BRB No. 01-0729

RICHARD NUNNALLY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
VIRGINIA INTERNATIONAL TERMINALS	)	DATE ISSUED: June 10, 2002
	)	
	)	
Self-Insured Employer-Petitioner	)	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, Breit, Klein, Camden, L.L.P.), for claimant.

R. John Barrett and Brian L. Sykes (Vandeventer Black, L.L.P.), for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2000-LHC-1651) 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 has worked as a checker at employer's Newport News Marine Terminal for eighteen years. He underwent audiometric testing on November 3, 1999, conducted by Dr. Queen, which revealed a 2.5 percent binaural noise-induced hearing loss. Cl. Ex. 2. Claimant also underwent audiometric testing by Dr. Hecker, an audiologist, on May 19, 2000, which revealed a bilateral, symmetrical, high frequency hearing loss pattern that was

typical for noise-induced hearing loss, but did not reach a ratable impairment. Cl. Ex. 1. Both Drs. Queen and Hecker recommended that claimant undergo annual hearing examinations, use protective devices while working with noise levels above 85 dB, and use hearing aids for the remainder of his life. Cl. Exs. 1, 2. Claimant sought benefits under the Act.

In his Decision and Order, the administrative law judge initially determined that claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption and that employer could not establish rebuttal thereof. The administrative law judge therefore concluded that claimant's hearing impairment is work-related. The administrative law judge then found that the audiogram administered by Dr. Queen is entitled to greater weight than that administered by Dr. Hecker. Thus, the administrative law judge found that claimant is entitled to benefits pursuant to Section 8(c)(13), 33 U.S.C. §908(c)(13), for a 2.5 percent binaural impairment. The administrative law judge also awarded claimant medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907.

On appeal, employer challenges the administrative law judge's finding of causation with regard to claimant's hearing impairment. In addition, employer contends that the administrative law judge erred in according Dr. Queen's opinion determinative weight and in awarding medical benefits. Claimant responds, urging affirmance.

In the instant case, it is uncontested that claimant suffered a "harm," *i.e.*, a hearing impairment. In his decision, the administrative law judge found that claimant credibly testified that his work environment is extremely noisy. Claimant testified that containers weighing between four and thirty tons are repeatedly stacked onto one another, or dropped onto the blacktop about fifteen feet from claimant. H. Tr. at 13-14, 22. He also testified that noisy machinery, powered by diesel engines, constantly surround him at work. H. Tr. at 24, 33. As claimant's testimony of exposure to injurious noise is sufficient to establish a *prima facie* case that working conditions existed that could have caused the hearing loss, we affirm the administrative law judge's finding that the Section 20(a) presumption that claimant's hearing loss is work-related is invoked. *See* *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998); *Jones Stevedoring Co. v. Director, OWCP [Taylor]*, 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997); *Damiano v. Global Terminal & Container Service*, 32 BRBS 261 (1998).

Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused, contributed to or aggravated by his employment. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Davison v. Bender Shipbuilding & Repair Co., Inc.*, 30 BRBS 45, 46-47 (1996). We reject employer's contention that the administrative law judge erred in finding that employer failed to produce substantial

evidence that claimant's hearing loss was not caused by his employment. In support of its contention, employer offered the testimony and report of Thomas Bragg, an acoustical consultant, who performed a noise survey at employer's terminal in the summer of 2000. Emp. Exs. 2, 3; Cl. Ex. 6. Mr. Bragg concluded that claimant's position as a checker did not violate the noise exposure standards mandated by the Occupational Health and Safety Administration (OSHA). Emp. Exs. 2, 3. The administrative law judge found that this noise survey was irrelevant for the purpose of determining the extent of claimant's exposure to noise throughout his career at employer's terminal. Moreover, the administrative law judge found that Mr. Bragg admitted that compliance with the OSHA regulations will not protect a worker from hearing loss.

We affirm the administrative law judge's finding that conformance at the terminal in the summer of 2000 with noise level standards established by OSHA is insufficient to rebut the Section 20(a) presumption in this case, as such evidence cannot demonstrate the absence of a work-related injury incurred over the entire course of claimant's employment. *See Everson v. Stevedoring Services of America*, 33 BRBS 149 (1999); *Damiano*, 32 BRBS 261. Moreover, as the administrative law judge correctly found, employer's mere assertions that claimant's hearing loss could have been caused by his age or diabetic condition are not sufficient to establish rebuttal, and the two physicians of record testified that claimant's hearing loss has a pattern that is typically seen as noise-induced, rather than the result of advancing age or diabetes. *See Williams v. Chevron U.S.A., Inc.*, 12 BRBS 95 (1980). Consequently, we affirm the administrative law judge's finding that employer failed to present substantial evidence that claimant's hearing loss is not work-related as it is supported by substantial evidence, and we thus affirm the administrative law judge's finding that claimant's hearing loss is work-related.[1] *See Everson*, 33 BRBS 149.

[1]As we affirm the administrative law judge's finding that employer did not establish rebuttal of the Section 20(a) presumption, we need not address employer's contentions regarding weighing the evidence as a whole.

We also reject employer's contention that the administrative law judge erred in relying on the audiometric test performed by Dr. Queen to establish the extent of claimant's hearing impairment. In adjudicating a claim, it is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses, including doctors, and is not bound to accept the opinion or theory of any particular medical examiner; rather, the administrative law judge may draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Moreover, the administrative law judge need not credit the lowest audiometric result. *See Norwood v. Ingalls Shipbuilding,* 26 BRBS 66 (1992)(Stage, C.J., dissenting on other grounds). The administrative law judge credited the results of the test administered by Dr. Queen, as he is a licensed medical doctor. While stating that Dr. Hecker is a thoroughly qualified doctor of audiology, the administrative law judge noted that the two exams were consistent in that they revealed a noise-induced hearing loss in the high frequency range, and the results are within a range of statistical similarity. Contrary to employer's contention on appeal, Dr. Queen did not testify that Dr. Hecker's results as a whole are more reliable, but rather that Dr. Hecker's equipment was better suited for testing claimant's hearing in the 125 and 250 frequencies, which accounted for the discrepancy in results at that range. Cl. Ex. 4 at 31-32. Those frequencies, however, are not used in calculating claimant's hearing loss under the American Medical Association *Guides to the Evaluation of Permanent Impairment. See Guides* at p. 225 (4th ed. 1995). Moreover, Dr. Queen stated that his equipment is "perfectly adequate" to provide an assessment on this case. Cl. Ex. 4 at 32. As employer has raised no reversible error on appeal,[2] and as the administrative law judge's finding is supported by substantial evidence, we affirm the administrative law judge's finding that claimant is entitled to benefits for a 2.5 percent binaural impairment.

[2]The administrative law judge also relied on the results of the audiogram administered by Dr. Queen because Dr. Queen is claimant's treating physician. This finding is not borne out by the record, which reveals that Dr. Queen only saw claimant one time for evaluation purposes. *See* Cl. Exs. 2, 4. Any error is harmless, however, as the administrative law judge provided valid reasons for crediting Dr. Queen's opinion.

Lastly, we reject employer's contention that claimant has no ratable hearing loss and thus is not entitled to an award of medical benefits, as we affirm the administrative law judge's finding that claimant has a 2.5 percent binaural impairment. Moreover, it is well-settled that a claimant is eligible for medical benefits under Section 7 where he has a hearing loss even though it results in no measurable impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment*.[3] *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993); *Davison*, 30 BRBS 45. As employer does not otherwise challenge the award of medical benefits, we affirm the administrative law judge's finding that claimant is entitled to necessary medical treatment for his work-related hearing loss.

Accordingly, the decision of the administrative law judge awarding permanent partial disability benefits pursuant to Section 8(c)(13)(B), 33 U.S.C. §908(c)(13)(B), and medical benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[3]Moreover, even if claimant had no ratable impairment, employer's reliance on *Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424 (1997), is misplaced. In *Buckley*, a railroad employee who had been exposed to asbestos sought to recover, under the Federal Employers' Liability Act, 45 U.S.C. §51 *et seq.* (FELA), medical monitoring costs he may incur as a result of his exposure. Because he had not been diagnosed with any asbestos-related disease and was not experiencing any symptoms, the Supreme Court held that he was not entitled to medical monitoring. *Buckley*, 521 U.S. at 427, 444. First, *Buckley* arose under the FELA and not under the Longshore Act. Moreover, Dr. Hecker, whose audiogram measured an unratable impairment, stated claimant needs hearing aids and annual hearing examinations. Thus, *Buckley* is inapposite.

PETER A. GABAUER, Jr.
Administrative Appeals Judge