BRB No. 92-1519

RICHARD C. AGOSTIN	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
BATH IRON WORKS CORPORATION	)	DATE ISSUED:
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Anthony J. Iacobo, Administrative Law Judge, United States Department of Labor.

Stephen D. Bither (Monaghan, Leahy, Hochadel & Libby), Portland, Maine, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (91-LHC-2337/2712) of Administrative Law Judge Anthony J. Iacobo 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 from August 1982 to June 1990 as a marine electrician during which time he was exposed to loud noise. Prior to claimant's commencement of work for employer, claimant underwent an employer-sponsored hearing evaluation in July 1982 which revealed a hearing loss. After leaving the employment of employer, claimant underwent a hearing evaluation which was interpreted by Dr. Haughwout as indicating a 53.8 percent bilateral

sensorineural hearing loss under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (3d ed. 1988) (AMA *Guides).* Claimant thereafter sought benefits under the Act. Employer contested the claim and, alternatively, sought Section 8(f) relief from its compensation liability. 33 U.S.C. §908(f).

In his Decision and Order, the administrative law judge awarded claimant benefits under the Act for a 53.8 percent hearing loss. *See* 33 U.S.C. §908(c)(13)(B). The administrative law judge rejected employer's application for Section 8(f) relief, finding that employer failed to establish the existence of a pre-existing permanent partial disability.

On appeal, employer contends the administrative law judge erred in denying it Section 8(f) relief. Section 8(f) requires, *inter alia*, that the employer establish that the claimant had a preexisting permanent partial disability. *Dubar v. Bath Iron Works Corp.*, 25 BRBS 5 (1991); 33 U.S.C. §908(f). In hearing loss cases, the Act, as amended in 1984, limits employer's Section 8(f) liability to the lesser of 104 weeks or the extent of hearing loss attributable to the work injury. *McShane v. General Dynamics Corp.*, 22 BRBS 427 (1989); 33 U.S.C. §908(f)(1) (1988). Thus, in order to limit its liability to less than 104 weeks, employer must submit evidence quantifying the extent of claimant's pre-existing hearing loss. *See Fucci v. General Dynamics Corp.*, 23 BRBS 161 (1990)(*en banc*) (Brown, J., dissenting on other grounds).

In the instant case, it is uncontroverted that employer failed to produce any evidence regarding the extent of claimant's alleged pre-employment hearing loss;[1] accordingly, since the administrative law judge's award of benefits to claimant is in excess of 104 weeks, employer may only limit its liability for claimant's hearing loss award to 104 weeks if it satisfies the pre-requisites for Section 8(f) relief. In support of its contentions of error, employer asserts that the administrative law judge erred in utilizing Section 702.441 of the Act's implementing regulations in considering claimant's July 1982 pre-employment audiogram. Employer additionally cites to the testimony of Dr. Haughwout who, after reviewing this July 1982 test, opined that claimant obviously had some pre-employment hearing loss. In rejecting claimant's July 1982 audiometric evaluation as a reliable source of information regarding claimant's pre-employment loss of hearing, the administrative law judge relied upon Section 702.411 of the regulations, 20 C.F.R. §702.441, which sets forth the requirements which must be met if an audiogram if to be considered presumptive evidence of the amount of hearing loss. Section 702.441(c) of the regulations, however, states that only audiograms performed after December 27, 1984, must comply with the standards described in Section 702.441(d). *See* 20 C.F.R. §702.441(c), (d). Accordingly, we hold that the administrative law judge erred in discrediting claimant's July 1982 audiometric evaluation solely on the basis of that test's failure to comply with Section 702.441. Moreover, we note that the administrative law judge did not address the testimony of Dr. Haughwout which, if credited, may meet employer's burden of establishing that claimant had a pre-existing hearing loss, nor did he address the remaining elements required for employer to establish entitlement to Section 8(f) relief. We therefore vacate the administrative law judge's determination that employer has not established entitlement to Section

[1]We note that although the administrative law judge requested that employer submit such evidence post-hearing, the administrative law judge did not receive this information while the record remained open. *See* Decision and Order at 2.

8(f) relief, and we remand the case to the administrative law judge for consideration of all of the evidence of record regarding this issue.

Accordingly, the administrative law judge's denial of Section 8(f) relief to employer is vacated, and the case is remanded for further findings consistent with this opinion. In all other respects, the administrative law judge's Decision and Order-Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge