BRB No. 13-0366

JACK B. BOWRON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JONES STEVEDORING COMPANY	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DATE ISSUED: Feb. 5, 2014
	)	
STEVEDORING SERVICES OF AMERICA	)	
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Jay W. Beattie (Lindsay Hart, LLP), Portland, Oregon, for Jones Stevedoring Company.

John Dudrey (Williams Fredrickson, LLC), Portland, Oregon, for Stevedoring Services of America/Homeport Insurance Company.

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

PER CURIAM:

Claimant appeals the Decision and Order (2009-LHC-0895) of Administrative Law Judge Steven B. Berlin 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 longshoreman for various employers in the Coos Bay, Oregon, area from 1956 until retiring on December 16, 1992. Claimant filed claims for hearing loss against his last two employers, Jones Stevedoring (Jones), for whom he worked from December 14 through 16, 1992, and Stevedoring Services of America (SSA), for whom he worked from December 10 through 13, 1992.[1] Claimant's first audiogram, administered on April 24, 1991, resulted in Dr. Tate's rating claimant's hearing impairment at zero percent bilaterally. Claimant's subsequent audiograms, administered on May 28, 2008, and August 26, 2009, revealed a binaural hearing loss of 27.5 and 22.81 percent, respectively. The administrative law judge found that claimant established a prima facie case of work-related hearing loss and that employer established rebuttal thereof. 33 U.S.C. §920(a). Based on the record as a whole, the administrative law judge found that claimant did not establish he sustained a work-related hearing loss. He thus denied benefits.

On appeal, claimant challenges the administrative law judge's finding that he did not sustain a work-related hearing loss and the consequent denial of benefits. Jones and SSA have each filed a response brief, urging affirmance of the administrative law judge's denial of benefits. Claimant filed a reply brief.

Claimant first contends the administrative law judge erred in relying on the 1991 audiogram and Dr. Hodgson's opinion to find that employer rebutted the Section 20(a) presumption.

Where, as in this case, claimant establishes entitlement to invocation of the Section 20(a) presumption,[2] the burden shifts to employer to rebut the presumption with substantial evidence that claimant's hearing loss was not caused, contributed to or aggravated by his employment. *See Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d

[1]Claimant also named several other employers but the administrative law judge dismissed them from the proceedings.

[2]In this case, the administrative law judge invoked the Section 20(a) presumption based on claimant's 2008 documented hearing loss and claimant's exposure to noise at the waterfront when he worked for Jones and SSA. These findings are affirmed as unchallenged on appeal. *See generally Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998).

615, 33 BRBS 1(CRT) (9th Cir. 1999); *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998). The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has held that employer's burden on rebuttal is to produce "evidence specific and comprehensive enough to sever the potential connection between the disability and the work environment." *Ramey*, 134 F.3d at 959, 31 BRBS at 210(CRT) (internal citation omitted). In *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010), the Ninth Circuit stated that the inquiry at rebuttal concerns "whether the employer submitted evidence that could satisfy a reasonable fact finder that the claimant's injury was not work-related." *Id.*, 608 F.3d at 651, 44 BRBS at 50(CRT).

The administrative law judge found that employer rebutted the Section 20(a) presumption with the opinion of Dr. Hodgson. The administrative law judge found that Dr. Hodgson testified, to a reasonable degree of medical probability, that if claimant had no ratable hearing loss after 34 years as a longshoreman as demonstrated on the 1991 audiogram, claimant's continued exposure to the same degree of occupational noise for an additional 20 months would not have caused a ratable hearing loss.[3] Furthermore, the administrative law judge found that Dr. Hodgson cited medical literature supportive of his opinion, finding that only in a rare case would noise-induced hearing loss appear later if it did not appear in the first five years of exposure. The administrative law judge thus concluded that Dr. Hodgson's opinion, that claimant "did not have a ratable hearing loss when he retired in 1992," EX 22, rebuts the Section 20(a) presumption. Decision and Order at 11-12. We affirm the administrative law judge's finding that Dr. Hodgson's opinion constitutes evidence "that could satisfy a reasonable fact finder that the claimant's injury was not work-related." *Ogawa*, 608 F.3d at 651, 44 BRBS at 50(CRT);

[3]Contrary to claimant's contention, the administrative law judge rationally concluded that the 1991 audiogram is valid, since it was supervised by Dr. Tate, a licensed otolaryngologist, who reviewed the results and opined that they were valid. Moreover, neither Dr. Lipman nor Dr. Hodgson opined that the 1991 audiogram was invalid. *See Norwood v. Ingalls Shipbuilding, Inc.*, 26 BRBS 66 (1992) (Stage, C.J., dissenting on other grounds). In addition, claimant's contention that the 1991 audiogram cannot be relied upon because the measurement at the 2000 HZ level is not valid, is without merit. While the decision in *Green-Brown v. Sealand Services, Inc.*, 586 F.3d 299, 43 BRBS 57(CRT) (4th Cir. 2009), stands for the proposition that an administrative law judge may not credit an audiogram that is *missing* results at a mandatory level, the administrative law judge properly found there is no evidence in this case that the 1991 audiogram is missing results at any of the mandatory levels, only that the results at that level were unexpected. Decision and Order at 13-14. The 1991 audiogram tested claimant's hearing at the required frequencies and met the other requirements for a valid audiogram.

Duhagon, 169 F.3d 615, 33 BRBS 1(CRT). Therefore, we affirm the administrative law judge's finding that employer rebutted the Section 20(a) presumption.

Once the Section 20(a) presumption is rebutted, it falls from the case and it is claimant's burden to establish that his hearing loss is work-related based on the administrative law judge's weighing of the evidence as a whole. *Ogawa,* 608 F.3d at 651, 44 BRBS at 50(CRT). Claimant contends that the administrative law judge erred in failing to credit the opinions of Dr. Lipman and Mr. Kornbau that claimant has a work-related noise-induced hearing loss, *see* HT 77-79; CX 12 at 30-32, and in giving determinative weight to Dr. Hodgson's opinion. Specifically, claimant asserts that Dr. Hodgson's opinion that claimant did not sustain additional hearing loss in the last 20 months of work is erroneously based on his belief that claimant wore hearing protection and on a misinterpretation of study by Sataloff and Sataloff, entitled *Occupational Hearing Loss* (1987) (Sataloff study).

Addressing the evidence as a whole, the administrative law judge found that claimant did not establish a causal connection between his employment, which ended in 1992, and his ratable hearing loss, which was first documented in 2008. In reaching this conclusion, the administrative law judge credited Dr. Hodgson's opinion because it is better supported by the audiogram evidence of record, as well as the Sataloff study.[4] The administrative law judge rejected Dr. Lipman's testimony that claimant's hearing loss is related to his work exposure to noise as speculative since his opinion is based on rare exceptions to the general conclusions set out in the Sataloff study.[5] The administrative

[4]The administrative law judge found that Dr. Hodgson based his opinion in part on his understanding that claimant was wearing hearing protection, a position the administrative law judge rejected as "unfounded" in light of claimant's testimony to the contrary. *See* Decision and Order at 7. The administrative law judge thus was aware of this flaw in Dr. Hodgson's opinion. Nonetheless, the administrative law judge did not err in finding that "no evidence shows that Claimant was exposed to any greater noise level during his last 20 months of employment (after the 1991 audiogram) than during the many years of employment before that." *Id.* at n. 8.

[5]Dr. Lipman concluded, based on the Sataloff study, that there is no way to determine whether claimant had a hearing loss after the 1991 audiogram but before he stopped working. Dr. Lipman stated that if the noise level of exposure before the 1991 audiogram and in his last 20 months of employment were similar it is possible that claimant could have had a hearing loss in that last 20 months of work. The administrative law judge, however, found that while the Sataloff study acknowledges that an individual might work in an occupation for years without hearing loss and then experience a loss even absent an increase in noise, the study describes such an occurrence as "rare."

law judge observed that Mr. Kornbau, an audiologist, first checked a box on a hearing aids form indicating claimant's 2008 hearing loss is not related to work, CX 3, an action for which neither he nor claimant had an explanation. *See* CX 12 at 47-49; HT at 48; Decision and Order at 6.

The administrative law judge is entitled to determine the credibility of the witnesses, and to weigh the evidence and draw his own inferences therefrom. He is not bound to accept the opinion or theory of any particular medical examiner. *Walker v. Rothschild Int'l Stevedoring Co.*, 526 F.2d 1137, 3 BRBS 6 (9th Cir. 1975). The Board may not reweigh the evidence but must ascertain only whether substantial evidence supports the administrative law judge's findings of fact. *King v. Director, OWCP*, 904 F.2d 17, 23 BRBS 85(CRT) (9th Cir. 1990). In this case, the administrative law judge rationally determined that the opinion of Dr. Hodgson was better supported by the other evidence of record. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Contrary to claimant's contention, the administrative law judge was entitled to rely on the generalizations in the Sataloff study given claimant's 1991 audiogram that did not demonstrate a ratable impairment after many years of noise exposure. Therefore, as it is rational and supported by substantial evidence of record, we affirm administrative law judge's finding that claimant did not establish that his hearing loss is work-related and the consequent denial of benefits.[6] *Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT); *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000).

[6]Claimant's reliance on *Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001), *Labbe v. Bath Iron Works Corp.*, 24 BRBS 159 (1991), and *Dubar v. Bath Iron Works Corp.*, 25 BRBS 5 (1991), is misplaced as claimant failed to establish that his employment exposures caused or contributed to his hearing loss. *Steevens, Labbe* and *Dubar* hold that a claimant may receive benefits for work-related hearing loss diagnosed after he leaves covered employment. However, in these cases the claimant sustained a compensable injury with the last maritime employer; claimant, here, has failed to establish any work-related injury. *See Bruce v. Bath Iron Works Corp.*, 25 BRBS 157 (1991) (benefits denied as there was no creditable evidence of hearing loss at the time claimant left covered employment); *see also Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151(CRT) (1993) (hearing loss injury based on noise exposure is complete when exposure ends).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge