BRB No. 91-165

JOHN J. HAUF	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:
BETHLEHEM STEEL CORPORATION	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Eric Feirtag, Administrative Law Judge, United States Department of Labor.

Bernard G. Link, Lutherville, Maryland, for claimant.

Richard W. Scheiner (Semmes, Bowen & Semmes), Baltimore, Maryland, for employer.

Before: SMITH and DOLDER, Administrative Appeals Judges, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order (89-LHC-2663) of Administrative Law Judge Eric Feirtag awarding benefits 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, who works for employer as a welder, had been employed at employer's shipyard for 23 years at the time of the hearing, during which time he has been exposed to loud noise. Claimant underwent audiometric testing which indicated he suffers from a hearing loss. Claimant subsequently filed a claim for benefits under the Act, alleging that his hearing loss is work-related.

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

The administrative law judge found, based on the audiometric test given by audiologist

Stephen Seipp on May 8, 1990, that claimant has a binaural impairment of 17.8 percent. The administrative law judge further found that, based on the Section 20(a), 33 U.S.C. §920(a) presumption, claimant's testimony that he was exposed to substantial amounts of loud noise throughout his career with employer, and the uncontradicted statements by Mr. Seipp and Dr. Dole Baker that the hearing impairments they detected were consistent with hearing loss resulting from noise exposure, claimant's hearing loss arose out of his employment with employer. In addition, the administrative law judge rejected employer's evidence that the level of noise exposure at the shipyard and the ear protection claimant was provided with produced a work environment devoid of injurious noise, finding that this evidence did not rebut the Section 20(a) presumption. Thus, the administrative law judge awarded claimant benefits under Section 8(c)(13), 33 U.S.C. §908(c)(13), for a 17.8 percent binaural impairment.

On appeal, employer contends that the administrative law judge erred in failing to find that the testimony of its Director of Occupational Health, Mr. Toothman, either deprived claimant of his entitlement to the Section 20(a) presumption or rebutted the Section 20(a) presumption and constituted substantial evidence that the noise level at the shipyard did not produce sufficient noise to cause claimant's hearing loss. Employer asserts that Mr. Toothman performed surveys at employer's shipyard which indicate that an employee who wore hearing protection, as claimant testified he did for his entire career, *see* Tr. at 37-39, was fully protected from injurious noise and could not have sustained his hearing loss due to noise exposure at the shipyard. Employer noted that Mr. Toothman testified that use of hearing protection devices attenuates the noise levels reaching the human ear to levels permitted by the Occupational Safety and Health Act (OSHA). Claimant responds, urging affirmance of the administrative law judge's Decision and Order.

We affirm the administrative law judge's award of benefits. Contrary to employer's contention, claimant is entitled to the Section 20(a) presumption, as he has established that he suffered a harm and that working conditions existed which could have caused the harm. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). In the instant case, the audiogram results indicate that claimant suffers from a hearing impairment, and claimant's testimony that he was exposed to loud noise at the shipyard for 23 years provides a basis for invocation of the presumption. *Id.* Mr. Seipp also testified in a post-hearing deposition that, because claimant worked in the shipyard for approximately 24 years as a welder in a noisy environment and had no other significant exposures to loud noise, he believed claimant's

hearing loss is work-related.[1] Dep at 16. Based on this evidence, therefore, the administrative law judge's invocation of the Section 20(a) presumption is affirmed. *Hampton v. Bethlehem Steel Corp.* 24 BRBS 141 (1990).

Once the presumption is invoked, employer may rebut it by producing facts to show that a claimant's employment did not cause, aggravate or contribute to his injury. *Peterson v. General Dynamics Corp.*, 25 BRBS 71, 78 (1991), *aff'd sub nom. Insurance Company of North America v. U.S. Dept. Labor*, 969 F.2d 1400, 26 BRBS 14 (CRT) (2d Cir. 1992), *cert. denied,* 113 S.Ct. 1253 (1993); *Obert v. John T. Clark and Son of Maryland*, 23 BRBS 157 (1990). Regarding the facts herein, Mr. Toothman's testimony is inadequate to rebut the Section 20(a) presumption. In the first instance, the Board has never held that conformance with OSHA standards is sufficient to rebut the Section 20(a) presumption. Further, while Mr. Toothman testified in detail regarding employer's efforts to monitor noise levels and shield its employees from injurious noise exposure by providing them with hearing protection devices, Tr. at 74-88, he did not state that claimant's work environment did not contribute to, aggravate or cause claimant's hearing loss; he merely opined that claimant was adequately protected at work from noise. Tr. at 87-88. Thus, this testimony does not remove claimant's work environment as a cause of his hearing loss and is therefore insufficient to rebut the Section 20(a) presumption.[2] *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92, 96 (1991); *Peterson*, 25 BRBS at 78. We therefore affirm the administrative law judge's finding that claimant is entitled to benefits for a work-related hearing loss, as employer failed to rebut the Section 20(a) presumption and sever the causal connection between claimant's injury and his employment.

[1] In addition, Dr. Baker testified at the hearing that the hearing loss he detected in his examinations was compatible with noise exposure. Tr. at 58. Dr. Baker commented that if he was presented with evidence that claimant's hearing loss was not due to his exposure to noise at the shipyard, he would have to assume it came from somewhere else; he stated, however, that he had not seen such evidence. Tr. at 60.

[2] In light of our holding that Mr. Toothman's testimony is inadequate to rebut the Section 20(a) presumption, we need not consider employer's argument regarding Mr. Seipp's opinion of the effectiveness of the hearing protection devices claimant wore at the shipyard.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge