BRB No. 01-0826

NICHOLAS CALISE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
UNIVERSAL MARITIME SERVICE CORPORATION	)	DATE ISSUED: July 17, 2002
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and Order of Denial of Motion for Reconsideration of Ralph A. Romano, United States Department of Labor.

James R. Campbell, Middle Island, New York, for claimant.

Christopher J. Field (Field, Womack & Kawczynski, LLC), South Amboy, New Jersey, for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order and Order of Denial of Motion for Reconsideration (99-LHC-2636) of Administrative Law Judge Ralph A. Romano 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 voluntary retiree, sought benefits under the Act for a noise-induced hearing loss allegedly sustained during the course of his employment with employer, based on an audiogram dated October 15, 1997, which revealed a 17.3 percent binaural hearing loss. Claimant began working as a longshoreman in 1960 and retired on December 31, 1989. Throughout his years on the waterfront, claimant testified he worked in a noisy environment, performing various functions, including that of a holdman and a hustler driver. Tr. at 36, 37.

The record contains five audiograms. The first, administered on May 24, 1967, revealed

normal hearing in the right ear and a high frequency left hearing loss, essentially rated as zero percent. CX 5 at 10-11; *see also* EX 11 at 23-24. The second, administered on June 3, 1985, showed a right ear high frequency hearing loss and progression of the high frequency loss in the left ear. CX 5 at 11. The third, administered on November 12, 1996, by Dr. Kantu, showed a 6.875 percent binaural hearing loss. EX 7, 11 at 28. The fourth, administered on October 15, 1997, by Dr. Matthews, showed a work-related 17.3 percent binaural hearing loss. CX 2. The fifth, administered by Dr. Katz on March 16, 1999, showed a 10.3 percent binaural impairment. EX 3.

In his Decision and Order, the administrative law judge found that claimant was entitled to invocation of the presumption at Section 20(a) of the Act, 33 U.S.C. §920(a), as claimant testified to his exposure to loud noise with employer, and Dr. Matthews stated that some of claimant's hearing loss is due to work-related exposure to noise. CX 2. The administrative law judge then determined that employer established rebuttal of the Section 20(a) presumption, based on the opinion of Dr. Katz that claimant's hearing loss is not caused by work exposure to noise, due to the asymmetric loss shown on the audiograms and the progression of the hearing loss following claimant's retirement. On weighing the evidence of record as a whole, the administrative law judge credited the opinion of Dr. Katz over that of Dr. Matthews, and accordingly denied benefits. The administrative law judge summarily denied claimant's for reconsideration. On appeal, claimant challenges the administrative law judge's denial of benefits, and employer responds, urging affirmance.

Where, as in the instant 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 it with substantial countervailing 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); *Meehan Serv. Seaway Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 118 S.Ct. 1301 (1998); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

Claimant contends the administrative law judge erred in relying on Dr. Katz's opinion to rebut the Section 20(a) presumption, because it is based on claimant's "self-diagnosis" of worsening hearing in the years following claimant's retirement. Moreover, claimant contends that Dr. Katz's reasoning is faulty as it fails to account for the worsening in claimant's hearing between the 1967 and 1985 audiograms, administered while claimant was still working. Contrary to claimant's contention, Dr. Katz's opinion is not based solely on claimant's "self-diagnosis" of increased hearing loss. The progression of claimant's hearing loss is evident from the reported results of the various audiometric tests, and Dr. Katz

discussed this progression in his deposition. EX 11. Dr. Katz also stated that the hearing loss demonstrated on the 1985 audiogram is not work-related because of the asymmetry of the loss and because the loss is a conductive type loss which is not noise-related unless it is due to an explosion. *Id.* at 24-27. Thus, the fact that a greater loss was demonstrated on the 1985 audiogram than on the 1967 audiogram does not demonstrate error in Dr. Katz's reliance on the post-retirement progression of claimant's hearing loss, nor does the mere fact of a demonstrated hearing loss in 1985 establish the work-relatedness of that loss. With regard to the progression of claimant's hearing loss after 1985, Dr. Katz stated it was not work-related, again because of the asymmetric results and because of claimant's age. *Id*. at 30-32. Finally, Dr. Katz's opinion, that claimant's hearing loss is "probably" due to age, is not too equivocal to rebut the Section 20(a) presumption, as he also stated that claimant's hearing loss is not due to work exposure to noise. *See O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000). As claimant has not demonstrated any reversible error in the administrative law judge's finding that employer rebutted the Section 20(a) presumption, we affirm this finding. *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000).

We also affirm the administrative law judge's crediting of Dr. Katz's opinion over that of Dr. Matthews, based on the record as a whole, as the administrative law judge is entitled to determine the relative weight to be accorded the physicians' opinions. *See generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). The administrative law judge rationally accorded greater weight to Dr. Katz's opinion as he accounted for the post-retirement progression of claimant's hearing loss, whereas Dr. Matthews did not. *See generally Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151(CRT) (1993). The administrative law judge's finding that claimant failed to establish the work-relatedness of his hearing loss therefore is affirmed.[1] *Coffey*, 34 BRBS 85.

Accordingly, the administrative law judge's Decision and Order and Order of Denial of Motion for Reconsideration are affirmed.

SO ORDERED.

[1]Claimant's argument regarding the responsible employer is misplaced. No issue was presented as to whether employer was the potentially responsible employer.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge