BRB No. 92-595

JAMES T. MOODY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:_____
INGALLS SHIPBUILDING, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of A.A. Simpson, Jr., Administrative Law Judge, United States Department of Labor.

Rebecca J. Ainsworth (Maples & Lomax, P.A.), Pascagoula, Mississippi, for claimant.

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

PER CURIAM:

Claimant appeals the Decision and Order (90-LHC-1346) of Administrative Law Judge A.A. Simpson, Jr. denying 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 welder from 1952 through 1975 where he was exposed to loud noise. A July 28, 1986, audiometric examination performed by audiologist Marianne Towell indicated that claimant had sustained a 100 percent binaural hearing loss. Ex. 5. On October 27, 1986, Dr. Douglas Lamppin interpreted the July 28, 1986, audiogram and an audiogram performed on October 6, 1986, as indicating a 100 percent binaural hearing loss. Ex.6. Subsequent audiograms performed by audiologist James Wold on January 3, 1987, Cx. 2, and by audiologist Jim McDill on April 20, 1987, Ex. 7, also revealed a

100 percent binaural hearing impairment. On January 17, 1987, claimant filed a claim under the Act for a 100 percent binaural noise-induced hearing loss. A December 13, 1989, audiogram was interpreted by audiologist James Wold and Dr. Donald Roberts, an otolaryngologist, as indicating a 93.1 percent binaural hearing loss.[1] Cx. 23.

At the hearing, the disputed issues included causation, the nature and extent of disability, and employer's liability for a Section 14(e), 33 U.S.C. §914(e), penalty, medical benefits, and an attorney's fee, as well as the applicability of Section 8(f), 33 U.S.C. §908(f). Decision and Order at 1. After considering all of the relevant evidence, the administrative law judge determined that claimant had sustained a 100 percent binaural hearing loss but denied the claim under the Act, finding that claimant's hearing loss was not work-related. Claimant appeals the denial of benefits. Employer has not responded to this appeal.

On appeal, claimant contends that the administrative law judge failed to consider all of the medical evidence of record under the aggravation doctrine which is applicable to hearing loss claims pursuant to *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200 (1986),[2] and that the weight of the evidence mandates a finding that his hearing loss was at least aggravated by noise exposure at employer's shipyard.

Section 20(a) of the Act, 33 U.S.C. §920(a), provides claimant with a presumption that the injury he sustained is causally related to his employment if he establishes a *prima facie* case by showing that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the onset of the injury. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). Once claimant has invoked the presumption, the burden shifts to employer to rebut the presumption with substantial countervailing evidence. If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must then weigh all the relevant evidence and resolve the causation issue based on the record as a whole. *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990).

[1]The record also contains an uninterpreted audiogram performed at the Ochsner Clinic on September 30, 1971, and a report of the same date which indicates that claimant had a moderately severe neurosensory hearing loss and that a prior audiogram indicated that claimant had sustained a 50 percent binaural hearing loss. Ex.8. Although claimant asserts that the administrative law judge erred in failing to consider this evidence, we hold that as this evidence does not address the effect of claimant's subsequent noise exposure on his hearing loss, any error the administrative law judge made in failing to discuss it is harmless.

[2]In *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200, 201 (1986), the Board held that employer is liable for claimant's entire hearing loss and not just for the aggravation caused by claimant's employment.

In the present case, the administrative law judge found that claimant was entitled to the Section 20(a) presumption because he sustained a harm, a hearing loss, and it was undisputed that he was exposed to workplace noise which could have caused this condition. He then found that employer had rebutted the Section 20(a) presumption based on the opinions of audiologists Marianne Towell and Jim McDill, as corroborated by the medical opinions of otolaryngologists Drs. Lamppin and Muller. Having found rebuttal established, the administrative law judge proceeded to consider the causation issue based on the evidence as a whole. Crediting this evidence over two reports submitted by audiologist James Wold and the medical opinion of otolaryngologist Dr. Roberts which indicated that claimant's hearing loss was either aggravated by noise or was noise-induced, the administrative law judge ultimately determined that claimant's hearing loss was not work-related. He, therefore, denied benefits.

We agree with claimant that the administrative law judge's finding that Section 20(a) was rebutted cannot be affirmed. In the present case, although the administrative law judge found rebuttal established based on the testimony of Marianne Towell, Jim McDill, and Drs. Lamppin and Muller, this testimony is insufficient to rebut the Section 20(a) presumption. In her July 26, 1986 report, Marianne Towell opined that the pattern of claimant's hearing loss was not typical of that traditionally seen in cases of long-term noise exposure. Jim McDill performed the April 20, 1987, audiometric evaluation which formed the basis for Dr. Muller's June 18, 1987, opinion that the audiometric picture presented did not "seem conducive with job-related noise-induced hearing loss and was probably related with a congenital or progressive cochlear degeneration." Ex. 7. In his October 27, 1986 report, Dr. Lamppin opined that the degree of hearing loss which claimant exhibited on the July 28, 1986, and October 6, 1986, audiograms "usually" is not due to sustained acoustic trauma and that he suspected a hereditary pattern. Dr. Lamppin ultimately concluded that in summary it did not represent a noise-induced loss.

In order to rebut Section 20(a), employer must present specific evidence that the hearing loss was not caused by claimant's employment. Moreover, where, as here, claimant's claim is based on the theory that his 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 his employment. *See 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). Although Ms. Towell and Drs. Lamppin and Muller opined that claimant's hearing loss was not caused by noise exposure, these opinions at best indicate only that a direct causal relationship is absent; none addresses whether claimant's hearing loss was aggravated by his employment. Thus, they cannot establish that claimant's employment exposure did not aggravate or contribute to his loss. Because the evidence which the administrative law judge relied upon in finding rebuttal does not establish that claimant's hearing loss was not aggravated by his employment, we reverse his finding that the Section 20(a) presumption was rebutted in this case. As the Section 20(a) presumption was not rebutted, we hold that claimant's hearing loss is work-related as a matter of law and remand the case for consideration of all remaining issues. *See Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988).

Accordingly, the Decision and Order of the administrative law judge denying benefits is reversed, and the case is remanded for consideration of all remaining issues consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge