BRB No. 01-0921

PETER LUBERTO	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	DATE ISSUED: August 26, 2002
	)	
Self-Insured Employer-Respondent	)	
	)	
PEQUOT RIVER SHIPWORKS	)	
	)	
and	)	
	)	
ESIS, INCORPORATED	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Mark Oberlatz (Murphy & Beane), New London, Connecticut, for Electric Boat Corporation.

Lucas D. Strunk (Pomeranz, Drayton & Stabnick), Glastonbury, Connecticut, for Pequot River Shipworks and Esis, Incorporated.

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

PER CURIAM:

Pequot River Shipworks appeals the Decision and Order Awarding Benefits (2000-LHC-0610, 0611) of Administrative Law Judge David W. DiNardi 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 was employed as a shipfitter for Electric Boat Corporation (Electric Boat) from 1976 until he was laid off on August 2, 1996. At that time, claimant began to work as a fabricator for Pequot River Shipworks (PRS), where he worked until he was laid off on June 9, 1999, due to downsizing. At the time of the hearing, claimant was employed as a tractor-trailer driver. Claimant began to experience bilateral hand problems in late 1995, and, on May 24, 1996, sought medical treatment at Electric Boat's Yard Hospital, where he was prescribed Motrin, told to wear a wrist brace at night and prohibited from using vibratory tools for two weeks ending on June 7, 1996. Claimant testified that he continued to have difficulty with his hands throughout his employment, and he filed a claim for permanent partial disability benefits under the Act against Electric Boat on June 14, 1998, Cl. Ex. 1, and against PRS on July 1, 1999. Cl. Ex. 2.

In his Decision and Order, the administrative law judge found that claimant suffered a work-related injury, namely hand/arm vibratory syndrome, that claimant reached maximum medical improvement on December 21, 1998, and that claimant suffers from a 21 percent permanent partial disability to each hand. In addition, the administrative law judge found that claimant is entitled to reasonable and necessary medical care. The administrative law judge also found that claimant's work at PRS aggravated, accelerated and exacerbated his pre-existing condition, and therefore, PRS is liable for claimant's compensation and medical benefits.

On appeal, PRS contends that the administrative law judge erred in not apportioning liability for the scheduled loss over the two claimed dates of injury. In addition, PRS contends that the administrative law judge erred in finding a 21 percent bilateral hand impairment. Electric Boat responds, urging affirmance of the administrative law judge's finding that PRS is liable for the total amount of claimant's compensation and medical benefits. However, Electric Boat agrees with PRS's contention that the administrative law judge erred in finding that claimant suffers from a 21 percent impairment of both hands. Claimant has not responded to this appeal.

Initially, PRS contends that the administrative law judge erred in determining that it is the employer responsible for the payment of benefits. Specifically, PRS asserts that the administrative law judge erred in failing to apportion liability for the two claimed injuries, and thus that it is only liable for the change in the extent of claimant's disability from August 1996 to June 1999.[1] We disagree.

[1]Initially, we reject employer's contention that there is an "identifiable earlier date of injury." Although claimant began experiencing symptoms while employed at Electric Boat,

In support of his conclusion that PRS is responsible for the payment of claimant's benefits, the administrative law judge relied on the decision of the United States Court of Appeals for the Second Circuit in *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955). In *Cardillo*, the court held that the responsible employer in cases involving the potential liability of multiple employers in occupational disease cases is the "employer during the last employment in which the claimant was exposed to the injurious stimuli prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment." *Id*. at 145. The Board has consistently followed the *Cardillo* rule in allocating full liability to the employer during the last employment in which the claimant was exposed to injurious stimuli prior to the date on which he was, or should have been, aware of the relationship between his disability, disease and employment. *See Justice v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 97 (2000); *see also Stilley v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 224 (2000), *aff'd*, 243 F.3d 179, 35 BRBS 12(CRT)(4th Cir. 2001); *Flanagan v. McAllister Brothers, Inc.*, 33 BRBS 209 (1999). Moreover, the administrative law judge found that whether claimant's hand condition is considered an occupational disease or a repetitive traumatic injury in the instant case, the result would be the same. *See Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991)(if claimant's employment aggravates, accelerates or combines with an earlier injury, the employer at that time is responsible for the payment of benefits for claimant's entire disability); *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986).

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he was not diagnosed with a ratable impairment at that time and was released for regular duties after treatment. Therefore, claimant's impairment was not "quantified" at the time he left Electric Boat's employment.

We reject PRS's argument that benefits should be apportioned. Regardless of whether claimant's injury is characterized as a occupational disease, neither the *Cardillo* test nor that in *Foundation Constructors* supports apportionment of claimant's disability among his employers. Moreover, application of either test leads to affirmance of the administrative law judge's conclusion that PRS is wholly liable for benefits here. Initially, substantial evidence supports the conclusion that claimant was not aware of the relationship between his hand condition, disability and employment until he was initially examined by Dr. Browning in 1998, at which time he was employed by PRS. Although claimant may have suffered symptoms during his employment with Electric Boat, the administrative law judge found that claimant's work at PRS was essentially the same as that at Electric Boat. Thus, claimant continued to be exposed to injurious working conditions, and his last exposure after awareness occurred while in PRS's employ. PRS is thus liable under *Cardillo*. Relevant to the test of *Foundation Constructors,* there is no evidence that claimant received an impairment rating for his hands prior to 1998. Moreover, the physicians of record agree that while claimant's hand condition dates back to his employment at Electric Boat, his duties at PRS aggravated or exacerbated his condition.[2] Electric Boat Exs. 4, 5, 7; PRS Ex. 4. The administrative law judge also found it dispositive that Dr. Caputo opined that claimant did not have "a subluxable left ulnar nerve at the elbow when seen by Dr. Browning in October of 1998" but he did have that condition on March 4, 1999, at which time he was still working

[2]Dr. Browning opined that claimant's continued use of pneumatic tools at PRS would have aggravated his hand/arm vibratory syndrome, PRS Ex. 4 at 28, and stated that he could not quantify claimant's impairment as of May 24, 1996, although a review of the evidence indicates that he had one, PRS Ex. 4 at 28. Dr. Wainwright opined that claimant's exposure to vibratory tools at PRS was likely injurious and that it contributed to his disability. Electric Boat Ex. 4 at 16. Dr. Willetts attempted to apportion the amount of disability claimant suffered with each employer, but agreed that claimant's duties at PRS could have lead to further damage of his hands. Electric Boat Ex. 5 at 30. Finally, Dr. Caputo opined that claimant's condition dates back to his employment with Electric Boat, but that it was exacerbated by employment with PRS. Electric Boat Ex. 7.

for PRS. PRS Ex. 5; Cl. Ex. 3. PRS is thus liable under the test of *Foundation Constructors.* Consequently, we affirm the administrative law judge's finding that PRS is responsible for the payment of claimant's benefits as it is rational, supported by substantial evidence and in accordance with law. *See Foundation Constructors*, 950 F.2d 621, 25 BRBS 71(CRT); *Cardillo*, 225 F.2d 137; *see also Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999), *aff'd*, 227 F.3d 934, 34 BRBS 79 (CRT)(7th Cir. 2000).

PRS also contends that the administrative law judge erred in finding that claimant has a 21 percent impairment of both hands. Specifically, PRS contends that the administrative law judge erred in according Dr. Browning dispositive weight as he was not claimant's treating physician and in failing to find that the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (the AMA *Guides*), are persuasive medical authority. The administrative law judge correctly stated that he is not required to apply the AMA *Guides* in this case as it involves neither hearing loss nor a post-retirement occupational disease. *See* 33 U.S.C. §§902(10), 908(c)(13)(E), (23); *see generally Pimpinella v. Universal Maritime Services, Inc.*, 27 BRBS 154 (1993). Rather, the administrative law judge is not bound by any particular standard, but may consider a variety of medical opinions and observations, as well as claimant's testimony regarding his symptoms and physical effects of the injury, in assessing the extent of claimant's permanent impairment. *See id.; Bachich v. Seatrain Terminals of California*, 9 BRBS 184 (1978).

Nonetheless, we cannot affirm the administrative law judge's decision as he relied on invalid factors in crediting Dr. Browning's opinion. *See Howell v. Einbinder*, 350 F.2d 442 (D.C. Cir. 1965). As PRS correctly argues, the administrative law judge erred in denoting Dr. Browning as claimant's treating physician, and in according deference to him on this basis. *See* Decision and Order at 20, 21. Dr. Browning saw claimant on only two occasions, the first at the behest of claimant's attorney for evaluation purposes, *see* Cl. Ex. 3A, and the second to rate claimant's impairment based on the objective studies performed by Dr. Browning and Dr. Alessi, a neurologist. *See* Cl. Ex. 3C, 4A. Dr. Browning did not provide continuing treatment for claimant and, in fact, noted that claimant's personal physician is Dr. Kilgannon. Cl. Ex. 3C. Thus, the administrative law judge erred in giving greater weight to Dr. Browning's opinion on the basis that he is the treating physician, as all of the physicians saw claimant only for the purposes of assigning impairment ratings. *See generally Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997).

Moreover, PRS correctly argues that it is irrational for the administrative law judge to credit Dr. Browning on the basis that he "is willing to effectuate the humanitarian and beneficent purposes of the Longshore Act," and "looks to the entire clinical situation and its effect on the Claimant's life experiences." Decision and Order at 20-21. Dr. Browning testified that he determined his impairment rating by assigning 18 percent to the "neuromuscular side" based solely on the EMG findings reported by Dr. Alessi and 3 percent

to the vascular condition. PRS Ex. 4 at 22, 33, 34. Furthermore, Dr. Browning does not discuss any resulting limitations on claimant's activities, and the record indicates that claimant's hand condition has not affected his work as a tractor-trailer driver or any daily activities. H. Tr. at 52, 64-65. Thus, the administrative law judge's reasoning that Dr. Browning's opinion looks to the effect of his impairment on claimant's daily life is not supported by substantial evidence. Inasmuch as we cannot affirm the administrative law judge's reasons for crediting Dr. Browning's opinion, we must vacate the administrative law judge's award of benefits for a 21 percent impairment to each hand. The case is remanded for the administrative law judge to reweigh the evidence of record and to provide valid explanations for his determinations regarding the extent of claimant's permanent impairment.

Accordingly, the administrative law judge's finding that PRS is the employer responsible for claimant's benefits is affirmed. However, the administrative law judge's finding that claimant is entitled to permanent partial disability for a 21 percent impairment of each hand is vacated, and the case is remanded to the administrative law judge for a decision consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge