

AUGUSTINE MACK, JR. )  
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 Claimant-Petitioner )  
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 v. )  
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 CERES MARINE TERMINALS ) DATE ISSUED: 01/31/2005  
 )  
 and )  
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 REGIONAL RISK MANAGEMENT )  
 )  
 Employer/Carrier- )  
 Respondents ) DECISION and ORDER

Appeal of the Decision and Order of Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

Bernard J. Sevel (Arnold, Sevel & Gay, P.A.), Baltimore, Maryland, for claimant.

Lawrence P. Postol (Seyfarth Shaw LLP), Washington, D.C., for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2002-LHC-2443) of Administrative Law Judge Stephen L. Purcell 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).

Claimant slipped and fell at work on September 25, 2000, injuring both knees and his left foot. Employer voluntarily paid compensation for temporary total disability from

December 11 to December 19, 2000, and from January 3, 2001, to May 13, 2002. The parties stipulated that claimant's condition reached maximum medical improvement on June 29, 2001. They disagreed about the extent of claimant's permanent impairment resulting from the work injury.<sup>1</sup>

In his decision, the administrative law judge credited the opinion of Dr. Pollak over that of Dr. Shephard and awarded claimant permanent partial disability benefits for a six percent left leg impairment pursuant to Section 8(c)(2), 33 U.S.C. §908(c)(2).<sup>2</sup> On appeal, claimant does not contest the administrative law judge's weighing of the medical evidence *per se*. Rather, claimant argues that the administrative law judge erred in relying on Dr. Pollak's opinion because it is based solely on the degree of claimant's *impairment* under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (the *AMA Guides*) and is not based on an assessment of claimant's *disability*. Employer responds, urging affirmance of the administrative law judge's decision.

In the event of an injury to a scheduled member, recovery for permanent partial disability is confined to that provided in the schedule at Section 8(c)(1)-(19) of the Act, 33 U.S.C. §908(c)(1)-(19), and is based on the degree of claimant's physical impairment. *Potomac Electric Power Co. v. Director, OWCP [PEPCO]*, 449 U.S. 268, 14 BRBS 363 (1980). Claimant's loss of wage-earning capacity is not a factor in a scheduled award. *See Rowe v. Newport News Shipbuilding & Dry Dock Co.*, 193 F.3d 836, 33 BRBS 160(CRT) (4<sup>th</sup> Cir. 1999). The administrative law judge properly recognized that the Act does not require that scheduled awards be based on the criteria of the *AMA Guides* except in cases involving hearing loss. *See* 33 U.S.C. §908(c)(13). Rather, the administrative law judge is not bound by any particular formula but may rely on a variety of medical opinions and observations in addition to claimant's description of symptoms and the physical effects of his injury in assessing the extent of his disability pursuant to the schedule. *See Pimpinella v. Universal Maritime Services*, 27 BRBS 154, 159 (1993); *see generally Cotton v. Army & Air Force Exch. Services*, 34 BRBS 88 (2000). The administrative law judge may, however, rely on a medical opinion based on the *AMA Guides*, as it is a standard medical reference. *See, e.g., Jones v. I.T.O. Corp. of Baltimore*, 9 BRBS 583 (1979).

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<sup>1</sup> The parties agreed that employer is entitled to a credit of \$6,742.70 for any award of compensation with respect to claimant's left leg for sums employer paid for work injuries to claimant's left leg in 1978 and 1980.

<sup>2</sup> Dr. Shepard opined that claimant has a 40 percent left knee impairment, a 20 percent left knee impairment, and a 20 percent left foot impairment. CX 1 at 38B.

We reject claimant's contention that the administrative law judge erred in awarding benefits for a six percent left leg impairment based on Dr. Pollak's opinion. Contrary to claimant's contention, the administrative law judge recognized that factors such as claimant's pain and the effect of his injury on his ability to work may be relevant in determining the extent of claimant's disability pursuant to the schedule. Decision and Order at 16, n.2; *see Cotton*, 34 BRBS 88. The administrative law judge, however, determined that, in this case, such factors did not warrant a finding that claimant has any additional impairment over that assigned by Dr. Pollak. Dr. Pollak stated that he did not increase claimant's impairment rating based on pain, as he stated that a certain pain level is factored into the AMA *Guides* rating. EX 54 at 8. Dr. Pollak also stated that he believed claimant's pain is primarily due to a nonwork-related hip condition. *Id.* at 6. The administrative law judge, moreover, rejected claimant's testimony regarding the requirements of his job and his alleged inability to perform it due to pain. Decision and Order at 17.

The administrative law judge found that Dr. Pollak's assessment of claimant's impairment was more credible than that of Dr. Shepard. Decision and Order at 18-20. The administrative law judge discussed the two opinions at length and provided rational reasons for crediting Dr. Pollak's opinion. It is well settled that in evaluating the evidence, the fact-finder is entitled to weigh the medical evidence and draw his own inferences from it and is not bound to accept the opinion or theory of any particular medical examiner. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5<sup>th</sup> Cir. 1962). Moreover, the administrative law judge's finding that claimant's testimony is not credible is rational. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9<sup>th</sup> Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). As the administrative law judge fully weighed the evidence, his decision to credit the opinion of Dr. Pollak over that of Dr. Shepard is rational, and claimant has not demonstrated any reversible error, we affirm the award of permanent partial disability benefits as it is supported by substantial evidence. *Brown v. Nat'l Steel & Shipbuilding Co.*, 34 BRBS 195 (2001).

Accordingly, we affirm the administrative law judge's Decision and Order.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge