BRB No. 92-1551

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

Appeal of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

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

Cornelius V. Gallagher (Gallagher & Field), New York, New York, for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (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 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, who has been working for employer since 1972 performing various jobs, sought benefits under the Act for a noise-induced hearing loss based on an audiogram administered on September 10, 1990, by Dr. Matthews, which revealed a 41.3 percent binaural impairment. Claimant underwent a subsequent hearing evaluation by Dr. Katz

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

on October 18, 1990; this audiometric examination revealed a 4.6 percent binaural impairment. In his Decision and Order, the administrative law judge accorded determinative weight to the opinion

of Dr. Katz, relying on his deposition testimony that claimant's audiogram was consistent with hearing loss caused by aging, and to the testimony of Thomas Bragg, an acoustical engineer, regarding the levels of noise to which claimant was exposed in his employment with employer. Based on this evidence, the administrative law judge concluded that conditions did not exist at the locations claimant worked for employer which could have caused claimant to suffer a noise-induced hearing loss. The administrative law judge therefore found that the evidence was insufficient to invoke the Section 20(a), 33 U.S.C. §920(a), presumption, and he denied the claim for compensation.

On appeal, claimant contends that the administrative law judge erred in weighing the conflicting evidence to determine whether the Section 20(a) presumption applies to this case. Claimant further argues that he is entitled to benefits as the opinion of Dr. Katz cannot support rebuttal of the Section 20(a) presumption inasmuch as it relies on the noise surveys which, claimant alleges, do not establish that he was not exposed to deleterious noise. Employer responds, urging affirmance of the administrative law judge's decision.

Where claimant has established his *prima facie* case, *i.e.*, shown that he has sustained a harm and that an accident occurred or working conditions existed which could have caused the harm, claimant is entitled to the Section 20(a), 33 U.S.C. §920(a), presumption linking that harm to his employment. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326, 331 (1981). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *Sam v. Loffland Brothers Co.*, 19 BRBS 228 (1987). It is employer's burden on rebuttal to present specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976).

In the instant case, claimant correctly contends that the administrative law judge erred in finding the evidence insufficient to invoke the Section 20(a) presumption, as claimant established that he suffered a harm, a hearing loss shown by both audiograms of record, and that working conditions existed which could have caused the harm, *i.e.*, claimant's testimony concerning loud workplace noise. *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989). The noise studies performed by Mr. Bragg in 1983 and 1991 do not establish that claimant was not exposed to loud noise at any time during his employment since 1972. They merely establish that, during the time reflected in the studies, *i.e.*, the 18 months prior to June 1982, and the three years prior to July 1991, the levels of noise in the various places claimant worked did not exceed that allowed by the Occupational Health and Safety Administration (OSHA), *i.e.*, over 90 decibels per eight hours. As claimant testified to the noisy conditions in which he worked, *see, e.g.*, transcript at 41, 47, 54, claimant has established his *prima facie* case, and the burden shifts to employer to rebut the Section 20(a) presumption. *Sinclair*, 23 BRBS at 154. Accordingly, we reverse the administrative law judge's finding that the Section 20(a) presumption is not invoked in this case.

Moreover, we agree with claimant that neither the noise surveys nor Dr. Katz's opinion is sufficient to rebut the Section 20(a) presumption. Initially, the Board has never held that conformance with OSHA standards is sufficient to rebut the Section 20(a) presumption. Additionally, the survey which, according to Mr. Bragg, demonstrates that claimant was exposed to

less than 90 decibels per eight hour day, is insufficient in itself to meet employer's burden because it is only indicative of the level of claimant's noise exposure during the various periods the survey was performed in June 1983 and July 1991. Claimant, who began his employment with employer in 1972, testified that it was noisy when he performed his jobs in the past, and that, at times, he worked more than eight hours per day. Transcript at 40, 51. Thus, these surveys cannot establish that claimant's hearing loss is not due to his employment and are, therefore, insufficient to rebut the Section 20(a) presumption. *See generally Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990).

The opinion of Dr. Katz is similarly insufficient to rebut the Section 20(a) presumption. Although Dr. Katz stated at his deposition that claimant's audiogram was consistent with hearing loss caused by aging, and was not due to noise exposure, *see* Emp. Ex. 4 at 71-72, Dr. Katz's opinion is based in part on the noise surveys.[1] As these surveys do not indicate the extent of claimant's exposure during his entire period of employment, to the degree that Dr. Katz relies on the surveys, his opinion cannot support a finding of rebuttal of the Section 20(a) presumption. Inasmuch as it is impossible to discern from Dr. Katz's opinion the extent to which this evidence influenced his ultimate conclusion, his deposition testimony is insufficient to rebut the presumption.

In addition, Dr. Katz's deposition testimony is compromised by his earlier medical report, which the administrative law judge failed to discuss. In a report dated October 18, 1990, Dr. Katz stated he reviewed the noise surveys, and administered audiometric testing. Emp. Ex. 2. He interpreted the audiogram as indicating a "sloping sensorineural hearing loss with a typical noise exposure pattern" and he stated that claimant has a 4.6 percent binaural impairment, part of which is due to the normal aging process. *Id.* Dr. Katz did not examine claimant a second time, and he provided no basis for changing his opinion about the cause of claimant's hearing loss at his deposition. Inasmuch as Dr. Katz gave no reason for changing his opinion regarding the type of loss shown by the audiometric pattern, his opinion also is insufficient to rebut the Section 20(a) presumption on this basis as well. *See generally Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990). As there is no other evidence of record sufficient to establish rebuttal of the Section 20(a) presumption, we hold that claimant's hearing loss is work-related as a matter of law and we reverse the denial of benefits. *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988). The case is remanded to the administrative law judge to determine the extent of claimant's hearing loss, and to resolve any remaining issues.

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is reversed. The case is remanded for further consideration consistent with this decision.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

[1]Dr. Katz also relied on claimant's history of noise exposure and the audiometric pattern in stating, at his deposition, that claimant's hearing loss is not noise-induced and is related to the aging process. Emp. Ex. 4 at 64, 71-72.

REGINA C. McGRANERY
Administrative Appeals Judge

ROBERT J. SHEA

Administrative Law Judge