BRB No. 13-0550

LIONEL GROWS	)	
	)	
Claimant-Petitioner	)	
	)	DATE ISSUED: July 17, 2014
v.	)	
	)	
HUNTINGTON INGALLS, INCORPORATED/AVONDALE OPERATIONS	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

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

Isaac H. Soileau, Jr., and Ryan A. Jurkovic (Soileau & Associates, LLC), New Orleans, Louisiana, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order (2011-LHC-01839, 2012-LHC-01199) of Administrative Law Judge Clement J. Kennington 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 law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained a work-related hearing loss during the course of his 42 years of employment for employer as a rigger and leaderman. Claimant last worked for employer on May 24, 2010. He filed claims under the Act on November 18, 2009, and on July 12,

2011, for which employer voluntarily paid benefits for a 41.9 percent binaural impairment and provided medical benefits, including hearing aids. *See* 33 U.S.C. §§907, 908(c)(13). The parties disputed the extent of claimant's hearing loss and his average weekly wage.

In his decision, the administrative law judge consolidated the two claims, and, averaging the results of four audiograms administered between May 7, 2010 and March 21, 2012, he found that claimant has a 43.3 percent binaural impairment. Decision and Order at 10. The administrative law judge determined claimant's average weekly wage under Section 10(c), 33 U.S.C. §910(c), as $1,099.92. The administrative law judge stated claimant is entitled to interest on compensation due and unpaid; the district director calculated the interest award as 81 cents on $1,368.54 in compensation due and unpaid between February 12 and August 21, 2013.

On appeal, claimant challenges the administrative law judge's findings regarding the extent of his hearing impairment and his average weekly wage. Claimant also contends that the interest award was not properly calculated. Employer responds, urging affirmance.[1] Claimant filed a reply brief.

Claimant raises several challenges to the administrative law judge's selection of four audiograms of record on which he based the award of compensation for a 43.3 percent binaural hearing loss. The gravamen of claimant's appeal in this regard is that the administrative law judge should have based the award of benefits only on the August 23, 2010 audiogram administered by Mr. Bode, which demonstrates a 70.3 percent binaural impairment. In his decision, the administrative law judge found that these audiograms were performed in accordance with the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) and as prescribed by the Act: the audiogram on May 7, 2010, by Catherine Kirkwood; the audiogram on August 23, 2010, by Daniel Bode; the audiogram on October 24, 2011, by Dr. Seidemann; and the audiogram on May 21, 2012, by Drs. Irwin and Waits. The administrative law judge stated that these audiograms were administered subsequent to claimant's last exposure to injurious noise, and he averaged the results indicating impairments of 36.6 percent, 70.3 percent, 29.1 percent, and 37.2 percent, respectively, to find that claimant has a 43.3 percent binaural hearing loss. Decision and Order at 9-10.

We reject claimant's challenge to the validity of Dr. Seidemann's October 24, 2011 audiogram on the ground that it does not conform to Section 702.441(b)(1), 20

[1] Employer also filed a cross-appeal. BRB No. 13-055A. By Order issued on January 10, 2014, the Board granted employer's motion to withdraw its appeal.

C.F.R. §702.441(b)(1).[2] This regulation provides that audiograms conducted in accordance with the standards set forth in the regulation shall be presumptive evidence of the amount of hearing loss on the date the test was administered. In adjudicating a hearing loss claim, however, it is well-established that an administrative law judge is entitled to determine the weight to be accorded to the audiometric evidence of record. Thus, while an audiogram that fails to conform to the requirements enumerated in Section 702.441(b)(1) is not *presumptive* evidence of the amount of hearing loss sustained as of the date thereof, the administrative law judge may nonetheless find such an audiogram *probative* of the extent of claimant's hearing loss. *R.H.* [*Harris*] *v. Bath Iron Works Corp*., 42 BRBS 6 (2008); *Craig, et al v. Avondale Industries, Inc.*, 35 BRBS 164 (2001) (decision on recon. en banc), *aff'd on recon.* en banc, 36 BRBS 65 (2002), *aff'd sub nom. Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003); *Norwood v. Ingalls Shipbuilding, Inc.*, 26 BRBS 66 (1992). Moreover, we reject claimant's contention that the administrative law judge erred by not crediting employer's

[2] Section 702.441(b)(1) provides:

> (b) An audiogram shall be presumptive evidence of the amount of hearing loss on the date administered if the following requirements are met:
>
> (1) The audiogram was administered by a licensed or certified audiologist, by a physician certified by the American Board of Otolaryngology, or by a technician, under an audiologist's or physician's supervision, certified by the Council of Accreditation on Occupational Hearing Conservation, or by any other person considered qualified by a hearing conservation program authorized pursuant to 29 C.F.R. §1910.95(g)(3) promulgated under the Occupational Safety and Health Act of 1970 (29 U.S.C. §667). Thus, either a professional or trained technician may conduct audiometric testing. However, to be acceptable under this subsection, a licensed or certified audiologist or otolaryngologist, as defined, must ultimately interpret and certify the results of the audiogram. The accompanying report must set forth the testing standards used and describe the method of evaluating the hearing loss as well as providing an evaluation of the reliability of the test results.

20 C.F.R. §702.441(b)(1).

in-house audiograms.[3] Although the parties stipulated to the degree of hearing loss demonstrated on these audiograms, *see* Decision and Order at 2-3, the administrative law judge rationally found that the audiometric reports do not provide sufficient information to permit him to assess the reliability of the results.[4] *See Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001); *see generally* 33 U.S.C. §908(c)(13)(E); *Green-Brown v. Sealand Services, Inc.*, 586 F.3d 299, 43 BRBS 57(CRT) (4th Cir. 2009).

Claimant next contends that the audiogram administered by Drs. Irwin and Waits on March 2, 2012, is not entitled to weight equal to that of the audiogram administered by Mr. Bode on August 23, 2010, because the Irwin/Waits test results are unreliable. Dr. Waits, who conducted the test, rejected the initial audiogram results she obtained on the ground that claimant's responses were inconsistent. CX 19 at 19-27. Claimant contends that because the initial results were so similar to the results obtained by Mr. Bode, and because such a similarity could not be obtained intentionally, the rejected results, and not those obtained upon re-testing, are a reliable measure of claimant's hearing loss. CX 19 at 20-21. In his decision, the administrative law judge noted Dr. Waits's explanation for repeat testing, as well as her opinion that the final test results are accurate and reliable.[5] Decision and Order at 6; *see* CX 19 at 9-10, 46. As the administrative law judge's decision shows his awareness of the circumstances surrounding the results of the Irwin/Waits audiogram, and claimant has failed to show that the administrative law judge erred in crediting the second set of test results, we reject claimant's contention. *See generally Cox v. Brady-Hamilton Stevedore Co.*, 25 BRBS 203 (1991).

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[3] Claimant's initial 1985 audiogram showed no binaural hearing loss, while his last in-house audiogram on May 31, 2010, revealed an 81.9 percent hearing loss. Decision and Order at 2; CX 10.

[4] Claimant asserts that the tests were administered pursuant to the OSHA standards at 29 C.F.R §1910.95(g), as required by 20 C.F.R. §702.441(d), but he does not cite any evidence of record to support his assertion. There is no indication of the qualifications of the examiners. Additionally, some of the test results do not state when the audiometer was last calibrated, and those reports that indicate a calibration date do not state that the calibration was done under the current standards and testing procedures, as enumerated in Section 702.441(d). Moreover, there is no statement as to the reliability of these test results, which show significant fluctuations in hearing loss from year to year, beginning in 2000, rather than a steady progression of hearing loss. *See* Decision and Order at 2.

[5] Dr. Waits stated that the pure tone audiogram and speech reception threshold test indicated inconsistent results and that she was able to get consistent results after reinstructing claimant and repeating the testing. CX 19 at 9, 19-22.

Claimant also contends that the administrative law judge erred in including the May 7, 2010 audiogram results among the results averaged to determine claimant's post-retirement hearing loss because it preceded claimant's last work day.[6] While claimant is correct that the administrative law judge erred by stating that all four of the credited audiograms were conducted after claimant retired from longshore employment on May 24, 2010, as the audiogram by Ms. Kirkwood was conducted on May 7, 2010, this error is harmless given the proximity of the test to claimant's last day of work and claimant's testimony that he wore hearing protection during this period. Tr. at 31. The audiograms the administrative law judge found to be reliable demonstrate hearing loss from a high of 70.3 percent to a low of 29.1 percent. *See* Decision and Order at 2-3. Given the breadth of the discrepancy in these test results, the administrative law judge's averaging of the four reliable audiograms is a rational method to establish the extent of claimant's work-related hearing loss and is within his discretion as fact-finder. *See Steevens*, 35 BRBS 129; *see generally Ceres Marine Terminals, Inc. v. Green*, 656 F.3d 235, 45 BRBS 45(CRT) (4th Cir. 2011). Accordingly, we affirm the award for a 43.3 percent binaural impairment. 33 U.S.C. §908(c)(13)(E).

Claimant also contends the administrative law judge erred in calculating his average weekly wage pursuant to Section 10(c), rather than Section 10(a). The administrative law judge found that, although claimant's employment was regular and continuous during the year prior to the date of injury, Section 10(a) provides a calculation for a five or six-day per week worker, whereas claimant was a four-day a week employee.[7] Decision and Order at 12. The administrative law judge found that use of Section 10(a) would "drastically distort" claimant's annual earnings and therefore claimant's average weekly wage must be calculated pursuant to Section 10(c). The

[6] We note that this argument is inconsistent with claimant's contention that employer's in-house audiograms should be credited as 10 of the 11 in-house audiograms also were conducted before claimant's last day of work.

[7] Section 10(a) provides:

> If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

33 U.S.C. §910(a).

administrative law judge divided claimant's total earnings of $56,645.46 from the year preceding the work injury by the 206 days he worked to derive an average daily wage of $274.98, which he multiplied by 208 days to correspond to a four-day work week. The administrative law judge concluded that claimant's average annual earnings were $57,195.84 with a resulting average weekly wage of $1,099.92. *Id.*

Claimant does not challenge the administrative law judge's finding that he was a four-day a week worker. Claimant's Brief at 9.[8] Thus, Section 10(a) is inapplicable, as a matter of law, since claimant was not a five or six-day per week worker. 33 U.S.C. §910(a); *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004). Moreover, the administrative law judge rationally found that such a formula would distort claimant's average weekly wage calculation,[9] and he properly utilized Section 10(c) to derive claimant's average weekly wage. *See generally SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996). Section 10(c) must be used when neither Section 10(a) nor Section 10(b) can be fairly and reasonably applied. 33 U.S.C. §910(c);[10] *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). As the administrative law judge's calculation of average weekly wage under Section 10(c) reasonably approximates claimant's annual earning capacity at the time of injury, we reject claimant's assertion of error and affirm the administrative law judge's average weekly wage calculation as it is supported by

[8] Claimant testified that he generally worked four 10-hour days per week, which is reflected in his payroll records. Tr. at 16-17.

[9] Multiplying claimant's average daily wage in this case of $274.98 by 260, which is utilized for a five-day per week worker, would result in a hypothetical average annual earnings of $71,494.80, which is far in excess of claimant's actual annual earnings during the year preceding the work injury of $56,645.46.

[10] Section 10(c) states:

> If either of the foregoing methods [Section 10(a) and (b)] of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

substantial evidence. *See Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991).

Claimant contends the administrative law judge erred by not awarding him pre-judgment interest from the date of the filing audiogram conducted by Mr. Bode on August 23, 2010. CX 14. In his decision, the administrative law judge stated that claimant is entitled to interest on any unpaid compensation, the amount of which would be determined by the district director. Decision and Order at 12. The interest calculation sheet appended by the district director to the administrative law judge's decision states that claimant is entitled to 81 cents of interest accrued on overdue compensation of $1,369.35 for the period from February 2 to August 21, 2013.

Although there is no express provision in the Act for the payment of interest on past-due compensation, the United States Courts of Appeals and the Board have uniformly approved interest awards as consistent with the Congressional purpose of ensuring that claimants receive the full amount of compensation due. *See, e.g.*, *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150(CRT) (5th Cir. 1997); *Renfroe v. Ingalls Shipbuilding, Inc.*, 30 BRBS 101 (1996) (recon. en banc); *see also Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991). Cases under the Act generally involve pre-judgment interest, i.e., interest accrued on unpaid benefits during the period prior to issuance of the administrative law judge's Decision and Order. *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998). Interest accrues from the date compensation becomes "due" under Section 14(b),[11] 33 U.S.C. §914(b), rather than from the date of the administrative law judge's award. *Wilkerson*, 125 F.3d at 907, 31 BRBS at 152-53(CRT); *Renfroe*, 30 BRBS at 105-108; *see also Roberts v. Sea-Land Services, Inc.*, 132 S.Ct. 1350, 1363, 46 BRBS 15, 21(CRT) (2012). The "due date" is determined with reference to when employer receives notice or knowledge of the injury. *See* 33 U.S.C. §914(b); *Renfroe*, 30

[11] Section 14(b) provides:

> The first installment of compensation shall become due on the fourteenth day after the employer has been notified pursuant to section 912 of this title, or the employer has knowledge of the injury or death, on which date all compensation then due shall be paid. Thereafter compensation shall be paid in installments, semimonthly, except where the deputy commissioner determines that payment in installments should be made monthly or at some other period.

33 U.S.C. §914(b).

BRBS at 108. In *Renfroe*, the Board rejected the contention that interest in a hearing loss case should be calculated from the date of injury, *i.e.*, the date of last exposure. *Id*. at 107; *see Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151(CRT) (1993). The Board explained that such a holding would be inconsistent with Section 14(b) as it would require employer to be liable prior to its awareness of the injury. *See also Meardry v. Int'l Paper Co.*, 30 BRBS 160 (1996). The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, subsequently reached the same conclusion in *Wilkerson*, 125 F.3d at 907-08, 31 BRBS at 153(CRT).

In this case, the administrative law judge did not make necessary findings of fact to permit the district director to calculate the interest due pursuant to *Wilkerson* and *Renfroe*, which were not discussed in the Decision and Order. Accordingly, we remand the case to the administrative law judge for necessary findings of fact concerning Section 14(b), the timeliness of employer's payments in relation to its date of knowledge, and thus whether additional interest is due claimant.

Accordingly, the case is remanded for further findings on the interest issue consistent with this decision. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge