BRB No. 04-0680

GARY R. TROXEL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
METROPOLITAN STEVEDORE COMPANY	)	
	)	
Self-Insured Employer-Respondent	)	
	)	
JONES OREGON STEVEDORING	)	DATE ISSUED:May 25, 2005
	)	
and	)	
	)	
RED SHIELD	)	
	)	
Employer/Carrier-Respondents	)	
	)	
ANACORTES LOG & BULK	)	
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order and Order on Claimant's Motion for Reconsideration of William Dorsey, Administrative Law Judge, United States Department of Labor.

Nicole A. Hanousek (Law Offices of William D. Hochberg), Edmonds, Washington, for claimant.

Robert Babcock, Lake Oswego, Oregon, for Metropolitan Stevedore Company.

Anna DePasquale (Slagle Morgan L.L.P.), Seattle, Washington, for Jones Oregon Stevedoring/Red Shield and Anacortes Log & Bulk/Homeport Insurance Company.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order and Order on Claimant's Motion for Reconsideration (2002-LHC-0794) of Administrative Law Judge William Dorsey 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, a longshoreman, filed a claim for a work-related hearing loss against the three named employers for whom he has worked since 1980.[1] In his Decision and Order, the administrative law judge found that claimant failed to establish a causal nexus between his current hearing loss and his longshore employment; accordingly he denied compensation. On reconsideration, the administrative law judge detailed his reasons for relying upon a 1979 audiogram to find that claimant's longshore work had not caused or aggravated his pre-existing hearing loss.[2] Claimant appeals, arguing that the administrative law judge erred in finding that employer rebutted the Section 20(a) presumption and in finding that his exposure to noise did not cause or aggravate his hearing loss. Employers respond, urging affirmance.

In establishing that an injury is causally related to his employment, claimant is aided by the Section 20(a), 33 U.S.C. §920(a), presumption which provides a presumed causal nexus between the injury and the employment. In this case, the administrative law judge found claimant entitled to invocation of the Section 20(a) presumption. Claimant's 2001 and 2002 audiograms show a loss of hearing and claimant testified to his exposure

[1] Claimant was employed in various jobs while working for these employers including bull driver, boom man, hold man, foreman, sling man, and shoveler. CX 3.

[2] The 1979 audiogram was a basis for claimant's state worker's compensation claim for hearing loss; this claim was denied. AX 2.

to loud noise in longshore employment.[3] *See Ramey v. Stevedoring Services of America*, 134 F.3d 959, 31 BRBS 206(CRT) (9th Cir. 1998). The invocation finding is not challenged on appeal and is affirmed.

Upon invocation of the Section 20(a) presumption, the burden shifts to employers to rebut the presumption with substantial evidence. In this case, employers sought to establish that claimant's hearing loss had not progressed since he underwent audiometric testing in 1978 and 1979 during non-covered employment. Therefore, in this regard, in order to rebut the Section 20(a) presumption, employers have to produce substantial evidence that claimant's hearing loss was not aggravated by his longshore employment. *See Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). The "aggravation rule" states that if a pre-existing condition is aggravated by the claimant's employment, the entire resultant disability is compensable. *Port of Portland v. Director, OWCP [Ronne I]*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966).

In his initial decision, the administrative law judge found that employers established rebuttal based upon the opinions of Dr. Lipscomb and Dr. Hicks that "the noise levels tested [at employers' facilities] were not high enough to contribute to hearing loss." Decision and Order at 9. In his Order denying claimant's motion for reconsideration, the administrative law judge further stated that "the medical evidence as a whole overcomes the Section 20(a) presumption, and persuades me that its cause was not workplace noise exposure. More likely than not it was due entirely to ageing." Order at 3-4. In both decisions, the administrative law judge drew inferences concerning the extent of claimant's pre-existing hearing loss, which claimant challenges on appeal.

In order to properly analyze this case, we will first address the issue of claimant's pre-existing hearing loss. None of the five audiometric evaluations conducted in the 1970s was interpreted at the time it was administered. Four tests, in 1971, 1976, 1977 and 1978, were administered with equipment calibrated under the ANSI 1969 standard. Hicks Dep. at ex. 2. Dr. Hicks interpreted the 1978 audiogram as indicating a 10.3 binaural loss, under the Fifth Edition of the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*), which is the same edition used to

[3] Dr. Lynch stated that the 2001 audiogram showed a 26.25 percent binaural loss using air conduction studies and a 14.4 percent binaural loss using bone conduction studies. Lynch Dep. at 10. Dr. Lynch stated he would add another two percentage points for tinnitus. AX 2. Dr. Hicks interpreted the 2002 audiogram as showing an 18.4 percent binaural loss; he stated that claimant's hearing loss probably falls within the 14.4 to 18.4 percent range. Hicks Dep. at 27.

interpret the 2001 and 2002 audiograms demonstrating an increased loss in hearing. *See* 33 U.S.C. §908(c)(13)(E); Hicks Dep. at 68.

With regard to the 1979 audiogram, the test form does not state under what standard the equipment was calibrated. Hicks Dep. at ex. 2. Dr. Lipscomb stated that this information is critical for purposes of comparing audiograms, as the 1951 and 1969 calibration standards could differ by as much as ten decibels at each tested frequency level. Lipscomb Dep. at 65-67. The administrative law judge inferred from Dr. Lipscomb's testimony that the 1979 audiogram was administered on equipment calibrated under the 1951 standard, and that therefore claimant's hearing loss had not worsened from 1979 to 2002.

We cannot affirm this inference or the conclusion that the administrative law judge drew therefrom. Dr. Lipscomb did state that "it looks like this 1979 test was based on the old standard," and that therefore claimant's hearing loss "has not changed a whole lot between 1979 and the present." Lipscomb Dep. at 67. The administrative law judge's crediting of this portion of Dr. Lipscomb's opinion is undermined, however, by Dr. Lipscomb's statement that he does not know what calibration was in effect, *id*. at 68, 75-76, 108, and that the older standard was not used too commonly in 1979, *id.* at 75. Dr. Lipscomb stated that if the 1969 calibration were in effect, claimant's hearing loss showed a "remarkable change" and that there is a "substantial difference" between the 1979 and later audiograms. *Id.* at 67, 75. Moreover, Dr. Lipscomb did not interpret the 1979 audiogram pursuant to the AMA *Guides*, nor did any other expert. We hold, based on the totality of Dr. Lipscomb's opinion, that substantial evidence does not support the administrative law judge inference that the 1979 audiogram was administered on equipment calibrated under the 1951 standard. "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, (1951). "Substantial evidence is not evidence considered in isolation from opposing evidence, but evidence that survives 'whatever in the record fairly detracts from its weight.'" *Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 1546, 24 BRBS 213, 216(CRT) (9th Cir. 1991), *quoting Universal Camera*, 340 U.S. at 488. The best that can be said about the 1979 audiogram based on the totality of Dr. Lipscomb's deposition is that the calibration of the equipment is unknown and that therefore the extent of claimant's pre-existing hearing loss and any progression thereafter cannot be assessed by reference to this audiogram.[4]

[4] Assuming, *arguendo*, the validity of the administrative law judge's inference, Dr. Lipscomb's opinion that claimant's hearing loss has not "changed a whole lot" is insufficient to rebut the Section 20(a) presumption. Nowhere in his deposition does Dr. Lipscomb state that claimant's hearing loss was not aggravated by his longshore employment. *See* discussion, *infra*. Moreover, the law does not assess a claimant's hearing loss by reference to individual frequency levels, which is how Dr. Lipscomb

The next most recent audiogram is the 1978 test that Dr. Hicks interpreted as showing a 10.3 percent binaural loss. In order to rebut the Section 20(a) presumption, therefore, employer must establish that the progression of claimant's hearing loss from 1978 to 2001 and 2002, which all experts state demonstrate noise-induced configurations, was not due to noise exposure during the totality of his longshore employment. *Everson v. Stevedoring Services of America,* 33 BRBS 149 (1999); *see* Lipscomb Dep. at 68; Hicks Dep. at 23; Lynch Dep. at 12.

We also cannot affirm the administrative law judge's finding that the Section 20(a) presumption is rebutted. The administrative law judge properly noted that surveys demonstrating noise levels below OSHA guidelines at a given facility at a specific point in time are not sufficient to rebut the Section 20(a) presumption. *Everson,* 33 BRBS 149; *Damiano v. Global Terminal & Container Service,* 32 BRBS 261 (1998). Indeed, Drs. Lynch and Lipscomb observed that the surveys do not cover claimant's entire period of longshore employment and do not account for an individual's susceptibility to noise exposure. Lipscomb Dep. at 41-43; Lynch Dep. at 24-25. Nonetheless, the administrative law judge found rebuttal based on opinions purporting to state that claimant's exposure to noise was insufficient to contribute to claimant's hearing loss.

This finding is not supported by substantial evidence. Dr. Hicks did state, assuming the accuracy of a noise survey and other assumptions posed by counsel, that claimant's exposure to noise at Metropolitan Stevedore after July 1998 did not contribute to claimant's hearing loss. Hicks Dep. at 30, 36-37. This opinion may be relevant to the responsible employer issue which the administrative law judge did not address, *see generally Jones Stevedoring Co. v. Director, OWCP,* 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997); *Zeringue v. McDermott, Inc.,* 32 BRBS 275 (1998), but is insufficient to rebut the Section 20(a) presumption because Dr. Hicks does not state that claimant's pre-existing hearing loss was not aggravated by his longshore employment as a whole. *See Bridier v. Alabama Dry Dock Co. & Shipbuilding Co.,* 29 BRBS 84 (1995). Dr. Lipscomb specifically declined to comment on the degree of claimant's noise exposure, as he found the noise survey evidence flawed. Lipscomb Dep. at 91, 100. Thus, the Section 20(a) presumption is not rebutted based on the absence of injurious noise exposure. *Everson,* 33 BRBS 149; *Damiano,* 32 BRBS 261.

Moreover, there is no other evidence of record sufficient to rebut the Section 20(a) presumption. Pervading the administrative law judge's two decisions is the belief that

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compared the 1979 and later audiograms, but on a monaural or binaural basis under the current edition of the AMA *Guides.* 33 U.S.C. §908(c)(13)(A), (B), (E); *see Tanner v. Ingalls Shipbuilding, Inc.,* 2 F.3d 143, 27 BRBS 113(CRT) (5th Cir. 1993); *Fucci v. General Dynamics Corp.,* 23 BRBS 161 (1990); *McShane v. General Dynamics Corp.,* 22 BRBS 427 (1989).

there must be some "significant degradation" in claimant's hearing between the late 1970s and the present. *See* Decision and Order at 10; Order at 3. This is a legally incorrect hypothesis. Even a work-related hearing loss too low to be computed under the AMA *Guides* constitutes an "injury" under the Act, for which claimant may be entitled to medical benefits. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker],* 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993). Thus, in order to rebut the Section 20(a) presumption where the claimant has a pre-existing hearing loss, employer must produce substantial evidence that there was no aggravation of the loss to noise exposure. *See generally Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000). The record does not support the administrative law judge's finding that the Section 20(a) presumption is rebutted because claimant's increased hearing loss is due to age-related factors. The fact that Dr. Lynch stated claimant's increased hearing loss *could be* due to aging, Lynch Dep. at 32, does not rebut the Section 20(a) presumption, as Dr. Lynch opined that claimant's current hearing loss is noise-induced on a "more probable than not" basis. *Id.* at 12. Similarly, based on the patterns of the 1978 and 2002 audiograms, Dr. Hicks stated that the one-sidedness of the increased loss "lends credibility either for aging or genetics" as a cause of the increase, but he declined to state definitely that age was the cause. Hicks Dep. at 67, 73. Dr. Hicks stated that the 2001 and 2002 audiograms support a noise-induced etiology. *Id.* at 71.

In sum, no expert stated that claimant was not exposed to injurious noise during the entirety of his longshore employment or that claimant's pre-existing hearing loss was not aggravated by his longshore employment. Each found a noise-induced configuration to claimant's recent audiograms and employers did not rebut the Section 20(a) presumption that the loss demonstrated on these audiograms is work-related. Thus, as a matter of law, claimant's hearing loss is work-related. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004). The administrative law judge's findings to the contrary are reversed, and the case is remanded to the administrative law judge to address the other issues raised by the parties.

Accordingly, the administrative law judge's Decision and Order and Order on Claimant's Motion for Reconsideration are reversed. Claimant's hearing loss is work-related as a matter of law. The case is remanded for the administrative law judge to address the remaining issues raised by the parties.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge