EUGENE CRAIG	)	BRB No. 00-0569
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
AVONDALE INDUSTRIES, INCORPORATED	)	DATE ISSUED: May 23, 2002
	)	
Self-Insured Employer-Respondent	)	
	)	
	)	
RAY ALARIO	)	BRB No. 00-0716
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
AVONDALE INDUSTRIES INCORPORATED	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	
	)	
	)	
JOSEPH HOWARD	)	BRB Nos. 00-0747 and 00-0747A
Claimant-Petitioner Cross-Respondent	)	
	)	
v.	)	
AVONDALE INDUSTRIES,	)	

INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	ORDER on MOTION
	)	for RECONSIDERATION
Party-in-Interest	)	*EN BANC*

Employer has filed a timely motion for reconsideration of the Board's Decision and Order on Reconsideration *En Banc, Craig, et al. v. Avondale Industries, Inc.*, 35 BRBS 164 (2001). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Claimants respond, urging rejection of employer's motion. The Director, Office of Workers' Compensation Programs (the Director), has not responded to employer's motion. In addition, counsel for claimants Craig and Alario has filed a petition for an attorney's fee for work performed before the Board.

We need not recount the full procedural history of these cases. In its last decision, the Board held that the hearing evaluations attached to the claim forms of claimants Craig and Alario were sufficient for employer to be able to discern whether the claimants had a compensable hearing loss, and thus, whether employer should pay benefits or decline to pay benefits within 30 days of employer's receipt of the claims from the district director. 33 U.S.C. §928(a). In neither *Craig* nor *Alario* did the employer pay any benefits within 30 days of its receipt of the claim from the district director. Thus, in *Craig*, the Board vacated its affirmance of the district director's award assessing the entire fee against claimant. The Board reversed the district director's finding that employer is not liable for claimant's attorney's fee, and remanded the case to the district director for consideration of the amount of the attorney's fee for which employer is liable under Section 28(a). In *Alario*, the Board vacated its reversal of the district director's fee award, and reinstated and affirmed the district director's finding on reconsideration regarding employer's liability for claimant's attorney's fees and expenses. *Craig*, 35 BRBS at 168.

The Board then turned to the legal issue of whether the initial claim forms filed by the claimants in all three cases, standing alone, triggered the 30-day time period following notice of the claim from the district director in which employer is required to pay benefits or decline to pay for purposes of attorney's fee liability under Section 28(a). In *Howard*, for example, the claimant wrote on the claim form only that he suffered a "hearing loss" due to "exposure to injurious noise." The Director contended that such a claim is sufficient under

the Act to trigger employer's duty to pay benefits or decline to pay benefits under Section 28(a). The Board agreed with the Director's contention, holding that hearing loss claims are not to be treated differently than any other claims. A "claim" need only consist of a writing that evinces an intent to seek compensation. *Craig*, 35 BRBS at 169, citing *Jones Stevedoring Co. v. Director, OWCP [Taylor]*, 133 F.3d 683, 691, 31 BRBS 178, 184(CRT) (9th Cir. 1997) ("Provided the claimant produces some kind of writing that mentions an injury and alleges that the injury is employment-related, courts will usually accept this as a valid claim."). Neither Section 13 of the Act, 33 U.S.C. §913, nor its implementing regulation at 20 C.F.R. §702.221 requires the claimant to submit any evidence of disability or impairment with his claim for compensation. Thus, the Board held that the claim forms filed in each case, standing alone, are "valid" claims under the Act as they specifically evince an intent to seek benefits for a work-related hearing loss. *Craig*, 35 BRBS at 169-170. With regard to the attorney's fee issue, employer had to either pay benefits voluntarily or decline to pay benefits within 30 days of its receipt of notice of the claim from the district director. In *Howard*, therefore, the Board held that the district director properly imposed attorney's fee liability on employer for the period after he served notice of the claim on employer until such time as employer paid benefits. The Board reinstated the district director's finding that employer is liable for claimant's attorney's fee for services rendered in the period between December 31, 1996 and January 15, 1998. *Craig*, 35 BRBS at 170.

Employer seeks reconsideration of the Board's decision. Employer contends that the requirement for fee liability under Section 28(a) has not been met in these cases, as it never declined to pay any compensation. Employer contends that it requires some sort of evidence to substantiate "conclusory allegations" made on a claim form, although employer states it is not averring that such "evidence" must be submitted with the claim form. Until this "evidence" is provided, however, employer contends that the 30-day period of Section 28(a) is not triggered. In hearing loss cases, employer contends that this evidence must be in the form of an audiogram and report which meet the "presumptive evidence" standard of Section 8(c)(13)(C), 33 U.S.C. §908(c)(13)(C). Employer contends it paid benefits within 30 days once it received the "valid" information it needed to determine the extent of each claimant's hearing loss, and thus, that it is not liable for claimants' attorney's fees under Section 28(a).

We reject employer's contentions. As the Board stated in its last decision, neither the Act nor the regulations require that a claimant submit evidence with his claim before the requirements of Section 28(a) are triggered. *Craig*, 35 BRBS at 169; *see also Pool Co. v. Cooper*, 274 F.3d 173, 183, 35 BRBS 109, 116(CRT) (5th Cir. 2001) (noting that a claim form requires the claimant to describe only the injury and the work incident). Section 28(a) states that an employer shall be liable for an attorney's fee for the successful prosecution of a claim, "[i]f the employer or carrier declines to pay any compensation on or before the thirtieth day *after receiving written notice of a claim for compensation* having been filed from the [district director] . . . ." 33 U.S.C. §928(a) (emphasis added). The Act is

clear that an employer may pay or decline to pay within 30 days after it receives the written notice of "a claim" from the district director; however, no other "evidence" is required before the 30-day period begins to run. Thus, contrary to employer's contention, a claimant need not establish a *prima facie* case under Section 20(a), 33 U.S.C. §920(a), before the requirements of Section 28(a) are triggered. If employer believes the claim is not meritorious, it can decline to pay in the belief that it will prevail after an evidentiary hearing.

Moreover, as discussed by the Board in *Craig*, 35 BRBS at 169, there is no reason to treat hearing loss claims differently, merely because a hearing loss must be ratable under the American Medical Association *Guides to the Evaluation of Permanent Impairment* in order to be compensable. *See* 33 U.S.C. §908(c)(13)(E). Section 8(c)(13)(C) of the Act states:

> 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.

See also 20 C.F.R. §702.441. Employer contends that the uninterpreted audiograms attached to the claims in *Craig* and *Alario* are insufficient to meet this standard, because there is no indication that they were performed by a licenced audiologist or otolaryngologist and there is no report accompanying the results.

That the uninterpreted audiometric tests do not meet the "presumptive"evidence standard of Section 8(c)(13)(C) is insufficient to establish that the claimants have not asserted valid claims for compensation, in view of the Board's holding that no evidence need accompany a claim for compensation. Audiometric tests that do not meet the "presumptive" standard are not invalid or inadmissible; it is for the administrative law judge to determine the probative value of such tests in determining the extent of the claimant's hearing loss.[1] *See generally Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001) (administrative law judge may give less weight to audiograms that do not meet the "presumptive evidence" standard); *see also Norwood v. Ingalls Shipbuilding, Inc.*, 26 BRBS 66 (1992) (Stage, C.J., dissenting on other grounds) (administrative law judge has discretion which audiogram to credit).

In these cases, employer did not pay benefits within 30 days of its receipt of notice of

[1]For the reasons stated in *Craig*, 35 BRBS at 168 & n.4, we reject employer's contention that it is not medically qualified to interpret the results of an audiometric graph.

a claim from the district director, nor did it specifically decline to pay within the 30 day period.[2] Thus, employer is properly held liable for claimants' attorney's fees under Section 28(a). *See Weaver v. Ingalls Shipbuilding*, Inc., 282 F.3d 357 (5th Cir. 2002); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993); *Martin v. Kaiser Co., Inc.*, 24 BRBS 112 (1990) (Dolder, J., concurring in the result). Employer's contentions are rejected and the Board's Decision and Order on Reconsideration *En Banc* is affirmed. 20 C.F.R. §802.409.

Counsel for claimants Craig and Alario has filed a fee petition for work performed before the Board. In *Craig,* counsel seeks a fee of $2,712.50, representing 15.5 hours of attorney services at an hourly rate of $175. In *Alario,* counsel seeks a fee of $2,187.50, representing 12.5 hours of attorney time at $175 per hour. Employer has not responded to the fee petitions.

We award counsel the requested attorney's fees. By virtue of the Board's decision on reconsideration, employer's liability for claimants' attorney's fees was established, and thus claimants were successful before the Board. *See generally Kerns v. Consolidation Coal Co.*, 247 F.3d 133 (4th Cir. 2001); *Hole v. Miami Shipyard Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981); 33 U.S.C. §928. The requested fees are reasonably commensurate with the necessary work performed before the Board, as these cases involved a novel issue, and the hourly rate is appropriate for the geographic area where counsel practices. 20 C.F.R. §802.203(d), (e). Thus, counsel is awarded an attorney's fee of $2,712.50 in *Craig,* and of $2,187.50 in *Alario.*

[2]In each case, employer filed a notice of controversion after claimant filed his claim, but before the district director served the claim on employer.

Accordingly, employer's motion for reconsideration is denied. 20 C.F.R. §802.409. The Board's Decision and Order *En Banc* is affirmed. Claimants' counsel is awarded a fee of $2,712.50 in *Craig*, and of $2,187.50 in *Alario,* to be paid directly to counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge