BRB No. 08-0614

A.P.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JONES STEVEDORING COMPANY	)	DATE ISSUED: 03/16/2009
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

Amie C. Peters (Law Office of William D. Hochberg), Edmonds, Washington, for claimant.

William M. Tomlinson (Lindsay, Hart, Neil & Weigler, LLP), Portland, Oregon, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2007-LHC-01528) of Administrative Law Judge Steven B. Berlin 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are 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, sought benefits under the Act for a noise-induced hearing loss based on an audiogram administered on November 15, 2006, by Dr. Wuth,

which revealed a 22.5 percent binaural impairment.[1] Claimant worked as a longshoreman for over 23 years prior to his retirement on October 31, 1983. Payroll records of the Pacific Maritime Association reflect that claimant worked primarily as a holdman, side runner and boom man/raft man during 1983, that claimant worked for employer as a side runner from October 26 through October 29, 1983, and as a button pusher on October 31, 1983, his last day of work. CX 2 at 10, 12; Decision and Order at 3.

In his Decision and Order, the administrative law judge found that this case presents significant proof problems for both claimant and employer because claimant did not undergo an audiogram until 2006, 23 years after his retirement from longshore work. Decision and Order at 2. The administrative law judge further found that because "[c]laimant's memory is severely limited by Alzheimer's disease. . .," his testimony was "unreliable (neither competent nor credible)." *Id.; see also* Decision and Order at 3-7. The administrative law judge therefore determined that he could accord weight to claimant's testimony only in the rare instances in which it was reliably corroborated by other evidence.[2] *Id.* With respect to the testimony of Nick Buckles, who had worked with claimant as a holdman, side runner and boom man/raft man, the administrative law judge credited Mr. Buckles's description of the general work environment at the facility at which he and claimant worked, but accorded very little weight to Mr. Buckles's testimony regarding claimant's particular working conditions. *Id.* at 2, 7-9.

Despite these evidentiary limitations, the administrative law judge found that claimant was entitled to invocation of the Section 20(a) presumption, 20 U.S.C. §920(a), on the basis of his undisputed hearing loss and credible record evidence that his longshore employment could have exposed him to frequent loud noise that could account for that hearing loss. Decision and Order at 16-17. The administrative law judge next found that employer met its burden of producing substantial evidence to rebut the Section 20(a) presumption. *Id.* at 17-20. Weighing the evidence as a whole, the administrative law judge determined that claimant failed to establish that his hearing loss is related to his longshore employment, and accordingly he denied the benefits sought by claimant. *Id.* at 20-22.

[1] A previous hearing evaluation by Dr. Langman on June 21, 2006, revealed an 18.75 percent binaural impairment.

[2] The administrative law judge found that claimant's wife was unable to reliably corroborate or supplement claimant's testimony. Decision and Order at 2, 9-10.

On appeal, claimant challenges the administrative law judge's finding that employer rebutted the Section 20(a) presumption and his weighing of the evidence as a whole. Employer responds, urging affirmance.

Where, as in the instant case, claimant has established entitlement to invocation of the Section 20(a) presumption,[3] *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989), the burden shifts to employer to rebut the presumption with substantial evidence that claimant's hearing loss was not caused, contributed to or aggravated by his employment. *See Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998); *Damiano v. Global Terminal & Container Serv.*, 32 BRBS 261 (1998); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995). The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has explained that employer's burden on rebuttal is to produce "evidence specific and comprehensive enough to sever the potential connection between the disability and the work environment." *Ramey*, 134 F.3d at 959, 31 BRBS at 210(CRT)(internal citation omitted); *see also American Grain Trimmers v. Director, OWCP [Janich]*, 181 F.3d 810, 819, 33 BRBS 71, 77-78(CRT) (7th Cir. 1999); *Damiano*, 32 BRBS at 262-263. The aggravation rule provides that when an employment injury aggravates, accelerates or combines with a pre-existing condition, the entire resulting condition is compensable. *See 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 cases in which the aggravation rule is applicable, the relative contributions of the underlying disease and the work-related component are not weighed. *O'Leary*, 357 F.2d at 815. 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. *See, e.g., Universal Mar. Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Meehan Serv. Seaway Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

[3] In this case, the administrative law judge invoked the Section 20((a) presumption based on his findings of claimant's documented hearing loss and the existence of noise at the waterfront when claimant worked for employer. These findings are not challenged on appeal, and, thus, the administrative law judge's finding of invocation is affirmed. *See generally Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998).

In addressing the issue of whether employer met its burden of producing substantial evidence sufficient to rebut the Section 20(a) presumption, the administrative law judge first acknowledged the absence of any direct evidence that claimant was not exposed to "potentially injurious levels of noise"[4] during the course of his employment with employer. Decision and Order at 18. The administrative law judge was correct in finding that there are no medical opinions of record that constitute direct rebuttal evidence. Specifically, neither Dr. Langman, Dr. Wuth nor Dr. Lipscomb opined within a reasonable degree of medical certainty that noise exposure experienced by claimant in the course of his longshore employment did not cause, aggravate or contribute to his hearing loss, and, thus, their opinions do not constitute substantial evidence rebutting the Section 20(a) presumption.[5] *See Ramey*, 134 F.3d at 959, 31 BRBS at 210(CRT); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000); *Bridier*, 29 BRBS at 90.

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[4] Although the administrative law judge stated that "there is no direct evidence to rule out exposure to potentially injurious levels of noise," Decision and Order at 18, we do not construe the administrative law judge's use of the term "rule out" in this limited context to suggest that the administrative law judge applied a rebuttal standard under which employer was required to "rule out" any possible causal relationship between claimant's hearing loss and his longshore employment. The administrative law judge's discussion of the rebuttal issue considered as a whole reflects that the administrative law judge applied a standard requiring employer to produce substantial evidence that claimant's hearing loss was not caused or aggravated by his longshore employment. *See* Decision and Order at 17-20; *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Bath Iron Works Corp. v. Director, OWCP [Shorette]*, 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000).

[5] Dr. Langman, a Board-certified otolaryngist, testified on deposition that in the absence of an audiogram administered at the time of claimant's retirement in 1983, he could not offer an opinion as to whether claimant had a rateable hearing loss at the time of his retirement. CX 7 at 104-105, 113-114. He further testified that without the benefit of prior audiograms he could not state within a reasonable degree of medical certainty whether the noise-related portion of claimant's present hearing loss is due to noise exposure during his military service or to noise exposure during his longshore employment. *Id.* at 73-74, 106, 122-123.

Dr. Wuth, a Board-certified audiologist, testified that while at least a portion of claimant's hearing loss is noise-related, he was unable to state to a reasonable probability whether any of the hearing loss was due to longshore employment-related noise exposure in the absence of evidence of the noise levels at claimant's workplace and evidence that his hearing loss developed at the time of that exposure. Tr. at 67, 72; *see also* JX 2.

The administrative law judge further stated that in the absence of direct evidence to rebut the presumption, employer was "left to make out a case of substantial evidence circumstantially." Decision and Order at 18. He then addressed various pieces of circumstantial evidence, and concluded that this evidence met employer's burden on rebuttal. *Id.* at 18-20. Circumstantial, or negative, evidence may rebut the Section 20(a) presumption only if it is sufficiently specific and comprehensive to sever the presumed relationship between the injury and the employment. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *Holmes v. Universal Mar. Serv. Corp.*, 29 BRBS 18, 21 (1995); *see also Ramey,* 134 F.3d at 959, 31 BRBS at 210(CRT). The presumption is not rebutted, however, where the employer does not provide concrete evidence, but merely relies on "hypothetical probabilities" or suggestions of alternate ways that claimant's injury might have occurred. *Swinton*, 554 F.2d at 1085, 4 BRBS at 481; *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998).

We agree with claimant that the circumstantial, or negative, evidence on which the administrative law judge relied is insufficient to rebut the Section 20(a) presumption that claimant's hearing loss is causally related to his longshore employment. First, with respect to the administrative law judge's finding that noise exposure during claimant's military service could have caused claimant's hearing loss, Decision and Order at 18-19, it is irrelevant that other factors, including claimant's military service-related noise exposure, may also have contributed to claimant's hearing loss, as the well-settled aggravation rule provides that where a work-related injury combines with other possible causes, the entire condition is compensable. *See Ronne I,* 932 F.2d 836, 24 BRBS 137(CRT); *Cordero v. Triple Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied,* 440 U.S. 911 (1979). Although the administrative law judge acknowledged that any possible hearing loss caused by claimant's military service[6] "is relevant only to the extent that it supports a conclusion that *all* of claimant's hearing loss resulted from causes unrelated to longshore work," Decision and Order at 19, his rebuttal analysis is incompatible with the aggravation rule. A "hypothetical probability" that claimant sustained some hearing loss due to his military service does not constitute "specific and comprehensive evidence" that *none* of claimant's hearing loss was caused or aggravated

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Dr. Lipscomb, an audiologist, similarly testified that, in the absence of previous audiograms, he could not determine the percentage of claimant's hearing loss that was due to noise exposure during his military service and the percentage that was due to his longshore employment-related noise exposure. CX 8 at 169-170.

[6] The administrative law judge conceded that the evidence in this case establishes, at most, the *possibility* that claimant sustained a hearing loss resulting from his military service. Decision and Order at 18-19.

by his longshore employment. *See Director, OWCP v. Vessel Repair, Inc. [Vina]*, 168 F.3d 190, 193, 33 BRBS 65, 67(CRT) (5th Cir. 1999); *Cordero,* 580 F.2d at 1335, 8 BRBS at 747. Similarly, evidence that claimant may possibly have sustained some hearing loss as a result of an accident in which he suffered head trauma,[7] *see* Decision and Order at 19, is not sufficient to show that claimant's longshore employment did not also contribute to his hearing loss. *Id.*

The administrative law judge further relied on "negative evidence from the experts." Decision and Order at 20. Specifically, the administrative law judge observed that Drs. Langman, Wuth and Lipscomb all agreed that without earlier hearing tests, it was not possible to determine within a reasonable degree of medical certainty whether claimant had any hearing loss prior to his retirement. *Id.* at 11-16, 20; *see* CX 7 at 104-105, 113-114; CX 8 at 169; Tr. at 65-70. The medical experts' inability to ascertain whether claimant had a rateable hearing loss at the time of his retirement, however, cannot be relied upon to rebut the Section 20(a) presumption; we have already affirmed the conclusion that the experts' opinions do not establish that claimant's employment was not a cause of his hearing loss. *See Bridier,* 29 BRBS 84; *see also Ramey*, 134 F.3d at 959, 31 BRBS at 210(CRT); *Swinton,* 554 F.2d at 1083, 4 BRBS at 477; *Holmes*, 29 BRBS at 21. Moreover, the experts' concession that it was possible that claimant's hearing loss was entirely due to the combination of aging and head trauma or to the combination of aging, head trauma and military service-related noise exposure, with possibly no contribution resulting from claimant's longshore employment, *see* Decision and Order at 20, is too speculative and equivocal to rebut the presumption. *Id.*

The remaining evidence relied upon by the administrative law judge concerns the point at which claimant and his wife noticed a hearing problem. Decision and Order at 19-20. Specifically, the administrative law judge relied first on claimant's wife's

[7] Claimant testified on deposition that he suffered a head injury while working on the waterfront and afterward told a doctor that his hearing had gotten worse. EX 1 at 30-34; *see* Decision and Order at 5. In his June 23, 2006 report, Dr. Langman noted that claimant sustained head trauma about 35 years ago and felt his hearing declined following this accident. CX 4 at 21, 23; CX 7 at 92. In his deposition testimony, Dr. Langman opined that this head trauma contributed to claimant's hearing loss. CX 7 at 103-104. He conceded that it was theoretically possible that claimant's hearing loss was due entirely to the combination of his head injury and aging, but he could not offer an opinion on this issue within a reasonable degree of medical certainty. *Id.* at 103-104, 112-113. Dr. Lipscomb testified that although it is possible that claimant's head trauma could be a significant factor in the causation analysis, typically head trauma results in a monaural asymmetry, as opposed to the binaural hearing loss that claimant demonstrates. CX 8 at 177.

testimony that claimant did not complain about his hearing prior to his retirement. *Id.* at 19. Noting claimant's wife's testimony regarding her active involvement in, and supervision of, claimant's health care since the late 1980's, the administrative law judge found that the fact that she first arranged for claimant to be evaluated for hearing aids in 2006 supports the inference that she did not notice that claimant had hearing difficulties prior to 2001.[8] *Id.* at 19-20; *see* Tr. at 15-16, 19-20, 22-34, 38-39, 42-43. This inference, however, does not establish the absence of a work-related hearing loss and, standing alone, is insufficient to rebut the Section 20(a) presumption. *See generally Ramey*, 134 F.3d at 959, 31 BRBS at 210(CRT); *Swinton*, 554 F.2d at 1083, 4 BRBS at 477; *Holmes*, 29 BRBS at 21.

Applying the applicable caselaw on Section 20(a) and the aggravation rule, it is apparent that the record in this case is devoid of substantial evidence to rebut the presumption that claimant's longshore employment did not contribute to his hearing loss. As previously discussed, none of the doctors' opinions of record rebuts the presumption and none of the circumstantial evidence on which the administrative law judge relied constitutes substantial evidence that claimant's longshore employment did not cause, contribute to, or aggravate his hearing loss. *See Ramey*, 134 F.3d at 959, 31 BRBS at 210(CRT); *Ronne I*, 932 F.2d 836, 24 BRBS 137(CRT); *Damiano*, 32 BRBS 261; *Bridier*, 29 BRBS 84. We therefore reverse the administrative law judge's finding that employer rebutted the Section 20(a) presumption, and hold that claimant's hearing loss is work-related as a matter of law.[9] The case is remanded to the administrative law judge for consideration of the remaining issues. *See, e.g., Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001).

[8] Dr. Langman indicated that claimant reported a history of hearing loss dating back more than 20 years, and that his hearing had been worse for the past five years. CX 4 at 21, 23; CX 7 at 72, 94. Claimant's wife was unable to recall precisely when she first noticed problems with his hearing; she testified that his hearing worsened between 2001 and 2006 but stated that the problems had started earlier. Tr. at 15, 32-33.

[9] In a case in which the employer fails to produce substantial evidence to the contrary, a claimant can prevail on the basis of the Section 20(a) presumption. *See Bath Iron Works v. Brown*, 194 F.3d 1, 33 BRBS 162(CRT) (1st Cir. 1999); *Janich*, 181 F.3d 810, 33 BRBS 71(CRT).

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