BRB No. 11-0387

LARRY E. SIMMONS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIPBUILDING, INCORPORATED	)	DATE ISSUED: 01/20/2012
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel A. Sarno, Jr., Administrative Law Judge, United Sates Department of Labor.

Gregory E. Camden (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2010-LHC-1455) of Administrative Law Judge Daniel A. Sarno, Jr., 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant has worked continuously for employer as an electrician since 1974. He underwent a screening audiogram on September 6, 1974, and filled out a questionnaire related to his noise exposure. The results of that audiogram showed that claimant's left ear exhibited a very mild loss of high-frequency hearing, with essentially normal hearing through the mid-range of 2,000 hertz. Claimant did not have any hearing loss in his right

ear. Claimant stated that his job at the shipyard exposes him to loud noises which often occur without warning, before he has time to put in ear protection. He began noticing problems with his hearing in late 2009, and his February 26, 2010, audiogram demonstrated a 7.5 percent monaural hearing loss in his left ear. Based on the February 26, 2010, audiogram, claimant alleged he has occupational noise-induced hearing loss.

The parties stipulated that the February 26, 2010, audiogram meets the evidentiary requirements of an audiogram under the Act, 33 U.S.C. §908(c)(13)(C), and demonstrates a 7.5 percent monaural hearing loss. The administrative law judge found that claimant is entitled to the Section 20(a), 33 U.S.C. §920(a), presumption that his hearing loss is work-related based on Dr. Pasquale's opinion that occupational exposure to high intensity noise levels is most likely a contributing factor to claimant's hearing loss. However, the administrative law judge found that employer rebutted the presumption with Dr. Zambas's opinion that claimant's hearing loss is not due to noise exposure at the shipyard. Weighing the evidence as a whole, the administrative law judge found that Dr. Zambas's opinion is well-reasoned and documented and that Dr. Pasquale's opinion is not; thus, he found that claimant did not establish that his hearing loss is work-related.[1] Accordingly, the administrative law judge denied the claim. Claimant appeals the decision. Employer responds, urging affirmance.

Claimant contends that the administrative law judge erred in finding that employer rebutted the presumption that claimant's hearing loss is work-related and in crediting Dr. Zambas's opinion over Dr. Pasquale's opinion when weighing the evidence as a whole. Once the Section 20(a) presumption is invoked, as here, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000); *Swinton v. J. Frank Kelly, Inc*., 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole, with claimant bearing the burden of persuasion. *See Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

[1]The administrative law judge found that Dr. Eackles's opinion alone does not establish that claimant's hearing loss is work-related because, although Dr. Eackles did not rule out any possibility that occupational noise could have contributed to claimant's hearing loss, he opined that it was "more consistent" with aging and claimant's history of right-handed shooting while hunting. Decision and Order at 12; CX 8 at 13, 16.

Claimant asserts that the administrative law judge erred in finding the Section 20(a) presumption rebutted. Specifically, claimant contends that Dr. Zambas's opinion cannot rebut the Section 20(a) presumption, as a matter of law, because Dr. Zambas is an audiologist and not a medical doctor and, therefore, is "not licensed to provide medical opinions regarding causation." Cl. Brief at 7 (citing *John v. Im*, 263 Va. 315, 321, 599 S.E.2d 694, 697 (2002)). We reject claimant's assertion that only an opinion of a medical doctor may constitute substantial evidence supportive of rebuttal under Section 20(a). Employer's burden on rebuttal is one of production only, not one of persuasion, and it need produce only "as much relevant factual matter as a reasonable mind would need to accept, as one rational conclusion" that claimant's condition was not caused or aggravated by his work. *See Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 226, 43 BRBS 67, 69(CRT) (4th Cir. 2009). The administrative law judge found that Dr. Zambas's opinion meets this standard. Dr. Zambas stated that claimant's hearing loss is not due to noise exposure in his employment. Hr. Tr. at 44. Moreover, although employer need not demonstrate another cause of claimant's injury, we note that Dr. Zambas did not merely surmise that claimant's hearing loss is due to his history of right-handed shooting, *see Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989), but specifically stated it was not due to occupational noise exposure because, after accounting for claimant's age, there is no progression of hearing loss in claimant's right ear as is seen in his left ear.[2] Hr. Tr. at 44-46. Thus, the administrative law judge found that employer satisfied its burden of production, as Dr. Zambas's opinion constitutes substantial evidence that claimant's hearing loss was not caused or contributed to by his occupational noise exposure. *See Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). As the administrative law judge's finding that Dr. Zambas's opinion rebuts the Section 20(a) presumption is rational and supported by substantial evidence, it is affirmed. *See Moore*, 126 F.3d 256, 31 BRBS 119(CRT).

[2]Dr. Zambas explained that noise-related hearing loss "is [a] very insidious, very slow process," which manifests itself equally in both ears, unless there is a traumatic assault, or an explosive force of sound, to one ear. Hr. Tr. at 36-37. Dr. Zambas further explained that the only history of trauma to claimant's left ear is his history of firearms exposure and that even a single blast from a firearm may result in monaural hearing loss. *Id.* at 37, 39. He further explained that for a right-handed shooter, like claimant, the sound impact from firing a gun affects the left ear much more than the right ear because the sound comes from the barrel of the gun placed over the shoulder opposite the trigger finger, while the placement of the head reduces the sound reaching the corresponding ear significantly. *Id.* at 37.

Claimant additionally asserts that the administrative law judge erred in giving greater weight to Dr. Zambas's opinion than to Dr. Pasquale's opinion when weighing the record as a whole. Specifically, claimant argues that Dr. Pasquale is more qualified to render a medical opinion because she is a medical doctor and Dr. Zambas is not. Claimant also alleges that the administrative law judge erred in crediting Dr. Zambas's opinion because it is not well-reasoned. We reject claimant's assertions of error.

We reject claimant's assertion that Dr. Zambas's opinion cannot be found more persuasive than Dr. Pasquale's because Dr. Pasquale is a licensed medical doctor and Dr. Zambas is "only" an audiologist. Dr. Zambas has a doctorate in audiology and has been the manager of audiology for employer for 37 years. Moreover, there is no fundamental requirement that only medical doctors can provide creditable opinions as to the cause of hearing loss. The administrative law judge is not bound to accept the opinion or theory of any particular medical examiner; rather, he may draw his own inferences and conclusions from the evidence, subject to the administrative law judge's providing a rational basis for his finding. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 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).

In finding Dr. Zambas's opinion to be well-documented and well-reasoned, the administrative law judge observed that Dr. Zambas based his opinion on claimant's audiograms and explained that claimant's "earliest hearing test upon being hired at the ship yard showed hearing loss in the left ear, which was likely due to [c]laimant's hunting as a right handed shooter." Decision and Order at 12. The administrative law judge further found that Dr. Zambas acknowledged that occupational noise exposure may affect a hearing loss already reduced by noise from gunfire, but explained that this did not appear to be the situation in claimant's case given the asymmetry of change between claimant's left and right ears and the slow progression of change in claimant's right ear as related to the aging process.[3] *Id.*; *see* Hr. Tr. at 44. In contrast, the administrative law judge found that Dr. Pasquale's opinion is not well-reasoned and documented, despite the fact that she was the only medical doctor to offer an opinion in this case, because she did not relate her understanding of claimant's occupational noise exposure history or address the asymmetry in claimant's hearing loss. The administrative law judge provided a

[3]Dr. Zambas explained that, when he compared the results of claimant's September 6, 1974, and February 26, 2010, audiograms and factored into consideration hearing loss due to aging, the change in hearing sensitivity of claimant's right ear was smaller than he expected while the change in hearing sensitivity of claimant's left ear was greater than he expected. Hr. Tr. at 43.

rational basis for finding the opinion of Dr. Zambas more persuasive.[4] *Coffey*, 34 BRBS 85. Thus, as it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant's hearing loss is not work-related and the denial of benefits. *Id.*

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[4]We reject claimant's assertion that the opinions of Drs. Zambas and Eackles support claimant's position that his hearing loss was worsened by noise from the use of Hilti guns at the shipyard. The administrative law judge accurately observed that Dr. Zambas unequivocally opined that claimant's hearing loss was not related to his occupational noise exposure, and that, although Dr. Eackles acknowledged the possibility that claimant's hearing loss was affected by his occupational noise exposure, he opined that it was more consistent with aging and his history of right-handed gun shooting. Hr. Tr. at 44; CX 8.