

BRB No. 96-1043

MARY YOUNG	)	
(Widow of Willie R. Young)	)	
	)	
Claimant	)	DATE ISSUED:
	)	
v.	)	
	)	
INGALLS SHIPBUILDING,	)	
INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT OF	)	
LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Employer appeals the Decision and Order (95-LHC-1244) of Administrative Law Judge Richard D. Mills 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1964); 33 U.S.C. §921(b)(3).

Claimant worked as a shipfitter for employer from 1972 until 1992, where he was

exposed to injurious noise. On October 9, 1992, claimant sought compensation under the Act for a 13.1 percent binaural hearing loss based on the results of an audiogram performed on July 28, 1992.<sup>1</sup> Thereafter, the district director granted employer's request for Section 8(f), 33 U.S.C. §908(f), relief. Although employer sought to establish under Section 8(f) that claimant suffered from a pre-existing 12.2 percent binaural hearing loss based on the results of an audiogram performed on May 13, 1992, the district director determined that claimant suffered from a pre-existing 13.13 percent monaural hearing loss based on the results of an in-house audiogram performed on March 19, 1982. Employer requested that the case be referred for a formal hearing.

Prior to the scheduled hearing, the parties stipulated that claimant had a binaural hearing impairment of 13.1 percent and was entitled to compensation based on an average weekly wage of \$507.88. The only issue pending for adjudication was employer's assertion that it was entitled to Section 8(f) relief based on the 12.2 percent binaural hearing loss reflected on the May 13, 1992, audiogram. In his Decision and Order, the administrative law judge, agreeing with the district director, rejected employer's argument and held that employer's entitlement to Section 8(f) relief should be based on the 13.13 percent monaural hearing loss evidenced on the March 19, 1982, audiogram.

On appeal, employer contends that the administrative law judge erred in failing to base the award of Section 8(f) relief on the 12.2 percent binaural hearing loss evidenced on the May 13, 1992, audiogram. The Director, Office of Workers' Compensation Programs (the Director), has not responded to employer's appeal.

Section 8(f) limits an employer's liability for permanent disability benefits. Employer is entitled to this relief in a case of permanent partial disability if employer proves that claimant had a manifest pre-existing permanent partial disability which combined with a subsequent work injury to result in a materially and substantially greater degree of disability. If these prerequisites are met in a hearing loss case, employer's liability for compensation under Section 8(c)(13) is limited to the lesser of 104 weeks or the number of weeks attributable to the subsequent injury. *Reggiannini v. General Dynamics Corp.*, 17 BRBS 254 (1985); 33 U.S.C. §908(f)(1988).

We agree with employer that the administrative law judge's calculation of its liability under Section 8(f) relief is not consistent with principles enunciated by the Board in *Risch v. General Dynamics Corp.*, 22 BRBS 251 (1989), and *Fucci v. General Dynamic Corp.*, 23 BRBS 161 (1990)(Brown, J., dissenting). In *Risch*, 22 BRBS at 251, the Board rejected the Director's argument that hearing loss must be manifested by an audiogram administered prior to claimant's hiring in order to qualify for Section 8(f) relief and held that audiograms

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<sup>1</sup>The parties stipulated that claimant was an active employee as of the date of the filling audiogram.

taken during the course of employment may be considered if thereafter the employee continues to be exposed to injurious levels of noise and employer establishes that claimant's continued exposure to noise aggravated claimant's hearing loss. In so concluding, the Board noted that an employer risks increased compensation liability when it retains an employee after discovering that the employee has a permanent partial disability, and that were it not for this shifting of increased compensation liability from the employer to the Special Fund, the Act would discourage employers from retaining disabled workers. In *Fucci*, 23 BRBS at 161, the claimant who had worked as a material checker and supervisor for employer from 1940 until 1963, and as a supervisor from 1964 until August 31, 1983, when he retired, was awarded compensation under the Act for a 23.4 percent binaural hearing loss. The administrative law judge found that employer was entitled to Section 8(f) relief based on the results of a 1964 pre-employment audiogram which revealed a high frequency hearing loss which was too minimal to be quantifiable under the American Medical Association *Guides to the Evaluation of Permanent Impairment*. The Director appealed the award of Section 8(f) relief. On appeal, the Board agreed with the Director that because the 1964 audiogram did not contain a measurable impairment it was insufficient to establish that claimant had a pre-existing permanent partial disability at the time of his hire. Inasmuch, however, as the record contained additional audiograms taken during claimant's tenure of employment, based on *Risch*, the Board remanded the case for the administrative law judge to decide whether claimant's post-1964 audiograms support a Section 8(f) award.

In the present case, , the administrative law judge cited this law in his Decision and Order but did not apply it correctly, stating,

Employer in this case, although retaining claimant, continued to expose him to injurious noise as evidenced by claimant's worsening hearing loss. I find therefore that the Director was correct in using the first (March 19, 1982) audiogram to determine Section 8(f) liability.

Decision and Order at 3. Because the reasoning employed by the administrative law judge would apply equally to the later May 13, 1992, audiogram and the purpose of retaining workers who become handicapped during their employment would be frustrated by requiring adherence to the earliest mid-employment audiogram, we vacate the administrative law judge's award of Section 8(f) relief based on the May 1982 audiogram. Any audiogram reflecting measurable impairment taken during the course of claimant's employment may properly support a Section 8(f) award, if a claimant continues to be exposed to injurious levels of noise and employer establishes that the continued exposure aggravated claimant's hearing loss, resulting in a materially and substantially greater degree of disability. In the present case, because the record contains an audiogram performed on May 14, 1992, revealing a 3.125 percent binaural hearing loss which was not considered by the administrative law judge, in addition to the May 13, 1992, audiogram reflecting a 12.2 percent binaural loss which employer asserts is indicative of claimant's pre-existing hearing loss, the case must be remanded for additional consideration. On remand, the administrative law judge should reconsider employer's entitlement to Section

8(f) relief in light of the two May 1992 audiograms and should provide an explanation of the evidentiary basis for his ultimate conclusion in accordance with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A). See generally *White v. Peterson Boatbuilding Co.*, 29 BRBS 1, 11 (1995).

Accordingly, the administrative law judge's finding that employer is entitled to Section 8(f) relief based on the May 1982 audiogram is vacated, and the case is remanded for the administrative law judge to reconsider the extent of the employer's liability. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge