

BRB Nos. 90-194
and 90-194A

DARRELL D. BULLOCK)	
)	
Claimant-Petitioner)	
Cross-Respondent)	
)	
v.)	
)	
INGALLS SHIPBUILDING, INCORPORATED)	DATE ISSUED:
)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER on
Cross-Petitioner)	RECONSIDERATION <i>EN BANC</i>

Appeals of the Decision and Order - Awarding Benefits and Supplemental Decision and Order - Awarding Attorney Fees of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

John F. Dillon and Rebecca J. Ainsworth (Maples and Lomax, P.A.), Pascagoula, Mississippi, for claimant.

Paul M. Franke, Jr. and Martin J. Nussbaum, Jr. (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant has timely moved for reconsideration of the Board's Decision and Order in this case awarding benefits for claimant's hearing loss pursuant to Section 8(c)(13)(B) of the Act, 33 U.S.C. §908(c)(13)(B). *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993)(*en banc*)(Brown and McGranery, JJ., concurring and dissenting); 33 U.S.C. §921(b)(5); 20 C.F.R. §§801.301(a), (c), 802.407(b), 802.409. We hereby grant claimant's motion for reconsideration.

To recapitulate, claimant suffers from a work-related 5.6 percent impairment in his left ear, which converts to a binaural impairment of .9 percent. In its decision, the Board, *inter alia*, affirmed the administrative law judge's award of permanent partial disability benefits pursuant to Section 8(c)(13)(B) of the Act to claimant for his monaural impairment for the reasons set forth in *Tanner v. Ingalls Shipbuilding, Inc.*, 26 BRBS 43 (1992)(*en banc*)(Smith and Dolder, JJ., dissenting).

In its motion for reconsideration, claimant contends that the Board erred in affirming the

administrative law judge's determination that benefits for his monaural impairment should be calculated pursuant to Section 8(c)(13)(B), rather than Section 8(c)(13)(A), of the Act.

Subsequent to the Board's issuance of its Decision and Order in this case, the United States Court of Appeals for the Fifth Circuit issued its decision in *Tanner v. Ingalls Shipbuilding, Inc.*, 2 F.3d 143, BRBS (CRT)(5th Cir. 1993), *rev'g* 26 BRBS 43 (1992)(*en banc*)(Smith and Dolder, JJ., dissenting), in which the court held that claimants who suffer from a monaural impairment should be compensated under Section 8(c)(13)(A) of the Act, 33 U.S.C. §908(c)(13)(A)(1988). As this case arises within the jurisdiction of the Fifth Circuit, the court's decision in *Tanner* is dispositive of the issue presented by claimant on reconsideration in this case. Thus, pursuant to the Fifth Circuit's holding in *Tanner*, we vacate both our prior decision affirming the administrative law judge's determination that claimant is entitled to permanent partial disability benefits pursuant to Section 8(c)(13)(B) of the Act for his monaural impairment, and the administrative law judge's award of permanent partial disability benefits pursuant to Section 8(c)(13)(B) of the Act. Since the administrative law judge's finding that claimant suffered a work-related 5.6 percent monaural impairment is unchallenged, we modify the administrative law judge's award to reflect that claimant is entitled to receive permanent partial disability benefits pursuant to Section 8(c)(13)(A) of the Act for his 5.6 percent monaural impairment.

Lastly, we note that claimant has filed a motion to defer filing of request for fees and costs before the Board pending the disposition of his motion for reconsideration. Inasmuch as we have rendered a decision on claimant's motion for reconsideration, the motion to defer filing of request for fees and costs is denied. Claimant is advised that an application for an attorney's fee for services performed before the Board may be filed pursuant to 20 C.F.R. §802.203.

Accordingly, claimant's motion for reconsideration is granted, and the Board's decision is vacated insofar as it affirmed the administrative law judge's award of permanent partial disability benefits pursuant to Section 8(c)(13)(B) of the Act. The administrative law

judge's Decision and Order - Awarding Benefits under Section 8(c)(13)(B) is vacated, and the decision modified to award claimant permanent partial disability compensation for a 5.6 percent monaural hearing loss pursuant to Section 8(c)(13)(A) of the Act. In all other respects, the Board's decision is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge