

BRB Nos. 92-1018
and 92-1018A

STANKO SVORINICH)	
)	
Claimant-Respondent)	
Cross-Respondent)	
)	
v.)	
)	
TODD PACIFIC SHIPYARDS)	
CORPORATION)	DATE ISSUED:
)	
and)	
)	
AETNA CASUALTY & SURETY)	
COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	
Cross-Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Cross-Petitioner)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and Order on Reconsideration of
Edward C. Burch, Administrative Law Judge, United States Department of Labor.

Marilyn S. Green (Cantrell, Green, Pekich & Cruz), Long Beach, California, for claimant.

Enrique M. Vassallo and Tim Keller (Mullen & Filippi), Long Beach, California, for
employer/carrier.

Michael S. Hertzog (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate
Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the
Director, Office of Workers' Compensation Programs, United States Department of
Labor.

Before: HALL, Chief Administrative Appeals Judge, BROWN and DOLDER,
Administrative Appeals Judges.

PER CURIAM:

Employer appeals, and the Director, Office of Workers' Compensation Programs (the Director), cross-appeals, the Decision and Order Awarding Benefits and Order on Reconsideration (90-LHC-1358 and 90-LHC-1359) of Administrative Law Judge Edward C. Burch awarding benefits on claims 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 filed two claims under the Act: a claim for a respiratory impairment, alleging exposure to respiratory irritants in the course of his employment, and a claim for bilateral hearing loss and tinnitus, alleging exposure to noise in the course of his employment. Employer controverted both claims. The parties' stipulations included that no compensation had been paid on either claim, that claimant sustained a binaural hearing loss of 12.2 percent which arose out of and in the course of his employment with employer, and that claimant was exposed to asbestos in the course and scope of his employment prior to June 1, 1976. The issues presented for adjudication included average weekly wage, whether claimant was a "retiree" under the Act, and whether claimant sustained any compensable respiratory injury arising from his employment.

In his Decision and Order, the administrative law judge found that claimant retired from his employment on March 31, 1988, for reasons unrelated to his occupational diseases which became manifest after he retired and that claimant therefore was a "voluntary retiree" under the Act for the purposes of both claims. On the hearing loss claim, the administrative law judge initially determined that claimant was entitled to benefits for a 12.2 percent impairment of the whole person pursuant to Section 8(c)(23), 33 U.S.C. §908(c)(23) (1988). On reconsideration, he converted claimant's 12.2 percent binaural impairment to a four percent impairment of the whole person, pursuant to the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA Guides). See 33 U.S.C. §§902(10), 908(c)(23) (1988).

On the respiratory claim, the administrative law judge found that the evidence was sufficient to invoke the presumption of causation contained in Section 20(a) of the Act, 33 U.S.C. §920(a), and that employer failed to produce sufficient evidence to rebut the presumption. Assuming, *arguendo*, that employer established rebuttal, the administrative law judge weighed the evidence as a whole and determined that claimant's respiratory impairment is, at least in part, due to his exposure to respiratory irritants at work. He found that claimant suffers a respiratory impairment of 25 percent of the whole person based on Dr. Dahlgren's opinion.¹ Inasmuch as claimant's occupational diseases

¹In his Order on Reconsideration the administrative law judge awarded claimant benefits for a 27 percent impairment of the whole person for the combined effects of his hearing and respiratory impairments pursuant to the Combined Values Chart of the AMA Guides. Order at 2.

were diagnosed within one year of claimant's voluntary retirement, the administrative law judge determined that claimant's average weekly wage pursuant to 33 U.S.C. §910(d)(2)(A) is \$768.06.²

On appeal, employer contends that the administrative law judge erred in calculating claimant's award for hearing loss under Section 8(c)(23) rather than Section 8(c)(13), 33 U.S.C. §908(c)(13). Employer also contends that the administrative law judge erred in finding that claimant's respiratory impairment is work-related. In her cross-appeal, the Director contends that claimant's hearing loss benefits should be calculated pursuant to Section 8(c)(13), and additionally contends that the case should be remanded for calculation of claimant's average weekly wage prior to his last exposure to injurious noise. Claimant agrees that his hearing loss benefits are properly calculated pursuant to Section 8(c)(13), but seeks affirmance of the award for his respiratory impairment. In addition, claimant has filed a "Petition for Submission or Remand" in which he contends that his average weekly wage in the year prior to retirement is \$1,014.70 pursuant to Section 10(a), 33 U.S.C. §910(a). Employer objects to claimant's request that the Board calculate average weekly wage pursuant to Section 10(a), arguing that the administrative law judge has made an appropriate determination of average weekly wage consistent with claimant's last exposure to noise.

In the time since the parties filed their briefs on appeal, the United States Supreme Court issued its decision in *Bath Iron Works Corp. v. Director, OWCP*, U.S. , 113 S.Ct. 692, 26 BRBS 151 (CRT)(1993). In *Bath Iron Works*, the Court held that claims for hearing loss under the Act, whether filed by current employees or retirees, are claims for a scheduled injury and must be compensated pursuant to Section 8(c)(13), rather than Section 8(c)(23), of the Act. Specifically, the Court stated that a worker who sustains a work-related hearing loss suffers disability simultaneously with his or her exposure to excessive noise and, thus, the hearing loss cannot be considered "an occupational disease which does not immediately result in disability." See 33 U.S.C. §910(i). Since Section 8(c)(23) only applies to retirees with such occupational diseases, it is inapplicable to hearing loss injuries. The Court further held that the date of the last exposure to injurious noise, rather than the date of awareness pursuant to Section 10(d)(2), (i), 33 U.S.C. §910(d)(2), (i), is the relevant time of injury for calculating average weekly wage. Thus, for the reasons set forth in *Bath Iron Works*, we vacate the administrative law judge's award of hearing loss benefits pursuant to Section 8(c)(23), and we hold that claimant is entitled to benefits under Section 8(c)(13) for the stipulated 12.2 percent binaural impairment. Moreover, we affirm the administrative law judge's calculation of claimant's average weekly wage, as it is based on claimant's wages in his last year of employment. There is no suggestion in the record that claimant was not exposed to injurious noise through the time he retired, and the administrative law judge's finding thus comports with *Bath Iron Works*.³

²Section 10(d)(2)(A) provides that the average weekly wage with respect to a claim based on disability due to an occupational disease for which the time of injury occurs within the first year after the employee has retired shall be one fifty-second part of the average annual earnings during the 52-week period preceding retirement.

³Claimant's "Petition for Submission or Remand" therefore is denied.

Employer next contends that the administrative law judge erred in finding that claimant has a work-related respiratory impairment. The Section 20(a) presumption aids a claimant in establishing that his injury is causally related to his employment. In order to avail himself of the Section 20(a) presumption, claimant must show that he sustained an injury, *i.e.*, physical harm, and that an accident took place or working conditions existed that could have caused the harm. Claimant need only establish the presence of working conditions which could have caused the harm alleged; he does not have to prove the causal nexus. *Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). In the instant case, it is undisputed that claimant suffers from a respiratory condition,⁴ and that he was exposed to asbestos and other respiratory irritants at work;⁵ therefore claimant has satisfied the requirements of his *prima facie* case. *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989).

Upon invocation of the Section 20(a) presumption, the burden shifts to employer to present specific and comprehensive evidence sufficient to sever the potential causal connection between the injury and employment. *See Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993). The administrative law judge concluded that Dr. Mohler's opinion that claimant has obstructive airways disease and emphysema due to cigarette smoking is insufficient to establish that claimant's impairment was not caused or contributed to by his occupational exposures. Although Dr. Mohler also opined that claimant does not have asbestosis, the administrative law judge relied on Dr. Mohler's testimony on cross-examination that claimant's obstructive airways disease could have been caused by dust and other irritants to find that the Section 20(a) presumption is not rebutted. Inasmuch as Dr. Mohler's opinion does not rule out claimant's exposure to dust and other irritants as a cause of his respiratory impairment and substantial evidence supports the administrative law judge finding that employer failed to produce sufficient evidence to establish rebuttal of the Section 20(a) presumption, we affirm the finding that claimant's respiratory is work-related.⁶ *See Bridier v. Alabama Dry Dock & Shipbuilding Co.*, 29 BRBS 84 (1995); *Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991), *aff'd sub nom. Ins. Co. of N. America v. U.S. Dept. of Labor*, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), *cert. denied*, U.S. , 113 S.Ct. 1253 (1993).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and

⁴The administrative law judge found that the uncontradicted evidence establishes that claimant has pleural plaques consistent with asbestos exposure. Dr. Dahlgren stated that claimant has asbestosis, with an obstructive component, due to asbestos exposure. Dr. Mohler stated that claimant has obstructive airways disease.

⁵The parties stipulated that claimant was exposed to asbestos and claimant also testified that he was exposed to fiberglass, welding materials, sandblasting, paints and solvents.

⁶We need not address employer's remaining contentions regarding the administrative law judge's weighing of the evidence inasmuch as our holding that substantial evidence supports the finding that employer failed to establish rebuttal of the Section 20(a) presumption is dispositive of the causation issue.

Order on Reconsideration are modified to reflect claimant's entitlement to benefits for a 12.2 percent binaural impairment under Section 8(c)(13) based on an average weekly wage of \$768.06. In all other respects, the administrative law judge's Decision and Order Awarding Benefits and Order on Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge