BRB No. 12-0124

MARSHALL JACKSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CERES GULF, INCORPORATED	)	DATE ISSUED: 10/31/2012
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and Order Denying Employer's Motion for Reconsideration 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.

Lawrence P. Postol (Seyfarth Shaw LLP), Washington, D.C., for self-insured employer.

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order and Order Denying Employer's Motion for Reconsideration (2010-LHC-00793) 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, a longshoreman, filed a claim for compensation for a work-related hearing loss. Claimant first had his hearing tested by Daniel Bode, a licensed clinical audiologist, on May 14, 2009. Mr. Bode opined that claimant has a bilateral, work noise-induced sensorineural hearing loss. Using the American Medical Association guidelines, Mr. Bode found a 39.8 percent bilateral impairment. Dr. Seidemann, Ph.D., who performed audiological evaluations of claimant on October 14, 2009, and November 22, 2010, found that claimant suffers a mild, bilateral sensorineural hearing loss, first measured at 2.8 percent and then at 4.7 percent, which he stated was unrelated to claimant's work noise exposure. Subsequently, Dr. Marks, an otolaryngologist, administered an audiogram on December 22, 2009, which revealed a 56 percent binaural impairment, and a second audiogram on May 25, 2010, which revealed a 39.6 percent binaural impairment. In July 2010, Dr. Sanborn, Au.D., conducted an audiological brainstem response (ABR) evaluation which, she stated, supported the presence of a significant sensorineural hearing loss.

In his decision, the administrative law judge concluded that claimant's hearing loss is work-related, finding that claimant established invocation of the presumption at Section 20(a) of the Act, 33 U.S.C. §920(a), and that employer did not establish rebuttal of the presumption. Relying on the average of the two audiograms administered by Dr. Marks, the administrative law judge found that claimant is entitled to permanent partial disability benefits for a 47.8 percent binaural loss. 33 U.S.C. §908(c)(13). The administrative law judge also awarded claimant medical benefits. Employer's motion for reconsideration was denied.

On appeal, employer challenges the administrative law judge's findings that claimant's hearing loss is permanent such that claimant is entitled to an award of permanent partial disability benefits under the schedule and has a 47.8 percent binaural hearing loss. Claimant and the Director, Office of Workers' Compensation Programs

(the Director) each respond urging affirmance of the award of benefits.[1] Employer has filed a reply in response to the Director's brief.

Employer argues that the administrative law judge improperly found that claimant's injury is permanent based on his incorrect interpretation of Dr. Marks's testimony since each expert in this case, including Dr. Marks, testified that surgery is a viable option to correct claimant's conductive hearing loss. Employer's argument that claimant's hearing loss is not yet permanent due to the possibility of surgical intervention for that condition is without merit.

The date that a claimant's disability reaches permanency is a question of fact determined solely by medical evidence. *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1980). If surgery is anticipated, maximum medical improvement has not been reached. *Kuhn v. Associated Press*, 16 BRBS 45 (1983). However, if surgery is not anticipated, or if the prognosis after surgery is uncertain, the claimant's condition may be permanent. *McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9 (2000); *Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999), *aff'd*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000); *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200 (1986).

In this case, the administrative law judge found that while Dr. Marks stated that the conductive portion of claimant's hearing loss could "theoretically" be improved through medication or surgery, amplification is the more appropriate way to treat claimant. CX 28. In light of Dr. Marks's opinion, the administrative law judge rationally concluded that surgery is not anticipated and that claimant's hearing loss thus is permanent in nature.[2] *See McCaskie*, 34 BRBS 9. We, therefore, affirm the administrative law judge's findings that claimant sustained a permanent hearing loss as of

[1]The Director's response is limited to employer's challenge to the administrative law judge's averaging of the results of the two audiograms conducted by Dr. Marks.

[2]Dr. Sanborn testified that she typically refers patients, like claimant, who exhibit a conductive component to their hearing loss, to an otolaryngologist for medical management, sometimes surgery, sometimes medication. CX 33 at 88. Dr. Seidemann also stated that he would "absolutely" defer to the treatment recommended by an otolaryngologist and particularly as to whether claimant would, in this case, "benefit from surgery to correct his conductive loss." HT at 191. Dr. Seidemann further conceded that Dr. Marks, an otolaryngologist, opined that claimant's condition would be most appropriately dealt with by amplification. HT at 192.

the stipulated date of injury, May 14, 2009, and is entitled to an award under the schedule as they are rational, supported by substantial evidence, and in accordance with law. *See generally Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151(CRT) (1993).

Employer next contends the administrative law judge erred in crediting Dr. Marks's audiograms to determine the extent of claimant's hearing loss in this case. Employer argues that in light of Dr. Marks's admission that his first audiogram was not accurate, and because the two audiograms he administered were not within the allowed test-retest variance, those audiograms are not an accurate representation of the extent of claimant's hearing loss.

In this case, the administrative law judge, after reviewing the five audiograms and the opinions of the four experts, credited Dr. Marks's opinion regarding the extent of claimant's hearing loss based on: his qualifications as an otolaryngologist; because he "provided reasonable and unbiased explanations regarding the differences between the audiograms when possible;" and because Dr. Marks's findings are supported by objective tests.[3] Decision and Order at 17. The administrative law judge rejected the audiograms and findings of Dr. Seidemann because his opinion, that claimant suffered only a mild hearing loss, is inconsistent with the other audiograms and objective test results. *Id.* Contrary to employer's assertion, Dr. Marks made no admission that his first audiogram was not accurate. While Dr. Marks conceded that there might "possibly" be some inconsistency "in the lower frequency" between the air conduction study and the otoacoustic emission (OAE) testing his office conducted, Dr. Marks stated that he would "rather put more faith in my audiometrics than in [the OAE] results." HT at 73-75. Upon crediting Dr. Marks's opinion,[4] the administrative law judge averaged the results of the audiograms he administered to determine the extent of claimant's hearing loss as 47.8 percent.

[3]Dr. Sanborn stated that claimant's ABR testing accurately reflects a significant hearing loss consistent with the results of the audiograms conducted by Mr. Bode and Dr. Marks, CX 33 at 26-28, 103-105, and inconsistent with the audiograms conducted by Dr. Seidemann. *Id.* at 33-35, 48, 65-66, 108. Similarly, Dr. Marks explained in his deposition that the results of his otoacoustic emissions test show that there is an error in Dr. Seidemann's test results. CX 34 at 51.

[4]The administrative law judge relied, in part, on Dr. Marks's testimony that Mr. Bode and Dr. Seidemann overlooked the conductive component of claimant's hearing loss. CX 34, Dep. at 50-52.

We also reject employer's contention that the administrative law judge was required to find Dr. Marks's audiograms inconsistent under a "test/retest" variability analysis. While Dr. Marks indicated that "plus or minus six decibels" is generally the acceptable test/retest reliability on any two audiograms, CX 34 at 49, he noted that patients are not always consistent in their responses and that different responses are expected on each test. CX 28. Dr. Sanborn stated that there can be a variance of 5 to 10 decibels at any given frequency due to subjective factors. CX 33, Dep. At 40-41. Claimant submitted into evidence the *Guide for Conservation of Hearing and Noise*, Sixth Edition, *Committee on Hearing and Equilibrium*, which in pertinent part states, "[i]f the audiograms are within 10 DB at four or more at the recommended audiometric frequencies, example, 500, 1,000, 2,000, 3,000, 4,000, 6,000 and 8,000 kilohertz, they may be considered consistent." CX 32. Dr. Seidemann conceded that the 2009 and 2010 audiograms conducted by Dr. Marks's office were, under that criterion, consistent. HT at 177. As a majority of the audiometric results at a given frequency are within 5 decibels and all are within the 10 decibel threshold, we reject employer's contentions that the audiograms must be rejected due to test/retest discrepancy.

Finally, we reject employer's contention that the administrative law judge erred in averaging the results of Dr. Marks's audiograms. An administrative law judge has the discretion to determine the weight to be accorded to the audiograms of record. Accordingly, he 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). Employer argues that pursuant to the decision of the United States Court of Appeals in *Ceres Marine Terminals, Inc. v. Green*, 656 F.3d 235, 45 BRBS 45(CRT) (4th Cir. 2011), the two audiograms conducted by Dr. Marks cannot be averaged because claimant did not carry his burden to prove that the two audiograms were of equal validity. In *Green*, 656 F.3d 235, 45 BRBS 45(CRT), the Fourth Circuit held that when an administrative law judge finds impairment ratings equally probative and intends to average them, and one of those ratings represents a zero percent impairment, then claimant has not met his burden of proving he is disabled pursuant to *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). As claimant and the Director assert, the administrative law judge properly found this case factually distinguishable from *Green*, in that neither of the two credited audiograms in this case, i.e., the December 22, 2009, indicating a 56 percent binaural hearing impairment, or the May 25, 2010, indicating a 39.6 percent binaural hearing impairment, showed a zero hearing loss. As the administrative law judge correctly observed on reconsideration, the Fourth Circuit did "not disturb the administrative law judge's authority to average the results of credible audiograms in order to determine the extent of a claimant's disability." Decision on Recon. at 2. As it is for the administrative law judge to determine the appropriate weight to be given to the audiometric evidence in determining the extent of a claimant's hearing loss, *see Steevens*, 35 BRBS 129; *see also 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), and as the administrative law judge, in this case, rationally found that both audiograms conducted by Dr. Marks's office are credible and probative, we affirm the administrative law judge's rational decision to average the results of the two audiograms to determine the extent of claimant's hearing loss. *Steevens*, 35 BRBS 129. Thus, we affirm the administrative law judge's finding that claimant has a 47.8 percent binaural impairment as it is supported by substantial evidence.[5] *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962).

Accordingly, we affirm the administrative law judge's Decision and Order and Order Denying Employer's Motion for Reconsideration.

SO ORDERED.

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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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BETTY JEAN HALL
Administrative Appeals Judge

[5]Contrary to employer's argument, the administrative law judge, in this case, thoroughly set out the evidence of record, including evidence cited on appeal by employer, *see* Decision and Order at 4-14, and stated the relevant evidence on which he relied for his findings of fact. Thus, we reject employer's contention that the administrative law judge's decision does not comport with the Administrative Procedure Act. 5 U.S.C. §557(c)(3)(A); *see Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996).