**U.S. Department of Labor**

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 17-0319

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| AGNEW A. WATTS | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | DATE ISSUED: Oct. 12, 2017 |
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| ALABAMA POWER COMPANY | ) | |
| | ) | |
| Self-Insured | ) | |
| Employer-Respondent | ) | DECISION and ORDER |

Appeal of the Decision and Order and the Decision and Order on Reconsideration of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

John D. Gibbons (John D. Gibbons & Associates, P.C.), Mobile, Alabama, for claimant.

Patrick J.R. Ward (Hand Arendall LLC), Mobile, Alabama, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order and the Decision and Order on Reconsideration (2016-LHC-00285) of Administrative Law Judge Patrick M. Rosenow 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 rational, supported by substantial evidence, and 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 filed a claim alleging he sustained a hearing loss as a result of noise exposure during his work for employer, which commenced on February 4, 1976, and ended with his retirement in December 2007. Over the course of his 30-plus years of work, claimant underwent 25 hearing tests conducted by employer as part of its hearing

conservation program, with the first and last tests occurring on September 27, 1976 and July 25, 2007, respectively. All of these tests showed no ratable hearing loss. EX 2. On October 2, 2014, claimant underwent a hearing test which revealed a 6.57 percent binaural impairment, prompting him to file a claim under the Act, which employer controverted. CXs 1, 4, 5.

The administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), that his hearing loss is related to his employment exposure to noise, that employer rebutted the presumption, and that claimant did not establish by a preponderance of the evidence that his present hearing loss was caused by exposure to noise during the course of his work for employer. The administrative law judge, therefore, denied the claim for disability and medical benefits. Claimant filed a motion for reconsideration, in which the employer joined, contending that employer had accepted liability for medical benefits. The administrative law judge granted reconsideration and modified his decision to reflect employer's liability for claimant's medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907. The administrative law judge, however, reiterated that claimant is not entitled to disability compensation.

On appeal, claimant challenges the administrative law judge's denial of disability benefits. Employer responds, urging affirmance of the administrative law judge's decisions. Claimant has filed a reply brief.

Claimant contends the administrative law judge's conclusion that his hearing loss is not related to his employment exposures is contrary to the parties' agreement at the hearing. Claimant alleges that the only issue for resolution was the calculation of the extent of claimant's hearing loss.[1] In this respect, claimant contends that the 2014 audiogram, which is the only one conducted after his last covered occupational exposure ended, coupled with the absence of any evidence addressing any causes of his hearing loss, establishes his entitlement to benefits for his documented 6.57 percent binaural impairment.

Contrary to claimant's contention, employer did not concede that claimant sustained a compensable hearing loss as a result of his work for employer. Employer maintained that while claimant may have been exposed to noise in the course of his work, he did not sustain any hearing impairment from that employment. HT at 13-14. The administrative law judge stated at the hearing that this case involves "a causation question" specifically involving the Section 20(a) presumption, HT at 16, 104-105, an

[1]Claimant maintains that the parties' agreement is tantamount to a concession from employer that claimant suffered some level of hearing loss as a result of his work for employer.

interpretation neither party disputed. Each party's post-hearing brief discussed the evidence in terms of causation, *see* Cl. Post-Hearing Br. dated October 26, 2016 at 5-8; Emp. Post-Hearing Br. dated November 11, 2016 at 4-8, with employer's position being that the credible evidence as a whole establishes claimant did not sustain any work-related hearing impairment. *See* Emp. Post-Hearing Br. at 7-8. We therefore reject claimant's contention that the cause of claimant's hearing impairment was not a contested issue.

We also reject claimant's contention that the administrative law judge erred in finding that he did not have any hearing loss as a consequence of his work for employer at the time of his December 2007 retirement.[2] A retiree, such as claimant, may establish a compensable hearing loss under the Act based on audiometric evidence post-dating his retirement. *Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001); *Labbe v. Bath Iron Works Corp.*, 24 BRBS 159 (1991). In the absence of credible evidence regarding the extent of claimant's hearing loss at the time he leaves covered employment, the administrative law judge should evaluate all the relevant evidence of record to determine the extent of the claimant's work-related hearing loss. *Labbe*, 24 BRBS at 162; *see also Dubar v. Bath Iron Works Corp.*, 25 BRBS 5 (1991). An administrative law judge need not project later audiometric results back to the last date of covered employment if he finds that the most reliable evidence of the claimant's work-related hearing loss is audiometric results nearer in time to the claimant's last date of covered employment. *Bruce v. Bath Iron Works Corp.*, 25 BRBS 157 (1991).

While the 25 hearing tests employer conducted on claimant throughout his period of work for employer did not qualify as presumptive evidence of hearing loss, *see* 33 U.S.C. §908(c)(13)(E); 20 C.F.R. §702.441(d), the administrative law judge properly recognized that they may be probative of the extent of claimant's hearing impairment at the time he retired. Decision and Order at 11; *see Steevens*, 35 BRBS 129; *see also Norwood v. Ingalls Shipbuilding, Inc.*, 26 BRBS 66 (1992) (Stage, C.J., dissenting on other grounds). The administrative law judge found that notwithstanding claimant's testimony about the testing conditions,[3] "employer offered credible evidence that the

[2]We affirm the administrative law judge's finding that employer rebutted the Section 20(a) presumption as it is unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007). Thus, the burden is on claimant to show that he sustained a compensable hearing loss related to his employment. *See Ceres Gulf, Inc. v. Director, OWCP* [*Plaisance*], 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012).

[3]The administrative law judge acknowledged claimant's testimony that the hearing tests were, at first, conducted in a building which was not insulated, meaning that he could still hear noise from outside while undergoing the testing. Decision and Order at 5; HT at 36-37. The administrative law judge, however, also recognized claimant's

testing was conducted by properly trained and certified personnel on equipment that was properly and consistently maintained and calibrated." Decision and Order at 11. The administrative law judge found that employer's safety and health manager, Dee Ward, and two of its compliance specialists, Angie Jimmerson and David Griffin, credibly testified regarding employer's hearing conservation program and as to the validity of employer's in-house testing. *Id.* at 6, 11. Ms. Ward testified that in the 1980s employer hired a full-time audiologist who performed much of the testing and that when the audiologist left all testing was done by consultants certified by the Council for Accreditation of Occupational Hearing Conservation (CAOHC). HT at 61-69. Ms. Jimmerson and Mr. Griffin each testified as to their roles as Certified Occupational Hearing Conservationists in administering hearing tests to employer's workers, with both stating that the testing equipment is calibrated annually by an outside firm and in-house on a daily basis. HT at 87-88; EX 9, Dep. at 15-16, 21, 36, 39-40. They corroborated Ms. Ward's testimony regarding employer's testing facilities and that only CAOHC certified testers are used to administer the annual tests.[4] HT at 76-80, 81; EX 9, Dep. at 13, 22-23. The administrative law judge also deemed significant "the absence of any aberrational or highly inconsistent test results over the many years that claimant was tested by employer." Decision and order at 11. The administrative law judge noted, moreover, that claimant testified he did not have any hearing tests for seven years after he retired and it was only upon learning from others that he might obtain hearing loss benefits that he went to get tested. Decision and Order at 11; HT at 51-52.

The administrative law judge credited employer's evidence regarding the in-house testing procedures and audiometric results over the 2014 audiogram as the most probative evidence of claimant's hearing loss as of his last work for employer in December 2007. The administrative law judge is entitled to determine the weight to be accorded, and to draw inferences from, the evidence of record. *See Del Monte Fresh Produce v. Director, OWCP [Gates]*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009). The Board may not reweigh the evidence. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Based on the normal audiometric results nearer in time

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testimony that he had no reason to doubt the accuracy of the test results, or whether the administrators of the tests were certified or otherwise qualified. Decision and Order at 5; HT at 42-43.

[4]Mr. Griffin stated that his training with, and certification by, the Council For Accreditation of Occupational Hearing Conservation (CAOHC), qualified him to verify that the audiometer and testing procedures which employer conducted complied with the requirements of 29 C.F.R. §1910.95. *See generally* 33 U.S.C. §908(c)(13)(E); 20 C.F.R. §702.441(d); EX 9, Dep. at 33. Ms. Jimmerson testified that the CAOHC training and certification qualified her to administer hearing tests and audiograms. HT at 74.

to claimant's retirement, the administrative law judge rationally concluded that claimant did not establish that his current hearing loss is related to his work for employer. *See Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151(CRT) (1993);[5] *Bruce*, 25 BRBS 157. Substantial evidence of record supports the administrative law judge's finding that claimant did not establish a causal relationship between his 2014 hearing loss and his covered employment, which ended in December 2007. *See Ceres Gulf, Inc. v. Director, OWCP* [*Plaisance*], 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012). Therefore, we affirm the denial of disability benefits.[6]

Accordingly, the administrative law judge's Decision and Order and Decision and Order on Reconsideration are affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge

[5]In *Bath Iron Works Corp.*, 506 U.S. 153, 26 BRBS 151(CRT), the Supreme Court held that hearing loss due to noise exposure does not progress in the absence of such exposure.

[6]We affirm the administrative law judge's award of medical benefits on reconsideration. A claimant need not have a ratable impairment in order to be entitled to medical benefits. *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993).