BRB No. 98-633

SCOTT CARDELL	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
	)	
v.	)	
	)	
GLOBAL TERMINAL & CONTAINER SERVICES, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order-Granting Benefits of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Walter J. Curtis (Baker, Garber, Duffy & Pedersen), Hoboken, New Jersey, for claimant.

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

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order-Granting Benefits (94-LHC-3406) of Administrative Law Judge Paul H. Teitler 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 worked as a longshoreman since 1942, and began working for employer in the late 1960's. He initially worked as a general longshoreman and then became a checker in 1972 and worked stuffing containers, in the scalehouse, in the delivery department, at the scales, in the U.S. Customs department, and as a gatekeeper. He testified that he was

exposed to noise at all of the job locations from hi-los, cranes, trucks, drotts, traffic and flackers. Claimant retired in December 1989 and testified that he was having hearing difficulties when he retired, including cracking and popping noises in his ears. He underwent audiometric testing with Dr. West on October 5, 1992, which revealed a 22.5 percent binaural impairment. Claimant underwent a subsequent hearing evaluation by Dr. Katz on July 28, 1993, which revealed an 18.8 percent binaural impairment.

In his Decision and Order, the administrative law judge found that the Section 20(a), 33 U.S.C. §920(a), presumption is invoked as it is undisputed that claimant suffered a harm, a hearing loss, and claimant testified that he was exposed to loud noise while working for employer. In addition, the administrative law judge noted that Dr. West attributed claimant's hearing loss to his occupational noise exposure. The administrative law judge also found that the noise surveys submitted by employer, Dr. Katz's opinion that claimant's hearing loss is unrelated to noise exposure, and the testimony of Mr. Pattipaglia, employer's terminal manager, that the noise levels were acceptable, are insufficient to establish rebuttal of the presumption. Thus, the administrative law judge awarded claimant benefits under Section 8(c)(13)(B) of the Act, 33 U.S.C. §908(c)(13)(B), for a 20.65 percent binaural hearing loss based on an average weekly wage of $617.21.[1]

On appeal, employer contends that the administrative law judge erred in not finding evidence sufficient to establish rebuttal. Claimant responds, urging affirmance of the award of benefits as the administrative law judge properly rejected the foundation of the opinion of employer's medical witness and, accordingly, properly found the presumption was not rebutted.

We reject employer's contention that the administrative law judge erred in determining that it did not rebut the Section 20(a) presumption. Section 20(a) of the Act

[1]The administrative law judge averaged the results of the two audiometric tests performed closest to claimant's retirement date, the test performed by Dr. West on October 5, 1992, revealing a 22.5 percent binaural hearing loss, Cl. Ex. 2, and the test performed by Dr. Katz on July 28, 1993, revealing an 18.8 percent binaural hearing impairment, Emp. Ex. 8, and concluded that claimant suffered a 20.65 percent binaural hearing impairment.

provides claimant with a presumption that his disabling condition is causally related to his employment. 33 U.S.C. §920(a). In the instant case it is undisputed that the administrative law judge properly invoked the Section 20(a) presumption. *See generally Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6 (1998). Once the presumption is invoked, the burden shifts to employer to rebut it with substantial countervailing evidence that claimant's disabling condition was not caused or aggravated by his employment. *See Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995).

In the present case, the administrative law judge rationally found that the noise surveys submitted by employer are not sufficient to rebut the Section 20(a) presumption as they do not cover every period of time that claimant worked for employer from the late 1960's to 1989. He also noted that the studies only considered an eight hour work day while claimant testified that on occasion he worked more than eight hours. Additionally, the administrative law judge rationally reasoned that conformance with the standards of the Occupational Health and Safety Act of 1970 is not sufficient to rebut the presumption as it does not rule out that hearing loss may occur in some workers due to lower levels of noise exposure. *See Damiano v. Global Terminal & Container Service,* BRBS , BRB No. 98-472 (Nov. 24, 1998).

The administrative law judge also found that Dr. Katz's deposition testimony that claimant's hearing loss was unrelated to noise exposure is insufficient to rebut the presumption. Initially, Dr. Katz found "no more than a 3% binaural hearing loss disability from any noise exposure," EX 3, but the administrative law judge properly noted that any contribution makes the whole loss compensable under the aggravation rule. *See Port of Portland v. Director, OWCP,* 932 F.2d 836 24 BRBS 137 (CRT) (9th Cir. 1991). He also noted that Dr. Katz changed his opinion in his deposition and testified that claimant's hearing loss was unrelated to noise exposure. However, the administrative law judge found this change of opinion to be unreliable as it appeared to be based on the report of Dr. Blady that claimant may have a peripheral vestibular abnormality and on his review of the noise surveys. Contrary to employer's contention on appeal, the administrative law judge did not find Dr. Katz's opinion insufficient to establish rebuttal as he does not prove the existence of an alternative causative agent; rather, the administrative law judge concluded that Dr. Katz changed his opinion on the etiology of claimant's hearing loss based on a diagnosis of peripheral vestibular abnormality by Dr. Blady which was never definitively made. Moreover, the administrative law judge previously found that the noise surveys do not rule out injurious exposure and that Dr. Katz made an unsubstantiated assumption regarding claimant's exposure to loud noise in the armed forces. The administrative law judge thus concluded that on these bases Dr. Katz's opinion is rendered unreliable, and his report is not sufficient to establish rebuttal.[2] *See Damiano,* slip op. at 4-5. Inasmuch as the

[2]In addition, the administrative law judge noted that Dr. Blady did not address

administrative law judge's determination that employer did not establish rebuttal of the Section 20(a) presumption and his consequent conclusion that claimant's hearing impairment is work-related is rational, supported by substantial evidence, and in accordance with law, we affirm the administrative law judge's award of benefits. *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990); *Damiano*, slip op. at 5; *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990).

Accordingly, the administrative law judge's Decision and Order-Granting Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

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whether noise exposure was a possible cause of claimant's hearing loss. Emp. Ex. 11; Decision and Order at 11.