BRB No. 13-0282

FRANCIS GOODNESS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	DATE ISSUED: 12/23/2013
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Timothy J. McGrath, Administrative Law Judge, United States Department of Labor.

Lance G. Proctor, Westerly, Rhode Island, for claimant.

Robert J. Quigley, Jr. (McKenney, Quigley, Izzo & Clarkin, LLP), Providence, Rhode Island, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2012-LHC-00335) of Administrative Law Judge Timothy J. McGrath 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 worked as a stagebuilder for employer from 1975-1978.[1] He left this employment in 1978, choosing to work as a carpenter, framing houses, until 1980. Tr. at

[1]Claimant constructed staging for other shipyard workers to stand on while constructing vessels. He worked with torches, hammers, wrenches, ratchets, skillsaws, chainsaws, basket cranes, and other construction equipment, and he worked in close proximity to the other steel trades and was exposed to loud noises. EX 3-22; Tr. at 26.

28-29. In April 1980, claimant returned to his position with employer. Tr. at 29. Claimant underwent a pre-employment audiogram, which showed normal hearing. CX 6-11; EX 6-5. Claimant testified that, as a result of new construction technologies, such as robotic gouging, he was exposed to greater noises than previously. Tr. at 32, 35. Due to a work-related back and neck injury, claimant last worked for employer on April 19, 1985. *Id*. at 37, 54. Since then, claimant has held a variety of jobs, including that of a carpenter, carpenter foreman, truck driver, and vacuum truck driver. EX 3-45; Tr. at 39-49.

On May 5, 2011, Dr. Uchmanowicz conducted a hearing evaluation on claimant, which demonstrated a 6.6 percent binaural hearing loss. CX 3. She opined that claimant's hearing loss is causally related to his eight years of employment at employer's facility while working in noisy conditions without adequate hearing protection. CX 3-2; CX 6-15. On August 8, 2011, upon employer's request, Dr. Sells conducted a hearing evaluation, which also demonstrated a binaural hearing loss, albeit at 2.8 percent. EX 1-1; EX 6-4. Dr. Sells opined that claimant's hearing loss could not be attributed to his work with employer because she believed some hearing loss should have been present on his 1980 audiogram after his first three years of exposure. She also noted that claimant did not begin to complain about hearing loss until 26 years after leaving employer's employ. EX 1-2.

Based on Dr. Uchmanowicz's opinion, the administrative law judge found that claimant established a prima facie case relating his hearing loss to his employment; however, he also found that Dr. Sells's opinion rebutted the Section 20(a) presumption. 33 U.S.C. §920(a); Decision and Order at 10-11. Weighing the evidence as a whole, the administrative law judge found that claimant did not establish his hearing loss is causally related to his employment with employer. Specifically, the administrative law judge found Dr. Uchmanowicz's opinion unpersuasive because she did not inquire into claimant's post-employment work history and took his statement that he was not exposed to injurious noise levels after leaving his employment with employer at face value. The administrative law judge found this significant because both audiologists testified that noise exposure as a carpenter and vacuum truck driver could cause hearing loss. The administrative law judge further found Dr. Uchmanowicz's statement that she did not know "one way or the other" whether claimant suffered a hearing loss prior to leaving work in 1985 undermined her opinion on the cause of claimant's hearing loss. Decision and Order at 12; CX 6-26. Additionally, the administrative law judge found claimant's testimony to be unreliable as claimant demonstrated "inaccurate and self-serving behavior with the parties' audiologists" by omitting from his work history jobs that put him at risk for hearing loss. Decision and Order at 13-14. As claimant did not establish a causal relationship between his hearing loss and his employment by a preponderance of the evidence, the administrative law judge denied benefits. Claimant appeals and employer responds, urging affirmance.

Where, as in this case, it is undisputed that claimant is entitled to the benefit of the Section 20(a) presumption, 33 U.S.C. §920(a), the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused by his employment. *See Bath Iron Works Corp. v. Director, OWCP [Shorette]*, 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997). It is an employer's burden on rebuttal to present substantial evidence stating there is no causal relationship between the claimant's harm and his employment. *See Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1988). If the administrative law judge finds employer has rebutted the Section 20(a) presumption, it falls out of the case and the administrative law judge must weigh all of the relevant evidence and resolve the issue on the record as a whole, with claimant bearing the burden of persuasion. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

Claimant first contends the administrative law judge erred in finding that employer rebutted the Section 20(a) presumption, as employer did not produce substantial evidence that claimant's working conditions did not cause the injury or aggravate the pre-existing condition to result in injury. We reject claimant's assertion of error. The standard of rebuttal claimant asks the Board to apply is that for an aggravation injury; however, claimant has not established he had a preexisting hearing impairment, given that his 1980 hearing evaluation prior to his reemployment with employer was normal. CX 6-11; EX 6-5; *see also* Decision and Order at 5. Therefore, contrary to claimant's assertion, a physician's statement that there is no causal relationship between the harm and the employment is sufficient to rebut the presumption in this case. *Harford*, 137 F.3d at 675, 32 BRBS at 46(CRT). As Dr. Sells stated that claimant's hearing loss is not attributable to his work with employer, the administrative law judge rationally found employer rebutted the presumption with this opinion. *Id.*; EX 1; EX 6.

Claimant additionally contends the administrative law judge erred in failing to find the evidence as a whole establishes a causal connection between his hearing loss and his work for employer. The administrative law judge found claimant's testimony regarding his noise exposure with employer was not credible because he failed to inform the audiologists of any post-employment noise exposure that put him at risk for hearing loss. Decision and Order at 13. This finding is rational in light of claimant's subsequent work as a carpenter and truck driver and the audiologists' agreement that claimant could have been exposed to loud noises at those jobs. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Further, the administrative law judge found that although claimant testified he experienced hearing difficulties while employed with employer and thereafter, claimant produced no evidence that he sought treatment for any hearing difficulties, and, thus could not support his assertion in this regard. Finally, the administrative law judge found that Dr. Uchmanowicz's opinion that claimant's hearing loss is related to his employment did not carry claimant's burden on the record as a whole, as her opinion was premised on

incomplete information. Decision and Order at 12-13. Not only did the administrative law judge find Dr. Uchmanowicz's opinion "tenuous" because she was uncertain whether claimant had sustained a hearing loss by 1985 but also because her conclusions were based solely on claimant's incomplete work history. *Id.* Substantial evidence supports the administrative law judge's weighing of the evidence and conclusions based thereon. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). As the administrative law judge rationally found that claimant presented no credible evidence establishing a causal link between his hearing loss and his work for employer, he properly concluded that claimant is not entitled to benefits.[2] *Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996). We, therefore, affirm the denial of benefits.

[2]In his brief, claimant relies heavily on *Labbe v. Bath Iron Works Corp.*, 24 BRBS 159 (1991), and *Dubar v. Bath Iron Works Corp.*, 25 BRBS 5 (1991). Claimant's reliance on these cases, however, is misplaced as claimant failed to establish that his employment with employer contributed to his hearing loss. Both *Labbe* and *Dubar* establish that a claimant may receive benefits for hearing loss after he leaves covered employment even if he was exposed to injurious noise thereafter. However, these cases presume the claimant sustained a compensable injury with the last maritime employer, and claimant, here, has failed to establish any work-related injury. *See also Bruce v. Bath Iron Works Corp.*, 25 BRBS 157 (1991)(benefits denied as no creditable evidence of hearing loss at the time claimant left covered employment).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.[3]

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

[3]As claimant was not successful on appeal, we deny the petition for an attorney's fee filed by his counsel. 33 U.S.C. §928; 20 C.F.R. §802.203.