

BRB No. 93-1101

THOMAS T. POWELL)
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 Claimant-Respondent)
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 v.)
)
 BETHLEHEM STEEL CORPORATION) DATE ISSUED:
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 Self-Insured)
 Employer-Petitioner) DECISION and ORDER

Appeal of the Decision and Order of Robert J. Shea, Administrative Law Judge, United States Department of Labor.

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

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

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (92-LHC-2164) of Administrative Law Judge Robert J. Shea 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).

On May 15, 1991, claimant, a pipefitter for employer for 8 years, filed a claim under the Act for occupational hearing loss benefits based on the results of a December 1, 1989, audiometric test performed by Mr. Saltsman, an audiologist, which revealed a 14.7 percent binaural hearing loss. CX-1. A May 23, 1990, audiogram by Dr. Baker revealed a .9 percent binaural hearing loss. EX-6. A December 3, 1990, audiogram performed by Dr. Proctor revealed a 1.9 percent binaural hearing loss. EX-2. A fourth audiometric examination performed by Mr. Saltsman on December 31, 1991, revealed a 16.3 percent hearing loss. CX-2. At the hearing before the administrative law judge, the only issue pending for adjudication was the extent of claimant's hearing loss.

In his Decision and Order, the administrative law judge awarded claimant compensation for an 8.3 percent binaural hearing loss. In determining the extent of claimant's hearing impairment, the administrative law judge stated that he was disregarding the December 1, 1989, and the May 23, 1990, audiograms, which yielded the highest and lowest values, in order to achieve some degree of fairness. The administrative law judge then took the remaining audiograms, the November 30, 1989 test, by Mr. Saltsman, and Dr. Proctor's December 3, 1990 test, and reduced the recorded threshold values of Mr. Saltsman's higher test by 5 decibels per increment, and raised the recorded threshold values of Dr. Proctor's lower test by 5 decibels per increment based on Mr. Saltsman's expert testimony that the audiograms had a test-retest reliability factor of 5 decibels per increment. Recalculating the percentage of hearing impairment for both of these audiograms based on the test-retest reliability values, the administrative law judge determined that Mr. Saltsman's test reflected a 7.2 percent binaural loss, whereas Dr. Proctor's test reflected a loss of 9.4 percent. He then averaged these two figures and determined that claimant sustained a binaural hearing loss of 8.3 percent.

Employer appeals, contending that the administrative law judge erred in finding that claimant suffered an 8.3 percent binaural hearing loss. Claimant responds, requesting affirmance of the decision below.

Employer initially asserts that in determining the extent of claimant's hearing loss, the administrative law judge erred by failing to consider expert testimony from Drs. Baker and Proctor which indicated that the audiogram producing the lowest value is the most accurate measure of the extent of claimant's hearing impairment. An administrative law judge is generally not required to credit the audiogram producing the lowest values. *Norwood v. Ingalls Shipbuilding, Inc.*, 26 BRBS 66 (1992) (Stage, C.J., dissenting on other grounds). Moreover, in this case, contrary to employer's assertions, neither Dr. Baker nor Dr. Proctor testified that the lowest audiogram of record is always the most reliable measure of claimant's hearing impairment. Rather, Dr. Baker stated that the differences in values produced by the tests was a reflection of the sound attenuated area, and Dr. Proctor stated that the tests taken together essentially produced an acceptable range of values for hearing loss. Tr. at 77-78, 101. While these two physicians did respond to a hypothetical question by stating that, when all other factors are equal, a lower amount of impairment would be more reliable because a patient cannot fabricate a rating higher than he or she is able to achieve, each qualified his response by noting that there are several factors which may alter the reliability of a hearing test. Tr. at 76, 101-102. Inasmuch as it is within the purview of the trier-of-fact to accept or reject all or any part of any medical testimony according to his judgment, and employer has failed to establish that the administrative law judge's decision not to credit the lowest audiogram was an abuse of his discretion, this credibility determination is affirmed. *Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992); *Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991).

Employer also asserts that in determining the extent of claimant's hearing impairment, the administrative law judge erred in crediting the November 30, 1989, audiogram performed by Mr. Saltsman which revealed a 14.7 percent binaural hearing impairment. Employer maintains that the administrative law judge erred in including this audiogram in his disability assessment, asserting that Mr. Saltsman conceded that this audiogram may have reflected an exaggeration of the extent of claimant's hearing loss because it was conducted within 16 hours of his exposure to high noise levels, was therefore subject to a temporary threshold shift and that experts for both the claimant and the employer explained that a temporary threshold shift will result in a temporary worsening of claimant's hearing. We reject this contention, as Mr. Saltsman did not concede that the 1989 audiogram was tainted by a temporary threshold shift. Rather, while Mr. Saltzman initially testified that a temporary threshold shift may have affected the validity of the November 30, 1989 audiogram, he later found the test to be valid based on the results of a second test he performed in 1991 which yielded essentially the same results. Tr. at 42-46; CX-2. Moreover, Dr. Baker, who provided the only other testimony relevant to the issue, opined that if the shift occurs it usually occurs no more than 12 hours after noise exposure¹ and attributed the difference between his test and that performed by Mr. Saltsman to the sound attenuated area in which the test is performed. Tr. at 79. Because the record is devoid of any evidence which mandates that the November 30, 1989, audiogram be disregarded as invalid due to a temporary threshold shift, we reject employer's argument that the administrative law judge committed reversible error in crediting this audiogram. Inasmuch as the testimony provided by Dr. Baker and Dr. Proctor, which indicates that all of the tests were valid notwithstanding a wide variance in their results, Tr. at 74-75, 103, provides substantial evidence to support the administrative law judge's finding that all of the tests are valid, this determination is affirmed. See *O'Keefe*, 380 U.S. at 360.

Employer also contends that the administrative law judge committed reversible error in factoring the audiogram results to account for a test-retest reliability factor. We disagree. While an administrative law judge may not substitute his own expertise for that of the physicians in evaluating the medical evidence, *Donnell v. Bath Iron Works Corp.*, 22 BRBS 136 (1989), in this case the administrative law judge factored the reported values of the audiograms he relied upon based upon Mr. Saltsman's testimony that audiometric examinations have a test-retest reliability factor of 5 decibels. Tr. at 53. Moreover, any error the administrative law judge may have made in this regard is harmless, since the average of the actual results of Mr. Saltsman's November 30, 1989, audiogram and Dr. Proctor's December 3, 1990, audiogram yields an 8.3 percent binaural hearing loss, the same result reached by the administrative law judge after factoring for test-retest reliability in this case.

Employer's contention that the administrative law judge erred in failing to accord dispositive weight to the audiogram of Dr. Proctor in light of his status as an independent medical examiner under Section 7(e) of the Act, 33 U.S.C. §907(e), is similarly without

¹Dr. Baker testified that if the shift occurs, it usually occurs no more than 12 hours after noise exposure, that 12 to 16 hours is a rough measurement of testing, and that 16 to 24 hours is "the absolute time." Tr. at 79.

merit. Opinions of independent medical experts under Section 7(e) are not entitled to dispositive weight. Rather, such opinions, which are merely designed to provide the fact-finder a means to obtain a reliable, independent evaluation of a claimant's medical condition, are treated no differently than any other medical opinion and may be accepted or rejected by the administrative law judge as he sees fit. *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380, 387 (1990).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge