BRB No. 05-0737

IVAN ANDERSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	DATE ISSUED: 05/23/2006
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Scott N. Roberts, Groton, Connecticut, for claimant.

Conrad M. Cutliffe (Cutliffe Glavin & Archetto), Providence, Rhode Island, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2004-LHC-01768) of Administrative Law Judge Stuart A. Levin 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, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On August 28, 1987, claimant voluntarily retired from his supervisory position with employer, having been employed for approximately 48 years. In 2003, claimant underwent an audiometric evaluation which revealed a 28.8 percent binaural hearing impairment. CX 1, 2, 3. Claimant filed a claim for benefits against employer. On April 20, 2004, employer filed an LS-208 Form, Payment of Compensation Without an Award, stating that it paid claimant compensation for a 3.75 monaural impairment in his right ear,

as evidenced by an audiogram dated June 2, 1987.[1] EX 4, 7, 8-1. Claimant contended that his November 19, 2003 audiogram was the most reliable evidence of his compensable hearing loss, because after the last audiogram administered by employer on June 2, 1987, he worked an additional 88 days until his retirement on August 28, 1987, during which he continued to be exposed to injurious noise.[2] Tr. at 9. Claimant also sought medical benefits, specifically payment for digital hearing aids recommended by his treating physician, Dr. Hardy, and an audiologist, Dr. Trychel, to ameliorate his 28.8 percent bilateral hearing loss. Tr. at 10; CX 5.

The administrative law judge denied the claim for additional benefits, finding that claimant did not establish that the 2003 audiogram is a more accurate reflection of claimant's employment-related hearing loss than the 1987 audiogram. Although the administrative law judge found that claimant was exposed to noise during his last days of employment with employer which could have caused a hearing loss in excess of the 3.75 monaural impairment measured by the June 2, 1987, audiogram, the administrative law judge found no credible evidence of such a hearing loss attributable to claimant's employment with employer.[3] Decision and Order at 8. Rather, the administrative law judge stated that Dr. Hardy's opinion raised a mere "possibility" of a noise-induced component to the additional hearing loss shown on the 2003 audiogram. The administrative law judge did not address claimant's claim for medical benefits.

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[1] Employer explained that it did not pay claimant for his 3.75 percent monaural loss in his right ear in 1987, because this loss was not considered compensable under the edition of the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) then in effect. *See generally* 30 U.S.C. §§902(10), 908(c)(13)(E).

[2] The administrative law judge found that of the 88 days between June 2 and August, 28, 1987, only about 60 were work days. Decision and Order at 5.

[3] In this regard, the administrative law judge invoked the Section 20(a) presumption, but found it rebutted by the opinion of Jay Hans, employer's in-house audiologist, that while claimant received additional noise exposure after June 2, 1987, it did not, in his opinion, "appreciably" contribute to his hearing loss. EX 5 at 18; Decision and Order at 6. In further support of his rebuttal finding, the administrative law judge found that the record fails to reflect any evidence that the noise environment in the pattern shop or any other area claimant worked was significantly different after June 2, 1987, than it was before. *Id.* Claimant does not allege any error with regard to these findings.

Claimant appeals the decision, arguing that the administrative law judge erred in denying compensation and medical benefits. Claimant contends that the administrative law judge mischaracterized Dr. Hardy's testimony and therefore erred in finding that his current hearing loss is not compensable. Employer responds urging affirmance.[4]

In *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151(CRT) (1993), the Supreme Court held that hearing loss due to noise exposure does not progress in the absence of such exposure. The Board has held that the administrative law judge may weigh the evidence to determine which audiogram of record best represents claimant's work-related hearing loss as of the time he left covered employment, in this case, at the time claimant retired. *Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001); *Bruce v. Bath Iron Works Corp.*, 25 BRBS 157 (1991); *Dubar v. Bath Iron Works Corp.*, 25 BRBS 5 (1991); *Labbe v. Bath Iron Works Corp.*, 24 BRBS 159 (1991).[5]

In this case, the administrative law judge found that claimant demonstrated a measurable hearing loss before he left covered employment. Decision and Order at 6. In weighing the evidence as a whole, the administrative law judge found that claimant was exposed to the same level of noise in his last days of employment after the 1987 audiogram as he was prior to the audiogram. However, as claimant's exposure to noise at work had produced only a 3.75 percent monaural loss over approximately 48 years, the administrative law judge credited Mr. Hans's opinion that that is unlikely that the last 60

[4] By letter dated May 9, 2006, employer filed its response brief, with a motion to accept it out of time. We grant employer's motion and accept its response brief. 20 C.F.R. §§802.212, 802.217(e), 802.219.

[5] In *Labbe*, claimant left covered employment in 1963. The Board held that the administrative law judge rationally discredited an uninterpreted 1967 audiogram that lacked evidence of the credentials of the tester and rationally relied on a 1986 audiogram in awarding benefits. *Labbe*, 24 BRBS at 162. In *Dubar*, the Board affirmed the award and held that the administrative law judge rationally relied on a 1988 audiogram, as the record contained no evidence of a hearing loss in 1971 when the claimant left covered employment, and as he found that the 1988 audiogram was more reliable than one conducted in 1984. *Dubar*, 25 BRBS at 7-8. Similarly, in *Steevens*, the Board affirmed the administrative law judge's determination that the audiograms conducted in 1985 and 1992 were not as probative as the ones conducted in 1998, and it affirmed his decision to award benefits based on an averaging of the result of the 1998 audiograms, despite there being a 23-year gap between the 1998 audiograms and the claimant's last year of covered employment. *Steevens*, 35 BRBS at 130, 133.

work days contributed "appreciably" to claimant's hearing loss. EX 5 at 18. The administrative law judge also discussed Dr. Hardy's opinion that it is "possible" that claimant's prior noise exposure contributed to the 28.8 percent binaural loss, CX 7 at 14, 16, but he relied on Dr. Hardy's opinion that claimant's current hearing loss is not of a pattern typical of a noise-induced loss, *id.* at 18-19; CX 3, and that the best measure of claimant's work-related hearing loss would be an audiogram taken at the time claimant retired. CX 7 at 21-22.

The administrative law judge is entitled to weigh the evidence and to draw his own inferences and conclusions from it. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). The opinions of Dr. Hardy and Mr. Hans constitute substantial evidence supporting the administrative law judge's finding that claimant did not establish a work-related hearing impairment in excess of that demonstrated on the June 1987 audiogram. While Dr. Hardy agreed that "it is reasonable to assume" that "at least some" of claimant's current impairment is due to noise exposure to work, CX 7 at 23, the administrative law judge rationally relied on those portions of Dr. Hardy's opinion stating that claimant's hearing loss was not of a typical noise-induced pattern and that it was only possible that some of the loss was noise-induced. *Heyde*, 306 F.Supp. 1321. The administrative law judge's finding that the 1987 audiogram is the best measure of the hearing loss claimant sustained as a result of his employment therefore is affirmed as it is rational, supported by substantial evidence, and in accordance with law.[6] *Bruce*, 25 BRBS 157.

Nonetheless, remand is required for the administrative law judge to address the issue of claimant's entitlement to digital hearing aids pursuant to Section 7 of the Act, 33 U.S.C. §907, as he has a work-related hearing monaural hearing loss. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993); *see also Weikert v. Universal Maritime Service Corp.*, 36 BRBS 38 (2002); *Davison v. Bender Shipbuilding & Repair Co.*, 30 BRBS 45 (1996).

[6] Claimant correctly notes that the hearing loss demonstrated on the audiogram found to be most credible is not apportioned into work-related and nonwork-related components. *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991). However, as the administrative law judge found that the later audiogram is not the most probative evidence of claimant's work-related hearing loss, this principle is inapplicable in this case. *See generally Davison v. Bender Shipbuilding & Repair Co.*, 30 BRBS 45 (1996) (employer is not liable for nonwork-related hearing loss that occurs after the work-related injury).

Accordingly, the administrative law judge's Decision and Order denying additional compensation is affirmed. The case is remanded for the administrative law judge to address claimant's entitlement to digital hearing aids pursuant to Section 7 of the Act.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge