BRB No. 97-1844

ANTHONY PEPE	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
	)	
v.	)	
	)	
UNIVERSAL MARITIME SERVICE CORPORATION	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Samuel A. Denburg (Baker, Garber, Duffy & Pedersen, P.C.), Hoboken, New Jersey, for claimant.

Christopher J. Field (Weber Goldstein Greenberg & Gallagher), Jersey City, New Jersey, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (96-LHC-1714) of Administrative Law Judge Robert D. Kaplan 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 checker, worked for employer from September 1981 through March 1988, when he retired. He filed a claim for hearing loss after audiometric testing administered by Dr. Matthews in 1995 revealed that he suffered a 38.8

percent binaural hearing loss. A subsequent 1996 audiogram administered by Dr. Katz revealed a 34.7 percent binaural hearing loss. The administrative law judge invoked the presumption pursuant to Section 20(a) of the Act, 33 U.S.C. §920(a), after finding that claimant established his *prima facie* case, and he further found that employer did not rebut the presumption. Consequently, the administrative law judge awarded claimant benefits for a 36.75 percent binaural hearing loss after averaging the results of the two audiograms.

On appeal, employer challenges the administrative law judge's findings regarding causation and the extent of claimant's hearing loss. Claimant responds, urging affirmance.

After review of the Decision and Order in light of the relevant evidence and employer's arguments on appeal, we affirm the administrative law judge's finding that claimant's hearing loss is work-related because it is rational, supported by substantial evidence, and in accordance with applicable law. *See O'Keeffe*, 380 U.S. at 359. 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, aggravated, or accelerated the ultimate disability. *Manship v. Norfolk & Western Railway Co.*, 30 BRBS 175 (1996); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). 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 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 causation has been established. *See Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985).

We affirm the administrative law judge's finding that the evidence is sufficient to invoke the Section 20(a) presumption. Claimant established that he suffered a harm, a hearing loss shown by both audiograms of record, and that working conditions existed which could have caused the harm, *i.e.*, claimant's testimony concerning loud workplace noise. *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989). The administrative law judge acted within his discretion in crediting claimant's testimony that the noise at some locations was loud enough to require the employees to raise their voices to be heard against the contrary testimony of Mr. Pizzariello, employer's general manager, which the administrative law judge found not as firm and unequivocal as claimant's testimony on this subject. *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206 (CRT)(9th

Cir. 1998); *Jones Stevedoring Co. v. Director, OWCP*, 133 F.3d 683, 31 BRBS 178 (CRT)(9th Cir. 1997); Decision and Order at 7; Tr. at 28, 30-36, 44-46, 48-49.

The administrative law judge's finding that employer did not establish rebuttal of the Section 20(a) presumption is also affirmed. The administrative law judge properly found that the noise survey performed by Mr. Bragg in 1993 is insufficient to establish rebuttal, as it does not establish that claimant was not exposed to loud noise at any time during his employment with employer, which ended in 1988. Decision and Order at 8-9; Emp. Ex. 8 at 35, 66. The survey establishes only that during 1993, the level of noise in some of the places where claimant had previously worked did not exceed that allowed by the Occupational Health and Safety Administration, *i.e.*, over 90 decibels per eight hours. The administrative law judge also found that the survey did not cover all of the areas and circumstances in which claimant testified he worked; for example, inside a container while a hi-lo was operating. Decision and Order at 8-9; Emp. Ex. 8 at 61-63. Moreover, the administrative law judge acted within his discretion in finding the opinion of Dr. Katz insufficient to establish rebuttal of the Section 20(a) presumption. Decision and Order at 8. Although Dr. Katz stated that claimant's loss of hearing was due to a factor besides noise exposure due to its asymmetry, the administrative law judge properly found that Dr. Katz did not rule out some loss caused by noise exposure. Emp. Ex. 7 at 60-62. Additionally, the administrative law judge rationally found that the physician's opinion was insufficient to rebut the Section 20(a) presumption because it was based in part on the 1993 Bragg noise survey. Decision and Order at 8-9. Inasmuch as the administrative law judge rationally determined that employer did not introduce evidence sufficient to establish rebuttal of the Section 20(a) presumption, *see Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976), his conclusion that claimant's hearing loss is causally related to his employment is affirmed. *See generally Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995).

The administrative law judge's findings regarding the extent of claimant's hearing loss are affirmed. After considering the relevant opinions of Drs. Katz and Matthews, the administrative law judge acted within his discretion in averaging the results of the two audiograms as they were so close to each other. *See generally Roberts v. Alabama Dry Dock & Shipbuilding Corp.*, 30 BRBS 229 (1997); Decision and Order at 6; Cl. Ex. 2; Emp. Exs. 3, 7. The fact that Dr. Katz testified that Dr. Matthews did not perform a complete audiological evaluation did not require the administrative law judge to reject Dr. Matthews's rating, as the weighing of the medical evidence is within the administrative law judge's authority. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); Emp. Ex. 7 at 34. Inasmuch as employer failed to establish that the administrative law judge erred in deciding to average the two audiograms of record,

we affirm his finding that claimant sustained a 36.75 percent binaural hearing loss based on his averaging. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge