BRB No. 97-1270

JOHN O'KEEFE	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
UNIVERSAL MARITIME SERVICES CORPORATION	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Order of Dismissal of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Samuel A. Denburg (Baker, Garber, Duffy & Pederson, P.C.), Hoboken, New Jersey, for claimant.

Christopher J. Field (Weber Goldstein Greenberg & Gallagher), Jersey City, New Jersey, for employer.

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

PER CURIAM:

Claimant appeals the Order of Dismissal (96-LHC-1353) of Administrative Law Judge Ralph A. Romano denying 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).

In 1981, claimant began working for employer as a heavy equipment operator, signalman, and parker which exposed him to noise from various military and industrial equipment. On March 24, 1992, Dr. Matthews examined claimant and diagnosed a 21.5 percent binaural hearing impairment related to exposure to noise. Three days later, on March 27, 1992, claimant completed a claim form, EX 8, and a

retainer, EX 9, with a compensation representative, John Gargano. Nonetheless, claimant's claim for compensation under the Act was not filed until June 26, 1995. Employer raised a timeliness defense before the administrative law judge, alleging that the claim is barred because claimant failed to file his claim within one year from his receipt of an audiogram and accompanying report as required by Section 8(c)(13)(D) of the Act, 33 U.S.C. §908(c)(13)(D).

In his Order of Dismissal, the administrative law judge found that, based on claimant's signature on the claim form, and circumstantial evidence, *i.e.*, the claimant's experiencing hearing difficulties, visiting an audiologist and three days later retaining a representative to pursue a work-related hearing loss, and signing a claim form, that claimant was made aware of his work-related hearing loss through the contents of Dr. Matthews's report and audiogram. While noting claimant's testimony to the contrary, the administrative law judge found further from claimant's awareness that he could inferentially establish that claimant received the audiogram and report in accordance with Section 8(c)(13)(D). The administrative law judge thus found that employer rebutted the presumption of timeliness set forth in 33 U.S.C. §920(b), and therefore found the claim time barred and dismissed it without reaching the merits.

On appeal, claimant contends that the administrative law judge erred by finding the claim time-barred. Specifically, claimant contends the administrative law judge erred in finding he received a copy of an audiogram and medical report within the meaning of Section 8(c)(13)(D), and that employer presented sufficient evidence to rebut the Section 20(b) presumption. Employer responds, urging affirmance.

Section 13(a) states that claimant has one year from the date of injury to file a claim for compensation under the Act. *See Vaughn v. Ingalls Shipbuilding, Inc.,* 28 BRBS 129 (1994)(Decision and Order on Recon. *en banc*). The time for filing a claim under Section 13 for a hearing loss does not commence until the employee has received a copy of the audiogram with accompanying report. 33 U.S.C. §908(c)(13)(D); 20 C.F. R. §702.221(b). The Board has held that under Section 8(c)(13)(D), claimant must have actual physical receipt of the audiogram and report before the statute of limitations starts to run irrespective of claimant's awareness of a work-related hearing loss. *Ranks v. Bath Irons Works Corp.,* 22 BRBS 301 (1989). Moreover, Section 20(b) of the Act, 33 U.S.C. §920(b), provides a presumption that sufficient notice of a claim has been given, in the absence of substantial evidence to the contrary. *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989).

Although the administrative law judge's inference that claimant was aware of his work-related hearing loss in 1992 is rational, this finding is not dispositive of the

timeliness issue, inasmuch as mere awareness of a hearing loss is clearly insufficient to establish claimant's actual physical receipt of an audiogram and accompanying medical report under Section 8(c)(13)(D). *Ranks,* 22 BRBS at 301. In the instant case, claimant testified that he never received Dr. Matthews's audiogram and medical report, and there is no direct evidence of record to contradict claimant's testimony. Indeed, Dr. Matthews testified he did not usually discuss the results of the audiogram with the longshoreman, but that his usual practice was to send the report and audiogram to the claimant's representative. CX 6 at 17. In the present case, the report is addressed to the law firm of Marciano & Topazio. The retainer form signed by claimant, however, lists John Gargano in the space captioned "Attorney or Representative," and the record does not contain any evidence linking Mr. Gargano to Marciano & Topazio.[1] Mr. Gargano did not testify in this proceeding, and employer did not present any additional evidence that could establish claimant's actual receipt of the audiogram and report. Given the contrary testimony of claimant and Dr. Matthews, we hold that the administrative law judge's conclusion that since claimant was aware of his work-related hearing loss, he must have physically received an audiogram and medical report within the meaning of Section 8(c)(13)(D) of the Act, is not supported by substantial evidence. Moreover, there is simply no evidence to rebut the Section 20(b) presumption. Consequently, we reverse the administrative law judge's finding that the claim is time-barred, and we remand this case for the administrative law judge to address the merits of claimant's claim.

[1]The United States Court of Appeals for the Ninth Circuit held in *Jones Stevedoring Co. v. Director, OWCP [Taylor],* 133 F.3d 683, 31 BRBS 178 (CRT)(9th Cir. 1997), that the one year statute of limitations for filing a claim for hearing loss commenced when claimant's attorney received a copy of the audiogram and accompanying report indicating the claimant had a work-related hearing loss, and that the time was not tolled because claimant had not personally received these documents. *Contra Vaughn v. Ingalls Shipbuilding, Inc.,* 28 BRBS 129 (1994)(Decision and Order on Recon. *en banc).*

Accordingly, the administrative law judge's Order of Dismissal is reversed, and the claim is remanded for the administrative law judge to address the merits of claimant's claim.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. MCGRANERY
Administrative Appeals Judge