BRB No. 09-0306

N.P.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CERES GULF, INCORPORATED	)	DATE ISSUED: 09/25/2009
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order 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 the Decision and Order (2007-LHC-1706) 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).

Claimant was employed as a longshoreman since the 1950's and for employer between 1982 and his retirement in 1988. Claimant alleged that he noticed a loss in his hearing in 1976, at which time he procured hearing aids from a local retail business. Subsequent to his retirement, claimant was diagnosed with both a conductive and sensorineural hearing loss. In March 2006, claimant filed a claim against employer, who was claimant's last maritime employer, for hearing loss benefits under the Act. In his

Decision and Order, the administrative law judge found that claimant established a *prima facie* case sufficient to invoke the presumption of causation under Section 20(a) of the Act, 33 U.S.C. §920(a), that employer established rebuttal of the presumption, and that claimant did not thereafter establish causation based on the record as a whole. Accordingly, the administrative law judge denied claimant's claim for benefits.

On appeal, claimant challenges that the administrative law judge's finding that employer rebutted the Section 20(a) presumption; alternatively, claimant contends that even if rebuttal was established, the administrative law judge erred in finding that the record as a whole establishes that his hearing loss was not related to his employment with employer. Employer responds, urging affirmance of the administrative law judge's decision.

In the instant case, the administrative law judge properly invoked the Section 20(a) presumption as he found that claimant suffered a harm, specifically a loss of hearing, and that claimant's testimony established that he was exposed to loud noise that could have caused his loss. *See Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001). Upon invocation of the presumption, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Conoco,* 194 F.3d 684, 33 BRBS 187(CRT); *Gooden*, 135 F.3d 1066, 32 BRBS 59(CRT); S*winton v. J. Frank Kelley, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied,* 429 U.S. 820 (1976); *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000). If the administrative law judge finds that the Section 20(a) presumption is rebutted, the administrative law judge must weigh all of the evidence and resolve the causation issue based on the record as a whole, with claimant bearing the burden of persuasion. *Id.; see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT) (1994); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990).

In the present case, the administrative law judge found the presumption rebutted by the opinions of Drs. Irwin and Seidemann. For the reasons that follow, we hold that the administrative law judge erred in finding the Section 20(a) presumption rebutted based on the reasons given, and we consequently vacate the administrative law judge's denial of benefits to claimant and remand the case for further consideration.

Initially, Dr. Irwin's opinion cannot rebut Section 20(a). Dr. Irwin, a Board-certified otolaryngologist who examined claimant at the request of the Department of Labor, diagnosed claimant with a mixed conductive and sensorineural hearing loss, and testified that a sensorineural hearing loss may be the result of aging, trauma, infection, heredity or noise exposure. Dr. Irwin further stated that while claimant's sensorineural hearing loss may be to some degree related to his previous noise exposure, such a relationship is not definite. EX 10 at 2; EX 32 at 14 – 15. In addressing rebuttal, the

administrative law judge stated that Dr. Irwin included aging as a cause of sensorineural hearing loss and opined that many people with otosclerosis also have a sensorineural loss. These statements cannot establish rebuttal in light of the aggravation rule; if noise exposure combined with other causes to result in claimant's loss, the entire disability is compensable. *See Strachan Shipping v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986); *Ronne v. Jones Oregon Stevedoring Co.*, 22 BRBS 344 (1989), *aff'd in pert. part and rev'd on other grounds sub nom. Port of Portland v. Director, OWCP*, 932 F.2d 826, 24 BRBS 137(CRT) (9th Cir. 1991). Moreover, inasmuch as Dr. Irwin specifically opined that workplace noise exposure may have played a part in claimant's hearing loss, his opinion cannot meet employer's burden of demonstrating that claimant's work environment did not aggravate or contribute to his hearing loss.[1] *See Conoco*, 194 F.3d 684, 33 BRBS 187(CRT); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995).

The administrative law judge primarily relied on Dr. Seidemann's testimony to find rebuttal, discussing his reliance on noise surveys performed at other locations in the longshore industry and his statement that claimant's hearing was actually better than expected for a typical man of his age who did not have a history of noise exposure.[2] Decision and Order at 22. We agree with claimant that the administrative law judge's finding of rebuttal upon these two bases cannot be affirmed. Initially, a comparison between the degree of hearing loss exhibited by claimant and that of his peers cannot support a finding that a causal relationship does not exist between this claimant's present condition and his employment with employer, since such a comparison does not address whether this claimant's present hearing loss was caused, aggravated, or contributed to by his employment with employer. *See Conoco*, 194 F.3d 684, 33 BRBS 187(CRT); *Gooden*, 135 F.3d 1066, 32 BRBS 59(CRT). Employer takes his employee as he finds him, with any pre-existing frailties which predispose him to harm. *Gooden*, 135 F.3d at

[1] While the administrative law judge relied on Dr. Irwin's inclusion of aging as a cause of hearing loss and his observation that many people with otosclerosis also have a degree of sensorineural loss in discussing rebuttal, *see* Decision and Order at 22, he thereafter found, when discussing the record as a whole, that Dr. Irwin's testimony reflected an opinion that claimant's work for employer "may or may not be a cause or contributing factor in his sensorineural hearing loss," *see id.* at 23 – 24, and he thus concluded that Dr. Irwin's testimony was not determinative on this issue. This conclusion is supported by substantial evidence and establishes that Dr. Irwin's testimony cannot rebut Section 20(a).

[2] Dr. Seidemann, who obtained his PhD in audiology, opined that claimant exhibited a mixed-use hearing loss, specifically a mild sensorineural hearing loss superimposed upon by a moderate to severe bilateral conductive hearing loss, which was not caused by noise exposure. EX 7 at 3; EX 31 at 16 – 19.

1069, 32 BRBS at 61(CRT); *Southern Stevedoring Co. v. Henderson*, 175 F.2d 863 (5th Cir. 1949).[3]

Additionally, Dr. Seidemann's testimony regarding the results of noise level surveys from facilities other than that of employer cannot establish that this claimant's hearing loss is not related to the noise exposure he experienced with employer. The Board has previously held that noise surveys indicating employer's conformance with OSHA noise level standards during two years in the facility in which an employee was exposed to noise was insufficient to rebut the Section 20(a) presumption since such evidence cannot demonstrate the absence of a work-related injury incurred over the course of the employee's employment. *Everson v. Stevedoring Services of America*, 33 BRBS 149 (1999). Similarly, noise surveys taken at other facilities cannot rebut the presumption that the noise exposure experienced by claimant here at employer's facility, which the administrative law judge credited in finding invocation, caused or aggravated claimant's documented hearing loss.[4] *See Damiano v. Global Terminal & Container*

[3] In *Henderson*, the Fifth Circuit stated that the Act compensates "accidental injury or death arising out of and in the course of employment; it does not say caused by the employment. There is no standard of normal man who alone is entitled to workmen's compensation." 175 F.2d at 866.

[4] The finding that Section 20(a) was invoked is not challenged, and claimant's testimony is sufficient to establish exposure to potentially injurious noise for this purpose. Claimant asserts, based on *New Orleans Stevedores v. Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *cert. denied*, 540 U.S. 1141 (2004), that as the presumption was invoked, employer was required to rebut it with evidence that this exposure did not cause or aggravate claimant's harm. The administrative law judge rejected claimant's reliance on *Ibos* on the basis that it was an occupational disease case involving asbestos exposure, whereas hearing loss "is not an occupational disease under the Act," Decision and Order at 22 n.45, *citing Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151(CRT) (1993). *Bath Iron Works*, however, did not hold that hearing loss is not an "occupational disease" but rather it is not one "that does not immediately result in death or disability," as required for application of certain sections of the Act, *e.g.*, 33 U.S.C. §§908(c)(23), 910(i). The seminal case in determining the responsible employer in an occupational disease case, *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955), is a hearing loss case. *Ibos* adopted the *Cardillo* holding regarding responsible employer, and its holding on that topic and its statements regarding Section 20(a) thus are applicable in hearing loss cases. In *Ibos*, the Fifth Circuit stated that, once an employee has made a *prima facie* case of entitlement to benefits under the Act, the burden shifts to employer to demonstrate either (1) that exposure to injurious stimuli did not cause the employee's occupational disease, or (2) that the employee was performing work covered under the Act for a subsequent employer when he was exposed to injurious stimuli. *Ibos*, 317 F.3d

Serv., 32 BRBS 261 (1998). Consequently, as the bases stated by the administrative law judge in relying on the opinion of Dr. Seidemann to rebut Section 20(a) cannot form a proper foundation for his opinion that claimant's current hearing loss is unrelated to his exposure to noise while working for employer, *see generally Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990), the administrative law judge's finding of rebuttal cannot be affirmed. However, in addressing whether Dr. Seidemann's opinion was sufficient to establish rebuttal of the presumption, the administrative law judge did not evaluate the totality of Dr. Seidemann's testimony regarding the cause of claimant's hearing loss; specifically, in both his written report and on deposition, Dr. Seidemann discussed, *inter alia*, the potential relationship between claimant's non work-related otosclerosis[5] and his present hearing loss. *See* EX 7 at 3; EX 31 at 16 – 19. Accordingly, we vacate the administrative law judge's finding that the Section 20(a) presumption was rebutted, and we remand the case for further consideration of this issue in accordance with applicable law.

Accordingly, the administrative law judge's Decision and Order is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

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

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at 485, 36 BRBS at 96(CRT), *citing Avondale Indust., Inc. v. Director, OWCP*, 977 F.2d 186, 26 BRBS 111(CRT) (5th Cir. 1992). In the instant case, employer does not dispute that it is the party liable for the payment of any benefits due claimant under the Act. Thus, the issue here is whether employer produced substantial evidence that his hearing loss is not due, even in part, to workplace noise.

[5] Claimant's conductive hearing loss was diagnosed by Dr. Irwin as being the result of otosclerosis, which was defined as bone growth in the ear canal.