

BRB No. 93-1107

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

Appeal of the Decision and Order on Remand of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Rebecca J. Ainsworth (Maples and Lomax, P.A.), Pascagoula, Mississippi, for claimant.

Traci M. Castille (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (88-LHC-3284) of Administrative Law Judge Richard D. Mills 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with applicable 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, a retiree, was exposed to loud noise while in the course of his employment and sought benefits under the Act for a work-related hearing loss. Prior to a hearing on this claim, both parties filed a Motion for Summary Judgement asserting that the only issue remaining was under which section claimant should be compensated. In his Decision and Order Granting Claimant's Motion for Summary Judgment and Denying Employer's Motion for Summary Judgment, the administrative law judge found that claimant should be compensated for his 17.95 percent work-related binaural hearing loss pursuant to Section 8(c)(13), 33 U.S.C. §908(c)(13), of the Act.

Employer appealed this decision to the Board, arguing that claimant should have been awarded compensation under Section 8(c)(23), 33 U.S.C. §908(c)(23), of the Act. The Director, Office of Workers' Compensation Programs (the Director), cross-appealed, requesting that the Board hold the case in abeyance until a decision by the United States Court of Appeals for the Fifth Circuit was issued on the proper method to compensate retirees with hearing loss. In an Order dated September 12, 1991, the Board remanded the case for further consideration consistent with the decision of the Fifth Circuit in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990). The Board further directed the administrative law judge to consider claimant's entitlement to a penalty under Section 14(e), 33 U.S.C. §914(e). *Rogers v. Ingalls Shipbuilding, Inc.*, BRB Nos. 89-0572/A (Sept. 12, 1991)(unpublished).

On remand, consistent with the Fifth Circuit's decision in *Fairley*, the administrative law judge awarded claimant compensation pursuant to Section 8(c)(23) for a 17.95 percent binaural loss converted to a 6 percent impairment of the whole person, at a weekly compensation rate of \$201.77.

Claimant appeals the administrative law judge's decision on remand, arguing that he is entitled to compensation under Section 8(c)(13). Employer responds, conceding that the decision of the United States Supreme Court in *Bath Iron Works Corp. v. Director, OWCP*, U.S. , 113 S.Ct. 692, 26 BRBS 151 (CRT)(1993), is dispositive of the issue raised on appeal.

In *Bath Iron Works*, the Court held that claims for hearing loss under the Act, whether filed by current employees or retirees are claims for a scheduled injury and must be compensated pursuant to Section 8(c)(13), rather than Section 8(c)(23), of the Act. Consequently, pursuant to the Court's holding in *Bath Iron Works*, we vacate the administrative law judge's award of benefits under Section 8(c)(23). Inasmuch as the administrative law judge's finding that claimant has a 17.95 percent binaural hearing loss is unchallenged, we modify the award to reflect that claimant is entitled to receive permanent partial disability benefits for this hearing loss pursuant to Section 8(c)(13) of the Act.

Accordingly, the administrative law judge's Decision and Order on Remand is modified to reflect claimant's entitlement to permanent partial disability benefits pursuant to Section 8(c)(13). In all other respects, the administrative law judge's decision is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge