BRB No. 91-1608

CARLEE MERCHANT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BETHLEHEM STEEL CORPORATION	)	DATE ISSUED:
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Robert J. Feldman, Administrative Law Judge, United States Department of Labor.

Bernard G. Link, Lutherville, Maryland, for claimant.

Richard W. Scheiner (Semmes, Bowen & Semmes), Baltimore, Maryland, for self-insured employer.

Laura Stomski (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Acting Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

PER CURIAM:

Employer appeals the Decision and Order (90-LHC-1413) of Administrative Law Judge Robert J. Feldman awarding benefits 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 if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant has worked for employer since 1956 at its Sparrows Point shipyard where he has been exposed to loud industrial noise. Prior to 1970, he was employed as a material chaser and as a checker; thereafter, he worked primarily in the receiving office. In August 1982, claimant suffered a sudden total loss of hearing in his left ear, ten to fifteen minutes in duration. On September 20, 1982, he was examined by Dr. Heroy, who performed audiometric testing which revealed a right ear hearing loss of 1.88 percent and a left ear hearing loss of 26.22 percent, or a 3.8 percent binaural loss. Dr. Heroy initially diagnosed Meniere's disease as the probable cause for the temporary period of total loss of hearing in claimant's left ear. Subsequent audiograms performed by Dr. Heroy in 1982 and 1983 revealed little or no change from his initial testing. An August 1, 1988, audiometric test performed by the Chesapeake Optical Company revealed a 30 percent left ear loss, a 7.5 percent right ear loss, or binaural hearing loss of 11.3 percent. A December 13, 1988, audiometric test performed by Dr. Robert Schwager, a board-certified otolaryngologist, was interpreted as indicating a moderate bilateral sensorineural hearing loss, 30 percent of which was due to noise exposure. Audiometric tests performed by Dr. Luis Rosell in October 1989 indicated an 11.2 percent right ear loss and a 30 percent left ear loss, or a binaural hearing loss of 14.4 percent. Claimant filed a claim for hearing loss benefits under the Act on August 16, 1989. Thereafter, a March 9, 1990 audiometric examination performed by Dr. Dole Baker, a board-certified otolaryngologist, revealed an 11.25 percent impairment of the right ear and a 26.25 percent impairment of the right ear, or a binaural impairment of 13.75 percent. A January 31, 1991, audiogram was interpreted by audiologist Robert Saltsman as indicating a right ear hearing loss of 18.8 percent and a left ear hearing loss of 35.6 percent, or a 21.6 percent binaural loss.

In his Decision and Order, the administrative law judge credited the January 31, 1991, audiogram performed by Robert Saltsman, noting it was the most recent test, and awarded claimant compensation for a 21.6 percent binaural impairment. Employer appeals the award of benefits, arguing that in holding it liable for all of claimant's hearing loss, the administrative law judge misapplied the aggravation rule. Employer asserts that its liability should have been limited to the 1.88 percent right ear hearing loss evidenced on the September 20, 1982, audiogram which Dr. Baker attributed to occupational noise exposure, arguing that any hearing loss claimant suffered after that time was due to the aggravation of his work-related hearing loss by the non-occupationally induced Meniere's disease. Employer further avers that in determining that claimant sustained a 21.6 percent binaural hearing impairment, the administrative law judge not only erred in crediting Mr. Saltsman's opinion over that of Dr. Baker, a medical doctor, but in addition wrongfully assumed that employer had not produced any contrary autographic evidence. Claimant and the Director, Office of Workers' Compensation Programs, respond, urging affirmance.

We reject employer's assertion that the administrative law judge erred in holding it liable for claimant's entire hearing loss. Section 20(a) of the Act, 33 U.S.C. §920(a), provides claimant with a presumption that the injury he sustained is causally related to his employment if he establishes a *prima facie* case by showing that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the onset of the injury. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). In the present case, the administrative law judge properly invoked the Section 20(a) presumption based on the evidence of claimant's hearing impairment and his long term exposure to industrial noise. Once the Section 20(a) presumption is invoked, employer bears the burden of coming forward with evidence that claimant's hearing loss was neither caused nor aggravated by his employment over that period. *See Peterson v. General Dynamics Corp.*, 25 BRBS 71, 78 (1991), *aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor*, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), *cert. denied*, ___ U.S. ____, 113 S.Ct. 1253 (1993). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990).

In the present case, employer offered the medical opinion of Dr. Baker, the 1982 and 1983 medical reports of Dr. Heroy, and a 1988 medical report of Dr. Schwager in support of rebuttal. After considering this evidence, the administrative law judge determined that although Dr. Baker had opined that the primary cause of claimant's hearing loss was Meniere's disease, *see* tr. at 112, his opinion was insufficient to establish rebuttal. Inasmuch as Dr. Baker did not state that claimant's hearing loss was unrelated to his employment and in fact conceded that, as of the time of the September 1982 audiogram, claimant had a mild hearing loss due to noise exposure on the right side, *see* tr. at 146, the administrative law judge's finding in this regard was proper.[1] The administrative law judge also properly determined that Dr. Heroy's 1982 and 1983 reports attributing claimant's hearing loss to Meniere's disease also were not sufficient to establish rebuttal because Dr. Heroy was unaware of claimant's occupational noise exposure when this diagnosis was made and later indicated in his 1991 report that claimant's follow up audiograms documented a fairly symmetrical progression of hearing loss in both ears consistent with noise exposure. Finally, the administrative law judge properly concluded that Dr. Schwager's 1988 report also was not sufficient to establish rebuttal because he attributed 30 percent of claimant's overall bilateral hearing loss to noise exposure. As the aforementioned evidence is not sufficient to sever the potential causal connection between claimant's hearing loss and his employment, the administrative law judge's finding that employer failed to establish rebuttal of the Section 20(a) presumption is affirmed. *See Caudill v. Sea Tac Alaska Shipbuilding, Inc.*, 25 BRBS 92, 96 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding, Inc. v. Director, OWCP*, No. 91-70753 (9th Cir. September 17, 1993)

[1]The administrative law judge also noted that although Dr. Baker indicated that noise-induced hearing loss generally occurs in the higher frequencies whereas hearing loss due to Meniere's typically occurs in the lower frequencies, he also indicated that claimant exhibited both high and low tone loss. Tr. at 104, 107.

In addition, although the administrative law judge found the evidence insufficient to rebut the Section 20(a) presumption, he nonetheless concluded that even if the presumption had been rebutted the record as a whole established that claimant's hearing loss was due, at least in part, to occupational noise exposure. In so concluding, the administrative law judge credited the 1991 medical report of Dr. Heroy. The administrative law judge also credited the 1991 report of audiologist Robert Saltsman, which indicated that claimant exhibited no symptoms of Meniere's disease at that time and that his condition was consistent with his history of exposure to intense auditory stimuli over the course of his employment. Finally, the administrative law judge credited the medical opinions of Drs. Rosell and Schwager, each of whom attributed at least a portion of claimant's hearing loss to occupational noise exposure. Because the evidence credited by the administrative law judge provides substantial evidence to support his finding that claimant' hearing loss is at least in part causally-related to his employment, employer's argument that the administrative law judge erred in holding it liable for claimant's entire hearing loss is rejected. It is well-established that an employment injury need not be the sole cause of a disability. Where, as here, the employment injury aggravates, accelerates, or combines with an underlying condition, the entire resultant condition is compensable. *See Independent Stevedores Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989). As employer has failed to raise any reversible error made by the administrative law judge in weighing the medical evidence and making credibility determinations, his finding that employer is liable for claimant's entire hearing loss in this case is affirmed. *See Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52 (CRT)(4th Cir. 1982), *aff'g* 14 BRBS 520 (1981); *see also Uglesich v. Stevedoring Services of America*, 24 BRBS 180, 183 (1991).

Employer next contends that the administrative law judge erred in determining the extent of claimant's hearing loss. Specifically, employer maintains that in determining that claimant had a 21.6 percent binaural hearing loss, the administrative law judge improperly credited the January 31, 1991, audiogram performed by Robert Saltsman, a lay person, over that of Dr. Baker, a physician specializing in hearing disorders, and improperly concluded that employer produced no "contrary" autographic evidence. Employer asserts that Dr. Baker's March 9, 1990, audiogram indicating that claimant has a binaural hearing loss of only 13.75 percent is probative contrary evidence and that the Board should therefore remand this case for the administrative law judge to reconsider the extent of claimant's hearing loss in light of this audiogram.

Employer's assertion that the administrative law judge erred in concluding that claimant had a 21.6 percent binaural hearing loss based on the results of the most recent audiogram is without merit. Contrary to employer's assertions, Robert Saltsman is not a lay person; he is an audiologist, a licensed professional trained in performing audiological evaluations. Moreover, as the administrative law judge may accept or reject any part of any testimony, it was not an abuse of discretion for the administrative law judge to have credited Mr. Saltsman's January 31, 1991, audiogram over the March 1990 audiogram performed by Dr. Baker. *See generally Avondale Shipyards, Inc. v. Kennel*, 914 F.3d 88, 24 BRBS 46 (CRT)(5th Cir. 1990).

Employer's argument that the administrative law judge erred in finding that employer failed to introduce "contrary" autographic evidence similarly must fail. The administrative law judge's statement is consistent with Section 702.441 of the regulations which provides in pertinent part, that a qualifying audiogram is presumptive evidence of hearing loss measured on the date of the test provided "no one produces a contrary audiogram of equal probative value made at the same time." 20 C.F.R. §702.441(b). Subsection (b)(3) defines the "same time" as within thirty days where, as here, noise exposure continues or within six months where exposure to excessive noise does not continue. In the instant case, the administrative law judge credited Mr. Saltsman's January 31, 1991 because it was the most recent audiogram in the record. As Dr. Baker's March 9, 1990, audiogram, the second most recent audiogram of record, was performed more than 30 days prior to the January 31, 1991 audiogram, the administrative law judge could properly conclude that employer did not introduce "contrary" autographic evidence. As employer has failed to raise any reversible error made by the administrative law judge in evaluating the conflicting medical evidence of record, his finding that claimant sustained a 21. 6 percent hearing loss based on the results of the January 31, 1991, audiogram is affirmed. *See generally Thompson v. Northwest Enviro Services*, 26 BRBS 53 (1992).

Accordingly, the administrative law judge Decision and Order awarding benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge