

CARLOS L. DAVISON	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
BENDER SHIPBUILDING & REPAIR	)	
COMPANY, INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION AND ORDER

Appeal of the Decision and Order - Denying Benefits of Quentin P. McColgin, Administrative Law Judge, United States Department of Labor.

Mitchell G. Lattof, Sr. (Lattof & Lattof, P.C.), Mobile, Alabama, for claimant.

Douglas L. Brown (Armbrecht, Jackson, DeMouy, Crowe, Holmes & Reeves), Mobile, Alabama, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (91-LHC-2907) of Administrative Law Judge Quentin P. McColgin 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a retiree, suffered a hearing loss which he alleges arose out of noise exposure during the course of his intermittent employment as a welder with employer from 1961 through 1974. On June 28, 1990, claimant filed a claim for benefits under the Act based on a May 8, 1990, audiological evaluation which revealed a 16.8 percent binaural hearing loss. Upon notification of the pending claim, employer filed its Notice of Controversion on March 31, 1992. The parties have stipulated that no compensation and/or medical benefits have been paid to claimant as a result of this claim.<sup>1</sup> Joint Exhibit 1.

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<sup>1</sup>Additionally, the parties stipulated that employer was claimant's last maritime employer and that on the date of injury, May 8, 1990, claimant was a voluntary retiree. Moreover, the parties have

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further agreed that claimant's average weekly wage was \$330.31. Joint Exhibit 1.

The medical evidence of record consists of audiological examinations by three individuals. The first, dated May 8, 1990, led audiologist Robert Garcia to state that claimant had a zero percent hearing loss for the right ear and a 100 percent hearing loss for the left ear, equating to a 16.8 percent binaural hearing loss. Claimant's Exhibit 9. Mr. Garcia additionally stated that claimant's audiological test "revealed a mild to severe sensorineural hearing loss in the mid to high frequency range for the right" ear, and that the "left ear thresholds revealed a profound sensorineural hearing loss in the low, mid, and high frequency ranges." *Id.* As for the etiology of claimant's hearing loss, Mr. Garcia commented that "[t]he configuration of the right ear audiogram is consistent with a hearing loss secondary to noise exposure." *Id.* Mr. Garcia also noted that "[i]n view of claimant's history of noise exposure and current hearing status, it is reasonable to assume that noise was a contributing factor to the hearing loss in the left ear." *Id.*

Claimant was next examined on March 30, 1992, by Jim McDill, Ph.D., a certified audiologist, who similarly found that claimant had a zero percent hearing loss for the right ear, a 100 percent hearing loss for the left ear, and a binaural hearing loss of 16.8 percent. Claimant's Exhibit 10. Dr. McDill noted that the audiological results were indicative of "a moderate high frequency sensorineural loss in the right ear and a profound sensorineural loss in the left ear." *Id.* Dr. McDill did not address the etiology of claimant's hearing loss. *Id.*

Dr. Muller, an otolaryngologist, also examined claimant on March 30, 1992. Employer's Exhibit 2. Dr. Muller had previously seen claimant in February 1987, as a result of claimant's fall in the shower while he was in prison in November 1986. *Id.* At that time, Dr. Muller noted that an audiogram revealed a complete absence of cochlear response or hearing in the left ear which Dr. Muller attributed to a probable fracture of the temporal bone. *Id.* In his March 30, 1992 report, Dr. Muller compared Dr. McDill's audiogram with the one he had administered in February 1987, and found that the two were similar "with a complete cochlear loss on the left side and a mild-to-moderate high tone sensorineural hearing loss in the right ear above 2 kHz with good speech discrimination scores." *Id.* In light of claimant's history and his examination, Dr. Muller concluded that the loss of hearing in the left ear is "compatible with a traumatic fracture of the temporal bone on the left side with complete cochlear loss, described by [claimant] in 1987 as being secondary to a fall in the shower while in prison in Florida." *Id.* Dr. Muller further opined that the loss in the right ear was described as a "sensorineural loss for the high tones which is compatible with noise exposure in the past." *Id.*

In his Decision and Order, the administrative law judge found that claimant was entitled to the Section 20(a), 33 U.S.C. §920(a), presumption of causation, but that employer rebutted this presumption. The administrative law judge then found, after evaluating the record as a whole, that the noise-induced loss in both of claimant's ears is zero percent under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) and thus, non-compensable. The administrative law judge also determined that since noise-induced hearing loss is not progressive, the remaining hearing loss in claimant's left ear is attributable solely to an

intervening cause, and therefore, is similarly non-compensable. Accordingly, benefits were denied.<sup>2</sup> On appeal, claimant challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance.

Claimant initially contends that the administrative law judge erred in finding that employer established rebuttal of the Section 20(a) presumption. Moreover, claimant avers that the administrative law judge's conclusion that claimant cannot recover for subsequent aggravation of his occupational hearing loss is contrary to the applicable law.

Section 20(a) of the Act, 33 U.S.C. §920(a), provides claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed or an accident occurred which could have caused, aggravated, or accelerated the condition. *See James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). Because it is undisputed that claimant suffered a harm, *i.e.*, a sensorineural hearing loss consistent with noise exposure, and that injurious noise levels existed in parts of employer's facility during claimant's period of employ, the administrative law judge properly determined that claimant is entitled to the presumption. *See Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988).

It is employer's burden to rebut the Section 20(a) presumption that claimant's hearing loss is work-related with substantial countervailing evidence sufficient to establish that there is no causal connection between the hearing loss and his employment. *See Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995). If claimant sustains a subsequent injury, an employer can establish rebuttal of the Section 20(a) presumption by producing substantial evidence that claimant's condition was caused by the subsequent event; in such a case, employer must additionally establish that the first work-related injury did not cause the second injury. *See, e.g., Kelaita v. Director, OWCP*, 799 F.2d 1308, 1310-1311 (9th Cir. 1986). Employer is liable for the entire disability if the second injury is the natural and unavoidable result of the first injury. Where the second injury is the result of an intervening cause, however, employer is relieved of liability for that portion of disability attributable to the second injury. *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994).

In the instant case, the audiograms establish that claimant has zero percent impairment of the right ear and 100 percent impairment of the left ear. Employer has set forth specific and comprehensive evidence, notably the unequivocal medical opinion of Dr. Muller, which establishes that the 100 percent hearing loss in claimant's left ear occurred as a result of a traumatic fracture of the temporal bone, secondary to a fall, long after his employment had ended.<sup>3</sup> The evidence further

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<sup>2</sup>The administrative law judge also denied claimant's request for medical benefits under Section 7, 33 U.S.C. §907.

<sup>3</sup>We note that the administrative law judge erred by relying solely on Dr. Seller's deposition testimony to establish rebuttal under Section 20(a), as his opinion that noise-induced hearing loss is generally equal in both ears does not specifically rule out noise as a cause of claimant's hearing loss. Moreover, Dr. Seller's deposition was taken in another case. However, in light of the other medical evidence of record, particularly the medical opinion of Dr. Muller, we hold that the administrative

shows that subsequent to his last day of employment in 1974, claimant was not exposed to any employment-related noise. Tr. at 18. Consequently, since unequivocal evidence of record establishes that the second injury, *i.e.*, the 100 percent hearing impairment of the left ear, is solely the result of an intervening cause, we hold that the Section 20(a) presumption is rebutted as a matter of law. *Holmes v. Universal Maritime Service Corp.* 29 BRBS 18 (1995)(Decision on Recon.); *Bass*, 28 BRBS at 11; *James*, 22 BRBS at 271. Moreover, we note that since this case involves a non-work-related injury which occurred subsequent to claimant's work-related injury, the aggravation rule is inapplicable. *Leach v. Thompson's Dairy, Inc.*, 13 BRBS 231 (1981). Accordingly, we hold that the administrative law judge's finding that there is no causal relationship between claimant's employment and the hearing loss in claimant's left ear is supported by the evidence of record as a whole. *Holmes*, 29 BRBS at 18; *Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988). Furthermore, although the evidence sufficiently establishes a causal relationship between the hearing loss of the right ear and claimant's employment, the administrative law judge correctly found, pursuant to the *AMA Guides*, that claimant has no compensable impairment for that ear. We therefore affirm the administrative law judge's denial of compensation benefits.

Claimant also argues that the administrative law judge improperly denied medical benefits for an amplification device under Section 7, 33 U.S.C. §907. Inasmuch as claimant has a work-related hearing loss in his right ear, claimant is eligible for medical benefits under Section 7, even though claimant may have no measurable work-related impairment under the *AMA Guides*. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993). In order to be entitled to medical benefits under Section 7, claimant must provide an adequate evidentiary basis sufficient to support the award such as past expenses incurred or evidence of necessary treatment in the future. *Id.* In the instant case, the administrative law judge determined that since the basis for recommending the hearing device is to compensate for the severe hearing loss of the left ear and that condition occurred as a result of an intervening cause wholly unrelated to any work-related hearing loss, employer could not be held liable for that proposed treatment. We affirm that finding on the basis that it is a rational inference drawn from the evidence of record.<sup>4</sup> *Pimpinella v. Universal Maritime Service Inc.*, 27 BRBS 154 (1993); Claimant's Exhibit 9. We, therefore, affirm the administrative law judge's denial of medical benefits in this case.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed.

SO ORDERED.

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law judge's error is harmless.

<sup>4</sup>We reject claimant's contention regarding the administrative law judge's finding that claimant did not want a hearing aid, as well as claimant's contention that the administrative law judge's improperly assumed that the basis for recommending the hearing aid is to compensate for the hearing loss only in claimant's left ear. Contrary to claimant's contentions, these determinations are rationally supported by the evidence in this case, and thus, are affirmed. *Pimpinella v. Universal Maritime Service Inc.*, 27 BRBS 154 (1993).

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge