BRB No. 93-0999

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| SONYA E. FUNK | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | DATE ISSUED: |
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| ARMY & AIR FORCE EXCHANGE | ) | |
| | ) | |
| and | ) | |
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| CIGNA/ESIS | ) | |
| | ) | |
| Employer/Carrier-Petitioners | ) | DECISION AND ORDER |

Appeal of the Decision and Order Awarding Benefits of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Kim M. Hoffman (Army & Air Force Exchange Service), Dallas, Texas, for employer/carrier.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (91-LHC-1440) of Administrative Law Judge Ainsworth H. Brown 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 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).

On January 30, 1990, claimant, while working as a sales associate at employer's Sacramento Army Depot, was exposed to a 45 minute fire alarm. The administrative law judge accepted the parties' stipulation that claimant was exposed to acoustic trauma during her employment. The administrative law judge found that employer failed to rebut the Section 20(a), 33 U.S.C. §920(a), presumption of causation and, relying upon the deposition of Captain Vickie Tuten, a certified audiologist approved by both parties, awarded claimant
permanent partial disability compensation for a 21.56 percent binaural hearing loss pursuant to Section 8(c)(13)(B) of the Act, 33 U.S.C. §908(c)(13)(B).

On appeal, employer challenges the administrative law judge's findings regarding causation

and the extent of claimant's hearing impairment. Claimant has not filed a response brief.

Employer initially challenges the administrative law judge's finding that claimant's hearing loss is related to her employment with employer. Employer specifically argues that claimant failed to establish her *prima facie* case; alternatively, employer asserts that it has met its burden of establishing the lack of a casual nexus between claimant's hearing loss and her employment with employer. We disagree.

Section 20(a) of the Act, 33 U.S.C. §920(a), provides claimant with a presumption that her injury is causally related to her employment. In order for Section 20(a) to be invoked, claimant must establish a *prima facie* case by proving that she suffered a harm and that working conditions existed or an accident occurred which could have caused the harm. *See Kelaita v. Triple A Machine Shop,* 13 BRBS 326 (1981). Claimant has the burden of proof to establish her *prima facie* case. *Obert v. John T. Clark and Son of Maryland*, 23 BRBS 157 (1990). Once the presumption is invoked, the burden shifts to employer to establish that claimant's condition was not caused or aggravated by her employment. *See Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989). It is employer's burden on rebuttal to present specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment; the unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. *See Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988). If employer establishes rebuttal of the presumption, the issue of causation must be resolved on the whole body of proof. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976).

In the instant case, the administrative law judge found that claimant sustained a harm, specifically a loss of hearing, and that working conditions existed, namely, the 45 minute activation of a fire alarm, which could have caused the harm. Accordingly, as claimant has established the two elements of her *prima facie* case, we affirm the administrative law judge's determination that the Section 20(a) presumption applies to link claimant's loss of hearing to her employment. *See Kelaita*, 13 BRBS at 326. The administrative law judge further found that employer submitted no evidence sufficient to rebut the Section 20(a) presumption. Captain Tuten, upon whom employer relies in support of its contention, does not state that claimant's hearing loss is unrelated to her employment; rather, Captain Tuten testified that "determination of this cause of the problem cannot be made conclusively." *See* EX 1. Captain Tuten also stated that the type of hearing loss presented by claimant did not seem to be the product of acoustic trauma, but she qualified this conclusion by saying that in 2 or 3 percent of cases, trauma can cause the type of decrement seen here. *See* CX 3 at 65. As this opinion is insufficient to rebut the presumption as it does not rule out a causal relationship, we affirm the administrative law judge's finding that claimant's hearing loss is causally related to her employment. *See Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988).

Employer next contends that the administrative law judge erred in determining the extent of claimant's hearing loss. Specifically, employer asserts that, as the audiological test results credited by the administrative law judge were not in accordance with the American Medical Association *Guides to the Evaluation of Permanent Impairment*, the administrative law judge's impairment

finding must be reversed; alternatively, employer argues that the administrative law judge's findings may be vacated, and the case remanded for further consideration.

In the instant case, claimant underwent audiological testing in May 1990 and June 1992. Although Captain Tuten stated that, generally, a person can expect some recovery following a noise trauma, the administrative law judge credited Captain Tuten's June 2, 1992, test results and evaluation, which revealed a 21.56 percent impairment, over the lower May 1990 rating, stating that Captain Tuten had not found any discrepancy upon her initial evaluation of her June 1992 test and that her reliance on what is considered typical was not a persuasive rational for accepting the lower rating. In adjudicating a claim, it is well-established that an administrative law judge is entitled to weigh the medical evidence and to draw his own inferences from it, *see Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988), and he is not bound to accept the opinion or theory of any particular witness. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Thus, as the administrative law judge's credibility determinations are rational and within his authority as factfinder, we affirm the administrative law judge's determination that claimant's hearing loss should be calculated from the June 1992 testing results.

As employer correctly asserts, however, Section 8(c)(13)(E) of the Act, 33 U.S.C. §908(c)(13)(E)(1988), mandates that hearing loss determinations be rendered in accordance with the AMA *Guides*. Accordingly, all hearing loss determinations must be either initially rendered or later converted under the *Guides* standards to be used in calculations rendered pursuant to the Act. *See Fucci v. General Dynamics Corp.*, 23 BRBS 161 (1990)(Brown, J., dissenting on other grounds). During her deposition testimony, Captain Tuten conceded that her hearing loss calculations were not rendered in accordance with the AMA *Guides*; accordingly, we vacate the administrative law judge's findings regarding the extent of claimant's hearing loss and we remand the case for the administrative law judge to re-calculate claimant's hearing loss based on the June 1992 testing results.

Accordingly, the administrative law judge's finding regarding the extent of claimant's hearing loss is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge