

R.H.)	
)	
Claimant)	
)	
v.)	
)	
BATH IRON WORKS CORPORATION)	DATE ISSUED:
)	03/28/2008 <u>2008</u>
Self-Insured)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Petitioner)	

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Special Fund Relief and the Decision and Order Granting in Part and Denying in Part Director's Motion for Reconsideration of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

Stephen Hessert (Norman, Hanson & Detroy, LLC), Portland, Maine, for self-insured employer.

Matthew W. Boyle (Gregory F. Jacob, Solicitor of Labor; Allen H. Feldman, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Awarding Benefits and Special Fund Relief and the Decision and Order Granting in Part and Denying in Part Director's Motion for Reconsideration (2006-

LHC-2034) of Administrative Law Judge Colleen A. Geraghty 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 sought, and received, benefits from employer for a 15 percent binaural work-related hearing loss established by an audiogram conducted on September 10, 2004.¹ Claimant continued to work at employer's shipyard where he was exposed to additional injurious noise. An audiogram conducted on September 23, 2005, revealed a binaural hearing loss of 23.8 percent, prompting claimant to file a claim. Employer conceded that claimant is entitled to benefits for a 23.8 percent loss, and sought Section 8(f) relief, 33 U.S.C. §908(f), for the pre-existing 15 percent impairment.² The district director denied employer's request for Section 8(f) relief because the August 9, 2004, audiogram did not comply with the requirements of Sections 702.321(a)(1) and 702.441(b)(1), 20 C.F.R. §§702.321(a)(1), 702.441(b)(1). ALJ Exhibit 2. The case was thereafter referred to the Office of Administrative Law Judges for a formal hearing.

In her decisions, the administrative law judge found that claimant is entitled to, and employer liable for, permanent partial disability benefits for a 23.8 percent binaural hearing loss. The administrative law judge, however, also found employer entitled to Section 8(f) relief. She thus concluded, after factoring in a credit based on employer's prior payment of compensation for the 15 percent binaural hearing loss, that claimant is entitled to an additional \$10,728.51, in benefits, with the Special Fund liable for \$1,421.10 of that amount.

On appeal, the Director challenges the administrative law judge's finding that employer is entitled to Section 8(f) relief. Employer responds, urging affirmance.

The Director argues that employer is not entitled to Section 8(f) relief in this case because it did not establish a pre-existing hearing loss with a "presumptive" audiogram

¹ Employer voluntarily paid claimant a total of \$14,443.80 in benefits, which represents 30 weeks of compensation based on a weekly rate of \$481.46 (two-thirds of claimant's stipulated average weekly wage at that time, \$722.19).

² In support of its Section 8(f) application, employer submitted two audiograms conducted on August 4 and 9, 2004, which it argued established that claimant had a pre-existing permanent binaural hearing loss of 15 percent.

which, he alleges, is required by the relevant regulations. The Director argues that the administrative law judge ignored the mandatory language of Section 702.321(a)(1), which requires that pre-existing hearing loss be documented by an audiogram complying with Section 702.441. The Director asserts that the audiograms at issue here fail to meet the applicable criteria.

Section 702.321 of the regulations, entitled “Procedures for Determining Applicability of Section 8(f) of the Act,” states, in relation to hearing loss cases, that “[i]f the injury is loss of hearing, the pre-existing hearing loss *must be* documented by an audiogram which complies with the requirements of Section 702.441.” 20 C.F.R. §702.321(a)(1) (emphasis added). Section 702.441, entitled “Claims for Loss of Hearing,” in turn, mandates that all “[c]laims for hearing loss pending on or filed after September 28, 1984, shall be adjudicated with respect to the determination of the degree of hearing impairment in accordance with these regulations.” 20 C.F.R. §702.441(a). Subsection (b) states “an audiogram shall be *presumptive evidence* of the amount of hearing loss on the date administered if” the requirements, detailed at Section 702.441(b)(1)-(3) are met.³ 20 C.F.R. §702.441(b) (emphasis added); *see also* 33 U.S.C. §908(c)(13)(C). Subsection (c) provides requirements for pre-employment audiograms and states that audiograms performed after December 27, 1984, must comply with the standards described in subsection (d). Section 702.441(d) states that “[i]n determining the loss of hearing under the Act, the evaluators shall use the criteria for measuring and calculating hearing impairment as published and modified from time-to-time by the American Medical Association in the *Guides to the Evaluation of Permanent Impairment*, using the most currently revised edition of this publication,” *see* 33 U.S.C. §908(c)(13)(E), and provides the standards for calibrating audiometers used in testing and for testing procedures. The Director avers that an audiogram must meet the requirements of each subsection of Section 702.441 in order to qualify employer for Section 8(f) relief pursuant to Section 702.321. We reject this contention and affirm the administrative law judge’s decision, as Section 702.441 does not require an audiogram to be presumptive evidence in order to be determinative of the degree of hearing loss under the Act.⁴

³ Under the criteria, this subsection applies where the audiogram is administered by a licensed or certified audiologist, a copy is provided to the claimant, and no contrary audiogram of equal probative value is produced.

⁴ We also reject the Director’s contention that his “interpretation of his own regulation is controlling.” Director’s Brief at 5. The amount of deference given to the Director’s interpretation “will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *Grant v. Director, OWCP*, 502 F.3d 361, 41 BRBS 49(CRT) (5th Cir. 2007) *citing United States v.*

Initially, consistent with the plain language of Section 702.414(a), we note that this regulation applies to all determinations regarding the degree of hearing loss and not just to those necessary for Section 8(f) entitlement. Case precedent, however, does not support the argument that an audiogram must meet the “presumptive evidence” standard in order for an administrative law judge to rely upon it. In *Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001), the Board affirmed an administrative law judge’s decision to give less weight to audiograms not meeting the “presumptive” standards, upholding the administrative law judge’s authority to determine the probative value of the tests. In *Steevens*, the Board described the requirements for an audiogram to be presumptive as including the requirements of both Section 702.441(b)(1)–(3), as well as Section 702.441(d) which incorporated the Act’s requirement that hearing loss be measured under the standards set forth by the *AMA Guides*.⁵ A distinction thus has been

Mead Corp., 533 U.S. 218, 238 n. 19 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)) (internal quotation marks omitted). Such deference, however, is not afforded litigation positions taken by the Director that are wholly unsupported by regulations, rulings, or administrative practice. *Grant*, 502 F.3d at 363, 41 BRBS at 51(CRT); *Total Marine Serv. v. Director, OWCP*, 87 F.3d 774, 776 n.2, 30 BRBS 62, 64 n.2(CRT) (5th Cir. 1996), *aff’g Arabie v. C.P.S. Staff Leasing*, 28 BRBS 66 (1994). In the instant case, the Director’s interpretation is no more than a litigation position developed in his role as an advocate on behalf of the Special Fund. As shall be discussed, the interpretation is a new position and is not supported by case precedent or the plain language of the regulations. That the Director has never raised this issue before, despite there having been a large number of Section 8(f) hearing loss cases since 1984, *see, e.g., Fucci v. General Dynamics Corp.*, 23 BRBS 161 (1990) (Brown, J., dissenting); *Risch v. General Dynamics Corp.*, 22 BRBS 251 (1981), speaks volumes to the fact that the Director’s interpretation in this case is merely an unsupported litigation position. As such, we reject the Director’s request for deference to its litigation position regarding the interpretation of Section 702.441. *Grant*, 502 F.3d at 363, 41 BRBS at 51(CRT); *Total Marine Serv.*, 87 F.3d 774, 776 n.2, 30 BRBS 62, 64 n.2(CRT).

⁵ The Board stated:

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 from the time that the audiogram was administered; 3) no one has provided a contrary audiogram of equal probative value within thirty days of the subject audiogram where claimant continues to be exposed to

drawn between those audiograms which meet the strict requirements for “presumptive evidence” of a hearing loss under Section 8(c)(13)(C) of the Act and Section 702.441(b), and those which do not meet those standards but are nonetheless probative evidence which an administrative law judge may credit in determining hearing loss. Thus, the Board has not required that a claimant produce an audiogram which qualifies as “presumptive evidence” in order to demonstrate the extent of hearing loss under the Act; rather, it is for the administrative law judge to weigh the audiograms submitted and determine the appropriate weight to be given that evidence. *See Steevens*, 35 BRBS 129; *Norwood v. Ingalls Shipbuilding, Inc.*, 26 BRBS 66 (1991) (Stage, C.J., dissenting on other grounds); *see also Craig, et al v. Avondale Industries, Inc.*, 36 BRBS 65 (2002) (*en banc*), *aff’d sub nom. Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003).⁶ The text of Section 702.441 supports this conclusion that there is a difference between “presumptive” evidence of hearing loss and audiograms that are sufficient, if credited, to establish the degree of hearing loss under the Act.

excessive noise levels or within six months if such exposure ceases; 4) the audiometer used must be calibrated according to current American National Standard Specifications; and, 5) the extent of claimant’s hearing loss must be measured according to the most currently revised edition of the American Medical Association *Guides to the Evaluation of Permanent Impairment*. *See* 20 C.F.R. 702.441(b)(1)-(3) and (d); *West v. Port of Portland*, 20 BRBS 162 (1988), *modified on recon.*, 21 BRBS 87 (1988).

Steevens, 35 BRBS at 133 n. 6 (emphasis added).

⁶ In rejecting employer’s argument that, in order for a claim to shift liability for attorney’s fees under 33 U.S.C.C. §928(a), in a hearing loss case, the claim must be accompanied by an audiogram meeting the “presumptive” evidence standard of Section 8(c)(13)(C), the Board stated that “audiometric tests that do not meet the ‘presumptive’ standard are not invalid or inadmissible; it is for the administrative law judge to determine the probative value of such tests in determining the extent of the claimant’s hearing loss.” *Craig, et al v. Avondale Industries, Inc.*, 36 BRBS 65, 67 (2002) (*en banc*), *aff’d sub nom. Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003). This statement is consistent with unpublished decisions holding that an audiogram that fails to qualify as presumptive evidence as to the extent of a claimant’s hearing loss may be considered probative evidence and accorded weight by the administrative law judge in deciding that issue. *See, e.g., Perry v. Universal Maritime Serv.*, Nos. 03-0468/A (Apr. 6, 2004) (unpub.); *Tuckell v. Logistec of Connecticut, Inc.*, No. 98-1201 (June 7, 1999) (unpub.); *Smith v. Ingalls Shipbuilding, Inc.*, Nos. 91-0231/A (Feb. 29, 1993)(unpub.).

In this regard, Section 702.441(b) parallels Section 8(c)(13)(C) of the Act in defining whether an audiogram constitutes presumptive evidence of the amount of hearing loss. Neither the Act nor the regulation states that such evidence is required for all determinations of the degree of hearing loss; rather, such evidence may properly be accorded greater weight than audiograms not meeting the standard, *see Steevens*, 35 BRBS 129, and is sufficient in and of itself to establish the degree of hearing loss.⁷ In contrast, Section 8(c)(13)(E) of the Act provides that determinations regarding hearing loss *shall* be made in accordance with the current edition of the *AMA Guides to the Evaluation of Permanent Impairment*. *See West v. Port of Portland*, 20 BRBS 162, *modified on recon.*, 21 BRBS 87 (1988). Section 702.441(d) incorporates this mandatory requirement and states that its requirements apply “in determining the loss of hearing under the Act.” This language supports a conclusion that it is this subsection which states the mandatory requirements to be met by audiograms used in determining the extent of hearing loss. The language of Section 702.441(c) supports this conclusion as it states that audiograms performed after December 27, 1984, must comply with the standards in subsection (d). Thus, read in its entirety, an administrative law judge evaluating a claim under Section 702.441 may credit an audiogram as determinative evidence of hearing loss so long as it complies with Section 702.441(d). If the audiogram meets the additional requirements of Section 702.441(b), it may further serve as “presumptive evidence” of a hearing loss.

Consistent with this interpretation, the Board has repeatedly held that it is for the administrative law judge to assess the probative value of audiograms in determining the extent of a claimant’s hearing loss. *See Steevens*, 35 BRBS 129 (administrative law judge may give less weight to audiograms that do not meet the “presumptive evidence” standard); *see also Norwood*, 26 BRBS 66 (administrative law judge has discretion regarding which audiogram to credit); *Cox v. Brady-Hamilton Stevedore Co.*, 25 BRBS 203 (1991) (the Board affirms the administrative law judge’s crediting of an audiogram over another reflecting a higher loss because the former was taken closest to claimant’s last exposure to noise with the covered employer); *Bruce v. Bath Iron Works Corp.*, 25 BRBS 157 (1991) (the Board holds it is within the administrative law judge’s discretionary authority to evaluate the medical evidence of record and to draw inferences from that evidence in order to discern issues related to a claimant’s alleged work-related hearing loss); *Dubar v. Bath Iron Works Corp.*, 25 BRBS 5 (1991) (administrative law judge rationally found the February 1988 evidence more reliable than the other relevant evidence of record because it included an audiogram and the identity of the test administrator, a certified audiologist, and because the opinion of Dr. Haughwout was that

⁷ This interpretation is supported by the language of the regulation, as one of the requirements for a presumptive audiogram is that no contrary audiograms meeting the standards are produced. If so, neither could be “presumptive.”

the 1988 test was more complete); *Labbe v. Bath Iron Works Corp.*, 24 BRBS 159 (1991) (administrative law judge acted within his discretion by awarding claimant benefits based on the extent of his hearing loss in 1986, since he rationally found it to be the only credible evidence rendered pursuant to the *AMA Guides*). The decisions in these cases do not require that an audiogram meet the requirements for it to be presumptive evidence in order for an administrative law judge to credit the audiogram in determining the extent of claimant's hearing loss.⁸ In order for it to be determinative of claimant's hearing loss, an audiogram must apply the *AMA Guides* criteria in accordance with Section 8(c)(13)(E) of the Act and meet that requirement and the other criteria of Section 702.441(d).⁹

⁸ We agree with the Director that the unpublished decision in *Maersk Stevedoring Co. v. Container Stevedoring Co.*, 210 F.3d 384 (table), 2000 WL 27883 (9th Cir. 2000), is neither binding precedent nor did it address the relevant issue regarding the determination of the extent of hearing loss. The issue before the court concerned the employer responsible for compensating claimant's hearing loss. However, it is illustrative of the authority given to an administrative law judge in evaluating the reliability of an audiogram and determining its probative value. As such, the administrative law judge did not err in citing it. In *Maersk*, the court found, based on the unique circumstances presented, that an early audiogram that was not conducted in accordance with the standards set forth in the *AMA Guides* but that was confirmed by three later audiograms which were reliable and conformed with the guidelines, was sufficient to establish that claimant sustained a hearing loss as of that test's date for purposes of identifying the responsible employer. The audiogram in question was missing a value at the 3000-hertz level and the employee had been exposed to noise less than fourteen hours prior to the test. All doctors, however, agreed that the four audiograms were "essentially the same." While the court stated its decision in no way violated the Act's requirement that an audiogram comply with the *AMA Guides* in order to be "determinative" under the Act, it found that on the facts presented the purposes of uniformity and predictability required by Section 8(c)(13)(E) and Section 702.441(d) had been met.

⁹ The legislative history of the 1984 Amendments to the Act also indicates that the purpose of Section 8(c)(13)(E), and its corresponding regulation, Section 702.441(d), in requiring the use of the *AMA Guides*, is to establish uniformity in how hearing loss is to be measured. Prior to the enactment of the 1984 Amendments, it was within the administrative law judge's discretion to employ any reasonable method to determine the extent of the claimant's hearing loss. *See, e.g., Linkous v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 158 (1984). The Conference Substitute Report states that the Senate bill, the House Amendment and the Conference Substitute all require determinations of hearing loss in accordance with the *Guides* as promulgated and

For these reasons, we affirm the administrative law judge’s interpretation of the pertinent regulations and reject the Director’s argument that the regulations require a “presumptive” audiogram in order for employer to establish that claimant had a pre-existing permanent partial disability for purposes of Section 8(f) relief. Section 702.321(a), by its very terms, does not require a presumptive audiogram, as it references Section 702.441 as a whole. If the intent of the pertinent Section 8(f) regulation was to require, as the Director urges, a “presumptive” audiogram, then it stands to reason that Section 702.321(a) would have specifically referenced Section 702.441(b). Instead, Section 702.321(a) refers to Section 702.441 without citation to a specific subsection. Thus, consistent with the administrative law judge’s conclusion, the more reasonable interpretation based on the specific language of Section 702.441 is that the requirements in Section 702.441(b)(1)-(3) apply only for audiograms to be “presumptive evidence” of hearing loss, and that audiograms which do not meet those standards may establish the degree of hearing loss if they are nevertheless reliable and probative.

We therefore hold that the Section 702.321 does not require that employer produce a presumptive audiogram in order for it to establish the pre-existing hearing loss requisite for its entitlement to Section 8(f) relief. The key question relating to hearing loss for purposes of Section 8(f) relief as well as establishing the extent of hearing loss in adjudicating any other aspect of the claim is whether there is sufficient probative evidence, applying the *AMA Guides* and procedures of Section 702.441(d), to establish the extent of a claimant’s permanent loss of hearing at a particular point in time. Such determinations are squarely within the purview of the administrative law judge, and her findings on such matters must be affirmed if they are rational and supported by substantial evidence.

In this case, it is undisputed that claimant had a binaural hearing loss of 15 percent as of August 9, 2004, as evidenced by the results of an audiogram administered on that date and the subsequent statements of Dr. Haughwout, confirming at least a 15 percent binaural hearing loss under the *AMA Guides* as of that date. The Director, however, argues the August 9, 2004, audiogram cannot establish the existence of a pre-existing hearing impairment because it is deficient in terms of the requirements of Section 702.441(d). Specifically, the Director contends that said audiogram does not meet the requirements of the *AMA Guides*, which include an assessment of claimant’s current clinical status, or establish whether the audiometer was properly calibrated. In this regard, the Director argues that the regulations require that a health care professional, and not, as in this case, an administrative law judge, evaluate the reliability of the test.

modified from time to time by the AMA as the *AMA Guides* are the most widely accepted medical standards. H.R.REP.CONF. No. 1027, 98th Cong., 2d Sess. 28, reprinted in 1984 U.S.C.C.A.N. 2778.

Examining the August 9, 2004, audiogram, in terms of the regulatory requirements of Section 702.441(d), the administrative law judge found that it clearly identifies the name of the examiner, the type of equipment used, and the calibration date.¹⁰ Additionally, she found that the materials accompanying the August 9, 2004, audiogram reflect claimant's current physical condition and that the results of that test are consistent with those of other audiograms administered in 2000, on August 4, 2004, and on November 30, 2004. Decision and Order on Recon. at 5. Based on these findings, the administrative law judge rationally found that the August 9, 2004, audiogram was sufficient to establish, for purposes of employer's application for Section 8(f) relief, the requisite pre-existing permanent partial disability, *i.e.*, that claimant had a pre-existing binaural hearing loss of 15 percent.

Contrary to the Director's assertion, the administrative law judge did not individually evaluate the reliability of the August 9, 2004, audiogram, but properly relied on medical evidence establishing the reliability of the August 9, 2004, test. For instance, the affidavit of Dr. Mazorra reflects that the audiogram of August 9, 2004, was appropriately administered such that it provided reliable results regarding the extent of claimant's hearing loss. EX 10. Additionally, Dr. Haughwout, upon whom the administrative law judge relied, testified that all of his calculations regarding the amount of impairment that claimant showed on his audiograms was done using the Fifth Edition of the *AMA Guides*. EX 21, Dep. at 7. Dr. Haughwout added that based on the August 9, 2004, audiogram made available to him, he would opine that claimant had a permanent binaural hearing loss of at least 15 percent at that time. *Id.* Thus, the administrative law judge's finding that the August 9, 2004, audiogram is substantially compliant with Section 702.441(d), and therefore a reliable indicator of claimant's pre-existing hearing loss for purposes of Section 8(f) relief, is affirmed, as it is supported by substantial evidence. We therefore affirm the administrative law judge's finding that employer

¹⁰ In support of the administrative law judge's findings, the record reflects that the audiogram dated August 9, 2004, includes the calibration date, as either November 1, or 7, 2003, the type of equipment used, *i.e.*, a microprocessor, and identifies the examiner as Thomas M. Brooks, who, at that time, held a certification from the Council for Accreditation in Occupational Hearing Conservation (CAOHC). CX 6 at 40-42. Additionally, Dr. Maria Mazorra, who was employer's Chief of Occupational Medicine, attested that certified technicians administered all of the audiograms performed at employer's facility between October 19, 1988, and June 20, 2005. EX 10. Dr. Mazorra further certified that these "audiometric examinations were conducted in a manner and in a facility that meets the standards set forth" by the CAOHC. *Id.* The record further contains a "Medical Surveillance History Questionnaire" dated August 4, 2004, which reflects the claimant's physical condition at that time and would suffice for the tests on August 4, 2004, and August 9, 2004. CX 6 at 38.

established the requisite pre-existing binaural hearing loss for entitlement to Section 8(f) relief. As the Director does not challenge any other aspect of the administrative law judge's finding that employer is entitled to Section 8(f) relief, that finding is affirmed.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Special Fund Relief and Decision and Order Granting in Part and Denying in Part Director's Motion for Reconsideration are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge