

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 20-0057

FRANK GARLAND)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
AMERICAN SUGAR REFINING)	
)	DATE ISSUED: 03/23/2020
and)	
)	
ZURICH AMERICAN INSURANCE)	
COMPANY c/o ESIS)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits in Part of Jennifer Whang, Administrative Law Judge, United States Department of Labor.

Jonathan S. Beiser (Beiser Law Firm), Rockville, Maryland, for claimant.

John J. Rabalais and Gabriel E. F. Thompson (Rabalais Unland), Covington, Louisiana, for employer/carrier.

Before: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Awarding Benefits in Part (2018-LHC-00983) of Administrative Law Judge Jennifer Whang rendered on a claim filed pursuant to 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 rational, supported by substantial evidence, and in

accordance with law. 33 U.S.C. §921(b)(3); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant struck his left knee on a bulldozer during the course of his employment for employer on September 21, 2016. He continued working and did not seek treatment until March 5, 2017, when he was diagnosed with left knee effusion and iliotibial band syndrome. CX 6. Claimant twisted his left knee at work climbing a ladder on April 19, 2017; thereafter, he was placed on light duty until July 26, 2017, when he returned to full duty. Claimant sought compensation for temporary disability from April 13, 2017 to July 26, 2017, and scheduled permanent partial disability thereafter.

The administrative law judge found claimant entitled to compensation for temporary disability from April 13 to August 25, 2017, in the amount stipulated by the parties, \$11,837.28. *See* Decision and Order at 3. The administrative law judge denied the claim for scheduled permanent partial disability compensation because claimant did not establish he has any permanent left knee impairment related to his work injuries. *Id.* at 14-16.

On appeal, claimant challenges the denial of permanent partial disability compensation. Employer responds, urging affirmance of the administrative law judge’s decision. Claimant filed a reply brief reiterating the arguments made in its Brief in Support of Petition for Review.

Awards under the schedule, the exclusive remedy for permanent partial disability for parts of the body enumerated therein, *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980), are based on medical ratings of the degree of permanent physical impairment and not on economic factors. *Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915, 32 BRBS 15(CRT) (4th Cir. 1998); *Young v. Newport News Shipbuilding & Dry Dock Co.*, 45 BRBS 35 (2011); *see* 33 U.S.C. §908(c)(2). An administrative law judge is not bound by any particular standard or formula in arriving at an impairment rating and may base her determination under the schedule on credible medical opinions and observations as well as on the claimant’s symptoms and the physical effects of his injury. *White v. Newport News Shipbuilding & Dry Dock Co.*, 633 F.2d 1070, 12 BRBS 598 (4th Cir. 1980); *Cotton v. Army & Air Force Exch. Services*, 34 BRBS 88 (2000); *Pimpinella v. Universal Maritime Services, Inc.*, 27 BRBS 154 (1993).

In support of his claim for permanent partial disability benefits, claimant relied on the April 18, 2018 opinion of Dr. Franchetti¹ that claimant has a 36 percent left knee impairment under the American Medical Association (AMA) *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) (AMA Guides), of which he attributed 26 percent to the April 11, 2017 work injury and 10 percent to pre-existing arthritis. CX 4 at 17. Employer relied on the opinion of Dr. Dvorkin,² who examined claimant on June 20, 2017 and July 20, 2018. EX 4. Dr. Dvorkin opined claimant has pre-existing degenerative arthritis, which was manifest on a 2011 x-ray taken after claimant sustained a left knee injury in 2010, which worsened from 2011 to 2017. *Id.* at 3, 5-6. Dr. Dvorkin also opined claimant has no permanent impairment from his work-related knee injuries in September 2016 and April 2017, although he “probably” has a 10 percent permanent impairment due to his pre-existing left knee degenerative arthritis. *Id.* at 3, 5-6; EX 11 at 29. Dr. Dvorkin stated that Dr. Franchetti’s rating reflects only claimant’s pre-existing arthritis. EX 4 at 6.

The administrative law judge concluded “[c]laimant has not established permanent disability to his left knee.” Decision and Order at 15. She declined to credit Dr. Franchetti’s opinion that claimant has a 36 percent impairment because it is inconsistent with claimant’s actual functioning and the opinion of Dr. Liu, claimant’s treating physician.³ *Id.* The administrative law judge found Dr. Dvorkin’s opinion “deserving of greater weight than Dr. Franchetti’s opinion” as it is more consistent with claimant’s actual functioning and Dr. Lui’s opinion. *Id.* In this respect, the administrative law judge found Dr. Lui did not restrict claimant from returning to full duty when employer no longer

¹ Dr. Franchetti is an associate of claimant’s treating physician, Dr. Lui. Dr. Franchetti, who is Board-certified in orthopedic surgery, examined claimant at his request in order to determine an impairment rating. CXs 4 at 17; 8 at 5.

² Dr. Dvorkin, who is Board-certified in orthopedic surgery, examined claimant at employer’s behest. EXs 4, 5.

³ The administrative law judge also stated that Dr. Franchetti provided “a bare assertion” of the degree of claimant’s impairment with a “general reference” to the AMA Guides. Decision and Order at 15. We agree with claimant that this is not an accurate assessment of Dr. Franchetti’s opinion, as he indicated in his report each factor he considered in calculating the rating: 10 percent for loss of motion, 20 percent based on x-ray evidence, and 6 percent for left thigh atrophy. CX 4 at 16-17. At his deposition, Dr. Franchetti reiterated his objective findings and the corresponding degrees of impairment under the AMA Guides. CX 8 at 16-20. Nonetheless, any error in this respect is harmless as the administrative law judge gave greater weight to Dr. Dvorkin’s opinion. *See infra.*

offered light duty, and claimant in fact returned to full duty and is not undergoing any left knee treatment. CX 4 at 12-14.

We reject claimant's contention that the administrative law judge erred by not relying on Dr. Franchetti's impairment rating. It is claimant's burden to show that at least part of his left knee impairment is related to his work-related injuries. *Ceres Marine Terminals, Inc. v. Green*, 656 F.3d 235, 45 BRBS 67(CRT) (4th Cir. 2011); 33 U.S.C. §902(10). The administrative law judge permissibly found Dr. Dvorkin's opinion that claimant does not have any work-related impairment more credible because his treating physician placed no restrictions on his return to work and he was able to return to full-time work duties similar to those that he previously performed. Decision and Order at 15. The administrative law judge is entitled to determine the weight to be accorded to medical opinions; the Board may not reweigh the evidence or draw other inferences from the record, but must affirm the administrative law judge's findings that are supported by substantial evidence of record. *Pittman Mech. Contractors, Inc. v. Director, OWCP [Simonds]*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hess]*, 681 F.2d 938, 14 BRBS 1004 (4th Cir. 1982). As the administrative law judge's weighing of the evidence is rational and within her discretion, and her finding is supported by substantial evidence, we affirm her finding that claimant did not establish he has a work-related permanent impairment as a result of his left knee injury. *See generally White*, 633 F.2d 1070, 12 BRBS 598; *Pimpinella*, 27 BRBS 154. Thus, we affirm the denial of permanent partial disability benefits. *Green*, 656 F.3d 235, 45 BRBS 67(CRT).

Accordingly, we affirm the administrative law judge's Decision and Order - Awarding Benefits in Part.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge