BRB No. 97-1182

DONALD FORMAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:_____
GLOBAL TERMINAL AND CONTAINER, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order (Upon Second Remand) of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Jorden N. Pedersen, Jr. (Baker, Garber, Duffy & Pedersen, P.C.), Hoboken, New Jersey, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order (Upon Second Remand) (91-LHC-1255) of Administrative Law Judge Robert D. Kaplan 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 is the third time this case has come before the Board. To reiterate, claimant, who worked various jobs for employer at its facility in New Jersey, testified he was exposed to loud noise. In 1990, he underwent two audiometric evaluations

which revealed binaural impairments of 41.3 percent and 4.6 percent, respectively. Cl. Ex. 1; Emp. Ex. 2. Claimant filed a claim for benefits.

In his initial decision, the administrative law judge denied benefits, finding that claimant failed to establish conditions at work which could have caused his hearing loss. The administrative law judge credited the opinions of employer's witnesses that noise levels at employer's facility where claimant worked did not exceed 90 decibels. Based upon this information in conjunction with the pattern of claimant's hearing loss, the administrative law judge found that claimant did not have a noise-induced hearing loss. Decision and Order at 5-6. On appeal, the Board reversed the administrative law judge's conclusion that claimant failed to establish a *prima facie* case necessary for invocation of the Section 20(a), 33 U.S.C. §920(a), presumption. The Board held that claimant's testimony was sufficient to invoke the Section 20(a) presumption, and that conformance with Occupational Safety and Health Administration (OSHA) standards alone is not sufficient to rebut the Section 20(a) presumption. The Board also held that Dr. Katz's opinion is insufficient rebuttal evidence because he relied in part on the OSHA standards and his deposition testimony conflicted with his earlier report regarding the type of loss shown by claimant's audiometric pattern.[1] As there was no other evidence of record sufficient to rebut the Section 20(a) presumption, the Board held that claimant's hearing loss is work-related as a matter of law. Therefore, the Board remanded the case to the administrative law judge for him to determine the extent of claimant's hearing loss and to resolve any remaining issues. *Forman v. Global Terminal & Container, Inc.*, BRB No. 92-1551 (Oct. 26, 1994) (unpublished) (*Forman I*).

On remand, the administrative law judge denied, in part, employer's motion for modification, rejecting its request to conduct a hearing and admit new evidence to disprove the Board's "findings of fact," stating that he has no authority to review the Board's decision. He granted, however, employer's motion to submit new evidence regarding claimant's average weekly wage. Order (Feb. 14, 1995). In his Decision and Order (on Remand), the administrative law judge declined to revisit the question of average weekly wage because employer, after requesting permission to do so, did not submit evidence to refute the previously stipulated average weekly wage of $1,341.38. Decision and Order (on Remand) at 3-4. The administrative law

[1]When deposed, Dr. Katz stated that claimant's hearing loss was consistent with loss caused by aging and was not due to noise exposure. Emp. Ex. 4 at 71-72. In an earlier report, however, he stated that the loss was typical of a noise exposure pattern but that part of the impairment is due to the normal aging process. Emp. Ex. 2.

judge then credited Dr. Katz's opinion and awarded claimant benefits for a 4.6 percent binaural impairment based on the stipulated average weekly wage. *Id.* at 5; *see* 33 U.S.C. §908(c)(13)(B) (1994).

Because the stipulated average weekly wage resulted in a compensation rate which exceeded the maximum compensation rate allowed by the Act in 1989, *see* 33 U.S.C. §906(b), the administrative law judge amended his decision on employer's motion for reconsideration. He awarded claimant benefits based on the maximum compensation rate of $660.62. Claimant then filed a motion for reconsideration, disputing not the $660.62 figure but challenging the implication that the date of injury was 1989. Claimant stated he did not stipulate that the date of injury was 1989 even though he agreed to use his 1989 earnings to calculate his average weekly wage. The administrative law judge denied claimant's motion, finding that the parties are in agreement as to average weekly wage and because this is a scheduled loss, compensable under Section 8(c)(13)(B), the date of injury is not otherwise relevant. Order (June 6, 1995). Employer appealed the award of benefits, and claimant responded, urging affirmance.

On appeal, the Board rejected employer's argument that the administrative law judge erred in awarding claimant benefits for his hearing loss. As the Board had previously addressed the issue of whether claimant's hearing loss is work-related, it held that its conclusion on this matter constitutes the law of the case. *Forman v. Global Terminal & Container, Inc.*, BRB No. 95-1725 (Sept. 12, 1996) (unpublished) (*Forman II*).[2] Further, based on new evidence submitted by employer, the Board reversed the denial of employer's motion for modification and remanded the case for appropriate proceedings. With regard to claimant's average weekly wage, the Board held that employer had been given, but did not take, the opportunity to refute the average weekly wage stipulation; therefore, it affirmed the award based on the maximum compensation rate. Finally, the Board rejected employer's challenges to the administrative law judge's fee award and affirmed the award in its entirety. *Id.*, slip op. at 3-5.

[2]Employer's appeal to the United States Court of Appeals was dismissed on January 27, 1997, as premature. The court stated that the Board's decision was issued timely pursuant to Public Law No. 104-134.

On second remand, the administrative law judge again characterized the Board's conclusions as "fact-finding" but proceeded as the Board's Order mandated.[3] He admitted employer's "new" evidence but stated that the Board's decision "took away from [him] any meaningful consideration" of Mr. Bragg's letter (a noise survey), leaving for consideration only a March 6, 1995 letter from Dr. Katz.[4] Decision and Order (Upon Second Remand) at 3; Rem. Emp. Ex. 4; Emp. Ex. 5. The administrative law judge then determined that Dr. Katz's 1995 letter does not rebut the Section 20(a) presumption because, rather than resolving the

[3]The administrative law judge continued to disagree with the Board's conclusion that the Section 20(a) presumption was invoked, and he did not agree that the evidence employer wished to submit was "new" as he felt that employer should have obtained such reports during the time the case was initially before him. Decision and Order (Upon Second Remand) at 3-4.

[4]The record contains six employer's exhibits: four exhibits were originally admitted into the record, Emp. Exs. 1-4 (Emp. Ex. 4 is the deposition of Dr. Katz), and two exhibits were originally rejected on motion for modification but later admitted by virtue of the Board's decision in *Forman II*, Emp. Exs. 4-5 (a 1995 letter from Dr. Katz and a 1995 letter from an engineer summarizing an earlier noise survey, respectively). Because the record now contains two exhibits admitted as "Emp. Ex. 4," this decision will refer to the 1995 letter from Dr. Katz as "Rem. Emp. Ex. 4."

inconsistencies in his opinions, it compounds them. Decision and Order (Upon Second Remand) at 3-5. Consequently, the administrative law judge denied employer's motion for modification. Employer appeals this decision, and claimant responds, urging affirmance.

Employer contends the Board exceeded its scope of authority and made findings of fact the first time this case was before it. Employer also contends that the administrative law judge erred in determining claimant's average weekly wage.[5] These arguments are identical to those presented to the Board previously. *Forman II*, slip op. at 3-4; *Forman I*, slip op. at 2-3. As the Board's conclusions on these matters are the law of the case, we will not address employer's contentions. *Doe v. Jarka Corp. of New England*, 21 BRBS 142 (1988).

Employer also contends that the administrative law judge, while properly granting modification proceedings and admitting new evidence into the record, erred in weighing the evidence and in following the directive that the letter concerning data from a noise survey, Emp. Ex. 5, is not sufficient to rebut the Section 20(a) presumption. In this case, the Board has held that claimant's testimony is sufficient to invoke the Section 20(a) presumption. *Forman I*, slip op. at 2-3; *see also Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206 (CRT) (9th Cir. 1998). Contrary to employer's argument, the Board held in its first decision and noted in its second decision in this case that the noise survey herein is insufficient to rebut the Section 20(a) presumption because it does not address the levels of noise to which claimant was exposed over his entire employment with employer and it does not address the issue of the cause of claimant's hearing loss. *Forman II*, slip op. at 4 n.2; *Forman I*, slip op. at 3. This data cannot sever the relationship between claimant's hearing loss and his work, and it is, therefore, insufficient to rebut the presumption afforded by Section 20(a). *See generally Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995); *Obert v. John T. Clark and Son of Maryland*, 23 BRBS 157 (1990).

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[5]Employer argues that the letter regarding the noise survey, in conjunction with the noise survey, establishes that claimant sustained no injurious exposure to noise; therefore, there is no date of last injurious exposure on which to base an average weekly wage and an award of benefits pursuant to *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151 (CRT) (1993).

Similarly, medical opinions which are equivocal as to the etiology of a claimant's injury are insufficient to rebut the presumption. *Bridier*, 29 BRBS at 90; *Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988). In his March 6, 1995 letter, Dr. Katz stated that claimant's hearing loss is "probably" due to something other than industrial noise, *e.g.*, it is "possibly" due to other noise exposure and age. His concluding paragraph assessed zero percent of claimant's hearing loss to injurious work-related noise, in agreement with his deposition conclusion; however, this conclusion is contradicted by other statements in the 1995 letter as well as by statements in a 1990 letter (pattern is "typical" of noise-induced loss). Emp. Exs. 2, 4; Rem. Emp. Ex. 4. Thus, the administrative law judge found that Dr. Katz's 1995 letter also does not rebut the Section 20(a) presumption. Because Dr. Katz's opinion is equivocal as to the cause of claimant's hearing loss, it cannot rebut the Section 20(a) presumption. Therefore, as a matter of law, claimant's hearing loss is work-related. *Bridier*, 29 BRBS at 90.

Accordingly, the administrative law judge's award of benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge