BRB No. 01-650

HANIFF H. BARAICHI	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:
NATIONAL STEEL AND SHIPBUILDING COMPANY	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits, the Decision and Order on Reconsideration, and the Supplemental Decision and Order on Reconsideration Awarding Representative's Fee of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Jeffrey Winter, San Diego, California, for claimant.

Barry W. Ponticello and Renee C. St. Clair (England, Trovillion, Inveiss & Ponticello, P.C.), San Diego, California, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits, the Decision and Order on Reconsideration, and the Supplemental Decision and Order on Reconsideration Awarding Representative's Fee (2000-LHC-2397) of Administrative Law Judge Thomas M. Burke 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). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with the law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

The facts of this case are undisputed. In January 2000, claimant filed a claim for

compensation for work-related bilateral hearing loss and bilateral knee injuries which resulted from his 30 years of employment as a welder and welder supervisor with employer. During this time, claimant was exposed to loud noises and was required to repeatedly bend, climb, kneel and squat in order to perform his work. Employer accepted the claim for the knee injuries and agreed that claimant sustained a non-ratable work-related hearing loss in each ear. However, employer disputed whether the remaining hearing loss in claimant's right ear was compensable, contending that this hearing loss was due to an intervening cause.

Prior to 1995, claimant had undergone audiometric testing which revealed an unratable mild symmetric bilateral sensorineural hearing loss related to noise exposure. Emp. Ex. F. In 1995, claimant underwent audiometric testing which revealed an asymmetric high frequency loss, with the right ear being worse, but the loss was still at an unratable level. *Id.* The parties agreed that this hearing loss is work-related. In late 1997, claimant had a sudden severe loss of hearing in his right ear following an ear infection. On July 30, 1999, claimant suffered a heart attack. After recovering from the heart attack, claimant retired, retroactive to July 1999, due to the elimination of his job. The parties stipulated that claimant's last date of noise exposure was July 30, 1999. A hearing evaluation conducted in 1999 revealed that claimant's right ear has no hearing capacity, and the left ear has a greater loss than it did in 1995, but that loss is still unratable. Decision and Order at 3-4.

The administrative law judge found, pursuant to the parties' stipulation, that the hearing loss in claimant's left ear is work-related but is not compensable under the Act. Decision and Order at 5-6. In addressing whether employer is liable for benefits for the hearing loss in the right ear, the administrative law judge applied the Section 20(a), 33 U.S.C. §920(a), presumption and found that employer failed to rebut it. Nevertheless, the administrative law judge explained that he credited claimant's expert, Dr. Smith, and found that claimant's hearing in his right ear was worse due to the combination of the damage caused by an inner ear infection and the damage due to work-related noise exposure. Decision and Order at 7-8. The administrative law judge awarded claimant benefits for a 16.8 percent binaural hearing impairment pursuant to Section 8(c)(13)(B) of the Act, 33 U.S.C. §908(c)(13)(B). Decision and Order at 10. The administrative law judge denied employer's application for Section 8(f), 33 U.S.C. §908(f), relief. Decision and Order at 9.

Both parties sought reconsideration of the Decision and Order. The administrative law judge rejected employer's assertion that the ear infection was not the natural or unavoidable result of the work-related hearing loss, finding that "the compensable hearing loss was the natural consequence of a viral infection on the pre-existing occupational injury to the right ear." Decision and Order on Recon. at 2. The administrative law judge granted claimant's motion for reconsideration and modified his award for a binaural loss to one for a monaural loss in light of the decision of the United States Court of Appeals for the Fifth Circuit in *Tanner v. Ingalls Shipbuilding, Inc.*, 2 F.3d 143, 27 BRBS 113(CRT) (5th Cir.

1993). Thus, the administrative law judge awarded claimant benefits for 100 percent hearing loss in the right ear under Section 8(c)(13)(A), 33 U.S.C. §908(c)(13)(A). Decision and Order on Recon. at 3. In a Supplemental Decision and Order on Reconsideration, the administrative law judge awarded claimant's counsel an attorney's fee of $9,137.50, representing 30.75 hours at an hourly rate of $250, plus $1,750 for a witness fee, minus $300 for the state offset. Employer appeals both decisions, and claimant responds, urging affirmance.

Employer contends the administrative law judge erred in awarding benefits for claimant's hearing loss in his right ear because the ratable loss was caused by a subsequent, non work-related, intervening event, namely the non work-related ear infection. In this regard, employer argues that the administrative law judge improperly applied the aggravation rule to this case.

In determining whether a disability is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after he establishes a *prima facie* case. To establish a *prima facie* case, the claimant must show that he sustained a harm or pain and that conditions existed or an accident occurred at his place of employment which could have caused the harm or pain. *Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 33 BRBS 162(CRT) (1st Cir. 1999); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once the claimant establishes a *prima facie* case, Section 20(a) applies to relate the injury to the employment, and the employer can rebut this presumption by producing substantial evidence that the injury was not related to the employment. *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *see also American Grain Trimmers v. Director, OWCP [Janich]*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999) (*en banc*), *cert. denied*, 120 S.Ct. 1239 (2000); *Gooden*, 135 F.3d 1066, 32 BRBS 59(CRT). If the employer rebuts the presumption, it no longer controls and the issue of causation must be resolved on the evidence of record as a whole, with the 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 Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). If the claimant sustains an injury at work which is followed by a subsequent injury or aggravation outside of work, the employer is liable for the entire resultant condition if the subsequent harm is the natural or unavoidable result of the work injury. *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989); *Pakech v. Atlantic & Gulf Stevedores, Inc.*, 12 BRBS 47 (1980) (Smith, C.J., dissenting); *Vandenberg v. Leicht Material Handling Co.*, 11 BRBS 164 (1979) (Smith, C.J., dissenting). If the subsequent progression of the condition is not due to the work injury but is the result of an intervening cause, the employer remains liable for any portion of the disability related to the work injury, but it is relieved of liability for all disability attributable to the intervening cause. *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d

1046, 15 BRBS 120(CRT) (5th Cir. 1983); *Cyr v. Crescent Wharf & Warehouse Co.*, 211 F.2d 454 (9th Cir. 1954); *Leach v. Thompson's Dairy, Inc.*, 13 BRBS 231 (1981).

In this case, the parties stipulated that claimant sustained a non-ratable work-related hearing loss in both ears. Subsequently, claimant developed an ear infection, and it is undisputed that the ear infection was not work-related. Claimant suffered total hearing loss in his right ear after the infection. Dr. Smith opined that claimant's right ear loss was worse as a result of the combination of his noise exposure and ear infection, as a person with pre-existing damage to the inner ear due to exposure to noise is more likely to suffer an increase in hearing loss following an ear infection. Cl. Ex. 3. On these facts, the administrative law judge properly invoked the Section 20(a) presumption, as claimant established a harm, hearing loss, and working conditions which could have caused that harm, noise exposure. *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984).

As claimant invoked the Section 20(a) presumption, the burden shifted to employer to present substantial evidence severing the causal nexus between claimant's hearing loss and his employment. The administrative law judge found that employer failed to do so, as he found that Dr. Goodman's testimony was equivocal and not sufficiently specific or comprehensive to rebut the presumption. Decision and Order at 8; Tr. at 87-88, 100. Dr. Goodman testified that claimant's sudden hearing loss was caused by a vascular injury related to high cholesterol. Tr. at 87. He also stated that he did not believe claimant was more susceptible to hearing loss from an ear infection by virtue of the previous noise-related damage to his ears, but noted that "the term infection is a vague term." Tr. at 100. The testimony reiterates the opinion in his report dated February 14, 2000, wherein Dr. Goodman stated that claimant's sudden hearing loss was caused by an acute loss of blood supply to the inner ear and that without documentation of an explosive noise or trauma immediately preceding the hearing loss, the loss cannot be considered work-related. Emp. Ex. H.

We need not address whether Dr. Goodman's opinion suffices to rebut Section 20(a), as any error the administrative law judge may have made in this regard is harmless. The administrative law judge determined that the opinion of Dr. Smith was entitled to more weight than that of Dr. Goodman based on Dr. Smith's educational background, training, work experience, and research into the specific area at issue. It is within the authority of the administrative law judge to determine the weight to be given the evidence. *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); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). As the decision to give greater weight to Dr. Smith is rational, it must be affirmed.

Dr. Smith determined that claimant's loss of hearing in his right ear is worse as a result of the combination of the inner ear infection and the trauma due to noise exposure, and

he stated that the pre-existing damage in claimant's right ear due to noise exposure made claimant more susceptible to suffering a hearing loss as a result of the ear infection. Based on his research in the temporal bone laboratory at UCLA, Dr. Smith stated that where a person has pre-existing inner ear damage due to noise trauma, as claimant herein, he is more likely to suffer an increase in hearing loss after contracting an ear infection. He explained that this occurs because a person with damage to the outer third of the cochlea is more likely to destroy the remaining portion of the inner ear upon the occurrence of a subsequent traumatic event. Thus, he opined that the damage caused by the infection superimposed over the previous work-related hearing loss resulted in claimant's "dead" right ear. Cl. Ex. 3; Tr. at 49, 51-53. Dr. Smith's opinion constitutes substantial evidence supporting the finding that claimant's right ear hearing loss is related, at least in part, to claimant's employment. *James*, 22 BRBS at 273-274; *Vandenberg*, 11 BRBS at 168-169 (holding disability compensable, as work-related hernia increased susceptibility for another hernia).

Given Dr. Smith's opinion, the instant case is similar to the situations in *James* and *Plappert v. Marine Corps Exchange*, 31 BRBS 13, *aff'd on recon. en banc*, 31 BRBS 109 (1997), where disabilities following subsequent injuries were compensable as sequelae of the work injury, and distinguishable from *Davison v. Bender Shipbuilding & Repair Co.*, 30 BRBS 45 (1996), a hearing loss case involving a subsequent intervening cause. In *James*, the claimant's work-related back injury, which had not fully healed, was exacerbated when he stepped in a hole and jarred his spine. The evidence of record contained the opinion of a doctor who believed that both incidents, the work-related back injury and the non work-related misstep, resulted in a work-related disability. The administrative law judge credited this opinion. Consequently, the administrative law judge awarded, and the Board affirmed, benefits for this disability. *James*, 22 BRBS at 274. In *Plappert*, the claimant injured her back during the course of her employment and then she sustained another back injury while working for a subsequent non-longshore employer. The doctors' opinions of record established that the claimant's resulting disability was due to the combined effects of the damage to the spine caused by the work injury as well as the damage caused by the subsequent injury. The Board, therefore, affirmed the administrative law judge's award of benefits. *Plappert*, 31 BRBS at 16, 31 BRBS at 111.

Unlike *James* and *Plappert*, in *Davison* there was no credited medical opinion supporting a causal nexus between a work injury and claimant's disability following a non work-related subsequent event. Similar to the present case, in *Davison* the claimant sustained an unratable work-related hearing loss in both ears. Long after his employment and his exposure to work-related noise ended, Davison suffered a fall which resulted in the traumatic fracture of his temporal bone.[1] According to the evidence of record credited by the

[1]In contrast, in the present case claimant was employed and continued to be exposed to noise at work at the time that he suffered the ear infection and for two years thereafter.

administrative law judge, the fracture was the sole cause of Davison's 100 percent monaural hearing loss. As the hearing loss was not work-related, the Board affirmed the administrative law judge's denial of benefits. *Davison*, 30 BRBS at 47. Unlike *Davison*, in the present case, the credited medical evidence establishes that claimant's work-related loss was causally related to the loss following his ear infection.

Contrary to employer's assertions, the administrative law judge applied the proper law,[2] correctly citing cases involving situations where disability following a subsequent event outside of work was found related to the prior work injury. Because the second injury in this case was not work-related, we agree that the aggravation rule is not applicable. *See Davison*, 30 BRBS 45; *Leach*, 13 BRBS 231. However, we reject employer's contention that the proper issue is "whether the nonindustrial infection is the natural or unavoidable result of the prior industrial loss." Pet. Brief at 9. The issue is not the cause of the ear infection, but rather whether the disability thereafter was related to the employment injury. Thus, the administrative law judge did not err in reviewing the evidence to determine whether claimant's hearing impairment following his ear infection was the natural or unavoidable result of the work-related damage to his ear. This determination is consistent with case law establishing that if the employment injury contributes to or plays a causal role in claimant's ultimate condition, then the resulting disability is compensable. *James*, 22 BRBS at 273-274; *Pakech*, 12 BRBS 47; *Vandenberg*, 11 BRBS at 168-169 (discussing *J.V. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967)); *see also Southern Stevedoring Co. v. Henderson*, 175 F.2d 863 (5th Cir. 1949) (if "conditions of employment constitute the precipitating cause," the injury is compensable). The administrative law judge thus properly concluded that claimant's right ear hearing loss is compensable "because the hearing loss itself was the natural and unavoidable consequence of the initial work injury, not because the viral infection was a consequence of the work injury." Decision and Order on Recon. at 1. Since Dr. Smith opined that claimant's work-related damage to his ear resulted in an increased loss following the ear infection, claimant's disability cannot be attributed to the ear infection alone. Thus, his hearing loss in his right ear was a natural or unavoidable consequence of the damage caused by his work injury. As the administrative law judge's finding that claimant's work-related hearing damage loss combined with the loss resulting from the ear infection to cause claimant's disability is supported by Dr. Smith's opinion, employer is liable for the full extent of the hearing loss in claimant's right ear.[3] *Jones v.*

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[2]Employer argues that the administrative law judge misapplied the aggravation rule, which provides that when a claimant sustains an employment injury that aggravates, accelerates or combines with a pre-existing disability, the entire resulting disability is compensable. *Port of Portland v. Director, OWCP [Ronne I]*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991); *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*). Under the aggravation rule, the second injury must be work-related, and it must aggravate a prior condition. This rule does not apply here, as the work-related injury occurred first. It is clear that the administrative law judge's decision did not rely on this principle, but on the correct law. Decision and Order at 7.

[3]There is no evidence in this case which would permit apportionment of the degree of loss attributable solely to the subsequent ear infection. *See Plappert v. Marine Corps Exchange*, 31 BRBS 13, 16, *aff'd on recon. en banc*, 31 BRBS 109, 110 (1997).

Director, OWCP, 977 F.2d 1106, 26 BRBS 64(CRT) (7th Cir. 1992); *Plappert*, 31 BRBS 13. Accordingly, we affirm the administrative law judge's award of disability benefits for claimant's 100 percent monaural impairment.

Employer also challenges the administrative law judge's award of an attorney's fee based on an hourly rate of $250. Employer argues that the issue involved in this case was not unusually complex and that, therefore, claimant's counsel's fee should be computed based on an hourly rate of $175. It also asserts that the administrative law judge erred in relying on the *Survey of Law Firm Economics* because the average hourly rates stated therein do not reflect the simplicity of this case nor do they represent the rates for sole practitioners. The fact that there was only one issue before the administrative law judge does not require a conclusion that this case was simple. The issue involved a difficult determination of the cause of claimant's hearing loss. This factor was properly addressed by the administrative law judge, as he clearly considered the appropriate regulatory criteria in determining the hourly rate.[4] Further, the amount of an attorney's fee is discretionary, and the administrative law judge acted within his discretion in relying on the *Survey of Law Firm Economics* in considering an appropriate fee for attorneys practicing in San Diego, California. *Story v. Navy Exchange Service Center*, 33 BRBS 111, 120 (1999); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998). Therefore, we reject employer's argument that the administrative law judge erred in awarding a fee based on an hourly rate of $250, and we affirm the administrative law judge's fee award.

Accordingly, the administrative law judge's Decision and Order on Reconsideration and his Supplemental Decision and Order on Reconsideration Awarding Representative's Fee are affirmed.

SO ORDERED.

[4]Although the administrative law judge cited to 20 C.F.R. §725.366, a Black Lung regulation, the relevant portion of that section contains the identical considerations as the criteria enumerated in 20 C.F.R. §702.132:

> Any fee approved shall be commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the legal issues, and the amount of benefits awarded. . . .

20 C.F.R. §702.132(a); *compare with* 20 C.F.R. §725.366(b).

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge