BRB No. 98-1292

RONALD CUNNINGHAM	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GLOBAL TERMINAL AND CONTAINER SERVICE	)	DATE ISSUED: June 24, 1999
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Order on Reconsideration of James Guill, Associate Chief Administrative Law Judge, United States Department of Labor.

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

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 and Order on Reconsideration (95-LHC-0020) of Associate Chief Administrative Law Judge James Guill 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. *O'Keeffe v. Smith Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a warehouse/field checker, alleges that he has suffered an employment-related hearing loss. He filed a claim for benefits under the Act following the administration of an audiogram on March 2, 1993, which showed a 6.5 percent binaural hearing loss. CX 1. In his decision, the administrative law judge found that claimant had invoked the presumption contained in Section 20(a) of the Act, 33 U.S.C. §920(a), based on an undisputed hearing loss and his allegations of noise in the workplace. The administrative law judge also determined that employer failed to rebut the presumption and, thus, he awarded claimant compensation for a 5.82 percent binaural hearing loss.[1]

On appeal, employer contends that the administrative law judge erred in finding it failed to rebut the Section 20(a) presumption and in his interpretation and application of *Ronne v. Jones Oregon Stevedoring Co.*, 22 BRBS 344 (1989), *aff'd in pert. part sub nom. Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137 (CRT) (9th Cir. 1991). Claimant has not responded to this appeal.

Where, as in the instant case, the Section 20(a) presumption is invoked, the burden shifts to employer to rebut it with substantial evidence that claimant's condition is not caused or aggravated by his employment. *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1985); *Sam v. Loffland Bros.*, 19 BRBS 88 (1987). 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). If the administrative law judge finds the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue on the record as a whole. *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990); *see Director, OWCP v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43 (CRT)(1994).

In the instant case, employer alleges that the testimony of Dr. Katz constitutes evidence sufficient to establish rebuttal of the Section 20(a) presumption. We need not address this specific contention, however, because the administrative law judge also weighed the medical opinions and other relevant evidence of record. Any error with regard to rebuttal is thus harmless, as his finding of a causal relationship between claimant's employment and his hearing loss is supported by substantial evidence on the record as a whole. *See Merrill v.*

[1]In his Order on Reconsideration, the administrative law judge modified his original order to reflect that claimant was entitled to benefits for 11.64 weeks instead of 12 weeks as initially awarded.

Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94 (1988).

Specifically, in reaching his conclusion, the administrative law judge fully considered the opinions of Drs. Katz, West and Matthews which accompanied the audiograms of record.[2] *See* CXS 1, 2; EX 3. The administrative law judge found that the opinion of Dr. West better explained claimant's hearing test results and accounted for differences in individual responses than did Dr. Katz's categorical dismissal of all results which did not conform to the classical pattern associated with a noise-induced hearing loss. Decision and Order at 10. Moreover, the administrative law judge gave greater weight to the opinions of Drs. West and Mathews that different individuals respond differently to the same exposure, than to Dr. Katz's view that everyone responds similarly.

The administrative law judge also found the opinions of Drs. West and Matthews more persuasive than that of Dr. Katz concerning the use of the Occupational Safety and Health Administration (OSHA) 90 dBA exposure standard in determining the existence of a noise-induced hearing loss. Decision and Order at 11. The administrative law judge found that Dr. Katz was emphatic in his view that exposure to 90 dBA or less over 8 hours cannot cause hearing loss. In contrast Dr. Matthews noted the existence of many studies of the effects of noise exposure, most of which arrived at different thresholds for hearing loss, and testified it is difficult to quantify an exact level of exposure which will cause loss in an individual, maintaining that 90 dBA or less is not necessarily a minimum exposure level for each individual. Matthews Dep. at 60-61. Dr. West testified that the OSHA standard is less of a medical standard and more of a political compromise. West Dep. at 49. He stated that the 90 dBA criterion is not based on medical research or definitive data establishing that exposure to levels over 90 dBA always causes hearing loss while exposure to lower levels does not. *Id.*

As the administrative law judge rationally credited Drs. West and Matthews, employer's argument that because its noise surveys indicate it met the OSHA standards, claimant's hearing loss could not be the result of such exposure must be rejected. The administrative law judge, moreover, fully addressed the noise surveys themselves, finding they demonstrated only a general description of noise levels to which a holdman could have been exposed and that there was no "hard" data on claimant's particular exposure. Decision and Order at 16. The administrative law judge also addressed the relationship between an OSHA standard and a worker's compensation inquiry, finding the latter focuses on whether a

[2]Dr. Katz is a board-certified medical doctor in otolaryngology. Drs. West and Matthews are osteopaths who are also board-certified in ear, nose and throat and otolaryngology, respectively.

particular individual has suffered an injury due to workplace exposure, and concluding that evidence of OSHA compliance is relevant evidence of working conditions but is not dispositive of whether claimant was exposed to injurious stimuli. *Id.* at 19-21. *See Damiano v. Global Terminal Container Service*, 32 BRBS 262 (1998). The administrative law judge's findings on this issue are rational, supported by substantial evidence and consistent with law.

Finally, employer argues that the administrative law judge erred in his application of the holding in *Ronne v. Jones Oregon Stevedoring Co.*, 22 BRBS 344 (1989), *aff'd in pert. part sub nom. Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137 (CRT)(9th Cir. 1991), to the facts of this case. In *Port of Portland*, the United States Court of Appeals for the Ninth Circuit held that although part of a claimant's hearing loss may be related to a cause other than workplace exposure, under the aggravation rule the claimant is entitled to full compensation without a reduction for the non-work related loss. Employer contends that the administrative law judge misinterpreted its argument that Dr. Katz's opinion that claimant's 4.7 percent binaural hearing loss, EX 3, was due entirely to non-noise induced presbycusis was a request for a deduction rather than an alternative and dispositive explanation for claimant's hearing loss. However, the administrative law judge fully considered Dr. Katz's opinion that none of claimant's hearing loss was related to industrial noise exposure and declined to credit his views on causation. His opinion simply does not support employer's assertion that he misconstrued its argument or *Port of Portland.*

In sum, the administrative law judge fully weighed the relevant evidence, providing a rational explanation for his determination. As his decision that claimant's hearing loss is related to his work is supported by substantial evidence and is in accordance with law, it is affirmed. *See O'Keeffe,* 380 U.S. at 359. As employer does not contest the percentage of hearing loss arrived at by the administrative law judge, we affirm his award of compensation for a 5.82 percent binaural hearing loss.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and his Order on Modification are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge