

J. D. KIRKSEY)	
)	
Claimant-Respondent)	
)	
v.)	
)	
ITO CORPORATION)	
)	
Self-Insured)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	DATE ISSUED:
OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Mitchell G. Lattof, Sr. (Lattof & Lattof, P.C.), Mobile, Alabama, for claimant.

Robert E. Thomas (Cornelius, Sartin & Murphy), New Orleans, Louisiana, for self-insured employer.

LuAnn Kressley (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Acting Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (91-LHC-822) of Administrative Law Judge C. Richard Avery 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.*

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

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 as a hook-up man for employer, where he was exposed to workplace noise. On October 31, 1986, claimant underwent an audiological examination, which audiologist Daniel E. Sellers, Ph.D., interpreted on July 22, 1991 as indicating a 5.6 percent impairment in claimant's right ear, or a binaural hearing loss of 0.9 percent. Dr. Sellers further opined that employment-related noise exposure could have been a contributing factor in claimant's hearing loss. An April 8, 1991 audiogram performed by Jim McDill, Ph.D., an audiologist, revealed a mild bilateral high frequency sensorineural hearing loss which measured as a zero percent binaural impairment. After examining claimant and reviewing both audiograms, Donald J. Muller, M.D. opined that claimant has a very mild work-related hearing loss that is probably below the range of compensability. After conducting a noise survey in April 1991, and reviewing the aforementioned hearing tests and medical reports on August 26, 1991, audiologist Michael F. Seidemann, Ph.D. concluded that the April 8, 1991 audiogram showing a mild hearing loss which measured as a zero percent binaural impairment was the most reliable audiogram and that claimant's hearing loss was not due to his employment. Claimant filed a claim for hearing loss benefits under the Act on December 2, 1986.

In his Decision and Order Awarding Benefits, the administrative law judge afforded claimant the benefit of the Section 20(a), 33 U.S.C. §920(a), presumption that claimant's hearing loss was the result of noise exposure at his worksite based on claimant's testimony and the medical reports of Drs. Muller and Sellers. He then found Dr. Seidmann's opinion that there was no causal connection between claimant's exposure to noise at work and his minor hearing impairment sufficient to establish rebuttal and accordingly proceeded to resolve the causation issue based on his evaluation of the record as a whole. After considering the record evidence, the administrative law judge ultimately concluded that claimant had established that his hearing loss was work-related based on the medical opinions of Drs. Muller and Sellers which recognized that hearing loss could occur at the levels of noise exposure reflected in Dr. Seidmann's noise survey. Crediting the April 9, 1991, audiogram which indicated that claimant had a zero percent binaural hearing loss because it was the most recent, the administrative law judge concluded that claimant sustained no compensable disability under the Act. He further determined that as claimant was not entitled to compensation, he also was not entitled to an assessment under Section 14(e), 33 U.S.C. §914(e). Finally, the administrative law judge ordered employer to pay any medical expenses arising from claimant's hearing loss in the future, noting that although Dr. Muller's report indicated that claimant was not a candidate for amplification or surgery and there was no indication that treatment of claimant's hearing loss was anticipated at that time, employer would be liable for future medical treatment necessitated by claimant's work-related hearing impairment.

On appeal, employer contends that as claimant does not suffer from a compensable injury, the administrative law judge erred in awarding him future medical benefits. Both claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance of the administrative law judge's decision.

Employer's argument that the administrative law judge erred in awarding claimant future medical benefits because he did not sustain a compensable injury is without merit. The recent opinion of the United States Court of Appeals for the Fifth Circuit in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT) (5th Cir. 1993), is instructive and its reasoning persuasive.¹ In *Baker*, the court held that a claimant who suffers a work-related hearing loss that does not result in measurable impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (3d ed. 1988), may nonetheless be entitled to medical benefits under Section 7 if they are found to be reasonably necessary. The court cautioned, however, that an evidentiary basis must exist for the award of medical benefits, such as past expenses incurred or evidence of treatment necessary in the future. *Id.* In one of the two cases consolidated in *Baker*, the court reversed the award of medical benefits to claimant Buckley because such an evidentiary basis was found to be lacking. In the second claim, the court remanded, noting conflicting evidence regarding the necessity of future treatment. As *Baker* is consistent with our prior decisions recognizing that where claimant is successful in establishing causation, employer is liable for reasonable and necessary medical expenses regardless of whether claimant's injury is disabling, see *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 1 (1992), *aff'd sub nom Brooks v. Director, OWCP*, 2 F.3d 64, BRBS (CRT) (4th Cir. 1993); *Winston v. Ingalls Shipbuilding, Inc.*, 16 BRBS 168, 174 (1984), employer's argument that it was error for the administrative law judge to have awarded claimant future medical benefits because he had no compensable injury is rejected.

While we reject employer's argument that the administrative law judge erred in awarding claimant future medical benefits because claimant does not have a compensable hearing loss, we note that the administrative law judge found that the record does not establish that medical treatment is anticipated at this time. The administrative law judge stated that in the event claimant requires treatment due to his mild hearing impairment, employer would be liable. The administrative law judge's determination is consistent with the requirement in *Baker* that an evidentiary basis exist for an award of medical benefits. As claimant succeeded in establishing that his hearing loss was work-related and claims for medical benefits are never time-barred, claimant may file a claim for medical benefits if and when medical treatment becomes necessary. See *Baker*, 991 F.2d at 166, 27 BRBS at 16 (CRT); see also *Colburn v. General Dynamics Corp.*, 21 BRBS 219 (1988); *Mayfield v. Atlantic & Gulf Stevedores*, 16 BRBS 228 (1984).

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

SO ORDERED.

¹We note that the United States Court of Appeals for the Eleventh Circuit, from which this case arises, has not yet addressed the issue presented.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge