

JACK WALKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
MISSISSIPPI INSURANCE GUARANTY ASSOCIATION	)	
	)	
Employer/Carrier- Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

John D. Gibbons (Gardner, Middlebrooks, Fleming & Hamilton, P.C.), Mobile, Alabama, for claimant.

Traci M. Castille (Franke, Rainey & Salloum), Gulfport, Mississippi, for employer/carrier.

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIUM:

Claimant appeals the Decision and Order Denying Benefits (95-LHC-2118) of Administrative Law Judge C. Richard Avery 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, who was employed by employer as a sheet metal worker for over 8 years, last worked for employer in 1949. Subsequent to that employment, claimant worked for International Paper Company as a receiving clerk for 30 years, where he was exposed to loud machinery noise about 10 to 20 percent of the time. Claimant underwent an audiometric evaluation on July 25, 1992, which revealed that claimant suffered from a 16.6 percent binaural impairment. Based on this evaluation, claimant filed a claim under the Act on May 10, 1993.

In his Decision and Order, the administrative law judge credited the results of a 1971 audiogram and found that claimant failed to establish the existence of a measurable hearing impairment due to his employment with employer. Decision and Order at 3. In addition, the administrative law judge found that as neither reviewing audiologist would have recommended amplification assistance based on the results of the 1971 audiometric evaluation, any present need for hearing devices claimant may have is not related to claimant's employment with employer.

On appeal, claimant contends that the administrative law judge erred in relying on the November 11, 1971, audiometric evaluation in determining the extent of claimant's hearing impairment due to his noise exposure in covered employment. Specifically, claimant asserts that the 1971 audiometric evaluation does not meet the requirements of the American Medical Association *Guides to the Evaluation of Permanent Impairment* (3d ed. 1988)(the *AMA Guides*) since the identity of the tester is not known and the quality of the test cannot be established. Thus, claimant contends that this audiometric evaluation should not be determinative of claimant's hearing loss.

The Supreme Court has held that a hearing loss injury occurs simultaneously with exposure to excessive noise, and therefore the injury is complete on the date of last exposure. *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151 (CRT)(1993). In determining the extent of impairment, the exact degree of work-related impairment at the time of the last covered exposure need not be ascertained and, in the absence of credible evidence of record regarding the extent of the claimant's hearing loss at the time he left covered employment, the administrative law judge may rely on other probative evidence in determining the extent of the claimant's compensable hearing loss. See *Dubar v. Bath Iron Works Corp.*, 25 BRBS 5 (1991); *Labbe v. Bath Iron Works Corp.*, 24 BRBS 159 (1991); cf. *Bruce v. Bath Iron Works Corp.*, 25 BRBS 157 (1991).

We affirm the administrative law judge's decision to credit the November 11, 1971, audiometric evaluation, because it was closest in time to claimant's last covered employment, in determining the extent of claimant's hearing loss at the time he left covered employment. See *Brown*, 25 BRBS at 157. The administrative law judge found that neither reviewing audiologist invalidated the 1971 test and both agreed it consisted of pure tone testing air scores which were sufficient to compute a hearing impairment rating using the *AMA Guides*. McDill Dep. at 23, 29; Holston Dep. at 24. Both stated that the 1971 test reveals a zero percent impairment under the *AMA Guides*. Emp. Ex. 6; Holston Dep. at 24. Therefore, although the audiogram may not comply with the standards required of

audiograms performed after December 27, 1984, see 20 C.F.R. §702.441, the administrative law judge could properly rely upon it as probative and rationally determined that the audiometric evaluation of November 11, 1971, is entitled to determinative weight. Accordingly, the administrative law judge's determination that claimant sustained a zero percent hearing impairment during his covered employment and his consequent denial of compensation benefits to claimant are affirmed as it is supported by substantial evidence.<sup>1</sup>

Claimant also contends on appeal that the administrative law judge erred in failing to award medical benefits based on the hearing loss evidenced by the November 11, 1971, audiometric evaluation. In order for a medical expense to be assessed against the employer, claimant must establish that the expense is reasonable and necessary for the treatment of the work injury. See *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996). In addition, the United States Court of Appeals for the Fifth Circuit has held that a claimant whose work-related hearing impairment is not rateable under the AMA *Guides* is entitled to medical benefits if he presents evidence of medical expenses incurred in the past or medical treatment necessary in the future. See *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993).

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<sup>1</sup>Claimant also contends the administrative law judge erred in failing to invoke Section 20(a) to presume that claimant has a work-related hearing loss. Claimant has the burden of proving the existence of a harm and that working conditions existed which could have caused the harm in order to establish a *prima facie* case under Section 20(a) of the Act. See *Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6 (CRT)(5th Cir. 1986). Contrary to the administrative law judge's finding, the claimant in the instant case presented evidence that he suffers from a hearing loss that may be due, at least in part, to his exposure to work-related noise and he testified to noisy working conditions. See Cl. Exs. 3, 5. However, any error the administrative law judge may have made in this regard is harmless given our disposition of this appeal. As the 1971 audiogram establishes claimant's impairment at zero percent, any increase thereafter must be attributed to causes subsequent to claimant's employment with employer, which ended in 1949.

In the present case, the administrative law judge found that both of the reviewing audiologists opined that, based on the results of the 1971 examination, they would not have suggested an amplification device unless claimant noticed a hearing loss and requested assistance. McDill Dep. at 11-12; Holston Dep. at 25. The administrative law judge rationally concluded that as claimant did not notice any hearing difficulties until the mid 1980's, claimant did not establish the necessity of medical treatment for any hearing loss related to his covered employment. As claimant has raised no reversible error in the administrative law judge's evaluation of the evidence, we affirm the administrative law judge's finding that claimant is not entitled to medical benefits. *Baker*, 991 F.2d at 165, 27 BRBS at 16 (CRT); *Schoen*, 30 BRBS at 114.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge