**U.S. Department of Labor**

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 21-0076

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| ARTURO CHAMPI APAZA | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| SOC-SMG, INCORPORATED | ) | |
| | ) | |
| and | ) | |
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| CONTINENTAL INSURANCE COMPANY | ) | DATE ISSUED: 4/26/2023 |
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| Employer/Carrier-Respondents | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | DECISION and ORDER on MOTION for RECONSIDERATION |
| | ) | |
| Respondent | ) | |

Claimant has filed a motion for reconsideration with suggestion for en banc review of the Benefits Review Board's decision in this case, *Apaza v. SOC-SMG, Inc.*, BRB No. 21-0076 (Jan. 30, 2023) (unpub.), which affirmed Administrative Law Judge (ALJ) Angela F. Donaldson's denial of benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act), as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (DBA). 33 U.S.C. §921(b)(5); 20 C.F.R. §§801.301, 802.407. The Director, Office of Workers' Compensation Programs (the Director), responds, requesting the Board grant Claimant's motion and reconsider its decision. Employer responds, urging the Board deny Claimant's motion for en banc reconsideration. For the reasons stated below, we grant Claimant's motion and reconsider his petition for review and accompanying brief but deny the suggestion for en banc review.

To reiterate the pertinent facts, Claimant filed a claim for benefits for a psychological injury and monoaural hearing loss in his left ear allegedly sustained as a result of his work as a security guard in Iraq from 2006 to 2012. In her decision, the ALJ denied Claimant's claim for benefits relating to both of his alleged injuries,[1] ALJ D&O at 20-21. On appeal, the Board affirmed the ALJ's finding that Claimant did not establish the requisite harm element of his prima facie case regarding his alleged hearing loss. *Apaza*, slip op. at 5-6; *see* 33 U.S.C. §920(a). In reaching this conclusion, the Board indicated "this case arises under the jurisdiction of the United States Court of Appeals for the Fifth Circuit," *id.*, slip op. at 2 n.1, and held the ALJ's Section 20(a) invocation analysis, including her interpreting the parties' stipulation and her assessing the credibility of Claimant's evidence, accorded with the Fifth Circuit's invocation standard.[2] *Id.*, slip op. at 5-6. The Board next affirmed the ALJ's findings that Employer rebutted the Section 20(a) presumption for Claimant's psychological condition, and that Claimant did not establish he sustained a work-related psychological condition by a preponderance of the evidence. *Id.*, slip op. at 7-12. For both rebuttal and on the record as a whole, the Board stated the ALJ permissibly relied on Dr. Morote's opinion as constituting substantial evidence to support a finding that Claimant does not have any psychological condition. *Id.* Consequently, the Board affirmed the ALJ's denial of benefits. *Id.*, slip op. at 12.

**Parties' Respective Positions for Reconsideration**

In his motion for reconsideration, Claimant contends the Board incorrectly stated this case arises within the jurisdiction of the Fifth Circuit rather than the United States Court of Appeals for the Second Circuit. He therefore requests the Board grant his motion, vacate its decision, and reconsider the entirety of his appeal in light of Second Circuit law, explicitly reiterating that substantial evidence does not support denying benefits. The Director agrees with Claimant's assessment that the Board erred in giving Fifth Circuit law controlling effect as this case arises in the Second Circuit, and that the difference in

[1] The ALJ found Claimant did not establish the harm element of his prima facie case for his hearing loss claim and therefore he did not invoke the Section 20(a) presumption, 33 U.S.C. §920(a). While she found Claimant entitled to the Section 20(a) presumption relating his psychological condition to his overseas work with Employer, she also found Employer rebutted the presumption and determined on the record as a whole that Claimant did not prove he suffered from a psychological injury as a result of his work with Employer in Iraq by a preponderance of the evidence.

[2] The Board further stated that because the "case arises under the Fifth Circuit's jurisdiction," it was "bound to follow the Fifth Circuit's interpretation on Section 20(a) invocation." *Apaza*, slip op. at 5 n.4.

controlling case law may impact the case's outcome. *McDonald v. Aecom Technology Corp*., 45 BRBS 45 (2011). The Director, however, takes no position on a particular resolution. Dir. Br. at 3.

Employer also responds to Claimant's motion, asserting the Board did not commit an error of law in applying Fifth Circuit rather than Second Circuit precedent, but that even if Claimant and the Director are correct on this issue, the Board did not commit manifest injustice as any error would be harmless. In this regard, it maintains there is no prejudice to Claimant because even if his audiogram had been deemed sufficient to invoke the Section 20(a) presumption, the ALJ would have found Employer rebutted it, and she would have reached the same conclusion that Claimant does not have any work-related hearing loss. It maintains that even if Second Circuit precedent controls, Claimant's audiogram remains insufficient to meet his prima facie burden for purposes of invoking the Section 20(a) presumption with regard to his hearing loss claim. Alternatively, Employer states if Claimant invoked the Section 20(a) presumption linking his hearing loss to his work for Employer, it rebutted the presumption by satisfying its own burden of production.[3] Employer therefore requests the Board deny Claimant's motion for reconsideration en banc.

**Applicable Circuit**

Claimant and the Director correctly contend this case arises within the jurisdiction of the Second Circuit, and not the Fifth, because the record reveals the district director in New York filed the ALJ's decision. *McDonald*, 45 BRBS 45. In light of this, we grant Claimant's motion and reconsider his appeal in the context of Second Circuit controlling law.

**Psychological Condition**

Once the Section 20(a) presumption has been invoked, as in this case for Claimant's psychological condition, the burden an employer bears in rebutting the Section 20(a) presumption is the same in both the Second and Fifth Circuits: the burden shifts to the employer to produce substantial evidence that the claimant's condition was not caused or aggravated by his employment. *Compare Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008), *with Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33

[3] Employer maintains it produced "***both* the applicable statute explaining where an audiogram shall be presumptive evidence of hearing loss *and* an explanation of how [Claimant's] audiogram failed to meet these standards**." Emp's Br. at 10 (emphasis in original).

BRBS 187(CRT) (5th Cir. 1999). Thus, for the reasons articulated in our prior decision, *Apaza*, slip op. at 7-12, we re-affirm the ALJ's findings that Employer rebutted the Section 20(a) presumption for Claimant's psychological condition and that Claimant has not established he sustained a work-related psychological condition by a preponderance of the evidence, as they are supported by substantial evidence.[4] *Rainey*, 517 F.3d at 634, 42 BRBS at 12(CRT); *American Stevedoring Ltd. v. Marinelli*, 248 F.3d 54, 64-65, 35 BRBS 41, 49(CRT) (2d Cir. 2001); *Sealand Terminals v. Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT) (2d Cir. 1993); *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982). Consequently, we again affirm the ALJ's denial of benefits relating to Claimant's alleged psychological injury, albeit under Second Circuit law.

**Hearing Loss**

With respect to Claimant's hearing loss claim, the variance in controlling circuit case law brings the Section 20(a) presumption invocation analysis under the less stringent standard enunciated by the Board and circuits other than the Fifth, as set forth in *Rose v. Vectrus Systems Corporation*, 56 BRBS 27(CRT) (Decision on Recon. En banc), which espouses a burden of production and precludes an ALJ from making credibility determinations in determining whether Claimant has met his burden of presenting a prima facie case. *Id.; see also Rainey*, 517 F.3d 632, 42 BRBS 11(CRT); *Marinelli v. Am. Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001). Because of this difference, and because the ALJ found Claimant's 2018 audiogram was too unreliable to show the existence of a hearing loss, we review anew the ALJ's findings related to Claimant's hearing loss. For the reasons stated below, we vacate our prior disposition on the hearing loss claim, reverse the ALJ's finding that Claimant did not invoke the Section 20(a) presumption with regard to his hearing loss, hold as a matter of law that Claimant's hearing loss is work-related and, therefore, remand the case for the ALJ to enter an award of benefits to Claimant, payable by Employer, for his work-related hearing loss.

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[4] The Board stated:

> the ALJ permissibly found Dr. Morote's opinion constitutes substantial evidence that a reasonable mind could accept as adequate to support a finding that Claimant does not have any psychological condition. Dr. Morote unequivocally stated Claimant has no current psychological or mental condition and, more specifically, no psychological condition caused, aggravated, or exacerbated by his work with Employer.

*Apaza*, slip op at 8; EX 1 at 10.

In order to be entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), a claimant must sufficiently allege: 1) he has sustained a harm; and 2) an accident occurred or working conditions existed which could have caused or aggravated the harm.[5] *Rose*, 56 BRBS 27; *see, e.g., Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Rainey*, 517 F.3d 632, 42 BRBS 11(CRT); *Brown v. I.T.T/Cont'l Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). The claimant bears an initial burden of production in order to invoke the Section 20(a) presumption.[6] *Rose*, 56 BRBS at 36. Credibility plays no role in addressing whether a claimant has established a prima facie case. *Id.* at 37. In this regard, the Section 20(a) invocation analysis "does not require examination of the entire record, an independent assessment of witness' credibility, or weighing of the evidence." *Id.* Instead, the claimant need only "present some evidence or allegation that if true would state a claim under the Act."[7] *Id.* If the claimant establishes his prima facie case, he is entitled to the presumption that his injury is work-related and compensable. *Id.*

The ALJ's Section 20(a) analysis in this case as to Claimant's hearing loss is not in accordance with the *Rose* invocation standard. D&O at 17-18. First, she incorrectly held Claimant to a burden of persuasion rather than production at invocation. *Id.* Second, she improperly relied on credibility determinations she made regarding the 2018 audiogram -- Dr. Bermejo's opinion, and Claimant's testimony as to his hearing loss symptoms -- in determining he did not establish the requisite harm element. *Id.* Because of these errors, the ALJ's finding that Claimant did not establish the requisite harm element to invoke the Section 20(a) presumption with regard to his hearing loss cannot stand.

The ALJ found Claimant established the working conditions element of his prima facie case through his testimony that mortar explosions sometimes caused buzzing in his ears and his statements to Dr. Bernejo that he had been in a place with bombs exploding

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[5] As previously noted, the Board originally applied Fifth Circuit law to this case, *Bis Salamis, Inc. v. Director, OWCP [Meeks]*, 819 F.3d 116, 50 BRBS 29(CRT) (5th Cir. 2016), which states the ALJ has "the authority to address witness credibility in determining whether the claimant has made a prima facie case." *Apaza*, slip op. at 5 n.4.

[6] "The burden of production or 'some evidence' standard which we have set forth here is a light burden – being no greater than an employer's burden on rebuttal – meant to give the claimant the benefit of the statutory framework." *Rose*, 56 BRBS at 38.

[7] "Whether the claimant's evidence fails or carries the day is a matter to be resolved at step three when weighing the evidence, not at step one invocation." *Rose*, 56 BRBS at 38.

30 to 50 meters away from him. Decision and Order at 18. To support the harm element, Claimant submitted an audiogram indicating he has a 1.9% monoaural hearing loss (left ear),[8] as well as Dr. Bernejo's accompanying report diagnosing "chronic acoustic trauma" related to prolonged exposure to noise greater than or equal to 80 dB. CX 11. This evidence must be considered under a burden of production – without looking to its credibility or reliability; it represents evidence of a harm "that if true would state a claim under the Act," *Rose*, 56 BRBS at 37, and is sufficient to invoke the Section 20(a) presumption. *Id.* at 36-37.

Therefore, upon reconsideration, we reverse the ALJ's finding that Claimant did not establish a prima facie case of a work-related hearing loss. We hold Claimant satisfied his initial burden of production and is entitled to the Section 20(a) presumption that his hearing loss is work-related. *See Rose*, 56 BRBS at 38. As Employer has not put forth any rebuttal evidence,[9] we further hold Claimant's hearing loss is work-related as a matter of law. *Bass v. Broadway Maint.*, 28 BRBS 11 (1994); *Willis v. Titan Contractors, Inc.*, 20 BRBS 11 (1987). Moreover, as the ALJ permissibly found the parties stipulated to a 1.9 percent hearing impairment "conditioned on the finding of a compensable hearing loss," ALJ Order

[8] Employer agreed that in the event Claimant is found to have a compensable injury, this audiogram shows a 1.9% impairment. Emp. Resp. Br. at 27-28.

[9] Employer's hearing loss causation arguments before the ALJ and originally before the Board have always been limited to Section 20(a) invocation. Emp. ALJ Br. at 22-23; Emp's Br. at 21-26. In its response to Claimant's motion for reconsideration, Employer readily admits it "**may not have presented the opinions of a *medical expert* in order to rebut the presumption**." Emp's Br. at 10 (emphasis in original). Rather, its "rebuttal evidence" consists of evidence it contends invalidates the audiogram and shows it cannot serve as "presumptive evidence" of a hearing loss, 33 U.S.C. §908(c)(13). This misinterprets its burden at rebuttal: an employer must produce substantial evidence to support a finding that the claimant does not have a harm or that workplace conditions did not cause the accident or injury. *Rainey*, 517 F.3d at 637, 42 BRBS at 14(CRT) (an employer cannot satisfy its burden of production simply by submitting any "evidence" whatsoever). Weighing the evidence or assessing credibility comes only at the third stage of the causation analysis, *Rose*, 56 BRBS at 38, so evidence of an invalid audiogram could also provide evidence of the extent of impairment. We therefore reject Employer's contentions that its evidence rebuts the Section 20(a) presumption linking Claimant's hearing loss to his work with Employer.

on Recon. at 6, and Claimant has now established a compensable hearing loss, we remand this case to the ALJ for entry of an award of benefits for a 1.9% monaural hearing loss.[10]

Accordingly, we grant Claimant's motion for reconsideration and the relief requested in part.[11] 20 C.F.R. §802.409. We vacate our affirmance of the ALJ's consideration of the hearing loss claim, reverse her finding that Claimant did not invoke the Section 20(a) presumption, hold as a matter of law that Claimant's hearing loss is work-related, and remand for entry of an award of benefits to Claimant for his work-related 1.9% monaural hearing loss. In all other respects, we affirm the Board's prior decision, albeit under the appropriate controlling law of the Second, rather than the Fifth, Circuit.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[10] Claimant's contentions regarding the applicability of the parties' stipulation to the cause of his hearing loss and the validity and constitutionality of the calibration requirement, as expressed in 20 C.F.R. §702.441(d), remains moot. *See Apaza*, slip op. at 7 n.6.

[11] Given the panel's disposition of Claimant's motion for reconsideration, we deny his suggestion for en banc review. 20 C.F.R. §§801.301(c), 802.409.

MELISSA LIN JONES
Administrative Appeals Judge