BRB No. 92-2358

HOLLIS W. BRIDIER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ALABAMA DRY DOCK AND SHIPBUILDING CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Quentin P. McColgin, Administrative Law Judge, United States Department of Labor.

John D. Gibbons (Gardner, Middlebrooks & Fleming, P.C.), Mobile, Alabama, for claimant.

Walter R. Meigs, Mobile, Alabama, for employer.

Traci M. Castille (Franke, Rainey & Salloum), Gulfport, Mississippi, for carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (90-LHC-1487) of Administrative Law Judge Quentin P. McColgin 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 worked for employer as an electric welder from 1944 until the yard closed in 1988, except for two years of military service between 1953 and 1955. During his employment, claimant was exposed to noise levels which he characterized as very loud. In December 1963, Dr. Mueller

diagnosed claimant as having otosclerosis, a sex-linked hereditary disease involving the deposit of spongy bone tissue in the ear, which produces conductive hearing loss. In 1967 and 1973, claimant underwent surgery for this condition, which involved the removal of the stapes bones in his ears.[1] Claimant testified that his hearing improved initially after the surgery, but then deteriorated again. Tr. at 94. Claimant subsequently developed sensorineural hearing loss. Claimant testified that he started to wear hearing aids in 1981 and has since consistently used hearing protection at work. Tr. at 92-93. Claimant further stated that he remembered receiving an audiogram shortly before the yard closed down in 1988 but did not recall receiving audiograms administered by employer in 1982 and 1983. Tr. at 21, 23, 25, 102-107, 109. Claimant filed a claim for an 80.9 percent binaural hearing loss under Section 8(c)(13), 33 U.S.C. §908(c)(13), on November 11, 1986, based on audiometric testing performed on October 24, 1986.

The administrative law judge found that the evidence established that claimant received documents from employer on October 19, 1983, sufficient to satisfy the requirements of Section 8(c)(13)(D), 33 U.S.C. §908(c)(13)(D)(1988), so as to trigger the running of the time periods under Sections 12 and 13 of the Act, 33 U.S.C. §§912, 913. The administrative law judge determined that claimant's claim was not barred by Section 12 of the Act, as it fell within the Section 12(d)(1) exception, since employer had knowledge of the injury. 33 U.S.C. §912(d)(1). The administrative law judge concluded, however, that the claim was barred under Section 13 as it was filed on November 11, 1986, three years after October 19, 1983, the date claimant received an audiogram and accompanying report and should have been aware of his work-related hearing loss. The administrative law judge further found that the Section 13 statutory limitations period was not tolled under Section 30, 33 U.S.C. §930, by employer's failure to file a First Report of Injury beyond September 24, 1984, inasmuch as the 1984 Amendments, which became effective on that date, eliminated the requirement of filing a Section 30 report for no time-loss injuries. With regard to causation, he also found that employer had rebutted the Section 20(a), 33 U.S.C. §920(a), presumption and, upon weighing the evidence as a whole, concluded that claimant failed to establish that his hearing loss is attributable to work-related noise exposure. The administrative law judge, therefore, denied claimant both disability compensation under Section 8(c)(13) and medical benefits under Section 7, 33 U.S.C. §907.

On appeal, claimant contends that the administrative law judge erred in finding the November 11, 1986, claim untimely under Section 13, arguing that the documents he received from employer in October 1983 do not constitute an audiogram and accompanying report within the meaning of Section 8(c)(13)(D). Claimant also contends that as employer did not file a First Report of Injury, the limitations period was tolled under Section 30(a), asserting that the 1984 Amendments do not apply to this issue. Finally, claimant argues that the administrative law judge erred in concluding that his hearing loss is not work-related. Employer responds, urging that the administrative law judge's findings with regard to timeliness and causation be affirmed. In the alternative, employer contends that it is entitled to Section 8(f), 33 U.S.C. §908(f), relief. The

[1]The records relating to this surgery are not in evidence as they were apparently destroyed after 10 years.

carrier has also filed a separate brief, urging affirmance.[2] Claimant replies, reiterating his original arguments.

TIMELINESS

Claimant first argues that the administrative law judge erred in finding the claim barred under Section 13, asserting that the documents which the administrative law judge found he received on October 19, 1983, are insufficient to satisfy the audiogram and accompanying report requirement of Section 8(c)(13)(D). Section 8(c)(13)(D) of the Act provides that, in claims for a loss of hearing, the time period of Section 13 will not commence "until the employee has received an audiogram, with the accompanying report thereon, which indicates that the employee has suffered a loss of hearing." 33 U.S.C. §908(c)(13)(D)(1988). *See* 20 C.F.R. §702.221(b); *Vaughn v. Ingalls Shipbuilding, Inc.*, 26 BRBS 27, 29 (1992), *aff'd on recon. en banc*, 28 BRBS 129 (1994). Once claimant receives a copy of the audiogram and accompanying report, a claim must be filed within one year of the date that claimant is or should have been aware that his hearing loss is work-related. 33 U.S.C. §913(a).[3]

In concluding that the documents claimant received on October 19, 1983, started the running of the statute of limitations, the administrative law judge rejected the argument that to satisfy the requirements of Section 8(c)(13)(D), the audiogram must be prepared by an audiologist and must accord with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (3d ed. 1988) (AMA *Guides)*, and the regulation at 20 C.F.R. §702.441. He determined that the stringent criteria of 20 C.F.R. §702.441 are applicable to quantifying the degree of hearing loss and not to whether claimant knew or should have known that he had a hearing loss. The administrative law judge noted that to satisfy the requirements of Section 8(c)(13)(D), the employee must receive both an "audiogram" and an "accompanying report" which indicates that he has suffered a loss of hearing. Accepting the definition of an audiogram provided by audiologist Holston, *i.e.*, a graph expressed numerically or graphically that is used to plot hearing thresholds across a specific range of pitches and frequencies, the administrative law judge determined that the chart documenting claimant's hearing at various frequencies was sufficient to satisfy the audiogram requirement of Section 8(c)(13)(D).

[2]Although the responsible carrier issue was not reached by the administrative law judge because he denied benefits, there apparently is a dispute as to whether self-insured employer or Travelers Insurance Company is liable for claimant's benefits.

[3]The United States Supreme Court has held that occupational hearing loss is not an occupational disease which does not immediately result in disability. *Bath Iron Works Corp. v. Director, OWCP*, 113 S.Ct. 692, 26 BRBS 151 (CRT)(1993). Therefore, the two-year statute of limitations of Section 13(b)(2), which the administrative law judge applied in this case, is not applicable and the claim is subject to the one year limitation period provided in Section 13(a). *See Vaughn v. Ingalls Shipbuilding, Inc.*, 28 BRBS 129 (1994)(*en banc*), *aff'g on other grounds* 26 BRBS 27 (1992).

The administrative law judge's finding that the audiogram claimant received in October 1983 is sufficient to satisfy the requirement of Section 8(c)(13)(D) that an audiogram be provided is affirmed. We agree with the administrative law judge's conclusion that the criteria contained in 20 C.F.R. §702.441 apply only to quantifying the degree of hearing loss and not to the issue of whether claimant knew or should have known that he had a hearing loss under Section 8(c)(13)(D). Section 8(c)(13)(C) of the Act, 33 U.S.C. §8(c)(13)(C), explicitly states that an audiogram shall be presumptive evidence of the amount of hearing loss sustained as of the date thereof only where it was administered by a licensed or certified audiologist or a physician certified in otolaryngology, such audiogram with the report thereon was provided to the employee at the time it was administered, and no contrary audiogram made at that time is provided. The regulation applicable to this provision, 20 C.F.R. §702.441, which parallels the language in the statute, by its own terms indicates that the regulation is applicable to determining the degree of hearing loss. The requirements of Section 8(c)(13)(C) of the Act and 20 C.F.R. §702.441 are thus not related to determinations under Sections 8(c)(13)(D), 12 and 13. Thus, claimant's argument that the October 19, 1983 audiogram was not technically sufficient to satisfy the requirements of Section 8(c)(13)(D) is rejected.

Claimant's alternate argument that the October 1983 documents do not suffice to start the Section 13 statute of limitations running because there is no proof that he received the report within 30 days of the audiogram fails under the same rationale, as this requirement is similarly contained in 20 C.F.R. §702.441(b)(2). In any event, with respect to the circumstances surrounding claimant's receipt of this report, the administrative law judge credited the testimony of Sarah Winn, employer's former medical administrator, LPN, and Hearing Conservationist, who identified the letter in question as one which she prepared, reporting the results of claimant's hearing test given on the same date and comparing it with an audiogram administered to claimant in 1982. She testified that she prepared the report, made copies of it and the audiogram, and gave both to claimant. Ms. Winn stated that claimant's signature at the bottom of the report coupled with the absence of a stamp indicated that claimant had come to the medical department and that she had physically handed him the audiogram and letter. While claimant did not recall receiving the documents, he acknowledged that the signature was his. Inasmuch as the administrative law judge acted within his discretion in concluding that claimant did receive the October 19, 1983 documents, based on the testimony provided by Ms. Winn, this finding is affirmed. *See Konno v. Young Bros. Ltd.*, 28 BRBS 57 (1994); *Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992).

We agree with claimant, however, that the administrative law judge erred in determining that the October 19, 1983, letter which accompanied this audiogram was sufficient to constitute an "accompanying report" under the statute. The letter in question states in pertinent part:

> Generally, you have fair hearing. We show little or no difference in your ability to hear since your audiogram of March 15, 1982. However, you should be aware that your overall hearing is below normal. . . . Therefore you should wear hearing protection at all times you are in work areas.

> Also, we want you to be aware of the regulations on earplugs. According to our noise surveys, you are required to wear earplugs while working. We would be glad to explain what noise levels you are exposed to if you would like to stop by for the information.

RX 23 at 57.

The administrative law judge concluded that Section 8(c)(13)(D) requires "1) an audiogram, 2) an accompanying report, 3) which indicates that the employee has suffered a loss of hearing." Decision and Order at 4. He then found that although the October 19, 1983, letter did not explicitly inform claimant that he has a hearing loss, it did so implicitly by telling him that his hearing was below normal. He then determined that this statement was sufficient to alert claimant that he has suffered a loss of hearing. The administrative law judge further determined that the content of the letter was sufficient to constitute a report, and that accordingly, the time periods contained in Sections 12 and 13 commenced running as of the date of the letter. The administrative law judge found that given the noisy conditions of claimant's employment, informing claimant that his hearing was below normal and advising him that he should wear ear protection and come to the medical department for more details and an explanation, should suffice so that claimant, by exercising reasonable diligence, should have been aware of the relationship between his work and his injury based on the October 19, 1983, documentation.

We reverse the administrative law judge's finding that the October 19, 1983, letter is an "accompanying report" under Section 8(c)(13)(D). The statute does not specify the contents of an "accompanying report," stating only that claimant must receive an audiogram, with an accompanying report which indicates a loss of hearing. The applicable regulation states that "the time for filing a claim does not begin to run until the employee receives an audiogram with the accompanying report which indicates the employee has sustained a hearing loss that is related to his or her employment." 20 C.F.R. §702.221(b). The Board has also recognized that Section 8(c)(13)(D) must be read in conjunction with the requirement for awareness under Sections 12 and 13, as an audiogram generally provides only a measure of the degree of impairment and may not indicate the relationship between its results and claimant's work. Therefore, the Board has held that a claimant is aware of the relationship between his work and his hearing loss, for purposes of Sections 12 and 13, when he receives an audiogram with report and "has knowledge of the causal connection between his work and his loss of hearing." *Larson v. Jones Oregon Stevedoring Co.*, 17 BRBS 205, 208 (1985); *see also Ranks v. Bath Iron Works Corp*., 22 BRBS 301 (1989).[4]

The United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction this case arises, has stated consistently that the regulation at 20 C.F.R. §702.221(b) is a combination of the Section 13(a) requirement that an employee be aware of the relationship between the injury and

[4]While the analysis of the responsible employer issue in *Larson v. Jones Oregon Stevedoring Co.*, 17 BRBS 205 (1985) has been superseded, *see Good v. Ingalls Shipbuilding, Inc.*, 26 BRBS 159 (1992), the awareness analysis contained therein remains valid.

employment and Section 8(c)(13)(D), so that an employee must receive an audiogram with an accompanying report which indicates that he has sustained a loss of hearing related to his or her employment before the time for filing a claim starts to run. *See Alabama Dry Dock & Shipbuilding v. Sowell*, 933 F.2d 1561, 1563 n.2, 24 BRBS 229, 231 n.2 (CRT) (11th Cir. 1991). In *Sowell*, the Eleventh Circuit held that substantial evidence supported the administrative law judge's finding that claimant was not aware of the relationship between his hearing loss and employment until a 1986 diagnosis, where claimant had received a prior 1980 audiogram given to him by his doctor in a sealed envelope, which he never opened, with instructions to take it directly to a hearing aid clinic. In order for the statutory periods to commence, it is thus clear that claimant must receive sufficient information so that he is aware or should be aware that he has an impairment and that it is work-related. In order for an audiogram and report to provide the critical date for commencing the statute of limitations, these documents must contain the relevant information.

Applying this criterion, we conclude that the October 19, 1983, letter, which indicates that claimant has "fair" and "below normal" hearing and is silent as to any employment connection, stating only that due to noise surveys conducted by employer claimant should wear ear plugs, is wholly inadequate.[5] Particularly in view of claimant's longstanding non work-related hearing problems due to an otosclerotic condition for which he had undergone surgery, this letter is insufficient to confer "awareness" of an employment-related hearing loss as contemplated by the statute. Nowhere does the letter state the extent of the loss or relate it to claimant's employment, nor does it provide a basis to find claimant should have made the connection in view of his medical history. The administrative law judge did not account for claimant's history of hearing problems in discussing "awareness," and his conclusion that the letter was sufficient to provide "constructive knowledge" must be reversed.[6] *See* Decision and Order at 6.

[5]The fact that the October 19, 1983, letter fails to state that claimant has a measurable hearing impairment or the degree of the impairment is, in and of itself, problematical. The Courts of Appeals which have addressed the issue of awareness have uniformly held that the limitations period of Section 13(a) does not begin to run until the injured employee becomes aware of the full character, extent, and impact of the harm done to him or her as a result of the employment-related injury, *i.e.*, when he knows he has a compensable injury. *See Duluth, Missabe & Iron Range Ry. Co. v. Director, OWCP*, 43 F.3d 1206 (8th Cir. 1994); *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98 (CRT) (4th Cir. 1991); *Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130 (CRT) (9th Cir. 1991); *Brown v. ITT/Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75 (CRT) (D.C. Cir. 1990); *Brown v. Jacksonville Shipyards Inc.*, 893 F.2d 294, 23 BRBS 22 (CRT) (11th Cir. 1990). In cases involving hearing loss, which fall under the schedule, there is no compensable injury absent evidence of permanent physical impairment. *See, e.g., Lombardi v. General Dynamics Corp.*, 22 BRBS 323, 327 (1989) (in case under 33 U.S.C. §908(c)(23)(1988), voluntary retiree not aware for purposes of Section 13 until aware that work-related condition resulted in permanent physical impairment); *see also Harris v. Todd Pacific Shipyards Corp*, 28 BRBS 254 (1994).

[6]In this regard, we note that the administrative law judge relied on claimant's knowledge of noisy conditions at employer's facility and advice in the letter for claimant to wear ear protection in work

The legislative history relating to Section 8(c)(13)(D) provides additional support for this conclusion that the October 19, 1983, letter is not properly viewed as an "accompanying report." In discussing the presumptive effect to be given audiograms in Section 8(c)(13)(C), the committee report which accompanied S.38 also discussed the requirement that a report accompany the audiogram, stating "the Committee would expect that any report on an audiogram which is provided to an employee be in a form which is clearly understandable to the employee, and to the extent possible, technical and medical terms should be explained on the face of the report." H.R. REP. No. 98-570, *reprinted in* 1984 U.S.C.C.A.N. 2742-2743; *see Mauk v. Northwest Marine Iron Works*, 25 BRBS 118, 123 n.1 (1991). The committee explained that the report is necessary because the employee may want to file a claim for compensation against a previous employer and undertake steps in his current employment to limit his exposure to noise, so as to prevent further detriment to his hearing. *Id.* Viewed in light of these statements, the October 19, 1983, letter which states both that claimant has "fair" hearing and that his overall hearing is "below normal," clearly is, without these, insufficient to start the Section 13 time limitation.

Employer bears the burden of establishing that the claim was untimely filed pursuant to Section 20(b), 33 U.S.C. §920(b). In this case, there is no evidence of record sufficient to establish that claimant was provided with an audiogram and accompanying report which indicated that he had sustained a permanent hearing loss related to his employment at any time prior to the filing of the claim on November 11, 1986.[7] We therefore reverse the administrative law judge's finding that the claim was untimely filed. *See generally Horton v. General Dynamics Corp.*, 20 BRBS 99, 102 (1987); *see also Fortier v. General Dynamics Corp.*, 15 BRBS 4 (1982), *aff'd mem.*, 729 F.2d 1441 (2d Cir. 1983). The claim is timely as a matter of law.[8]

CAUSATION

Claimant also argues on appeal that the administrative law judge erred in finding that employer introduced evidence sufficient to establish rebuttal of the Section 20(a) presumption. Moreover, he asserts that even if rebuttal was established, upon weighing the record as a whole, the

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areas as factors which should have alerted claimant to a relationship between his work and his injury. The Board has held, however, that knowledge of the general hazards of employment is insufficient grounds for finding awareness under Sections 12 and 13. *See Love v. Owens-Corning Fiberglas Co.*, 27 BRBS 148, 151-152 (1993).

[7]Although the claim was filed based on the results of the October 24, 1986, audiogram, the accompanying report to this audiogram was not prepared until March 26, 1991. CX 5.

[8]As we reverse the administrative law judge's finding that the claim is untimely, we need not address claimant's arguments with respect to 33 U.S.C. §930(f). We note, however, that the 1984 Amendments would apply in this case. *See Alabama Dry Dock & Shipbuilding Co. v. Sowell*, 933 F.2d 1561, 1564, 24 BRBS 229, 231 (CRT) (11th Cir. 1991).

evidence establishes that workplace noise contributed to claimant's hearing loss.

The administrative law judge found that claimant was entitled to the Section 20(a) presumption based on the opinions of audiologists Fitch and Holston, which indicated that claimant's hearing loss was, or could have been, the result of exposure to excessive noise. Once the presumption is invoked, employer may rebut it by producing facts to show that 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 Co. of North America v. U.S. Dept of Labor*, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), *cert. denied*, 113 S.Ct. 1253 (1993). In the present case, the administrative law judge found the presumption rebutted by the testimony of Dr. Mueller, describing the overall substance of his opinion as being that claimant's hearing loss is attributable to otosclerosis or the unsuccessful surgery performed to correct that condition. In discussing Dr. Mueller's findings, however, the administrative law judge recognized that Dr. Muller moderated his position somewhat on deposition, in that he "no longer assigned the disease or the effects of the surgery as the exclusive cause of claimant's hearing loss." Decision and Order at 10. The administrative law judge further noted that Dr. Mueller explained that it simply could not be determined whether noise exposure contributed to claimant's hearing loss because neither the amount of claimant's pre-surgery conductive hearing loss nor the amount of noise exposure was quantified.

We hold that the administrative law judge erred in finding Section 20(a) rebutted based on Dr. Mueller's testimony. On deposition, Dr. Mueller testified that claimant's conductive hearing loss acted as "built-in protection" which interfered with transmission of noise from the eardrum to the inner ear, and thus the greater the extent of claimant's conductive hearing loss, the greater the degree of protection from excessive noise levels. He further testified that claimant's sensorineural hearing loss was primarily due to otosclerosis and his subsequent surgery. He also stated, however, that since neither the noise level nor the hearing loss was quantified, the effect of the noise on claimant's condition could not be calculated; thus, whether noise exposure contributed to claimant's hearing loss could not be determined. Inasmuch as Dr. Mueller's testimony specifically acknowledged that workplace noise may have played a part in claimant's hearing loss, his opinion cannot meet employer's burden of demonstrating claimant's work environment did not aggravate or contribute to his hearing loss. *See Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 297, 23 BRBS 22, 24 (CRT)(11th Cir. 1990); *Konno*, 28 BRBS at 62; *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92, 95-96 (1993), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, No. 91-70743 (9th Cir. Sept. 17, 1993). Accordingly, we reverse the administrative law judge's finding that employer rebutted the Section 20(a) presumption. As the presumption was not rebutted, causation is established as a matter of law. The case must be remanded for consideration of any remaining issues.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is reversed, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge