BRB No. 03-0556

LARRY WEIKERT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
UNIVERSAL MARITIME SERVICE CORPORATION	)	DATE ISSUED: May 20, 2004
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order and the Order Denying Reconsideration of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Breit Klein Camden, L.L.P.), Norfolk, Virginia, for claimant.

R. John Barrett and Brian L. Sykes (Vandeventer Black, L.L.P.), Norfolk, Virginia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order and the Order Denying Reconsideration (2000-LHC-2038) of Administrative Law Judge Richard E. Huddleston 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).

This is the second time this case has come before the Board and the facts are not in dispute. Claimant worked for employer repairing containers and chassis during the month of October 1996. He underwent an audiogram on October 31, 1996, which revealed a 2.2 percent binaural sensorineural hearing impairment. Tr. at 21-22; Cl. Ex. 2; Jt. Ex. 1. Claimant filed a claim for benefits in October 1999. In November 1999, claimant underwent two audiograms both of which revealed improved hearing. Cl. Exs. 2, 8. At the hearing, claimant withdrew his request for disability benefits but continued to seek medical benefits. Tr. at 8, 19. Employer stipulated that claimant has a noise-induced hearing loss caused by his employment, but it disputed liability for medical benefits. Jt. Ex. 1.

The administrative law judge determined that claimant has a work-related hearing loss. Decision and Order I at 3. He found that the provisions of Section 8, 33 U.S.C. §908, requiring claimant's hearing loss to be determined pursuant to the American Medical Association *Guides to the Evaluation of Permanent Impairment*, do not apply to the claim for medical benefits under Section 7. 33 U.S.C. §907. Therefore, he concluded claimant need not have a minimum level of hearing loss to be entitled to medical benefits. *Id.* at 3-4. Because the administrative law judge determined that the district director is to supervise claimant's medical care, he remanded the case to the district director to determine "the necessity, character and sufficiency of any medical care (including hearing aids)," and he ordered employer to pay all medical benefits deemed reasonable and necessary by the district director for the treatment of claimant's work-related hearing loss. *Id.* at 4-5. Employer appealed the decision.

The Board affirmed the determination that a claimant need not have a ratable hearing loss to be entitled to medical benefits under the Act, and it affirmed claimant's eligibility for medical benefits. *Weikert v. Universal Maritime Service Corp.*, 36 BRBS 38, 39 (2002). Explaining that the administrative law judge has the authority to resolve factual disputes regarding medical benefits, the Board vacated the administrative law judge's remand order and remanded the case to him to determine whether hearing aids are necessary and reasonable for claimant's work-related hearing loss. *Id.* at 39-40.

On remand, the administrative law judge first noted there had been no evidence admitted prior to the first decision on which he could base an award of hearing aids and that such evidence was submitted only after the Board's remand.[1] In his discussion of the

[1]This is incorrect. Claimant and employer submitted into evidence Mr. Leffke's notes, 1996 audiogram, and 1999 audiogram, as well as Ms. Graham's 1999 audiogram. Cl. Exs. 2, 8; Emp. Exs. 1-3. Employer also submitted the opinion of its expert, Dr. Jacobson, and although his opinion was originally rejected as an exhibit, Tr. at 12, employer included it in its supplemental exhibits. Emp. Exs. 6-7, 9; Supp. Emp. Ex. Both 1999 audiograms recommended annual monitoring of claimant's hearing, and Mr.

issue, the administrative law judge stated there was no way to verify whether Mr. Leffke was claimant's "treating audiologist" because that determination is within the purview of the district director, but he would presume such status because it is not disputed by employer. Decision and Order II at 1-2. After comparing the evidence on the need for hearing aids and the credentials of the experts, the administrative law judge stated that Dr. Jacobson's qualifications are superior to Mr. Leffke's and that Mr. Leffke and Ms. Graham are equally qualified audiologists. *Id.* at 3. Nevertheless, the administrative law judge awarded claimant hearing aids stating:

> assuming that the District Director has designated Mr. Leffke as the Claimant's treating audiologist, I find that his opinion must be accorded greater weight. Therefore, I find that the prescription of hearing aids is a reasonable and necessary medical treatment to which claimant is entitled.

Decision and Order II at 3.

Employer moved for reconsideration of this decision, asserting that it has all along disputed Mr. Leffke's status as "treating audiologist." It argued that Mr. Leffke is merely the first audiologist claimant saw and that he has not treated with or obtained hearing aids from anyone. The administrative law judge stated there is no way to resolve the dispute over whether there is a treating audiologist because that is a discretionary matter belonging to the district director. Order Denying Recon. at 1. After reviewing his opinion on remand in light of employer's arguments, the administrative law judge stated:

> I remain of the opinion that Mr. Leffke's opinion should be accorded greater weight, even if Mr. Leffke has not been designated as the Claimant's treating audiologist. Because the Board has affirmed the finding that the Claimant is entitled to medical expenses under §7 of the Act, the opinion of Mr. Leffke is consistent with that finding, while the contrary opinion of Ms. Graham is that he has no ratable hearing loss.

Order Denying Recon. at 2. Employer appeals the administrative law judge's award of hearing aids, and claimant responds, urging affirmance.

Leffke recommended using hearing aids. Cl. Exs. 2, 8. Further, claimant's counsel stated at the hearing that claimant was not seeking compensation but was seeking medical benefits and that "in both audiograms from Virginia Audiology, it indicated that [claimant] needs hearing aids." Tr. at 9. Supplemental evidence submitted after the Board's remand was merely duplicative of evidence previously submitted. Cl. Ex. 12; Supp. Cl. Ex.; Supp. Emp. Ex.

Employer argues that claimant is not entitled to hearing aids because there is no treating audiologist in this case, and even if Mr. Leffke were claimant's treating audiologist, his opinion is not entitled to greater weight than those of other experts. Claimant argues that Mr. Leffke's role as "treating audiologist" was not the reason the administrative law judge gave his opinion greater weight, although he is entitled to do so. Claimant also argues that Mr. Leffke is well qualified to give an opinion on whether or not claimant needs hearing aids, and it was reasonable for the administrative law judge to credit his opinion.

Under the Act, claimant bears the burden of establishing his entitlement to medical benefits that are reasonable and necessary for the treatment of his work-related injury. *Weikert*, 36 BRBS at 39; *Davison v. Bender Shipbuilding & Repair Co., Inc.*, 30 BRBS 45 (1996). In this case, claimant presented the opinion of Mr. Leffke. In 1996, he recommended claimant use hearing protection, undergo periodic monitoring, and possibly, in the future, wear hearing aids. Cl. Ex. 2. In 1999, Mr. Leffke again recommended claimant wear hearing protection and undergo periodic monitoring. At this time, however, he believed claimant was a good candidate for hearing aids, and he recommended their use. *Id.* In a letter dated May 29, 2001, Mr. Leffke explained the technicalities of his 1999 recommendation for hearing aids and why their use would be beneficial to claimant. Cl. Ex. 12.

To the contrary, employer presented the opinions of Ms. Graham and Dr. Jacobson. Ms. Graham examined claimant's hearing on November 24, 1999, a few weeks after Mr. Leffke's examination, and although she found a hearing loss within normal limits, she recommended claimant wear hearing protection and return for annual monitoring. Cl. Ex. 8. Dr. Jacobson reviewed all audiograms, agreed there was a hearing loss within normal limits, and questioned the benefit of using hearing amplification. He believed claimant was not a good candidate at that time and suggested claimant wait before attempting to use hearing aids. Emp. Exs. 6, 9.

We agree with employer that the administrative law judge's award of hearing aids cannot be affirmed. The administrative law judge erroneously gave Mr. Leffke's opinion greater weight because he found it "is consistent with" the Board's affirmance of claimant's entitlement to medical expenses. Although the administrative law judge has the authority to credit and weigh the testimony of the witnesses, including medical testimony, *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); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969), the Board need not defer to his findings if they are not made in a valid manner. *Howell v. Einbinder*, 350 F.2d 442 (D.C. Cir. 1965). The administrative law judge's reasons for giving Mr. Leffke's opinion greater weight in this case are not valid and are not supported by the record. The Board affirmed only

claimant's *eligibility* for medical benefits, not his entitlement thereto. Only if the administrative law judge determines that the recommended medical treatment is necessary and reasonable for claimant's work-related hearing loss is claimant entitled to medical benefits. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993). Further, as all experts agreed that claimant has no ratable hearing impairment, it is irrational to give Ms. Graham's opinion less weight for this reason. Having an "unratable" loss does not affect claimant's entitlement to medical benefits if they are otherwise reasonable and necessary. *Id.*; *Weikert*, 36 BRBS at 39; *Davison*, 30 BRBS 45. Because the administrative law judge's reasons for giving Mr. Leffke's opinion greater weight and Ms. Graham's opinion less weight are not rational, we vacate the award of hearing aids. *Howell*, 350 F.2d 442; *see also* 5 U.S.C. §557(c)(3)(A).

Moreover, to the extent the administrative law judge relied on Mr. Leffke's status as claimant's "treating audiologist," the record does not support his determination. Claimant met with Mr. Leffke on only two occasion. Thus, there is no "treating audiologist" in this case.[2] Rather, there are two examining audiologists and one reviewing doctor.

The administrative law judge discussed the credentials of each expert, and he found that Mr. Leffke has a "B.S. degree in Speech Pathology and Audiology and an M.S. degree with a special emphasis in clinical audiology." Decision and Order II at 2 n.2; Cl. Ex. 12. He found that Ms. Graham has a "B.A. degree in Communicative Services and Disorders and an M.S. degree in Audiology." Decision and Order II at 3 n.4; Emp. Ex. 8. And, he found that "Dr. Jacobson is the Director of the Eastern Virginia Medical School Department of Otolaryngology. He holds a B.A. degree in Education, an

[2]Contrary to the administrative law judge's statements, whether a doctor is a treating physician is not a matter for the district director. Rather, it is a fact the administrative law judge may address in his evaluation of the medical evidence. There is no "mechanical" deference accorded to the opinions of treating physicians. Their opinions are to be weighed and credited along with the opinions of any other expert of record. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Consolidation Coal Co. v. Held*, 314 F.3d 184, 22 BLR 2-564 (4th Cir. 2002); *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997) (quoting *Grizzle v. Picklands Mather & Co.*, 994 F.2d 1093, 1097, 17 BLR 2-123, 2-128-129 (4th Cir. 1993)). If, however, the treating physician's opinion is not contradicted, it may be entitled to "special" consideration under certain circumstances. *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997); *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999).

M.S. degree in audiology, and a Ph.D. in Audiology." Decision and Order II at 3 n.3; Emp. Ex. 7; Supp. Emp. Ex. As stated previously, the administrative law judge found Mr. Leffke and Ms. Graham to be equally qualified, and he found that "the qualifications of Dr. Jacobson are superior to those of Mr. Leffke." Decision and Order II at 3.

In light of the audiograms, explanatory letters, medical recommendations, and the evidence regarding the experts' qualifications, the administrative law judge has sufficient evidence from which he can make a rational decision regarding claimant's entitlement to hearing aids and medical monitoring. On remand, the administrative law judge should consider and weigh all relevant evidence accordingly. Therefore, we remand the case for the administrative law judge to reconsider the issue of claimant's entitlement to hearing aids, considering factors such as professional qualifications, explanations of opinions, documentation in support of their conclusions, and the existence of other corroborating evidence. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-276 (4th Cir. 1997).

Accordingly, the administrative law judge's Decision and Order and Order Denying Reconsideration are vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge