BRB No. 09-0497

JOSEPH BROWN, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
STEVENS SHIPPING AND TERMINAL COMPANY	)	DATE ISSUED: 11/09/2009
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Klein Camden L.L.P.), Norfolk, Virginia, for claimant.

Dana Adler Rosen (Clarke, Dolph, Rapaport, Hull, Brunick & Garriott, P.L.C.), Norfolk, Virginia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2008-LHC-00631) of Administrative Law Judge Daniel A. Sarno, 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, a voluntary retiree,[1] sought benefits under the Act for a noise-induced work-related hearing loss based on an audiogram administered on July 27, 2007, by Dr. Lynch, an audiologist, which revealed a 25.9 percent binaural hearing impairment. Claimant underwent a subsequent hearing evaluation on March 25, 2008, by Dr. Meyer, a Board-certified otolaryngologist who also has a PhD in hearing science, which revealed a 20 percent binaural impairment pursuant to the American Medical Association Guidelines.

In his decision, the administrative law judge found claimant entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption, linking his hearing loss to his employment, and found that employer did not present substantial evidence to rebut the presumption. The administrative law judge therefore concluded that claimant's hearing loss is related to his employment. The administrative law judge next averaged the results of the two audiograms of record, and accordingly awarded claimant compensation for a 22.95 percent binaural hearing loss and medical benefits.

On appeal, employer challenges the administrative law judge's finding that claimant's hearing loss is causally related to his employment. Claimant responds, urging affirmance.

In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after the claimant establishes a *prima facie* case. To establish a *prima facie* case, the claimant must show that he suffered a harm and that a work-related accident occurred or working conditions existed which could have caused the harm; claimant bears the burden of establishing each element of his *prima facie* case by affirmative proof. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *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). Employer, on appeal, summarily assigns error to the administrative law judge's finding that the Section 20(a) presumption was invoked, contending that the administrative law judge erred in relying on the undeveloped opinion of Dr. Lynch to invoke the presumption. We reject employer's contention of error. In order to invoke the presumption, claimant is not required to prove that working conditions in fact caused his harm; rather claimant must show the existence of working conditions which could have caused the harm. *See, e.g., Bath Iron Works Corp. v.*

[1] Claimant, who worked as a longshoreman for 25 years, was employed by employer as a foreman in 1984 and 1985. Tr. at 18-19; EX 4 at 7-8. He retired in January 1985 due to problems with his vision. Tr. at 18, 24; EX 4 at 4-7.

Preston, 380 F.3d 597, 605, 38 BRBS 60, 65(CRT) (1st Cir. 2004); *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 959, 31 BRBS 206, 210(CRT) (9th Cir. 1998); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1993). Here, it is undisputed that claimant suffered a hearing loss, and, thus, the administrative law judge properly found that the harm element of claimant's *prima facie* case was satisfied. *See* Decision and Order at 9; *Damiano v. Global Terminal & Container Service*, 32 BRBS 261, 262 (1998). Moreover, the administrative law judge rationally credited claimant's uncontradicted testimony that he was regularly exposed to loud noise throughout the day in the course of his employment with employer. *See* Decision and Order at 9; Tr. at 3, 19-21; EX 4 at 9-10. *See generally Norfolk Shipbuilding & Drydock Corp. v. Faulk*, 228 F.3d 378, 386, 34 BRBS 71, 76-77(CRT) (4th Cir. 2000), *cert. denied*, 531 U.S. 1112 (2001). As a claimant's credible testimony is sufficient to establish the working conditions element of his *prima facie* case, *see Moore*, 126 F.3d at 262-263, 31 BRBS at 123(CRT), we affirm the administrative law judge's finding that this element was established, and his consequent invocation of the Section 20(a) presumption.

Once claimant has established entitlement to invocation of the Section 20(a) presumption, the burden shifts to employer to rebut the presumption by producing substantial evidence that claimant's hearing loss was not caused, contributed to or aggravated by his employment.[2] *See Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *Damiano*, 32 BRBS 261; *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence in the record, and resolve the causation issue based on the record as a whole, with claimant bearing the burden of persuasion. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). In the instant case, employer contends that the administrative law judge erred in finding that Dr. Meyer's opinion is insufficient to rebut the Section 20(a) presumption. We disagree. After providing a detailed summary of Dr. Meyer's report and deposition testimony, Decision and Order at 3-7, the administrative law judge thoroughly considered the substance of Dr. Meyer's testimony in addressing

[2] Pursuant to the aggravation rule, an employment injury need not be the sole cause of a disability; rather, if the employment injury aggravates, contributes to or combines with an underlying condition, the entire resultant condition is compensable. *See Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52(CRT) (4th Cir. 1982); *see also Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000). Thus, claimant's hearing loss need only be due in part to work-related conditions to be compensable under the Act. *See Peterson v. General Dynamics Corp.*, 25 BRBS 78 (1991), *aff'd sub nom. Ins. Co. of North America v. U.S. Dep't of Labor, OWCP*, 969 F.2d 1400, 26 BRBS 14(CRT) (2d Cir. 1992), *cert. denied*, 507 U.S. 909 (1993).

whether employer presented substantial evidence to rebut the Section 20(a) presumption. *Id.* at 9-10. The administrative law judge initially determined that the basis for Dr. Meyer's opinion that it is not medically probable that claimant's hearing loss is noise-induced is that claimant's audiogram does not demonstrate the "noise notch" typically seen in individuals with noise-induced hearing loss. *Id.* at 9; *see* CXs 3; 9 at 4, 6-10, 14-19, 24-25. The administrative law judge then noted Dr. Meyer's concessions that a noise notch on an audiogram is not necessary for noise to have contributed to a hearing loss and that it is possible that claimant's hearing loss was caused in part by his noise exposure.[3] Decision and Order at 9-10. Next, the administrative law judge acknowledged Dr. Meyer's testimony that claimant's history of noise exposure is consistent as a potential cause of noise-induced hearing loss and that the bilateral and sensorineural nature of claimant's hearing loss also is consistent with a noise-induced hearing loss. *Id.* at 10; *see* CX 9 at 4-6. The administrative law judge additionally stated that Dr. Meyer did not attribute claimant's hearing loss solely to presbyacusia, or aging.[4] Decision and Order at 10. Noting Dr. Meyer's testimony that without having an old audiogram, he could only speculate as to the cause of claimant's hearing loss and his acknowledgement that it was possible that noise contributed to claimant's hearing loss, the administrative law judge concluded that Dr. Meyer's opinion does not constitute substantial evidence to rebut the Section 20(a) presumption. *Id.*

It is well-established that the Board must accept the rational inferences and factual findings of the administrative law judge which are supported by substantial evidence and may not disregard the administrative law judge's findings merely on the basis that the evidence permits diverse inferences. *See, e.g., Newport News Shipbuilding & Dry Dock Co. v. Ward*, 326 F.3d 434, 438, 37 BRBS 17, 19-20(CRT) (4th Cir. 2003); *Faulk*, 228 F.3d at 380-81, 34 BRBS at 72(CRT). In this case, the administrative law judge fully examined Dr. Meyer's report and deposition testimony, and his evaluation of Dr. Meyer's testimony and the inferences drawn therefrom are reasonable and supported by the evidence. *See id.* Having considered the totality of Dr. Meyer's testimony, the administrative law judge rationally determined that Dr. Meyer did not render a

[3] Dr. Meyer testified that "[y]ou don't necessarily need a notch in the audiogram to have noise be one of the contributing factors in hearing loss." CX 9 at 26. He further testified that it was possible that there was some contribution from noise exposure in claimant's hearing loss, but that lacking an old audiogram, he could only speculate as to the cause of claimant's hearing loss. *Id.* at 11-12, 17-18, 25, 28.

[4] Dr. Meyer characterized claimant's hearing loss as fairly flat. CX 9 at 9-10. He testified that presbyacusia hearing loss typically shows more high frequency hearing loss relative to low frequency loss than the pattern shown on claimant's audiogram which reveals just a little more high frequency loss than low frequency loss. *Id.* at 9-10, 16.

sufficiently certain opinion that claimant's work-related noise exposure did not contribute to his hearing loss.[5] *See Bridier,* 29 BRBS at 89-90. Thus, the administrative law judge properly determined, in accordance with the aggravation rule, that Dr. Meyer's opinion does not constitute substantial evidence to rebut the Section 20(a) presumption.[6] *See Burley v. Tidewater Temps, Inc.*, 35 BRBS 185, 189 (2002); *Bridier,* 29 BRBS at 89-90. *See also Newport News Shipbuilding & Dry Dock Co. v. Fishel,* 694 F.2d 327, 15 BRBS 52(CRT) (4th Cir. 1982). Therefore, we affirm the administrative law judge's finding that

[5] Although a physician need not rule out all possibilities regarding the cause of a claimant's condition before his opinion that the condition is not work-related may be found sufficient to rebut the Section 20(a) presumption, his opinion that the condition is not work-related must be given to a reasonable degree of medical certainty. *See O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000). In this case, although Dr. Meyer stated that it was not medically probable that noise exposure *caused* claimant's hearing loss, he acknowledged that a noise notch did not necessarily need to be present on an audiogram for noise to *contribute* to a hearing loss and that it was possible that claimant's work-related noise exposure did in fact contribute to claimant's hearing loss. Dr. Meyer also stated that claimant's history of noise exposure and the bilateral and sensorineural character of his hearing loss are consistent with noise-induced hearing loss. Thus, it was not unreasonable for the administrative law judge to infer from this testimony that Dr. Meyer was undecided as to whether claimant's noise exposure played a contributing role in his hearing loss. *See Fishel*, 694 F.2d 327, 15 BRBS 52(CRT).

[6] Contrary to employer's contentions on appeal, *see* Emp. brief at 36-37, whether claimant has introduced affirmative medical evidence establishing that his condition is related to his work is not relevant to rebuttal. *See Sinclair v. United Food & Commercial Workers,* 23 BRBS 148 (1989). Employer's assertion that claimant's medical evidence of a causal relationship between his hearing loss and his work is weak reflects a misunderstanding of the operation of the Section 20(a) presumption. On rebuttal, only evidence supporting employer's position is considered by the administrative law judge in determining whether employer has produced substantial evidence to rebut the presumption. *See, e.g., Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Moore*, 126 F.3d 256, 31 BRBS 119(CRT). In this case, the administrative law judge rationally concluded that Dr. Meyer was unable to come to a conclusion as to whether claimant's work-related noise exposure contributed to his hearing loss and, thus, his testimony is not substantial evidence to meet employer's burden of production. It is only after employer produces substantial evidence to rebut that the presumption drops from the case and the administrative law judge must weigh the evidence as a whole, with claimant bearing the ultimate burden of persuasion. *See id.*

employer did not rebut the Section 20(a) presumption, and, thus, that claimant's hearing loss is work-related.[7]

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[7] In light of our affirmance of the administrative law judge's finding that employer did not establish rebuttal of the Section 20(a) presumption, we need not consider employer's arguments regarding weighing the evidence as a whole. *See Moore*, 126 F.3d at 262, 31 BRBS at 123(CRT).