BRB No. 11-0537

VICTOR E. LODGE, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PORTS AMERICA LOUISIANA, INCORPORATED	)	DATE ISSUED: 05/02/2012
	)	
	)	
	)	
and	)	
	)	
PORTS INSURANCE COMPANY, INCORPORATED	)	
	)	
	)	
Employer/Carrier Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Arthur J. Brewster and Edward S. Rapier, Jr., Metairie, Louisiana, for claimant.

Christopher J. Field (Field Womack & Kawczynski), South Amboy, New Jersey, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2010-LHC-0872) of Administrative Law Judge Lee J. Romero, 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, 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 had worked as a longshoreman for approximately 11 years before filing this claim against employer for compensation for a work-related hearing loss. On June 23, 2009, while working for employer, claimant underwent an audiometric evaluation by Mr. Bode, an audiologist. The audiogram reflected a 44.8 percent binaural impairment. After the evaluation, claimant continued to work for employer as well as for other longshore employers.[1]

The parties agreed that during the course of his employment with employer claimant suffered a compensable, sensorineural hearing loss but disagreed as to the percentage of loss. On November 6, 2009, claimant underwent another audiometric evaluation performed by employer's expert, Dr. Seidemann, which reflected a 5.9 percent binaural impairment. On December 22, 2009, claimant underwent a third audiometric evaluation with an independent evaluator, Dr. Irwin, who is a board-certified otolaryngologist, and his colleague, Dr. Wait. This audiogram reflected a 58.1 percent binaural impairment. Employer voluntarily paid claimant permanent partial disability benefits pursuant to the schedule, 33 U.S.C. §908(c)(13), for a 25.35 percent binaural impairment, based on the average of the results of the June and November 2009 audiograms.

The administrative law judge found that all three audiograms complied with the regulation at 20 C.F.R. §702.441 and, therefore, were presumptively valid evidence of the degree of claimant's hearing loss as of the dates of the evaluations. The administrative law judge also found that claimant worked for another employer just prior to undergoing the December 2009 audiogram, relieving employer of liability for the increased impairment identified by that evaluation. Decision and Order at 18-19. As he also found he was not required to credit the lowest audiogram, the administrative law judge averaged the two earlier audiograms, and he awarded claimant compensation for a 24.85 binaural hearing loss under Section 8(c)(13) of the Act. Claimant appeals the decision. Employer responds, urging affirmance.

Claimant contends the administrative law judge erred in calculating the degree of his impairment. Specifically, claimant argues that Dr. Irwin's independent evaluation confirms the evaluation of Mr. Bode, and the administrative law judge's reason for excluding Dr. Irwin's results therefore is irrational. Thus, claimant asserts, the administrative law judge should have considered the December 2009 evaluation, as it

[1]Claimant did not file a claim for benefits against his last covered employer, Ryan Walsh.

establishes the invalidity of Dr. Seidemann's November 2009 audiogram, averaged the results of the June and December 2009 audiograms, and awarded benefits for a 51.5 percent binaural impairment. Alternatively, claimant argues that if the Board accepts the administrative law judge's rationale for excluding Dr. Irwin's results, then the same rationale should apply to exclude Dr. Seidemann's results, and claimant's award should be based solely on the results of the June 2009 audiogram.

A claimant with a work-related hearing loss is entitled to benefits under Section 8(c)(13) of the Act. A valid audiogram is presumptive evidence of the amount of hearing loss as of the date of the audiogram. 33 U.S.C. §908(c)(13)(C). An administrative law judge has the discretion to determine the weight to be accorded to the audiograms of record. *Norwood v. Ingalls Shipbuilding, Inc.*, 26 BRBS 66 (1992) (Stage, C.J., dissenting on other grounds). Accordingly, the administrative law judge may average the results of equally probative and reliable audiograms to determine the extent of a claimant's hearing loss. *Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001) *cf. Ceres Marine Terminals, Inc. v. Green*, 656 F.3d 235, 45 BRBS 45(CRT) (4th Cir. 2011) (improper to average audiograms if one demonstrates a zero percent impairment because claimant failed to meet burden of proving disability).

We reject claimant's assertion that the administrative law judge erred in not including Dr. Irwin's audiogram results in the calculation of the percentage of impairment. The administrative law judge found that all three hearing evaluations are valid; specifically, he found that the last audiogram corroborated and validated the first audiogram. Decision and Order at 17. Nonetheless, the administrative law judge rationally found that the increase in impairment revealed in the December 2009 audiogram could be related to claimant's continued work for a subsequent covered employer who is not a party to this case. Thus, the administrative law judge declined to rely on the December 2009 audiogram in determining the extent of claimant's hearing loss. Claimant has not established that this finding is irrational or contrary to law. Therefore, we reject claimant's assertion that the administrative law judge erred in excluding the December 2009 results. *See Cox v. Brady-Hamilton Stevedore Co.*, 25 BRBS 203 (1991).

We also reject claimant's contention that the administrative law judge erred in including the results of Dr. Seidemann's November 2009 audiogram in determining the extent of claimant's impairment. Although the administrative law judge found that the December 2009 audiogram validated the June 2009 audiogram under a "test/re-test" reliability analysis, and that the November 2009 audiogram was not compatible with the other two tests, he nevertheless concluded that Dr. Seidemann's November 2009 results are valid. The administrative law judge found that, although Mr. Bode and Dr. Irwin gave little credence to the results of Dr. Seidemann's evaluation, they

could find no flaw in his testing. The administrative law judge found that the record does not contain any reasonable explanations for the differences among the evaluations and therefore there was no basis by which Dr. Seidemann's audiogram should be excluded from the calculation of claimant's impairment. As the administrative law judge found that both Mr. Bode's and Dr. Seidemann's audiograms were properly administered and valid, and, as claimant was working for employer at the time of both evaluations, unlike at the time of the December 2009 evaluation, the administrative law judge rationally averaged the results of the June and November evaluations. *See Green*, 656 F.3d 235, 45 BRBS 45(CRT); *Steevens*, 35 BRBS 129. Therefore, we affirm the finding that claimant has a 24.85 percent binaural impairment as it is rational and supported by substantial evidence.[2]

Accordingly, we affirm the administrative law judge's Decision and Order.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[2]The administrative law judge excluded one percentage point of the 44.8 percent impairment for tinnitus, Decision and Order at 16, and used 43.8 percent impairment in his calculation (43.8 + 5.9 = 49.7; 49.7 ÷ 2 = 24.85). This finding is not appealed and therefore is affirmed. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).