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 Claimant-Petitioner)
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 v.)
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 SEALAND SERVICES, INCORPORATED) DATE ISSUED: 01/28/2008
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 and)
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 CRAWFORD AND COMPANY)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order and Supplemental Decision and Order Awarding Attorney Fees of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Klein Camden, L.L.P.), Norfolk, Virginia, for claimant.

Mark E. Newcomb (Davey & Brogan, P.C.), Norfolk, Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order and Supplemental Decision and Order Awarding Attorney Fees (2006-LHC-0604) of Administrative Law Judge Kenneth A. Krantz 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). The amount of an attorney's fee award is discretionary and will not be set aside unless

shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, a container repairman, was employed by employer from 1970 to 1987 when he was unable to return to work for reasons unrelated to this claim. The parties agreed that during the course of his employment claimant suffered a hearing loss but disagreed as to the percentage of this loss. Claimant sought benefits for a 28.7 percent binaural hearing loss while employer contended claimant's work-related hearing loss is 5.65 percent.

In his Decision and Order, the administrative law judge awarded claimant compensation for a 5.65 percent binaural hearing loss, an assessment pursuant to Section 14(e) of the Act, 33 U.S.C. §914(e), and medical benefits. In addressing claimant's attorney's fee petition,¹ the administrative law judge reduced the requested fee by 20 percent to reflect that claimant was not fully successful. The administrative law judge therefore awarded counsel a fee of \$8,062.82, representing \$7,070.88 for legal services, plus costs of \$991.94.

Claimant appeals, contending the administrative law judge erred in determining the extent of claimant's hearing loss and in awarding a reduced attorney's fee. Employer responds, urging affirmance of the administrative law judge's decisions.

The record contains five audiograms: October 1, 1987; August 9, 1988; April 2, 2003; September 2, 2005; and October 4, 2005. CXs 5, 6. The first four audiograms were administered under the supervision of Dr. Lemel but the identity of the actual technician administering the tests is unknown as is the calibration of the instruments. Only the last test identifies the individual administering the test and the calibration of the equipment, and includes the testing point of 3000 Hz, as utilized in a calculation pursuant to the American Medical Association *Guides to the Evaluation of Permanent Impairment (AMA Guides)*. CX 7. Dr. Lambert, chairman of the Department of Otolaryngology at the Medical University of South Carolina testified that, based upon his review of the audiograms, the results of the 1987 and 1988 test are indicative of a binaural loss of 5.65 percent. HT at 55. He further testified that the audiogram administered on October 4, 2005, indicates a binaural loss of 28.7 percent. *Id.* at 54. He concluded, with 100 percent certainty, that the increase in claimant's hearing loss in the eighteen years between the

¹ Claimant's counsel sought a fee of \$8,838.60, representing 30.27 hours of attorney services at \$250 per hour, 4.75 hours of attorney services at \$200 per hour, and 3.38 hours for paralegal services at \$95 per hour, as well as \$991.94 in costs.

tests was due to the natural effect of aging and not to claimant's work with employer. *Id.* at 48.

The administrative law judge, upon weighing the evidence as a whole, credited Dr. Lambert's opinion that the increase in claimant's hearing loss is not due to his employment, over the opinion of Ms. Martine, an audiologist, that claimant's work-related noise exposure "could have" contributed to the 28.7 percent hearing loss evidenced on the most recent audiogram. The administrative law judge therefore found that the 1987 audiogram is the best measure of claimant's work-related hearing loss. The administrative law judge rejected claimant's contention that he could not credit this audiogram due to the absence of the technician's name, instrument calibration, and results at the 3000 Hz level. The administrative law judge stated that, although such an audiogram is not presumptive evidence of the degree of hearing loss, he could nonetheless credit the audiogram if it is otherwise reliable. Claimant contends that the administrative law judge erred in relying on the Dr. Lambert's interpretation of the 1987 audiogram as it is not in compliance with the *AMA Guides*, as required by Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13).

Section 8(c)(13) of the Act states, "Determinations of loss of hearing shall be made in accordance with the guides for the evaluation of permanent impairment as promulgated and modified from time to time by the American Medical Association." 33 U.S.C. §908(c)(13); *see also* 20 C.F.R. §702.441(d). Certain audiograms may be deemed "presumptive evidence" of the degree of hearing loss,² 33 U.S.C. §908(c)(13)(C), but the administrative law judge properly recognized that audiograms that do not meet the "presumptive evidence" threshold may be credited nonetheless. *See Craig, et al. v. Avondale Industries, Inc.*, 36 BRBS 65 (2002), *aff'g on recon. en banc* 35 BRBS 164 (2001) (*en banc*), *aff'd sub nom. Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003); *Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001); *see also Norwood v. Ingalls Shipbuilding, Inc.*, 26 BRBS 66 (1992) (Stage, C.J., dissenting on other grounds). Claimant, a retiree, is entitled to benefits for hearing loss based on the audiogram which the administrative law judge finds most credibly demonstrates the degree of his impairment. *See Bath Iron Works Corp. v. Director*,

² Under the Act and implementing regulations, an audiogram provides presumptive evidence of the extent of claimant's hearing loss if the following conditions are met: 1) the audiogram was administered by a licensed or certified audiologist or physician; 2) the employee was provided with a copy of the audiogram and the accompanying report within thirty days of the subject audiogram where claimant continues to be exposed to excessive noise levels or within six months if such exposure ceases; and 3) no one produces a contrary audiogram of equal probative value. 33 U.S.C. §908(c)(13)(C); 20 C.F.R. §702.441(b).

OWCP, 506 U.S. 153, 26 BRBS 151(CRT) (1993) (hearing loss due to noise exposure does not progress once that exposure ceases); see *Bruce v. Bath Iron Works Corp.*, 25 BRBS 157 (1991); *Labbe v. Bath Iron Works Corp.*, 24 BRBS 159 (1991) (affirming use of audiogram administered seven years after retirement, as it was the most credible audiogram of record); see also *Steevens*, 35 BRBS at 133 (affirming use of latest audiogram where administrative law judge rationally found that earlier audiograms administered closer to retirement were not as reliable).

We reject claimant's contention that the administrative law judge was precluded from crediting the 1987 audiogram due to its lack of technical compliance with the *AMA Guides*. Dr. Lambert testified as to the reliability of the 1987 audiogram, stating that Dr. Lemel, who oversaw the test, has a fine reputation in the medical community. HT at 44-45. Moreover, he testified that the results of the 1987 and 1988 audiograms are virtually identical, which increases the reliability of the results. *Id.* at 71-72. Thus, the administrative law judge rationally found that the absence of the name of the person who administered the test and of the calibration of the instrument does not negate the probative value of the 1987 audiogram. *Craig*, 36 BRBS at 67.

Moreover, the absence of testing at the 3000 Hz level is not determinative of the audiogram's reliability on the facts of this case. The *AMA Guides* state that the patient's hearing should be tested at the 500, 1000, 2000 and 3000 Hz levels. *AMA Guides*, 5th ed. at 247. Dr. Lambert testified that it is acceptable to substitute the results at the 4000 Hz level when the 3000 Hz level is not tested. HT at 50. He stated that this may have the effect of modestly overstating the person's hearing loss, but that the results are "close enough." *Id.* Contrary to claimant's contention, the Board's decision in *Steevens*, 35 BRBS at 133, does not mandate the rejection of audiograms that lack results at the required levels. In *Steevens*, the claimant retired in 1975. Audiograms were administered in 1985, 1992, and 1998. The medical evidence established that the claimant's work-related noise exposure contributed to the hearing loss demonstrated on all the post-retirement audiograms. The Board held that the administrative law judge rationally rejected the two earlier audiograms, in comparison to the later audiograms, because they lacked measurements at the 3000 Hz level. *Id.* The Board stated that the administrative law judge's award was supported by substantial evidence as it was based on the audiometric evidence he rationally found most probative of claimant's work-related hearing loss. *Id.*

In this case, the administrative law judge rationally found that the 1987 audiogram was the best measure of claimant's work-related hearing loss at the time he retired. See, e.g., *Cox v. Brady-Hamilton Stevedore Co.*, 25 BRBS 203 (1991). This finding is consistent with Dr. Lambert's credited opinion that no part of claimant's increased hearing loss was due to noise exposure at work. Additionally, Dr. Lambert's testimony

regarding use of the 4000 Hz measurement as a substitute for the 3000 Hz measurement insures that claimant is not undercompensated.³ As claimant has not raised any reversible error in the administrative law judge's crediting of the 1987 audiogram, we affirm the award of benefits for a 5.65 percent binaural loss as it is supported by substantial evidence. *Bruce*, 25 BRBS at 159.

Claimant's sole challenge to the administrative law judge's award of an attorney's fee is that he is entitled to a greater fee award if the Board agrees that the administrative law judge erred in awarding benefits only for the 5.65 percent impairment demonstrated on the 1987 audiogram. As we have affirmed the administrative law judge's award of benefits, we likewise affirm the administrative law judge's fee award.

Accordingly, the administrative law judge's Decision and Order and Supplemental Decision and Order Awarding Attorney Fees are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

³ Each audiogram of record shows a decrease between the 2000 and 4000 Hz levels in each ear. EXs 2, 3, 4, 8.