BRB Nos. 02-0150
and 02-0150A

JAMES CASH	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
VIRGINIA INTERNATIONAL TERMINALS	)	DATE ISSUED: Sept. 30, 2002
	)	
and	)	
	)	
ABERCROMBIE, SIMMONS & GILLETTE OF VIRGINIA, INCORPORATED	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	DECISION and ORDER

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

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

R. John Barrett and Brian L. Sykes (Vandeventer Black, L.L.P.), Norfolk, Virginia, for employer/carrier.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order (01-LHC-0075) 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, an interchange writer, alleged he sustained a hearing loss during the course of his employment, and sought medical benefits for this condition. The record contains the reports of Dr. Carter, who conducted an audiogram on April 8, 1999, which demonstrated no ratable hearing loss, EX 2.6, and of Dr. Queen, who conducted an audiogram on April 11, 2000, which also demonstrated a non-ratable noise-induced hearing loss.[1] EX 1.6.

In his decision, the administrative law judge found that claimant's hearing loss is work-related, but as it does not reach the prescribed level of compensability under the Act, claimant is not entitled to compensation. Decision and Order at 9. Although he further found claimant entitled to certain medical benefits under the Act, 33 U.S.C. §907, the administrative law judge concluded that claimant is not entitled to the hearing aids he requested.

Employer appeals, arguing that the administrative law judge erred in finding that claimant's hearing loss is work-related. Claimant responds, urging the Board to affirm the administrative law judge's conclusion that his hearing loss is work related and cross-appeals, contending that the administrative law judge erred in finding that he is not entitled to hearing aids. Employer responds that if the Board affirms the administrative law judge's conclusions on causation, it also should affirm his finding that claimant is not entitled to hearing aids at its expense.

We address first employer's contention that the administrative law judge erred in finding claimant entitled to the presumption at Section 20(a) of the Act, 33 U.S.C. §920(a). Employer further argues that if the presumption is applicable it has produced substantial evidence to rebut it. In order to be entitled to the Section 20(a) presumption linking claimant's condition to his employment, claimant must establish a *prima facie* case by showing that he suffered a harm and that an accident occurred or working conditions existed which could have caused the injury or harm. *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once the Section 20(a) presumption is invoked, employer may rebut it by producing substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *see also Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Bath Iron*

[1]The parties stipulated at the hearing that Dr. Queen's audiogram was presumptive evidence of the extent of claimant's hearing loss and that such loss does not reach the level entitling claimant to compensation. Decision and Order at 3; Stip. 8.

Works Corp. v. Director, OWCP, 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997). If the administrative law judge finds that the Section 20(a) presumption is rebutted, it drops from the case, and he must then weigh all of the evidence and resolve the issue of causation based on the record as a whole with claimant bearing the burden of persuasion. *See 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).

In his decision, the administrative law judge found that claimant established invocation of the Section 20(a) presumption based on claimant's testimony, that his work environment exposed him to loud noise, and the opinions of the two physicians of record, that claimant suffers a hearing loss, albeit unratable under American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*), that was the result of claimant's exposure to workplace noise.[2] For the reasons that follow, we reject employer's contention that the administrative law judge erred in finding the Section 20(a) presumption invoked and that it failed to establish rebuttal of that presumption.

It is uncontested that claimant suffered a harm, *i.e.*, a hearing impairment. The administrative law judge found that the harm was caused by working conditions, based upon claimant's testimony that the noise from the trucks around which he worked was very loud. HT at 11-14. Employer contends that claimant's subjective, anecdotal and unsubstantiated testimony regarding alleged work-related noise exposure is insufficient to show the injurious working conditions necessary to establish a *prima facie* case of causation.

[2]Employer concedes that claimant suffers a hearing loss. *See* Emp. brief at 6.

We reject these contentions. There is medical evidence of record that claimant's hearing loss is attributable to noise exposure,[3] *see Damiano v. Global Terminal & Container Service*, 32 BRBS 261 (1998); *see also Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT)(9th Cir. 1998), and the administrative law judge rationally credited claimant's testimony about the noise level to which he was exposed. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Consequently, the administrative law judge's determination that claimant established working conditions which could have caused his hearing impairment and thus has established his *prima facie* case is affirmed as it is supported by substantial evidence. *See Moore*, 126 F.3d 256, 31 BRBS 119(CRT).

Employer next argues that the administrative law judge erred in determining that it did not rebut the Section 20(a) presumption. Employer asserts that the administrative law judge

[3]Employer's argument that the audiogram conducted by Dr. Queen should not be used to support claimant's claim that his hearing loss is work-related because it was not conducted in conformity with OSHA regulations, 29 C.F.R §1910.95(g)(5)(iii), as it was conducted within eight hours of claimant's exposure to workplace noise, is without merit. First, employer has stipulated to the validity of that audiogram. Second, the record contains an additional audiogram administered by Dr. Carter. Although this audiogram is not presumptive of the degree of claimant's hearing loss as claimant was not provided with a report after the audiogram was administered, *see* 33 U.S.C. §908(c)(13)(C); 20 C.F.R. §702.441(b), Dr. Carter stated that claimant's hearing loss is noise induced. EX 2. Finally, in order to invoke the presumption, claimant need not actually establish that working conditions did in fact cause the condition, but only that working conditions existed which could have caused his condition. *Champion v. S & M Traylor Bros.*, 690 F.2d 285, 15 BRBS 33(CRT) (D.C. Cir. 1982).

erred in his rejection of its noise surveys which document the absence of noise at or in excess of that proscribed by OSHA. Employer maintains that the noise survey and testimony of Mr. Bragg constitute relevant and probative evidence sufficient to establish rebuttal of the Section 20(a) presumption.

The administrative law judge rejected employer's noise survey because it failed to account for the numerous years of claimant's exposure,[4] and because Mr. Bragg conceded that approximately 25 percent of the population will suffer noise-induced hearing loss after exposure to noise at levels which meet OSHA standards. JX 7; Decision and Order at 9. Conformance with the noise level standards established by OSHA at a particular point in time is insufficient to rebut the Section 20(a) presumption as such evidence cannot demonstrate the absence of a work-related injury over the entire course of claimant's employment. *Everson v. Stevedoring Services of America*, 33 BRBS 149 (1999); *Damiano,* 32 BRBS 261. Moreover, the administrative law judge properly found employer's allusion to claimant's sporadic and infrequent hunting or operation of power tools without ear protection insufficient to establish rebuttal as it does not establish that working conditions did not cause or contribute to claimant's hearing loss. *See Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998). Consequently the administrative law judge's determination that employer did not establish rebuttal of the Section 20(a) presumption and his consequent conclusion that claimant's hearing impairment is work-related are affirmed as rational, supported by substantial evidence and in accordance with law. *See Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002); *see generally Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT)(5th Cir. 1998).

Claimant appeals the administrative law judge's finding that he is not entitled to hearing aids under Section 7 of the Act, 33 U.S.C. §907.[5] In order for a medical expense to be assessed against employer, the expense must be both reasonable and necessary. *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989); *Powell v. Capitol Hill Masonry*, 11 BRBS 532 (1979) Claimant argues that the administrative law judge improperly denied medical benefits for a hearing aid based upon the opinion of Dr. Queen that such devices may be an "option" for him. Inasmuch as claimant has a work-related hearing loss, claimant is eligible for medical benefits under Section 7 even though claimant has no measurable work-related impairment under the AMA *Guides*.[6] *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*,

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[4]Mr. Bragg stated that the survey is accurate only for three to five years retroactively, assuming that the equipment and other environmental factors were the same. JX 7.

[5]The administrative law judge did award claimant medical benefits in the form of regular hearing examinations and ear protection. Decision and Order at 10.

[6]Employer's reliance upon the holding of the United States Supreme Court in *Metro-*

991 F.2d 163, 27 BRBS 14(CRT)(5th Cir. 1993); *Weikert v. Universal Maritime Service Corp*., 36 BRBS 38 (2002). However, in order to be entitled to medical benefits, claimant must provide an adequate evidentiary basis sufficient to support the award. *Id.* In the instant case, the administrative law judge determined that Dr. Queen's opinion that hearing aids were an "option" did not meet the requisite level of establishing the necessity of such for treatment of claimant's work-related hearing loss.

North Commuter Railroad v. Buckley, 521 U.S. 424 (1997), is misplaced as the facts and the law in *Buckley* are distinguishable from those in the instant case. In *Buckley*, the claimant sought medical benefits in the form of periodic monitoring under the Federal Employers' Liability Act, 45 U.S.C. §51 *et seq*., and had neither been diagnosed with nor experienced any symptoms arising out of his work-place exposure to asbestos. *See Weikert v. Universal Maritime Service Corp*., 36 BRBS 38 (2002). In the instant case, the administrative law judge found, and we affirmed, that claimant suffers a work-related hearing loss; consequently, claimant is eligible for medical benefits pursuant to Section 7 of the Act upon showing the necessity of such benefits. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT)(5th Cir. 1993).

Dr. Carter, who administered the first audiogram, recommended future hearing examinations as well as ear protection to be worn while at work. EX 2. However, he made no recommendations as to whether claimant would benefit from the use of hearing aids. Dr. Queen, in his report, makes two notations regarding hearing aids: (1) that a "hearing aid is an option," EX 1.6; and (2) "hearing aids are optional." EX 1.8. The administrative law judge found that these vague suggestions by Dr. Queen are insufficient to establish that hearing aids were necessary for the treatment of claimant's work-related hearing loss.[7]

In adjudicating a claim, it is well established that an administrative law judge is entitled to weigh the medical evidence and to draw his own inferences from it, and is not bound to accept the opinion or theory of any particular witness. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). In the instant case, the administrative law judge rationally found that claimant failed to establish the necessity of hearing aids. *See generally Maryland Shipbuilding & Dry Dock Co. v. Jenkins*, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979); *Schoen v. United States Chamber of Commerce*, 30 BRBS 112 (1996). As claimant did not meet his burden of establishing that hearing aids are necessary for the treatment of his work-related injury, we affirm the administrative law judge's finding that employer is not liable for hearing aids.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[7]Claimant himself testified as to his need for hearing aids, stating that he felt no particular need for them at work or for individual conversation although he assumed they might help when listening to the television or to music. HT at 21.