BRB No. 99-0781

JOHN O'KEEFE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
UNIVERSAL MARITIME SERVICES CORPORATION	)	DATE ISSUED: 4/25/2000
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Samuel A. Denburg (Baker, Garber, Duffy & Pederson, P.C.), Hoboken, New Jersey, for claimant.

Christopher J. Field (Weber Goldstein Greenberg & Gallagher), Jersey City, New Jersey, 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 on Remand and Order denying reconsideration (96-LHC-1353) of Administrative Law Judge Ralph A. Romano awarding benefits 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).

This case is before the Board for the second time. Claimant, a longshoreman, was allegedly exposed to noise over the course of his employment at employer's facility. While claimant began working for employer in 1981, the majority of his alleged noise exposure occurred in 1991-1992, when, as a result of Operation Desert Storm, there was a sharp increase in activity at employer's facility. Claimant filed a claim for compensation under the

Act on June 26, 1995, based on the results of an audiogram administered on March 24, 1992. Employer raised a timeliness defense before the administrative law judge, alleging that the claim was barred because claimant failed to file his claim within one year from his receipt of an audiogram and accompanying report as required by Section 8(c)(13)(D) of the Act, 33 U.S.C. §908(c)(13)(D).

In his Order of Dismissal, the administrative law judge found that employer rebutted the presumption of timeliness set forth in 33 U.S.C. §920(b), and therefore found the claim time-barred and dismissed it without reaching the merits. Claimant appealed, challenging the administrative law judge's dismissal of the claim.

In its decision, the Board held that the administrative law judge's conclusion that since claimant was aware of his work-related hearing loss, he must have physically received an audiogram and medical report within the meaning of Section 8(c)(13)(D) of the Act, was not supported by substantial evidence or consistent with law. *O'Keefe v. Universal Maritime Service Corp.*, BRB No. 97-1270 (June 9, 1998)(unpub.). As there was no evidence that either claimant or his representative actually received an audiogram and accompanying report, the Board held that there is no evidence to rebut the Section 20(b) presumption. *Id.* Consequently, the administrative law judge's finding that the claim is time-barred was reversed, and the case was remanded for the administrative law judge to address the merits of claimant's claim. *Id.* The Board also rejected employer's subsequent motion for reconsideration.

On remand, the administrative law judge determined that claimant's hearing loss is work-related and, thus, that he is entitled to benefits under Section 8(c)(13)(B), 33 U.S.C. §908(c)(13)(B), for a 10.3 percent binaural impairment. In addition, the administrative law judge determined that employer is liable as the responsible employer. The administrative law judge accepted claimant's calculation of his average weekly wage as $1,598.86. Employer's motion for reconsideration was summarily denied.

On appeal, employer challenges the administrative law judge's award of benefits.[1] Claimant responds, urging affirmance.

[1]Employer also challenges, for purposes of preserving its right to appeal, the Board's determination that the claim is not time-barred under Sections 12 and 13 of the Act. The law of the case doctrine precludes the Board's consideration of this contention. *See Schaubert v. Omega Services Industries,* 32 BRBS 233 (1998).

Employer first argues that the administrative law judge's decision violates the Administrative Procedure Act (APA), as the administrative law judge did not adequately summarize the evidence of record, failed to address certain relevant evidence and issues, and rendered findings on evidence not included in the record. Similarly, employer argues that the administrative law judge's summary Order denying its motion for reconsideration violates the APA.

The APA requires an administrative law judge to adequately detail the rationale behind his decision, analyze and discuss the relevant evidence of record, and explicitly set forth the reasons for his acceptance or rejection of such evidence. 5 U.S.C. §557(c)(3)(A); *see Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988). The administrative law judge's summary of the evidence in the instant case comports with the APA in that he set out all of the relevant evidence of record in his decision,[2] and subsequently discussed this evidence, in greater detail, in his consideration of the causation issue based on the record as a whole. Additionally, as employer simply raised the same arguments in its motion for reconsideration that were previously addressed and rejected by the administrative law judge in his Decision and Order on Remand, it was unnecessary for him to extensively revisit these contentions upon reconsideration. Moreover, the issuance of his Order on reconsideration necessarily establishes that the administrative law judge considered and rejected employer's contentions. Consequently, the administrative law judge's Decision and Order on Remand and Order on reconsideration do not violate the APA. 5 U.S.C. §557(c)(3)(A); *see Santoro*, 30 BRBS at 171.

Employer next argues that the administrative law judge erred by not requiring claimant to establish the elements of a *prima facie* claim of compensability, contending that

[2]Specifically, the administrative law judge recognized that claimant submitted the report of Dr. Matthews dated March 25, 1992, and his subsequent deposition testimony taken on March 17, 1997, and that employer submitted a June 25, 1996, report by Dr. Alvin Katz, along with his deposition testimony, reports of Noise Unlimited, Incorporated, work history records, and deposition transcripts of Mr. Bragg and Mr. Lysick. Decision and Order on Remand at 2.

claimant cannot establish the requisite proof of physical harm as the record contains no valid audiogram. In addition, employer argues that the administrative law judge improperly weighed the evidence of record in addressing the issue of causation.

It is well-established that claimant bears the burden of proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have potentially caused the harm, in order to establish his *prima facie* case. *See Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). It is claimant's burden to establish each element of his *prima facie* case by affirmative proof. *See Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

Although the administrative law judge discussed the relevant case law associated with invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), he did not render an explicit finding regarding whether claimant established his *prima facie* case. However, a finding of invocation can be inferred as the administrative law judge proceeded to discuss and find that employer established rebuttal of the Section 20(a) presumption, and thereafter considered the issue of causation on the record as a whole. *See generally Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995). In addition, the evidence credited by the administrative law judge in weighing the issue of causation as a whole, *i.e.*, Dr. Matthews's testimony that claimant sustained an occupationally-induced hearing loss while working for employer,[3] and claimant's testimony regarding noise exposure while working at employer's facility, is sufficient to establish invocation of the Section 20(a) presumption. Accordingly, claimant established a *prima facie* case. *See Damiano v. Global Terminal & Container Service*, 32 BRBS 261 (1998); *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989).

[3]Moreover, the fact that one of the audiograms conducted for Dr. Matthews is not valid, and the other was excluded from the record as untimely submitted, does not preclude a finding of invocation as the record contains Dr. Matthews's opinion, which the administrative law judge found is well-reasoned and documented, that sufficiently discusses the cause of claimant's hearing impairment.

As for employer's other contentions regarding the weighing of the evidence, initially we note that as the administrative law judge addressed employer's objections to the admission of claimant's evidence, HT at 10-12, 85-87, and provided employer with the opportunity to submit additional evidence in rebuttal to the evidence submitted by claimant, employer's contention that the admission of Dr. Matthews's post-hearing deposition testimony is violative of its rights is without merit. *See generally Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999)(table). The administrative law judge's admission and consideration of Dr. Matthews's deposition testimony is therefore affirmed. Additionally, the administrative law judge acted within his discretion in rejecting the noise surveys and accompanying testimony of Mr. Bragg, as not coincident with claimant's employment, and in finding that Mr. Lysick's testimony corroborates rather than refutes claimant's testimony relative to noise exposure during claimant's employment with employer.[4] *See generally 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). The administrative law judge also rationally credited Dr. Matthews's opinion over the contrary opinion of Dr. Katz, as he found it is well-reasoned and documented, and as he rationally and forthrightly explained the different results of the 1992 and 1997 audiograms. *Id.* In contrast, the administrative law judge found that Dr. Katz's opinion does not appear to factor in claimant's occupational noise exposure, as it is based in part on the noise surveys. *Damiano*, 32 BRBS at 261.

Moreover, employer's contention that the administrative law judge erroneously credited Dr. Matthews's assessment of a 10.3 percent binaural impairment in calculating the extent of claimant's hearing loss is without merit. Claims for disability due to hearing loss are compensable pursuant to Section 8(c)(13) of the Act. 33 U.S.C. §908(c)(13); *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151 (CRT) (1993). Although Section 8(c)(13)(C) states that "an audiogram shall be presumptive evidence of the amount of hearing loss sustained . . . ." 33 U.S.C. §908(c)(13)(B); *see also* 20 C.F.R. §702.441(b), there is no requirement that the administrative law judge rely exclusively on an audiogram to establish the extent of claimant's hearing loss. Rather, pursuant to Section 8(c)(13)(E), "[d]eterminations of loss of hearing shall be made in accordance with the guides for

[4]While Mr. Lysick stated that the noise from a hustler does not interfere with normal conversation, and that when working with or around hi-los and/or military vehicles you would have to raise your voice, but not yell, EX 11, Dep. at 15, 18-19, 22-23, he further testified that during Operation Desert Storm the activity levels at employer's facility were tremendous and conceded that the noise levels inside of the hold of ships, where claimant occasionally worked as a signalman or parker, were quite loud, so as to require hand signals for communication. EX 11, Dep. At 38-42. The latter part of Mr. Lysick's testimony indeed corroborates claimant's testimony regarding exposure to loud noise at employer's facility.

evaluation of permanent impairment as promulgated and modified from time to time by the American Medical Association [AMA]." 33 U.S.C. §908(c)(13)(E). In the instant case, Dr. Matthews testified that his determination that claimant sustained a 10.3 percent binaural hearing loss associated with his occupational exposure to noise was calculated under the AMA guidelines. CX 6, Dep. at 35. Thus, while the 1997 audiogram itself was excluded from the record, Dr. Matthews's deposition testimony is sufficient to establish the extent of claimant's work-related hearing loss in this case, as the administrative law judge accorded greatest weight to Dr. Matthews's overall assessment, and that assessment conforms with the AMA guidelines. The administrative law judge's award of benefits for a 10.3 percent hearing loss therefore is affirmed.

Lastly, employer argues that the administrative law judge erred by calculating claimant's average weekly wage based on the figures set out in claimant's post-hearing brief, since it was not given a chance to address this issue or to rebut the "inappropriately admitted evidence." We agree that the case must be remanded for further consideration of this issue.

At the hearing, it appeared as though the parties would reach an agreement on the issue of average weekly wage; however, claimant's counsel added that "if we haven't then I'll submit my calculation I would think in 30 days." HT at 5. Employer's counsel responded that "I think we'll be able to agree on an average weekly wage." *Id.* In his Closing Argument dated April 21, 1997, and resubmitted on February 1, 1999, claimant's counsel states that the parties were unable to agree on average weekly wage and therefore he set out his calculations pursuant to Section 10(a) of the Act, 33 U.S.C. §910(a), based on claimant's earnings in 1991. Employer's Closing Argument initially submitted on April 16, 1997, and then resubmitted on February 24, 1999, did not address the average weekly wage issue. Thus, claimant's post-hearing brief constitutes the only "evidence" of record regarding average weekly wage.

In his decision, the administrative law judge adopted claimant's average weekly wage calculation, as he was the only one to raise the issue. As the parties did not agree on a contested issue, and as the administrative law judge did not admit any evidence into the record concerning claimant's average weekly wage, the administrative law judge's adoption of claimant's proposed calculation resulted in a finding which is not supported by substantial evidence.[5] *See* 30 C.F.R. §702.338. We therefore vacate the administrative law judge's

[5]We also note that claimant's average weekly wage calculation, purportedly calculated pursuant to Section 10(a) of the Act, 33 U.S.C. §910(a), is not in accordance with the formula set out in that Section. *See generally Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31

finding on this issue. On remand, the administrative law judge must allow both parties to submit evidence into the record regarding claimant's average weekly wage, and the administrative law judge then must calculate claimant's average weekly wage under one of the methods set forth in 33 U.S.C. §910.

BRBS 119 (CRT) (4th Cir. 1997).

Accordingly, the administrative law judge's average weekly wage determination is vacated, and the case is remanded for further consideration consistent with this opinion. In all other regards, the administrative law judge's Decision and Order on Remand and Order on reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge