BRB No. 98-1373

MELVIN H. AYMAMI	)	
	)	
Claimant-Petitioner	)	DATE ISSUED: June 30, 1999
	)	
	)	
	)	
BOLAND MACHINE AND MANUFACTURING COMPANY	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Compensation Benefits and the Order Denying Petition for Reconsideration of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

John D. Gibbons (Gardner, Middlebrooks, Fleming & Gibbons, P.C.), Mobile, Alabama, for claimant.

Darryl J. Foster (Lemle & Kelleher, L.L.P.), New Orleans, Louisiana, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Compensation Benefits and the Order Denying Petition for Reconsideration (96-LHC-850) of Administrative Law Judge Richard D. Mills 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 worked for employer for approximately six months in 1963 as a hook-on man or rigger loading and unloading vessels with a crane. After leaving employer in 1963, he worked primarily as a boilermaker with a non-covered employer in southern Louisiana for the remainder of his career. After his retirement, claimant underwent audiometric testing in December 1993, which revealed a 16.6 percent binaural hearing loss. On the basis of this audiogram, a claim for benefits was filed on June 16, 1993, which employer controverted on September 26, 1995. *See* Cl. Ex. 1. Subsequently, claimant underwent further audiometric testing on July 11, 1995, which revealed a 9.7 percent binaural hearing loss, that was "consistent with noise exposure at least to some degree."[1] *See* Cl. Ex. 6.

Initially, the administrative law judge found that it was undisputed that claimant suffered a harm, namely a noise-related binaural hearing loss, but that as he failed to prove a causal nexus between his employment and his hearing loss, he is not entitled to compensation or medical benefits from employer. Decision and Order at 4. However, in an Order Denying Petition for Reconsideration, the administrative law judge revised the rationale of his original opinion. He found that the parties stipulated to the first prong of a *prima facie* case of causation, the hearing loss, but that claimant failed to establish the second prong, that there were working conditions that could have caused the injury. 33 U.S.C. §920(a); Order at 3-4. Thus, the administrative law judge reaffirmed the denial of medical and compensation benefits under the Act.

On appeal, claimant contends that the administrative law judge erred in finding that evidence was insufficient to establish a *prima facie* case that his noise-induced hearing loss was work-related under Section 20(a) of the Act. Employer responds, urging affirmance of the administrative law judge's decision.

Claimant contends on appeal that the administrative law judge erred in finding that the evidence does not establish that working conditions existed which could have caused the harm, *i.e.*, his noise-induced hearing loss. We agree. Section 20(a) provides claimant with a presumption that his disabling condition is causally related to his employment. *See Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995). However, initially claimant must establish a *prima facie* case by establishing that he suffered an injury and that working conditions existed which could have caused the harm alleged. *See Kooley v. Marine Industries Northwest*, 22

[1]A third audiometric test performed on July 6, 1995, revealed a 13.8 percent binaural hearing loss. *See* Cl. Ex. 7. The parties stipulated to an 11.8 percent binaural hearing loss. *See* Decision and Order at 2.

BRBS 142 (1989); *Mackey v. Marine Terminals Corp.*, 21 BRBS 129 (1988). Once the presumption is invoked, the burden shifts to employer to rebut it with substantial evidence that claimant's disabling 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). When employer produces such substantial evidence, the presumption drops out of the case, and the administrative law judge must weigh all of the evidence relevant to the causation issue, and render a decision supported by the record. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT) (4th Cir. 1997); *MacDonald v. Trailer Marine Transport Corp.*, 18 BRBS 259 (1986), *aff'd mem. sub nom. Trailer Marine Transport Corp. v. Benefits Review Board*, 819 F.2d 1148 (11th Cir. 1987).

In the present case, claimant testified that while performing his duties as a rigger and hook-on man, he was exposed to noisy conditions on the wharf, in the fabrication shop, and on the ships themselves. He also testified that he was exposed to noise in these locations on a daily basis. The administrative law judge found that this testimony was sufficiently contradicted by the testimony of his former supervisor, Mr. Rupple, and by the evidence on the record as a whole. This finding is not supported by the evidence. Initially, the record does not contain any other contradictory evidence; the only relevant evidence in contradiction to claimant's testimony is that of the supervisor. Claimant's former supervisor, Mr. Rupple, testified that the rigger duties were performed primarily outdoors and that on the wharf there would not have been any extreme or unusual noises. Tr. at 32. He also testified that while the forging shop was very noisy, claimant would not ever have a reason to be in that shop. While he admitted that claimant would have been in the fabrication shop daily to retrieve material, his testimony did not address the noise level in either the fabrication shop or onboard the ships.

The administrative law judge did not find that claimant's testimony was not credible, but rather that it was "sufficiently contradicted" by the testimony of his supervisor. However, as Mr. Rupple did not address the noise levels of two daily work areas identified by claimant, his testimony cannot contradict claimant's testimony that those areas were noisy. As employer submitted no other evidence regarding noise levels, claimant's testimony is not contradicted in this regard and is thus sufficient to establish that he was exposed to noise during his employment. *See Ramey v. Stevedoring Services of America,* 134 F.3d 954, 31 BRBS 206 (CRT)(9th Cir. 1998). On this record, we must reverse the administrative law judge's finding that the evidence is insufficient to establish working conditions that could have caused claimant's noise-induced hearing loss. The Section 20(a) presumption of causation is therefore invoked. *Everett v. Newport News Shipbuilding & Dry Dock Co.,* 23 BRBS 316 (1989).

As Section 20(a) was invoked, the burden shifted to employer to produce evidence that claimant's hearing loss is not work-related. Employer, however, offered no evidence

severing the causal connection. In the absence of such evidence, causation is established as a matter of law. *See, e.g., Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988). The denial of compensation and medical benefits therefore is vacated, and the case is remanded to the administrative law judge for consideration of any remaining issues.

Accordingly, the Decision and Order Denying Compensation Benefits and the Order Denying Petition for Reconsideration of the administrative law judge are vacated, and the case is remanded for further consideration.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge