BRB No. 12-0272

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| WARREN JONES | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| CARGILL, INCORPORATED | ) | DATE ISSUED: 01/17/2013 |
| | ) | |
| Self-Insured | ) | |
| Employer-Respondent | ) | DECISION and ORDER |

Appeal of the Decision and Order of Larry W. Price, Administrative Law Judge, United States Department of Labor.

V. William Farrington, Jr. (Farrington & Thomas, L.L.C.), New Orleans, Louisiana, for claimant.

George J. Nalley, Jr., and Rachel A. Smith (Nalley & Dew, P.L.C.), Metairie, Louisiana, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2011-LHC-00715) of Administrative Law Judge Larry W. Price 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 for employer in various roles from 1977 until his retirement in 2001. He testified he worked in jobs that exposed him to noise. Between 1978 and 2000, claimant underwent 19 hearing tests at work conducted by Hearing Conservation, Inc. (HCI). Emp. Ex. 23. After he retired, an audiogram was administered in April 2010, conducted by Dr. Juneau, an audiologist. Dr. Juneau's testing revealed sloping moderate loss in each ear, and she assigned claimant a binaural impairment rating of 23.1 percent. Cl. Ex. 19 at Exh. 3. She also concluded that at least part of claimant's hearing loss is

due to work-related noise, based on his description of his noise exposure. Claimant filed a claim for benefits under the Act.

Employer scheduled an appointment with Dr. Seidemann, an audiologist, in August 2010. Dr. Seidemann concluded that claimant had a hearing impairment of 9.4 percent in his right ear, zero percent in his left ear, and a binaural impairment of 1.6 percent. However, Dr. Seidemann attributed the loss to claimant's age and not to noise exposure. Emp. Exs. 9-10; Tr. at 113-117. Because of the discrepancy between test results, the district director ordered an independent examination with Dr. Irwin, an otolaryngologist. Dr. Irwin examined claimant on October 29 and November 3, 2010. The October evaluation revealed a binaural impairment of 41.3 percent and the November evaluation demonstrated a binaural impairment of 39.7 percent. Dr. Irwin stated that the loss pattern is relatively flat and is not typical of acoustic trauma or noise-induced loss, although he found the loss symmetrical. Accordingly, Dr. Irwin stated that he could not determine within a reasonable degree of medical certainty that the loss was more probably than not caused by claimant's exposure to noise at work, although he could not definitively exclude noise as a cause. Emp. Ex. 13.

All three doctors also considered the Noise Dosimetry Assessment and Noise Level Surveys, which were conducted by HCI, as well as the ANSI and OSHA standards. Dr. Seidemann stated that noise levels at employer's facility were insufficient to have caused claimant's hearing loss; Dr. Juneau stated claimant would have had to be exposed to an average of 95 dB eight hours per day over 20 years in order to get the hearing loss she measured. Cl. Ex. 19; Emp. Exs. 9, 13. Although he acknowledged that the noise levels in the departments where claimant worked varied, Dr. Irwin later stated that the surveys suggested claimant was exposed to noise at levels sufficient to be considered a factor in his hearing loss.

Dr. Engelberg, Chief Consulting Audiologist for HCI, testified as to claimant's examinations during the course of his employment and concluded that the pattern of loss revealed by the audiograms during claimant's employment is not a noise-induced pattern. Further, he opined that, as claimant stated he wore hearing protection, this would reduce his exposure and make it less likely that his work caused his hearing loss. Additionally, in light of the noise standards, Dr. Engelberg stated that claimant would have had to have been exposed to 95 dB eight hours per day over 20 years to match Dr. Juneau's test results. Emp. Ex. 23.

The administrative law judge found that claimant established a hearing loss and conditions at work which could have caused that hearing loss, and he invoked the Section 20(a), 33 U.S.C. §920(a), presumption. He then found that employer presented substantial evidence rebutting the presumption, as Drs. Engelberg and Seidemann opined that claimant's loss is not noise-induced. Decision and Order at 16-17. On weighing the evidence as a whole, the administrative law judge found in favor of employer. He found

all the doctors licensed and credible, all the equipment properly calibrated, and all the testing procedures within appropriate standards. As Drs. Irwin, Seidemann, Engelberg, and Juneau all agreed that the pattern of claimant's hearing loss is not typical of a noise-induced loss, and as only Dr. Juneau attempted to explain that the loss must be noise-related based on claimant's history, the administrative law judge rejected Dr. Juneau's opinion as being an "outlier." *Id.* at 17. Based on the record as a whole, the administrative law judge found that claimant failed to carry his burden of establishing a work-related hearing loss, and he denied benefits. *Id.* at 17-19.

Claimant appeals the denial of benefits, contending the administrative law judge erred in finding that employer rebutted the Section 20(a) presumption. Employer responds, urging affirmance. Employer also filed a supplemental brief, highlighting the decision of the United States Court of Appeals for the Fifth Circuit in *Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012), which was issued after it filed its brief before the Board. For the reasons set forth below, and in accordance with the Fifth Circuit's decision in *Plaisance*, we reject claimant's contention, and we affirm the administrative law judge's decision.

Once the claimant establishes a prima facie case, as here, Section 20(a) applies to relate his injury to his employment, and the burden is on the employer to rebut this presumption by producing substantial evidence that the injury is not related to the employment. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). The employer's burden is one of production, not persuasion; once the employer produces substantial evidence of the absence of a causal relationship, the Section 20(a) presumption is rebutted. *Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT); *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Conoco, Inc.*, 194 F.3d 684, 33 BRBS 187(CRT). If the employer rebuts the presumption, it no longer controls and the issue of whether there is a causal relationship must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT); *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).

In finding the Section 20(a) presumption rebutted, the administrative law judge relied on the opinions of Drs. Seidemann and Engelberg who stated that claimant's hearing loss is not related to noise exposure based on the flat pattern and the asymmetry of his loss. Additionally, they testified that claimant would have had to have been exposed to significantly higher decibels for longer periods of time to match his measured hearing loss, and the dosimetry and noise surveys do not indicate that kind of exposure. We reject claimant's argument that these opinions cannot constitute rebuttal evidence because they are based on noise studies. First, Drs. Engelberg and Seidemann did not rely solely on the noise studies to render their conclusions, although the noise studies

bolstered their opinions as they demonstrated that noise at employer's facility typically was within accepted ranges, and was certainly so given claimant's use of hearing protection. Second, the Fifth Circuit held in *Plaisance* that it was improper for the Board to hold doctors' opinions insufficient to rebut the Section 20(a) presumption because they relied on noise surveys or compared the claimant to other people. The Fifth Circuit reiterated that the employer's burden on rebuttal is not a demanding one – merely to present substantial evidence to show that the injury was not caused by the employment – and that the administrative law judge, not the Board, is tasked to determine the sufficiency of the evidence adduced for that purpose. *Plaisance*, 683 F.3d at 230-231, 46 BRBS at 28-29(CRT).

In this case, the administrative law judge rationally determined that the opinions of Drs. Engelberg and Seidemann constitute substantial evidence that claimant's hearing loss is not related to his exposure to noise at work. *Plaisance*, 683 F.3d at 231, 46 BRBS at 28-29(CRT). Thus, the administrative law judge properly concluded that employer rebutted the Section 20(a) presumption and that it falls from the case. *Id.*; *Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT); *Conoco, Inc.*, 194 F.3d 684, 33 BRBS 187(CRT); *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000). Claimant does not challenge the administrative law judge's weighing of the evidence as a whole, and, moreover, the administrative law judge's finding that claimant did not meet his burden of proving the work-relatedness of his hearing loss is supported by substantial evidence. *Hice v. Director, OWCP*, 48 F.Supp.2d 501 (D. Md. 1999); *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001). Therefore, we affirm the administrative law judge's decision denying benefits.

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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JUDITH S. BOGGS
Administrative Appeals Judge