BRB No. 97-723

VIRGILIO BONILLA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INTERNATIONAL TERMINAL OPERATING COMPANY, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order (Upon Remand by the Benefits Review Board) of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

James R. Campbell, Glen Cove, New York, for claimant.

Christopher J. Field (Gallagher & Field), Jersey City, New Jersey, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (Upon Remand by the Benefits Review Board) (92-LHC-2818) 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).

This case is before the Board for a second time. To recapitulate, claimant worked for various companies, including employer, as a holdman from December 1964 until September 5, 1987. Claimant officially retired from longshore work in June 1989, and he filed a claim for a work-related hearing loss on December 5, 1991, naming employer as the responsible employer.

In his original Decision and Order, the administrative law judge found that the evidence established that claimant has a 7.81 percent binaural hearing loss. Decision and Order Denying Benefits at 5. However, the administrative law judge also found that claimant did not establish that he was exposed to injurious stimuli on September 5, 1987. *Id*. at 6. Thus, he found that the Section 20(a) presumption, 33 U.S.C. §920(a), was not invoked and benefits were denied. *Id*. at 7. Claimant appealed this decision to the Board contending that the administrative law judge erred in his application of the Section 20(a) presumption. In its original decision, the Board held that the administrative law judge confused the concepts of causation and responsible employer. It vacated the administrative law judge's finding that claimant does not have a work-related hearing loss. The Board held that the medical opinions that claimant's hearing loss is consistent with occupational noise exposure, in conjunction with claimant's testimony regarding noisy working conditions in general, are sufficient to invoke the Section 20(a) presumption. *Bonilla v. International Terminal Operating Co., Inc.*, BRB No. 93-2008 (Sept. 12, 1996). In addition, as there was no rebuttal evidence, the Board held that causation was established as a matter of law, and the case was remanded for further consideration of the responsible employer issue, with employer bearing the burden of establishing it is not the responsible employer. *Id.*

On remand, the administrative law judge found that employer did not present any evidence that it did not expose claimant to injurious stimuli. Thus, the administrative law judge found that employer is the responsible employer, and he held it liable to claimant for a 7.81 percent binaural hearing loss.

On appeal, employer contends that the Board did not have the power to make findings of fact in its decision, that the findings of fact are not supported by substantial evidence, and that the Board erred in holding that the responsible employer rules have no bearing on the issue of causation. Claimant responds, urging affirmance of the administrative law judge's decision.

Initially, employer contends that the findings of fact adopted by the administrative law judge on remand were adopted in error as they were the findings of fact made by the Board, an appellate body not authorized to make such findings. We disagree that the Board engaged in fact-finding in its initial decision. Claimant has the burden of proving the existence of an injury or harm, and that working conditions existed which could have caused the harm, in order to establish a *prima facie* case. *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Obert v. John T. Clark and Son of Maryland*, 23 BRBS 157 (1990); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). In its previous decision, the Board initially held that the administrative law judge erred in focusing his Section 20(a) analysis only on whether claimant established noisy working conditions on September 5, 1987, rather than on whether claimant suffered from an occupational hearing loss due to noise exposure during the totality of his longshore employment.[1] *Bonilla*, slip op. at 3.

[1]Employer also contends that the Board erred in holding that claimant was exposed to injurious stimuli on September 5, 1987, as a matter of law. However, the Board did not so hold, but held that claimant's exposure on September 5, 1987, was not relevant in

Moreover, the Board noted that although the administrative law judge did not specifically address whether claimant has a work-related hearing loss, he did find Dr. Stingle's opinion was the most credible medical opinion of record, and Dr. Stingle opined that claimant's binaural loss is consistent with occupational noise exposure. *Id*.; Cl. Ex. 5. In addition, the Board noted that Dr. Brownstein stated that claimant's hearing loss is due to occupational noise exposure. Cl. Ex. 2. Thus, rather than engage in fact-finding, the Board held that these opinions, in conjunction with claimant's testimony regarding noisy working conditions in general, were sufficient to establish claimant's *prima facie* case and thus to invoke the Section 20(a) presumption that claimant has a work-related hearing loss, as a matter of law. Moreover, as no opinion of record ruled out claimant's employment as a cause of, or contributor to claimant's hearing loss, the Board also held that the presumption was not rebutted, as a matter of law. *Id.*

Contrary to employer's contention, the Board's decision does not relieve claimant of his burden of proving entitlement in contravention of the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries,* 512 U.S. 267, 28 BRBS 43 (CRT)(1994). Claimant satisfied his initial burden of establishing that he has a harm, a hearing loss, and that conditions existed during his years of employment that could have caused his hearing loss, *see Brown v. I.T.T./Continental Baking Corp.,* 921 F.2d 289, 24 BRBS 75 (CRT)(D.C. Cir. 1990), and indeed his case is bolstered by two doctors who opined that his hearing loss is work-related. At this point, by virtue of Section 20(a) of the Act, the burden shifts to employer to prove the absence of a causal relationship between claimant's hearing loss and the conditions of his employment. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). Employer offered no evidence legally sufficient to rebut the Section 20(a) presumption. *Brown v. Jacksonville Shipyards, Inc.,* 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990). Thus, claimant's hearing loss is work-related as a matter of law. *Id.*

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determining whether claimant has a work-related hearing loss; rather claimant's exposure to work-place noise over the entire course of his employment is the relevant inquiry in determining whether claimant's hearing loss is work-related. The Board did not disturb the administrative law judge's findings with regard to claimant's exposure on September 5, 1987.

Employer also contends that the Board erred in holding that claimant does not bear the burden of establishing he was exposed to injurious noise in its employ on September 5, 1987, before it can be held liable as the responsible employer. However, as the Board held in its prior decision, once the compensability of claimant's claim is established, as in this case, it is not also claimant's burden of proof to establish the last employer to expose him to potentially injurious stimuli; rather, the employer claimed against may establish that it is not the responsible employer by showing that the employee was exposed to injurious stimuli while performing work covered under the Act for a subsequent employer, or by showing that it did not expose claimant to injurious stimuli. *Avondale Industries, Inc. v. Director, OWCP*, 977 F.2d 186, 26 BRBS 111 (CRT) (5th Cir. 1992); *General Ship Service v. Director, OWCP*, 938 F.2d 960, 25 BRBS 22 (CRT)(9th Cir. 1991); *Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992); *Susoeff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986). The administrative law judge found that employer offered no evidence in this case that it did not expose claimant to injurious noise.[2] Therefore, as the Board has not made any findings of fact in this case, but has applied the facts, which were either determined by the administrative law judge or are not in dispute to the applicable law, and employer has not raised any reversible error on appeal, we affirm the administrative law judge's award of benefits

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

[2]Claimant did not have any subsequent employment.