BRB No. 97-1397

DAVID HAYSLETT	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
	)	
v.	)	
	)	
NORFOLK SHIPBUILDING AND DRYDOCK CORPORATION	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Granting Permanent Partial Disability Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden and Matthew H. Kraft (Rutter & Montagna, L.L.P.), Norfolk, Virginia, for claimant.

Bradford C. Jacob (Taylor & Walker, P.C.), Norfolk, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Granting Permanent Partial Disability Benefits (96-LHC-1235) of Administrative Law Judge Richard K. Malamphy 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 conclusions of law of the administrative law judge which 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 for over 45 years as a machinist and sought benefits under the Act for a work-related hearing loss. In his Decision and Order, the administrative law judge, after crediting claimant's testimony that he has

been exposed to loud noise during the course of his employment with employer, found invocation of the Section 20(a), 33 U.S.C. §920(a), presumption established, and then determined that employer failed to rebut that presumption. Relying on the most recent audiogram of record, the administrative law judge thereafter awarded claimant permanent partial disability compensation for a 4.1 percent binaural hearing impairment 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 with respect to causation, as well as to the nature and extent of claimant's hearing impairment. Claimant responds, urging affirmance of the administrative law judge's decision; specifically, claimant argues that employer failed to raise the issues of the nature and extent of claimant's disability before the administrative law judge, and therefore, it cannot raise these issues for the first time on appeal.

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

In order to be entitled to the benefit of the Section 20(a) presumption, claimant must establish a *prima facie* case by showing that he suffered a harm and that either a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990); *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987). Once claimant establishes his *prima facie* case, he is entitled to invocation of the Section 20(a) presumption linking his harm to his employment. *See Stevens*, 23 BRBS at 191. Upon invocation of the presumption, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). 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 the 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 administrative law judge must weigh all of the evidence contained in the record and resolve the causation issue based on the record as a whole. *See Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

In the instant case, Dr. Shroyer opined that claimant suffers from hearing loss secondary to noise exposure as well as the aging process. *See* Cl. Ex. 2. Moreover, the record contains audiograms which show the percentage of claimant's hearing loss. *See* Cl. Ex. 4; Emp. Ex. 3. Thus, claimant has established the existence of a harm, specifically a documented hearing loss. The administrative law judge credited claimant's testimony, which was uncontradicted, that he has been exposed to loud noise while working in employer's machine shop. *See* Tr. at 16-17, 24. 38. This testimony is sufficient to establish that the noise to which claimant was exposed was sufficient to constitute injurious exposure. *See generally Meadry v. International Paper Co.*, 30 BRBS 160 (1996). Accordingly, as claimant has established the two elements of his *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 his employment. *See Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981).

Next, the administrative law judge found that employer submitted no evidence sufficient to rebut the Section 20(a) presumption; in rendering this finding, the administrative law judge rejected employer's theories that claimant's hearing loss may be the result of his exposure to noise during his years of military service or while hunting. We reject employer's contention that the administrative law judge's finding in this regard is in error, as the Section 20(a) presumption is not rebutted by mere hypothetical possibilities, or by suggesting an alternate way that claimant's injury might have occurred. *See Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989). In the instant case, employer has presented no medical evidence that claimant's hearing loss is unrelated to his employment; we therefore affirm the administrative law judge's finding that claimant's hearing loss is causally related to his employment. *See Manship v. Norfolk & Western Railway Co.*, 30 BRBS 175 (1996); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994); *see generally ITO Corp. v. Director, OWCP*, 883 F.2d 422, 22 BRBS 126 (CRT)(5th Cir. 1989).

Employer next challenges the administrative law judge's findings regarding the nature and extent of claimant's hearing loss. Specifically, employer asserts that claimant's condition is not permanent since claimant has not reached maximum medical improvement; moreover, employer argues that since the audiological test results credited by the administrative law judge were not based on Occupational Safety and Health Administration (OSHA) age correction tables, the administrative law judge's impairment finding must be reversed. As claimant correctly asserts in his response brief, however, these issues were not raised before the administrative law judge and thus cannot be raised for the first time on appeal. *See Boyd v. Ceres Terminals*, 30 BRBS 218 (1997); *Maples v. Texports Stevedores Co.*, 23 BRBS 303

(1990), *aff'd sub nom. Texports Stevedores Co. v. Director, OWCP*, 931 F.2d 331, 28 BRBS 1 (CRT)(5th Cir. 1991). We note, however, that these contentions are without merit. In the instant case, the record contains audiograms which show the percentage of claimant's hearing impairment; as the date a physician assesses claimant with a disability rating will suffice to determine the date of permanency, we reject employer's argument to the contrary. *See Sketoe v. Dolphin Titan Int'l*, 28 BRBS 212 (1994)(Smith, J., dissenting on other grounds). Moreover, while all hearing loss determinations must be either initially rendered or later converted under the standards set forth in the American Medical Association *Guides to the Evaluation of Permanent Impairment*, *see Fucci v. General Dynamics Corp.*, 23 BRBS 161 (1990)(Brown, J., dissenting on other grounds), there is no requirement that a hearing loss determination be based on OSHA age correction tables. Accordingly, employer's contention in this regard is also rejected. Therefore, the administrative law judge's award to claimant of permanent partial disability compensation for a 4.1 percent binaural hearing impairment pursuant to Section 8(c)(13)(B) is affirmed.

Accordingly, the Decision and Order Granting Permanent Partial Disability Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge