BRB No. 91-0382

LEO J. PAIGE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING,	)	
INCORPORATED	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Kenneth A. Jennings, Administrative Law Judge, United States Department of Labor.

John F. Dillon (Maples & Lomax, P.A.), Pascagoula, Mississippi, for claimant.

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

PER CURIAM:

Claimant appeals the Decision and Order (89-LHC-1232) of Administrative Law Judge Kenneth A. Jennings denying 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 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 rigger/material handler for employer and was exposed to the noise of jackhammers, grinders and chipping guns. On January 9, 1987, claimant underwent an audiological evaluation at Dr. McClelland's office, the results of which revealed a mild-to-moderate hearing loss bilaterally. Emp. Ex. 11. Dr. McClelland determined that claimant has a 99.9 percent impairment in the left ear and a 50.6 percent impairment in the right ear, with a binaural impairment of 58.8 percent, pursuant to the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*). He stated that "the audiometric configuration is consistent with noise-induced hearing loss." *Id.* Dr.

McClelland concluded that claimant is a "good candidate for binaural amplification" and that he should undergo annual hearing evaluations. *Id.* Based on these results, claimant filed a claim for a work-related hearing loss.[1]

On August 12, 1987, claimant underwent an evaluation conducted by Dr. Gilchrist, the results of which revealed a moderate high frequency hearing loss in the right ear, which calculated to a zero percent impairment, and a moderate to profound sensori-neural hearing loss in the left ear, which calculated to a 99.4 percent impairment. Emp. Ex. 7. Dr. Gilchrist stated that the cause of the left ear impairment was difficult to determine and that:

> (I)t is possibly not a noise related problem as it is not a typical pattern that we see from long noise exposure. There is a history of a blast that he (Claimant) was around and this should be looked into and investigated to see what involvement he had in this accident. Some of his hearing loss is possibly from noise related problems.

Id.

On November 21, 1988, claimant underwent an evaluation conducted by Dr. Lamppin, the results of which revealed, "a nerve type hearing loss in both ears." Emp. Ex. 8. The results revealed a zero percent impairment in the right ear and 100 percent impairment in the left ear under the AMA *Guides*. In his report, Dr. Lamppin stated:

> [A]n audiogram ... demonstrated a sloping nerve type loss in the right ear that is compatible with noise induced hearing loss. . . Mr. Paige has a nerve type hearing loss in both ears; however, the profound loss in the left ear is not characteristic of noise induced hearing loss and the difference between the right ear and the left ear is so great that this is not compatible with noise induced hearing loss. His lack of discrimination scores, also, is not compatible with noise induced hearing loss.

Id.

In his Decision and Order, the administrative law judge determined that employer rebutted the presumption of causation contained in Section 20(a), 33 U.S.C. §920(a), based on Dr. Lamppin's opinion. The administrative law judge then concluded, based upon the record as a whole, that claimant failed to establish that his hearing loss was caused by noise exposure at employer's facility. Accordingly, benefits were denied.

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[1]We note that claimant was around an explosion of a manifold at employer's facility in the early 1970's. Emp. Exs. 7, 13 at 16-18. A claim based on the explosion is not before the Board.

On appeal, claimant contends that the administrative law judge erred in finding that claimant's hearing loss was not caused by his employment. Employer has not responded to this appeal.

Claimant challenges the administrative law judge's determination that he is not entitled to compensation for his hearing loss. In determining whether an injury is caused or aggravated by conditions of his employment or a work accident, a claimant is aided by the Section 20(a), 33 U.S.C. §920(a), presumption, which may be invoked only after the claimant establishes a *prima facie* case. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Once the presumption is invoked, the burden shifts to employer to rebut it by producing facts to show that a claimant's employment did not cause, aggravate, or contribute to his injury. *Obert v. John T. Clark and Son of Maryland*, 23 BRBS 157 (1990). Under the aggravation doctrine, if a work-related injury aggravates, accelerates, or combines with a pre-existing impairment to produce a disability greater than that which would have resulted from the employment injury alone, the entire resulting disability is compensable. *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137 (CRT) (9th Cir. 1991), *aff'g in pert. part Ronne v. Jones Oregon Stevedoring Co.*, 22 BRBS 344 (1989); *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45 (CRT) (5th Cir. 1986)(*en banc*); *Fishel v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 520 (1981), *aff'd*, 694 F.2d 327, 15 BRBS 52 (CRT) (4th Cir. 1982); *Primc v. Todd Shipyards Corp.*, 12 BRBS 190 (1980).

As it is uncontested that claimant has established a *prima facie* case, the burden shifts to employer to put forth evidence that exposure to noise at work did not cause, aggravate or combine with claimant's hearing impairment resulting from other causes. *See generally Janusziewicz v. Sun Shipbuilding & Dry Dock Co.*, 22 BRBS 376 (1989). In the instant case, the administrative law judge found that Dr. Lamppin's opinion is sufficient to rebut the Section 20(a) presumption, characterizing it as "uncategorically denying" that claimant's hearing loss was due to noise. Dr. Lamppin, however, found that the hearing loss in the left ear is not characteristic of noise induced hearing loss, while the hearing loss in the right ear is characteristic of noise induced hearing loss. Emp. Ex. 8. He also stated that the difference between the two ears was so great that the loss is not compatible with noise induced hearing loss. It is not clear from this latter statement whether Dr. Lamppin is referring to both ears or to the left ear only. As Dr. Lamppin states that the non-rateable impairment in claimant's right ear is noise induced and that the left ear impairment is "not characteristic" of noise exposure, Dr. Lamppin's opinion does not rule out noise as a causative or aggravating factor of hearing loss in both ears. The opinion therefore does not constitute affirmative evidence ruling out noise exposure as an aggravating or contributing factor in claimant's hearing loss. *See Port of Portland*, 932 F.2d at 836, 24 BRBS at 137 (CRT); *Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52 (CRT) (4th Cir. 1982); *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200 (1986). Thus, Dr. Lamppin's opinion is insufficient to rebut the Section 20(a) presumption. *See Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22 (CRT) (11th Cir. 1990); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995); *Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988). Further, the opinion of Dr. Gilchrist is insufficient to rebut the Section 20(a) presumption as it does not state that claimant's hearing loss was not caused or aggravated by noise exposure. *Phillips*, 22

BRBS at 94. The fact that the loss in one ear cannot be measured affects the extent of disability; it is uncontested that a loss exists and there is no evidence in the record that noise exposure has had no effect on claimant's hearing.

Thus, as employer has failed to disprove aggravation or contribution, the Section 20(a) presumption is not rebutted. The presumption therefore controls, and claimant's hearing loss is work-related as a matter of law. *Obert*, 23 BRBS at 160. Therefore, we vacate the administrative law judge's denial of disability benefits, and we remand the case for a determination of the extent of claimant's disability.

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge