BRB No. 00-0951

ELLIS ADAMS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
AVONDALE INDUSTRIES, INCORPORATED	)	DATE ISSUED: June 20, 2001
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order-Denying Benefits of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Frank A. Bruno, New Orleans, Louisiana, for claimant.

William C. Cruse (Blue Williams, L.L.P.), Metairie, Louisiana, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (98-LHC-2811) of Administrative Law Judge Richard D. Mills 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 tool clerk for employer in 1945. Following a period of military service, claimant returned to work for employer as a clerk in the accounts payable department in 1952-1953, for a period of six to eight months. He left the shipyard at that time and has not worked in any other covered employment. Claimant underwent audiometric testing by Mr. Bode in January 1997, which revealed a 21.9 percent binaural impairment. Mr. Bode

opined that this impairment is noise-induced. Following this examination, claimant sought benefits under the Act. Claimant also underwent testing by Dr. Seidemann on November 9, 1998, which revealed a 31.3 percent binaural impairment. Dr. Seidemann opined that claimant's hearing loss is not noise-induced.[1]

In his decision, the administrative law judge found that claimant worked for employer for only two weeks in 1945 in covered employment, and that the period of time claimant worked as a clerk in 1952-1953 did not constitute covered employment. In addition, the administrative law judge found that the evidence is sufficient to invoke the Section 20(a), 33 U.S.C. §920(a), presumption that claimant's hearing loss is related to his employment at the shipyard, but that employer established rebuttal of the presumption. Then, based on the evidence as a whole, the administrative law judge found that claimant's hearing loss is not work-related. Therefore, the administrative law judge denied benefits.

Claimant contends on appeal that the administrative law judge erred in finding that claimant's work in 1952-1953 is not covered under the Act. Claimant further contends that the administrative law judge erred in finding that his hearing loss is not work-related based on the opinion of Dr. Seidemann. Employer responds, urging affirmance of the administrative law judge's decision.

We first address the causation issue, as it is potentially dispositive of the claim for compensation. Claimant contends the administrative law judge erred in finding that the evidence is insufficient to establish that his hearing loss is causally related to his work with employer. Once, as here, the Section 20(a) presumption is invoked, employer may rebut it by producing substantial evidence that claimant's employment did not cause, accelerate, aggravate or contribute to his injury. 33 U.S.C. §920(a). *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 120 S.Ct. 1239 (2000); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). If such evidence is produced, the presumption no longer applies, and the administrative law judge must weigh the competing evidence as a whole, with claimant bearing the burden of persuasion. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich*

[1]Claimant also was tested at a Beltone hearing aid center by Mr. Stinson. Cl. Ex. 2. The parties agreed that this hearing test was not valid under the Act's regulations. Tr. at 8-10.

Collieries, 512 U.S. 267, 28 BRBS 43(CRT) (1994). In the present case, the administrative law judge found that Dr. Seidemann's opinion is sufficient to establish rebuttal of the Section 20(a) presumption, and claimant does not challenge this finding.

The administrative law judge found that the evidence, weighed as a whole, does not establish that claimant's hearing loss is work-related. The administrative law judge found that Dr. Seidemann's opinion is more persuasive than the opinion of Mr. Bode. Dr. Seidemann stated that claimant's hearing loss is not noise-induced. Tr. at 127. He gave several reasons for this opinion. He testified that noise-induced hearing loss results in a pattern on a audiogram that has a notching shape, sometimes described as a backwards checkmark. *Id.* at 129. That pattern was not on either of claimant's valid audiograms. *Id.* Dr. Seidemann also opined that claimant's hearing loss is too great in the higher frequencies for the loss to be noise-induced. *Id.* at 129-130. Lastly, Dr. Seidemann opined that claimant's hearing loss is not noise-induced given the lack of symmetry of loss between the two ears. *Id.* at 160. In rendering his opinion that claimant's hearing loss is not noise-induced, Dr. Seidemann emphasized that no source of noise – occupational, recreational or military – is the cause of claimant's hearing loss. *Id.* at 134, 159.

In giving less weight to Mr. Bode's opinion that claimant's hearing loss is noise-induced, the administrative law judge found that Mr. Bode did not adequately explain the fact that the pattern on the audiograms did not match one expected from noise-induced hearing loss, nor was he persuaded by Mr. Bode's statement that very brief, intense, exposure could cause hearing damage in view of Dr. Seidemann's opinion to the contrary. As claimant has identified no errors in the administrative law judge's weighing of the medical evidence, and as Dr. Seidemann's opinion supports the administrative law judge's finding that claimant's hearing loss is not work-related, we affirm the denial of benefits as it is rational and supported by substantial evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961).

In view of our affirmance of the administrative law judge's finding that claimant's hearing loss is not work-related, we need not address claimant's contentions of error regarding his employment with employer in 1952-1953. As Dr. Seidemann stated that no source of noise caused claimant's hearing loss, an additional six to eight months of covered employment, assuming, *arguendo,* error on the administrative law judge's part,[2] would not change the result herein.

[2]We express no opinion on the propriety of the administrative law judge's findings in this regard.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge