

BRB No. 91-713

JOHNNIE WILKERSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING,	)	DATE ISSUED:
INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Quentin P. McColgin, Administrative Law Judge, United States Department of Labor.

John D. Gibbons (Gardner, Middlebrooks & Fleming, P.C.), Mobile, Alabama, for claimant.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.\*

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (89-LHC-2765) of Administrative Law Judge Quentin P. McColgin 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 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).

Claimant worked as an electrician for employer over a two year period from 1975 to 1976 where he was exposed to workplace noise. On November 22, 1986, claimant underwent an audiological examination which audiologist Joseph T. Holston interpreted in a November 2, 1989, report as indicating a 3.8 percent impairment in a claimant's right ear, and a 1.9 percent impairment in his left ear, or a binaural hearing loss of 2.2. percent. Mr. Holston further opined that employment-related noise exposure could have contributed to claimant's bilateral hearing loss. A July 27, 1987, audiological examination performed by

\*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).

audiologist Jim McDill, Ph.D, revealed a mild bilateral sensori-neural hearing loss which measured

as a zero percent binaural impairment. After examining claimant and reviewing Dr. McDill's audiological report, Dr. John K. Lingo, M.D., opined that the July 27, 1987, audiogram revealed a mild sensori-neural bilateral hearing loss which could be due to prolonged job-related noise exposure. Claimant filed a claim for hearing loss benefits under the Act on February 9, 1987.

After affording claimant the benefit of the Section 20(a), 33 U.S.C. §920(a), presumption, the administrative law judge concluded that claimant's hearing loss was the result of noise exposure at his worksite. Based on Dr. Lamppin's testimony that the lowest audiogram contains the most accurate results, the administrative law judge credited the July 27, 1987 audiogram, which indicated that claimant exhibited a zero percent binaural hearing loss. Accordingly, the administrative law judge concluded that claimant sustained no compensable disability under the Act and further determined that as claimant was not entitled to compensation, he also was not entitled to an assessment under Section 14(e) of the Act, 33 U.S.C. §914(e). Finally, the administrative law judge determined that claimant's counsel was not entitled to an attorney's fee as he had not been successful in the prosecution of the claim.

On appeal, claimant contends that inasmuch as employer disputed claimant's entitlement to medical benefits and he was successful in establishing that his hearing loss was work-related, the administrative law judge erred in failing to award him medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907. Employer has not responded to claimant's appeal.

The recent opinion of the United States Court of Appeals for the Fifth Circuit in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993), is dispositive of the issue presented in this appeal. In *Baker*, the court held that a claimant who suffers a work-related hearing loss that does not result in measurable impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, 3d ed. (1988), may nonetheless be entitled to medical benefits under Section 7 if they are found to be reasonably necessary. The court indicated, however, that an evidentiary basis must exist for the award of medical benefits, such as past expenses incurred or evidence of treatment necessary in the future. *Id.* In one of the two cases consolidated in *Baker*, the court reversed the award of medical benefits to claimant Buckley because such an evidentiary basis was found to be lacking. In the second claim, the court remanded, noting conflicting evidence regarding the necessity of future treatment.

Although the administrative law judge in the present case erred in failing to consider claimant's entitlement to medical benefits for claimant's work-related hearing loss, we conclude that, on the facts presented, this error was harmless. In the present case, as in the case of claimant Buckley, claimant presented no evidence of medical expenses incurred in the past or medical treatment necessary in the future. Thus, no evidentiary basis exists sufficient to support an award of medical benefits at this time. Inasmuch, however, as claimant succeeded in establishing that his hearing loss was work-related and claims for medical benefits are never time-barred, claimant may file a claim for medical benefits if and when medical treatment becomes necessary. *See Baker*, 991 F.2d at 166, 27 BRBS at 16 (CRT).

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

SO ORDERED.

NANCY S. DOLDER, Acting Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

ROBERT J. SHEA  
Administrative Law Judge