BRB No. 10-0474

WILLIAM DEVANEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CERES MARINE TERMINALS, INCORPORATED	)	DATE ISSUED: 02/18/2011
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Myles R. Eisenstein, Baltimore, Maryland, for claimant.

Lawrence P. Postol (Seyfarth Shaw LLP), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (2007-LHC-00901) of Administrative Law Judge Janice K. Bullard 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).

This case is before the Board for a second time. Claimant sustained a fractured right elbow on March 23, 2006, when he tripped on a chain while working for employer as a longshoreman. Claimant sought treatment for his injury and returned to work for employer on May 15, 2006. Employer voluntarily paid claimant temporary total disability benefits for the period of March 24 through May 14, 2006, and permanent partial disability benefits for a five percent impairment to claimant's right arm, 33 U.S.C.

§908(b), (c)(1). Claimant subsequently filed a claim for benefits under the Act, averring, *inter alia*, that he had sustained a greater impairment to his right arm than that acknowledged by employer.

In her original decision, the administrative law judge declined to accept the parties' stipulation that claimant's condition reached maximum medical improvement on May 15, 2006, finding instead that claimant reached maximum medical improvement on November 6, 2006. The administrative law judge then found that claimant sustained a four percent impairment to his right arm as a result of his March 23, 2006, work injury, and she consequently awarded claimant permanent partial disability benefits pursuant to that finding.

Claimant appealed this decision, contending that the administrative law judge erred in failing to inform the parties that their stipulation regarding the date claimant's condition reached maximum medical improvement would not be accepted and that the administrative law judge erred in determining the extent of claimant's disability. The Board agreed that the administrative law judge erred in not providing the parties notice that the stipulation regarding the date of maximum medical improvement would not be accepted and an opportunity to submit relevant evidence. Therefore, the Board vacated the administrative law judge's determination that claimant reached maximum medical improvement as of November 6, 2006, and remanded the case for the administrative law judge to allow the parties the opportunity to present additional evidence in support of their positions regarding this issue. *W.D. [Devaney] v. Ceres Marine Terminals*, BRB No. 08-0778 (April 29, 2009)(unpub.). In addition, the Board vacated the administrative law judge's finding that claimant suffered a four percent impairment of his right arm. The Board remanded for the administrative law judge to evaluate the bases for each medical opinion and to determine which most persuasively establishes the degree of claimant's permanent impairment. *Id.*

On remand, the administrative law judge accepted additional evidence from the parties. After reviewing the newly submitted evidence, as well as the evidence already in the record, the administrative law judge found that claimant's condition reached maximum medical improvement on November 6, 2006, the date of the last examination in which claimant showed signs of improvement. In addition, the administrative law judge found that claimant suffers from a four percent impairment of his right arm. Claimant appeals this decision. Employer responds, urging affirmance.

Claimant contends the administrative law judge erred in determining the date claimant reached maximum medical improvement. The date that a claimant's disability reaches permanency is a question of fact determined solely by medical evidence. *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996); *Trask*

v. Lockheed Shipbuilding & Constr. Co., 17 BRBS 56 (1980). Thus, if the employee returns to work before reaching maximum medical improvement, the return does not establish that his disability was then permanent. *Thompson v. McDonnell Douglas Corp.*, 17 BRBS 6 (1984).

In determining the date claimant reached maximum medical improvement, the administrative law judge addressed the opinion of Dr. Franchetti, who examined claimant's right arm on September 25, 2006, and noted that claimant suffered from a loss of function in his right arm and right elbow pain. Cl. Ex. 1. He measured claimant's range of motion and concluded that claimant had reached maximum medical improvement by the date of the examination. *Id.* However, the administrative law judge found that Dr. Fisher, who examined claimant on November 6, 2006, reported that claimant had a greater range of motion than that exhibited in September. Emp. Ex. 11. The administrative law judge concluded that as claimant's range of motion continued to improve until November 6, 2006, he did not reach maximum medical improvement until that date. This finding is rational and supported by substantial evidence. While the date a doctor opines that a claimant's injuries stabilized and became permanent may be sufficient to establish maximum medical improvement, *see Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989), the administrative law judge here did not err in crediting the evidence that claimant's condition continued to improve after Dr. Franchetti's examination in September 2006. Thus, we affirm the administrative law judge's finding that claimant did not reach maximum medical improvement until November 6, 2006, the date Dr. Fisher examined claimant.[1] *See generally Reposky v. Int'l Transp. Services*, 40 BRBS 65 (2006).

Claimant also contends that the administrative law judge erred in her determination of the extent of claimant's partial disability. In the event of an injury to a scheduled member, recovery for a claimant's permanent partial disability under Section 8(c), 33 U.S.C. §908(c), is confined to the schedule in Section 8(c)(1)-(19), 33 U.S.C. §908(c)(1)-(19), and is based on the degree of permanent impairment. *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980). In cases other than those involving hearing loss, *see* 33 U.S.C. §908(c)(13)(E), the administrative law judge is not bound by any particular standard or formula but may consider medical opinions and observations in addition to the claimant's description of symptoms and the physical effects of his injury in assessing the extent of his permanent impairment. *See, e.g., Cotton v. Army & Air Force Exch. Services*, 34 BRBS 88 (2000); *Pimpinella v. Universal Mar. Serv., Inc.*, 27 BRBS 154 (1993). The administrative law judge may rely on

[1]Therefore, we also reject claimant's contention that he reached maximum medical improvement by May 15, 2006, the date he returned to work. *See Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988).

opinions that rate the claimant's impairment under the American Medical Association *Guides to the Evaluation of the permanent Impairment* (AMA *Guides*). *See Jones v. I.T.O. Corp. of Baltimore*, 9 BRBS 583 (1979).

The record contains four opinions assessing an impairment rating for claimant's right arm injury. Dr. Franchetti opined that claimant suffered a three percent upper extremity impairment due to loss of motion, but he added an additional 25 percentage points, for a total impairment of 28 percent, because of claimant's persistent pain and loss of endurance and function. Cl. Ex. 1. Dr. Fisher examined claimant on November 6, 2006, and opined that claimant sustained a five percent impairment of the right upper extremity for symptoms of elbow instability. Emp. Ex. 11. However, in a report dated June 18, 2007, Dr. Fisher reassessed claimant's impairment rating under the 5th Edition of the AMA *Guides*, as he opined that this edition better assesses joint impairment due to excessive passive medial lateral instability; he concluded that claimant's injury yields a four percent impairment to the right upper extremity. Emp. Ex. 22. Dr. Gubernick reported on July 18, 2007, that he agreed with the reasoning provided by Dr. Fisher in his June 2007 report. Emp. Ex. 23. Dr. Brigham reviewed claimant's medical records and issued a report dated May 18, 2007. He opined that Dr. Fisher's range of motion measurements were more reliable than Dr. Franchetti's findings. Dr. Brigham assessed claimant with a one percent impairment of his right upper extremity. Emp. Ex. 16.

The administrative law judge discounted the opinion of Dr. Franchetti that added a 25 percent impairment due to persistent pain, loss of endurance and loss of function, since she found that claimant had returned to work and is working effectively. The administrative law judge also noted that claimant's condition continued to improve following the assessment of Dr. Franchetti, based on her finding that claimant did not reach maximum medical improvement until November 6, 2006. The administrative law judge credited the opinion of Dr. Fisher, which was rendered following a review of claimant's medical records, a physical examination, and diagnostic testing, noting that claimant's treating physician, Dr. Gubernick agreed with Dr. Fisher's four percent impairment rating and reasoning. It is well established that the administrative law judge is entitled to determine the weight to be accorded to the evidence of record and that the Board cannot reweigh the evidence. *See generally Burns v. Director, OWCP,* 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The administrative law judge's decision to credit the June 2007 opinion of Dr. Fisher based on the AMA *Guides* is rational, and the finding that claimant has a four percent permanent impairment is supported by substantial evidence. *Cotton v. Army & Air Force Exchange Services,* 34 BRBS 88 (2000); *Mazze v. Frank J. Holleran, Inc.,* 9 BRBS 1053 (1978). Therefore, we affirm the administrative law judge's award of benefits for a four percent arm impairment.

Accordingly, the administrative law judge's Decision and Order on Remand 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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BETTY JEAN HALL
Administrative Appeals Judge