BRB No. 07-1004

W.H.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MATSON TERMINALS, INCORPORATED	)	DATE ISSUED: 08/29/2008
	)	
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Gerald M. Etchingham, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and Steven M. Birnbaum, San Rafael, California, for claimant.

Frank B. Hugg, Oakland, California, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits (2006-LHC-1111) of Administrative Law Judge Gerald M. Etchingham 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 was exposed to loud noises during the course of his employment with employer from 1978 until August 21, 1997, when he stopped working due to back and knee injuries. He officially retired in 2000. In 2004 and 2005, claimant underwent audiometric evaluations revealing binaural hearing loss of 39.4 percent and 36 percent, respectively. Cl. Ex. 1-2; Emp. Ex. 1. Claimant filed a claim for benefits for his hearing loss. The administrative law judge held a hearing on February 9, 2007, and the parties filed their exhibits at that time.

On April 2, 2007, claimant's counsel filed a motion requesting admission into evidence, for impeachment purposes, an April 10, 2006, medical report written by Dr. Schindler in an unrelated case. Employer responded, arguing that it would be prejudiced by such admission as the report had been available at the time of the hearing and as it had not had the opportunity to cross-examine Dr. Schindler about the report. On April 23, 2007, the administrative law judge found that claimant's motion was untimely and that the report was irrelevant, and he denied claimant's motion. Claimant moved for reconsideration of that decision, and the administrative law judge again denied the motion in his Decision and Order.

Based on the evidence of record, the administrative law judge found that none of the audiograms in evidence satisfied the requirements of Section 702.441(b) of the regulations, 20 C.F.R. §702.441(b), for being "presumptive" evidence of the extent of claimant's hearing loss. Decision and Order at 19-22. Accordingly, he considered the audiometric evidence as a whole. He credited Dr. Schindler's testimony that the 1996 evaluation was the best evidence of claimant's hearing loss at the time he stopped working in 1997. Thus, the administrative law judge found that the audiogram with the most probative value was administered to claimant in 1996 and revealed a 20 percent binaural impairment. Emp. Exs. 1 at 18, 3 at 2; Tr. at 128. The administrative law judge awarded claimant benefits for a 20 percent impairment. Decision and Order at 31.[1]

[1]The administrative law judge added one percent impairment for claimant's tinnitus, and he granted employer's request for Section 8(f), 33 U.S.C. §908(f), relief. Therefore, he held employer liable for benefits for 9.1 percent of the total impairment (18.2 weeks of benefits based on an average weekly wage of $1,171.71) and the Special Fund liable for 11.9 percent of the total impairment (23.8 weeks based on the same average weekly wage). The administrative law judge also awarded claimant medical benefits and interest. Decision and Order at 31.

Claimant challenges the award of benefits.[2]

Claimant contends the administrative law judge erred in awarding benefits based on a hearing evaluation performed 17 months before claimant ceased work instead of on the post-retirement evaluations. He asserts that employer failed to protect itself by not evaluating claimant's hearing upon his retirement and, therefore, must accept the greater impairment shown by the later evaluations.[3] He also argues that it was irrational for the administrative law judge to presume that no further hearing loss occurred during the 17 months of exposure to loud noises after the 1996 audiogram was administered and to find that the evaluations in 2004 and 2005 were less reliable than the one conducted in 1996. We reject claimant's contentions.[4]

As the administrative law judge found that none of the audiograms presumptively established the extent of claimant's hearing loss as of August 21, 1997, the administrative law judge properly addressed and weighed all the audiometric evidence of record to determine which audiogram provides the best measure of claimant's compensable hearing loss. In this case, the October 2004 audiogram registered a 39.4 percent hearing impairment, and the March 2005 audiogram registered a 36 percent hearing impairment.

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[2]On March 20, 2008, the Board dismissed claimant's appeal due to his failure to file a Petition for Review and brief and his failure to respond to the Board's order to show cause. On April 28, 2008, claimant filed a motion for reconsideration as well as a Petition for Review and brief. Employer responded, opposing claimant's motion. On June 26, 2008, the Board granted claimant's motion and reinstated the appeal. Employer did not file a brief in response to claimant's arguments on appeal.

[3]Claimant relies on the Supreme Court's statement in *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 165, 26 BRBS 151, 154(CRT) (1993), that employers can freeze the amount of compensable hearing loss by providing their employees with audiograms at the time of retirement.

[4]Claimant states that the administrative law judge erred in denying admission of the 2006 report by Dr. Schindler. The administrative law judge twice addressed and denied this motion finding that it was untimely and that the report was prejudicial and irrelevant. Although claimant raises this argument in his Petition for Review, he does not address it in his supporting brief. The Board will not address an issue that is inadequately briefed by counsel. *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988); *Carnegie v. C & P Telephone Co.*, 19 BRBS 57 (1986). The administrative law judge's exclusion of the report is affirmed. *Smith v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 22 BRBS 46 (1989); *Sam v. Loffland Bros. Co.*, 19 BRBS 228 (1987); *Smith v. Ceres Terminal*, 9 BRBS 121 (1978); 20 C.F.R. §702.338.

Cl. Ex. 1; Emp. Ex. 1. The 1996 report revealed a 20 percent hearing impairment, and this measurement, the administrative law judge determined, followed a steady but subtle trend of loss since 1992.[5] Emp. Exs. 1 at 18-20, 2 at 3. In rejecting the 2004 and 2005 audiograms as evidence of claimant's hearing loss at the time of his 1997 retirement, the administrative law judge found that the reports in 2004 and 2005 revealed losses that nearly doubled the loss measured previously and that claimant did not present evidence of noise exposure during his last 17 months of work which would suggest that his hearing loss would greatly surpass the trend that occurred during the course of his employment.[6] The administrative law judge also credited Dr. Schindler's opinion that the additional loss measured by the post-employment audiograms must be attributed to something other than work-related noise exposure because noise-induced hearing loss becomes more subtle in later periods of exposure. Thus, he accepted Dr. Schindler's opinion that the 1996 audiogram is the best measure of claimant's hearing loss as of the time he left covered employment. Decision and Order at 14, 26-28; Tr. at 169-170.

The Supreme Court has held that hearing loss is not a progressive injury but is one that occurs simultaneously with exposure to injurious noise. *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151(CRT) (1993). Claimant is entitled to benefits based on the audiometric evidence found to be most credible and probative. *R.H. v. Bath Iron Works Corp.*, 42 BRBS 5 (2008); *Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001); *Cox v. Brady-Hamilton Stevedore Co.*, 25 BRBS 203 (1991); *Dubar v. Bath Iron Works Corp.*, 25 BRBS 5 (1991); *Labbe v. Bath Iron Works Corp.*, 24 BRBS 159 (1991). In a case similar to this one, the Board held that it was rational for the administrative law judge to decline to project later test results back to the last date of covered employment when he found that the most reliable evidence of the claimant's hearing loss was the audiogram taken nearest in time to the claimant's last date of covered employment. *Bruce v. Bath Iron Works Corp.*, 25 BRBS 157 (1991).

Although claimant correctly asserts that he may have sustained some additional hearing loss during his final 17 months of exposure to industrial noise, substantial evidence in the form of Dr. Schindler's opinion supports the administrative law judge's determination that the 1996 audiogram best reflects claimant's hearing loss as of 1997.

[5]Claimant's audiograms revealed the following losses: 1991: 19.1 percent; 1992: 13.1 percent; 1994: 15 percent; and 1995: 18.1 percent. Emp. Ex. 1 at 19. Dr. Schindler, whom the administrative law judge credited, testified that noise-induced hearing loss becomes more subtle in later periods of exposure. Tr. at 117-120, 139, 188-191. Further, he testified that he would choose the 1996 audiogram even over the one he administered in 2005 to reflect claimant's hearing loss in 1997. Tr. at 169-170.

[6]Claimant testified that the noise to which he was exposed during his last 17 months of work was consistent with his earlier exposure. Tr. at 75.

Dr. Schindler stated that the 1996 audiogram is the best measure of claimant's 1997 hearing loss. The administrative law judge rationally relied on the results of the audiograms prior to 1996 to determine that claimant's exposure to noise had previously caused approximately two or three percentage points of additional impairment yearly and that noise exposure during the final months was consistent with the exposure prior thereto. Thus, the administrative law judge rationally determined that the 2004 and 2005 audiograms were not the most reliable evidence of claimant's 1997 hearing impairment.[7] *Bruce*, 25 BRBS at 159-160. Therefore, as it is rational and supported by substantial evidence, we affirm the administrative law judge's award of benefits for a 20 percent hearing impairment.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

[7]We reject claimant's arguments that the administrative law judge's reliance on Dr. Schindler's opinion was unfounded and that his analysis of the relative reliability of the audiograms is "bizarre." The administrative law judge considered Dr. Schindler to be a "highly qualified and credible witness" whose testimony was useful and uncontradicted. Decision and Order at 14, 28. Further, while the administrative law judge discussed the "indicia of reliability" of the audiograms and considered the later audiograms to be "contradictory," it is clear that he most heavily relied on the fact that the later results greatly exceeded the prior results to an unexplained degree and on the fact that he could not reconcile the later results with Dr. Schindler's uncontradicted testimony that noise-induced hearing loss becomes more subtle in later periods of exposure. *Id.* at 27-28.