BRB No. 07-0539

J.G.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CERES GULF, INCORPORTAED	)	DATE ISSUED: 02/29/2008
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Arthur J. Brewster and Edward S. Rapier, Metairie, Louisiana, for claimant.

Lawrence P. Postol (Seyfarth Shaw LLP), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2006-LHC-1173) of Administrative Law Judge C. Richard Avery 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant was employed as a longshoreman for various employers between 1968 and his retirement in 1997. In 1999, claimant sought and received an award of benefits from the Veterans Administration for a hearing loss related to his service in the United States military during the 1960's. In 2004, claimant filed a claim against employer, who was claimant's last maritime employer, for hearing loss benefits under the Act. In his Decision and Order, the administrative law judge found that claimant failed to establish the existence of working conditions with employer which could have caused his hearing

loss, and thus failed to establish a *prima facie* case sufficient to invoke the presumption of causation under Section 20(a) of the Act, 33 U.S.C. §920(a). Assuming, *arguendo*, that claimant had met his burden so that he would be entitled to invocation of the Section 20(a) presumption, the administrative law judge found that employer established rebuttal of the presumption and that claimant did not thereafter establish causation based on the record as a whole.

On appeal, claimant contends that the administrative law judge erred in finding that he is not entitled to invocation of the Section 20(a) presumption and by failing to find that his hearing loss was related to his employment with employer. Employer responds, urging affirmance of the administrative law judge's decision.

It is well-established that in order to establish a *prima facie* case, claimant bears the burden of demonstrating the existence of an injury or harm and that a work-related accident occurred or working conditions existed which could have caused or aggravated that harm. *See Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *see generally U.S. Industries/Federal Sheet Metal, Inc., v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). It is claimant's burden to establish each element of his *prima facie* case, *see O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994), and a claimant's credible testimony alone may establish the working conditions element. *See generally Manship v. Norfolk & W. Ry. Co.*, 30 BRBS 175 (1996); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990). Once claimant has established his *prima facie* case, he is entitled to invocation of the Section 20(a) presumption linking his harm to his employment. *See Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Gooden*, 135 F.3d 1066, 32 BRBS 59(CRT); *O'Kelley*, 34 BRBS 39.

In the instant case, claimant asserted that he was exposed to injurious noise while working for employer; specifically, claimant averred that, while working for employer seventy-five percent of the time as a spotter, he was required to yell in order to be heard by his co-workers, and that, while working the remaining twenty-five percent of the time as a carpenter, he was exposed to noise generated by chainsaws and hammers. The administrative law judge, after discussing claimant's testimony at length, found his testimony was not credible. The administrative law judge specifically found that claimant had reported no occupational noise exposure when applying for compensation from the Veterans Administration in 1999,[1] that claimant informed Mr. Bode, an

[1] Claimant's application for benefits from the Veterans Administration states that claimant was exposed to noise from tanks and machine guns while in the United States Army during the 1960's, and that claimant reported that his hearing problems began while in the military. *See* CX 4 at 10. This document further states that claimant reported no occupational noise exposure. *Id.*

audiologist, that he worked for an employer other than the employer named here, and that employer established that it did not have a need for work performed by carpenters during the period claimed by claimant.[2] Decision and Order at 13 – 14. Considering the lack of credibility in claimant's testimony in this regard, the administrative law judge concluded that claimant's sole remaining assertion, *i.e.*, that he and his co-workers were required to yell in order to be heard, was not persuasive enough to establish his exposure to noise while working for employer. *Id.* at 14.

Based upon his credibility findings, the administrative law judge concluded that claimant failed to establish that working conditions existed at employer which could have caused his hearing loss and that he therefore failed to invoke the Section 20(a) presumption. In adjudicating a claim, it is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses, *see Calbeck v. Strachan Shipping* Co., 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961), and the administrative law judge's credibility determinations are not to be disturbed unless they are inherently incredible or patently unreasonable. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). In the instant case, the administrative law judge considered, *inter alia*, claimant's prior statements regarding his exposure to noise and his testimony regarding his purported employment duties while working for employer and fully explained his determination that claimant lacked credibility. As the administrative law judge's credibility determination is rational, it is affirmed. *Id.* We therefore affirm the administrative law judge's determination that claimant failed to establish the existence of working conditions which could have caused his hearing loss.[3] *See, e.g., Rochester v. George Washington Univ.*, 30 BRBS 233 (1997); *Bolden*, 30 BRBS at 73. As claimant failed to establish an essential element of his *prima facie* case, the administrative law judge's finding that Section 20(a) was not invoked is affirmed. *See U.S. Industries*, 455 U.S. 608, 14 BRBS 631; *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27(CRT) (9th Cir. 1988).

[2] Specifically, Mr. Daigre, employer's terminal superintendent, testified that his review of employer's 1996 – 1997 records revealed that during the period of time when claimant was employed by employer, employer serviced only container and break-bulk vessels, neither of which required the services of a carpenter. Tr. at 92 – 97.

[3] We reject claimant's contention that the testimony of Dr. Seidemann supports a finding that claimant established the working conditions element of his *prima facie* case since, as claimant acknowledges in his brief, that physician did not conduct a noise study of employer's facility during the period of claimant's employment there. *See* Clt's br. at 10.

In addition, the administrative law judge determined that assuming, *arguendo*, claimant established his *prima facie* case, the testimony of Dr. Seidemann was sufficient to rebut the Section 20(a) presumption. Upon invocation of the presumption, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Conoco,* 194 F.3d 684, 33 BRBS 187(CRT); *Gooden,* 135 F.3d 1066, 32 BRBS 59(CRT); S*winton v. J. Frank Kelley, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *O'Kelley*, 34 BRBS 39. If the administrative law judge finds that the Section 20(a) presumption is rebutted, the administrative law judge must weigh all of the evidence and resolve the causation issue based on the record as a whole, with claimant bearing the burden of persuasion. *Id.; see also Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990). In finding that employer rebutted the presumption, the administrative law judge relied on the opinion of Dr. Seidemann, who stated within a reasonable degree of medical certainty that claimant did not have an occupational noise-induced hearing loss. EX 16 at 17 – 18. As this opinion constitutes substantial evidence sufficient to rebut the presumption, we affirm the administrative law judge's finding that the Section 20(a) presumption, if invoked, is rebutted.[4] *See O'Kelley*, 34 BRBS 39; *Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988). Moreover, we reject claimant's summary contention that the record as a whole supports a finding of causation; the administrative law judge discussed the relevant evidence and rationally concluded that claimant failed to establish a causal relationship between his hearing loss and his employment with employer. Decision and Order at 15. We therefore affirm the administrative law judge's determination that claimant's hearing loss is unrelated to his employment with employer.

[4] Contrary to claimant's assertion on appeal, employer is not required to establish another agency of causation in order to rebut the presumption. *See Stevens v. Todd Pacific Shipyards*, 14 BRBS 626 (1982)(Kalaris, J., concurring and dissenting), *aff'd mem.*, 722 F.2d 747 (9th Cir. 1983), *cert. denied*, 467 U.S. 1243 (1984).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge