BRB No. 11-0671

JOHN E. SCHIESSL	)	
	)	
Claimant-Petitioner	)	
v.	)	
	)	
GEORGIA-PACIFIC CORPORATION	)	
	)	
and	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	DATE ISSUED: 07/13/2012
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Claim for Benefits of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Richard Mann and Paul G. Dodds (Brownstein, Rask, Sweeney, Kerr, Grim, Desylvia & Hay, LLP), Portland, Oregon, for claimant.

Norman Cole (Sather, Byerly & Holloway, LLP), Portland, Oregon for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Claims for Benefits (2010-LHC-01487) of Administrative Law Judge Richard M. Clark 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates,Inc.*, 380 U.S. 359 (1965).

In 2009, claimant, a voluntary retiree, sought benefits under the Act for a bilateral hearing loss. Claimant had worked for employer for 30 years before his retirement in 2008. Claimant worked as a tugboat mechanic for employer's predecessor from 1976 until 1998. In 1998, claimant began working for employer as a lift truck mechanic.

While working for employer, claimant underwent employer-provided audiometric evaluations between 1989 and 1999. JX 26-31. These audiograms do not demonstrate a ratable hearing impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment*, but do demonstrate a loss of hearing. *See* 33 U.S.C. §908(c)(13)(E). Claimant underwent five audiometric evaluations between April 2005 and October 2010. These audiograms demonstrated a ratable loss of hearing.[1]

Beginning in 1999, employer had noise studies taken in its workplace.[2] Employer submitted into evidence four noise studies of lift-truck mechanics: (1) November 5, 1999: maximum noise level of 114.4 decibels and time-weighted averages of between 78.3 and 75.0 decibels. JX 2 at 17. Under "particularly noisy jobs" it notes that an employee used a "compressed air hose." *Id.* (2) November 12, 1999: maximum noise level of 100.7 decibels and time-weighted averages of 67.3 and 53.2 decibels. *Id.* at 20. Under "particularly noisy jobs," the employee wrote "n/a." *Id.* (3) November 19, 1999: maximum noise level of 108.3 decibels and time-weighted averages of 76.5 and 73.7 decibels. JX 3 at 23. Under "particularly noisy jobs," the employee wrote "n/a." *Id.* (4)

[1]The audiograms demonstrated the following impairments: (1) 7.5 percent, JX 32; (2) 10.9 percent, JX 35; (3) 30.8 percent, of which two percentage points were due to tinnitus, JX 37; (4) 31.5 percent, of which four percentage points were due to tinnitus, JX 42; and (5) 29.6 percent, of which three percentage points were due to tinnitus, JX 56.

[2]A noise dosimetry is a measurement taken using a device that records occupational noise by means of attaching a microphone to the clothing of an employee near that employee's ear. Decision and Order at 7, 19; Tr. at 164. The measurements taken are converted into a "time-weighted average," which represents the amount of exposure that would have occurred over a standard period, such as eight or ten hours, based on those measurements. Tr. at 161-163.

June 22, 2006: contained no maximum noise level reading and the time-weighted average is given only as "low." JX 15 at 135. The parties stipulated that claimant was not personally tested in any of the noise surveys; seven lift truck mechanics were tested. Decision and Order at 3; Tr. at 163-64.

In his Decision and Order, the administrative law judge found claimant entitled to invocation of the Section 20(a) presumption. 33 U.S.C. §920(a). The administrative law judge stated that employer conceded claimant's entitlement to the Section 20(a) presumption, Tr. at 25, and he also found that both elements of claimant's prima facie case are met as claimant has a physical harm in the form of hearing loss, and claimant established that working conditions, exposure to noise, could have caused such harm. Decision and Order at 8. The administrative law judge found that employer met its burden of producing substantial evidence to rebut the Section 20(a) presumption in the form of Dr. Hodgson's opinion. Weighing the evidence as a whole, the administrative law judge found that claimant failed to establish that his hearing loss is related to his employment after December 1, 1999, and, accordingly, he denied the claim. Decision and Order at 11. Claimant appeals the denial of benefits. Employer responds, urging affirmance of the administrative law judge's decision. Claimant has filed a reply brief.

On appeal, claimant contends initially that the administrative law judge incorrectly found that employer conceded his entitlement to invocation of the Section 20(a) presumption, when, in fact, employer limited its concession to a period pre-dating 1999 when the noise surveys commenced. Claimant contends he established his prima facie case with respect to the totality of his employment.

We agree with claimant that he is entitled to the Section 20(a) presumption with respect to the totality of his employment. Employer indeed conceded claimant's entitlement to the Section 20(a) presumption, notwithstanding its position that it did not expose claimant to injurious noise after 1999 such that claimant's ratable impairment is not work-related. Tr. at 25. Moreover, the administrative law judge found that claimant has a harm, a hearing loss, and that he was exposed to loud noise both before and after 1999. *See* Decision and Order at 3-4, findings 3-6.[3] Thus, in this case, claimant is

[3]We agree with claimant that the administrative law judge erred in stating that the issue in this case is whether, "Did occupational noise after December 1, 1999, contribute to Claimant's hearing loss." Decision and Order at 2. Claimant's claim is that the entirety of his employment with employer resulted in a compensable hearing loss. The administrative law judge's error is harmless, however, as substantial evidence supports his findings. *See infra.*

entitled to the presumption that his ratable hearing loss is due at least in part to his employment with employer. *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998).

Therefore, the burden shifted to employer to produce substantial evidence that claimant's hearing loss is not work-related. The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has stated that employer's burden on rebuttal is to produce "evidence specific and comprehensive enough to sever the potential connection between the disability and the work environment." *Ramey*, 134 F.3d at 959, 31 BRBS at 210(CRT). In *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010), the Ninth Circuit stated that the inquiry at rebuttal concerns "whether the employer submitted evidence that could satisfy a reasonable fact finder that the claimant's injury was not work-related." *Id.*, 608 F.3d at 651, 44 BRBS at 50(CRT). Claimant contends that the administrative law judge erred in finding Dr. Hodgson's opinion sufficient to rebut the Section 20(a) presumption. We reject claimant's contention and affirm the finding that the Section 20(a) presumption is rebutted.

The administrative law judge noted that Dr. Hodgson is a board-certified otolaryngologist who spends a significant portion of his continuing education in the study of forensic otolaryngology. Dr. Hodgson opined, after examining claimant and reviewing the noise dosimetries of lift mechanics and claimant's audiometric results, that it was not medically probable that noise exposure after 1999 contributed to claimant's hearing loss. Decision and Order at 9; JX 40; Tr. at 170, 174-175. Dr. Hodgson acknowledged that claimant's initial audiograms demonstrated a pattern consistent with noise exposure. JX 40. Dr. Hodgson testified, however, that the audiograms signifying a ratable impairment are not consistent with noise exposure because of the loss demonstrated at levels that are not generally affected by noise exposure. Tr. at 170. The doctor attributed claimant's post-1999 hearing loss to age and genetics. Tr. at 172-173. Dr. Hodgson was aware that claimant generally wore hearing protection after 1999, and that claimant may have been subjected to some "impact noise." Tr. at 206. Nonetheless, Dr. Hodgson testified that the noise surveys take such exposure into account in the time-weighted averages. Tr. at 211, 219-220. While Dr. Hodgson stated it is "possible" that claimant had some noise-induced hearing loss after 1999, Tr. at 214, he did not change his opinion that noise exposure after 1999 did not contribute to claimant's hearing loss. Tr. at 217.

The administrative law judge found that Dr. Hodgson's opinion rebuts the Section 20(a) presumption because he stated that claimant's ratable hearing loss is not related to occupational noise exposure. The administrative law judge observed that Dr. Hodgson

did not rely entirely on noise surveys in rendering his opinion, but also relied on the pattern of hearing loss demonstrated on claimant's more recent audiograms.[4] We affirm the finding that Dr. Hodgson's opinion constitutes evidence "that could satisfy a reasonable fact finder that the claimant's injury was not work-related." *Ogawa*, 608 F.3d at 651, 44 BRBS at 50(CRT); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). That the cases cited by the administrative law judge have different facts than those in this case does not undermine their relevance. Decision and Order at 9. In *Damiano v. Global Terminal & Container Serv.*, 32 BRBS 261 (1996), the Board affirmed the administrative law judge's finding that a medical opinion based in part on noise surveys was insufficient to rebut the Section 20(a) presumption. In that case, the administrative law judge found the survey evidence insufficient to establish that claimant was not exposed to loud noise at any time during his employment.[5] In this case, however, the administrative law judge was entitled to find that employer produced substantial evidence that claimant's hearing loss is not work-related. *Ogawa*, 608 F.3d at 651-652, 44 BRBS at 50-51(CRT). Therefore, we affirm the administrative law judge's finding that employer rebutted the Section 20(a) presumption.

[4]The administrative law judge noted that Dr. Hodgson initially reported that claimant worked as a forklift driver rather than as a lift truck mechanic, but rationally found that this does not undermine his opinion because the surveys found neither group exposed to injurious noise levels, and found higher noise levels for forklift drivers. Decision and Order at 10 n.4; JX 40 at 256.

[5]In view of the recent decision of the United States Court of Appeals for the Fifth Circuit in *Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, __ F.3d ___, No. 11-60456, 2012 WL 1977908 (5th Cir. June 4, 2012), claimant's citation to the Board's underlying, unpublished decisions is unavailing. In *Plaisance*, the Fifth Circuit held that the Board erred in reversing an administrative law judge's finding that employer produced substantial evidence rebutting the presumption. The administrative law judge relied on the opinion of a doctor that the claimant's hearing loss was not work-related. The opinion was based in part on noise studies at facilities similar to the employer's and on the degree of the claimant's hearing impairment compared to others his age. The Board held that these factors could not rebut the Section 20(a) presumption because they did not address the noise exposure to which the claimant testified he was exposed and which the administrative law judge had credited in invoking the Section 20(a) presumption. The court of appeals reversed the Board's decisions, holding that it is for the administrative law judge to determine if the evidence produced by employer constitutes "substantial evidence to the contrary."

Once the Section 20(a) presumption is rebutted, it falls from the case and it is claimant's burden to establish that his hearing loss is work-related based on the administrative law judge's weighing of the evidence as a whole. *Id.*, 608 F.3d at 651, 44 BRBS at 50(CRT). In this case, the administrative law judge found that claimant did not establish a causal connection between his employment and his ratable hearing loss. The administrative law judge declined to credit the opinion of Dr. Lipman, that claimant's hearing loss is due to noise exposure at work, because he is not Board-certified in otolaryngology, performs the bulk of his work for claimant-side parties, and gave inconsistent testimony on certain points. Decision and Order at 9-10. The administrative law judge found that Dr. Treyve's opinion supports that of Dr. Hodgson rather than that of Dr. Lipman. Dr. Treyve stated that while he could not exclude noise as a cause claimant's hearing loss, the trend of the patterns on claimant's audiograms and the noise surveys suggest that claimant's hearing loss is not noise-induced. JX 54 at 577, 594.

The administrative law judge is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences therefrom. He is not bound to accept the opinion or theory of any particular medical examiner. *Walker v. Rothschild Int'l Stevedoring Co.*, 526 F.2d 1137, 3 BRBS 6 (9th Cir. 1975). The Board may not reweigh the evidence but must only ascertain whether substantial evidence supports the administrative law judge's findings of fact. *King v. Director, OWCP*, 904 F.2d 17, 23 BRBS 85(CRT) (9th Cir. 1990). In this case, the administrative law judge was within his discretion in declining to rely on the opinion of Dr. Lipman and in finding that claimant failed to meet his burden of establishing the work-relatedness of his hearing loss. The administrative law judge rationally determined that the opinions of Drs. Hodgson and Treyve were more credible than that of Dr. Lipman. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Therefore, as the decision is supported by substantial evidence of record, we affirm the finding that claimant's hearing loss is not work-related and the consequent denial of benefits. *Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT); *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000).

Accordingly, the administrative law judge's Decision and Order Denying Claim for Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge