BRB No. 09-0475

T.B.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIP SYSTEMS, NCORPORATED/ AVONDALE INDUSTRIES	)	DATE ISSUED: 09/25/2009
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

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

Frank A. Bruno (Bruno and Bruno), New Orleans, Louisiana, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order (2008-LHC-1049) 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant was employed by employer as a welder for two years, last working for employer on July 31, 1981. Claimant has been employed in non-covered employment since that time. Claimant filed a claim for a 4.1 percent binaural hearing loss based on a

February 3, 2006, audiogram. Employer controverted the claim on the ground that a 2005 audiogram demonstrated no measurable hearing impairment.

The record contains no evidence reflecting the extent of claimant's hearing loss in 1981, when he left covered employment. The earliest audiogram of record was administered to claimant in 2005; this audiogram reflects a zero percent hearing loss. The administrative law judge found that although the 2005 audiogram is not entitled to presumptive weight pursuant to 33 U.S.C. §908(c)(13)(C) and 20 C.F.R. §702.441, it nonetheless is probative evidence of the degree of claimant's hearing loss. Based on this audiogram, as well as on claimant's testimony that he did not begin to notice a loss of hearing until 1989, and on evidence of claimant's exposure to other sources of noise after 1981, the administrative law judge concluded that claimant failed to establish he had a ratable hearing impairment at the time he left covered employment. Accordingly, the administrative law judge denied the claim for benefits.

On appeal, claimant contends that the administrative law judge erred by denying his claim for benefits for the hearing loss evidenced by the audiogram results from February 3, 2006. Employer responds, urging affirmance.

Claimant contends that the administrative law judge erred in relying on the 2005 audiogram because it does not qualify as "presumptive" evidence of the degree of claimant's hearing loss. In order for an audiogram to qualify as presumptive evidence it must meet the requirements of Section 702.441(b)(1)-(3), as well as those of Section 702.441(d) which incorporates the Act's requirements that hearing loss be measured under the standards set forth by the American Medical Association *Guides to the Evaluation of Permanent Impairment.*[1] 33 U.S.C. §908(c)(13)(C), (E). Audiograms

[1] Section 702.441, 20 C.F.R. §702.441, states, in pertinent part:

> (b) An audiogram shall be presumptive evidence of the amount of hearing loss on the date administered if the following requirements are met:
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> (1) The audiogram was administered by a licensed or certified audiologist, by a physician certified by the American Board of Otolaryngology, or by a technician, under an audiologist's or physician's supervision, certified by the Council of Accreditation on Occupational Hearing Conservation, or by any other person considered qualified by a hearing conservation program authorized pursuant to 29 CFR 1910.95(g)(3) promulgated under the Occupational Safety and Health Act of 1970 (29 U.S.C. 667). Thus, either a professional or trained technician may conduct audiometric testing. However, to be acceptable under this subsection, a licensed or certified audiologist or otolaryngologist, as defined, must

which do not meet the requirements for "presumptive evidence" of a hearing loss under Section 8(c)(13)(C) of the Act and Section 702.441 nonetheless may be found to be probative evidence which an administrative law judge may credit in determining the extent of hearing loss. *See R.H. v. Bath Iron Works Corp.*, 42 BRBS6 (2008); *Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001). It is for the administrative law judge to weigh the audiograms submitted and determine the appropriate weight to be given that evidence. *Steevens*, 35 BRBS 129; *Norwood v. Ingalls Avondale Industries, Inc.*, 26 BRBS 66 (1991) (Stage, C.J., dissenting on other grounds). In cases such as this, where the claimant is no longer employed in covered employment, the administrative law judge is to determine which evidence of record best reflects claimant's hearing loss at the time he left covered employment. *See Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151(CRT) (1993); *Bruce v. Bath Iron Works Corp.*, 25 BRBS 157 (1991);

> ultimately interpret and certify the results of the audiogram. The accompanying report must set forth the testing standards used and describe the method of evaluating the hearing loss as well as providing an evaluation of the reliability of the test results.
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> (2) The employee was provided the audiogram and a report thereon at the time it was administered or within thirty (30) days thereafter.
>
> (3) No one produces a contrary audiogram of equal probative value (meaning one performed using the standards described herein) made at the same time. "Same time" means within thirty (30) days thereof where noise exposure continues or within six (6) months where exposure to excessive noise levels does not continue. Audiometric tests performed prior to the enactment of Pub. L. 98-426 will be considered presumptively valid if the employer complied with the procedures in this section for administering audiograms.
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> (d) In determining the loss of hearing under the Act, the evaluators shall use the criteria for measuring and calculating hearing impairment as published and modified from time-to-time by the American Medical Association in the Guides to the Evaluation of Permanent Impairment, using the most currently revised edition of this publication. In addition, the audiometer used for testing the individual's threshold of hearing must be calibrated according to current American National Standard Specifications for Audiometers. Audiometer testing procedures required by hearing conservation programs pursuant to the Occupational Safety and Health Act of 1970 should be followed (as described at 29 CFR, Section 1910.95 and appendices).

Dubar v. Bath Iron Works Corp., 25 BRBS 5 (1991); *Labbe v. Bath Iron Works Corp*., 24 BRBS 159 (1991).

The administrative law judge fully addressed and rejected claimant's contention that the 2005 audiogram is not an accurate reflection of the degree of claimant's work-related hearing loss. He found that the 2005 audiogram is probative and reliable because it was reviewed and interpreted by two qualified professionals and was not invalidated by either one.[2] Ms. Allen, a licensed and certified audiologist, opined that the 2005 test reflects a zero percent impairment under the AMA *Guides*. EX 4. She stated that claimant's hearing impairment in 1981 when he was last employed by employer could not have exceeded that rating. *Id.* Mr. Bode, a licensed and certified audiologist who administered the 2006 audiogram, stated that the 2005 audiogram demonstrates a zero percent loss, but that the results of the two tests are very consistent and that the slight differences may be due to test/retest variability or to a mild progression of the loss over the year between the tests. CX 1; CX 3 at 27-28, 34. Mr. Bode opined that the 2006 audiogram likely was administered under better conditions than was the 2005 test, CX 3 at 16, but the administrative law judge noted that neither audiologist invalidated the 2005 audiogram. The administrative law judge also addressed the opinions of Drs. Lamppin and Graves, rendered in an unrelated hearing loss case, that the consensus among otolaryngologists is that the best performance is considered the proper hearing level. EXs 7, 8. Accordingly, the administrative law judge found that the result of the 2005 audiogram is the best measure of the degree of claimant's hearing loss in 1981.

We affirm the administrative law judge's decision. The administrative law judge acted within his discretion by crediting the 2005 audiogram as he rationally found it reliable and probative. *Bruce,* 25 BRBS 157. The record contains no evidence reflecting the extent of claimant's hearing loss in 1981, when he left covered employment. In addition to the 2005 audiogram, the administrative law judge noted that claimant had worked in other noisy environments after leaving employer's facility, he had used power tools without ear protection, and did not notice any hearing impairment until 1989, over seven years after leaving covered employment. The administrative law judge thus found that claimant did not sustain his burden of establishing he had a compensable hearing loss at the time he left covered employment. As this finding is rational, supported by substantial evidence and in accordance with law, we affirm the denial of benefits. *Bruce,* 25 BRBS 157; *see also Dubar*, 25 BRBS 5.

[2] The administrative law judge found that the 2005 audiogram is not presumptive evidence pursuant to Section 702.441. Decision and Order at 13-14. In its response brief, employer contends that this finding is in error. Given our disposition of this case, we need not address this contention.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge