BRB No. 91-1584

RICHARD E. KING	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
COLUMBIA GRAIN, INCORPORATED	)	DATE ISSUED:
	)	
	)	
and	)	
	)	
SAIF CORPORATION	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

Donald R. Wilson (Pozzi, Wilson, Atchison, O'Leary & Conboy), Portland, Oregon, for claimant.

Randolph B. Harris (SAIF Corporation), Portland, Oregon, for employer/ carrier.

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

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (90-LHC-2695) of Administrative Law Judge Alfred Lindeman 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 if they 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).

On April 30, 1987, claimant slipped and fell, fracturing his left ankle and great toe, while discharging grain from a barge for employer. He was treated by Dr. Lawrence Cohen, a Board-certified orthopedist, who continues to be his treating physician. Employer voluntarily paid claimant temporary total disability compensation, 33 U.S.C. §908(b), from the date of injury until claimant returned to light-duty longshore employment on September 10, 1987, and permanent partial disability under the schedule for an 8 percent impairment of the leg, which corresponds to an 11.24 percent impairment of the foot. *See* 33 U.S.C. §908(c)(4), (19). Claimant sought compensation for a higher percentage of impairment under the schedule.

Crediting the testimony of claimant and Dr. Cohen, the administrative law judge awarded claimant compensation for a 25 percent impairment of his foot pursuant to Sections 8(c)(4) and (c)(19) of the Act. 33 U.S.C. §908(c)(4), (19). The administrative law judge also determined that employer was entitled to a credit for its previous voluntary payment of permanent partial disability compensation. *See* 33 U.S.C. §914(j). Employer appeals the disability award. Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance.

On appeal, employer argues that the administrative law judge's finding that claimant sustained a 25 percent impairment of his foot is not in accordance with law. Employer asserts that in determining that claimant sustained a 25 percent impairment, the administrative law judge improperly adopted claimant's own interpretation of his disability and improperly included claimant's pain. Employer further avers that there is no medical basis in the record to support the administrative law judge's finding inasmuch as Dr. Cohen, claimant's treating physician, whose opinion was credited by the administrative law judge, only rated claimant's impairment at 20 percent. Moreover, while conceding that the Act does not require that medical ratings be based on the criteria of the American Medical Association *Guides to the Evaluation of Permanent Impairment* (3d ed. 1988) (the AMA *Guides)*, except in cases involving compensation for hearing loss and voluntary retirees, *see* 33 U.S.C. §§908(c)(13), 902(10), employer contends that the administrative law judge erred in crediting Dr. Cohen's impairment rating because it is speculative, not well-reasoned, and based in large part on claimant's complaints of pain. Employer contends that Dr. Cohen's opinion cannot properly support the award because he derived his values from his clinical experience rather than a range of motion value based on objective proof under the AMA *Guides*. Employer further asserts that as Dr. Cohen's 20 percent impairment rating was based in large part on claimant's subjective complaints of pain, it cannot support an award under the schedule, which is limited to loss of use of a member, pursuant to *Young v. Todd Pacific Shipyards Corp.*, 17 BRBS

201, 204 (1985).

After careful review of the record, we affirm the administrative law judge's finding that claimant suffered from a 25 percent impairment of his left foot as it is rational, supported by substantial evidence, and in accordance with law. *See O'Keeffe*, 380 U.S. at 362. Employer's contention that Dr. Cohen's opinion cannot properly support the award because he accounted for claimant's pain in his 20 percent impairment rating is without merit. The Board has recently held that *Young*, 17 BRBS at 201, does not require that pain and its symptoms never be considered when a doctor rates the loss of use of a member, or that pain and its symptoms should be disregarded in their entirety; the decision holds only that a doctor's impairment rating should not be amplified so as to separately compensate claimant for "pain and suffering" as in a tort context. *Pimpinella v. Universal Maritime Service, Inc.*, 27 BRBS 154, 159-160 (1993). In the present case, unlike *Young*, Dr. Cohen's 20 percent impairment rating did not involve an augmentation of claimant's disability to reflect "pain and suffering." Rather, Dr. Cohen's disability rating was based on his finding of internal derangement as well as his observation that claimant's pain had resulted in a limitation of motion, and loss of strength and agility. These medical factors establish a loss of use which is compensable under the schedule.

We also reject employer's assertion that the administrative law judge erred in increasing claimant's impairment rating based on his testimony because the medical evidence establishes that claimant suffered at most a 20 percent impairment. The administrative law judge is not bound by any particular standard or formula but 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. *See Pimpinella*, 27 BRBS at 159; *Bachich v. Seatrain Terminals of California, Inc.*, 9 BRBS 184 (1978); *Mazze v. Frank J. Holleran, Inc.*, 9 BRBS 1053 (1978). In the present case, in determining that claimant's injury resulted in a 25 percent impairment of his foot, the administrative law judge found Dr. Cohen's testimony as to claimant's ankle problems at the tibio-fibular joint convincing. Dr. Cohen opined that while claimant's complaints of continued pain and circulatory problems could not be objectively verified, claimant's problems were probably attributable to the site of the fracture at the tibio-fibular joint. Dr. Cohen further opined that a fracture in this area is almost impossible to see accurately on x-ray, and that the fact that this type of fracture would result in the type of symptoms claimant has is documented in the medical literature. While recognizing that Dr. Cohen initially agreed with Dr. Norton's assessment of an eight percent impairment of the foot, the administrative law judge, acting within his discretion, credited Dr. Cohen's explanation for his change in opinion, *i.e.*, that the extent of claimant's pain and impairment became more apparent over time. The administrative law judge also indicated that he found Dr. Norton's report and assessment less convincing than Dr. Cohen's finding of a 20 percent impairment because Dr. Norton was not claimant's treating physician, had not examined claimant personally, and had not given a rating for claimant's circulatory problem. Finally, the administrative law judge found credible claimant's testimony that he suffers from some type of problem in his left great toe which causes it to ache and turn color in cold weather, noting that claimant had returned to work as soon as he was released by Dr. Cohen.

In the present case, the administrative law judge reasonably concluded based on the totality of the record that claimant suffers a 25 percent impairment of his left foot as a result of the work injury. As employer has failed to establish any reversible error made by the administrative law judge in evaluating the conflicting evidence and making credibility determinations, the administrative law judge's award of compensation for a 25 percent impairment of the left foot under the schedule is affirmed. *See Uglesich v. Stevedoring Services of America*, 24 BRBS 180, 183 (1991). In light of our affirmance of the administrative law judge's finding of a 25 percent permanent impairment, we reject employer's argument that the administrative law judge erred in holding it liable for claimant's attorney's fee because claimant succeeded in obtaining additional compensation over that voluntarily paid by employer. 33 U.S.C. §928(b).

Accordingly, the administrative law judge Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge