

BRB No. 92-2553

ROBERT LAKE)
)
 Claimant-Petitioner)
)
 v.)
)
 M. P. HOWLETT,)
 INCORPORATED) DATE ISSUED:
)
 Self-Insured)
 Employer-Respondent) DECISION AND ORDER

Appeal of the Decision and Order - Denying in Part and Granting in Part Benefits of Frank D. Marden, Administrative Law Judge, United States Department of Labor.

Michael E. Glazer (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Michael N. Cotignola (Kalmus & Martuscello), Berkeley Heights, New Jersey, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (90-LHC-1609) of Administrative Law Judge Frank D. Marden 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 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 August 3, 1988, claimant sustained injuries to his right shoulder, left hand, and right ankle when, while working as a foreman for employer, he slipped on a greasy walkway. Claimant was taken to the Bayonne Hospital emergency room immediately thereafter where ice pack treatment was administered, his ankle was bandaged, and he was provided with crutches. On September 12, 1988, claimant sustained further injuries to his head, neck and back when he tripped and fell while using his crutches. Employer voluntarily paid claimant temporary total disability compensation based on a compensation rate of \$531.37 from August 4, 1988 until December 8, 1988. Claimant sought additional temporary total disability benefits from December 9, 1988, until January 25, 1989, and scheduled permanent partial disability compensation for his left wrist and right ankle injuries pursuant to Section 8(c)(3), (4) of the Act. 33 U.S.C. §908(c)(3), (4).

Agreeing with claimant that the injuries he sustained as a result of the second fall were a natural and unavoidable consequence of the initial work injury, the administrative law judge awarded claimant the additional temporary total disability benefits he sought based on a compensation rate of \$531.37. The administrative law judge denied claimant compensation for his left wrist and ankle injuries, however, finding that he had not introduced credible evidence of compensable permanent physical impairment.

Claimant appeals both the administrative law judge's denial of permanent partial disability benefits and his calculation of the applicable average weekly wage.¹ Employer responds, urging affirmance.

In the present case, claimant introduced the testimony of Drs. Margolies and Kneller in support of his permanent partial disability claims. Dr. Margolies, claimant's treating physician, opined that claimant exhibited a 25 percent permanent partial disability of the right ankle and a 15 percent impairment of the left wrist. Dr. Kneller found a 25 percent impairment of both claimant's right ankle and his left wrist. After considering Dr. Margolies' opinion, the administrative law judge reasonably rejected it, finding that Dr. Margolies' method of disability assessment, based on a combination of the American Medical Association *Guides to the Evaluation of Permanent Impairment* (3d ed. rev. 1990) (*AMA Guides*) and other factors, was unduly subjective. In so concluding, the administrative law judge noted that his method allowed for a finding of disability in the absence of permanent physical impairment² contrary to the concept of scheduled disability under the Act.³ The administrative law judge also rejected Dr. Kneller's testimony as subjective. He noted

¹Although claimant also argues on appeal that the evidence shows that the injuries he sustained as a result of his September 12, 1988 fall are compensable, the administrative law judge awarded claimant the additional temporary total disability compensation he sought in connection with that injury.

²On deposition, Dr. Margolies acknowledged that, under his method of disability evaluation, he would still assess some degree of permanent disability in the absence of permanent physical impairment. CX 12 at 76-77.

³The Act does not require impairment ratings based on medical opinions using the criteria of the *AMA Guides* except in cases involving compensation for hearing loss and voluntary retirees. See 33 U.S.C. §§908(c)(13)(E), (b), 902(10). An administrative law judge may consider a variety of medical opinions and observations in addition to claimant's description of symptoms and physical effects of his injury in assessing the extent of claimant's disability. *Pimpinella v. Universal Maritime Services, Inc.*, 27 BRBS 154 (1993). There is no disability under the schedule, however, in the absence of permanent physical impairment. Compensation for loss or partial loss of use under the schedule is based on the degree of permanent impairment proportionately applied to the number of weeks in the schedule. See generally *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980).

that Dr. Kneller also employed a hybrid AMA *Guides* and "other factors" method of disability assessment and more importantly failed to specify the "other factors" he relied upon in making his assessments of disability. Claimant avers that the administrative law judge erred in failing to accord determinative weight to Dr. Margolies' opinion in light of his status as treating physician. The administrative law judge, however, may accept or reject all or any part of any testimony according to his judgment. *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT) (5th Cir. 1990); *Thompson v. Northwest Enviro Services*, 26 BRBS 53, 61 (1992); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). Inasmuch as the administrative law judge acted within his discretion in rejecting the medical opinions of Drs. Margolies and Kneller, the only medical evidence indicative of permanent impairment to claimant's wrist, his denial of benefits under Section 8(c)(3) for the wrist injury is affirmed.⁴

The administrative law judge's denial of scheduled benefits for claimant's ankle injury is also affirmed. After considering the evidence relating to claimant's ankle condition, including the medical opinions of Drs. Margolies and Kneller previously discussed, the administrative law judge found the opinions of Drs. Leonardt and Zaresky most persuasive. The administrative law judge noted that their opinions that claimant had no objective evidence of residual permanent impairment was corroborated by that of Dr. Baghal, claimant's treating orthopedist, who similarly found no swelling, tenderness or limitation of motion when he examined claimant on December 5, 1988. The administrative law judge also considered claimant's testimony regarding his weakness, occasional pain and problems moving his ankle, and rationally found it insufficient to support a finding of permanent partial disability. The medical opinions of Drs. Leonardt and Zaresky provide substantial evidence to support the administrative law judge's denial of permanent partial disability benefits for claimant's ankle injury. As claimant has failed to raise any reversible error made by the administrative law judge in evaluating the conflicting evidence and making credibility determinations, this finding is affirmed.⁵ *See generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991).

Claimant also challenges the administrative law judge's calculation of his average weekly wage, stating only that the average weekly wage should be established at a minimum of \$989.79. Claimant offers no argument in support of this figure, nor does he assert specific error in the administrative law judge's calculation. We decline to address claimant's contention, as it was not adequately briefed. *West v. Washington Metropolitan Area Transit Authority*, 21 BRBS 125, 127 n.3 (1988); *Carnegie v. C & P Telephone Co.*, 19 BRBS 57, 58-59 (1986); 20 C.F.R. §802.211(b).

⁴We note that the administrative law judge considered claimant's testimony that his wrist was in "pretty good shape now," Transcript at 38, and rationally determined that this testimony was not supportive of his permanent disability claim.

⁵Although claimant asserts that the administrative law judge erred in failing to resolve factual doubt in his favor, the United States Supreme Court recently determined that the "true doubt rule" is invalid because it conflicts with Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §556(d). *Director, OWCP v. Greenwich Collieries*, ___ U.S. ___, 114 S.Ct. 2251, 28 BRBS 43 (CRT) (1994).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge