BRB No. 05-0579

JAMES W. PIERCE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIP SYSTEMS / INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED: 03/27/2006
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

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

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2004-LHC-1961) of Administrative Law Judge Clement J. Kennington 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked as a pipe welder for employer until March 17, 1977. Thereafter, he secured employment with a number of non-covered employers. In 2002, claimant underwent an audiometric evaluation which revealed a 4.7 percent binaural hearing

impairment. Cl. Ex. 8. Claimant filed a claim for benefits against employer as his last covered employer. During the hearing, claimant testified that he first noticed a problem with his hearing shortly before he left employer's employ in 1977. Tr. at 19; Decision and Order at 4. The record also contains medical questionnaires from 1977 and 1981, wherein claimant indicated by check-box that he had no hearing problems. Emp. Ex. 6 at 22-26. Contemporaneous with those questionnaires, claimant underwent audiometric testing and both evaluations revealed a zero percent hearing loss. Emp. Ex. 6 at 9, 15; Emp. Exs. 7-8.

The administrative law judge denied the claim for benefits, finding that claimant had no hearing loss related to his employment with employer at the time he left covered employment. Although the administrative law judge found that claimant established working conditions which could have caused a hearing loss, Decision and Order at 11, he found no credible evidence of a hearing loss attributable to claimant's employment with employer. The administrative law judge found that the 1977 and 1981 audiograms were nearer in time to claimant's covered employment and revealed he had no hearing loss at that time. He credited those results, in conjunction with the medical questionnaires claimant filled out in 1977 and 1981, and he discredited claimant's testimony, citing claimant's faulty memory and questioning why he would wait so long to be examined if he had noticed a loss in 1977. Decision and Order at 8-9, 12-13. Claimant appeals the decision, arguing that the administrative law judge erred in denying benefits. Employer responds, urging affirmance.

Claimant contends the administrative law judge must give greater weight to the 2002 audiogram than to the 1977 and 1981 audiograms. He asserts that, because the record contains the qualifications of the person who conducted the test and the conditions under which the 2002 examination was conducted, it is in compliance with the Act and it is more probative than the earlier audiograms which lack those credentials. Thus, claimant argues that the 2002 audiogram results should presumptively represent his loss of hearing at the time he left covered employment.

Section 8(c)(13)(C) provides:

> An audiogram shall be presumptive evidence of the amount of hearing loss sustained as of the date thereof, only if (i) such audiogram was administered by a licensed or certified audiologist or a physician who is certified in otolaryngology, (ii) such audiogram, with the report thereon, was provided to the employee at the time it was administered, and (iii) no contrary audiogram made at that time is produced.

33 U.S.C. §908(c)(13)(c); *see also* 20 C.F.R. §702.441. While the 2002 audiogram may be in compliance with this provision, the Act and the regulation specifically limit its

scope, stating that the audiogram is only presumptive evidence of the hearing loss as of the date it was administered. *Id.* For claimant, that date would be October 17, 2002. The Act does not require that the administrative law judge credit the most recent or most credentialed audiogram when there are multiple audiograms performed at different times. *See Norwood v. Ingalls Shipbuilding, Inc.*, 26 BRBS 66 (1992) (Stage, C.J., dissenting on other grounds); *Cox v. Brady-Hamilton Stevedore Co.*, 25 BRBS 203 (1991). Indeed, the Board has held that it was rational for an administrative law judge to decline to project 1984 audiogram results back to the last date of covered employment in 1953 where he found that the most reliable evidence of the claimant's hearing loss was a 1968 audiogram as it was taken nearest in time to the claimant's last date of covered employment. *Bruce v. Bath Iron Works Corp.*, 25 BRBS 157 (1991).

Claimant asserts that his case is analogous to *Labbe v. Bath Iron Works Corp.*, 24 BRBS 159 (1991), *Dubar v. Bath Iron Works Corp.*, 25 BRBS 5 (1991), and *Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001), in which the Board affirmed the administrative law judges' decisions to credit later audiograms and project the results back to the last covered employment.[1] We reject the contention that such "relation back" is mandated by those cases. Rather, in all three cases, the Board affirmed the administrative law judges' reliance on the later audiograms as the best evidence of claimant's hearing loss, as the administrative law judges rationally had discredited or given less weight to earlier audiograms. Contrary to claimant's assertion, *Labbe*, *Dubar* and *Steevens* merely reinforce the long-established principle that it is within the administrative law judge's judgment to weigh the medical evidence of record. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d

[1]In *Labbe*, claimant left covered employment in 1963. The Board held that the administrative law judge rationally discredited an uninterpreted 1967 audiogram that lacked evidence of the credentials of the tester and rationally relied on a 1986 audiogram in awarding benefits. *Labbe*, 24 BRBS at 162. In *Dubar*, the Board affirmed the award and held that the administrative law judge rationally relied on a 1988 audiogram, as the record contained no evidence of a hearing loss in 1971 when the claimant left covered employment, and as he found that the 1988 audiogram was more reliable than one conducted in 1984. *Dubar*, 25 BRBS at 7-8. Similarly, in *Steevens*, the Board affirmed the administrative law judge's determination that the audiograms conducted in 1985 and 1992 were not as probative as the ones conducted in 1998, and it affirmed his decision to award benefits based on an averaging of the result of the 1998 audiograms, despite there being a 23-year gap between the 1998 audiograms and the claimant's last year of covered employment. *Steevens*, 35 BRBS at 130, 133.

741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969).

The instant case is distinguishable from *Labbe*, *Dubar* and *Stevens* and is most similar to *Bruce.* Here, the 2002 audiogram presumptively establishes a 4.7 percent hearing impairment as of 2002. However, the issue is whether the evidence establishes that claimant had a ratable hearing impairment at the time he left covered employment in 1977. Two earlier audiograms were interpreted to show that claimant did not have a hearing loss in either 1977 or in 1981. Emp. Ex. 6 at 9, 15; Emp. Exs. 7-8. The Supreme Court has held that hearing loss is not a progressive injury but is one that occurs simultaneously with exposure to injurious noise. *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151(CRT) (1993). Therefore, the administrative law judge's reliance on the audiograms dated closer in time to claimant's last covered employment is rational. *Bruce*, 25 BRBS 157. The absence of specific credentials in the record for persons who administered the audiograms does not preclude the administrative law judge's finding them credible. The results of both audiograms were reviewed and interpreted by two qualified professionals and support a finding of no hearing loss as late as 1981.[2] On these facts, the administrative law judge cannot be required to credit the 2002 audiogram merely because the credentials of the administrator were provided, as he could rationally find that this audiogram does not provide the best measure of claimant's hearing loss at the time he left covered employment.[3] Accordingly, we reject claimant's contention that the administrative law judge was required to credit the 2002 audiogram over the other audiograms of record. *Bruce*, 25 BRBS at 159-160.

In addition to crediting the 1977 and 1981 audiograms, the administrative law judge based his conclusion that claimant did not have a hearing loss at the time he left covered employment on the medical questionnaires filled out by claimant contemporaneously with the audiograms. Therein, claimant acknowledged he did not have a hearing problem. Decision and Order at 13; Emp. Ex. 6 at 22, 25. In light of this evidence, the administrative law judge discredited claimant's testimony regarding when

[2]Dr. McDill, Ph.D., and Ms. Torricelli, a licensed and certified audiologist, reviewed the 1977 and 1981 audiograms. Emp. Exs. 7-8; *see* Decision and Order at 6-7.

[3]Although the administrative law judge referred to the 2002 audiogram as being more "probative" because it had the credentials of the test administrator, this word-use does not outweigh his other findings. When read in context, it is clear that the administrative law judge found the earlier audiograms better evidence of claimant's hearing condition as of the date he ceased working for employer. To disregard his conclusions because of a one-word description, especially in light of the discussion to the contrary, would be irrational.

he first noticed a hearing loss, finding that his actions in waiting until 2002 to have his hearing checked belied his statement that he first noticed a loss in 1977. This credibility determination is also reasonable, and it is affirmed. *Cordero*, 580 F.2d 1331, 8 BRBS 744; *Heyde*, 306 F.Supp. 1321. As it is supported by substantial evidence, we affirm the administrative law judge's conclusion that claimant did not have a compensable hearing loss.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge