BRB No. 00-0510

DONALD E. WHITE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING	)	
AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order and Order on Motion to Reconsider of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Benjamin M. Mason (Mason, Cowardin & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order and Order on Motion to Reconsider (99-LHC-880) of Administrative Law Fletcher E. Campbell, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant worked as a shipfitter in employer's shipyard from 1961 until November 3, 1990, when he retired due to injuries to his back, shoulder and knee. Claimant, who testified that he was exposed to loud noise during his employment with employer, underwent audiological examinations every two years between 1980 and 1990, as a matter of employer's hearing conservation program. Claimant's last audiometric testing prior to his retirement was performed in May 1990 and did not reveal a compensable hearing loss under the Act; claimant's audiometric evaluations over the years did, however, reveal a slight hearing

impairment in his right hear. On May 13, 1998, claimant underwent an audiometric evaluation which revealed a 1.875 percent monaural impairment in his right ear, and he thereafter filed a claim for permanent partial disability compensation under the Act.

In his Decision and Order, the administrative law judge found that claimant was entitled to invocation of the presumption at Section 20(a) of the Act, 33 U.S.C. §920(a), as the parties stipulated that claimant suffers from a hearing loss and Dr. Zambas, employer's chief audiologist, testified that some of claimant's hearing loss could have been caused by work-related exposure to noise. The administrative law judge then determined that employer failed to establish rebuttal of the Section 20(a) presumption, as the opinion of Dr. Zambas was insufficient to establish rebuttal, and employer failed to establish a subsequent, intervening event which caused claimant's hearing loss. Accordingly, the administrative law judge awarded claimant compensation for a 1.875 percent monaural hearing loss pursuant to Section 8(c)(13)(A) of the Act, 33 U.S.C. §908(c)(13)(A). The administrative law judge summarily denied employer's motion for reconsideration.

On appeal, employer contends that the administrative law judge erred in finding that claimant's hearing loss is related to his employment with employer. Claimant has not responded to the instant appeal.

Where, as in the instant case, a claimant establishes his *prima facie* case, the burden shifts to employer to rebut it with substantial countervailing evidence that claimant's hearing loss was not caused, contributed to or aggravated by his employment. *See generally Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *Davison v. Bender Shipbuilding & Repair Co.*, 30 BRBS 45 (1996). It is employer's burden on rebuttal to present specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment; the unequivocal testimony of a physician that no relationship exists between the injury and a claimant's employment is sufficient to rebut the presumption. *See Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988). If the administrative law judge finds that the Section 20(a) presumption is rebutted, then all relevant evidence must be weighed to determine if a causal relationship has been established, with claimant bearing the burden of persuasion. *See, e.g., Meehan Service Seaway Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114 (CRT)(8th Cir. 1997), *cert. denied*, 118 S.Ct. 1301 (1998); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

Employer argues that, contrary to the administrative law judge's determination, it introduced evidence sufficient to rebut the Section 20(a) presumption and establish the absence of causation on the record as a whole. In support of its contention, employer relies on the opinion of Dr. Zambas, the only medical opinion of record with regard to the issue of

causation. Employer further asserts that since claimant did not have a ratable hearing impairment under the Act at the time of his retirement, the contribution rule cannot apply. Contrary to employer's assertion, however, the opinion of Dr. Zambas is insufficient to establish rebuttal of the Section 20(a) presumption. Dr. Zambas, who examined claimant on behalf of employer's hearing conservation program, testified that the increase in claimant's hearing loss between 1990 and 1998 is more likely than not attributable to the aging process, since claimant was removed from noise exposure in November 1990. *See* Tr. at 50. While employer emphasizes that claimant did not have a ratable hearing impairment at the time of his retirement,[1] Dr. Zambas nevertheless stated that claimant did exhibit mild hearing loss typical of that due to noise exposure while working for employer. *Id*. at 57. Dr. Zambas further testified that claimant's hearing in his right ear was not normal even as far back as 1980, and that claimant's overall hearing impairment in 1998 was attributable in part to his work-related exposure to noise. *Id*. at 50-51. Inasmuch as Dr. Zambas' opinion specifically acknowledges that workplace noise played a part in claimant's hearing loss, we affirm the administrative law judge's determination that Dr. Zambas' opinion cannot meet employer's burden of demonstrating that claimant's work environment did not aggravate or contribute to his hearing loss. *See Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52 (CRT)(4th Cir. 1982); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995).

Employer further argues that it established rebuttal of the Section 20(a) presumption by virtue of an independent, non-industrial cause of claimant's hearing loss. In this regard, employer asserts that since claimant did not have a ratable hearing impairment prior to his retirement, claimant's hearing loss must have stemmed from another source, and therefore argues that claimant's retirement itself constitutes a subsequent, intervening cause. We reject employer's contention. Initially, as previously noted, the fact that employer's audiogram showed no ratable loss in May does not prove that claimant had no ratable hearing loss when

[1]Since claimant continued to work for approximately 6 months after the date of the last audiometric testing performed by employer, employer has not in fact established that claimant had a zero percent ratable loss on the date he retired. Under these circumstances, the administrative law judge is allowed to use the most credible audiogram dated after retirement to measure the extent of the hearing loss. *See Labbe v. Bath Iron Works Corp.*, 24 BRBS 159 (1991); *Dubar v. Bath Iron Works Corp.*, 25 BRBS 5 (1991).

he retired in November. It is well-established, moreover, that if claimant sustains an injury subsequent to the work injury, an employer can establish rebuttal of the Section 20(a) presumption by producing substantial evidence that claimant's condition was caused by a subsequent event; in such a case, employer must additionally establish that the first work-related injury did not cause the second injury. *See, e.g., Kelaita v. Director, OWCP*, 799 F.2d 1308, 1310-1311 (9th Cir. 1986). Employer is liable for the entire disability if the second injury is the natural and unavoidable result of the first injury. Where the second injury is the result of an intervening cause, however, employer is relieved of liability for that portion of disability attributable to the second injury. *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994). Thus, in order to establish an intervening cause resulted in claimant's hearing loss, employer must produce evidence that events subsequent to claimant's retirement caused his hearing loss.

Employer has not met this burden. In his decision, the administrative law judge rejected Dr. Zambas' opinion that noises around the house, such as that from a lawn mower, could have caused additional deterioration in claimant's hearing, as this opinion was contradicted by the Sataloff article on occupational hearing loss, which states that household noises do not damage hearing. *See* Decision and Order at 5; Admin. L.J. Ex. 1 at 374. The administrative law judge accepted Dr. Zambas' opinion that claimant's post-retirement hearing loss was caused in part by the aging process, but determined that mere aging does not constitute an intervening cause. As the administrative law judge's determination that claimant's hearing loss was not caused by a subsequent, intervening event sufficient to rebut the Section 20(a) presumption is supported by substantial evidence and is in accordance with law, we affirm the administrative law judge's determination that a causal relationship between claimant's hearing loss and his employment has been established. *See Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175 (1996); *Bass*, 28 BRBS at 11. We therefore affirm the administrative law judge's award for claimant's 1.875 percent monaural hearing impairment under Section 8(c)(13)(A) of the Act.

Accordingly, the Decision and Order and Order on Motion to Reconsider of the administrative law judge are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge