BRB No. 91-1518

DOROTHY M. PICKERING	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:_____
INGALLS SHIPBUILDING, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

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

John L. Hunter (Cumbest, Cumbest, Hunter & McCormick), Pascagoula, Mississippi, for claimant.

Paul M. Franke, Jr. (Franke, Rainey & Salloum), Gulfport, Mississippi, for employer.

Before: DOLDER, Acting Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

DOLDER, Acting Chief Administrative Appeals Judge:

Employer appeals the Decision and Order (90-LHC-1431) of Administrative Law Judge C. Richard Avery awarding benefits 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 applicable law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant worked for employer as a clerk typist and timekeeper from 1957 until her retirement in 1989. During the last 28 years of her employment, she was exposed to noise in the Machine Shop, with the brunt of noise on her right. Tr. at 5-7. On September 21, 1987, claimant underwent an audiological evaluation under the supervision of Dr. Wold. The results of the test revealed a sensori-neural hearing loss of 95.6 percent in the right ear and zero percent in the left ear, which converts to a 15.9 percent binaural impairment pursuant to the American Medical Association *Guides to the Evaluation of Permanent Impairment*. Cl. Ex. 1. Based on those results, claimant filed a claim for compensation on February 24, 1988. Jt. Ex. 1. Employer filed a notice of controversion on June, 17, 1988, and another on March 10, 1989. *Id.* Previously, on May 14, 1987, the district

director[1] excused employer from filing notices, responses, controversions, and making payments in regard to hearing loss claims, including this one, until 28 days following the date the district director served the claim on employer. On September 9, 1988, claimant underwent a second audiological evaluation, and Dr. Stanfield determined from the results that claimant's hearing loss is not noise-induced. Emp. Ex. 6.

A hearing was held on January 24, 1991, wherein the parties disputed the cause, nature and extent of claimant's disability, and employer's liability for a Section 14(e), 33 U.S.C. §914(e), penalty and an attorney's fee. Decision and Order at 2. After invoking the Section 20(a), 33 U.S.C. §920(a), presumption, and "even assuming [Dr. Stanfield's opinion] is sufficient to rebut the Section 20 presumption," the administrative law judge used the "true doubt" rule, credited Dr.Wold's opinion, and determined that claimant suffers from a work-related, noise-induced disability. *Id.* at 3. Given that Dr. Stanfield did not rate claimant's impairment, the administrative law judge accepted Dr. Wold's figures and concluded that claimant suffers from a 95.6 percent monaural impairment. Therefore, he awarded benefits under Section 8(c)(13)(A) of the Act, 33 U.S.C. §908(c)(13)(A) (1988). *Id.* at 3-4. Additionally, he held employer liable for medical expenses, interest, and a Section 14(e) penalty. *Id.* at 4-5. Employer appeals, contending the administrative law judge erred in finding claimant's hearing loss to be work-related, in awarding benefits for a monaural impairment, and in holding it liable for a Section 14(e) penalty. Claimant responds, urging affirmance.

Employer first contends that the administrative law judge erred in finding claimant's hearing loss to be causally related to her employment. Employer does not contest the administrative law judge's invocation of the Section 20(a) presumption. Instead, it contends it offered sufficient evidence to rebut the presumption and, on the record as a whole, to sever the connection between claimant's injury and her employment. Once the Section 20(a) presumption is invoked, an employer may rebut it by producing facts to show that a claimant's employment did not cause, aggravate or contribute to his injury. *Peterson v. General Dynamics Corp.*, 25 BRBS 71, 78 (1991), *aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor*, 969 F.2d 1400, 26 BRBS 14 (CRT) (2d Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1253 (1993); *Obert v. John T. Clark and Son of Maryland*, 23 BRBS 157 (1990). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990).

[1]Pursuant to 20 C.F.R. §702.105, the term "district director" has been substituted for the term "deputy commissioner" used in the statute.

Employer asserts that Dr. Stanfield's opinion constitutes evidence which severs the connection between claimant's injury and her employment. We disagree. Dr. Stanfield found that claimant's right ear has a "steep, mild to profound, sensori-neural, hearing involvement," while her left ear is "essentially normal." Emp. Ex. 6. Based on his examination and claimant's history, although she could recall no acoustic trauma that could account for the asymmetrical results, Dr. Stanfield concluded that claimant's hearing loss is not the result of high level, industrial noise exposure. *Id.* Dr. Wold, however, concluded that claimant's hearing loss is characteristic of a loss aggravated by noise. Cl. Ex. 1.

We hold that Dr. Stanfield's opinion is insufficient to rebut the Section 20(a) presumption. Because claimant's claim is based on Dr. Wold's opinion that her hearing loss was aggravated by noise exposure at work, employer bears the burden of coming forward with evidence that claimant's hearing loss was not aggravated by her employment. *Peterson*, 25 BRBS at 78. As Dr. Stanfield's opinion does not establish that claimant's hearing loss was not aggravated by her employment, the Section 20(a) presumption is not rebutted, and claimant's hearing loss is work-related as a matter of law.[2] *See generally Cairns v. Matson Terminals, Inc.*, 20 BRBS 252 (1988). We, therefore, affirm the administrative law judge's finding that claimant's hearing loss is related to noise exposure at work.

Alternatively, employer contends that benefits for claimant's hearing loss should be calculated on a binaural basis under Section 8(c)(13)(B), 33 U.S.C. §908(c)(13)(B) (1988), instead of monaurally pursuant to Section 8(c)(13)(A), 33 U.S.C. §908(c)(13)(A) (1988). The administrative law judge found that claimant has a 95.6 percent impairment in her right ear and a zero percent impairment in her left ear, and he awarded claimant benefits for a 95.6 percent monaural impairment. We reject employer's contention as the administrative law judge properly compensated claimant for a monaural impairment. *Tanner v. Ingalls Shipbuilding, Inc.*, ___ F.2d ___, Nos. 92-4974, *et. al*. (5th Cir. September 21, 1993), *rev'g* 26 BRBS 43 (1992) (*en banc*) (Smith and Dolder, J.J., dissenting); *see also Rasmussen v. General Dynamics Corp.*, 993 F.2d 1014, 27 BRBS 17 (CRT)(2d Cir. 1993). In accordance with the court's holding in *Tanner*, we affirm the administrative law judge's award of benefits under Section 8(c)(13)(A).

Employer next avers that it should not be held liable for a Section 14(e) penalty. Employer contends the administrative law judge erred in finding the "excuse" granted by the district director invalid because the district director acted within his authority in excusing employer from filing notices of controversion within the statutory period. Moreover, employer contends the instant case is distinguishable from *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990), *aff'g in pertinent part Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184

[2]Dr. Stanfield's opinion states only that claimant's hearing loss is not caused by noise exposure. This implies that a direct causal relationship is absent, but does not address the aggravation theory. Moreover, the administrative law judge committed no error in crediting Dr. Wold's opinion under the "true doubt" rule. *See generally Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992).

(1989) (*en banc*), because the excuse was not granted retroactively but was granted before claimant filed his claim, and employer detrimentally relied on it. In the alternative, employer contends that even if the "excuse" is invalid, the concept of "replacement income" is not applicable here, so the Section 14(e) penalty should not apply. In response, claimant contends that the *Fairley* decision should be applied and that the administrative law judge's award of a Section 14(e) penalty should be affirmed.

For the reasons set forth in *Benn v. Ingalls Shipbuilding, Inc.*, 25 BRBS 37 (1991), *aff'd sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 976 F.2d 934, 26 BRBS 107 (CRT) (5th Cir. 1992), we reject employer's arguments regarding Section 14(e). As employer failed to timely controvert the claim or pay benefits, we affirm the administrative law judge's finding that employer is liable for a Section 14(e) penalty. *See also Ingalls Shipbuilding*, 898 F.2d at 1088, 23 BRBS at 61 (CRT).

Accordingly, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

_____

I concur:

REGINA C. McGRANERY
Administrative Appeals Judge

BROWN, Administrative Appeals Judge:

I concur in the result reached in this case.

_____

JAMES F. BROWN

Administrative Appeals Judge