BRB Nos. 10-0562
and 10-0562A

NORRIS PLAISANCE, SR.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
CERES GULF, INCORPORATED	)	DATE ISSUED: 06/24/2011
	)	
Self-Insured Employer-	)	
Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order on Remand of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Arthur J. Brewster and Edward S. Rapier, Jr., Metairie, Louisiana, for claimant.

Lawrence P. Postol (Seyfarth Shaw LLP), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order on Remand (2007-LHC-01706) of Administrative Law Judge Patrick M. Rosenow 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 administrative law judge's findings of fact and conclusions of law 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).

This hearing loss case is before the Board for the second time. To reiterate, claimant worked as a longshoreman for various employers beginning in the 1950s and for employer from 1982 until his voluntary retirement in 1988. Subsequent to his retirement,

claimant underwent an audiometric evaluation on August 26, 2005, which reflected a binaural mixed hearing loss consisting of a sensorineural component and a conductive component. In March 2006, claimant filed a claim for benefits under the Act. Employer controverted the claim.

At the formal hearing on March 4, 2008, claimant sought entitlement to benefits for a 90 percent binaural hearing impairment, as well as digital hearing aids, claiming he was exposed to injurious noise while working for employer. Emp. Exs. 4, 28; Tr. at 21-28. The administrative law judge found that claimant presented sufficient evidence to invoke the Section 20(a) presumption, 33 U.SC. §920(a), that his hearing loss is work-related, and that employer presented substantial evidence to establish rebuttal of the Section 20(a) presumption. On weighing the evidence as a whole, the administrative law judge found that claimant did not establish that his hearing loss is work-related, and he denied benefits. Claimant appealed, and the Board vacated the denial of benefits. The Board stated that the opinion of Dr. Irwin is legally insufficient to rebut the Section 20(a) presumption and that the opinion of Dr. Seidemann could not rebut the presumption for the reasons given by the administrative law judge.[1] Accordingly, the Board remanded the case for the administrative law judge to reconsider the totality of Dr. Seidemann's opinion concerning the relationship between claimant's non-work-related otosclerosis, bone growth in the middle ear, exposure to workplace noise, and his present hearing loss to determine whether employer established rebuttal of the Section 20(a) presumption. *N.P. [Plaisance] v. Ceres Gulf, Inc.*, BRB No. 09-0306 (Sept. 25, 2009), *recon. denied* (Nov. 24, 2009); Emp. Ex. 7 at 3; Emp. Ex. 31 at 16-19.

[1]Dr. Irwin, who was retained by the Department of Labor as an independent examiner, opined that claimant's conductive hearing loss is not work-related and he determined that claimant had an 8.4 percent sensorineural hearing impairment. Emp. Ex. 10. The Board held that his opinion is insufficient to rebut the Section 20(a) presumption because he specifically opined that noise exposure may have played a part in claimant's hearing loss. *N.P. [Plaisance] v. Ceres Gulf, Inc.*, BRB No. 09-0306 (Sept. 25, 2009), *recon. denied* (Nov. 24, 2009). Dr. Seidemann, an audiologist, opined that claimant exhibited a mild sensorineural hearing loss superimposed upon by a moderate to severe bilateral conductive hearing loss which was not caused by noise exposure. Emp. Ex. 7 at 3; Emp. Ex. 31 at 16-19. Dr. Seidemann also excluded claimant's conductive hearing loss as non-work-related and opined that claimant has a binaural impairment of 7.8 percent. Because evidence of noise studies at locations other than the site of the injury and a comparison of claimant's hearing with that of a "normal" man are insufficient to establish that this claimant did not sustain a hearing loss at work, the Board held that those portions of Dr. Seidemann's opinion are insufficient to rebut the Section 20(a) presumption. *Plaisance*, slip op. at 3-5.

On remand, the administrative law judge found that the record does not contain substantial evidence to rebut the Section 20(a) presumption. Decision and Order on Remand at 4. The administrative law judge excluded the conductive component of claimant's hearing loss as not compensable, finding that the record does not establish that this portion of claimant's hearing loss pre-existed the work-related component. Therefore, the administrative law judge found that claimant suffers an 8.4 percent binaural permanent impairment as a result of his work for employer, and he awarded benefits pursuant to Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13). The administrative law judge also awarded the requested digital hearing aids. Decision and Order on Remand at 4-5.

Claimant appeals the administrative law judge's decision on remand, contending the administrative law judge erred in failing to award benefits for the totality of his hearing loss. Claimant contends his conductive hearing loss was aggravated by his employment with employer. BRB No. 10-0562. In its cross-appeal, employer contends it presented substantial evidence to rebut the Section 20(a) presumption and that the Board erred in vacating the administrative law judge's original decision. Accordingly, employer asks that the Decision and Order on Remand be vacated and the original decision denying benefits be reinstated, as it was supported by substantial evidence. BRB No. 10-0562A.

Where the claimant establishes a *prima facie* case and Section 20(a) applies to relate the disabling injury to the employment, as here, the employer can rebut this presumption by producing substantial evidence that the injury is not related to the employment. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *New Orleans Stevedores v. Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *cert. denied*, 540 U.S. 1141 (2004); *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). When aggravation of a pre-existing condition is claimed, the employer must produce substantial evidence that work events neither directly caused the injury nor aggravated the pre-existing condition to result in injury. *Prewitt*, 194 F.3d 684, 33 BRBS 187(CRT); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). If a work-related injury contributes to, combines with, or aggravates a pre-existing condition, the entire resultant condition is compensable. *Prewitt*, 194 F.3d 684, 33 BRBS 187(CRT); *see also American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000); *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991).

Initially, we address employer's contention on cross-appeal that the administrative law judge erred in finding it did not present substantial evidence to rebut the Section 20(a) presumption. Contrary to employer's assertions, the Board properly vacated the

administrative law judge's original decision as his findings regarding rebuttal were not supported by substantial evidence or in accordance with law. *See, e.g., Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004). Dr. Irwin's opinion is insufficient to rebut the Section 20(a) presumption because he acknowledged that claimant's hearing loss may be related to noise exposure. *Prewitt*, 194 F.3d 684, 33 BRBS 187(CRT). The aspects of Dr. Seidemann's opinion on which the administrative law judge relied also are insufficient to establish rebuttal, as the noise studies were not conducted at employer's facility and as the degree of claimant's hearing loss in relation to the "average" man of his age failed to address this claimant's medical situation. *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir.1998); *Everson v. Stevedoring Services of America*, 33 BRBS 149 (1999); *Damiano v. Global Terminal & Container Serv.*, 32 BRBS 261 (1998). As the Board fully addressed this issue in its previous decision, the Board's holding constitutes the law of the case. *See, e.g., Schaubert v. Omega*, 32 BRBS 233 (1998); *Doe v. Jarka Cor. of New* England, 21 BRBS 142 (1988). Therefore, we reject employer's contentions in this regard.

Employer also contends the administrative law judge erred in finding that Dr. Seidemann's overall opinion does not rebut the Section 20(a) presumption. On remand, the administrative law judge was to consider the totality of Dr. Seidemann's opinion to determine whether it rebutted the Section 20(a) presumption. The Board referred to Dr. Seidemann's written report and deposition regarding the potential relationship between claimant's non-work-related otosclerosis and his present hearing loss. Specifically, Dr. Seidemann stated that otosclerosis in the middle ear served as a built-in earplug and blocked sound from reaching the inner ear and that it actually could have served as a hearing protector for claimant, reducing the impact of noise exposure. Emp. Ex. 7 at 3; Emp. Ex. 31 at 18. The administrative law judge stated that he had "fully considered and summarized" these exhibits in his original decision. Decision and Order on Remand at 4. He also stated that he did not find this to "be a particularly persuasive factor." *Id.* Moreover, the administrative law judge stated that, were he to re-evaluate the rebuttal evidence consistent with the Board's directions, he would find that the record does not contain substantial evidence to rebut the presumption. There is no reversible error in the administrative law judge's conclusion. As the Board eliminated two bases for Dr. Seidemann's opinion and the administrative law judge found the third unpersuasive, all bases for Dr. Seidemann's opinion have been found insufficient to support his conclusion that claimant's hearing loss is not at least in part work-related. Therefore, his opinion overall is insufficient to rebut the Section 20(a) presumption. *See Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988); *see also Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008). As the record contains no other evidence sufficient to rebut the Section 20(a) presumption, we affirm the administrative law judge's finding that claimant's hearing loss is work-related. *Everson*, 33 BRBS 149; *Damiano*, 32 BRBS 261; *see also Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS

206(CRT) (9th Cir. 1998). Because claimant has a "mixed" hearing loss, we next address the degree of employer's liability.

Claimant contends he is entitled to the full extent of his hearing loss which includes both the conductive and sensorineural components. He alleges it was error for the administrative law judge to require him to prove that his conductive hearing loss pre-existed his work-related noise-induced hearing loss rather than requiring employer to produce substantial evidence that it did not. Thus, claimant argues that, as employer did not produce substantial evidence that the conductive loss occurred subsequent to the work injury, the administrative law judge erred in excluding his conductive impairment and limiting his award to one for only an 8.4 percent binaural sensorineural hearing loss.

In view of the Section 20(a) presumption that claimant's entire hearing impairment is work-related, it is employer's burden to produce substantial evidence that some portion of the disability is due to an intervening cause post-dating the work injury. *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 15 BRBS 120(CRT) (5th Cir. 1983); *Mississippi Coast Marine v. Bosarge*, 637 F.2d 994, 12 BRBS 969 (5th Cir. 1981); *Voris v. Texas Employers Ins. Ass'n*, 190 F.2d 929 (5th Cir. 1951); *Davison v. Bender Shipbuilding & Repair Co., Inc.*, 30 BRBS 45 (1996); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994); *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). In a hearing loss case, the aggravation rule requires only that a claimant's disabilities combine in an additive way. *Port of Portland*, 932 F.2d 836, 24 BRBS 137(CRT). Thus, where a claimant has an existing hearing loss and his work injury combines with that loss to create a greater loss, the employer is liable for the entire hearing loss. *Epps v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 1 (1986) (Brown, J., concurring). If, however, the claimant is a retiree and his hearing loss is due, at least in part, to a subsequent event, and the record contains credible evidence of the extent of the claimant's hearing loss at the time he left covered employment, making his subsequent loss severable, then the employer is not liable for the increased hearing loss. *See Dubar v. Bath Iron Works Corp.*, 25 BRBS 5 (1991); *Labbe v. Bath Iron Works Corp*., 24 BRBS 159 (1990).

The administrative law judge made alternate findings in his initial decision regarding the extent of claimant's hearing loss. He stated that, had he awarded benefits, he would have denied benefits for the conductive loss "as the record does not establish it was clearly pre-existing [and] found Claimant suffers an 8.4 percent binaural permanent impairment. . . ." Decision and Order at 24. On remand, having found no rebuttal, the administrative law judge applied these findings, stating "[m]y finding that the record does not establish that the conductive loss was preexisting remains unchanged as does my determination that the conductive loss is not compensable." Decision and Order on Remand at 4 (footnotes omitted). We agree with claimant that the administrative law

judge improperly required claimant to establish that his conductive loss pre-existed his work injury.

In this case, the evidence establishes agreement among the audiological experts that claimant has a mixed hearing loss and that the conductive loss was not caused by noise exposure. However, employer is liable for the full extent of claimant's hearing loss unless it produces substantial evidence that claimant's otosclerosis occurred subsequent to his retirement from its employ and is an intervening factor. *Shell Offshore v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998). Employer has not done so. Claimant's first audiogram of record occurred well after his retirement. Dr. Seidemann, on whom employer relies, stated that the otosclerosis may have acted as an ear protector for claimant by reducing the amount of noise that reached his inner ear. This statement suggests that the condition may have existed while claimant was working. In any event, it does not establish that the condition occurred after retirement and, therefore, is insufficient to establish that claimant's otosclerosis is an intervening injury. As there is no other evidence of record establishing or purporting to establish that claimant's conductive hearing loss occurred subsequent to his employment, we cannot affirm the administrative law judge's award of benefits based solely on claimant's sensorineural impairment. We hold that employer is liable for claimant's entire hearing loss pursuant to the aggravation rule. *Port of Portland*, 932 F.2d 836, 24 BRBS 137(CRT); *see also Bechtel Associates v. Sweeney*, 834 F.2d 1029, 20 BRBS 49(CRT) (D.C. Cir. 1987); *LaPlante v. General Dynamic Corp./Electric Boat Div.*, 15 BRBS 83 (1982) (Kalaris, J., concurring and dissenting).

We need not remand the case for further consideration, however, because the administrative law judge stated that if the conductive loss is found to be compensable, he would award benefits based on an 80.8 percent impairment, which averages the results of the three ratings of record. Decision and Order on Remand at 4, n.8; *see* Cl. Ex. 2 (Mr. Bode: 90%); Cl. Ex. 24 (Dr. Irwin: 76.9%); Decision and Order at 17 (Dr. Seidemann: 75.6%). This comports with the aggravation rule and is a reasonable method of calculating claimant's hearing loss in this case. *Green v. Ceres Marine Terminal, Inc.* 43 BRBS 173 (2010); *see generally Sweeney*, 834 F.2d 1029, 20 BRBS 49(CRT). Therefore, we modify the award to reflect employer's liability to claimant for benefits for an 80.8 percent binaural hearing impairment. 33 U.S.C. §908(c)(13).

Employer timely filed a motion for reconsideration of the Board's Order, BRB No. 09-0306 (Oct. 5, 2010), awarding claimant's counsel an attorney's fee in the amount of $4,981.51 for work performed before the Board in the first appeal in this case. 20 C.F.R. §802.407. The fee award represents $4,617.17 for 19.65 hours of legal services at an hourly rate of $235, plus $363.76 in expenses. The Board awarded the fee in the absence of any objections from employer. Claimant's counsel acknowledges that he inadvertently

sent employer two copies of his fee petition for work performed before the administrative law judge instead of sending employer one copy of his fee petition to the Board and one copy of his fee petition to the administrative law judge, 20 C.F.R. §802.203(g). Therefore, he does not oppose the Board's reconsidering his fee petition after employer has the opportunity to file objections. Thus, we grant employer's motion for reconsideration and vacate the Board's October 5, 2010, fee award. 20 C.F.R. §802.409.

We reject employer's contention that it is not liable for an attorney's fee in this case. Claimant successfully established the work-relatedness of his hearing loss and his entitlement to benefits for his entire hearing loss pursuant to the aggravation rule. Claimant is entitled to a fee for successfully prosecuting his appeal. 20 C.F.R. §802.203(a)(c). Thus, contrary to employer's contention, claimant obtained greater benefits than employer paid or tendered as a result of his appeal.

After reviewing employer's specific objections to counsel's fee request, we disallow the four hours requested for travel on August 11, 2009, as there was no "trial" to attend before the Board. The remainder of the work was reasonably commensurate with the necessary services. 33 U.S.C. §928; 20 C.F.R. §802.203(e). However, we disallow the $393.76 requested for Westlaw expenses. As employer contends, counsel has not demonstrated that this cost was incurred while the appeal was pending, as no date for the cost is indicated on the fee petition. *See Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), *aff'd on recon.*, 26 BRBS 32 (1992), *aff'd mem. sub nom. Argonaut Ins. Co. v. Mikell*, 14 F.3d 58 (11th Cir. 1994). Therefore, we award a fee of $3,677.75 for 15.65 hours of legal work at the requested rate of $235 per hour.

Accordingly, with regard to BRB Nos. 10-0562/A, the administrative law judge's award of benefits is modified to reflect employer's liability for an 80.8 percent binaural hearing loss pursuant to Section 8(c)(13). In all other respects, the administrative law judge's Decision and Order on Remand is affirmed.[2] With regard to the motion for

[2]Employer appealed the district director's award of an attorney's fee in the amount of $1,718.13. Employer does not challenge the amount of the fee awarded; rather, it challenges only its liability for the fee. As we affirm the administrative law judge's finding that employer is liable to claimant for hearing loss benefits, we reject employer's assertion that it is not liable for an attorney's fee. Therefore, we affirm the district director's award of an employer-paid attorney's fee.

reconsideration in BRB No. 09-0306, the Board's fee award is modified to reflect employer's liability for an attorney's fee in the amount of $3,677.75, representing 15.65 hours of legal services at an hourly rate of $235. This fee is payable directly to counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge