BRB No. 07-0739

R.H.	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
BATH IRON WORKS CORPORATION	)	DATE ISSUED: 09/19/2008
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	ORDER on
Petitioner	)	RECONSIDERATION

The Director, Office of Workers' Compensation Programs (the Director), has filed a timely motion for reconsideration of the Board's decision in *R.H. v. Bath Iron Works Corp.*, 42 BRBS 6 (2008), wherein the Board held, in contrast to the Director's argument, that 20 C.F.R. §702.321 does not require an employer to produce a "presumptive" audiogram pursuant to 20 C.F.R. §702.441(b) in order to establish the pre-existing hearing loss requisite for its entitlement to Section 8(f) relief. Employer responds in opposition to the Director's motion. We deny the Director's motion for reconsideration for the reasons stated herein.

To recapitulate, an audiogram conducted on September 10, 2004, indicated that claimant had a 15 percent binaural hearing loss, for which employer paid benefits. Claimant continued to work at the shipyard where he was exposed to additional injurious noise. A subsequent audiogram conducted on September 23, 2005, revealed that claimant had a binaural hearing loss of 23.8 percent. Employer agreed that claimant was entitled to additional benefits and sought Section 8(f) relief, 33 U.S.C. §908(f), for the portion attributable to claimant's pre-existing loss.[1] The administrative law judge

[1] In support of its Section 8(f) application, employer submitted an audiogram dated August 9, 2004, which it argued established that claimant had a pre-existing permanent binaural hearing loss of 15 percent. In a hearing loss case where Section 8(f) relief is granted, employer's liability for compensation is limited to the lesser of 104

awarded employer Section 8(f) relief, rejecting the Director's contention that pursuant to 20 C.F.R. §702.321 employer's entitlement to Section 8(f) relief is predicated on its producing an audiogram complying with each subsection of 20 C.F.R. §702.441.

On appeal, the Director challenged the administrative law judge's finding that employer is entitled to Section 8(f) relief. The Board rejected the contention that employer is required to produce an audiogram which complies with each subsection of Section 702.441.

Interpreting the pertinent regulations, *i.e.*, 20 C.F.R. §§702.321, 702.441, the Board observed that when read in its entirety, Section 702.441 provides that an audiogram may serve as determinative evidence of hearing loss so long as it complies with Section 702.441(d), and that if the audiogram meets the additional requirements of Section 702.441(b), it may further serve as "presumptive evidence" of a hearing loss. The Board thus held that "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." *R.H.*, 42 BRBS at 9. Consequently, the Board concluded that Section 702.321 does not require that employer produce a presumptive audiogram pursuant to Section 702.441(b) in order for it to establish the pre-existing hearing loss required for its entitlement to Section 8(f) relief.[2]

Moreover, the Board observed that the key question relating to hearing loss for purposes of Section 8(f) relief, as well as for establishing the extent of hearing loss in adjudicating any other aspect of the claim, is whether there is sufficient probative evidence, applying the American Medical Association *Guides to the Evaluation of Permanent Impairment* (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. Acknowledging that such determinations are squarely within the purview of the administrative law judge, the Board affirmed the administrative law judge's findings that

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weeks or the number of weeks attributable to the subsequent hearing loss. *See* 33 U.S.C. §908(f); *Reggiannini v. v. General Dynamics Corp.*, 17 BRBS 254, 257 (1985). Employer's remaining liability is transferred to the Special Fund. *Id.*

[2] We reiterate that Section 702.321 requires compliance with the requirements of Section 702.441; however, contrary to the Director's position, compliance with Section 702.441(b) is not required for an audiogram to be evidence determinative of the degree of claimant's hearing loss.

the August 9, 2004, audiogram is substantially compliant with Section 702.441(d), and thus that it serves as a reliable indicator of claimant's pre-existing hearing loss for purposes of Section 8(f) relief, as they are supported by substantial evidence. The Board thus affirmed the administrative law judge's finding that employer established the requisite pre-existing binaural hearing loss for entitlement to Section 8(f) relief. Accordingly, the administrative law judge's finding that employer is entitled to Section 8(f) relief was likewise affirmed.

In its request for reconsideration, the Director initially reiterates his argument on appeal, contending that the plain language of Section 702.321 requires that an audiogram offered to establish an employer's entitlement to Section 8(f) relief must meet all of the requirements set forth in Section 702.441. This argument was fully considered and addressed by the Board previously. Thus, as the Director raises no new arguments with respect to this particular issue, we reject this contention.

The Director alternatively argues that his interpretation of Section 702.321, as requiring compliance with all of the provisions of Section 702.441, including those pertaining to "presumptive evidence" in subsection (b), is controlling pursuant to the United States Supreme Court's decision in *Auer v. Robbins*, 519 U.S. 452 (1997). The Director argues that the Board's rejection of his interpretation as "no more than a litigation position," ignores the fact that the Director adopted the regulation specifically addressing the issue after formal rulemaking in accordance with the Administrative Procedure Act. The Director maintains that the "mere litigating position" analysis applies only if the agency has not promulgated a regulation, and is offering its interpretation of a statute (rather than a regulation) in response to litigation. Moreover, the Director contends, in contrast with the Board's statement, that it had previously raised this interpretation of Sections 702.321 and 702.441 in cases before the Board, *i.e.*, *L.W. v. Matson Terminals, Inc.*, BRB No. 07-0874, and *G.K v. Matson Terminals, Inc*., BRB No. 07-0643.

In *Auer*, the United States Supreme Court held that an agency's interpretation of its own regulation is entitled to deference. *Auer*, 519 U.S. at 461; *see also Thomas Jefferson Univ. v. Shalala*, 512 U.S. 502, 512 (1994); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). The Court subsequently clarified that *Auer* deference is warranted only when the language of the regulation is ambiguous. *Christensen v. Harris County*, 529 U.S. 576 (2000). The Board considered the issue regarding the amount of deference given to the Director's interpretation pursuant to the correct standard. *See R.H.*, 42 BRBS at 7 n. 4. Specifically, the Board observed that the amount of deference to be given 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. Mead Corp.*, 533 U.S. 218, 238 n. 19, (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1994)) (internal quotation marks omitted). The Board, however, further observed that such deference "is not afforded litigation positions taken by the Director that are wholly unsupported by regulations, rulings, or administrative practice." *R.H.*, 42 BRBS at 7 n.4, *citing 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).

It is undisputed that the statute is silent with respect to the particular issue in this case, *i.e.*, whether audiograms offered to establish the pre-existing permanent partial disability element of Section 8(f) should meet a more stringent requirement than those offered to establish a claimant's entitlement to compensation. Under such circumstances, the court must defer to the agency's regulation if it is based on a reasonable construction of the statute. *See Delaware River Stevedores v. DiFidelto*, 440 F.3d 615, 40 BRBS 5(CRT) (3d Cir. 2006) *citing Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, (1984). The Third Circuit, in *Difidelto*, stated that "when considering whether a regulation complies with Congress's mandate:

> We look to see whether the regulation harmonizes with the plain meaning of the statute, its origins, and its purpose . . . . So long as the regulation bears a fair relationship to the language of the statute, reflects the views of those who sought its enactment, and matches the purpose they articulated, it will merit deference.

Difidelto, 440 F. 3d at 619, 40 BRBS at 8(CRT), *citing Director, OWCP v. E. Associated Coal Corp.*, 54 F.3d 141, 147 (3d Cir. 1995)(quoting *Sekula v. FDIC*, 39 F.3d 448, 452 (3d Cir. 1994)). The Third Circuit also observed that it must "defer to an agency's *consistent interpretation* of its own regulation unless it is plainly erroneous or inconsistent with the regulation." *Difidelto*, 440 F. 3d at 619, 40 BRBS at 8(CRT), *citing Director, OWCP v. Mangifest*, 826 F.2d 1318, 1323 (3d Cir. 1987) (internal citations and quotations omitted) (emphasis added). Thus, in addressing the Director's contention herein, we are guided by the principle that regulations are supposed to "reasonably" interpret statutes.

There is no basis in the statute for the regulatory construction offered by the Director in this case, as the statute does not state that the pre-existing audiogram for purposes of establishing Section 8(f) relief must meet the "presumptive" standard of Section 702.441(b). Rather, the statute supports the Board's interpretation as evidenced by the fact that the 1984 Amendments included the addition of 33 U.S.C.§908(c)(13)(E), which indicates that it was Congress's intent to set certain requirements for making all

"determinations" regarding the extent of hearing loss, *i.e.*, "determinations of loss of hearing shall be made in accordance with the guides for the evaluation of permanent impairment as promulgated and modified from time to time by the American Medical Association." 33 U.S.C. §908(c)(13)(E). Absent from this is any indicia of an intent to differentiate between the requirements for making determinations as to the extent of hearing loss for purposes of Section 8(f) relief and for hearing loss claims in general.

Moreover, in promulgating regulations pursuant to the 1984 Amendments, the Department of Labor did not offer any discussion concerning the interpretation to be afforded to Sections 702.321 and 702.441.[3] *See* 50 Fed. Reg. 389 (Jan. 3, 1985); 51 Fed. Reg. 4280 (Feb. 3, 1986). Consequently, there is no basis in law for the Director's position, nor is one given in support of his argument before the Board. Moreover, the Director's interpretation is not reasonable because it is wholly unsupported by "administrative practice."[4]

In this regard, the regulation had been in existence for 22 years when the Director first espoused his opinion.[5] However, as the Board previously noted, "that the Director

[3] With regard to hearing loss, it is noted that "the amendments afford audiograms presumptive evidentiary weight if performed according to set standards, and the amendments prescribe that the extent of hearing loss must be determined in accordance with the [AMA *Guides*]." 50 Fed. Reg. 389 (Jan. 3, 1985). It does not differentiate between hearing loss cases in general and those involving Section 8(f) relief.

[4] Given this fact, the Director's contention that his interpretation is not a "litigating position" since he is seeking deference for a regulatory interpretation is moot. *See generally Todd Shipyards Corp. v. Director, OWCP*, 950 F.2d 607, 25 BRBS 65(CRT) (9th Cir. 1991); *Director, OWCP v. General Dynamics Corp. [Krotsis]*, 900 F.2d 506, 23 BRBS 40(CRT) (2d Cir. 1990). We also note that the Director in this case is not acting in his capacity as the administrator of the Act, but rather as the defender of the Special Fund; as the representative of a litigating party, the Director has an interest in the outcome and is not offering a neutral interpretation.

[5] The cases cited by the Director in its brief only further establish that his argument is "a new position," since the two other cases in which the Director raised this contention were pending before the Board at the same time as this case. The Board, in each of those cases, rejected the Director's contention for the reasons discussed in this case. The Director does not address the fact that he has not articulated this interpretation until now – despite having over twenty-plus years since the regulations were promulgated in 1985 and a large number of Section 8(f) cases in which to present this position. This supports the proposition that the Director's interpretation of these regulations is not "consistent." *Difidelto*, 440 F.3d at 619, 40 BRBS at 8(CRT).

has never raised this issue before, despite there having been a large number of Section 8(f) hearing loss cases since 1984, speaks volumes to the fact that the Director's interpretation in this case is merely an unsupported litigation position." *R.H.*, 42 BRBS at 7 n.4; *see Grant*, 502 F.3d 361, 41 BRBS 49(CRT); *Total Marine Service*, 87 F.3d 774, 776 n.2, 30 BRBS 62, 64 n.2(CRT); *see, e.g., Risch v. General Dynamics Corp.*, 22 BRBS 251 (1989); *Fucci v. General Dynamics Corp.*, 23 BRBS 161 (1990) (Brown, J, dissenting).[6] Consequently, as there is no basis in law for the Director's position regarding the regulations at Sections 702.321 and 702.441, and as his present interpretation of those provisions is, as discussed above, not reasonable, we hold that the Director's interpretation of the regulations in this case is not entitled to deference.[7] *Id.*

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[6] In *Fucci*, 23 BRBS 161, and *Risch*, 22 BRBS 251, the Director challenged the administrative law judges' findings that the respective employers were entitled to Section 8(f) relief on the ground that the audiograms presented by each employer, conducted years after the claimants began their work with employers, were insufficient to establish the requisite pre-existing permanent partial impairment. In either instance, the Director could have presented his interpretation of Section 702.321 in support of the underlying argument. However, the Director did not present his interpretation in either case, and for that matter, has not put forth this position in any other case involving the applicability of Section 8(f) with regard to a hearing loss claim, until this instance. We further note that while the appeal in *Risch* was apparently filed before the final rule on 702.321 was adopted, the case remained pending, and a final decision was not issued by the Board, for another three years, during which time the Director could have, but did not, submit any supplemental brief espousing its position regarding that regulation.

[7] Citing *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), the Director maintains that the "inconsistency" in his interpretation should not alter the deference due to that most recent interpretation. In that case, the United States Supreme Court stated that "[a]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework." *National Cable*, 545 U.S. at 981. Nevertheless, the agency's change in interpretation must be reasonable and accompanied by an adequate explanation for the change. *Id.* As demonstrated above, the Director's position in this case is not reasonable as it does not give full effect to each part of Section 702.441, nor has he provided any explanation in support for his interpretation.

Accordingly, the Director's motion for reconsideration is denied. 20 C.F.R. §802.409. The Board's decision is thus affirmed.[8]

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

[8] As a majority of the permanent Board members has denied reconsideration, the request for reconsideration *en banc* is also denied. 20 C.F.R. §801.301(c).