

BRB No. 90-1954

DONALD THOMAS)
)
 Claimant-Petitioner)
)
 v.)
)
 BATH IRON WORKS CORPORATION)
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 and)
)
 LIBERTY MUTUAL INSURANCE) DATE ISSUED:
 COMPANY)
)
 and)
)
 COMMERCIAL UNION INSURANCE)
 COMPANY)
)
 Employer/Carriers-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order on Remand of Chester Shatz, Administrative Law Judge,
United States Department of Labor.

Marcia Cleveland (McTeague, Higbee, Libner, MacAdam, Case & Watson), Topsham,
Maine, for claimant.

Stephen Hessert and Michelle Jodoin LaFond (Norman, Hanson & DeTroy), Portland,
Maine, for employer and Liberty Mutual Insurance Company.

Before: STAGE, Chief Administrative Appeals Judge, McGRANERY, Administrative
Appeals Judge, and LAWRENCE, Administrative Law Judge*.

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor
Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

PER CURIAM:

Claimant appeals the Decision and Order on Remand (84-LHC-71) of Administrative Law Judge Chester Shatz denying 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 if they 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 has worked for employer since 1958 in ship construction, where he is exposed to high levels of noise. Dr. Dixon administered an audiogram¹ in 1979 and testified that he noted a hearing loss. He, however, did not show claimant the audiogram nor did he state that the hearing loss was work-related. Claimant underwent a second audiogram at the Pine Tree Society on May 25, 1983, after filing a claim for compensation in March, 1983, which revealed a binaural hearing loss. A copy of this audiogram was forwarded to claimant's attorney and Dr. Dixon. Claimant returned to see Dr. Dixon on June 1, 1983, who found no significant difference between the two audiograms. A hearing was held on April 18, 1984.

In his initial Decision and Order dated September 14, 1984, the administrative law judge denied claimant's hearing loss claim for permanent partial disability benefits. The administrative law judge found that the claim was barred by Section 13 of the Act as it existed prior to its amendment in 1984, 33 U.S.C. §913 (1982) (amended 1984), as claimant should have reasonably concluded, after being examined by Dr. Dixon in 1979, that his hearing loss was related to his exposure to noise at work. Claimant did not file a claim until 1983. Based on his finding that claimant was not actually aware of a work-related hearing loss until 1983, however, the administrative law judge also found that Liberty Mutual Insurance Company was the responsible carrier and ordered it to pay future medical expenses and an attorney's fee. Liberty Mutual subsequently appealed to the Board arguing that it was not the responsible carrier. Claimant did not file a cross-appeal.²

¹This audiogram was not submitted into evidence,

²While claimant did not file a timely appeal of the administrative law judge's Decision and Order on the merits, he filed a timely appeal of the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees in which he did not address the attorney's fee award but instead argued that his entire claim should be reconsidered in light of the 1984 Amendments.

The Board, in its April 29, 1988 Decision and Order, agreed with Liberty Mutual that the administrative law judge's findings did not support his determination that Liberty Mutual is liable as the responsible carrier. *Catlin v. Bath Iron Works Corp., et al*, BRB Nos. 84-2017/A, 85-1737 (April 29, 1988)(unpublished). The Board, in the body of its opinion, discussed the inconsistencies between the administrative law judge's finding that claimant "should have been" aware that he sustained a work-related hearing loss after being advised by Dr. Dixon that he had a hearing loss in 1979 for purposes of Section 13, and his finding that claimant was not "actually" aware that he sustained a work-related hearing loss until advised of the results of the 1983 audiogram for purposes of determining the responsible carrier. Citing *Larson v. Jones Oregon Stevedoring Co.*, 17 BRBS 205 (1985), the Board instructed the administrative law judge that under the 1984 Amendments the same date of awareness applies for purposes of determining the timeliness of the claim as for determining the responsible carrier, and that pursuant to Section 8(c)(13)(D), 33 U.S.C. §908(c)(13)(D)(1988), claimant could not be charged with awareness until he received an audiogram and accompanying report. The Board accordingly remanded the case for the administrative law judge to determine claimant's date of awareness consistent with the 1984 Amendments and to reconsider which carrier is responsible for the payment of benefits, costs and an attorney's fee in light of his determination. The Board, in a footnote, also noted that while claimant's failure to timely appeal the denial of disability benefits precluded its review of claimant's arguments, the administrative law judge could reconsider this issue on remand "[i]f the administrative law judge finds a date of awareness on remand which would affect the timeliness of the disability claim," *Catlin, slip op. at 8 n3*.

The administrative law judge in his Decision and Order on Remand found that claimant's "date of awareness" occurred when his attorney received a copy of the 1983 audiogram in July 1983, and he concluded that Liberty Mutual was still the responsible carrier as it was on the risk from 1981.³ The administrative law judge, however, declined to reconsider the timeliness of the claim because, he reasoned, claimant never filed an appeal or cross-appeal of the original denial of disability benefits and should not benefit merely because Liberty Mutual appealed the responsible carrier issue. Claimant now appeals this finding, arguing that the administrative law judge erred in not reconsidering the issue of the timeliness of the claim. Claimant asserts that the claim was timely filed under the Act as amended in 1984 and therefore he is entitled to permanent partial disability benefits for his hearing loss. Employer responds, arguing that claimant's appeal of this issue is barred because he did not appeal the administrative law judge's 1984 Decision and Order. Claimant replies, citing *Lombardi v. General Dynamics Corp.*, 22 BRBS 323 (1989), that he is allowed to raise the timeliness issue on remand because he had no basis to raise it in a cross-appeal prior to the enactment of the 1984 Amendments.

³We note that the Board recently held that receipt of an audiogram and accompanying report by claimant's attorney is not constructive receipt by claimant, and that such receipt does not commence the running of the statute of limitation period. *Vaughn v. Ingalls Shipbuilding, Inc.*, 226 BRBS 27 (1992). This holding does not affect the instant case, as the claim was filed prior to the receipt of the audiogram and the accompanying report. See generally *Grace v. Bath Iron Works Corp.*, 21 BRBS 244.

Initially, we hold that Liberty Mutual's appeal of the responsible carrier determination prevented the 1984 Decision and Order denying disability benefits from becoming final, and that claimant's failure to appeal that decision did not preclude reconsideration of this issue on remand as claimant had no basis for filing an appeal at the time the administrative law judge's 1984 Decision and Order was issued on September 14, 1984. *See Lombardi*, 22 BRBS at 323. It was not until the enactment of the 1984 Amendments⁴ that claimant's date of awareness with respect to the question of the timeliness of the claim was tied to the receipt of an audiogram and an accompanying report. *See* 33 U.S.C. §908(c)(13)(D) (1988); *see also Ranks v. Bath Iron Works Corp.*, 22 BRBS 301 (1981).⁵

Moreover, we agree with claimant's contention that the administrative law judge abused his discretion in declining to reconsider the timeliness issue. Although an administrative law judge has broad discretion in procedural matters, *see generally Taylor v. B. Frank Joy Co.*, 22 BRBS 408 (1989); *Walker v. Sun Shipbuilding and Dry Dock Co.*, 19 BRBS 171 (1986), this discretion must be exercised intelligently. We hold that the administrative law judge abused his discretion when he refused to reconsider his finding under Section 13 since it was inconsistent with his analysis of claimant's awareness for purposes of determining the responsible employer, and was erroneous under the 1984 Amendments. The administrative law judge's action resulted in a manifest injustice by precluding consideration of a timely, meritorious claim. The Board's decision clearly informed the administrative law judge that the issue of entitlement to disability compensation remained alive in light of the 1984 Amendments.

⁴The amendments became effective on September 28, 1984, during the running of the appeal time on this case.

⁵The Board's holding in *Larson v. Jones Oregon Stevedoring Co.*, 17 BRBS 205 (1985), has been overruled to the extent that it holds that the date of awareness for purposes of determining the responsible employer or carrier is tied to claimant's receipt of an audiogram and accompanying report. *Good v. Ingalls Shipbuilding, Inc.*, 26 BRBS 159 (1992). *See also Port of Portland v. Dir., OWCP*, 932 F.2d 836, 24 BRBS 137 (CRT) (9th Cir. 1991), *aff'g in part and rev'g in part, Ronne v. Jones Oregon Stevedoring Co.*, 22 BRBS 344 (1989). The instant case is not affected by the decision in *Good* inasmuch as claimant continued to be exposed to noise in his employment after Liberty Mutual came on the risk in 1981, and as the administrative law judge credited Dr. Dixon's testimony that he did not state to claimant in 1979 that his hearing loss was related to noise exposure at work. *See Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert denied* 350 U.S. 913 (1955).

In amending the Act in 1984, Congress intended that cases such as this be adjudicated under the revised requirements for giving notice and filing claims in hearing loss cases, explicitly providing that the amended provision applies to "pending" claims. See *Swain v. Bath Iron Works Corp.*, 18 BRBS 148 (1986); see also Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, §§8(a), 28(a), 98 Stat. 1639, 1645, 1655. The provision requiring application to pending claims has been broadly construed. See *McDonald v. Director, OWCP*, 897 F.2d 1510, 23 BRBS 56 (CRT)(9th Cir. 1990), *rev'g sub nom. McDonald v. Todd Shipyards Corp.*, 21 BRBS 184 (1988). Furthermore, the legislative history states that

[b]ecause of the credibility which is given to audiograms as an indicator of the extent of hearing loss, the Committee believes that the period within which an employee must file a Notice of Injury . . . and a claim for compensation . . . should not begin to run until the employee has been provided with a copy of the audiogram with a clear nontechnical report thereon.

H.R. Rept. No. 98-570, 98th Cong., 1st Sess. 9 (1983), *reprinted in* 1984 U.S.C.C.A.N. 2734, 2743. Given the importance Congress placed on the receipt of the audiogram requirement, the administrative law judge should have reconsidered the issue of the timeliness of the claim consistent with the amended Act. As a matter of law, claimant's disability claim filed in March 1983 is timely in light of the administrative law judge's finding as to claimant's date of awareness. The case is remanded for the administrative law judge to determine the extent of claimant's compensable hearing loss under the American Medical Association *Guides to the Evaluation of Permanent Impairment*. 33 U.S.C. § 908(c)(13)(C)(1988).

Accordingly, we vacate the administrative law judge's Decision and Order on Remand as it pertains to the timeliness issue. We hold as a matter of law that claimant's claim for permanent partial disability benefits was timely filed, and we remand this case for further findings in accordance with this decision. In all other respects, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge