BRB No. 92-2418

ISRAEL BANKS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MURRAY STEVEDORING COMPANY, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
ALABAMA INSURANCE GUARANTY ASSOCIATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION AND ORDER

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

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

Joseph R. Sullivan (Miller, Hamilton, Snider & Odom), Mobile, Alabama, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (90-LHC-2248) of Administrative Law Judge A.A. Simpson, Jr., denying benefits 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 as a longshoreman for various stevedoring companies, including this employer, during the years 1925 to 1972, inclusive. The administrative law judge found that claimant was exposed to noise at the Alabama State Docks General Cargo Facilities, and that Murray Stevedoring (employer), for whom claimant performed most of his work in the last quarter

of 1972, last exposed claimant to injurious stimuli. Claimant retired in 1972.

On November 14, 1986, claimant underwent an audiometric evaluation which revealed a .9 percent binaural hearing impairment; claimant thereafter sought benefits from employer for a work-related hearing loss on March 25, 1987. Employer was notified of the claim on March 25, 1987, and filed a notice of controversion on June 13, 1990. Claimant also underwent audiometric testing on February 1, 1991, which indicated that claimant suffers a 6.85 percent binaural hearing loss.

In his Decision and Order, the administrative law judge found that claimant retired in 1972, and thus, if claimant's hearing loss is compensable, employer would not be liable for the deterioration in claimant's hearing indicated by the difference in hearing loss revealed by the 1986 and 1991 audiometric exams. The administrative law judge found employer's liability would be limited by the .9 percent loss exhibited on the 1986 test. The administrative law judge further found that a .9 percent binaural impairment translates to a zero percent "whole man" impairment under the American Medical Association Guides to the Evaluation of Permanent Impairment, and thus, if claimant demonstrated a measurable work-related impairment, he would not be entitled to benefits under Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23). Citing *Bruce v. Bath Iron Works Corp.*, 25 BRBS 157 (1991), the administrative law judge concluded based on the foregoing that claimant did not establish the existence of a measurable hearing impairment at the time he retired in 1972, and is thus not entitled to disability or medical benefits.[1] Decision and Order at 3.

On appeal, claimant contends that the administrative law judge erred in denying benefits based on the finding that claimant did not establish the existence of a measurable impairment at the time he retired. In addition, claimant contends that the administrative law judge erred in determining that his award should be calculated pursuant to Section 8(c)(23) rather than Section 8(c)(13). Employer responds, urging affirmance of the administrative law judge's Decision and Order.

Initially, claimant contends that the administrative law judge erred by failing to award benefits for claimant's hearing loss as evidenced by the audiogram results from 1986. We agree. The administrative law judge in this case erred in relying on *Bruce*, 25 BRBS at 157 to deny benefits, as it is factually dissimilar. In *Bruce*, and three earlier cases, *Labbe v. Bath Iron Works Corp.*, 24 BRBS 159 (1991), *Dubar v. Bath Iron Works Corp.*, 25 BRBS 5 (1991), and *Brown v. Bath Iron Works Corp.*, 22 BRBS 384 (1989), the Board was faced with the issue of the calculation of benefits for claimants who were exposed to noise in covered employment and then worked in non-covered employment. In *Brown*, the Board held that the aggravation of a covered injury occurring after claimant's longshore employment has terminated is non-compensable, citing *Leach v. Thompson's Dairy, Inc.*, 13 BRBS 231 (1981). The Board vacated the award of benefits based on a 1983 audiogram, and remanded the case for the administrative law judge to determine if claimant had a hearing loss prior to his leaving covered employment, based on earlier audiograms of record. *Brown*, 22 BRBS at 388.

Thereafter, in *Labbe v. Bath Iron Works Corp.*, 24 BRBS 159 (1991), the Board

[1]Inasmuch as claimant was not entitled to benefits, the administrative law judge also found that claimant was not entitled to interest or a Section 14(e) penalty.

reconsidered its holding in *Brown*, 22 BRBS at 388, and stated that *Leach*, 13 BRBS at 231, has not been applied to retiree occupational disease cases. *Labbe*, 24 BRBS at 161-162; *see also Dubar v. Bath Iron Works Corp.*, 25 BRBS 5 (1991) (restating this proposition with regard to a non-retiree case). The Board stated that in occupational disease cases the last covered employer or carrier is liable for the totality of claimant's disability resulting from an occupational disease even if the disability is aggravated by subsequent non-covered employment. *Labbe*, 24 BRBS at 162. The Board held in *Labbe* that the holdings in *Brown* and *Leach* do not necessarily require claimants to recreate the precise extent of their hearing loss at the date covered employment ended and that, in the absence of credible evidence regarding the extent of hearing loss at the end of covered employment, the administrative law judge may rely on the most credible evidence of record in determining the extent of claimant's work-related hearing loss. *Labbe*, 24 BRBS at 161-162; *see also Dubar*, 25 BRBS at 8.

Contrary to the administrative law judge's reasoning in this case, the Board did not require in *Bruce*, 25 BRBS at 157, that the results from later tests be projected back to determine whether claimant sustained a compensable hearing loss at the time he left covered employment. The earliest audiogram of record in that case was administered to the claimant fourteen and one-half years after he left covered employment, and reflected either a zero or a 6.5 percent hearing loss depending on the calibration of the equipment. The administrative law judge found that this audiogram was the most reliable evidence of the claimant's hearing loss as it was performed closest to the time the claimant left covered employment. Consequently, based upon the record, the Board affirmed the administrative law judge's finding that the claimant did not sustain his burden of establishing the existence of a measurable hearing impairment. *Bruce*, 25 BRBS at 160.

The instant case is distinguishable from the forgoing, as claimant herein retired from all employment in 1972, and was not exposed to noise in subsequent non-covered employment.[2] Claimant, therefore, is entitled to benefits for the totality of his occupational hearing loss based on the most credible evidence of record. *See Ronne v. Jones Oregon Stevedoring Co.*, 22 BRBS 344 (1989), *aff'd in pert. part sub nom. Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137 (CRT) (9th Cir. 1991). The administrative law judge found the 1986 audiogram to be the better indicator of claimant's work-related hearing loss. Moreover, Dr. Sellers noted that claimant had been exposed to loud noises in his employment as a longshoreman, and concluded that claimant's loss in the high frequencies indicate that noise exposure was a possible contributor to his hearing problem. Cl. Ex. 4. Therefore, inasmuch as the audiogram which the administrative law judge found to be the most reliable shows a hearing impairment which could have been caused by work-related noise exposure, we reverse the administrative law judge's denial of benefits.

In addition, we agree with claimant that, as a retiree, he is entitled to be compensated under Section 8(c)(13) rather than Section 8(c)(23) for his occupational hearing loss. The United States Supreme Court has held that because occupational hearing loss results in immediate disability, claimants must be compensated under the schedule pursuant to Section 8(c)(13), regardless of

[2]Moreover, unlike in *Bruce*, all audiograms of record reveal a measurable impairment.

whether they are retirees. *Bath Iron Works Corp. v. Director, OWCP*, ___ U.S. ___, 113 S.Ct. 692, 26 BRBS 151 (CRT)(1993). We therefore vacate the administrative law judge's award of benefits under Section 8(c)(23), and, as neither the administrative law judge's finding that the 1986 audiometric evaluation is the more credible nor his acceptance of the stipulated average weekly wage of $302.66 is challenged on appeal, we modify the award to reflect employer's liability for 1.8 weeks (.9 percent of 200 weeks) of permanent partial disability benefits based upon the stipulated average weekly wage pursuant to Section 8(c)(13) of the Act.[3] *Bath Iron Works*, 113 S.Ct. at 699-700, 26 BRBS at 154 (CRT); *Moore v. Ingalls Shipbuilding, Inc.*, 27 BRBS 76 (1993). Furthermore, employer is liable for a Section 14(e) penalty, as a matter of law, on the entire award of benefits, as it stipulated that it did not controvert the claim until over three years after it had notice of the injury. *Pullin v. Ingalls Shipbuilding, Inc.*, 27 BRBS 45, *aff'd on recon.*, 27 BRBS 218 (1993). Claimant, similarly, is entitled to interest on the entire award. *See generally Smith v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 22 BRBS 46 (1989).

[3]The administrative law judge's denial of medical benefits on the ground that claimant does not have a compensable impairment is similarly reversed. We note, however, that there is no evidentiary basis in the record for an award of medical benefits. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT) (5th Cir. 1993). Claimant may seek medical benefits if and when medical treatment becomes necessary. *Id.*

Accordingly, the administrative law judge's Decision and Order denying benefits is reversed, and the decision is modified to reflect claimant's entitlement to permanent partial disability benefits, a Section 14(e) penalty, and interest consistent with this decision.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge