BRB No. 99-0864

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| DAVID L. COFFEY | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| MARINE TERMINALS CORPORATION | ) | DATE ISSUED: May 10, 2000 |
| | ) | |
| and | ) | |
| | ) | |
| MAJESTIC INSURANCE COMPANY | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | DECISION and ORDER |

Appeal of the Decision and Order Denying Benefits of Anne Beytin Torkington, Administrative Law Judge, United States Department of Labor.

Peter W. Preston (Pozzi Wilson Atchison, LLP), Portland, Oregon, for claimant.

Dennis R. VavRosky (VavRosky, MacColl, Olson & Pfeifer, PC), Portland, Oregon, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (97-LHC-399) of Administrative Law Anne Beytin Torkington 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 as a longshoreman in the 1950's, and has worked for various

employers performing tasks on automobile ships, bulk carriers and container ships. He testified that he has been exposed to loud noise during the course of his employment on the waterfront. An audiogram performed on September 12, 1986 revealed a 39.4 percent binaural hearing impairment. After an audiogram administered by Dr. Lipman on March 21, 1995 revealed a 44.7 percent binaural hearing impairment, claimant filed a claim for noise-induced hearing loss under Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13), against employer and three other longshore employers.

In her Decision and Order, the administrative law judge determined that claimant's claim was not barred by Section 12 of the Act, 33 U.S.C. §912. The administrative law judge then found that claimant was entitled to invocation of the presumption pursuant to Section 20(a) of the Act, 33 U.S.C. §920(a), and that employer established rebuttal of the presumption based on the opinions of Dr. Hodgson, a board-certified otolaryngologist, and Dr. Hicks and Mr. Fairchild, both audiologists, that claimant's hearing loss is not noise-induced. The administrative law judge thereafter credited the opinions of Dr. Hodgson, Dr. Hicks, and Mr. Fairchild, over the contrary opinion of Dr. Lipman, to find that claimant's hearing loss is not work-related.[1]

On appeal, claimant challenges the administrative law judge's denial of benefits, contending that the administrative law judge erred in finding rebuttal of the Section 20(a) presumption, and in crediting the opinions of Dr. Hodgson, Dr. Hicks and Mr. Fairchild over that of Dr. Lipman. Employer filed a response brief in support of the administrative law judge's denial of benefits, to which claimant replied.

Section 20(a) provides claimant with a presumption that the injury he sustained is causally related to his employment if he establishes a *prima facie* case by showing that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused the harm. *See, e.g.*, *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998). Once claimant has invoked the presumption, the burden shifts to employer to rebut it with substantial countervailing evidence. *Peterson v. General Dynamics Corp.*, 25 BRBS 71, 78 (1991), *aff'd sub nom. Ins. Co. of North America v. U.S. Dep't of*

[1]Lastly, the administrative law judge found that assuming, *arguendo*, claimant has suffered a noise-induced hearing loss, employer was the last responsible employer, as claimant established that he was exposed to loud noise while unloading automobiles for employer on March 16, 1995. This finding is unchallenged on appeal.

*Labor [Peterson]*, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), *cert. denied*, 507 U.S. 909 (1993); *Davison v. Bender Shipbuilding & Repair Co., Inc.*, 30 BRBS 45, 46-47 (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.*, *Meehan Service 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).

In finding that employer rebutted the presumption, the administrative law judge relied on the opinion of Dr. Hodgson. Dr. Hodgson testified that claimant's audiological evaluation displayed none of the characteristics of a noise-induced hearing loss, in that the test results showed too much involvement with low tones, which noise does not affect significantly, without the high tone loss, or noise notch, which is typical of noise-induced hearing loss. *See* Tr. at 151-152; Emp. Ex. 30 at 14-15. Dr. Hodgson explained that claimant's decreased speech discrimination further supported the conclusion that claimant's hearing loss is not due to noise, as this is symptomatic of an inner ear condition, not noise-induced hearing loss. *See* Tr. at 139. Ultimately, Dr. Hodgson concluded that claimant's hearing loss as it existed in 1986 was not due to noise, and that noise played no role in the small progression of claimant's hearing loss since 1986. *Id*. at 140, 142. As Dr. Hodgson's opinion severs the causal link between claimant's exposure to noise and his hearing loss, we affirm the administrative law judge's finding that the Section 20(a) presumption is rebutted. *See Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1 (CRT)(9th Cir. 1999), *aff'g* 31 BRBS 98 (1997); *Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988).

Claimant also challenges the administrative law judge's finding that causation was not established based on the record as whole. Specifically, claimant assigns error to the administrative law judge's decision not to rely upon the testimony of Dr. Lipman. After considering all of the evidence of record, the administrative law judge gave greater weight to the opinion of Dr. Hodgson, as supported by the opinions of Dr. Hicks and Mr. Fairchild, than the opinion of Dr. Lipman.[2] Dr. Lipman opined that claimant's hearing loss is probably

[2]Dr. Hodgson is a physician. Dr. Hicks and Mr. Fairchild are audiologists. Dr. Hicks opined that claimant's hearing loss is most likely the result of aging and a genetic predisposition for hearing loss, and found nothing in the data which suggested noise exposure as a significant contributor to his present hearing loss. *See* Jones Oregon Ex. 18; Emp. Ex. 32 at 12. Mr. Fairchild stated that claimant's level of speech discrimination and the pure tone testing results combine to rule out noise as a cause of claimant's hearing loss. *See* Emp. Ex. 32 at 27-28.

due to a combination of the aging process and genetic factors, but that exposure to noise at work also contributed to his hearing loss. *See* Cl. Ex. 14; Tr. at 44, 60. The administrative law judge found Dr. Lipman's opinion to be conclusory and not well supported, as he did not review the audiograms from 1985, 1990 or May 1995, and, unlike Dr. Hodgson, did not discuss other factors such as non-noise notch audiogram patterns, speech reception thresholds and speech discrimination results. *See* Decision and Order at 15. By contrast, the administrative law judge found Dr. Hodgson's opinion more persuasive as he, like Dr. Hicks and Mr. Fairchild, examined all the audiograms and relied on multiple factors in concluding that claimant's hearing loss is not due to noise. As the administrative law judge acted within his discretion in crediting Dr. Hodgson's opinion over that of Dr. Lipman and as Dr. Hodgson's opinion supports the administrative law judge's conclusion that claimant's hearing loss is not work-related, we affirm the administrative law judge's determination that claimant's hearing loss is unrelated to his employment. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge