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 Claimant-Petitioner )  
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 v. )  
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 NORTHROP GRUMMAN SHIP ) DATE ISSUED: 09/26/2007  
 SYSTEMS/INGALLS SHIPBUILDING, )  
 INCORPORATED )  
 )  
 Self-Insured )  
 Employer-Respondent ) DECISION and ORDER

Appeal of the Decision and Order and Order Denying Reconsideration of Lee J. Romero, Jr., United States Department of Labor.

Robert E. O'Dell, Vancleave, Mississippi, for claimant.

Traci M. Castille (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order and Order Denying Reconsideration (2005-LHC-01366) 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 worked for employer from January 1985 until December 1994. On August 16, 2004, claimant filed a claim for compensation for a 10.6 percent binaural hearing loss. CX 4. Employer controverted the claim. EX 2. The district director held an informal conference on February 1, 2005. JX 1. The case was referred to the Office of Administrative Law Judges (OALJ) on March 31, 2005. On August 2, 2005, employer

voluntarily paid claimant disability compensation for a 2.5 percent binaural hearing loss in the amount of \$1,766.65 and \$57.92 in interest. EX 8.

Based on the audiograms administered by employer from 1985 to 1995, EX 5, which demonstrated a zero percent impairment, the administrative law judge found that claimant did not meet her burden of establishing she had any ratable impairment at the time she left covered employment.<sup>1</sup> Thus, the administrative law judge denied disability benefits. The administrative law judge further stated that since none of claimant's current hearing loss, if any, is attributable to her employment with employer, she is not entitled to medical benefits under the Act. The administrative law judge also denied claimant's counsel an attorney's fee, as claimant had not successfully prosecuted the claim. Claimant filed a motion for reconsideration, which the administrative law judge denied.

On appeal, claimant contends the administrative law judge erred in stating that she is not entitled to medical benefits, as the parties stipulated that claimant is entitled to such. Claimant further notes that the administrative law judge erred in finding that entitlement to medical benefits must be premised on the existence of a ratable hearing impairment. Claimant also argues that the administrative law judge erred in denying an attorney's fee, as employer paid benefits to claimant after the case was referred to the OALJ. Employer responds, urging that the administrative law judge's Decision and Order and Order Denying Reconsideration be affirmed.

Claimant challenges the denial of medical benefits on two grounds. First, claimant argues that despite accepting the parties' stipulation that employer is liable for claimant's medical benefits, the administrative law judge set aside the stipulation without notifying the parties that he would do so.<sup>2</sup> Second, claimant argues that the administrative law judge erred as a matter of law by apparently finding that in order to establish entitlement to medical benefits claimant was required to prove that she had a measurable hearing impairment at the time she left employer's employment. *See* Decision and Order at 11; Order Denying Reconsideration at 2.

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<sup>1</sup> The administrative law judge found that the audiograms administered in July 1993 demonstrating a ratable impairment were aberrational as the other eight audiograms administered by employer between 1985 and 1995 demonstrated no ratable impairment.

<sup>2</sup> The administrative law judge accepted the parties' stipulations, including, "That liability for medical benefits for Claimant has been accepted by the Employer pursuant to Section 7 of the Act." Decision and Order at 2; JX 1, Stip. 13.

Claimant correctly argues that the administrative law judge erred by setting aside the parties' stipulation regarding employer's liability for medical benefits. *Justice v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 97 (2000). An administrative law judge is required to give the parties notice that he will reject a stipulation, so that they may submit argument and evidence in support of their positions on the issue in question. *See Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989); *Beltran v. California Shipbuilding & Dry Dock*, 17 BRBS 225 (1985). The administrative law judge did not give the parties such notice in this case. Moreover, the stipulation did not evince an incorrect application of the law, which would provide a basis for the administrative law judge's rejection of the stipulation. *See, e.g., McDevitt v. George Hyman Constr. Co.*, 14 BRBS 677 (1982). Contrary to the administrative law judge's finding, a claimant is not required to demonstrate a ratable hearing impairment in order to be entitled to medical benefits. Claimant need only have sustained a work-related injury, *see Crawford v. Director, OWCP*, 932 F.2d 152, 24 BRBS 123(CRT) (2<sup>d</sup> Cir 1991); *Romeike v. Kaiser Shipyard*, 22 BRBS 57 (1989), for which a medical professional has stated claimant is need of medical treatment. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5<sup>th</sup> Cir. 1993). Specifically, in *Baker*, the United States Court of Appeals for the Fifth Circuit, in whose jurisdiction this case arises, rejected the employer's contention that the claimants' lack of a ratable hearing impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment* defeated their claims for medical benefits. The court held that entitlement to medical benefits is premised on the existence of a work-related injury, *see* 33 U.S.C. §902(2), and not on the existence of a disability as defined in Section 8 of the Act, 33 U.S.C. §908. *Baker*, 991 F.2d at 165-166, 27 BRBS at 15-16(CRT).

In this case, employer did not contest claimant's entitlement to medical benefits before the administrative law judge, having agreed before the district director that it is liable for them. EX 7; Emp. Post-hearing Br. at 2. The parties also stipulated that employer accepted liability for medical benefits. JX 1. The testimony of Ms. Towell, an audiologist, is uncontradicted that the credited audiograms from 1985 to 1995 demonstrate a high frequency work-related hearing loss. EX 10 at 21. Ms. Towell also prescribed hearing aids for claimant, for which employer accepted liability. EX 7. As there is no basis for the administrative law judge's setting aside the parties' stipulation or his conclusion that employer is not liable for claimant's medical expenses, we modify the administrative law judge's decision to reflect the parties' stipulation that employer accepted liability for medical benefits.<sup>3</sup> Tr. at 10-11.

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<sup>3</sup> Employer specifically accepted liability for claimant's hearing aids for which it has paid. EX 7; Tr. at 10-12. There has been no claim for any further medical treatment or an indication that such will be required. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5<sup>th</sup> Cir. 1993).

Claimant also contends that the administrative law judge erred in finding that she is not entitled to an attorney's fee because she did not successfully prosecute the claim. In this regard, claimant argues that employer's payment of \$1,766 in compensation benefits, plus interest of \$57.92, after the case was referred to the OALJ constitutes a successful prosecution of the claim. We reject this contention. The administrative law judge properly found that employer's voluntary payment of compensation, to which claimant was found not entitled, does not subject employer to fee liability as claimant was unsuccessful in prosecuting the claim for disability benefits.<sup>4</sup> Moreover, claimant did not challenge on appeal the denial of disability compensation. Therefore, as it is in accordance with law, we affirm the administrative law judge's conclusion that claimant is not entitled to an attorney's fee. *West v. Port of Portland*, 20 BRBS 162, *aff'd on recon.*, 21 BRBS 87 (1988).

Accordingly, we modify the administrative law judge's decisions to reflect the parties' stipulation that employer accepted liability for the claimed medical benefits. In all other respects, the administrative law judge's Decision and Order and Order Denying Reconsideration are affirmed.

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

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<sup>4</sup> In addition, employer agreed to pay medical benefits while the case was before the district director. Therefore, claimant is not entitled to an attorney's fee for work performed before the administrative law judge on this basis.