

BRB No. 91-1598

WILLIE F. MOORE )  
 )  
 Claimant-Respondent )  
 )  
 v. )  
 )  
 INGALLS SHIPBUILDING, )  
 INCORPORATED )  
 )  
 Self-Insured )  
 Employer-Respondent )  
 )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, )  
 UNITED STATES DEPARTMENT )  
 OF LABOR )  
 )  
 Petitioner )

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of A. A. Simpson, Jr., Administrative Law Judge, United States Department of Labor.

LuAnn Kressley (Thomas S. Williamson, Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and LAWRENCE, Administrative Law Judge.\*

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order - Awarding Benefits (89-LHC-1515) of Administrative Law Judge A. A. Simpson, Jr., 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

\*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988). 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 (1965); 33 U.S.C. §921(b)(3).

On July 8, 1987, claimant underwent an audiometric evaluation which revealed a 17.4 percent binaural impairment. Thereafter, on August 20, 1987, claimant filed a claim for benefits under the Act for a work-related hearing loss. On November 18, 1987, claimant underwent a second audiometric evaluation, which revealed a 15.6 percent binaural impairment. Employer filed a notice of controversion on December 29, 1987; on January 19, 1988, employer commenced payment of compensation to claimant without an award, based on a 16.52 percent binaural hearing impairment and a compensation rate of \$201.77 per week. At the formal hearing, the parties stipulated, *inter alia*, that claimant, a retiree, suffered a work-related hearing loss, that the date of the filing audiogram is November 18, 1987, that the applicable average weekly wage is \$302.66, and that \$6,666.48 in compensation plus \$96.56 in interest had been voluntarily paid to claimant by employer.

In his Decision and Order, the administrative law judge, relying on *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990), *aff'g in part and rev'g in part Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989)(*en banc*), determined that any award of compensation to claimant for a loss of hearing should be made pursuant to Section 8(c)(23) of the Act. After averaging the results of the two audiometric evaluations of record to determine that claimant has sustained a 16.5 percent binaural hearing impairment, the administrative law judge, utilizing the *AMA Guides*, converted that impairment to a 6 percent whole person impairment. Thus, the administrative law judge awarded claimant permanent partial disability benefits under Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23), for a 6 percent whole man impairment, at a rate of \$12.11 per week, commencing on November 18, 1987. Next, the administrative law judge determined that employer is liable for an assessment under Section 14(e) of the Act, 33 U.S.C. §914(e). The administrative law judge also ordered employer to pay claimant's medical expenses pursuant to Section 7 of the Act, 33 U.S.C. §907, and interest on all compensation due claimant; however, the administrative law judge found that employer's voluntary payments amounted to an overpayment which should be applied to penalties, interest and future compensation due claimant.

On appeal, the Director contends that the administrative law judge erred in finding that November 18, 1987, the date of the filing audiogram, is the date on which claimant's benefits should commence. Neither claimant nor employer has filed a response in the instant matter.

The Director contends that, in cases where the employee is retired, the proper commencement date for the award of benefits is the date of the employee's retirement, reasoning that "[i]f the onset date is found to be after retirement, the claimant will not receive any compensation for a period which he definitely did have an employment-related hearing impairment." Director's Brief at 7. In this case, the Director contends such a gap occurred because the administrative law judge commenced the award on the date of the filing audiogram, November 18, 1987, and claimant retired prior to that time. The Director's argument in this case rests on the theory that hearing loss does not progress after the employee is removed from exposure to injurious noise and thus results immediately in disability.

The United States Supreme Court's recent decision in *Bath Iron Works Corp. v. Director, OWCP*, U.S. , 113 S.Ct. 692, 26 BRBS 151 (CRT)(1993), which accepted the Director's theory, is dispositive of the issue presented by the Director in this case. In *Bath Iron Works*, the Court addressed whether hearing loss is "an occupational disease which does not immediately result in disability" under Section 10(i), 33 U.S.C. §910(i), in the context of determining whether hearing loss due to long-term exposure to noise suffered by voluntary retirees is to be compensated under Section 8(c)(13) or (c)(23), 33 U.S.C. §908(c) (13), (23). Based on a medical treatise establishing that hearing loss is not a progressive illness, the court found that a worker who sustains a work-related hearing loss suffers disability simultaneously with his or her exposure to excessive noise. As a loss of hearing occurs simultaneously with the exposure to excessive noise, the injury is complete when the exposure ceases; thus, the Supreme Court stated that the date of last exposure is the relevant time of injury for determining a retiree's benefits for occupational hearing loss. See *Bath Iron Works*, 113 S.Ct. at 699-700, 26 BRBS at 154 (CRT). The court concluded that as the hearing loss is not "an occupational disease which does not immediately result in disability," Section 10(i) and thus Section 8(c)(23) do not apply. Claims for hearing loss under the Act, whether filed by current employees or retirees, are claims for a scheduled injury and must be compensated under Section 8(c)(13), 33 U.S.C. §908(c)(13).

Pursuant to the Supreme Court's decision in *Bath Iron Works*, it is clear that the onset date of claimant's permanent partial disability is the date of his last exposure to noise. We note that in *Howard v. Ingalls Shipbuilding Inc.*, 25 BRBS 192 (1991), the Board held that benefits are payable to voluntary retirees in hearing loss cases arising under Section 8(c)(23) as of the date on which there is evidence of the existence of permanent impairment. In view of *Bath Iron Works*, this decision is overruled. We therefore vacate the administrative law judge's finding that the date of claimant's filing audiogram, November 18, 1987, is the commencement date for claimant's benefits, and hold that the claimant's hearing loss benefits commence on the date of his last exposure to injurious noise levels, which in this case is the date of his retirement. As the Director correctly states in his brief, the administrative law judge did not make a determination as to when claimant retired from his employment with employer. Accordingly, we remand the case for the administrative law judge to determine claimant's last date of employment with employer and, thus, the onset date for the commencement of claimant's benefits.

Moreover, since *Bath Iron Works* is dispositive of the onset issue raised, it would be incongruous to commence a Section 8(c)(23) award on the date of retirement while ignoring the Supreme Court's holding that claims for hearing loss benefits under the Act, whether filed by current employees or retirees, must be compensated pursuant to Section 8(c)(13). Accordingly, although neither party explicitly challenges the administrative law judge's award of permanent partial disability benefits under Section 8(c)(23), pursuant to the Supreme Court's holding in *Bath Iron Works*, we vacate the administrative law judge's award of hearing loss benefits under Section 8(c)(23). Since the administrative law judge's finding that claimant suffered a 16.5 percent binaural hearing loss is unchallenged on appeal, we modify the award to reflect that claimant is entitled to receive permanent partial disability benefits at the stipulated rate of \$201.77 per week for 33 weeks

(16.5 percent of 200 weeks) pursuant to Section 8(c)(13) of the Act.<sup>1</sup>

Accordingly, the administrative law judge's Decision and Order Awarding Benefits under Section 8(c)(23) is vacated, and the decision modified to award claimant compensation for a 16.5 binaural hearing loss pursuant to Section 8(c)(13). The case is remanded for the administrative law judge to determine, consistent with the Supreme Court's decision in *Bath Iron Works*, the onset date of claimant's disability. In all other respects, the administrative law judge's Decision and Order - Awarding Benefits is affirmed.

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge

LEONARD N. LAWRENCE  
Administrative Law Judge

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<sup>1</sup>We note that employer voluntarily paid benefits to claimant equal to the amount of permanent partial disability compensation due claimant under Section 8(c)(13) of the Act. It remains necessary, however, to remand the case for the administrative law judge to determine claimant's date of retirement, and thus his commencement date of benefits, as this may impact on the amount of the compensation subject to the administrative law judge's prior award of a Section 14(e) assessment and interest. See *Pullin v. Ingalls Shipbuilding, Inc.*, BRBS , (May 7, 1993), *modifying on recon.* BRB No. 91-131 (February 23, 1993)(unpublished).