

WALTER J. MARTIN)	
)	
Claimant-Respondent)	
)	
v.)	DATE ISSUED: _____
)	
INGALLS SHIPBUILDING,)	
INCORPORATED)	
)	
Self-Insured)	
Employer-Petitioner)	DECISION AND ORDER

Appeal of the Decision and Order of Kenneth A. Jennings, Administrative Law Judge, United States Department of Labor.

R. Bennett (Franke, Rainey, and Salloum), Gulfport, Mississippi, for self-insured employer.

BEFORE: STAGE, Chief Administrative Appeals Judge, DOLDER, Administrative Appeals Judge, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order (89-LHC-2286) of Administrative Law Judge Kenneth A. Jennings 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 the 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 welder for employer, where he was exposed to loud industrial noise, from 1965 until at least the time of the hearing. On February 28, 1989, claimant filed a claim under the

*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).

Act for a 20.94 percent binaural noise-induced hearing loss based on a February 8, 1989, audiogram performed by Dr. Gordan Stanfield, a Ph.D in audiology. Employer filed its notice of controversion on March 7, 1989. No compensation or medical benefits were paid. The parties stipulated that an "in-house" audiogram performed on March 14, 1989 indicated an 8.44 percent binaural impairment. Based on a third audiogram performed on April 20, 1989, by Marianne Towell, an audiologist, which revealed a 0 percent binaural hearing impairment, Dr. Douglas Lamppin, a board-certified otolaryngologist, opined that claimant suffered from a hearing loss and that hearing aids would be beneficial.

In his Decision and Order, the administrative law judge determined that claimant's hearing loss was related to his work at Ingalls and awarded claimant compensation for a 10.47 percent binaural hearing impairment pursuant to Section 8(c)(13)(B), 33 U.S.C. §908(c)(13)(B), based on the average of the February 8, 1989 and April 20, 1989 audiograms.¹ The administrative law judge further determined pursuant to the parties' stipulation that employer was not liable for a Section 14(e), 33 U.S.C. §914(e), penalty. In addition, the administrative law judge determined that although employer was not liable for claimant's audiological evaluation because of his failure to request prior authorization, claimant was entitled to future medical benefits, noting that hearing aids had been recommended. Lastly, the administrative law judge indicated that the issue of employer's liability for, and the amount of, an attorney's fee would be considered in a separate order after claimant filed his fee petition.

On November 20, 1990, claimant's counsel filed a fee petition requesting \$977.50 representing 8.5 hours of attorney services at \$115 per hour to which employer filed objections. In a Supplemental Decision and Order, the administrative law judge reduced several of the itemized charges and awarded claimant's counsel a fee of \$891.25 representing 7.75 hours at \$115 per hour payable by employer.²

On appeal, employer challenges the administrative law judge's finding that claimant sustained a compensable hearing loss,

¹In disregarding the in-house audiogram, the administrative law judge noted that the in-house audiogram report did not indicate the degree of impairment, who performed the test, when the test instrument was last calibrated, or the cause of any impairment.

²In awarding attorney's fees, the administrative law judge properly rejected employer's argument that it was improper for him to award a fee while the successful prosecution of the case was on appeal. See Bruce v. Atlantic Marine, Inc., 12 BRBS 524 (1980), aff'd, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981).

arguing that the administrative law judge erred in failing to accord determinative weight to Dr. Lamppin's 0 percent binaural hearing impairment rating in light of his superior credentials as an otolaryngologist. Employer further avers that a hearing loss is a form of permanent partial disability and that even if the 20.94 percent hearing loss assessed by Dr. Stanfield was valid at the time the February 8, 1989 audiogram was performed, a fact which employer disputes, it was not a permanent disability as it was not repeated on the April 20, 1989 audiogram. Relying on the deposition testimony of audiologist Marianne Towell, employer also asserts that common sense dictates giving determinative weight to the lowest audiogram rating, inasmuch as a person can test worse than he actually hears but cannot hear sounds which are not there. Employer maintains that because the overwhelming weight of the evidence mandates a finding of a zero percent impairment, the administrative law judge erred in finding a compensable hearing loss and that inasmuch as no compensation benefits are due, no medical benefits are owed either. Employer further submits that because hearing loss is not progressive and it is undisputed that claimant is no longer employed at Ingalls,³ the administrative law judge erred in awarding claimant future medical benefits as any future medical expenses he incurred would not be attributable to his work for employer. Accordingly, employer asserts that inasmuch as claimant's counsel did not achieve a successful prosecution in this case, the administrative law judge erred in holding it liable for claimant's attorney's fees.⁴ Claimant has not responded.

Employer's assertion that the administrative law judge erred in determining that claimant sustained a compensable hearing loss is rejected. Contrary to employer's assertions, the administrative law judge acted within his discretion in according equal weight to the February 8, 1989 and April 20, 1989 audiograms. It is well settled that an administrative law judge may accept or reject all or any part of any medical testimony according to his judgment. Perini Corp. v. Heyde, 306 F. Supp. 1321 (D.R.I. 1969). Accordingly, it follows that the administrative law judge is not required to credit the lowest audiogram rating. Inasmuch as employer has failed to establish that the administrative law judge's decision to accord equal weight to the February 8, 1989 and April 20, 1989 audiograms was inherently incredible or patently unreasonable, we affirm his award of benefits for a 10.47 percent binaural hearing loss based on these audiograms. See Uglesich v. Stevedoring Services of America, 24 BRBS 180, 183 (1991).

³Although employer argues that it is undisputed that claimant is no longer working at Ingalls, our review of the record reveals that claimant was still employed at Ingalls as of the time of the December 5, 1989 hearing. Tr. at 13.

⁴The amount of the fee is not being contested on appeal.

Employer's challenge to the award of future medical benefits also must fail as the administrative law judge's determination on this issue is rational and supported by substantial evidence. Section 7, 33 U.S.C. §907, requires only that an injury be work-related before appropriate medical care is compensable. See Romeike v. Kaiser Shipyards, 22 BRBS 57 (1989); 20 C.F.R. §702.402. In this case, as employer does not contest that claimant's hearing loss is work-related and employer's own expert, Dr. Lamppin, recommended that claimant obtain hearing aids, we affirm the administrative law judge's determination that claimant is entitled to future medical benefits. Although the United States Supreme Court recently embraced employer's argument that hearing loss is not progressive, see Bath Iron Works Corp. v. Director, OWCP, ___ U.S. ___, 61 U.S.L.W. 4049 (U.S. January 12, 1993), an award of future medical benefits for occupational hearing loss is appropriate in this case as employer remains liable for periodic evaluation and treatment of claimant's work-related impairment. See generally, Cotton v. Newport News Shipbuilding and Dry Dock Co, 23 BRBS 380 (1990).

Finally, because claimant's counsel successfully established claimant's right to compensation and future medical benefits under the Act, we reject employer's assertion that there has been no successful prosecution of the claim. The administrative law judge's finding that employer is liable for claimant's attorney's fees pursuant to Section 28(a), 33 U.S.C. §928(a), is therefore affirmed. See Powers v. General Dynamics Corp., 20 BRBS 119 (1987).

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

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge