



BRB No. 14-0214

JOSEPH PISATURO)
(Deceased))

Claimant-Respondent)

v.)

LOGISTEC, INCORPORATED)

and)

DATE ISSUED: Oct. 14, 2015

SIGNAL MUTUAL INDEMNITY)
ASSOCIATION)

Employer/Carrier-)
Petitioners)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Respondent)

DECISION and ORDER

Appeal of the Decision and Order Granting Claimant's Petition for Reconsideration and Amending Prior Decision and Order of Timothy J. McGrath, Administrative Law Judge, United States Department of Labor.

David A. Kelly (Montstream & May, L.L.P.), Glastonbury, Connecticut, for claimant.

Peter D. Quay (Law Office of Peter D. Quay, LLC), Taftville, Connecticut, for employer/carrier.

MacKenzie Fillow (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE,
Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Claimant's Petition for Reconsideration and Amending Prior Decision and Order (2013-LHC-01101) of Administrative Law Judge Timothy J. McGrath 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).

On October 31, 2005, Joseph Pisaturo (hereinafter claimant), a longshoreman, fell and struck the left side of his face, fracturing his left eye socket, also referred to as his left orbit, and nose; the injury displaced claimant's left eyeball within the orbit.¹ *See* JX 1; August 27, 2008 Decision and Order at 2. Claimant underwent three surgical procedures for the injuries sustained in his October 31, 2005 accident: 1) the repair of the left orbital fracture, on January 20, 2006; 2) the repair of his nasal fracture, on May 12, 2006; and 3) a left inferior rectus recession, also referred to as strabismus surgery, to realign claimant's left eye in an effort to correct the diplopia, or double vision, resulting from the left orbital fracture, on February 27, 2007. *See* CX 4 at 23-24, 31-32, 37-38, 41-43, 80, 92-94. After claimant's surgeries, he was left with some residual diplopia, which was his only permanent visual impairment, and he sought benefits under the Act.² In support of

¹ Claimant died of unrelated causes on June 11, 2013, while the case was pending before the Office of Administrative Law Judges. *See* ALJ EXs 3, 4; October 24, 2013 Decision and Order at 2 n.1. Claimant's death does not affect the award in this case. Claimant's estate is entitled to benefits that accrued during his lifetime and, pursuant to Section 8(d) of the Act, 33 U.S.C. §908(d), any unaccrued scheduled benefits would be payable to statutory survivors or, if there are no statutory survivors, to the Special Fund. *Clemon v. ADDSCO Industries, Inc.*, 28 BRBS 104 (1994); *see also M.M. [McKenzie] v. Universal Maritime APM Terminals*, 42 BRBS 54 (2008).

his claim for scheduled permanent partial disability benefits under Section 8(c)(5), (19) of the Act, 33 U.S.C. §908(c)(5), (19), claimant submitted the opinion of Dr. Bacal, his treating ophthalmologist, that as a result of the residual diplopia caused by claimant's work injury, claimant "is visually disabled approximately 30%." CX 1 at 1.³ Employer, in response, submitted the opinion of Dr. Orlin, an ophthalmologist, who, after reviewing claimant's medical records on behalf of employer, opined that claimant's diplopia resulted in a 7.5 percent impairment of the visual system pursuant to the guidelines set

² Employer voluntarily paid claimant temporary total disability benefits for various periods following his October 31, 2005 injury. *See* JX 1; October 24, 2013 Decision and Order at 2; August 27, 2008 Decision and Order at 2. Claimant returned to work for employer following his injury, although his injury caused some absences, and worked there until the facility closed; he subsequently worked elsewhere. *Id.* In a Decision and Order issued on August 27, 2008, Judge Geraghty determined claimant's average weekly wage and awarded claimant temporary total disability benefits for various periods between January 20, 2006 and April 22, 2007.

Subsequently, the parties stipulated that claimant reached maximum medical improvement on October 25, 2012. *See* JX 1; October 24, 2013 Decision and Order at 2. On March 20, 2013, employer made an advance payment of \$8,868.62 toward scheduled permanent partial disability benefits for a 7.5 percent impairment of claimant's left eye. JX 1. The case was referred for a hearing regarding the extent of the impairment to claimant's left eye.

Claimant also sought an award for disfigurement pursuant to Section 8(c)(20) of the Act, 33 U.S.C. §908(c)(20), and employer claimed entitlement to a credit under Section 3(e) of the Act, 33 U.S.C. §903(e), for the disfigurement award paid to claimant under the Connecticut Workers' Compensation Act. In his March 13, 2014 Decision and Order, the administrative law judge found claimant entitled to the maximum award of \$7,500 for disfigurement under Section 8(c)(20), and found employer entitled to a Section 3(e) credit for the net amount of \$8,329.70 paid for disfigurement under the state statute. *See* March 13, 2014 Decision and Order at 5; JX 1; EX 3. The disfigurement award is not at issue in the appeal before the Board.

³ In a report dated October 25, 2012, Dr. Bacal stated that following claimant's orbital fracture repair and strabismus surgeries, he was left with residual diplopia which occurs when he looks up or down, and which "limits his single binocular field of vision to approximately 60 degrees vertically." CX 1 at 1. Dr. Bacal concluded that claimant's diplopia caused an impairment of approximately 30 percent. *Id.*

forth in the American Medical Association *Guides to the Evaluation of Permanent Impairment* (6th ed. 2007) (*AMA Guides*).⁴ EXs 5, 6; CX 3.

In his initial Decision and Order issued on October 24, 2013, the administrative law judge found claimant entitled to a 7.5 percent permanent partial disability to his left eye pursuant to Section 8(c)(5) of the Act, 33 U.S.C. §908(c)(5), on the basis of Dr. Orlin's impairment rating. The administrative law judge rejected Dr. Bacal's opinion as unsubstantiated, observing that, in contrast to Dr. Orlin who provided a thorough explanation of his impairment rating, Dr. Bacal did not explain how his impairment rating was calculated.

Claimant filed a timely motion for reconsideration. In a Decision and Order issued on December 20, 2013, the administrative law judge granted reconsideration and amended his prior decision. The administrative law judge agreed with claimant that Dr. Orlin's 7.5 percent impairment rating, made pursuant to the *AMA Guides*, represented a rating of the impairment to claimant's binocular vision, or visual system. The administrative law judge found that the Act and the *AMA Guides* are incongruent in that Section 8(c)(5) of the Act provides compensation for loss of use of one eye whereas the *AMA Guides* are premised on impairment to the overall visual system. The administrative law judge then devised a conversion factor in order to reconcile the incongruity that he found existed between the *AMA Guides* and the Act, based on there being a 5:1 ratio between disability ratings for one eye under the Act and ratings for

⁴ Specifically, Dr. Orlin reported that the measurements of claimant's visual acuity and visual field, without consideration of his diplopia, would result in a zero percent impairment rating according to the *AMA Guides*. EX 6 at 37; *see also* CX 3 at 19-21, 23. Dr. Orlin stated that the *AMA Guides* allow an adjustment to the impairment rating for visual deficits, such as diplopia, and further explained that the maximum adjustment is 15 points unless the diplopia is so severe as to require the occlusion of one eye, in which case the impairment rating would be 20 percent. EX 6 at 37; CX 3 at 21, 27. Dr. Orlin determined that because claimant did not require occlusion of one eye and because the measurable aspects of claimant's diplopia, i.e., his ocular deviations, were not very significant, it was appropriate to assign claimant 50 percent of the maximum 15-point adjustment allowed under the *AMA Guides*, thus resulting in a 7.5 percent impairment rating. EX 6 at 37; CX 3 at 22-25, 29. Dr. Orlin clarified on deposition that his 7.5 percent impairment rating applies to claimant's visual system, or both eyes; he added that, consistent with the requirements of the *AMA Guides*, he rated the visual system and did not provide a single-eye rating. CX 3 at 26-27.

impairment to the visual system under the *AMA Guides*.⁵ Applying this 5:1 ratio to claimant's case, the administrative law judge determined that the 7.5 percent impairment of claimant's visual system found by Dr. Orlin pursuant to the *AMA Guides* equates to a 37.5 percent impairment of the left eye under Section 8(c)(5) of the Act.⁶ *Id.* The administrative law judge accordingly amended his prior decision to provide that claimant is entitled to permanent partial disability benefits for a 37.5 percent impairment to his left eye.

In response to employer's motion to vacate, the administrative law judge, in an order issued on December 30, 2013, vacated his December 20, 2013 decision and directed the parties to file briefs regarding the proper methodology for calculating the degree of visual impairment to one eye in this case. Subsequent to the filing of the parties' briefs addressing this issue, the administrative law judge issued a Decision and Order on March 13, 2014, in which he reinstated his December 20, 2013 decision. In this regard, the administrative law judge affirmed his previous finding that a 37.5 percent impairment to claimant's left eye best reflected the extent of the impairment caused by the work-related injury to that eye. Employer appeals this decision.

On appeal, employer contends that the administrative law judge exceeded his authority in applying a conversion factor to Dr. Orlin's impairment rating to award claimant compensation for a 37.5 percent impairment to the left eye. Claimant responds that because Dr. Orlin's 7.5 percent rating pertained to claimant's visual system as opposed to his left eye only, the administrative law judge's finding that claimant has a 37.5 percent impairment of the left eye is reasonable and represents an appropriate exercise of the administrative law judge's discretion to interpret and apply the Act to the facts of this case. Employer filed a reply to claimant's response brief, disputing claimant's interpretation of Dr. Orlin's opinion, and contending that Dr. Orlin was

⁵ The administrative law judge derived this 5:1 ratio by considering a hypothetical individual whose extreme diplopia required the continuous occlusion of one eye. In such a case, the *AMA Guides* would rate the impairment of the visual system at 20 percent, *see* CX 3 at 21; *AMA Guides* at 306, whereas, under Section 8(c)(5) of the Act, continuous occlusion of one eye would represent the legal equivalent of the total loss of that eye, i.e., a 100 percent impairment of the eye. December 20, 2013 Decision and Order 3; *see also* March 13, 2014 Decision and Order at 4. Extrapolating from this hypothetical, the administrative law judge found a 5:1 ratio between the Act's impairment rating for loss of use of one eye and the *AMA Guides*' visual system impairment rating for diplopia involving continuous occlusion. December 20, 2013 Decision and Order at 4; *see also* March 13, 2014 Decision and Order at 5.

⁶ The administrative law judge noted that his findings were limited to the particular facts of this case in which claimant had only a visual system disorder, diplopia, resulting from a work-related injury to only one eye.

addressing impairment in one eye “as his summary of the worst case scenario only related to the one eye that [was] affected by the injury.” Emp. Reply Br. at 2. In response to the Board’s March 11, 2015 Order, the Director, Office of Workers’ Compensation Programs (the Director), filed a brief addressing the issue of the determination of impairment where claimant’s work-related injury to one eye resulted in impairment to his visual system.⁷ The Director submits that the administrative law judge correctly found this case governed by Section 8(c)(5), (19) of the Act. The Director further contends, however, that the administrative law judge erred by devising a conversion factor to increase Dr. Orlin’s impairment rating and he urges the Board to remand the case for the administrative law judge to reconsider the evidence regarding the extent of impairment to claimant’s left eye. Employer replied to the Director’s brief, reiterating its contention that claimant is limited to an award for a 7.5 percent impairment pursuant to Section 8(c)(5), (19).

An award of permanent partial disability benefits for a scheduled disability, as set forth in Section 8(c)(1-20) of the Act, 33 U.S.C. §908(c)(1-20), is predicated solely on the existence of a permanent anatomical impairment to a member listed in the schedule, and economic loss is not considered in determining an impairment rating under the schedule. *Soliman v. Global Terminal & Container Service, Inc.*, 47 BRBS 1, 2 (2013); *see also Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915, 32 BRBS 15(CRT) (4th Cir. 1998). As recognized by the administrative law judge and the parties, in a case such as this one, in which the claimant’s work-related injury resulted in damage to one eye, the scheduled award is properly based on the extent of impairment to the injured eye. *Soliman*, 47 BRBS at 4; *see also National Steel & Shipbuilding Co. v. Director, OWCP [McGregor]*, 703 F.2d 417, 15 BRBS 146(CRT) (9th Cir. 1983), *aff’g* 8 BRBS 48 (1978).

⁷ By Order dated March 11, 2015, the Board requested that the Director file a brief addressing the following issues: (1) whether Section 8(c)(5) or Section 8(c)(16) governs the award of benefits in this case, *see n. 10, infra*; and (2) whether the administrative law judge correctly determined that use of a conversion factor was necessary in this case to resolve an incongruity between an impairment rating calculated under the *AMA Guides* and an impairment rating contemplated by the Act.

In this case, the administrative law judge correctly determined, consistent with the parties' position, that impairment due to claimant's diplopia is properly compensated under Section 8(c)(5), in conjunction with Section 8(c)(19).⁸ The Board has held in this regard that where an injury to an eye results in visual deficits other than a loss of visual acuity,⁹ an award properly rests under Section 8(c)(5), (19).¹⁰ *Banks v. Moses-Ecco Co.*,

⁸ Section 8(c)(5) provides compensation for "Eye lost" of "one hundred and sixty weeks' compensation." 33 U.S.C. §908(c)(5). Compensation for partial loss of use is based on the degree of permanent impairment proportionately applied to the number of weeks in the schedule. 33 U.S.C. §908(c)(19); see *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980); *Boone v. Newport News Shipbuilding & Dock Co.*, 37 BRBS 1 (2003).

⁹ Visual acuity refers to the ability of the eye to accurately detect objects, such as the letters on an eye chart, at both near and far distances. See *Banks v. Moses-Ecco Co., Inc.*, 8 BRBS 117, 121 n.1 (1978). In this case, claimant had no loss of visual acuity.

¹⁰ The Board requested that the Director address the issue of whether this claim is governed by Section 8(c)(5) or by Section 8(c)(16) of the Act, 33 U.S.C. §908(c)(5), (16). Section 8(c)(16) provides compensation for loss of "binocular vision or per centum of vision." This section provides that "compensation for loss of binocular vision or for 80 percentum or more of the vision of an eye shall be the same for loss of the eye." Thus, the loss of 80 percent or more of the uncorrected vision in one eye represents the legal equivalent of the total loss of that eye, and the claimant is entitled to 160 weeks of compensation pursuant to Section 8(c)(5). *McGregor*, 703 F.2d 417, 15 BRBS 146(CRT); *Soliman*, 47 BRBS at 4; see also *Gulf Stevedore Corp. v. Hollis*, 298 F.Supp. 426 (S.D.Tex. 1969), *aff'd*, 427 F.2d 160 (5th Cir.), *cert. denied*, 400 U.S. 831 (1970).

The Director interprets Section 8(c)(16) as applying only to cases involving a total loss of binocular vision or a minimum of 80 percent loss of vision in one eye, which represents the legal equivalent of total loss of vision in one eye. Thus, according to the Director, Section 8(c)(16) does not cover cases, like this one, involving a partial loss of binocular vision. The Director's position is that Section 8(c)(16) sets forth visual impairments that represent the legal equivalent of the total loss of one eye for purposes of compensability under Section 8(c)(5). Thus, in the Director's view, Section 8(c)(16) operates as a supplement to Section 8(c)(5), and does not create an independent scheduled injury. We find the Director's interpretation of the operation of Section 8(c)(16) to be reasonable. See generally *Universal Maritime Service Corp. v. Spitalieri*, 226 F.3d 167, 172, 34 BRBS 85, 88(CRT) (2^d Cir. 2000). We therefore agree with the Director that as claimant has neither a total loss of binocular vision nor a minimum of 80 percent loss of vision of one eye, Section 8(c)(16) is inapplicable to his claim.

Inc., 8 BRBS 117 (1978). Thus, in this case where the work-related injury to claimant's left eye resulted in diplopia, his claim was properly found to be compensable under those provisions. *Id.* Moreover, on the facts of this case, we agree with the Director that, in evaluating the degree of loss of use of the injured eye under Section 8(c)(5), (19), the effects of the left eye injury on claimant's overall visual system provide the basis for the compensation award. The injury to claimant's left eye impaired only the ability of that eye to work in tandem with the other eye; the injury did not result in any damage or impairment to the left eye in isolation.¹¹ Thus, it is appropriate to compensate the impairment to the visual system as the injury to the left eye.

In assessing the extent of claimant's disability in a scheduled injury case other than one involving hearing loss, an administrative law judge is not bound by any particular standard or formula. *See, e.g., King v. Director, OWCP*, 904 F.2d 17, 23 BRBS 85(CRT) (9th Cir. 1990); *Cotton v. Army & Air Force Exch. Services*, 34 BRBS 88 (2000); *Pimpinella v. Universal Maritime Services, Inc.*, 27 BRBS 154 (1993). Although the Act does not require impairment ratings to be made pursuant to the *AMA Guides* in this type of case, the administrative law judge may, nevertheless, rely on medical opinions that rate a claimant's impairment under these criteria, as it is a standard medical reference. *See Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195 (2001); *Jones v. I.T.O. Corp. of Baltimore*, 9 BRBS 583 (1979). In assigning error to the administrative law judge's evaluation of the medical opinions regarding the extent of claimant's visual impairment, the Director contends that, to the extent that Dr. Bacal's opinion was rejected for its failure to rely on the *AMA Guides*, that rejection was improper because an *AMA Guides* rating is not required in this case. *See* 33 U.S.C. §§902(10), 908(c)(13)(E), (23); *Cotton*, 34 BRBS 88 (the Act requires *AMA Guides* rating only in hearing loss and retiree cases). Employer replies that the primary reason for the administrative law judge's rejection of Dr. Bacal's opinion was the doctor's failure to clearly explain how he derived his impairment rating. Employer points to the administrative law judge's evaluation of the opinions of Drs. Orlin and Bacal in his initial October 24, 2013 Decision and Order, in this regard. *See* October 24, 2013 Decision and Order at 5-6.

We agree with employer that this portion of the administrative law judge's opinion establishes that the administrative law judge credited the opinion of Dr. Orlin over that of Dr. Bacal on the basis that Dr. Orlin provided a thorough explanation of the process by

¹¹ Diplopia is "the perception of two images of a single object." *Dorland's Illustrated Medical Dictionary* 525 (32^d ed.); *see* Dir. Br. at 2. Dr. Orlin explained that misalignment of the eyes can result in the brain's inability to fuse the two disparate images from the person's two eyes into a single image. *See* CX 3 at 10-11. In this case, although claimant's injury did not impair the injured eye's visual ability in isolation, i.e., the visual acuity and field of vision of the left eye, it impaired the ability of the eye to focus on objects in tandem with the right eye and, thus, to allow the brain to visualize a single image.

which he arrived at his impairment rating whereas Dr. Bacal provided no such analysis. *See id.* at 6. The administrative law judge acted within his discretion as the trier-of-fact in rejecting Dr. Bacal's impairment rating on the ground that he failed to provide a sufficient explanation of the basis for his impairment rating. *See Cotton*, 34 BRBS at 90; *Mazze v. Frank J. Holleran, Inc.*, 9 BRBS 1053, 1054 (1978). Determinations regarding the weight accorded to medical evidence are within the province of the administrative law judge, and the Board is not empowered to reweigh the evidence or to disturb the administrative law judge's rational credibility determinations. *See, e.g., Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT) (2^d Cir. 1993). Any error by the administrative law judge in rejecting Dr. Bacal's opinion on the basis that it is unclear whether his impairment rating was made pursuant to the *AMA Guides* is harmless, as the administrative law judge provided a valid alternate reason for rejecting the doctor's impairment rating. We therefore affirm the administrative law judge's determination to rely upon the opinion of Dr. Orlin, rather than that of Dr. Bacal, in determining the extent of claimant's left eye impairment.

We additionally agree with employer and the Director that the administrative law judge impermissibly substituted his own judgment for that of Dr. Orlin by devising a conversion factor to adjust Dr. Orlin's impairment rating. *See generally Pietrunti v. Director, OWCP*, 119 F.3d 1035, 1042, 31 BRBS 84, 89(CRT) (2^d Cir. 1997). First, as discussed above, it was not necessary to devise an impairment rating for claimant's left eye alone, as, on the facts of this case, the impairment to claimant's visual system resulting from the left eye injury may be compensated under Section 8(c)(5); thus, there is no incongruity between the Act and the *AMA Guides*. Moreover, as asserted by the Director, the administrative law judge's conversion of Dr. Orlin's rating of the impairment of claimant's visual system to a rating for partial loss of use of one eye "although facially appealing, is not based on any record evidence." Dir. Brief at 11. In this regard, we agree with the Director that the administrative law judge's "conversion factor assumes that an impairment rating for partial diplopia bears a direct relationship to a rating of loss of an eye, a conclusion without medical or scientific support in the record."¹² *See id.* at 12. Thus, there is not substantial evidence of record that provides a basis for the administrative law judge's conclusion that claimant is entitled to compensation for a 37.5 percent impairment to the left eye and we are unable to affirm that award.

It is claimant's burden to establish the extent of his disability. *See generally Pietrunti*, 119 F.3d at 1041, 31 BRBS at 88(CRT). Here, the only credited medical opinion regarding the extent of claimant's impairment is Dr. Orlin's assessment that claimant has a 7.5 percent impairment of the visual system. On the unique facts presented by this case, where the only effect of the injury to claimant's left eye was on

¹² That is, neither the *AMA Guides* nor any doctor's opinion provides a basis for the use of a conversion factor.

his overall visual system, and where the sole credited impairment rating is based on the impairment to claimant's visual system, as opposed to the one injured eye, claimant has not met his burden of producing credible medical evidence that the loss of use of his left eye is greater than the 7.5 percent impairment assessed by Dr. Orlin. We, therefore, modify the administrative law judge's decision to reflect claimant's entitlement to permanent partial disability benefits under Section 8(c)(5), (19) for a 7.5 percent impairment to his left eye, rather than for the 37.5 percent impairment to the left eye awarded by the administrative law judge. Thus, the administrative law judge's decision is modified to reflect claimant's entitlement to 12 weeks (.075 x 160 weeks) of benefits under the schedule at the weekly compensation rate of \$808.20, subject to the Section 3(e), 33 U.S.C. §903(e), credit to which the administrative law judge found employer entitled.¹³

Accordingly, the administrative law judge's Decision and Order Granting Claimant's Petition for Reconsideration and Awarding Prior Decision and Order is modified to reflect claimant's entitlement to 12 weeks of benefits for a 7.5 percent impairment to the left eye. In all other respects, the administrative law judge's decision is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

¹³ Employer also is entitled to a credit for any benefits it paid under the Act, pursuant to Section 14(j), 33 U.S.C. §914(j).