

ROBERT R. WAITE, JR.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
BENDER SHIPBUILDING & REPAIR)	DATE ISSUED:
COMPANY)	
)	
and)	
)	
ALABAMA INSURANCE GUARANTY)	
ASSOCIATION)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

John D. Gibbons (Gardner, Middlebrooks & Fleming, P.C.), Mobile, Alabama, for claimant.

Michael Gillion (Gillion, Brooks & Hamby, P.C.), Mobile, Alabama, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (91-LHC-2605) of Administrative Law Judge James W. Kerr, Jr., 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 findings of fact and conclusions of law of the administrative law judge 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 welder for employer for three months and four days in 1980, while he was on strike from Scott Paper Company, his non-maritime employer since 1967. Prior to this time, claimant testified that he worked a total of approximately ten years since 1943 for other maritime employers. Tr. at 17. On October 22, 1987, claimant filed a claim under the Act against employer, his last maritime employer, for a 3.8 percent noise-induced binaural hearing loss based on the results of a July 11, 1987, audiometric examination administered at the University of South Alabama Speech and Hearing Center. CX 4. Employer filed its Notice of Controversion on January 13, 1988. The case was referred to the Office of Administrative Law Judges for a formal hearing on March 19, 1992. At the hearing, employer admitted into evidence the results of eight additional audiograms administered between 1967 and 1988 at Scott Paper Company's on-site medical center.¹ EX 6.

In his Decision and Order, the administrative law judge found that claimant was not entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption. The administrative law judge relied on claimant's testimony that he always wore hearing protection while working for employer, and concluded that claimant thus failed to prove that there were circumstances at work which could have caused his hearing loss. Assuming, *arguendo*, that claimant was entitled to the Section 20(a) presumption, the administrative law judge found that employer had severed the presumed causal connection between claimant's hearing loss and his employment with employer, crediting a 1983 audiogram which evidenced that claimant had a 0 percent binaural hearing loss at the time he ceased working for employer. Moreover, he found that the weight of the evidence established that claimant's hearing loss was caused by his 25 years of noise exposure at Scott Paper Company or his recreational hunting, rather than his 3 months working for employer. The administrative law judge therefore concluded that claimant did not receive an injury under the Act while working for employer and denied the claim. Decision and Order at 4-7. Finally, the administrative law judge denied claimant medical benefits finding that as no treatment or amplification was requested or provided up through the time of the 1987 audiogram, any future need for such treatment would be due to factors other than claimant's employment with employer.

Claimant appeals the denial of benefits, arguing that the administrative law judge erred in failing to find that he was entitled to the Section 20(a) presumption and in concluding that employer introduced evidence sufficient to overcome the presumption and establish that claimant's hearing loss is not work-related. Employer responds, urging affirmance.

In this case, although we agree with claimant that the administrative law judge erred in finding that claimant's hearing loss is not causally related to his employment, we nonetheless affirm the denial of all benefits under the Act. Initially, we note that in determining the cause of claimant's

¹ Jim McDill, Ph.D., computed claimant's binaural hearing loss from the Scott Paper Company audiograms as follows: 0% in 1967, 1973 and 1983; .3% in 1984; 1.6% in 1985; 1.3% in 1986; 0% in 1987; and 13.4% in 1988. EX 5, 6.

injury, the administrative law judge intermixed the legal concepts relating to determining causation and the responsible employer. The question of causation deals solely with whether claimant's hearing loss is related to noise exposure in his employment as a whole, rather than to employment with a specific employer. The responsible employer rule comes into play once causation is established and is a judicially-created rule for allocating liability among successive employers in cases where an occupational disease develops after prolonged exposure to injurious conditions. *See Travelers Insurance Co. v. Cardillo*, 225 F.2d 137, 144-45 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955). It is well-established that the employer responsible for paying benefits in an occupational disease case such as hearing loss is the last covered employer to expose claimant to injurious stimuli prior to the date he becomes aware that he is suffering from an occupational disease arising out of his employment. *See Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13 (CRT)(9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984). A distinct aggravation of an injury need not occur for an employer to be held liable as the responsible employer; exposure to potentially injurious stimuli is all that is required. *See generally Good v. Ingalls Shipbuilding, Inc.*, 26 BRBS 159, 163 n.2 (1992).

In *Suseoff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986), the Board addressed the employer's burden of proof with regard to the issues of causation and the determination of the responsible employer. In *Suseoff*, the Board indicated that once claimant demonstrates *prima facie* entitlement to benefits by showing that "he sustained physical harm and that conditions existed at work which could have caused the harm," there exists a presumption of a compensable claim. Employer can rebut this presumption by showing that exposure to injurious stimuli did not cause the harm alleged, *i.e.*, that claimant's hearing loss is not due to noise exposure in any employment, but is due to other causes. Employer may also escape liability by establishing that it is not the responsible employer; employer bears the burden of demonstrating that it is not the last employer covered by the Act to expose claimant to injurious noise. *Id.*, 19 BRBS at 151. *Accord Avondale Industries, Inc. v. Director, OWCP*, 977 F.2d 186, 26 BRBS 111 (CRT)(5th Cir. 1992); *General Ship Service v. Director, OWPC*, 938 F.2d 960, 25 BRBS 22 (CRT)(9th Cir. 1991). *See also Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992).

In the present case, claimant is entitled to invocation of the Section 20(a) presumption, as there are several audiograms of record evidencing a hearing loss and claimant testified that he was exposed to loud noise while performing maritime activities with various companies, including employer. *See Konno v. Young Brothers, Ltd.*, 28 BRBS 57 (1994); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Accordingly, we reverse the administrative law judge's finding regarding invocation of the Section 20(a) presumption of causation.

Once the Section 20(a) presumption is invoked, employer may rebut it by producing facts to show that claimant's employment did not cause, aggravate, or contribute to his injury. *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*, 113 S.Ct. 1253 (1993). In the present case, the administrative law judge found rebuttal established because employer had introduced audiograms dating back to 1967 which established that claimant had no measurable hearing loss. These audiograms, however, do not establish that claimant's hearing loss is not related to noise exposure in a work environment. The only opinion to address

causation is that of Joseph T. Holston, a certified clinical audiologist, who found that workplace noise could have contributed to claimant's hearing loss. CX 4. As there is no record evidence sufficient to establish that noise exposure during the course of claimant's maritime employment did not cause, aggravate, or contribute to his hearing loss, causation is established as a matter of law. *See generally Bell Helicopter International, Inc. v. Jacobs*, 746 F.2d 1342, 17 BRBS 13 (CRT)(8th Cir. 1984).

As claimant's hearing loss is work-related, the last employer to expose him to potentially injurious stimuli is liable as the responsible employer. In the present case, the administrative law judge found that claimant was not exposed to industrial noise while working for employer based on claimant's testimony that he always wore hearing protection. Tr. at 33, 40, 44. Inasmuch as claimant's testimony as corroborated by that of employer's safety director, Harry Bodin, provides substantial evidence to support the administrative law judge's finding in this regard, the administrative law judge's finding that employer demonstrated it is not the responsible employer is affirmed.

With regard to the extent of disability, we affirm the administrative law judge's finding that claimant has no disability, based on his evaluation of the audiometric evidence. Claimant argues that the 1987 audiogram is the only reliable evidence of record regarding the extent of his disability because the other audiograms of record do not comply with the presumptive evidence requirements of Section 8(c)(13)(C), 33 U.S.C. §908(c)(13)(C). We reject this argument, as an audiogram need not comply with the presumptive evidence requirements of Section 8(c)(13)(C) to be probative. In the present case, the administrative law judge's decision to credit the 1983 audiogram in determining the extent of claimant's hearing loss is neither arbitrary, capricious, nor an abuse of his discretionary authority. *See generally Bruce v. Bath Iron Works Corp.*, 25 BRBS 157 (1991); *Fucci v. General Dynamics Corp.*, 23 BRBS 161 (1990)(Brown, J., concurring and dissenting). Inasmuch as claimant ceased maritime employment in 1980, the administrative law judge reasonably concluded that the 1983 audiogram, taken closest to the time claimant left covered employment, was the most reliable evidence regarding the extent of claimant's compensable hearing loss. *See generally Cox v. Brady-Hamilton Stevedore Co.*, 25 BRBS 203 (1991); *Bruce*, 25 BRBS at 159-160; *Dubar v. Bath Iron Works Corp.*, 25 BRBS 5 (1991); *Labbe v. Bath Iron Works Corp.*, 24 BRBS 159 (1991); *Brown v. Bath Iron Works Corp.*, 22 BRBS 384 (1989); *see also Bath Iron Works Corp. v. Director, OWCP*, U.S. , 113 S.Ct. 692, 26 BRBS 151 (CRT)(1993). As the 1983 audiogram indicated a zero percent hearing loss, the administrative law judge's finding that claimant sustained no compensable disability while working for employer is affirmed.

The administrative law judge's finding that claimant is not entitled to any medical benefits on the facts presented in this case is also affirmed. A claimant may be awarded medical benefits in the absence of a compensable disability if there is a sufficient evidentiary basis to support such an award. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993). In the present case, however, the administrative law judge rationally found that because no treatment or amplification was requested or required up through the time of the 1987 audiogram, any need for such treatment in the future will be due to factors other than claimant's noise exposure with employer. Because the administrative law judge's finding in this regard is

rational and supported by substantial evidence, his denial of medical benefits is affirmed. *See Bath Iron Works Corp. v. Director, OWCP*, 113 S.Ct. at 692, 26 BRBS at 151 (CRT).

Accordingly, the administrative law judge's finding that claimant's hearing loss is not work-related is reversed, but his Decision and Order denying disability and medical benefits is affirmed in all other respects.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge