BRB Nos. 13-0526A
and 14-0042

JOHN SLOAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SSA ATLANTIC TERMINALS, INCORPORATED	)	DATE ISSUED: June 19, 2014
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order on Reconsideration and the Supplemental Decision and Order Denying Attorney Fees of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Klein Camden L.L.P.), Norfolk, Virginia, for claimant.

Traci Castille (Franke & Salloum, P.L.L.C.), Gulfport, Mississippi, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Reconsideration and the Supplemental Decision and Order Denying Attorney Fees (2012-LHC-01479) of Administrative Law Judge Daniel A. Sarno, Jr., 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, rational, and

accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant last worked for employer as a longshoreman on July 20, 2005, when he retired. He filed a claim for compensation on January 20, 2012, based on a December 5, 2011 audiogram, which revealed an 18.1 percent binaural impairment. CX 1. Claimant underwent another audiogram on February 23, 2012, which demonstrated a 15.3 percent binaural hearing impairment. CX 3; EX 7. On February 24, 2013, based on an average of the audiometric results, employer voluntarily paid claimant benefits for a 16.55 percent binaural impairment. CXs 9, 10, 19; EXs 3, 4, 5. Claimant, however, continued to seek compensation for the entire 18.1 percent impairment demonstrated on his filing audiogram. In preparation for the hearing, employer subpoenaed claimant's medical records, which revealed an August 14, 2006 audiogram that reflected a 14.7 percent binaural hearing loss.[1] EX 6.

On March 11, 2013, Judge Malamphy found that the December 2011 audiogram was the only evidence presumptive of the degree of hearing loss. Therefore, he found claimant entitled to benefits for an 18.1 percent binaural hearing loss. He also found that employer failed to timely controvert the claim, and he awarded claimant an additional 10 percent assessment pursuant to Section 14(e), 33 U.S.C. §914(e). Decision and Order at 11. Employer moved for reconsideration, and the case was reassigned to Administrative Law Judge Sarno (the administrative law judge). The administrative law judge found, contrary to Judge Malamphy's finding, that the December 2011 audiogram was not a "presumptive audiogram" but that it, like the 2006 audiogram, is probative of the extent of claimant's hearing impairment. Because it revealed the lowest percentage of hearing loss, the administrative law judge gave the 2006 audiogram greater weight, and he awarded claimant benefits for a 14.7 binaural hearing loss.[2] The administrative law judge also awarded claimant a Section 14(e) assessment. Decision and Order on Recon. at 4. Claimant appeals the administrative law judge's decision on reconsideration. BRB No. 13-0526A.[3] Employer responds urging affirmance.

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[1] This test is the first audiogram administered to claimant after the cessation of his employment with employer in July 2005.

[2] The administrative law judge stated the American Medical Association *Guides to the Evaluation of Permanent Impairment* "require that if multiple tests are equally probative, the test that demonstrates the lowest hearing loss should be given the greatest weight." Decision and Order on Recon. at 4; *see* discussion, *infra*.

[3] Employer initially appealed the administrative law judge's decision as well, but subsequently withdrew its appeal. BRB No. 13-0526.

In light of the award of a Section 14(e) assessment, claimant's counsel filed a petition for an attorney's fee. In his supplemental decision, the administrative law judge denied claimant's counsel an employer-paid fee, as he found the criteria under Section 28(a), (b), 33 U.S.C. §928(a), (b), had not been met. Claimant appeals the administrative law judge's supplemental decision denying counsel a fee. BRB No. 14-0042. Employer responds, urging affirmance.[4] Claimant's appeals have been consolidated for decision.

Claimant contends the administrative law judge erred in finding that the 2011 audiogram is not presumptive evidence of a compensable 18.1 percent impairment pursuant to Section 702.441, 20 C.F.R. §702.441.[5] Claimant asserts that, because the 2011 audiogram is the only presumptive audiogram of record, he is entitled to benefits for an 18.1 percent hearing impairment. We reject claimant's contention.

Section 8(c)(13)(C) of the Act provides:

> An audiogram shall be presumptive evidence of the amount of hearing loss sustained as of the date thereof, only if (i) such audiogram was administered by a licensed or certified audiologist or a physician who is certified in otolaryngology, (ii) such audiogram, with the report thereon, was provided to the employee at the time it was administered, and (iii) no contrary audiogram made at that time is produced.

33 U.S.C. §908(c)(13)(C); *see also* 20 C.F.R. §702.441. Additionally, in order to be presumptive evidence of the amount of hearing loss, the regulations require, in relevant part, that "The accompanying report must set forth the testing standards used" and that "Audiometer testing procedures required by hearing conservation programs pursuant to

[4] On April 8, 2014, in light of the decision of the United States Court of Appeals for the Fourth Circuit in *Lincoln v. Director, OWCP*, 744 F.3d 911, 48 BRBS 17(CRT) (4th Cir. 2014) (addressing the statutory interpretation of 33 U.S.C. §928(a) with respect to an employer-paid attorney's fee), employer filed a supplemental brief along with a motion to accept its submission. We grant employer's motion and accept the supplemental brief. 29 C.F.R. §802.215.

[5] As the 2006 and 2011 audiograms were conducted by the same audiological group and contained similar information regarding the testing and interpretive methodology, the administrative law judge found "they appear to be" equally probative as to the extent of claimant's hearing loss. Decision and Order on Recon. at 4. Because the 2012 audiogram report did not state when the audiometer was calibrated, the administrative law judge found it less reliable and entitled to less weight than the 2006 or 2011 audiogram. Neither party challenges this latter finding. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

the Occupational Safety and Health Act of 1970 should be followed (as described at 29 C.F.R. 1910.95 and appendices)." 20 C.F.R. §702.441(b)(1), (d). The Occupational Safety Health Act regulations specify that audiograms should be "pure tone." 29 C.F.R. §1910.95. The OWCP Procedure Manual specifies that "audiograms performed after December 27, 1984 must conform to the following standards (see Section 20 C.F.R. section 702.441(d) and 29 C.F.R. 1910.95):

* * *

> b. Audiometric tests shall be pure tone, air conduction, hearing threshold examinations, with test frequencies including, at a minimum, 500, 1000, 2000, 3000, 4000 and 6000 Hz. . . ."

Procedure Manual at Part 3-401 para. 3(b).[6] Here, the administrative law judge accurately observed that the 2011 audiogram did "not describe the testing standards, including whether the audiogram was performed using a pure tone audiometer." Decision and Order on Recon. at 3; CX 1. Thus, the administrative law judge found that the 2011 audiogram is not presumptive evidence of disability. Decision and Order on Recon. at 3. Although claimant asserts the 2011 audiogram was administered using an audiometer and, by definition, an audiometer "measur[es] hearing activity for PURE TONES of normally available frequencies," Cl. Br. at 9 (emphasis included), the administrative law judge was not required to infer that a pure tone audiometer was used absent any evidence in the record to that effect. *See generally White v. Newport News Shipbuilding & Dry Dock Co.*, 633 F.2d 1070, 12 BRBS 598 (4th Cir. 1980) (an administrative law judge is entitled to weigh the medical evidence and draw his own conclusions from it). Therefore, as it is rational and supported by substantial evidence, we affirm the administrative law judge's finding that the 2011 audiogram is not presumptive evidence of the extent of claimant's hearing impairment. *See generally Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hess]*, 681 F.2d 938, 14 BRBS 1004 (4th Cir. 1982).

Claimant next contends the administrative law judge erred in weighing the 2006 and 2011 probative audiograms.[7] An audiogram may be credited as determinative of a claimant's disability as long as it complies with the American Medical Association's

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[6] http://www.dol.gov/owcp/dlhwc/lsproman/proman.htm#03-0401

[7] An audiogram that fails to qualify as "presumptive evidence" of the extent of a claimant's hearing loss nonetheless may be considered to be probative evidence by the administrative law judge in his determination of the extent of the claimant's hearing loss. *See generally 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).

Guides for the Evaluation of Permanent Impairment (the AMA *Guides*). 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). The administrative law judge is entitled to determine which audiometric evidence is the most probative of a claimant's impairment. *R.H. [Harris] v. Bath Iron Works Corp.*, 42 BRBS 5 (2008); *Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001); *Labbe v. Bath Iron Works Corp.*, 24 BRBS 159 (1991). In this case, the administrative law judge stated: "The *Guides* require that if multiple tests are equally probative, the test that demonstrates the lowest hearing loss should be given the greatest weight," and he accorded the 2006 audiogram the greatest weight and found that claimant has a 14.7 percent binaural hearing impairment. Decision and Order on Recon. at 4. We agree with claimant that this finding cannot be affirmed. Contrary to the administrative law judge's statement, the AMA *Guides* do not require an administrative law judge to credit the test demonstrating the lowest hearing loss. The administrative law judge appears to have confused the AMA *Guides* with the American Academy of Otolaryngology's *Guide for Conservation of Hearing Noise* (AAO *Guide*), which states that where tests are "consistent,"[8] "the test showing the best hearing is the test that best represents the true hearing." EX 11 at 45. The AAO *Guide*, however, also does not mandate a finding that the test demonstrating the lowest hearing loss be given the greatest weight, nor is an administrative law judge required to follow the AAO *Guide* in evaluating audiograms under the Act. The Act requires only that the AMA *Guides* be used to calculate hearing impairments. 33 U.S.C. §908(c)(13)(E); 20 C.F.R. §702.441(d). While the administrative law judge has discretion in weighing the evidence, and he may choose to give consideration to the AAO *Guide*, which was admitted into evidence, he is not *required* to do so. Therefore, as it is unclear how the administrative law judge would have weighed the two audiograms if he did not believe he was required to assign the greatest weight to the audiogram demonstrating the lowest hearing loss, we vacate the administrative law judge's finding that the 2006 audiogram is determinative of claimant's disability. We remand the case for the administrative law judge to again consider the probative value of the 2006 and 2011 audiograms as they relate to the extent of claimant's hearing loss. *Green-Brown*, 586 F.3d 299, 43 BRBS 57(CRT); *Harris*, 42 BRBS 5.

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[8] Per the AAO *Guide*:

> If the audiograms agree within 10 dB at four or more of the recommended audiometric frequencies (0.5, 1, 2, 3, 4, 6, and 8 kHz), they may be considered consistent. If so, the average of the thresholds at 0.5, 1, 2, and 3 kHz should be calculated for each test and that audiogram that yields the lowest (smallest number) average should be accepted as representing the status of the person's hearing sensitivity.

EX 11 at 25.

Claimant also challenges the administrative law judge's supplemental decision denying an employer-paid attorney's fee. He asserts that, because employer did not pay all benefits due within 30 days of receiving notice of the claim, employer is liable for a fee under either Section 28(a) or Section 28(b) of the Act.[9] 33 U.S.C. §928(a), (b).

An attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928, and the applicable regulation, 20 C.F.R. §702.132. Under Section 28(a) of the Act, if an employer declines to pay any compensation within 30 days after receiving written notice of a claim from the district director, and the claimant's attorney's services result in a successful prosecution of the claim, the claimant's attorney is entitled to a fee payable by employer. *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir.), *cert. denied*, 546 U.S. 960 (2005). Under Section 28(b) of the Act, when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that paid or tendered by the employer. 33 U.S.C. §928(b); *see Edwards*, 398 F.3d 313, 39 BRBS 1(CRT).

Claimant first contends his attorney is entitled to an employer-paid fee under Section 28(a) because employer declined to pay all compensation due within 30 days of its receipt of the claim from the district director. *See* n.9, *supra.* In this case, the administrative law judge observed that employer received written notice of the claim from the district director on January 27, 2012, and it commenced payment on February 24, 2012, 29 days after receiving written notice of the claim. Accordingly, the administrative law judge found that an attorney's fee cannot be awarded under Section 28(a). We agree.

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that if an employer pays "any" or "some" compensation to claimant within the 30 days after it received notice of the claim from the district director, the employer cannot be held liable for an attorney's fee pursuant to Section 28(a). *Lincoln v. Director, OWCP*, 744 F.3d 911, 48 BRBS 17(CRT) (4th Cir. 2014); *Edwards*, 398 F.3d 313, 39 BRBS 1(CRT). As employer here paid "some" compensation to claimant, benefits for a 16.55 percent hearing loss, within 30 days of its receipt of the claim for compensation from the district director, Section 28(a) does not apply. *Lincoln*, 744 F.3d at 914-915, 48 BRBS at 18-19(CRT) (the most natural reading of the Section 28(a) provision is that if an employer pays the claimant "something by way of compensation," it is not liable for an attorney's fee under that section); *Edwards*, 398

[9] In support of his contention for liability under Section 28(a), claimant asserts that the Section 14(e) assessment awarded demonstrates employer's failure to make timely compensation payments pursuant to Section 28(a).

F.3d 313, 39 BRBS 1(CRT). We affirm the administrative law judge's conclusion that employer is not liable for an attorney's fee pursuant to Section 28(a).

Claimant argues, in the alternative, that the administrative law judge erred in failing to award an employer-paid fee under Section 28(b). Specifically, claimant asserts his attorney is entitled to an employer-paid fee because claimant refused to accept the district director's recommendation and, by utilizing the services of an attorney, he was awarded an additional assessment under Section 14(e), which had not been recommended by the district director. As claimant misconstrues Section 28(b), we disagree.

The Fourth Circuit has held that, in order for an employer to be held liable for an attorney's fee under Section 28(b), the district director must have held an informal conference and issued a written recommendation, the employer must have rejected that recommendation, and the claimant must have used the services of an attorney to secure greater compensation than the employer paid or tendered after the written recommendation. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hassell]*, 477 F.3d 123, 41 BRBS 1(CRT) (4th Cir. 2007); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Moody]*, 474 F.3d 109, 40 BRBS 69(CRT) (4th Cir. 2006); *Edwards*, 398 F.3d 313, 39 BRBS 1(CRT). In this case, an informal conference was held on April 19, 2012, following which the district director recommended:

> I agree that the appropriate method of payment was to average the two audiograms. The results are 16.55 percent binaural impairment or 33.10 weeks. I also disagree that a Section 14(e) penalty is due. Since the carrier is allowed to make a payment biweekly until the scheduled award is exhausted, I do not agree that a penalty should be awarded.

EX 4. This recommendation was in accord with what employer had voluntarily paid claimant, and it was claimant, not employer, who rejected the recommendation. Although claimant pursued a formal hearing and was awarded an additional assessment under Section 14(e) by the administrative law judge, employer did not reject the district director's recommendation that no Section 14(e) assessment was due. Thus, the award of a Section 14(e) assessment does not render employer liable for claimant's attorney's fee. *Andrepont v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009). As all prerequisites for an employer-paid fee under Section 28(b) have not been met, employer cannot be held liable for an attorney's fee under this section. *Hassell*, 477 F.3d 123, 41 BRBS 1(CRT); *Edwards*, 398 F.3d 313, 39 BRBS 1(CRT). Therefore, we also affirm the administrative law judge's denial of an employer-paid fee pursuant to Section 28(b).

Accordingly, the administrative law judge's award of permanent partial disability benefits is vacated, and the case is remanded for further consideration as to the extent of claimant's hearing impairment. In all other aspects, the Decision and Order on Reconsideration is affirmed. The administrative law judge's Supplemental Decision and Order Denying Attorney Fees is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge