

J.D. KIRKSEY)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
I.T.O. CORPORATION)	DATE ISSUED:
)	
Self-Insured)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order on Remand of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

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

Robert E. Thomas (Cornelius, Sartin & Murphy), New Orleans, Louisiana, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (91-LHC-822) of Administrative Law Judge C. Richard Avery denying future medical expenses 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 the conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant worked as a hookup man for employer, where he was exposed to workplace noise. On December 2, 1986, claimant filed a claim under the Act for a noise-induced hearing loss. In his

Decision and Order Awarding Benefits, after considering the relevant evidence in light of the Section 20(a), 33 U.S.C. §920(a), presumption, the administrative law judge concluded that claimant's hearing loss was work-related based on the medical reports of Drs. Muller and Sellers. Crediting an April 9, 1991, audiogram which indicated that claimant had a zero percent binaural hearing impairment, the administrative law judge concluded that claimant sustained no compensable disability under the Act. He further determined that, as claimant was not entitled to compensation, he also was not entitled to an assessment under Section 14(e), 33 U.S.C. §914(e). Finally, the administrative law judge ordered employer to pay any medical expenses arising from claimant's hearing loss in the future, noting that although Dr. Muller's report indicated that claimant was not a candidate for amplification or surgery and there was no indication that treatment of claimant's hearing loss was anticipated at that time, employer would be liable for future medical treatment if and when such treatment becomes necessary. Employer appealed the administrative law judge's Decision and Order to the Board.

On appeal, the Board rejected employer's argument that the administrative law judge erred in awarding claimant future medical benefits because he had no compensable injury, relying on *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT) (5th Cir. 1993), and prior Board decisions which recognized that where claimant is successful in establishing a work-related hearing loss, employer is liable for reasonable and necessary medical expenses regardless of whether claimant's hearing loss results in a compensable disability, *i.e.*, an impairment measurable under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (3d ed. 1988) (*AMA Guides*). In addition, the Board held that while the administrative law judge found that the record did not establish that medical treatment was currently anticipated, he did not err in concluding that employer would be liable in the event claimant required future treatment. *Kirksey v. I.T.O. Corp.*, BRB No. 92-1050 (March 16, 1994)(unpublished). Employer appealed the Board's decision to the United States Court of Appeals for the Eleventh Circuit.

In *Kirksey v. I.T.O. Corp.*, No. 94-6391 (11th Cir. April 21, 1995)(unpublished), after expressing its agreement with the Fifth Circuit's ruling in *Baker* that a finding of hearing loss which is insufficient to warrant disability compensation does not preclude the injured from obtaining future medical benefits provided that an evidentiary basis exists to support such an award, the United States Court of Appeals for the Eleventh Circuit remanded the case to the administrative law judge for further consideration. Specifically, the court instructed the administrative law judge to explain the basis for his award of future medical benefits in light of the fact that the record did not contain sufficient findings to support a decision that there may be future medical expenses and the fact that claimant was found to have had a zero percent hearing impairment.

On remand, the administrative law judge determined that claimant suffers a mild, high frequency hearing loss which, while not at levels measured by the *AMA Guides*, nonetheless constituted an "injury" within the meaning of the Act. The administrative law judge further found that claimant was not entitled to an award of future medical expenses because the record lacks an evidentiary basis to support such an award.

Claimant now appeals the administrative law judge's denial of future medical benefits on remand, asserting that the administrative law judge's decision on remand went beyond the scope of the Eleventh Circuit's decision and that he has a right to future medical expenses arising from his work-related hearing loss and should not be forced to relitigate employer's liability for expenses arising from that injury at the time future medical costs are incurred. Employer responds, requesting affirmance of the decision below. Claimant replies, disputing employer's assertions.

After review of the Decision and Order on Remand in light of the relevant evidence and the arguments claimant raises on appeal, we affirm the administrative law judge's determination on remand that although claimant sustained a work-related hearing loss, the existing record is insufficient to establish his present entitlement to future medical benefits. Initially, we affirm the administrative law judge's determination that claimant's hearing loss constituted a work-related "injury" which could support an award of medical benefits if an adequate evidentiary basis existed to support such an award. As was noted by the Board previously, this determination is consistent with *Baker*, 991 F.2d at 165-166, 27 BRBS at 15 -16 (CRT), and prior Board decisions which recognized that where claimant is successful in establishing a work-related hearing loss, employer is liable for reasonable and necessary medical expenses regardless of whether claimant's injury is disabling. *See Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 1 (1992), *aff'd sub nom Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT (4th Cir. 1993); *Winston v. Ingalls Shipbuilding, Inc.*, 16 BRBS 168, 174 (1984).

Furthermore, we affirm the administrative law judge's determination that despite his having established a work-related injury, claimant is not entitled to future medical benefits because no evidentiary basis exists in the record to support such an award. The administrative law judge's finding in this regard is consistent with the Fifth Circuit's recognition in *Baker* that claimant is entitled to medical expenses for an injury resulting in zero impairment only upon a demonstration that the expenses are reasonably necessary and that an evidentiary basis exists to support such an award. *Baker*, 991 F.2d at 166, 27 BRBS at 16 (CRT). Inasmuch as there is no evidence in the current record that further treatment of claimant's hearing loss is necessary, the administrative law judge properly determined that the current record could not properly support an award of future medical benefits.¹ In light

¹Inasmuch as claimant established that his hearing loss was work-related and claims for medical benefits are never time-barred, claimant may file a claim for medical benefits in the future if medical treatment of the work-related hearing loss becomes necessary. *See Baker*, 991 F.2d at 166, 27 BRBS at 16 (CRT); *see also Colburn v. General Dynamics Corp.*, 21 BRBS 219 (1988); *Mayfield v. Atlantic & Gulf Stevedores*, 16 BRBS 228 (1984).

of our determination that the administrative law judge's denial of future medical benefits is consistent with *Baker*, we need not address claimant's remaining contentions.

Accordingly, the Decision and Order on Remand of the administrative law judge denying future medical benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge