BRB No. 06-0244

LEROY REED (deceased) Claimant-Petitioner v. UNIVERSAL MARITIME SERVICE CORPORATION and SIGNAL MUTUAL INDEMNITY ASSOCIATION Employer/Carrier- Respondents	)	DATE ISSUED: 10/24/2006 DECISION and ORDER

Appeal of the Decision and Order of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Philip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order (2005-LHC-0934) of Administrative Law Judge Paul H. Teitler 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 began working on the waterfront in 1960 for Sea-Land as a holdman. In the 1970s, claimant worked as a crane operator for Sea-Land, a position he held for approximately 30 years. CX 2 at 4-9. Claimant testified on deposition that the noise to which he was exposed while he operated the crane was not loud, but was a continuous hum. *Id*. In May 1999, claimant became a gang foreman. Universal Maritime Service Corporation (employer) began operating the pier in December 1999. Claimant operated the crane for about one month after employer took over the operations, and then he returned to his position as a gang foreman. *Id*. At the time of his May 9, 2002, deposition, claimant testified that he had been a gang foreman for about three years, and that his job entailed passing orders from the stevedores to the men he was supervising on the various ships. *Id.* at 6.

The record contains three audiograms. The first, administered on February 2, 2000, by Dr. Brownstein showed a work-related binaural loss of 35.8 percent. CX 1. The second, administered on September 19, 2000, by Dr. Katz, was not interpreted, as Dr. Katz described the audiogram as a "fluctuating, inconsistent . . . poorly reliable, . . . subjective audiometric test." EX 3 at 2. Dr. Katz opined that claimant has a zero percent hearing loss based upon claimant's speech reception thresholds. The final audiogram was conducted on February 28, 2002, by Dr. Woods, an audiologist. Utilizing the American Medical Association *Guides to the Evaluation of Permanent Impairment*, Dr. Woods concluded that claimant's hearing loss was 0 percent in each ear and binaurally. EXs 4; 5 at 21, 26-27. Dr. Woods stated that the pattern demonstrated on claimant's audiogram is not typical of that expected with noise-induced loss. EX 5 at 19.

In his Decision and Order, the administrative law judge found that claimant established his *prima facie* case entitling him to invocation of the presumption of causation at Section 20(a) of the Act, 33 U.S.C. §920(a). The administrative law judge found that claimant testified to a loss of hearing and that he was exposed to constant humming from the generator, correlating, in claimant's mind, to a greater hearing loss in his left ear. Decision and Order at 3. Nonetheless, the administrative law judge found that employer presented substantial evidence to establish rebuttal of the Section 20(a) presumption. The administrative law judge relied on the audiogram of Dr. Woods, which demonstrated no hearing loss under the AMA *Guides*, and on the deposition testimony of Dr. Woods that the audiogram conducted by Dr. Brownstein is not credible, as was the audiogram conducted by Dr. Katz. The administrative law judge also found rebuttal based on the absence of evidence of claimant's exposure to injurious stimuli during claimant's employment with employer, based on claimant's denial of significant noise exposure in his position as foreman.

On weighing the evidence as a whole, the administrative law judge accorded little weight to the audiogram administered by Dr. Brownstein, as it was found to be unreliable by Dr. Woods. The administrative law judge noted that the reliability of the audiogram

was not attested to by Dr. Brownstein, nor were his qualifications or that of the tester indicated on the report. The administrative law judge also found that claimant put forth only subjective evidence, *i.e.*, his deposition testimony, concerning the noise to which he was exposed while working for employer, and that this evidence does not establish claimant's belief that he was exposed to noise sufficient to have caused claimant's hearing loss.[1] The administrative law judge concluded that, "As hearing loss has not been established in this case, Claimant is not entitled to benefits under the Act." Decision and Order at 5. Therefore, the administrative law judge did not reach the issue of whether Universal is the responsible employer.

On appeal, claimant contends the administrative law judge erred in finding that employer rebutted the Section 20(a) presumption, in crediting the opinion of Dr. Woods, as he is not a medical doctor, and in finding that claimant's deposition testimony cannot be credited to establish exposure to injurious noise. Employer responds, urging affirmance of the administrative law judge's decision.

Claimant has failed to establish reversible error in the administrative law judge's denial of benefits. The issues in this case concerned the degree, if any, of claimant's work-related hearing loss and the identity of the responsible employer. The administrative law judge's decision co-mingles these issues, but he ultimately found that claimant did not establish that he had a hearing loss, an issue on which claimant bears the burden of proof. This finding is supported by substantial evidence. Thus, any error in the administrative law judge's decision is harmless.

Dr. Brownstein stated the results of the audiogram he administered in February 2000 demonstrated a 35.8 percent binaural loss. CX 1. Dr. Woods stated that the results of the audiogram he administered in February 2002 demonstrated a zero percent hearing loss under the AMA *Guides.* EX 4. Dr. Woods stated that pure-tone test results should be consistent with speech discrimination results, and that this consistency was present in his examination of claimant.[2] EX 5 at 21. He further opined that the results of the audiogram administered by Dr. Brownstein were not consistent with claimant's ability to hear because a 35.8 percent impairment would mean the claimant could not communicate normally, which was not the case, EX 5 at 25, and there is no evidence of notching on the test, which there would be if a person suffered from hearing loss due to physical damage,

[1] Claimant died prior to the formal hearing in this case.

[2] Dr. Katz opined that the speech discrimination results and pure-tone results were inconsistent in the test he administered in September 2000. He opined that the speech discrimination results were the better indicator of this claimant's hearing ability, and that claimant, therefore, did not demonstrate a hearing loss. EX 3.

Id. at 30-32. The administrative law judge concluded that Dr. Brownstein's audiogram could not be credited, and that, therefore, claimant failed to establish a compensable loss of hearing.

We affirm this finding, as the administrative law judge is entitled to weigh the evidence and to draw rational inferences therefrom. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). Contrary to claimant's contention, there is no prohibition in the Act or regulations precluding a properly qualified audiologist from testifying regarding the degree of a claimant's hearing loss or the cause of any loss demonstrated. *See generally* 33 U.S.C. §908(c)(13)(C); 20 C.F.R. §702.441. Dr. Woods testified at length in his deposition about his educational background and experience. EX 5 at 3-6. He also testified extensively about the different components of his audiometric evaluations. *Id*. at 8-10. Therefore, the administrative law judge rationally found, based on Dr. Woods's opinion and the results of the 2002 audiogram, that the audiogram administered by Dr. Brownstein could not be credited to establish a hearing loss.[3] As the administrative law judge's finding that claimant failed to establish that he had any hearing loss is rational and supported by substantial evidence, we affirm the denial of benefits.[4] *Davison v. Bender Shipbuilding & Repair Co.*, 30 BRBS 45 (1981); *Norwood v. Ingalls Shipbuilding, Inc.*, 26 BRBS 66 (1992) (Stage, C.J., dissenting on other grounds).

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

SO ORDERED.

[3] Although Dr. Katz's audiogram can be interpreted as showing a hearing loss under the AMA *Guides*, we reject claimant's contention that the administrative law judge was required to so find, as Dr. Katz stated the audiogram was not reliable and was inconsistent with claimant's speech reception results. EX 3.

[4] There was no claim for medical benefits in this case. Tr. at 6.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge