

CHARLES G. BYRD)	
)	
Claimant-Respondent)	
)	
v.)	
)	
ALABAMA MARITIME)	DATE ISSUED:
CORPORATION)	
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Decision and Order and Decision on Motion for Reconsideration of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Mitchell G. Lattof, Sr. (Lattof & Lattof, P.C.), Mobile, Alabama, for claimant.

Walter R. Meigs, Mobile, Alabama, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order and Decision on Motion for Reconsideration (93-LHC-2897) of Administrative Law Judge C. Richard Avery awarding benefits 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 worked for employer from 1943 until he voluntarily retired on November 6, 1987, except for the years of 1945 and 1946 when he served in the Army. Claimant was exposed to loud noise throughout his employment with employer. Claimant filed a claim for a 22.81 percent binaural hearing loss under Section 8(c)(13), 33 U.S.C. §908(c)(13), on September 24, 1991, based on an audiometric evaluation performed on September 14, 1991. Subsequent audiometric testing conducted on August 4, 1995, revealed a 27.5 percent binaural impairment. At the formal hearing, claimant identified his signature on a document acknowledging receipt by mail of an audiogram based on testing administered by employer on November 5, 1987, but testified that he did not remember receiving an audiogram from employer. Hearing Tr. at 12-13; Emp. Ex. 5.0.

In his Decision and Order, the administrative law judge found September 14, 1991, to be the first date on which claimant received an audiogram and accompanying report sufficient to satisfy the requirements of Section 8(c)(13)(D) of the Act, 33 U.S.C. §908(c)(13)(D)(1988), so as to trigger the running of the time periods under Sections 12 and 13 of the Act, 33 U.S.C. §§912, 913. The administrative law judge found, therefore, that the instant claim was not barred by Sections 12 and 13 of the Act. Next, the administrative law judge determined the extent of claimant's hearing loss by averaging the results of claimant's 1991 and 1995 audiograms; the administrative law judge did not credit the results of employer's in-house audiogram conducted on November 5, 1987, in light of the absence of record evidence that the 1987 audiometric testing was performed in compliance with the statutory and regulatory requirements. Accordingly, the administrative law judge found claimant entitled to compensation for a 25.16 percent binaural impairment. 33 U.S.C. §908(c)(13). Thereafter, the administrative law judge denied employer's motion for reconsideration.

On appeal, employer challenges the administrative law judge's finding that the claim is not barred by Sections 12 and 13 of the Act; in support of its contention, employer argues that the audiogram of November 5, 1987 was sufficient to satisfy the requirements of Section 8(c)(13)(D), thus triggering the running of the time periods under Sections 12 and 13. In the alternative, employer asserts that any compensation awarded to claimant for his loss of hearing should be limited to the 11.9 percent binaural impairment revealed by the November 5, 1987 audiogram. Claimant responds, urging affirmance of the administrative law judge's Decision and Order and Decision on Motion for Reconsideration.

Initially, we reject employer's assertion that the hearing loss claim in the instant case is barred by Sections 12 and 13 of the Act. Section 8(c)(13)(D) of the Act provides that the time for filing a claim for compensation due to a hearing loss under Section 13 does not commence "until the employee has received an audiogram, with the accompanying report thereon, which indicates that the employee has suffered a loss of hearing." 33 U.S.C. §908(c)(13)(D)(1988). Section 13(a) of the Act provides that a claim for compensation under the Act must be filed within one year of the date that the employee is or should have been aware of the relationship between his injury and his employment. 33 U.S.C. §913(a). The United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction this case arises, has stated that the regulation governing the time for filing a hearing loss claim, 20 C.F.R. §702.221(b), combines the requirements of Section 8(c)(13)(D) and Section 13(a), to provide that an employee must receive an audiogram with an accompanying report which indicates that he has sustained a loss of hearing related to his or her employment before the time for filing a claim starts to run. *See Alabama Dry Dock & Shipbuilding v. Sowell*, 933 F.2d 1561, 1563 n.2, 24 BRBS 229, 231 n.2 (CRT) (11th Cir. 1991). In *Bridier v. Alabama Dry Dock and Shipbuilding Corp.*, 29 BRBS 84 (1995), the Board stated that Section 8(c)(13)(D) must be read in conjunction with the requirement for awareness under Sections 12 and 13, as an audiogram generally provides only a measure of the degree of impairment and may not indicate the relationship between its results and claimant's work. Thus, in *Bridier*, the Board held that in order for the statute of limitations period to commence, claimant must have received an audiogram and accompanying written report containing sufficient information so that claimant is aware or should be aware that he

has an impairment and that his impairment is related to his employment. *See also Mauk v. Northwest Marine Iron Works*, 25 BRBS 118, 122-123 (1991).

It is well-established that, pursuant to Section 20(b) of the Act, 33 U.S.C. §920(b), the employer bears the burden of establishing that a claim was untimely filed. *See, e.g., Bridier*, 29 BRBS at 89; *Bivens v. Newport News Shipbuilding and Dry Dock Co.*, 23 BRBS 233 (1990). In the instant case, the administrative law judge correctly found that the evidence of record fails to establish that the November 5, 1987 audiogram was accompanied by a report which alerted claimant to the cause of his hearing loss. Thus, as there is no evidence that claimant was provided with a report accompanying the November 5, 1987 audiogram containing the requisite information, we affirm the administrative law judge's determination that the November 5, 1987 audiogram is insufficient to commence the limitations period of Sections 12 and 13, and his subsequent determination that the instant claim was timely filed.¹ *See* 33 U.S.C. §908(c)(13)(D); 20 C.F.R. §702.221(b); *Sowell*, 933 F.2d at 1561, 24 BRBS at 229 (CRT); *Bridier*, 29 BRBS at 84.

We further reject employer's alternative contention that any compensation awarded for claimant's hearing loss should be limited to the extent of loss reflected in the November 5, 1987 audiogram. The administrative law judge, after finding that the 1987 audiogram was not of equal probative value in view of the lack of evidence that the test was performed in accordance with the procedures set forth in the Act and regulations, calculated the extent of claimant's hearing loss by averaging the results of the audiograms administered in 1991 and 1995. *See* 33 U.S.C. §908(c)(13)(C); 20 C.F.R. §702.441. Specifically, the administrative law judge noted there is no report accompanying the 1987 audiogram that sets forth the testing standards used, describes the method of evaluating the hearing loss, or provides an evaluation of the reliability of the test results.²

¹We note that our affirmance of the administrative law judge's finding that the claim was timely filed is based on our holding that the November 5, 1987 audiogram fails to meet the requirements of Section 8(c)(13)(D) in that it lacks an accompanying report. Employer's assertion that the additional requirements contained in Section 8(c)(13)(C) of the Act apply only to quantifying the degree of hearing loss and not to the issue of whether claimant knew or should have known that he had a hearing loss under Section 8(c)(13)(D), while a correct statement of the law, *see Bridier v. Alabama Dry Dock and Shipbuilding Corp.*, 29 BRBS 84, 86-87 (1995), has no bearing on our ruling that the requirements of Section 8(c)(13)(D) are not satisfied by the November 5, 1987 audiogram. Moreover, pursuant to our discussion *supra*, we need not address employer's contentions regarding claimant's receipt of the audiogram itself.

²We need not address employer's contentions regarding the qualifications of Ms. Winn, the administrator of the 1987 audiometric test, inasmuch as the administrative law judge's determination regarding the probative value of the test was based on factors, in addition to Ms. Winn's qualifications, that constitute substantial evidence to support his credibility determination. While employer cites the certification of the 1987 audiogram by Dr. McDill, an audiologist, we note that the record lacks an interpretation of the test results by Dr. McDill or by any licensed or certified audiologist or otolaryngologist. *See* 20 C.F.R. §702.441(b)(1).

See 20 C.F.R. §702.441(b)(1). Inasmuch as the 1987 audiogram lacks an accompanying report that interprets and evaluates the reliability of the test results, it was reasonable for the administrative law judge to conclude that the 1987 audiogram is not equal in probative value to the subsequent audiograms administered in 1991 and 1995. In the absence of credible evidence regarding the extent of claimant's hearing loss at the time of his retirement, the administrative law judge rationally acted within his discretionary authority when he relied on the most credible evidence, the 1991 and 1995 audiograms, in determining the extent of claimant's work-related hearing loss. *See generally Labbe v. Bath Iron Works Corp.*, 24 BRBS 159 (1991). We therefore affirm the administrative law judge's determination that claimant suffers from a 25.16 percent binaural impairment.

Accordingly, the Decision and Order and the Decision on Motion for Reconsideration of the administrative law judge are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge