BRB Nos. 09-0172
and 09-0172A

J.W.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
JEFFBOAT, LLC	)	DATE ISSUED: 08/21/2009
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order-Denying Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Melissa M. Olson (Embry and Neusner), Groton, Connecticut, for claimant.

Douglas P. Matthews (King, Krebs & Jurgens, P.L.L.C.), New Orleans, Louisiana, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order-Denying Benefits (2007-LHC-01595) of Administrative Law Judge Donald W. Mosser 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 July 17, 2006, by Dr. Windmill, which revealed a 40.93 percent binaural impairment. Claimant worked for employer for forty years beginning in 1966, initially as a welder and then as a crane operator. Claimant also underwent an audiological evaluation by Dr. Mickler on November 8, 2007. The audiogram administered by Dr. Mickler was interpreted as showing a 41.9 percent binaural hearing loss.

In his decision, the administrative law judge found that the audiograms of record establish that claimant has suffered a harm and that claimant's credible testimony establishes working conditions that could have caused that harm. Thus, the administrative law judge invoked the Section 20(a) , 33 U.S.C. §920(a), presumption that claimant's hearing loss is work-related. The administrative law judge also found that Dr. Mickler opined that claimant's condition is not the result of noise exposure, and the administrative law judge thus found that employer rebutted the Section 20(a) presumption. After weighing the evidence as a whole, the administrative law judge found determinative Dr. Mickler's opinion that claimant's hearing loss is not noise-induced and therefore not work-related. Thus, the administrative law judge denied the claim.

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. Claimant filed a reply brief. On cross-appeal, employer contends that if the Board vacates the administrative law judge's finding that claimant's hearing loss is not work-related, the Board should find that the administrative law judge erred in excluding from evidence claimant's medical file from employer's clinic and Dr. Mickler's opinion based thereon. Claimant responds, urging affirmance of the administrative law judge's exclusion of this evidence.

Claimant contends that Dr. Mickler's opinion is insufficient to rebut the Section 20(a) presumption because he did not state that claimant's noise exposure at work did not contribute to claimant's hearing loss or aggravate his hearing loss due to other conditions. Where, as in this case, the Section 20(a) presumption is invoked,[1] the burden shifts to

[1] 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*

employer to rebut the presumption with substantial evidence that claimant's hearing loss was not caused, contributed to or aggravated by his employment. *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000). 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); *Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52(CRT) (4th Cir. 1982).

In his decision, the administrative law judge recognized employer's burden to introduce substantial evidence that noise did not cause or contribute to claimant's hearing loss or aggravate a hearing loss that is due to some other condition. Decision and Order at 6. The administrative law judge found that employer established rebuttal of the Section 20(a) presumption based on Dr. Mickler's opinion. Dr. Mickler administered an audiometric evaluation on November 8, 2007 and reviewed the results of the audiogram administered by Dr. Windmill on July 17, 2006. Dr. Mickler opined that there is no "noise notch" indicated on these audiograms and he thus concluded that claimant does not have a noise-related hearing loss. Emp. Exs. 1-3, 9.

We reject claimant's contention of error and affirm the administrative law judge's finding that employer produced substantial evidence that no part of claimant's hearing loss is noise-induced. The administrative law judge relied on the opinions of Drs. Mickler and Windmill that claimant's audiograms demonstrate a "flat" loss of hearing and that a noise-induced loss typically results in a high frequency loss at the 3000 to 6000 Hz levels. Emp. Ex. 1-3; Cl. Ex. 1. Dr. Mickler opined that the lack of a notch at one of these high frequency levels is the basis for his conclusion that claimant does not have noise-induced hearing loss. Emp. Ex. 9. As Dr. Mickler's opinion constitutes substantial evidence of the absence of any connection between claimant's hearing loss and his noise exposure, we affirm the finding that the Section 20(a) presumption is rebutted. *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000).

Once the Section 20(a) presumption is rebutted, it falls from the case and claimant bears the burden of proving that his hearing loss is work-related based on the record as a whole. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). The administrative law judge credited the opinion of Dr. Mickler over that of Dr. Windmill, who opined that claimant's hearing loss is due his long-term noise exposure. Cl. Ex. 1. The administrative law judge found that Dr. Mickler's opinion that

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generally Universal Maritime Corp. v. Moore, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).

the hearing loss is not work-related is supported by both experts' opinions that claimant's hearing loss pattern is not typical of a loss due to noise exposure. Thus, the administrative law judge found that claimant did not establish the work-relatedness of his hearing loss.

We reject claimant's contention that the administrative law judge erred in evaluating the evidence as a whole. It is axiomatic that the Board cannot reweigh the evidence or substitute its opinion for that of the administrative law judge, but must accept the administrative law judge's rational weighing of the medical evidence. *Moore v. Director, OWCP*, 835 F.2d 1219, 20 BRBS 68(CRT) (7th Cir. 1987); *see also Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). In this case, the administrative law judge found that Dr. Mickler's opinion is better supported by the audiometric results and the agreed principle that claimant's test results lack the "notch" at the upper frequencies usually associated with noise-induced loss. As this finding is rational and within his discretion as the fact-finder, the denial of the claim is supported by substantial evidence. Thus, it is affirmed.[2] *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Hice v. Director, OWCP*, 48 F.Supp.2d 501 (D. Md. 1999); *Coffey*, 34 BRBS 85.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge

[2] As we affirm the finding that claimant's hearing loss is not related to noise exposure, we need not address employer's protective cross-appeal asserting that if the Board vacated the administrative law judge's causation finding, his exclusion of additional evidence should also be overturned.