BRB No. 13-0539

THOMAS R. OSTARLY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HUNTINGTON INGALLS, INCORPORATED	)	DATE ISSUED: May 28, 2014
	)	
	)	
Self-Insured Employer-Respondent	)	
	)	DECISION and ORDER

Appeal of the Decision and Order of Patrick M. Rosenow, Administrative Law Judge, Unites States Department of Labor.

Arthur J. Brewster and Jeffrey P. Briscoe, Metairie, Louisiana, for claimant.

Traci M. Castille (Franke & Salloum), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2012-LHC-01759) of Administrative Law Judge Patrick M. Rosenow 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).

Claimant worked for employer as a test and trial engineer for diesel ship engines from 1977 until July 30, 1987. The parties stipulated that claimant was exposed to potentially injurious noise at employer's facility. JX 1. Claimant's subsequent non-covered employment involved working on ships in reduced operating status, and he

testified that he was exposed to less noise.[1] On April 18, 2006, claimant underwent a pre-employment audiometric evaluation for a non-covered employer which, the parties stipulated, revealed a 10 percent binaural impairment. On March 24, 2011, claimant underwent a second audiogram which, the parties stipulated, revealed a binaural impairment of 24.7 percent. *Id.* Employer accepted liability, and has paid claimant disability compensation under the schedule, for a 10 percent binaural hearing loss. 33 U.S.C. §908(c)(13). Claimant filed a claim for benefits for the remaining 14.7 percent binaural impairment pursuant to the 2011 audiogram.

The administrative law judge found that claimant's 2011 audiogram and Dr. Bode's testimony that the entirety of the 24.7 percent impairment could have been caused by claimant's exposure to noise at employer's facility is sufficient to establish a prima facie case relating claimant's entire hearing loss to his noise exposure. 33 U.S.C. §920(a). The administrative law judge also found that the 2006 audiogram, showing a 10 percent binaural hearing loss, considered in conjunction with the law that noise-related hearing loss does not progress after exposure has ceased, rebuts the Section 20(a) presumption. Decision and Order at 11-12; *see Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151(CRT) (1993). In weighing the evidence as a whole, the administrative law judge found that claimant failed to carry his burden of showing that the full 24.7 percent binaural hearing loss is related to his work for employer. Rather, the administrative law judge found it is more likely than not that claimant's hearing loss upon leaving covered employment was a maximum of 10 percent, as he relied on the 2006 audiogram, as it was performed closer in time to claimant's departure from covered employment. Decision and Order at 12. The administrative law judge also rejected, as an overstatement of the law, claimant's alternative legal argument that once an employer is liable for any hearing loss under the Act, it remains liable for all subsequent increases in that loss even if it is unrelated to covered employment. *Id.* at 12 n.35. Claimant appeals, challenging the administrative law judge's decision to credit the 2006 audiogram over the 2011 audiogram. Employer responds, urging affirmance. Claimant filed a reply brief.

On appeal, claimant contends the administrative law judge improperly relied on the 2006 audiogram which, claimant asserts, does not meet the requirements for a "presumptive" audiogram. Moreover, claimant asserts that the administrative law judge found the 2006 audiogram was not the most reliable evidence of record, and thus it cannot be credited. Claimant also contends that the law requires employer, if found liable for a work-related hearing loss, to be held liable for the entirety of any hearing loss.

[1] Claimant testified that this subsequent employment was as a member of ships' crews. Such employment is excluded from the Act's coverage. 33 U.S.C. §902(3)(G).

The Supreme Court has stated that noise-induced, occupational hearing loss is not a progressive injury but is one that occurs simultaneously with exposure to injurious noise. "[T]he injury is complete when the exposure ceases." *Bath Iron Works Corp.*, 506 U.S. at 165, 26 BRBS at 154(CRT).[2] A claimant is entitled to benefits for his work-related hearing loss based on the audiometric evidence found to be the most credible and probative. *R.H. [Harris] v. Bath Iron Works Corp.*, 42 BRBS 6 (2008); *Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001); *Cox v. Brady-Hamilton Stevedore Co.*, 25 BRBS 203 (1991); *Dubar v. Bath Iron Works Corp.*, 25 BRBS 5 (1991); *Labbe v. Bath Iron Works Corp.*, 24 BRBS 159 (1991); *see also* 33 U.S.C. §908(c)(13). Specifically, an employee who leaves covered employment is entitled to benefits based on the audiogram found to be the most reliable evidence of the hearing loss he sustained during covered employment. *Bruce v. Bath Iron Works Corp.*, 25 BRBS 157 (1991); *Dubar*, 25 BRBS 5. A presumptive audiogram is "presumptive" of the loss recorded as of the date the audiogram was administered and not, necessarily, of a claimant's compensable disability, as it is well established that an administrative law judge is entitled to evaluate and weigh the evidence of record.[3] *Harris*, 42 BRBS 6; *Norwood v. Ingalls Shipbuilding, Inc.*, 26 BRBS 66 (1992) (Stage, C.J., dissenting on other grounds); *see also 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). Indeed, the administrative law judge is not required to credit the most recent, most credentialed, or lowest or highest audiogram when there are multiple audiograms of record, as he may determine which audiogram is the most probative of the claimant's impairment. *See Norwood*, 26 BRBS 66; *Cox*, 25 BRBS 203. Moreover, an administrative law judge need not project later test results back to the last date of covered employment if he finds that the most reliable evidence of the claimant's work-related hearing loss is the audiogram taken nearest in time to the claimant's last date of covered employment. *Cox*, 25 BRBS 203; *Bruce*, 25 BRBS 157.

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[2] In this case, Dr. Bode similarly testified that noise-induced hearing loss is not progressive. Tr. at 86-87, 92-93.

[3] Section 8(c)(13)(C) of the Act provides:

> An audiogram shall be presumptive evidence of the amount of hearing loss sustained as of the date thereof, only if (i) such audiogram was administered by a licensed or certified audiologist or a physician who is certified in otolaryngology, (ii) such audiogram, with the report thereon, was provided to the employee at the time it was administered, and (iii) no contrary audiogram made at that time is produced.

33 U.S.C. §908(c)(13)(C); *see also* 20 C.F.R. §702.441.

In this case, the administrative law judge found that the 2011 audiogram is "likely more reliable" as to the full extent of claimant's hearing impairment. However, the administrative law judge properly considered which audiogram is more probative of the degree of claimant's work-related hearing loss. Thus, the administrative law judge correctly stated the relevant issue is whether the 2006 audiogram is reliable as a measure of claimant's hearing loss in 2006, which is closer in time to claimant's last covered noise exposure. Decision and Order at 12. Because Dr. Bode, who had questioned the reliability of the 2006 audiogram in favor of the 2011 audiogram he administered, was not present for the 2006 audiogram, the administrative law judge gave little weight to his opinion that the 2011 audiogram is the more reliable one. As the 2006 report is bolstered with evidence regarding the administration of the test and the calibration of the equipment, even though it lacked some elements that would make the report presumptive of the degree of hearing loss, 20 C.F.R. §702.441(b), the administrative law judge found that the 2006 audiogram is "probative and reliable evidence of Claimant's hearing loss at that time." Decision and Order at 12. Additionally, there was testimony that claimant identified his hearing loss as having occurred over time rather than having remained stable since he last worked for employer; therefore, as noise-induced hearing loss is not progressive, the administrative law judge concluded that the 2006 audiogram best reflects any hearing loss claimant has related to his covered employment. *Id.*; Tr. at 86.

Contrary to claimant's assertion, the administrative law judge may credit an audiogram which is not "presumptive" of the degree of impairment, if the audiogram is otherwise probative and complies with the American Medical Association's *Guides to the Evaluation of Permanent Impairment*. *Green-Brown v. Sealand Services, Inc.*, 586 F.3d 299, 43 BRBS 57(CRT) (4th Cir. 2009); *see* 33 U.S.C. §908(c)(13)(E). Here, the administrative law judge found there are two audiograms probative of the degree of claimant's hearing loss. Absent evidence of claimant's hearing loss as of his last date of exposure in covered employment in 1987, the administrative law judge rationally found that the more reliable evidence of claimant's work-related hearing loss is the 2006 audiogram, as it was taken nearer in time to claimant's last day of covered employment.[4]

[4] We reject claimant's assertion that *Labbe, Dubar*, and *Steevens* stand for the proposition that an employer is liable for the full extent of a claimant's hearing impairment when subsequent noise exposure in non-covered employment increases the claimant's impairment. In *Labbe, Dubar*, and *Steevens*, the Board affirmed the administrative law judges' reliance on later audiograms as the best evidence of the claimants' hearing losses because the administrative law judges had rationally discredited or had given less weight to earlier audiograms for various reasons. Thus, contrary to claimant's assertion, those cases merely reinforce the well-established principle that it is within the administrative law judge's discretion to determine the weight to be accorded to the evidence of record. They do not establish that an employer is always liable for the degree of impairment shown on the latest audiogram of record.

Norwood, 26 BRBS 66; *Cox*, 25 BRBS 203; *Bruce*, 25 BRBS 157. Therefore, as the administrative law judge rationally credited the earlier audiogram and found that claimant has a 10 percent binaural hearing loss related to his employment, we affirm his finding that claimant did not establish his entitlement to benefits for any additional hearing loss. *See generally Harris*, 42 BRBS 6; *see also Green-Brown*, 586 F.3d 299, 43 BRBS 57(CRT). Thus, we affirm the administrative law judge's denial of additional benefits.

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

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge