

BRB Nos. 99-0627
and 99-0627A

ARLETHA WILLIAMS-McDOWELL)	
)	
Claimant-Petitioner)	
Cross-Respondent)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING)	DATE ISSUED:
AND DRY DOCK COMPANY)	
)	
Self-Insured)	
Employer-Respondent)	
Cross-Petitioner)	DECISION and ORDER

Appeals of the Decision and Order Granting Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna, Klein & Camden, L.L.P.), Norfolk, Virginia, for claimant.

Christopher A. Taggi (Mason & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order Granting Benefits (98-LHC-0125) of Administrative Law Judge Richard K. Malamphy 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a sheet metal worker, experienced pain in both her hands while working on

August 15, 1991. Claimant subsequently had several operations on each wrist. Claimant returned to work for employer in a light duty capacity from which she was laid off on December 7, 1996. She obtained alternate employment on March 17, 1997. Employer voluntarily paid claimant temporary total disability benefits for various periods, as well as permanent partial disability benefits for 23.57 weeks for a 50 percent impairment to the right wrist and \$2000 for disfigurement. Claimant sought additional temporary total disability benefits for the period between December 7, 1996 and March 17, 1997, and permanent partial disability benefits for a 50 percent impairment to the right arm pursuant to Section 8(c)(1), 33 U.S.C. §908(c)(1).

The administrative law judge awarded claimant temporary total disability benefits for the period in question, finding that employer did not establish suitable alternate employment prior to claimant's obtaining employment on March 17, 1997. The administrative law judge awarded claimant scheduled permanent partial disability benefits for a 30 percent impairment to the right hand pursuant to Section 8(c)(3), 33 U.S.C. §908(c)(3).

On appeal, claimant contends the administrative law judge erred in not awarding her benefits for a 50 percent impairment to the arm pursuant to Section 8(c)(1). Employer responds urging affirmance of the administrative law judge's permanent partial disability award. On cross-appeal, employer challenges the administrative law judge's award of temporary total disability benefits, stating that such an award is improper because claimant's condition was already permanent at the time of the layoff and that claimant did not file a claim for permanent total disability benefits. Claimant responds, urging affirmance of the administrative law judge's award of temporary total disability benefits.

Claimant contends the administrative law judge erred in two respects with regard to the permanent partial disability award. Claimant contends that the administrative law judge erred in not awarding benefits pursuant to Section 8(c)(1) for an impairment to the arm rather than pursuant to Section 8(c)(3) for an impairment to the hand. She further contends the administrative law judge erred in not crediting the entirety of Dr. Freund's opinion to find that her impairment rating is 50 percent.

In the instant case, the administrative law judge awarded claimant permanent partial disability benefits for injury to her wrist/hand under Section 8(c)(3), finding that because the site of claimant's injury was her wrist, she has to be compensated for an impairment to the hand pursuant to Section 8(c)(3). The basis for the administrative law judge's finding was Section 8(c)(15) of the Act, 33 U.S.C. §908(c)(15), which states that if an arm is amputated below the elbow, compensation shall be the same as for the loss of a hand. The administrative law judge then noted that Dr. Freund rated claimant as having a 30 percent impairment due to loss of motion and an additional 20 percent impairment due to loss of

grip strength. The administrative law judge, however, credited the opinion of Dr. Ross that loss of grip strength should not be separately rated in this case, as this opinion is consistent with the American Medical Association *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) (*AMA Guides*). The administrative law judge thus discredited the 20 percent grip strength component of Dr. Freund's impairment rating, but nevertheless deferred to him as claimant's treating physician regarding the impairment rating for lack of range of motion. Thus, he credited Dr. Freund's opinion of a 30 percent impairment over the 26 percent impairment rating assigned by Dr. Ross.

We reject claimant's contention that the administrative law judge erred in crediting Dr. Ross's opinion that a rating for loss of grip strength is not merited here based on the criteria in the *AMA Guides* over Dr. Freund's conflicting opinion that claimant sustained a 20 percent additional impairment due to a lack of grip strength. The administrative law judge rationally concluded after his own review of the *AMA Guides* that Dr. Ross's opinion is better reasoned. Decision and Order at 12. As the fact finder, the administrative law judge is entitled to weigh the medical evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiner. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1965). Consequently, we affirm the administrative law judge's finding as it is rational, supported by substantial evidence, and in accordance with law. See generally *Pimpinella v. Universal Maritime Service, Inc.*, 27 BRBS 154 (1993).

Claimant correctly argues, however, that the administrative law judge erred in awarding her benefits under Section 8(c)(3) for the wrist/hand instead of Section 8(c)(1) for the arm. Both physicians, Drs. Freund and Ross, stated that claimant suffered an impairment to her right upper extremity as a result of her work injury to her wrist, and both physicians rated her impairment in terms of the upper extremity rather than the hand. Thus, the record does not contain substantial evidence to support a rating to claimant's hand. When the claimant suffers an injury to the smaller member which affects the larger member, the claimant is entitled to an award for an impairment to the larger member if the evidence of record supports such an award. *Young v. Todd Pacific Shipyards Corp.*, 17 BRBS 201 (1985). Furthermore, the Board has rejected the contention that Section 8(c)(15) supports only an award for a hand impairment when the site of the injury is below the elbow. *Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989). Inasmuch as the only impairment ratings of record are to claimant's upper extremity, we hold that claimant must receive an award for an impairment to the arm pursuant to Section 8(c)(1) in this case. We therefore modify the administrative law judge's award to hold that claimant is entitled benefits for a 30 percent permanent partial impairment pursuant to Section 8(c)(1).

On cross-appeal, employer contends that the administrative law judge cannot award temporary total disability benefits to claimant for the period between December 7, 1996 to

March 17, 1997, because claimant's condition reached permanency in July 1996 when claimant's treating physician, Dr. Freund, assigned claimant a permanent impairment rating, and claimant did not seek permanent total disability benefits. We reject this contention. While claimant did not claim permanent total disability benefits for the period in question, and claimant's condition reached maximum medical improvement as asserted by employer, inasmuch as the contested issue concerned the *extent* of claimant's disability, the administrative law judge did not err in awarding benefits as there is no difference in the burden of proof between a claim for permanent total and temporary total disability benefits on the facts in this case. *See Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993); *Bonner v. Ryan-Walsh Stevedoring Co., Inc.*, 15 BRBS 321 (1983). Moreover, the administrative law judge's award of total disability benefits for the period following the layoff from the light duty job at employer's facility until alternate employment was identified comports with law. *Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170 (CRT)(4th Cir.1999). Consequently, we affirm the administrative law judge's award of total disability benefits.

Accordingly, the administrative law judge's decision is modified to award claimant benefits for a 30 percent impairment under Section 8(c)(1). In all other respects, the administrative law judge's decision is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge