BRB No. 09-0552

HENRY BENNETT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
UNIVERSAL MARITIME SERVICE CORPORATION	)	DATE ISSUED: 03/24/2010
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LAMORTE BURNS & COMPANY, INCORPORATED	)	
	)	
Employer/Carrier-Respondents	)	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, LLP), Norfolk, Virginia, for claimant.

R. John Barrett and Lisa L. Thatch (Vandeventer Black LLP), Norfolk, Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2008-LHC-01011) 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 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 hustler driver for employer, underwent an audiometric evaluation on November 14, 2007, which revealed a 54.4 percent monaural loss in his right ear. On May 7, 2008, claimant underwent another audiometric evaluation at the Medical University of South Carolina, which reflected a 15 percent monaural hearing impairment in his right ear. On May 13, 2008, claimant was examined by Dr. Meyer, a Board-certified otolaryngologist with a Ph.D in hearing science, who diagnosed claimant with an asymmetric sensorineural loss, after an MRI of claimant's head did not reveal any abnormalities. Thereafter, claimant filed a claim for permanent partial disability and medical benefits, alleging that he has been exposed to injurious noise during the course of his employment for employer. Employer controverted the claim on the basis that claimant's hearing loss is not work-related.

Prior to the April 7, 2009, formal hearing, the administrative law judge accepted the parties' stipulation that if claimant's injury is compensable, claimant is entitled to benefits for a 34.7 percent monaural loss, which is the average of claimant's November 14, 2007 and May 7, 2008 audiograms. Decision and Order at 2, Stip. 9. In his decision, the administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C §920(a), linking his monaural loss to his employment, and that employer produced substantial evidence to rebut the presumption. Weighing the evidence as a whole, the administrative law judge found that claimant failed to carry his burden of establishing that the hearing loss in his right ear is causally related to his employment. Accordingly, the administrative law judge denied benefits.

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 of the administrative law judge's denial of benefits.

Where, as in this case, the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's hearing loss is not due to his employment. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219 (9th Cir. 2009). Claimant avers on appeal that the administrative law judge erred in finding that the opinions of Drs. Meyer and Katz are sufficient to rebut the Section 20(a) presumption. The administrative law judge acknowledged Dr. Meyer's deposition testimony that it was possible that the open window of claimant's hustler exposed claimant's right ear to more noise resulting in claimant's asymmetrical hearing loss. CX 4 at 16-17. Nonetheless, Dr. Meyer opined that claimant's hearing loss is not related to noise exposure because the noise to which claimant was exposed should affect

both ears equally. CX 1; CX 4 at 5, 9. Dr. Katz opined that as claimant's noise exposure was symmetrical, such exposure had not caused his asymmetrical hearing loss. EX 4.

The administrative law judge found that the opinions of Drs. Meyer and Katz rebut the Section 20(a) presumption because both stated that the noise exposure claimant experienced at work did not cause claimant's asymmetric hearing loss. The administrative law judge rejected claimant's contention that Dr. Meyer's opinion cannot rebut the Section 20(a) presumption because Dr. Meyer stated it was "possible" that claimant's hustler truck could have exposed claimant's right ear to greater noise or that noise exposure could have contributed to another hearing problem. The administrative law judge found that the acknowledgement of this "possibility" did not undermine Dr. Meyer's opinion that the noise would affect both ears equally. Decision and Order at 14, citing *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).[1] The administrative law judge also found that Dr. Katz's opinion bolstered that of Dr. Meyer. The administrative law judge rejected claimant's contention that he could not rely on Dr. Katz's opinion because he had not examined claimant. The administrative law judge stated that Dr. Katz reviewed the entire medical record and claimant's deposition before offering an opinion and that his opinion satisfies employer's burden of production on rebuttal. The administrative law judge stated that as the two opinions are highly consistent with each other, the combined weight of the two opinions constitutes "such relevant evidence as a reasonable mind might accept as adequate to support the conclusion that noise exposure was not the cause of claimant's hearing loss." Decision and Order at 17.

We reject claimant's contentions of error, which are the same as those properly rejected by the administrative law judge. Both physicians opined that claimant's hearing loss is not due to noise exposure. The fact that Dr. Meyer could not exclude the possibility that claimant's hearing loss is related to noise exposure does not preclude the administrative law judge from finding that the opinion constitutes substantial evidence of the absence of a causal connection between the injury and the exposure. *See, e.g., Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Bath Iron Works Corp. v. Director, OWCP*, 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1998).

[1] In *MacDonald*, three physicians opined that claimant's brain hemorrhage was not work-related, but also stated it was possible the work incident caused the harm and that they could not "rule out" such a relationship. The administrative law judge found the opinions inconclusive and therefore insufficient to rebut the Section 20(a) presumption. The Board affirmed, as the administrative law judge reasonably found the opinions insufficient, noting, however, that the administrative law judge could have relied on this evidence to rebut the Section 20(a) presumption. 18 BRBS at 261.

In addition, that Dr. Katz did not examine claimant does not undermine his opinion in this case as to the relationship between claimant's hearing loss and his noise exposure.[2] *See generally Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000). Moreover, the administrative law judge rationally found that the combined weight of the two consistent opinions rebuts the Section 20(a) presumption. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). In addition, employer need not establish another agency of causation in order to rebut the Section 20(a) presumption; thus, the fact that Drs. Meyer and Katz have not identified the cause of claimant's monaural impairment does not preclude their opinions from rebutting the Section 20(a) presumption. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2002). Therefore, as it is supported by substantial evidence, we affirm the administrative law judge's finding that the Section 20(a) presumption is rebutted. *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000); *Davison v. Bender Shipbuilding & Repair Co.*, 30 BRBS 45 (1996).

Having found the Section 20(a) presumption rebutted, the administrative law judge proceeded to weigh all of the relevant evidence to determine if claimant met his burden of establishing a causal relationship between his employment and his hearing loss. After considering the relevant evidence, consisting of claimant's testimony, two audiograms, pictures of the hustler, and the medical opinions,[3] the administrative law judge concluded that none of this evidence establishes that claimant's hearing loss is related to noise exposure at work. *See* Decision and Order at 15. This finding is supported by substantial evidence. *Coffey*, 34 BRBS 85. Thus, the administrative law judge's denial of benefits is affirmed.

[2] Contrary to claimant's contention, Dr. Katz's opinion is not internally inconsistent. Dr. Katz's statement that claimant's zero percent left ear hearing loss best represents "any" hearing loss from noise exposure is not inconsistent with his ultimate opinion that claimant's rateable loss is not work-related. EX 4.

[3] The only medical opinions are those of Drs. Meyer and Katz.

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

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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JUDITH S. BOGGS
Administrative Appeals Judge