BRB Nos. 13-0477
and 13-0571

CHARLES B. TERRY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
AMSTAR CORPORATION/AMERICAN SUGAR REFINING, INCORPORATED	)	
	)	
and	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	DATE ISSUED: June 18, 2014
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeals of the Decision and Order Granting Benefits and the Supplemental Order Awarding Attorneys' Fees of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

Bernard J. Sevel (Arnold, Sevel & Gay, P.A.), Towson, Maryland, for claimant.

John J. Rabalais, Janice B. Unland and Gabriel E. F. Thompson (Rabalais Unland), Covington, Louisiana, for employer/carrier.

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits and the Supplemental Order Awarding Attorneys' Fees (2012-LHC-01180) of Administrative Law Judge Pamela J. Lakes 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, rational, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). 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. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, who worked various jobs for employer over approximately 43 years,[1] was apprised he had sustained a hearing loss following a July 25, 2011 audiogram administered by Howe Rudow; that audiogram demonstrated a binaural impairment of 37 percent. CX 22 at 143. Claimant filed a claim against employer. A second audiogram administered by Dr. McCorkle on January 24, 2012, revealed a binaural impairment of 30.6 percent. Dr. McCorkle ultimately opined, based on his assumption that claimant wore hearing protection throughout his work for employer, that claimant's hearing loss was not a consequence of noise exposure at work but related to other factors such as aging and genetics. Employer thus controverted the claim, contending that claimant's hearing loss is not noise-induced. Employer also requested Section 8(f) relief. 33 U.S.C. §908(f).

In her decision, the administrative law judge concluded that claimant's hearing loss is work-related, finding claimant entitled to the presumption at Section 20(a) of the Act, 33 U.S.C. §920(a), and that employer did not rebut the presumption. Relying on the audiogram administered by Dr. McCorkle, the administrative law judge found claimant entitled to permanent partial disability benefits for a 30.6 percent binaural loss. 33 U.S.C. §908(c)(13). Employer's request for Section 8(f) relief was denied as the

[1]From 1970 to the present, claimant's work for employer has included stints as a finishing house operator, kiln gang member, kiln mechanic, service station member, crane/relief crane operator and utility worker. Claimant's work for employer from 2001, primarily as a relief crane operator and a scale man, satisfied the situs and status requirements and, therefore, is covered under the Act. 33 U.S.C. §§902(3), 903(a).

administrative law judge found it was untimely filed, pursuant to Section 8(f)(3), 33 U.S.C. §908(f)(3).

On July 15, 2013, claimant's counsel filed with the administrative law judge a petition for an attorney's fee and costs of $18,707.50, representing 53.45 hours of attorney time at $350 per hour, and $480.37 in costs. Following consideration of employer's objections, the administrative law judge granted the requested fee in its entirety.

On appeal, employer challenges the administrative law judge's findings: that claimant is entitled to the benefit of the Section 20(a) presumption; that it did not rebut the Section 20(a) presumption; and that its claim for Section 8(f) relief was untimely made. BRB No. 13-0477. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the denial of Section 8(f) relief. Employer also appeals the administrative law judge's award of an attorney's fee. BRB No. 13-0571. Claimant responds, urging affirmance of the administrative law judge's attorney's fee award.

Employer contends that claimant is not entitled to invocation of the Section 20(a) presumption because the audiometric evidence does not constitute presumptive evidence of hearing loss, as the administrative law judge did not apply the Occupational Safety and Health Administration (OSHA) guidelines defining injurious noise as exposure to 90 decibels over an eight-hour time-weighted average (TWA), and as there is no evidence that claimant had such exposure at employer's facility. Employer also contends that the administrative law judge erroneously relied on the flawed audiogram and accompanying opinion of Howe Rudow to find claimant entitled to the Section 20(a) presumption.

To establish a prima facie case, claimant must show that he suffered a harm and that a work-related accident occurred or working conditions existed which could have caused the harm; claimant bears the burden of establishing each element of his prima facie case by affirmative proof. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). In order to establish his prima facie case, claimant is not required to introduce medical evidence establishing that his employment in fact caused hearing loss, but he must show the existence of working conditions that could have caused the loss. *See Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982).

We affirm the administrative law judge's finding that the Section 20(a) presumption applies in this case. Contrary to employer's contention, claimant need not produce an audiogram which qualifies as "presumptive evidence" in order to demonstrate he has a hearing loss; rather, it is for the administrative law judge to weigh the audiograms submitted and determine the appropriate weight to be given that evidence. *See R.H. [Harris] v. Bath Iron Works Corp.*, 42 BRBS 6 (2008); *Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001); 33 U.S.C. §908(c)(13)(c); 20 C.F.R. §702.441. An administrative law judge, however, may not credit an audiogram that is not administered in compliance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*). *See* 33 U.S.C. §908(c)(13)(E); *Green-Brown v. Sealand Serv., Inc.*, 586 F.3d 299, 43 BRBS 57(CRT) (4th Cir. 2009). In this case, the January 24, 2012 audiogram administered by Dr. McCorkle in accordance with the AMA *Guides* and found credible by the administrative law judge, constitutes substantial evidence of the existence of hearing loss. The administrative law judge therefore rationally found, based on this testing, that claimant established a "harm" for purposes of invoking the Section 20(a) presumption.[2] *See Harris*, 42 BRBS at 7-9.

The administrative law judge also rationally rejected employer's contention that claimant did not establish the existence of working conditions that could have caused his hearing loss since employer's noise surveys do not record a TWA of 90 decibels or more. *See generally Damiano v. Global Terminal & Container Service*, 32 BRBS 261 (1998). The administrative law judge credited claimant's testimony of excessive noise exposure,[3] the initial opinion of Dr. McCorkle associating claimant's hearing loss with his employment,[4] and the opinion proffered by Mr. Rudow that claimant's hearing loss is

[2]Thus, the administrative law judge relied exclusively on the valid audiogram accompanying Dr. McCorkle's report to find that claimant established the "harm" element of claimant's prima facie case. Employer's contention that the administrative law judge erroneously relied on the audiogram administered by Mr. Rudow for this purpose is, therefore, without merit. Decision and Order at 13.

[3]The administrative law judge credited claimant's testimony that he had been exposed to various alarms while working as a crane and relief crane operator, that he does not wear hearing protection while in the cab of his crane because he needs to hear the radio or people yelling from the deck, and that he does not wear hearing protection in the morning when he passes the air dryer as his equipment is left on the dock. Decision and Order at 13; HT at 59-66.

[4]The administrative law judge found that Dr. McCorkle's revised opinion on causation was suspect since it was based upon questionable data provided by employer, but that, regardless, his initial opinion, tying claimant's hearing loss to his work for

attributable to his work,[5] to find that claimant's working conditions *could have* caused his hearing loss. As this constitutes substantial evidence sufficient to establish the working conditions element of claimant's prima facie case, *see Moore,* 126 F.3d at 262-263, 31 BRBS at 123(CRT), we affirm the administrative law judge's finding that this element was established and her consequent invocation of the Section 20(a) presumption.

Employer next contends the administrative law judge erroneously found that employer did not rebut the Section 20(a) presumption. Employer asserts that the sound level study conducted at its facility on April 20, 2012, and the accompanying report of Anish Ranpuria, establish that claimant's work as a crane operator exposed him to noise levels ranging from 64.3 to 78.5 decibels which is below the "action" level and within the permissible limit per the OSHA criteria. Employer also contends that the final opinion of Dr. McCorkle, based on his full review of all medical records and audiograms, that claimant's hearing loss is not due to his noise exposure at work, is sufficient to rebut the Section 20(a) presumption.

Where, as in this case, the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's hearing loss is not due to his employment. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *Moore*, 126 F.3d 256, 31 BRBS 119(CRT). Employer's burden on rebuttal is one of production only, not one of persuasion, and it need produce only "as much relevant factual matter as a reasonable mind would need to accept, as one rational conclusion" that claimant's condition was not caused or aggravated by his work. *See Holiday*, 591 F.3d 219, 226, 43 BRBS at 69(CRT). The administrative law judge found that employer sought to rebut the Section 20(a) presumption by presenting its April 20, 2012 noise monitoring survey and the revised opinion of Dr. McCorkle.

---

employer, is sufficient to support claimant's position that his work could have caused, aggravated, or accelerated claimant's hearing loss. Decision and Order at 15.

[5]The administrative law judge acknowledged that Mr. Rudow is not certified in audiology or otolaryngology, but based upon his study of audiology and his license from the Maryland State Hearing Aid Dispense Association, his lack of credentials are not flaws in his opinion. Rather, the administrative law judge found that Mr. Rudow's conclusion that claimant's hearing loss is attributable to his work for employer, supports a finding that conditions existed at work which could have contributed to claimant's hearing loss. Decision and Order at 13.

The administrative law judge found employer's noise monitoring survey flawed because it did not accurately measure the noise exposure that claimant likely was subjected to during the course of his employment as a crane operator. In this regard, the administrative law judge found that the survey noted its own limitations, stating that it is a "snapshot in time" and that the date is pertinent only for those times and particular locations tested. Decision and Order at 14; EX 5. Additionally, the administrative law judge found that while the noise survey reflected exposure ranges of 64.3 to 78.5 decibels, it also indicated that some of the exposures were well above 85 decibels.[6] *Id.* As the administrative law judge's finding that the noise survey does not rebut the Section 20(a) presumption is rational, supported by substantial evidence and in accordance with law, it is affirmed. *See Everson v. Stevedoring Services of America*, 33 BRBS 149 (1999); *Damianio*, 32 BRBS at 263.

The administrative law judge noted that Dr. McCorkle initially opined that claimant's hearing loss was more than likely a consequence of acoustic trauma at work. Decision and Order at 18; CX 7. Dr. McCorkle subsequently revised his opinion after receiving additional information from employer pertaining to claimant's occupational exposure to noise, i.e., its April 20, 2012 noise survey and a statement that claimant wore earmuffs throughout his employment. *Id;* EX 4. The administrative law judge found that, based on this new information, Dr. McCorkle stated "*if indeed* [claimant] wore appropriate ear protection to avoid acoustic trauma to his ears during his employment at [employer's facility], then noise exposure would be removed as a factor in his hearing loss problem." Decision and Order at 15 (emphasis in original). The administrative law judge, however, found Dr. McCorkle's revised opinion is predicated on the erroneous assumption that claimant always wore hearing protection, which is contrary to claimant's credible testimony that he did not wear hearing protection while in the crane so that he could hear the radio.[7] *Id*.; HT at 63-64, 66. As the administrative law judge rationally accepted claimant's testimony that he did not always wear hearing protection at work, the administrative law judge rationally found that Dr. McCorkle's reports, considered in their entirety, are not substantial evidence to rebut the Section 20(a) presumption. *See, e.g., Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008); *American*

[6]The administrative law judge found that Henry Dow, who operated Crane 1, was exposed to levels as high as 101.5 decibels, and that Jeff Smith and Johnny Godleski, both of whom operated Crane 2 on the test day, were exposed to levels as high as 123.9 and 104.1 decibels, respectively. Moreover, the survey shows that during spot testing, a crane movement alarm sounded, producing sound levels around 91 decibels below Cranes 1 and 2. Decision and Order at 14; EX 5.

[7]Claimant also testified that hearing protection is required in certain areas of the dock but not in the area where Crane 2 is located. HT at 102-103.

Grain Trimmers v. Director, OWCP, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000). We therefore affirm the administrative law judge's finding that the Section 20(a) presumption was not rebutted. As the Section 20(a) presumption was not rebutted, claimant's hearing loss is work-related as a matter of law. *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011). We affirm the administrative law judge's finding that claimant is entitled to benefits for a 30.6 percent binaural impairment.

Employer next contends that the absolute bar to Section 8(f) relief does not apply because it could not have reasonably anticipated the Special Fund's liability, given that claimant's hearing loss had fluctuated in the past. Section 8(f)(3) requires an employer to present a request for Section 8(f) relief to the district director prior to her consideration of the claim; failure to do so bars the payment of benefits by the Special Fund, unless the employer demonstrates it could not have reasonably anticipated while the case was pending before the district director that the Special Fund's liability would be at issue.[8] 33 U.S.C. §908(f)(3); *see generally Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Dillard]*, 230 F.3d 126, 34 BRBS 100(CRT) (4th Cir. 2000); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Elliot]*, 134 F.3d 1241, 31 BRBS 215(CRT) (4th Cir. 1998); *Wiggins v. Newport News Shipbuilding & Dry Dock Co.*, 31 BRBS 142, 145 (1997). The regulation implementing this provision, 20 C.F.R. §702.321, provides that a request for Section 8(f) relief should be made as soon as the permanency of claimant's condition is known. If claimant's condition has not reached maximum medical improvement and no claim for permanency has been raised by the date of referral to the Office of Administrative Law Judges (the OALJ), an application need not be submitted to the district director; however, in all other cases failure to do so is an absolute defense to the liability of the Special Fund. This defense is an affirmative defense which must be raised and pleaded by the Director. *Abbey v. Navy Exchange*, 30 BRBS 139 (1996).

---

[8]Section 8(f)(3), 33 U.S.C. §908(f)(3), states:

> Any request, filed after September 28, 1984, for apportionment of liability to the special fund established under section 944 of this title for the payment of compensation benefits, and a statement of the grounds therefore [sic], shall be presented to the deputy commissioner prior to the consideration of the claim by the deputy commissioner. Failure to present such request prior to such consideration shall be an absolute defense to the special fund's liability for the payment of any benefits in connection with such claim, unless the employer could not have reasonably anticipated the liability of the special fund prior to the issuance of a compensation order.

In this case, the Director timely raised the absolute defense before the administrative law judge, and it is undisputed that employer did not raise a claim, or file an application, for Section 8(f) relief with the district director. Whether employer should have reasonably anticipated the liability of the Special Fund while the claim was before the district director is a factual determination to be addressed by the administrative law judge. *Director, OWCP v. Vessel Repair, Inc. [Vina]*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999); *Elliot*, 134 F.3d 1241, 31 BRBS 215(CRT); *Bath Iron Works Corp. v. Director, OWCP [Bailey]*, 950 F.2d 56, 25 BRBS 55(CRT) (1st Cir. 1991). Employer contends the administrative law judge erred in finding it could have reasonably anticipated the liability of the Special Fund, since it did not have the requisite awareness regarding the permanency of claimant's hearing loss until after Dr. McCorkle confirmed, in his September 4, 2012 addendum, that claimant has a permanent, progressive hearing loss.[9]

The administrative law judge found that the fact that employer administered routine audiograms to claimant beginning in 1976,[10] indicates that "it has long been aware of his pre-existing hearing loss and could have the testing results evaluated by an audiologist." Decision and Order at 20. Additionally, the administrative law judge found that employer had in its possession at the time of the March 2012 informal conference, Dr. McCorkle's January 2012 report noting claimant's history of bilateral hearing loss.[11] EX 7. Moreover, the administrative law judge rejected employer's contention that it could not have filed for Section 8(f) relief with Dr. McCorkle's September 4, 2012

[9]Employer erroneously contends that it is the Director's burden to prove that it knew permanency was at issue. The burden is on employer, rather than Director, to show for purposes of Section 8(f)(3), that it could not have reasonably anticipated the liability of the Special Fund while the claim was pending before the district director. *Farrell v. Norfolk Shipbuilding & Dry Dock Corp.*, 32 BRBS 283 (1998), *modifying on recon.* 32 BRBS 118 (1998).

[10]The record contains 11 audiograms conducted on employer's behalf between 1976 and 2011, showing some variation in claimant's hearing over the years, e.g., claimant's high frequency hearing loss in his right ear was designated as moderate in 1984 but mild in 1987 and the testing seemingly showed a slight improvement in claimant's hearing between 2005 and 2007. EX 10, 11.

[11]Dr. McCorkle specifically noted, in his January 24, 2012 report, that claimant "has a history of bilateral hearing loss," and that claimant presented him with "old records which I reviewed and which indicate that he has a bilateral sensorineural hearing loss with diminished discrimination scores." Moreover, Dr. McCorkle observed that "there is no history of tinnitus or family history of hearing loss." EX 7.

addendum report, because this report was not issued until seven days after employer filed its application for Section 8(f) relief with the administrative law judge. Thus, the administrative law judge rejected employer's contention that it could not have reasonably anticipated the Special Fund's liability while the case was before the district director.

We reject employer's contention that this finding is in error.[12] Despite its awareness of claimant's audiograms, employer did not attempt to obtain further information, such as Dr. McCorkle's addendum, while the case was pending before the district director. Employer has a duty to undertake reasonable discovery to determine the applicability of Section 8(f) where, as here, the administrative law judge rationally found employer had reason to believe that Section 8(f) may be applicable. *Vina*, 168 F.3d 190, 33 BRBS 65(CRT). Accordingly, as the administrative law judge's finding is supported by substantial evidence, we affirm her determination that employer could have reasonably anticipated the liability of the Special Fund while the claim was before the district director and her resulting conclusion that the absolute defense of Section 8(f)(3) applies. *Elliot*, 134 F.3d 1241, 31 BRBS 215(CRT); *see also Newport News Shipbuilding & Dry Dock Co. v. Firth*, 363 F.3d 311, 38 BRBS 1(CRT) (4th Cir. 2004).

Employer challenges the administrative law judge's award of an attorney's fee in this case. Initially, it asserts that the hourly rate approved by the administrative law judge for work by claimant's counsel is excessive. Additionally, employer challenges various itemized entries.

Employer's contentions are without merit. In her supplemental order, the administrative law judge gave due consideration to the regulation at 20 C.F.R. §702.132 in addressing counsel's petition for an attorney's fee and fully examined counsel's request in terms of employer's specific objections. Supplemental Order at 2. With regard to the hourly rate, the administrative law judge addressed employer's objections and determined, based on previous hourly rates awarded in Longshore cases in Baltimore,[13] in conjunction with a consideration of claimant's evidence,[14] that the

[12]Contrary to employer's contention, prejudice is not an element necessary for imposition of the absolute defense. Consequently, its position that its untimely filing of its Section 8(f) application should be excused because the Director was not prejudiced is without merit.

[13]The administrative law judge found "perhaps most relevant (and most persuasive from my point of view), is that earlier this year I awarded [claimant's counsel] fees based upon an hourly rate of $350," Supplemental Order at 4. *Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2004).

claimed fee of $350 per hour falls within the general range of the prevailing rate in Baltimore for Longshore work by an attorney with the extensive experience of claimant's counsel. *Westmoreland Coal Co. v. Cox*, 602 F.3d 276 (4th Cir. 2010); *Holiday*, 591 F.3d 219, 43 BRBS 67(CRT); *Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2004). As employer has not shown that the administrative law judge abused her discretion in this regard, we affirm the administrative law judge's award of an hourly rate of $350 for attorney work in this case. *See Eastern Associated Coal Corp. v. Director, OWCP*, 724 F.3d 561 (4th Cir. 2013);*O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000); *Moore v. Universal Maritime Corp.*, 33 BRBS 54 (1999). Additionally, the administrative law judge determined that claimant's counsel's fee petition provides sufficient specificity such that it conforms to the requirements of 20 C.F.R. §702.132(a). Supplemental Order at 5; *see generally Forlong v. American Security & Trust Co.*, 21 BRBS 155 (1988). The administrative law judge further addressed and rationally rejected each of employer's specific line-by-line objections to the fee petition. Supplemental Order at 5-6. Consequently, as employer has not established that the administrative law judge's fee award is based on an abuse of her discretion, the administrative law judge's award of an attorney's fee is affirmed. *Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997); *see generally Clark v. Chugach Alaska Corp.*, 38 BRBS 67 (2004).

[14]The administrative law judge noted that counsel's evidence consisted of information concerning average partner rates from 1991/1992 for Baltimore, Maryland firms (which ranged from $150 to $265) and the *Laffey* Matrix (which indicates that attorneys with over 20 years' experience commanded $495 per hour in 2011 to 2012, up from $380 in 2003 to 2004). The administrative law judge also recognized that employer "provided no supporting authority or evidence and has not even suggested what would be an appropriate fee." Supplemental Order at 3.

Accordingly, the Decision and Order Granting Benefits and the Supplemental Order Awarding Attorneys' Fees are affirmed.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge