BRB No. 97-849

MARIO CLAUDIO	)	
	)	
Claimant-Respondent	)	DATE ISSUED: _____
	)	
v.	)	
	)	
GLOBAL TERMINAL AND CONTAINER SERVICE	)	
	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order and Amendment to Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Samuel A. Denburg (Baker, Garber, Duffy & Pedersen, P.C.), Hobeken, New Jersey, for claimant.

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

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order of Ralph A. Romano (96-LHC-0371) 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, a longshoreman, who worked for employer in various capacities from 1972 to 1976 and from 1986 to 1995, sought occupational hearing loss benefits under the Act for a noise-induced hearing loss based on a January 17, 1995, otological report by Dr. Matthews. CX-2. Claimant was re-examined by Dr. Matthews on July 8, 1996, at which time corroborative

audiometric testing was performed which included brainstem evoked response audiometry, which Dr. Matthews testified was the most objective test available. EX-9 at 17-18. Dr. Matthews stated that this testing confirmed his original diagnosis of a 34.5 percent binaural hearing loss. CX-5. During cross-examination at his deposition, however, Dr. Matthews admitted having made a mathematical error and stated that claimant's actual binaural hearing loss was 31.5 percent. CX-9 at 46. Claimant also underwent subsequent hearing evaluations by Dr. Katz, EX-3, and Dr. Kramer, EX-4, and these doctors rated claimant's binaural hearing loss at 1.25 percent and 6.24 percent, respectively.

In his Decision and Order, the administrative law judge found that claimant had successfully established invocation of the Section 20(a), 33 U.S.C. §920(a), presumption, and that employer had not introduced evidence sufficient to establish rebuttal. Accordingly, giving determinative weight to the opinion of Dr. Matthews, he awarded claimant compensation for a 31.5 percent binaural hearing loss pursuant to 33 U.S.C. §908(c)(13)(B).[1] On appeal, incorporating its closing brief below, employer challenges the administrative law judge's findings regarding causation and the extent of claimant's hearing loss. In addition, employer argues that claimant was required to prove that he received injurious exposure while working for employer in order for employer to be held liable as the responsible employer. Claimant responds, urging affirmance.

Section 20(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 ultimate disability. *Manship v. Norfolk & Western Railway Company*, 30 BRBS 175 (1996); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). Once claimant has invoked the presumption, the burden shifts to employer to rebut it with substantial countervailing evidence. *Peterson v. General Dynamics Corp.*, 25 BRBS 71, 78 (1991), *aff'd sub nom. Insurance Company of North America v. U.S. Department of Labor,* 969 F.2d 1400, 26 BRBS 14 (CRT) (2d Cir. 1992), *cert. denied,* 507 U.S. 909 (1993)*; Davison v. Bender Shipbuilding & Repair Co., Inc.*, 30 BRBS 45, 46-47 (1996). If the administrative law judge finds that the Section 20(a) presumption is rebutted, then all relevant evidence must be weighed to determine if causation has been established. *See Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985).

[1]Although the administrative law judge originally awarded claimant benefits based on the original report of Dr. Matthews finding a 34.5 percent binaural hearing impairment, the administrative law judge subsequently filed an amended decision which reflected his testimony that claimant actually suffered from a 31.5 percent binaural hearing impairment. CX-9 at 46.

After review of the Decision and Order in light of the relevant evidence and employer's arguments on appeal, we affirm the administrative law judge's finding that claimant's hearing loss is work-related because it is rational, supported by substantial evidence, and in accordance with applicable law. *See O'Keeffe*, 380 U.S. at 359. In the instant case, employer does not contest the administrative law judge's determination that claimant was entitled to invocation of the Section 20(a) presumption.[2] Rather, employer argues that, contrary to the determination made by the administrative law judge, it introduced evidence sufficient to rebut the presumption and establish the absence of causation in the record as a whole based on the testimony of and noise studies performed by Mr. Bragg in 1983 and 1991, the medical opinion of Dr. Katz, and the lay testimony of Mr. Nargi.

Contrary to employer's assertions, however, neither the noise studies performed by Mr. Bragg in 1983 and 1991, nor his testimony regarding the surveys is sufficient to rebut Section 20(a). This evidence does not establish that claimant was not exposed to loud noise at any time during his employment; all it establishes is that during the time reflected in the studies, 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 8 hours. As the administrative law judge stated, however, conformance with OSHA standards is not sufficient to rebut the Section 20(a) presumption, as such evidence cannot demonstrate the absence of a work-related injury. Additionally, the noise survey is insufficient to meet employer's burden because it is only indicative of the level of noise during the periods when the survey was performed in June 1983 and July 1991. Claimant worked for employer from 1972 to 1976, and again from 1986 to 1995. As the time-frame of the surveys does not coincide with claimant's periods of employment, the administrative law judge properly rejected them.

The administrative law judge also properly found that the opinion of Dr. Katz is 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, the administrative law judge rationally found that his opinion was insufficient to rebut Section 20(a) because it was based in part on the Bragg noise surveys. EX-3. Finally, the administrative law judge rationally rejected the testimony of Mr. Nargi, a terminal manager for employer, who testified that the noise levels to which claimant was exposed were not "too loud." The administrative law judge found that Mr. Nargi was not a noise expert and that his disagreement with claimant regarding the level of noise was easily explained as simply a difference of perception. Inasmuch as the administrative law judge rationally determined that employer did not introduce evidence sufficient to establish rebuttal of the Section 20(a) presumption,[3] *see Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.),

[2]Although much of employer's brief below was directed at invocation of the Section 20(a), 33 U.S.C. §920(a), presumption, employer abandoned this argument on appeal.

[3]We note that in addressing the extent of claimant's hearing loss, the administrative law judge rationally gave greatest weight to the opinion of Dr. Matthews. *See* discussion, *infra*. Thus, even if Section 20(a) were rebutted the administrative law judge's finding of causation would be supported by his weighing of the evidence as a whole.

cert. denied, 429 U.S. 820 (1976), his conclusion that claimant's hearing loss was causally related to his employment is affirmed.[4] *See generally Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995).

Characterizing the administrative law judge's award as a rush to judgment, employer argues in the alternative that in determining the extent of claimant's hearing loss, the administrative law judge acted irrationally in crediting the opinion of Dr. Matthews over that of Dr. Kramer and in entering an award of compensation based on the worst threshold levels. Employer further avers that as Dr. Kramer provided the only complete evaluation in the record, it should have been accorded determinative weight, and argues that the administrative law judge's failure to recognize the inherent contradiction in awarding compensation for a loss far worse than that revealed on the only complete evaluation of record defies logic and constitutes reversible error.

[4]Contrary to employer's assertions, the fact that it produced more evidence than claimant regarding causation does not mandate that the administrative law judge credit its evidence; the administrative law judge is free to accept or reject all or any part of any testimony as he sees fit. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). Moreover, employer's argument that the administrative law judge erred in weighing its proposed rebuttal evidence in addressing rebuttal of Section 20(a) is rejected. It is incumbent upon the administrative law judge to determine both the legal sufficiency and credibility of employer's rebuttal evidence, as an employer may rebut the Section 20(a) presumption only upon the production of substantial evidence severing the presumed causal connection. *See generally Holmes v. Universal Maritime Service Corp.*, 29 BRBS 18 (1995) (Decision on Recon.).

The administrative law judge's findings regarding the extent of claimant's hearing loss are also affirmed. After considering the relevant opinions of Drs. Matthews, Kramer, and Katz, and rejecting Dr. Katz's opinion,[5] the administrative law judge rationally accorded greater weight to Dr. Matthews than to Dr. Kramer. Initially, the administrative law judge found that Dr. Matthews's credentials were impressive and superior to those of Dr. Kramer in terms of the practice of medicine. Moreover, he rationally determined that Dr. Matthews's opinion was the most reliable, probative, and documented opinion in the record, as not only had he performed two corrobative audiograms, but he also performed a stapedial reflex test and brainstem evoked response audiometry, which Dr. Kramer did not perform. Decision and Order at 7. Contrary to employer's assertions, neither the fact that Dr. Matthews made a mathematical error in initially calculating the extent of claimant's hearing loss at 34.5 percent, nor Dr. Kramer's testimony that tests which are considered part of a complete audiological evaluation were not performed by Dr. Matthews, requires that the administrative law judge reject his testimony. Weighing the medical evidence is within the administrative law judge's authority. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). Inasmuch as employer has failed to establish that the administrative law judge erred in deciding to accord greatest weight to the impairment rating of Dr. Matthews than to that of Dr. Kramer, we affirm his finding that claimant sustained a 31.5 percent binaural hearing loss based on this opinion. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961).

Finally, we reject employer's argument, raised in its closing brief below and incorporated on appeal, that in order for employer to be held liable as the responsible employer under the last injurious exposure rule set forth in *Travelers ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955), claimant was required to establish that he was exposed to injurious stimuli on the last day or days he worked for employer. The last covered employer to expose claimant to potentially injurious stimuli which could have contributed to the disability evidenced on the determinative audiogram is the employer liable for benefits for claimant's hearing loss. *See Barnes v. Alabama Dry Dock & Shipbuilding Corp.*, 27 BRBS 188 (1993). Contrary to employer's assertion, employer bears the burden of proof in establishing that it is not the responsible employer. *See 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). Employer may do so by establishing that it did not expose claimant to injurious stimuli or that claimant was exposed while performing work for a subsequent covered employer. In the present case, inasmuch as employer stipulated that it was the last covered employer prior to the determinative January 17, 1995 audiogram, Tr. at 5-6, and the administrative law judge rationally rejected employer's evidence in favor of claimant's testimony that he was exposed to injurious noise levels throughout his employment with employer, we affirm his finding that

[5]The administrative law judge's discrediting of Dr. Katz's impairment rating is not challenged on appeal.

employer is liable as the responsible employer. *See generally Roberts v. Alabama Dry Dock & Shipbuilding Corp.*, 30 BRBS 229 (1997).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge