 initial report; ADMIN_001063, Hill's May 19, 2019 progress notes with Lancaster; ADMIN_00714, Hill's treatment plan contained in the May 19, 2019 progress notes; ADMIN_000715, counsel for Employer's representations during the October 9, 2018 informal conference; ADMIN_000850, Hill's March 28, 2019 deposition testimony; ADMIN_001794, Hill's discovery responses; ADMIN_001803, and Employer's Post-Hearing Brief; ADMIN_001298–99.

As for Employer's argument that ALJ Panagiotis erred in not holding a de novo hearing on remand, doc. 34 at 7, the Court finds it unavailing. Parties are entitled to a de novo hearing when a case is remanded to an administrative law judge if (1) the presiding judge is unavailable and (2) the credibility of a witness is at issue. *Williams*, 2001 WL 36392891, at * 2; *see also Gregory*, 1999 WL 35135288, at *2. "A rehearing of the evidence or a reopening of the record is generally not required when the Board remands a case to an administrative law judge when the parties were afforded ample opportunity to develop the evidence prior to the issuance of the original decision." *Gregory*, 1999 WL 35135288, at *2.

The ALJ determined that a de novo hearing was unwarranted because "credibility determinations [were] not at issue. The experts for both parties submitted testimony through written records," meaning "a determination must be made from the cold record, without observing demeanor or assessing credibility." ADMIN_001731. And the administrative record shows that the parties actively litigated the case before ALJ Henderson issued his decision. More importantly, ALJ Panagiotis did not assess credibility because he determined that Employer failed to rebut the Section 20(a) presumption. ADMIN_001735, ADMIN_001439–40. Specifically, he found that "Employer has not put forth any evidence, much less substantial evidence, to rebut the presumption that dust exposure *aggravated* claimant's underlying ILD." ADMIN_001439–40 (emphasis in original).

Considering this finding, Employer was not entitled to a de novo hearing on remand. Therefore, I conclude that ALJ Panagiotis' findings that Employer was

afforded sufficient notice of Hill's dust aggravation claim and that Employer was not entitled to a de novo hearing on remand are support by substantial evidence, and I recommend affirming the Board's December 29, 2022 decision on these issues.

B. Board's Authority in Its May 27, 2020 Decision

Employer next argues that "[t]he Board exceeded their authority by making findings of fact on appeal." Doc. 34 at 17. Employer contends that the Board engaged in fact finding by assuming that Hill raised an aggravation claim and by failing to "address[] the fact-finding needed for making a *prima facie* case." *Id.* at 19. Hill refutes Employer's argument and states "that the Board did not engage in additional fact-finding" because "it was simply reiterating what Judge Henderson's decision stated." Doc. 35 at 11.

Under 33 U.S.C. § 921(b)(3), "[t]he Board shall be authorized to hear and determine appeals raising a substantial question of law or fact." Further, "[t]he Board's orders shall be based upon the hearing record," and "[t]he findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole." *Id*. Here, the Court's "only function is to correct errors of law and to determine if the Board has adhered to its proper scope of review, i.e., has the Board deferred to the ALJ's fact-finding or has it undertaken de novo review and substituted its views for the ALJ's." *Del Monte Fresh Produce*, 563 F.3d at 1219 (alteration adopted).

A review of the May 27, 2020 decision shows that the Board did not engage in fact finding. ALJ Henderson found that Hill "established a prima facie case that he

suffered an 'injury' under the Act, having established that he suffered a harm or pain, namely interstitial lung disease . . . and that his working conditions and activities in Afghanistan could have caused or contributed to the interstitial lung disease." ADMIN_002133. He further evaluated Rosen's April 11, 2018 initial report wherein she opined about Hill's ILD in relation to exposure to burn pits and found "that Dr. Rosen's medical opinion constitutes substantial evidence sufficient to rebut Claimant's prima facie case that his idiopathic pulmonary fibrosis was due to work-related exposures such as burn pits, dust, or other pulmonary irritants." ADMIN_002136.

The Board specifically referenced ALJ Henderson's finding that Hill was entitled to the Section 20(a) presumption by stating

> In his decision, the administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. § 920(a), that his working conditions in Afghanistan could have caused or contributed to this ILD based on claimant's testimony about his dust and burn pit fumes exposure, the opinion of Dr. Richard Sneeringer that claimant's burn pit fumes exposure could be a contributing factor to his pulmonary fibrosis, and the opinion of Dr. Lisa Lancaster that occupational dust exposure could be a risk factor for idiopathic pulmonary fibrosis (IPF). The administrative law judge found the opinion of Dr. Patricia Rosen rebutted the Section 20(a) presumption that claimant's ILD is due to his work-related exposures to burn pit fumes, dust, and other pulmonary irritants.

ADMIN_000084 (citations omitted). Based, in part, on the above, the Board determined that ALJ Henderson "did not adequately address whether employer rebutted the Section 20(a) presumption that his occupational dust exposure in Afghanistan from 2012 to July 2018 contributed to, aggravated, or hastened his ILD"

because "his rebuttal findings addressed only Dr. Rosen's rationale for opining that claimant's ILD was not caused by burn pit exposure." ADMIN_000088.

Employer mischaracterizes the Board's recitation of ALJ Henderson's finding as fact-finding. The Board neither assumed an aggravation claim nor failed to address the prima facie case for such a claim. By referencing ALJ Henderson's findings, ADMIN_000084, ADMIN_000088, "the Board deferred to the ALJ's fact-finding . . . and [did not] substitute[] its views for the ALJ's." *Del Monte Fresh Produce*, 563 F.3d at 1219. As a result, I recommend finding that the Board "adhered to its statutory standard of review of factual determinations," *Roger's Terminal & Shipping Corp.* at 690, and that its May 17, 2020 order be affirmed.

C. Employer's Rebuttal of Hill's Dust Aggravation Claim

The Court next addresses Employer's argument that it "produced substantial evidence to rebut the Section 20(a) presumption of a compensable injury." Doc. 34 at 20. To support its argument, Employer relies on Rosen's April 11, 2018 initial report wherein she stated that Hill's "illness is not work related," *id.* at 26 (quoting ADMIN_000943), and her June 13, 2019 report wherein she stated that Hill has IPF "without evidence of a work related component," *id.* at 23 (quoting ADMIN_001169). According to Employer, "[a] well-founded report by a qualified expert finding no evidence of a work-related component to an injury is precisely the sort of evidence that would lead a reasonable person to conclude that there is no relationship between

working conditions and aggravation of an injury." *Id.* at 25.[10]

In his response, Hill asserts that no reasonable judge could find that Employer provided substantial evidence to rebut his occupational dust exposure aggravation claim. Doc. 35 at 15. While Hill concedes that Employer "provided evidence that no reasonable relationship exists to [his] burn pit exposure claim and IPF," he contends that Employer "failed to do the same for Hill's aggravation by dust exposure [claim]." *Id.* With respect to Rosen's statement in her June 13, 2019 report that there is no work-related component, ADMIN_001169, Hill argues that more facts are needed to support the opinion. *Id.*

As discussed above, Section 20(a) "creates a rebuttable presumption which the employer ha[s] the duty of rebutting with evidence that the accident neither caused nor aggravated plaintiff's . . . condition." *Brown*, 893 F.2d at 297 (citing *Noble Drilling Co.*, 795 F.2d at 478) (recognizing that "[t]o rebut this presumption of causation, the employer [is] required to present substantial evidence that the injury was not caused by the employment")). "Substantial evidence is more than a mere scintilla," *Consol. Edison Co.*, 205 U.S. at 217, and is met when there is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Del Monte Fresh Produce*, 563 F.3d at 1219 (quoting *Lollar*, 893 F.2d at 1262). When, as is the case here,

[10] Employer argues, somewhat confusingly, that Hill failed to raise a claim for aggravation from dust exposure, in part, because Form LS-203 Employee's Claim for Compensation does not specifically mention aggravation. Doc. 34 at 7–8. However, Employer states in its petition that Rosen's April 11, 2018 "report addresses whether dust exposure at [Hill]'s work aggravated his ILD/IPF." *Id.* at 26.

a claimant raises an aggravation claim, an employer must present evidence on rebuttal that also addresses aggravation. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 225 (4th Cir. 2009) (citations omitted) (stating "[w]here the claimant makes out a prima facie case alleging the aggravation of a previous injury, the employer may rebut with substantial evidence demonstrating that the claimant's symptoms are a natural outgrowth of, or complication from, an existing predicate condition").

Here, on May 5, 2021, ALJ Panagiotis issued a Ruling on Issue Remanded from BRB and Order, in which he determined that "Employer has not put forth any evidence, much less substantial evidence, to rebut the presumption that dust exposure *aggravated* claimant's underlying ILD" because Rosen did "not address whether exposure to environmental dust or other particulates could *aggravate* the underlying lung disease." ADMIN_001734–35 (emphasis in original).[11] ALJ Panagiotis' finding is supported by substantial evidence, or stated more succinctly, is supported by a lack of substantial evidence.

In Rosen's April 11, 2018 initial report, she concluded that Hill's "illness is not work related" based on her review of Hill's medical records, which indicate that "[t]here is no history of consistent exposures to burn pits." ADMIN_000943, ADMIN_000949. She also stated that Hill "did not work in close proximity to these

[11] ALJ Panagiotis incorporated the May 5, 2021 Ruling on Issue Remanded from BRB and Order in his decision. ADMIN_001434.

pits for any period of time" and that "[i]t is important to note also that no significant illnesses have been shown to be related to exposure to burn pits." ADMIN_000949.

Importantly, after the May 13, 2019 hearing, ALJ Henderson provided Employer thirty days for Rosen to review "records from Dr. Lancaster from the May appointment" including "the letter that was sent and the treatment records." ADMIN_001847–48. Lancaster's May 16, 2019 Physician Statement of Health Condition noted that Hill suffers from "a progressive lung disease" and recommended that he "limit exposure to respiratory irritants to prevent worsened scarring in his lungs." ADMIN_000701. In Hill's treatment plan dated May 19, 2019, Lancaster stated that "[f]umes, dust, particulate inhalation could result in worsening disease." ADMIN_000715. Despite such a statement, after being provided an opportunity to review Hill's May 19, 2019 progress notes and treatment plan with Lancaster contained therein, Rosen reiterated in her June 13, 2019 report that Hill "has [IPF] without evidence or a work related component" and further stated that "[t]he new materials do not alter my initial opinion nor do they add any further data to change the diagnosis as previously established." ADMIN_001169–70.[12]

Rosen's reports fail to address Hill's dust exposure aggravation claim, and the Board did not err in affirming ALJ Panagiotis' finding that Employer failed to rebut

[12] In her June 13, 2019 report, Rosen indicated that she reviewed Lancaster's May 16, 2019 Work Capacity Evaluation Cardiovascular/Pulmonary Conditions, ADMIN_000702, and Lancaster's May 16, 2019 Physician Statement of Health Condition, ADMIN_000701, ADMIN_001170.

the Section 20(a) presumption. *See Brown*, 893 F.2d at 297 (stating that "[n]one of the physicians expressed an opinion ruling out the possibility that there was a causal connection between the accident and [claimant]'s disability. Therefore, there was no direct concrete evidence sufficient to rebut the statutory presumption"); *see also Newport News Shipbuilding & Dry Dock Co.*, 591 F.3d at 226 (stating that "no matter the nature of the evidence, it is not substantial if it cannot respond to the prima facie case in the first place" (citation omitted)).

D. Hill's Burden to Establish Nature and Extent of His Disability

Having determined that the Board did not err in affirming ALJ Panagiotis' finding that Employer failed to rebut the Section 20(a) presumption as to Hill's dust aggravation claim, Hill still has "[t]he burden of establishing the nature and extent of disability." *Trask v. Lockheed Shipbuilding & Constr. Co.*, BRB No. 81-1816, 1985 WL 55363, at *3 (DOL Ben. Rev. Bd. Feb. 14, 1985) (per curiam). "Once claimant has established that he is unable to perform his usual employment because of a work-related injury, however, the burden shifts to employer to prove the availability of suitable alternate employment." *Id.* (citation omitted).

Employer argues that Hill failed to produce evidence establishing disability due to aggravation. Doc. 34 at 39. It relies on *Lamon v. A-Z Corp.*, BRB No. 11-0322, 2012 WL 3198805, at *3 (DOL Ben. Rev. Bd. July 26, 2012) to argue that Hill "must produce evidence that shows he cannot return to work due to aggravation to support the finding of disability, when a claim for aggravation of an underlying condition specifically has been made." Doc. 34 at 39 (emphasis omitted). Employer asserts that

(1) Rigdon's June 10, 2021 Work Capacity Evaluation Cardiovascular/Pulmonary Conditions, ADMIN_001578, is insufficient because it "does not state that [Hill] is totally disabled due to aggravation from his employment"; (2) medical records for Hill's visit with Rigdon on March 12, 2020, ADMIN_001564, are insufficient because they do not contain evidence "that supports a finding of disability on the basis that [Hill] cannot work due to employment-related aggravation of his underlying condition"; and (3) Lancaster's May 16, 2019 Physician Statement of Health Condition is insufficient because her conclusion contained therein that Hill must limit exposure to respiratory irritants, ADMIN_000701, is only based on exposure to burn pits. Doc. 34 at 39–42 (emphasis omitted).

Hill, however, refutes Employer's arguments arguing that Lancaster's Physician Statement of Health Condition constitutes substantial evidence of dust aggravation claim because she opines that Hill cannot return to his overseas employment, in part, because of her concerns that such deployment could result in an acute exacerbation of his ILD. Doc. 35 at 18 (citing ADMIN_000701). Hill further argues that his treatment plan, contained in the May 19, 2019 progress notes with Lancaster, also constitutes substantial evidence because Lancaster opined that "[f]umes, dust, particulate inhalation could result in worsening disease." *Id.* (quoting ADMIN_000715).

Here, ALJ Panagiotis, with respect to Hill's disability, found as follows:

> In light of the medical evidence in the record, including Claimant's doctor's opinions regarding his functional capacity after the injury, the objective findings in their treatment notes and their opinions in the work capacity evaluations, the undersigned concludes that Claimant has

> established he was unable to return to his regular or usual employment in Afghanistan due to his injuries aggravated by work-related environmental exposure to dust on July 18, 2018. Therefore, at this initial stage, Claimant has established a *prima facie* case of total disability.

ADMIN_001450.[13]

The Court reiterates that it must evaluate an ALJ's findings to the extent they are "supported by substantial evidence in light of the entire record." *U.S. Steel Mining* Co, 386 F.3d at 984 (11th Cir. 2004) (quoting *Lollar*, 893 F.2d at 1261). Employer specifically contests Rigdon's June 10, 2021 Work Capacity Evaluation Cardiovascular/Pulmonary Conditions and the medical records for Hill's visit with Rigdon on March 12, 2020. Doc. 34 at 39–41. Employer argues that the Work Capacity Evaluation Cardiovascular/Pulmonary Conditions only states that "lung disease is progressive," and provides no further support. *Id.* at 39–40.

The evaluation also states, however, that Hill is unable to perform his usual job without restriction and that Hill's "work injury/condition caused [anatomical] and/or [functional] changes in the cardiovascular or respiratory systems that preclude exposure to" temperature extremes, *airborne particles*, gas/fumes, and electromagnetic function. ADMIN_001578 (emphasis added). As for the March 12, 2020 medical records, they state that Hill's "chest CT scan result . . . showed *worsening* of the pulmonary fibrosis and carotid calcification." ADMIN_001564 (emphasis added).

[13] ALJ Panagiotis further concluded that Hill "carried his burden to establish that he is unable to work as a result of his IPF/ILD, aggravated by work-related conditions." ADMIN_001450.

Rigdon acknowledged a worsening of the underlying ILD, which indicates that he considered aggravation. Finally, with respect to Lancaster's May 16, 2019 Physician Statement of Health Condition, it too mentions Hill's progressive ILD and in it Lancaster, like Rigdon, recommends employment that is "temperature controlled" and "free of respiratory irritants." ADMIN_000701. Therefore, the Court finds that ALJ Panagiotis' finding that Hill established a prima facie case of total disability is supported by substantial evidence.

As for the Board's December 29, 2022 decision, in it the Board likewise concluded that the "medical opinion evidence, credited by the ALJ, satisfies Claimant's burden of showing he cannot return to his usual overseas work for Employer due to his ILD, as aggravated by his work-related dust exposure." ADMIN_000101 (citing *Rice v. Serv. Employees Int'l, Inc.*, BRB No. 09-0785, 2010 WL 3454037 (DOL Ben. Rev. Bd. June 25, 2010) (per curiam)). With respect to Employer's reliance on *Lamon*, the Board distinguished it "because the ALJ has already rationally determined that Claimant's total disability is due, at least in part, to his overseas work exposures to dust." *Id.* n.16 (citing *Rice*, 2010 WL 3454037).

The Court agrees with the Board's analysis. In *Lamon*, the Board vacated its prior affirmance of the ALJ's award of total disability benefits because the ALJ failed to determine whether the claimant's total disability was due to work exacerbations or "due solely to the natural progression of his non-work-related" chronic obstructive pulmonary disease. *Lamon*, 2012 WL 3198805, at *1, *3. Here, as noted above, ALJ Panagiotis found that Hill's total disability was due, at least in part, to dust exposure.

ADMIN_001450. As a result, I find that the Board's affirmance is also supported by substantial evidence and is consisted with the law.[14] Thus, I recommend affirmance.

Recommendation

I respectfully **recommend**:

1. Employer's Petitions for Judicial Review, docs. 1, 7, be **denied as moot**.
2. The Board's May 27, 2020 and December 29, 2022 decisions be **affirmed**.
3. The Clerk be directed to **terminate** any pending motions and **close** the file.

Entered in Jacksonville, Florida, on November 18, 2025.

/s/ Laura Lothman Lambert
United States Magistrate Judge

[14] Although "[o]nce claimant has established that he is unable to perform his usual employment because of a work-related injury . . . the burden shifts to employer to prove the availability of suitable alternate employment," *Trask*, 1985 WL 55363, at *3, Employer fails to reference or make any argument related to suitable alternate employment in its petition. As a result, the Court will deem the issue waived. *See United States v. Harding*, 104 F.4th 1291, 1300 (11th Cir. 2024) (quoting *Sapuppo v. Allstate Floridian Ins.*, 739 F.3d 678, 681 (11th Cir. 2014) ("A party abandons an issue when [it] 'makes only passing reference to it or raises it in a perfunctory manner without supporting arguments and authority.'")). Additionally, ALJ Panagiotis determined that Employer did not meet its burden of establishing suitable alternate employment because Employer failed "to conduct a vocational assessment of [Hill] or provide a labor market survey." ADMIN_001452.

Notice to the Parties

"Within 14 days after being served with a copy of [a report and recommendation on a dispositive issue], a party may serve and file specific written objections to the proposed findings and recommendations." Fed. R. Civ. P. 72(b)(2). "A party may respond to another party's objections within 14 days after being served with a copy." *Id.* A party's failure to serve and file specific objections to the proposed findings and recommendations alters the scope of review by the District Judge and the United States Court of Appeals for the Eleventh Circuit, including waiver of the right to challenge anything to which no specific objection was made. *See* Fed. R. Civ. P. 72(b)(3); 28 U.S.C. § 636(b)(1)(B); 11th Cir. R. 3-1; Order (Doc. No. 3), No. 8:20-mc-100-SDM, entered October 29, 2020, at 6.

c:
The Honorable Wendy W. Berger, United States District Judge
Billy J. Frey, Esquire
Alan G. Brackett, Esquire
Alex J. Domingue, Esquire
Howard S. Grossman, Esquire
Callie Jean Fixelle, Esquire
Kathleen Hwang Kim, Esquire