BRB No. 03-0290

ROGER A. CLARK Claimant-Respondent v. RAG CUMBERLAND RESOURCES, L.P. and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Petitioners	)	DATE ISSUED: Dec. 22, 2003 DECISION and ORDER

Appeal of the Decision and Order-Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Stephen P. Moschetta (Joseph P. Moschetta and Associates), Washington, Pennsylvania, for claimant.

Richard W. Scheiner (Semmes, Bowen & Semmes, P.C.), Baltimore, Maryland, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits (2002-LHC-1151) of Administrative Law Judge Daniel L. Leland 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 began working for employer in 1977 in its coal mining facility.[1] From 1977 to 1984 claimant worked as a barge handler. From 1987 to the time of the hearing, claimant worked in various capacities at the harbor facility. Tr. at 24, 42-43, 45. Claimant underwent audiometric testing on April 18, 2000, conducted by Dr. Oliverio, which revealed a binaural hearing loss of 27.5 percent. CX 7, 19; EX 4. Claimant also underwent audiometric testing on March 8, 2002, conducted by Dr. Bell, which revealed a binaural hearing loss of 32.5 percent. CX 9, 18. An audiogram administered by employer's expert, Dr. Chen, on June 13, 2001, revealed a binaural hearing loss of 43.13 percent. EX 8 at 4, 37.

In his Decision and Order, the administrative law judge found that claimant was not aware that his hearing loss was work-related until 2000 when Dr. Oliverio first provided him with a written report regarding his hearing impairment. The administrative law judge thus found that claimant provided employer timely notice of his injury in accordance with Section 12 of the Act, 33 U.S.C. §912, and timely filed his claim for benefits in accordance with Section 13 of the Act, 33 U.S.C. §913.[2] Next, the administrative law judge determined that claimant submitted sufficient evidence to establish invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), linking his hearing loss to his employment, and found further that employer did not submit substantial evidence to establish rebuttal of the presumption. Concluding, therefore, that claimant's hearing impairment is work-related, the administrative law judge credited Dr. Bell's 2001 audiometric evaluation of a 32.5 percent binaural hearing loss and awarded claimant benefits accordingly. 33 U.S.C. §908(c)(13); 20 C.F.R. §702.441(b),(d). The administrative law judge also awarded claimant medical benefits under Section 7 of the Act, 33 U.S.C. §907, and a penalty under Section 14(e) of the Act, 33 U.S.C. §914(e), and interest on unpaid compensation.

On appeal, employer seeks reversal of the administrative law judge's finding that employer submitted insufficient evidence to rebut the Section 20(a) presumption, and remand of the case for the administrative law judge to evaluate the evidence regarding the

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[1] From August 1, 1977 to June 30, 1999, claimant was employed by U.S. Steel Mining Company, Inc. at Cumberland Mine. Since July 1, 1999, the company has employed claimant under the name of RAG Cumberland Resources, L.P. *See* CX 15; EX 1.

[2] Claimant filed two claims for benefits due to work-related hearing loss, one on February 2, 2001, based on Dr. Oliverio's audiometric evaluation of 27.5 percent binaural hearing loss and one on April 22, 2002, based on Dr. Bell's audiometric evaluation of 32.5 percent binaural hearing loss. CX 1, 2.

cause of claimant's hearing loss on the record as a whole. Claimant responds, urging affirmance of the award of benefits.

Where, as in this case, it is uncontested that claimant has established his *prima facie* case for invocation of the Section 20(a) presumption, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's hearing loss was not caused, contributed to, or aggravated by his employment. *See generally Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT)(5th Cir. 1998); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *Davison v. Bender Shipbuilding & Repair Co,* 30 BRBS 45 (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 a causal relationship has been established, with claimant bearing the burden of persuasion. *See, e.g*., *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries* 512 U. S. 267, 28 BRBS 43(CRT)(1994). Moreover, if an employment-related injury contributes to, combines with, or aggravates a pre-existing condition, employer is liable for the entire resulting disability.[3] *See Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137(CRT)(9th Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52(CRT)(4th Cir. 1982).

Employer contends that the administrative law judge erred in finding its evidence insufficient to rebut the Section 20(a) presumption. Employer argues that the Section 20(a) presumption is rebutted based on noise surveys performed at its harbor facility between 1997 and 2000, and the medical opinion of Dr. Chen, a board-certified otolaryngologist, that claimant's hearing loss is not work-related.

With respect to its noise surveys, employer argues the studies rebut the Section 20(a) presumption because they establish it was in compliance with OSHA regulations regarding employee exposure to noise. Employer argues that the highest dosimeter reading for a dockman was 82.2 dBA, which is below OSHA exposure regulations. EX

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[3] The administrative law judge found that claimant credibly testified, as corroborated by his wife, that he began experiencing hearing difficulties in the early 1990s, which caused him to obtain his first set of hearing aids in 1993, and his second set in 1998. Tr. at 71-73, 113-115.

8-11; 29 C.F.R. §1910.95; Decision and Order at 8.[4] The administrative law judge found the noise surveys insufficient to rebut the Section 20(a) presumption, stating they do not establish that claimant was not exposed to levels of noise that could cause hearing loss. In this regard, the administrative law judge observed that the OSHA regulations do not provide medical standards. Therefore, the administrative law judge rationally stated that this standard does not mean that exposure above 90 dBA will cause hearing loss while exposures below 90 dBA will not. Decision and Order at 14. Additionally, the administrative law judge found that claimant never wore a dosimeter, and thus it is unclear as to the noise levels to which claimant actually was exposed as a dockman. The administrative law judge also found a great fluctuation in the dosimeter readings of the tested dockmen, with results varying from 63.1 dBA to 89.5 dBA and from 74.6 dBA to 83.3 dBA. CX 11; EX 8 at 2; Decision and Order at 15. Moreover, the noise surveys do not cover all of the years of claimant's employment at the harbor, and thus, do not constitute substantial evidence of the absence of injurious exposure during the entirety of claimant's employment. *Damiano v. Global Terminal & Container Service*, 32 BRBS 261 (1998). Consequently, as the administrative law judge's finding that the noise surveys do not rebut the Section 20(a) presumption is rational, supported by substantial evidence, and in accordance with law, it is affirmed. *See Everson v. Stevedoring Services of America*, 33 BRBS 149 (1999); *Damiano*, 32 BRBS at 263.

Employer also argues that Dr. Chen's opinion rebuts the Section 20(a) presumption. Dr. Chen stated that, within a reasonable degree of medical certainty, claimant's noise exposure at work did not cause any of claimant's hearing impairment. EX 8 at 20; *see also* EX 7. He based this opinion on the dosimetry testing showing noise exposure of average decibel levels in the mid-70s to low 80s. EX 7 at 5; EX 8 at 19. Dr. Chen also stated that due to the asymmetry of claimant's hearing loss, its cause likely was recreational noise exposure such as hunting. EX 8 at 18. The administrative law judge found that Dr. Chen's opinion does not constitute substantial evidence of the lack of a causal connection between claimant's hearing loss and his employment because Dr. Chen did not take into account the other noise surveys of record which show exposure to decibels as high as 89.5, which, Dr. Chen admitted, is a level which can cause hearing loss in some individuals. EX 8 at 31-32. The administrative law judge also stated that Dr. Chen did not account for claimant's use of hearing protection when he hunts and the lack of use of hearing protection during claimant's work as a dockman. Decision and Order at 15.

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[4] Under 29 C.F.R. §1910.95, an 8-hour time-weighted average sound level of 90 dBA is the permitted noise exposure. 29 C.F.R §1910.95, table G-16. The administrative law judge emphasized, however, that as the results of the dosimeter testing are an average, an individual may be exposed to noise levels greater than the average during the 8-hour test period. Decision and Order at 15.

We reject employer's contention of error with regard to Dr. Chen's opinion. The administrative law judge may reject a medical opinion, offered to rebut the Section 20(a) presumption, if he finds that the physician lacked full knowledge of the circumstances regarding the alleged work injury, or it is otherwise based on an improper foundation. *See Hampton v. Bethlehem Steel Corp*., 24 BRBS 141 (1990); *Sinclair v. United Food & Commercial Workers,* 23 BRBS 148 (1989). Such an opinion is not "substantial evidence" to the contrary. *See* 33 U.S.C. §920(a); *see generally Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 280 (1990). In this case, the administrative law judge rationally rejected Dr. Chen's opinion for lack of knowledge concerning the degree of claimant's noise exposure at the work place, *see Hampton*, 24 BRBS 141, and employer has not raised any reversible error in the administrative law judge's consideration of Dr. Chen's opinion. Therefore, as the administrative law judge rationally found that employer did not rebut the Section 20(a) presumption, we affirm the administrative law judge's finding that claimant's hearing loss is work-related.[5] As employer does not otherwise challenge the award of benefits, we affirm the administrative law judge's award of benefits for a 32.5 percent binaural impairment.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[5] Assuming, *arguendo,* that employer's production of Dr. Chen's opinion was sufficient to meet employer's burden under Section 20(a), the outcome of this case would not be altered. As the administrative law judge rationally rejected Dr. Chen's opinion, which is the only evidence of a non-work related hearing loss, the only credible evidence would support a work-related loss.