BRB No. 01-0579

BERT JOHNSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: April 11, 2002
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

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

Jonathan H. Walker (Mason, Cowardin & Mason, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (1999-LHC-0181) of Administrative Law Judge Fletcher E. Campbell, Jr., 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 is the second time this case has come before the Board. To briefly reiterate, in 1989, claimant was diagnosed with brachial plexopathy, a nerve condition, in his upper right arm. He also had residual decreased range of motion of his right thumb due to a previous injury. In 1992, claimant developed carpal tunnel syndrome in both wrists, and he filed a

claim for compensation. Employer stipulated that the carpal tunnel condition in the left arm was work-related, but it disputed the work-relatedness of the disability in the right arm, asserting it was due to claimant's pre-existing conditions. Nevertheless, employer paid temporary total disability benefits and all medical benefits, and it paid permanent partial disability benefits pursuant to Section 8(c)(1), 33 U.S.C. §908(c)(1), for a 10 percent impairment to each arm. The administrative law judge found that claimant's right arm disability was related to his employment. Decision and Order at 7. Crediting the opinion of claimant's expert, Dr. Wardell, over the opinions of three other doctors, the administrative law judge awarded claimant benefits for a 50 percent impairment to his right arm. *Id.* at 9.

Employer appealed, challenging the determination that claimant's right arm disability was caused by his employment and the award of benefits for a 50 percent impairment to the right arm. The Board affirmed the finding of a causal relationship but vacated the award of benefits, holding that the administrative law judge's reasons for crediting Dr. Wardell's opinion over the opinions of other doctors were irrational.[1] Specifically, the Board held that, contrary to the administrative law judge's statements, Dr. Wardell's opinion did not attribute any impairment to claimant's pre-existing condition and employer's expert, Dr. Gwathmey, did examine claimant. Because the Board found the administrative law judge's reasoning to be flawed, it remanded the case to him for further consideration of claimant's degree of right arm impairment. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 00-292 (Nov. 17, 2000).

On remand, the administrative law judge cited two primary reasons for giving Dr. Wardell's opinion greater weight than the opinions of either Dr. Ross or Dr. Gwathmey. The administrative law judge inferred from circumstantial evidence that Dr. Wardell considered

[1]The administrative law judge gave less weight to the opinions of Drs. Ross and Gwathmey because they were both asked to rate claimant with respect to his carpal tunnel syndrome only. He gave less weight to Dr. Griffith's opinion because Dr. Griffith admitted confusion with the rating system. He credited Dr. Wardell's opinion, the only one remaining in the record, and found that Dr. Wardell applied the aggravation rule and assigned ratings for both the pre-existing condition and the work-related carpal tunnel syndrome in determining the extent of claimant's disability. Decision and Order at 8.

claimant's pre-existing condition in his assessment, finding that Dr. Gwathmey was told to assess only the impairment from claimant's carpal tunnel syndrome, and he concluded that Dr. Wardell's report was well-reasoned and better documented than the other reports. Decision and Order on Remand at 3-4. Consequently, he determined, by "a bare preponderance of the evidence[,]" claimant is entitled to benefits for an impairment of 50 percent to the right arm. *Id.* at 4. Employer appeals this decision, and claimant responds, urging affirmance.

Employer first challenges the administrative law judge's statement that neither party submitted new evidence on remand with regard to the issue of the extent of claimant's right arm disability. Employer asserts that the administrative law judge did not give the parties the opportunity to submit new evidence on remand, but that, in any event, it submitted information from Dr. Gwathmey with its motion for reconsideration of the administrative law judge's first decision which the administrative law judge did not consider. We reject employer's assertions. In general, it is not necessary for the administrative law judge to reopen the record on remand for the admission of additional evidence, and he has wide discretion in the manner in which proceedings are conducted. *See Dionisopoulous v. Pete Pappas & Sons*, 16 BRBS 93 (1984); *Swain v. Bath Iron Works Corp.*, 14 BRBS 657 (1982). Accordingly, the administrative law judge did not err by not reopening the record on remand. To the extent employer argues that the administrative law judge erred in failing to address the additional information provided by Dr. Gwathmey which it submitted with its motion for reconsideration of the original decision, we hold that employer waived that issue by not appealing it in employer's first appeal to the Board. 20 C.F.R. §802.205(c).

Employer also contends the administrative law judge erred in giving greater weight to Dr. Wardell's opinion over that of Dr. Gwathmey in determining the extent of claimant's right arm disability.[2] Employer argues that Dr. Gwathmey's opinion is comparable with Dr. Wardell's findings based on the criteria highlighted by the administrative law judge and should not be given less weight. Rather, employer contends Dr. Gwathmey's opinion should be given greater weight because the administrative law judge's reasons for accepting Dr. Wardell's opinion are irrational. Therefore, employer asks the Board to reverse the administrative law judge's decision and hold that claimant has a 10 percent impairment to his right arm as a matter of law. We reject employer's arguments.

[2]Employer does not dispute the administrative law judge's weighing of the evidence as it pertains to the opinions of Drs. Griffith and Ross.

It is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses, including doctors, and may draw his own conclusions from the evidence. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *see also, e.g., Mazze v. Frank J. Holleran, Inc.*, 9 BRBS 1053 (1978). Additionally, the Board may not reweigh the evidence, but only may assess whether there is substantial evidence to support the administrative law judge's decision. *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, No. 80-1870 (D.C. Cir. 1981). In this case, the administrative law judge accepted and gave determinative weight to the opinion of Dr. Wardell. He specifically stated: "Dr. Wardell gave a better reasoned and documented opinion than did his two colleagues." Decision and Order on Remand at 4. He then cited to Dr. Wardell's use of the Jamar dynamometer for testing grip strength and to his use of certain tables to compute an impairment rating. While Dr. Gwathmey mentioned claimant's grip strengths and concluded that claimant has a 10 percent impairment of the right arm, Emp. Ex. 22, the administrative law judge correctly stated that Dr. Gwathmey did not identify which tests he conducted or how he computed the impairment rating. Decision and Order on Remand at 4. The administrative law judge in this case weighed the relevant medical evidence and it is within his discretionary authority to do so.[3] *See Pimpinella v. Universal Maritime Service, Inc.*, 27 BRBS 154 (1993). As Dr. Wardell's opinion supports the administrative law judge's award, we affirm the award of benefits for a 50 percent impairment to claimant's right arm.[4]

[3]Although it is unnecessary to use the American Medical Association *Guides to the Evaluation of Permanent Impairment* to calculate a claimant's impairment rating under the schedule unless the case involves hearing loss, 33 U.S.C. §908(c)(13)(E); *Pimpinella v. Universal Maritime Service, Inc.*, 27 BRBS 154, 159 n.4 (1993), the administrative law judge's decision to credit the doctor who clearly used those *Guides* is reasonable.

[4]In light of our determination that the administrative law judge's reason for giving greater weight to Dr. Wardell's opinion is valid, we need not address employer's assertion that the remaining reason, *i.e.*, the administrative law judge's inference from circumstantial

evidence that Dr. Wardell considered claimant's pre-existing condition in his impairment rating, is invalid, as that was not his only reason for crediting Dr. Wardell's opinion.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge