BRB No. 07-0305

D. A.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BAE SYSTEMS NORFOLK SHIP REPAIR	)	DATE ISSUED: 09/18/2007
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden and Charlene A. Morring (Montagna Klein Camden LLP), Norfolk, Virginia, for claimant.

Gerard E. Voyer and Audrey Marcello (Taylor & Walker, P.C.), Norfolk, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2005-LHC-01102) of Administrative Law Richard K. Malamphy 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 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 began working for employer in 1986 as an electrical calibration specialist. He testified that he has been exposed to loud noise during the course of his employment for employer. An audiogram administered by employer on August 21, 2002, revealed a 26.9 percent binaural hearing impairment. EX 17. Claimant filed a claim for compensation under the Act, which employer paid. 33 U.S.C. §908(c)(13). An audiogram administered by employer on November 3, 2004, revealed a 29.4 percent

binaural impairment. EX 19. Claimant filed a claim for compensation for the additional hearing loss, which employer controverted.

In his decision, the administrative law judge found claimant entitled to invocation of the presumption pursuant to Section 20(a) of the Act, 33 U.S.C. §920(a), and that employer established rebuttal of the presumption based on the opinions of Dr. Deutsch, a board-certified otolaryngologist, and Dr. Erdreich, who received his doctorate in physiological acoustics. The administrative law judge thereafter credited claimant's testimony regarding his noise exposure and Dr. Deutsch's opinion that some of claimant's hearing loss is work-related, and he concluded that claimant is entitled to benefits under the Act for a 29.4 percent binaural hearing impairment.[1]

On appeal, employer challenges the administrative law judge's award of benefits, contending that the administrative law judge erred by invoking the Section 20(a) presumption, and by concluding that claimant established he has additional work-related hearing loss. Claimant responds, urging affirmance of the award of benefits.

In order to be entitled to the Section 20(a) presumption linking his hearing loss to his employment, claimant must establish a *prima facie* case by showing that he suffers a harm and that working conditions existed which could have caused the harm. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). Employer contends that claimant's testimony is insufficient to establish that working conditions existed that could have caused his hearing loss, and that bone conduction readings taken during audiometric evaluations claimant underwent after August 21, 2002, establish that claimant did not sustain any additional work-related hearing loss.

We reject employer's contention of error. In order to establish his *prima facie* case, claimant is not required to introduce medical evidence establishing that his employment in fact caused additional hearing loss, but he must show the existence of working conditions that could have caused the loss. *See Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Claimant's theory as to how the injury arose must go beyond "mere fancy." *Champion v. S & M Traylor Bros.*, 690 F.2d 285, 295 (D.C. Cir. 1982); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). In this case, claimant testified that he was occasionally exposed to loud noise from compressors when he walked to and from his job site at the calibration lab, at the lab from cranes in the adjoining machine shop, and at the marine electrical shop. Tr. at 34-40, 47-49. M.P., a co-worker, also testified to loud noise from

[1] Employer was awarded a credit for its payments on the prior claim for benefits. 33 U.S.C. §914(j).

compressors operating nearby the calibration lab. Tr. at 20-26. This testimony is sufficient to establish that working conditions existed that could have caused hearing loss after August 21, 2002, *see Damiano v. Global Terminal & Container Serv.*, 32 BRBS 261 (1998); *see also Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998), and the administrative law judge rationally credited claimant's testimony about the noise levels to which he was exposed. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Moreover, the November 3, 2004, audiogram showing a 29.4 percent binaural impairment is sufficient evidence to establish a harm as claimant is not required to show that this additional 2.5 percent hearing impairment over the hearing loss revealed by the August 21, 2002, audiogram is caused by noise exposure for purposes of invoking the Section 20(a) presumption *See Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Thus, we affirm the administrative law judge's finding that claimant is entitled to invocation of the Section 20(a) presumption as it is rational, supported by substantial evidence and in accordance with law.[2] *See Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 33 BRBS 162(CRT) (1st Cir. 1999); *see also Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000).

The administrative law judge found that employer rebutted the Section 20(a) presumption, and that, based on the record as a whole, claimant's current hearing loss is work-related.[3] If employer rebuts the Section 20(a) presumption, then the administrative law judge must weigh all relevant evidence to determine if a causal relationship has been established between claimant's hearing loss and his employment, with claimant bearing the burden of persuasion. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT)*; see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996).

Employer contends that the administrative law judge erred by concluding, based on the evidence as a whole, that claimant's additional 2.5 percent hearing loss as recorded by the November 3, 2004, audiogram was caused by his employment after August 21, 2002. Employer asserts there is no medical evidence of record that claimant sustained

[2] Accordingly, any error in the administrative law judge's finding that claimant is entitled to invocation of the Section 20(a) presumption for the hearing loss recorded on November 3, 2004, based solely on the August 21, 2002, audiogram is harmless.

[3] We need not address claimant's contention, raised in his response brief, that the administrative law judge erred in finding the Section 20(a) presumption rebutted based on the opinion of Dr. Erdreich, as the administrative law judge also found that Dr. Deutsch's opinion rebuts the Section 20(a) presumption, and this finding is not challenged.

any additional noise-induced hearing loss from August 2002 to November 2004, and that claimant therefore failed to meet his burden of persuasion.

In this case, employer submitted the report and deposition testimony of Dr. Deutsch, as well as audiometric evaluations conducted at Dr. Deutsch's office on December 9, 2002, January 19, April 13, and May 24, 2005. Dr. Deutsch testified that claimant has had a mixed hearing loss due to noise exposure and to Eustachian tube dysfunction, for which claimant underwent surgery in 1987. EX 23 at 20, 24-25, 55; *see also* EX 18. Dr. Deutsch further stated that claimant's audiometric evaluations at his office recorded both air and bone conduction values. The air conduction values represent claimant's total hearing loss, while the bone conduction values represent hearing loss attributable solely to noise exposure. EX 23 at 20-23, 26-28; *see also* EX 20. Based on the bone conduction loss recorded by the audiometric evaluations conducted at his office in 2002 and 2005, Dr. Deutsch opined that claimant did not sustain any increase in his noise-induced hearing loss during this period. EX 23 at 31, 34-35. Employer also submitted acoustical assessment reports of employer's facility prepared by Dr. Erdreich. EXs 13-14. Dr. Erdreich testified that, based on his testing of the noise levels at employer's facility, claimant's testimony as to his work-related noise exposure and the audiometric evidence, there has not been an increase in claimant's noise-related hearing loss between December 2002 and November 2004. Tr. at 99, 110-112.

The administrative law judge found Dr. Erdreich's test results to be speculative in view of claimant's testimony concerning the noise producing machinery to which he was exposed. The administrative law judge also found that Dr. Deutsch stated that claimant has a work-related hearing loss, and he thus found claimant entitled to additional compensation. Decision and Order at 6.

We must reverse this finding in view of Dr. Deutsch's deposition testimony that the increase in claimant's hearing loss between 2002 and 2005 is not due to noise exposure. Dr. Deutsch explained that, looking at what caused claimant's hearing loss before 2002, claimant "certainly has had some noise induced hearing loss." EX 23 at 55. When asked, more specifically, however, regarding the increase in claimant's hearing loss between 2002 and 2004, Dr. Deutsch opined that the increase was within the "accepted degree of variability," *id.* at 5-6, and that based on the bone conduction results, any increase is not due to noise exposure.[4] *Id.* at 32-25. Claimant did not introduce any

[4] We reject claimant's contention that the bone conduction results may not be relied upon because the American Medical Association's *Guides to the Evaluation of Permanent Impairment* requires the use of air conduction results to evaluate the loss of hearing. *See* 33 U.S.C. §908(c)(13)(E) ("Determinations of loss of hearing shall be made in accordance with the guides for the evaluation of permanent impairment as promulgated and modified from time to time by the American Medical Association."). The Longshore

medical evidence that his increased hearing loss is due to noise exposure at his employment. Based on this record, therefore, we hold that claimant did not carry his burden of proof to show that noise exposure contributed to his increased hearing loss during this period. *See Moore*, 126 F.3d 256, 31 BRBS 119(CRT). Therefore, the administrative law judge's finding that claimant is entitled to additional benefits for hearing loss must be reversed as it is not supported by substantial evidence. *See Lynch v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 29 (2005); *Coffey v. Marine Terminals Corp.*, 34 BRBS 35 (2000); *see generally Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994). Accordingly, the administrative law judge's award of compensation for an additional 2.5 percent binaural hearing impairment is reversed.

Procedure Manual, cited by claimant, states that audiograms must reflect both bone and air conduction studies, and that the extent of the impairment should be made with reference to the air conduction results. As the issue in this case does not concern the extent of claimant's hearing impairment, but the cause thereof, reliance on Dr. Deutsch's opinion concerning the bone conduction results is not precluded by the *Guides* or the Procedure Manual. *See www.dol.gov/esa/owcp/ dlhwc/lspm/lspm3-401.htm.*

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

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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JUDITH S. BOGGS
Administrative Appeals Judge