BRB No. 98-1412

VICTOR E. RODI	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
AVONDALE INDUSTRIES, INCORPORATED	)	DATE ISSUED: July 2, 1999
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits, the Order Granting Claimant's Motion for Reconsideration, and the Supplemental Decision and Order Awarding Attorney Fees of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Richard S. Vale and Elizabeth D. Bogan (Blue Williams, L.L.P.), Metairie, Louisiana, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits, the Order Granting Claimant's Motion for Reconsideration, and the Supplemental Decision and Order Awarding Attorney Fees of Administrative Law Judge Richard D. Mills (97-LHC-628) 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). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, who was allegedly exposed to noise while working for employer between

1960 and October 21, 1982, filed a claim for his work-related hearing loss in 1995 after undergoing an audiological evaluation. Prior to the formal hearing, claimant passed away due to causes unrelated to this claim. In his Decision and Order, the administrative law judge, after crediting the statements made by claimant to his audiologists prior to his death regarding his exposure to noise during the course of his employment with employer, found that claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption with regard to causation, and that employer failed to rebut this presumption. Next, the administrative law judge determined that claimant's average weekly wage for compensation purposes was $590.32. Accordingly, after accepting the opinion of Dr. Seidemann regarding the extent of claimant's hearing impairment, the administrative law judge awarded claimant compensation for a 26.6 percent binaural hearing loss pursuant to Section 8(c)(13)(B) of the Act, 33 U.S.C. §908(c)(13)(B). Subsequently, in an Order Granting Claimant's Motion for Reconsideration, the administrative law judge averaged the two audiometric ratings of record and thus amended his decision to reflect claimant's entitlement to benefits for a 28.6 percent binaural hearing loss.

Claimant's counsel filed a petition requesting an attorney's fee of $4,539.20, representing 26.625 hours of attorney services at $150 per hour, and $545.45 in expenses. In his Supplemental Decision and Order, the administrative law judge, after specifically finding that employer had not objected to the requested fee, determined that the requested fee appeared to be reasonable and thus awarded claimant's counsel the amounts sought.

On appeal, employer argues that the administrative law judge erred in finding that it failed to rebut the Section 20(a) presumption. Employer also challenges the administrative law judge's finding regarding the extent of claimant's hearing loss, and the administrative law judge's calculation of claimant's average weekly wage. Lastly, employer avers that the administrative law judge erred in determining that the fee requested by claimant's counsel was reasonable. Claimant has not filed a response brief.

Causation

In the instant case, the administrative law judge properly invoked the Section 20(a) presumption as he found that claimant suffered a harm and that working conditions existed which could have contributed to that harm. *See generally Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). Upon invocation of the presumption, the burden shifts to employer to present specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment, and therefore, to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995); *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990). The opinion 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); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). If the administrative law judge finds that the Section 20(a) presumption is rebutted, 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)*; Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT) (1994).

We affirm the administrative law judge's finding that employer failed to rebut the Section 20(a) presumption. The administrative law judge's finding is supported by the record, as he rationally found the opinion of Dr. Seidemann, upon whom employer relies in support of its contention of error, insufficient to rebut the presumption since that physician focused his testimony on whether claimant's work-related noise exposure could have caused all of claimant's hearing loss rather than if that exposure was sufficient to cause any loss of hearing. Although Dr. Seidemann testified that it was his opinion that claimant's hearing loss was not caused by his work, *see* RX 4 at 8, his opinion was based on his belief that the noise levels to which claimant would have been exposed as an electrician were not severe enough to cause claimant's loss. However, he also conceded that "in situations of prolonged short claims, the claim could be related to incidental noises in the work place coming from other crafts. I just don't know if there is enough incidental exposure from other crafts to have resulted in this severity of hearing loss." *Id.* at 9. As Dr. Seidemann's testimony does not address the possibility that claimant's employment aggravated, accelerated, or contributed to claimant's disabling condition, it is insufficient to rebut the Section 20(a) presumption. *See Bath Iron Works Corp. v. Director, OWCP [Shorette},* 109 F3d 53, 31 BRBS 19 (CRT)(1st Cir. 1997); *Sam v. Loffland Bros. Co.*, 19 BRBS 228 (1987). Thus, as the opinion of Dr. Seidemann does not establish that claimant's working conditions played no role in the onset of claimant's hearing loss, the administrative law judge's finding that employer did not establish rebuttal of the Section 20(a) presumption and his consequent conclusion that claimant's hearing impairment is work- related are affirmed as rational, supported by substantial evidence, and in accordance with law. *See Brown v. Jacksonville Shipyards, Inc.,* 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990); *Clophus v. Amoco Production Co.,* 21 BRBS 261 (1988).

Extent of Disability

Alternatively, employer asserts that the administrative law judge erred in determining the extent of claimant's hearing loss; specifically, employer contends that the administrative law judge's initial finding that Dr. Seidemann's lower audiometric rating of 26.6 percent represented claimant's hearing loss was correct and should be reinstated. Although the administrative law judge, in his decision, accepted Dr. Seidemann's testimony regarding the

extent of claimant's hearing loss as well-reasoned, he subsequently determined on reconsideration that the percentage difference between the two audiometric evaluations of record was so small as to allow those results to be averaged in order to arrive at claimant's hearing loss.[1] Contrary to employer's assertion, an administrative law judge is not required to credit the lowest audiometric rating of record. *See Norwood v. Ingalls Shipbuilding, Inc.*, 26 BRBS 66 (1992). Rather, determinations as to the weight to be assigned evidence fall within the purview of the trier-of-fact. *See Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969). As the administrative law judge rationally decided to determine the extent of claimant's hearing impairment by averaging the two audiometric evaluations of record, both of which were performed approximately thirteen years after claimant left covered employment, the administrative law judge's award of benefits for a 28.6 percent binaural hearing impairment is affirmed.

Average Weekly Wage

Employer next challenges the administrative law judge's calculation of claimant's average weekly wage for compensation purposes; specifically, employer alleges that the administrative law judge erred in using claimant's total earnings in the fifty-three weeks of his pre-injury employment, including vacation payments made to claimant, in his average weekly wage calculation. For the reasons that follow, we reject employer's contentions of error, and we affirm the administrative law judge's decision on this issue.

[1]Dr. Bode, based upon an audiological evaluation performed on May 23, 1995, opined that claimant exhibited a 30.6 percent binaural hearing impairment. *See* CX-4. In contrast, Dr. Seidemann, based upon a June 26, 1995, audiological exam, fixed claimant's binaural hearing impairment at 26.6 percent. *See* EX-4.

Initially, we note that employer does not challenge the administrative law judge's use of Section 10(c) of the Act, 33 U.S.C. §910(c), in adjudicating the issue of claimant's applicable average weekly wage. Section 10(c) of the Act is a catch-all provision to be used by the fact-finder when neither Section 10(a) nor Section 10(b) of the Act, 33 U.S.C. §910(a), (b), can be reasonably and fairly applied. *See Newby v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 155 (1988). The object of Section 10(c) is to arrive at a sum which reasonably represents the claimant's annual earning capacity at the time of his injury. *See Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982). It is well-established that the administrative law judge has broad discretion in determining annual earning capacity under Section 10(c). *See generally Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991). Thus, contrary to employer's contention, an administrative law judge, in rendering an average weekly wage calculation under Section 10(c), is allowed to consider more than just the year immediately preceding the injury. *See New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028, 31 BRBS 51 (CRT)(5th Cir. 1997). Moreover, vacation pay earned during the year prior to claimant's injury is properly included in the calculation of claimant's average weekly wage. *See Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49 (CRT)(9th Cir. 1996). In the instant case, the administrative law judge divided claimant's total wages, including vacation pay rendered to claimant, for the fifty-three weeks prior to October 21, 1982, by 53.[2] We hold that the result reached by the administrative law judge under Section 10(c) is supported by substantial evidence, since the amount determined by the administrative law judge represents a reasonable estimate of claimant's annual earning capacity at the time of his injury; accordingly, the administrative law judge's finding that claimant's average weekly wage was $590.32 is affirmed. *See Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1988); *Hicks v. Pacific Marine & Supply Co., Ltd.*, 14 BRBS 549 (1981).

Attorney's Fee

Lastly, employer challenges the fee awarded to claimant's counsel by the administrative law judge. Specifically, employer contends that the administrative law judge erred in concluding that the number of hours of services rendered, the hourly rate, and the costs submitted by claimant's counsel were reasonable. Although employer asserts that a fee was awarded by the administrative law judge over its "objection," *see* Employer's brief at 2, our review of the record reveals, and the administrative law judge specifically found in his Supplemental Decision and Order, that employer filed no objections to claimant's counsel's fee petition with the administrative law judge. Therefore, we decline to address employer's

[2]Employer does not challenge the administrative law judge's finding that claimant earned $31,286.91 during this period of time.

contentions regarding the hourly rate, the number of hours, or the costs awarded by the administrative law judge, as they are raised for the first time on appeal. *See Boyd v. Ceres Terminals*, 30 BRBS 218 (1997); *Shaw v. Todd Pacific Shipyards Corp.*, 23 BRBS 96, 100 (1989).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits, Order Granting Claimant's Motion for Reconsideration, and Supplemental Decision and Order Awarding Attorney Fees are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge