BRB No. 97-1431

LUIS HERNANDEZ	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
	)	
v.	)	
	)	
UNIVERSAL MARITIME SERVICE CORPORATION	)	
	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Samuel A. Denberg (Baker, Garber, Duffy & Pedersen), Hoboken, New Jersey, for claimant.

Christopher J. Field (Gallagher & Field), Jersey City, New Jersey, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (95-LHC-2455) of Administrative Law Judge Paul H. Teitler 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 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, a top-loader operator who worked exclusively for employer from

December 15, 1991, until his retirement on October 11, 1994, sought benefits under the Act for a noise-induced hearing loss based on an audiogram administered on October 11, 1994, by Dr. Matthews, which revealed a 42 percent binaural impairment. Claimant underwent a subsequent hearing evaluation by Dr. Katz on July 31, 1995, which revealed a 30.3 percent binaural impairment.

In his Decision and Order, the administrative law judge initially determined that claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption and that employer could not establish rebuttal thereof. The administrative law judge therefore concluded that claimant's hearing impairment is work-related. The administrative law judge then averaged the results of the two audiograms of record, and determined that claimant is entitled to benefits pursuant to Section 8(c)(13), 33 U.S.C. §908(c)(13), based on his 36.15 percent hearing impairment. Lastly, the administrative law judge denied employer's request for Section 8(f), 33 U.S.C. §908(f), relief.

On appeal, employer challenges the administrative law judge's causation finding and subsequent calculation of the percent of hearing impairment sustained by claimant. Claimant responds, urging affirmance of the administrative law judge's decision.

Where claimant has established his *prima facie* case, *i.e.*, shown that he has sustained a harm and that an accident occurred or working conditions existed which could have caused the harm, claimant is entitled to the Section 20(a) presumption linking that harm to his employment. *See, e.g., Quinones v. H.B. Zachery, Inc*., 32 BRBS 6 (1998). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial countervailing evidence that claimant's condition was not caused or aggravated by his employment. *Bridier v. Alabama Dry Dock & Shipbuilding Co.*, 29 BRBS 84 (1995). 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. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *see generally Holmes v. Universal Maritime Service Corp.,* 29 BRBS 18 (1995) (Decision on Recon.).

Employer argues that the administrative law judge erred in determining that it has not established rebuttal of the Section 20(a) presumption. Employer first asserts that the administrative law judge erred by not assessing its rebuttal evidence in an independent manner. Specifically, employer argues that the administrative law judge prematurely weighed the entirety of the relevant evidence regarding causation without first determining whether employer's evidence is, in and of itself, sufficient to

establish rebuttal of the Section 20(a) presumption. Employer additionally avers that the administrative law judge held it to an excessively high burden by requiring that it produce overly specific evidence to rebut the Section 20(a) presumption.

In the instant case, employer submitted the noise surveys and testimony of its noise engineer, Thomas Bragg, the medical report and testimony of Dr. Alvin Katz, and the testimony of Carmine Pizzariello, employer's general manager, in an effort to rebut the Section 20(a) presumption. Contrary to employer's contentions, the administrative law judge independently analyzed employer's evidence under the appropriate rebuttal standard. *See* Decision and Order at 6-7. Consequently, the administrative law judge did not weigh the entirety of the medical evidence regarding causation, but rather determined that employer's specific evidence is insufficient to establish rebuttal of the Section 20(a) presumption.

In particular, the administrative law judge found that the noise survey which, according to Mr. Bragg, demonstrates that claimant was exposed to noise levels of less than 90 decibels per eight hour day, is insufficient to meet employer's burden because it is only indicative of the level of claimant's noise exposure during the six month period preceding the date of the study, November 9, 1992, and thus, does not address the extent of claimant's exposure during the entire period of his employment, from December 15, 1991 through October 11, 1994. Additionally, the administrative law judge found that Mr. Bragg's underlying data is flawed since he could not state with certainty that his test included the specific top-loader used by claimant, which the administrative law judge found is significant because of Mr. Bragg's further testimony that the noise emissions from two identical machines can vary and that the condition of a top-loader, and thus, the noise emissions, could change from day to day.

The administrative law judge next determined that the testimony of Dr. Katz is likewise insufficient to rebut the Section 20(a) presumption, since his opinion that claimant's audiogram was consistent with hearing loss caused by aging, and not due to noise exposure, EX 9 at 47-50, is predominantly based on the noise surveys, EX 9 at 60-62. This finding is rational. *See Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990)(presumption not rebutted by opinion that lacks a proper foundation). Lastly, the administrative law judge rationally determined that Mr. Pizzariello's statements that a top-loader operator can use the Citizen Band radio while the engine is running but that the engine must be shut off in order to speak to someone on the ground are not persuasive in showing that claimant was not exposed to deleterious noise while operating his top-loader. Accordingly, as the administrative law judge properly found that employer did not rebut the Section 20(a) presumption, we affirm his finding that claimant's hearing impairment therefore is

work-related.

Employer also argues that the administrative law judge's "Solomon-like" averaging of the two audiograms of record to arrive at the percent of impairment to be awarded is in error. Employer maintains that the audiogram administered by Dr. Katz should determine the percentage of claimant's hearing impairment as it was a more complete test.

As the administrative law judge correctly noted, the record contains two audiograms. The first, administered by Dr. Matthews on October 11, 1994, reveals a 42 percent hearing impairment, while the second administered by Dr. Katz on July 31, 1995, reveals a 30.3 percent hearing impairment. The administrative law judge noted that both audiograms were administered by a Board-certified audiologist and analyzed by a physician. Noting that there are subjective elements to both audiograms that prevent either from being completely accurate, the administrative law judge found that they are entitled to equal weight, and thus, rationally determined claimant's binaural impairment of 36.15 percent by averaging the results of these audiograms. As employer has failed to establish that the administrative law judge's decision to average the results of the two audiograms of record is irrational based on his finding that they are equally credible, it is affirmed.[1] *See generally Norwood v. Ingalls Shipbuilding, Inc.*, 26 BRBS 66 (1992)(Stage, C.J., dissenting on other grounds).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[1]Employer argues that the audiogram administered by Dr. Matthews is less reliable than that administered by Dr. Katz, as Dr. Matthews did not perform a speech discrimination test. Nonetheless Dr. Matthews specifically stated that the audiogram administered at his office is reliable, Dep. at 12, and the administrative law judge was not required to credit Dr. Katz's opinion to the contrary. EX 9 at 39-41.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge