

BRB No. 92-2122

WILLIAM D. STREET)
)
 Claimant-Petitioner)
)
 v.)
)
 BETHLEHEM STEEL CORPORATION) DATE ISSUED:
)
 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of the Decision and Order - Award of Benefits of Charles P. Rippey, Administrative Law Judge, United States Department of Labor.

Richard M. Bader, Baltimore, Maryland, for claimant.

Richard W. Scheiner and Heather H. Kraus (Semmes, Bowen & Semmes), Baltimore, Maryland, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Award of Benefits (91-LHC-2091) of Administrative Law Judge Charles P. Rippey 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 law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, who has been working for employer as a laborer since 1968, sought benefits under the Act for a noise-induced work-related hearing loss. An audiogram administered on October 17, 1989 by Robert Saltsman, an audiologist, revealed a 43.1 percent binaural

*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).

impairment. Claimant underwent a subsequent hearing evaluation by Dr. Baker on August 10, 1990;

this audiometric examination revealed only a 5 percent binaural impairment.¹ Emp. Ex. 2. Thereafter, claimant was ordered by the district director² to submit to testing by Dr. Loury, an independent medical examiner. Dr. Loury subsequently conducted a hearing evaluation on November 2, 1990. However, due to a discrepancy between claimant's speech reception threshold and his pure tone responses, Dr. Loury was unable to calculate the percentage of claimant's hearing loss. Another hearing evaluation conducted by Dr. Baker on January 23, 1991 revealed an 8.44 percent binaural impairment. Emp. Ex. 1. The most recent audiogram of record, administered by Mr. Saltsman on November 22, 1991, revealed a 54.4 percent binaural impairment. Cl. Ex. 2.

In his Decision and Order, the administrative law judge gave greater weight to the testimony of Dr. Loury who opined, based upon the results of the January 23, 1991, audiometric evaluation, that claimant suffers from an 8.5 percent binaural impairment. Thus, the administrative law judge found that claimant was entitled to permanent partial disability benefits for an 8.5 percent binaural impairment pursuant to Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13).

On appeal, claimant contends that the administrative law judge erred both in relying on the opinion of Dr. Loury and in failing to comply with Section 702.441(d) of the regulations, 20 C.F.R. §702.441(d), in calculating claimant's hearing impairment. Claimant asserts that the administrative law judge should have found that he suffers from a 54.4 percent binaural impairment based on his November 22, 1991 audiogram. Employer responds, urging affirmance of the administrative law judge's Decision and Order.

It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56 (1985). In the instant case, the administrative law judge initially noted his agreement with claimant that the disparity in results between claimant's August 1990 and January 1991 audiometric evaluations "suggests" test unreliability. *See* Decision and Order at 4. After considering the totality of the evidence, however, the administrative law judge, noting that Dr. Loury is an expert employed by the Department of Labor and, therefore, is an impartial party to the proceedings not employed by either of the parties, credited and relied upon the opinion of that physician in concluding that claimant sustained an 8.5 binaural impairment. *See id.* Dr. Loury, in his post-hearing deposition, testified that he favored the results of claimant's August 10, 1990 and January 23, 1991, audiograms because those tests were performed by two different audiologists and achieved comparable results; since both audiograms revealed a lower degree of hearing loss than the audiograms performed by Mr. Saltsman, Dr. Loury further opined that they demonstrated the best hearing of which claimant is

¹Dr. Baker performed hearing evaluations on December 13, 1989 and May 30, 1990; however, due to internal inconsistencies in the results of these examinations, Dr. Baker performed a third evaluation on August 10, 1990.

²Pursuant to 20 C.F.R. §702.105, the term "district director" has been substituted for the term "deputy commissioner" used in the statute.

capable. *See* Loury Post-Hearing Dep. at 18. Dr. Loury additionally stated that although there was disagreement between claimant's speech reception thresholds and his pure tone average in the tests he performed in November 1990, those speech reception thresholds agree well with claimant's August 1990 and January 1991 audiograms, thereby lending more reliability to those results.³ *Id.* at 13, 21. Taking into account his review of the medical records, as well as his own examination of claimant, Dr. Loury opined that, based on the January 23, 1991 audiogram, claimant suffers from an 8.5 percent binaural impairment. *Id.* at 23.

The administrative law judge properly relied upon the testimony of Dr. Loury, as supported by the January 23, 1991 audiogram, in concluding that claimant sustained an 8.5 percent binaural impairment. In adjudicating a claim, it is well-established that an administrative law judge is entitled to weigh the medical evidence and draw his own inferences from it. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962, *cert. denied*, 372 U.S. 954 (1963)); *see also Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). Likewise, an administrative law judge is not bound to accept the opinion or theory of any particular examiner. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Thus, as the administrative law judge's credibility determination is rational and within his authority as factfinder, and this credited opinion constitutes substantial evidence to support his ultimate findings, we affirm the administrative law judge's determination that claimant sustained an 8.5 percent binaural impairment. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

Claimant next challenges the administrative law judge's reliance on claimant's speech reception thresholds which, he contends, is in contravention of the regulations. Section 702.441(d), 20 C.F.R. §702.441(d), of the implementing regulations provides that, in determining hearing loss under the Act, evaluators shall use the criteria for measuring and calculating hearing impairment as published by the American Medical Association in the *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*), using the most currently revised edition. Claimant asserts that, pursuant to the AMA *Guides*, the determination of the degree of binaural impairment is derived from the results of a pure-tone audiogram, *see* AMA *Guides* at 175 (3d ed. revised 1990), and that the AMA *Guides* mandate no other testing techniques. In the instant case, Dr. Loury determined that claimant's speech reception thresholds corroborated the results of claimant's January 23, 1991, audiogram; thereafter, Dr. Loury relied upon this pure tone audiogram, for the reasons set forth

³Claimant asserts that the results of the January 23, 1991 audiogram are inherently unreliable since the test was performed within 16 hours of claimant's exposure to loud noise. Claimant, however, cites no evidence to support the assertion that this audiogram was in fact conducted within 16 hours of claimant's exposure to loud noise, but merely that this may have been the case. Moreover, Mr. Saltsman, and Drs. Baker and Loury each testified that if an audiogram is conducted within 16 hours of exposure to noise, the result would be an artificially *high* hearing loss. *See* Tr. at 74, 121; Loury Post-Hearing Dep. at 45.

supra, in opining that claimant sustained an 8.5 percent binaural impairment.⁴ Thus, as Dr. Loury found claimant's speech reception thresholds to be one of several factors supportive of his decision to rely upon claimant's January 23, 1991, audiogram, we reject claimant's contention of error.

Accordingly, the Decision and Order - Award of Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge

⁴We note that the *AMA Guides* list speech reception thresholds as one of the criteria in evaluating a patient's hearing loss. *See AMA Guides* at 174 (3d ed. revised 1990).