

BRB No. 00-0686

JOHN THOMPSON)
)
 Claimant-Petitioner)
)
 v.)
)
 NEWPORT NEWS SHIPBUILDING) DATE ISSUED: March 30, 2001
 AND DRY DOCK COMPANY)
)
 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

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

Benjamin M. Mason (Mason, Cowardin & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (98-LHC-2318) of Administrative Law Judge Fletcher E. Campbell, Jr., 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 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 underwent audiometric testing on December 9, 1997, at employer's facility as part of pre-retirement examination. This audiogram showed a 4.06 percent binaural impairment. Two days later, claimant had his hearing tested by an audiologist of his choosing. This audiogram showed a 5.625 percent binaural impairment. Claimant retired in January 1998. Employer's audiologist, Chris Zambas, testified that both tests are reliable, and that the differences between the two tests are clinically insignificant and are within the standard margin of error. He further testified that the variance could not be explained based on claimant's exposure to noise in the two days between the tests. Employer paid claimant permanent partial disability benefits for the 4.06

percent impairment. Claimant sought additional benefits for the impairment evidenced on the later audiogram.

Claimant contended before the administrative law judge that the later audiogram is entitled to greater weight under 33 U.S.C. §908(c)(13)(C) and its implementing regulation, 20 C.F.R. §702.441(b). Section 8(c)(13)(C) of the Act states:

An audiogram shall be presumptive evidence of the amount of hearing loss sustained as of the date thereof, only if (i) such audiogram was administered by a licensed or certified audiologist or a physician who is certified in otolaryngology, (ii) such audiogram, with the report thereon, was provided to the employee at the time it was administered, and (iii) no contrary audiogram made at that time is produced.

With regard to the last requirement, Section 702.441(b) states that a contrary audiogram is one of “equal probative value (meaning one performed using the standards described herein) made at the same time. ‘Same time’ means within thirty (30) days thereof where noise exposure continues or within six (6) months where exposure to excessive noise levels does not continue” 20 C.F.R. §702.441(b). The parties agreed that both audiograms were performed by qualified audiologists, and that claimant received the required reports. The administrative law judge, however, rejected claimant’s contention that the two audiograms are not “contrary” to each other because the results are within the statistical margin of error. The administrative law judge found that the audiograms are “contrary” enough to have given rise to litigation, and thus the later audiogram is not “presumptive” evidence of the degree of claimant’s hearing loss. The administrative law judge also found that the later audiogram is not entitled to greater weight because the audiologist was not claimant’s “treating” audiologist. The administrative law judge rejected claimant’s contention that the later audiogram should be credited on the basis that claimant was exposed to additional noise after the first audiogram, as the uncontradicted testimony of Mr. Zambas established that there could not be a diminution in claimant’s hearing in two days. Finally, the administrative law judge found no differences in the qualifications of the two audiologists that would warrant crediting one audiogram over the other. He thus concluded that the evidence is in equipoise, and that, pursuant to the Supreme Court’s decision in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994), claimant did not sustain his burden of establishing that the later audiogram should be credited.

On appeal, claimant contends that the administrative law judge erred in failing to credit the audiogram demonstrating a 5.625 percent binaural impairment. Specifically, claimant contends the administrative law judge erred in finding that the earlier audiogram is contrary to the later audiogram and therefore in not giving presumptive effect to the later audiogram. Alternatively, claimant contends that if the audiograms establish essentially the

same degree of hearing loss, the administrative law judge should have averaged the results of the two audiograms. Employer responds, urging affirmance of the administrative law judge's decision.

After consideration of claimant's contentions, we affirm the administrative law judge's decision as it is rational, supported by substantial evidence, and in accordance with law. *O'Keefe*, 380 U.S. 359. Despite the statistical insignificance in the results of the two audiograms, the administrative law judge was entitled to find that they are contrary to each other in view of the fact that each gives rise to a differing amount of compensation. *See generally Norfolk Shipbuilding & Drydock Corp. v. Faulk*, 228 F.3d 378, 34 BRBS 71(CRT) (4th Cir. 2000), *cert. denied*, 121 S.Ct. 855 (2001); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hess]*, 681 F.2d 938, 14 BRBS 1004 (4th Cir. 1982) (rational inferences must be affirmed). Thus, we reject claimant's contention that the higher audiogram must be credited as presumptive evidence of the degree of hearing impairment. Furthermore, claimant has not identified any error in the administrative law judge's finding that the results of the two audiograms are in equipoise, and thus, that claimant is not entitled to additional benefits. *See Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT); *Santoro v. Maher Terminals*, 30 BRBS 171 (1996). There is no legal requirement that an administrative law judge average the results of audiograms which are within a statistical margin of error.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge