BRB No. 03-0222

JOSEPH P. RABLE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RAG CUMBERLAND RESOURCES, L.P.	)	DATE ISSUED: Nov. 25, 2003
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits (2001-LHC-3139) 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] Since 1994, he has worked in employer's harbor facility as both a train operator and a dockman. Claimant underwent audiometric testing on February 10, 2000, conducted by Dr. Oliverio, which revealed a binaural hearing loss of 31.56 percent. CX 1, 20. Claimant also underwent audiometric testing on September 12, 2001, conducted by Dr. Bell, which revealed a binaural hearing loss of 38.438 percent. CX 2, 21. On December 22, 2000, an audiogram was administered by employer's expert, Dr. Arriaga. This audiogram revealed a binaural hearing loss of 47.82 percent.

In his Decision and Order, the administrative law judge found that claimant was not aware that his hearing loss was work-related until February 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 sufficient evidence to establish rebuttal of the presumption. Concluding, therefore, that claimant's hearing impairment is work-related, the administrative law judge credited the September 12, 2001, audiometric evaluation of a 38.438 binaural hearing loss and awarded 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, 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 produced 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 cause of claimant's hearing loss on the record as a whole. Claimant responds, urging affirmance of the award of benefits.

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[1] From August 15, 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.

[2] Claimant filed two claims for benefits due to work-related hearing loss, one on July 17, 2000 based on Dr. Oliverio's audiometric evaluation of 31.56 percent binaural hearing loss and one on October 18, 2001, based on Dr. Bell's audiometric evaluation of 38.438 percent binaural hearing loss. CX 1, 2.

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 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 the entire resulting disability is compensable, and employer is liable for the entire resulting injury.[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 avers that the Section 20(a) presumption is rebutted based on noise surveys performed at its harbor facility between 1997 and 2002, and the medical opinion from Dr. Arriaga, 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 these studies show that the highest dosimeter reading for a dockman was 82.2 dBA, which is below OSHA exposure

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[3] Claimant presented evidence of a hearing loss pre-existing the loss for which he sought compensation. An audiogram was administered on August 9, 1977, in connection with a pre-employment physical. CX 5, 6; EX 3. The second audiogram, administered on August 11, 1988, showed a 19 percent binaural hearing loss. CX 7; EX 4. Claimant began wearing a hearing aid after this audiogram. Tr. at 46. Claimant also underwent audiometric testing on January 10 and 23, 1991, April 22, 1993, and November 17, 1999. CX 8, 9, 10; EX 5, 6, 7, 9. Claimant began wearing binaural hearing aids after the 1999 audiogram. Tr. 47, 55.

regulations. EX 15; 29 C.F.R.§1910.95.[4] The administrative law judge found the noise surveys insufficient to rebut the Section 20(a) presumption because 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. Moreover, 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. CX 11, 12; EX 15. Consequently, the administrative law judge rationally concluded that employer's noise surveys constituted insufficient evidence to rebut the presumed causal relationship between claimant's hearing loss and his employment. Moreover, the noise surveys do not cover all 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 as a dockman. *Damiano v. Global Terminal & Container Service*, 32 BRBS 261 (1998). 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, we affirm the finding. *See Everson v. Stevedoring Services of America*, 33 BRBS 149 (1999); *Damanio*, 32 BRBS at 263.

Employer also argues that Dr. Arriaga's opinion severs the causal relationship between claimant's hearing loss and his employment. Dr. Arriaga stated that claimant's employment as a dockman did not significantly contribute to claimant's hearing loss, and that the asymmetry in the hearing loss is due to claimant's 30-year history of recreational gun exposure. EX 12; 13 at 13. Dr. Arriaga opined that only 25.38 percent of claimant's hearing loss is multifactorial, and that the progression of claimant's hearing loss is due to age. EX 13 at 18-19. In discounting occupational noise as a significant cause of claimant's hearing loss, Dr. Arriaga stated that he had relied on claimant's prior statements that he had no significant noise exposure in his position as a dockman. Dr. Arriaga also relied on employer's December 1998 noise survey reflecting that another dockman was exposed to sound levels of only 63.1 dBA. EX 12 at 2.

In finding Dr. Arriaga's opinion insufficient to establish rebuttal, the administrative law judge reiterated that he found credible claimant's testimony regarding his exposure to noise in his duties as a train operator and dockman. Decision and Order

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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.

at 12, 14.[5] Additionally, the administrative law judge stated that inasmuch as he had determined from employer's noise studies that other dockmen were exposed to sound levels as high as 89.5dBA, the 63.1dBA on which Dr. Arriaga based his opinion that claimant's hearing loss was not work-related is flawed. Decision and Order at 14.[6] Next, the administrative law judge found that, although Dr. Arriaga identified a gun-related component and an age-related component to claimant's hearing loss, Dr. Arriaga did not establish that claimant's remaining hearing loss was not caused or aggravated to any degree by his employment. Decision and Order at 14-15. Therefore, the administrative law judge determined that employer did not submit substantial evidence severing the causal relationship between claimant's hearing loss and his employment with employer.

We reject employer's contentions of error with regard to Dr. Arriaga's opinion. The administrative law judge did not abuse his discretion in crediting claimant's testimony despite its inconsistency with the evidence adduced in the state workers' compensation proceeding, as it is not "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). The administrative law judge rationally rejected Dr. Arriaga's opinion for lack of knowledge concerning the degree of claimant's noise exposure. *See Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990). Moreover, as Dr. Arriaga did not state that none of claimant's hearing loss was caused or aggravated by his employment, the administrative law judge properly found Dr. Arriaga's opinion insufficient to rebut the Section 20(a) presumption. *Damiano*, 32 BRBS at 263-264. Accordingly, we affirm the administrative law judge's finding that employer did not rebut the Section 20(a) presumption. As employer does not otherwise challenge the award of benefits, we affirm the administrative law judge's award of benefits for a 38.438 percent binaural impairment.

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[5] In this regard, employer argues that claimant's hearing testimony regarding noisy conditions cannot be credited. Claimant testified that he had not noticed the noise at the harbor because his previous work at the preparation plant was extremely noisy. This testimony was offered to "explain" claimant's prior inconsistent statements to health care providers and in his May 2002 state workers' compensation hearing, wherein claimant testified that his work as a dockman was not noisy.

[6] In his deposition, Dr. Arriaga acknowledged that he considered only whether claimant's duties as a dockman had contributed to claimant's sensorineural hearing loss. The doctor explained that claimant never indicated to him upon questioning that he worked as a train operator. EX 13 at 53. The administrative law judge credited claimant's testimony that he was exposed to loud noise in this position as well. Decision and Order at 12.

Claimant's counsel has filed a fee petition for work performed before the Board in connection with this appeal. Counsel requests a fee of $2,105, representing 1.6 hours of attorney services at an hourly rate of $200, and 11.9 hours of attorney services at an hourly rate of $150. Employer has not responded to the fee petition. Since claimant successfully defended his award of benefits on appeal, counsel is entitled to a fee award payable by employer. 33 U.S.C. §928. We award the requested fee, as it is reasonably commensurate with the necessary work performed in this case. *See generally Smith v. Alter Barge Line, Inc.*, 30 BRBS 87, 89 (1996); *Love v. Owens-Corning Fiberglass Co.*, 27 BRBS 148 (1993).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed. Claimant's counsel is awarded an attorney's fee of $2,105, to be paid directly to counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge