**U.S. Department of Labor**

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

BRB No. 18-0562

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| DAVID BOUDREAU | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | DATE ISSUED: 07/08/2019 |
| INDUSTRIAL RESOURCES, INCORPORATED | ) | |
| | ) | |
| and | ) | |
| | ) | |
| SEABRIGHT INSURANCE COMPANY | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | DECISION and ORDER |

Appeal of the Decision and Order of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Amie C. Peters and Amanda E. Peters (Blue Water Legal PLLC), Edmonds, Washington, for claimant.

Richard A. Nielsen (Nielsen Law, PLLC), Seattle, Washington, for employer/carrier.

Before: BUZZARD, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2016-LHC-01726) of Administrative Law Judge Richard M. Clark 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).

On November 13, 2012, claimant sustained a work-related injury to his right elbow while swinging a sledgehammer. Following this incident, he experienced weakness in his grip and numbness in his fingers and, although he was employed as a welder, he was instructed to continue working in a supervisory capacity, which he did for about a week. On November 30, 2012, he sought medical care and was diagnosed with, inter alia, lateral epicondylitis in his right arm. Claimant continued to work for employer until approximately mid-December 2012. *See* Decision and Order at 4 n.3. On July 15, 2013, he commenced working as a self-employed appraiser. Employer voluntarily paid him temporary total disability benefits from December 13, 2012 to May 30, 2013, followed by permanent partial disability benefits for a two percent impairment to his right arm. 33 U.S.C. §908(b), (c)(1). Claimant subsequently filed a claim for additional permanent partial disability benefits.

The administrative law judge determined that claimant's right arm injury, which he found included both lateral epicondylitis and nerve dysfunction, did not "combine with" his pre-existing left arm condition.[1] Consequently, he found claimant entitled to disability benefits only for his right arm impairment as determined under the schedule. Decision and Order at 19-25. Rejecting Dr. Nimlos's 39 percent impairment rating under the 5th Edition of the *American Medical Association Guides to the Evaluation of Permanent Impairment* (Guides), and declining to adopt in full Dr. Nanos's impairment rating of two percent under the 6th Edition of the Guides, he assigned claimant's right upper extremity a 10 percent impairment rating, stating this figure "reflects the extent of Claimant's injury including the nerve dysfunction, based on the medical evidence and Claimant's credible description of his symptoms and the physical effects of his injury" and that "10 percent fairly compensates the impairment of Claimant's right arm." *Id.* at 25. The administrative law judge determined that claimant is not eligible for a nominal award because the schedule is the exclusive remedy for a permanent partial disability to a body part enumerated in the schedule. *Id.* at 25-26. He thus awarded claimant temporary total disability benefits from December 13, 2012 to May 30, 2013, based upon a stipulated average weekly wage of $853.80, and 31.2 weeks of permanent partial disability benefits pursuant to Section 8(c)(1) for a 10 percent arm impairment.

[1] Because of a congenital birth defect, claimant is missing his left arm below the elbow.

On appeal, claimant challenges the administrative law judge's award of permanent partial disability benefits and the denial of a nominal award. Employer responds, urging affirmance. Claimant filed a reply brief.

Claimant contends the administrative law judge erred in failing to consider the aggravation rule in determining the extent of his impairment. Acknowledging he is limited to a scheduled award under Section 8(c)(1), he contends the aggravation rule mandates consideration of how his work-related right arm injury combines with his pre-existing congenital left arm defect to result in a greater overall impairment.

The aggravation rule provides that when a claimant has a pre-existing condition, employer is liable for the entire resulting disability where the work injury aggravates, accelerates, or combines with the existing condition. *See Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991); *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). The administrative law judge acknowledged this well-established rule, but found:

> Claimant does not allege any aggravation to his left stump; nor does he allege that his injury was causally attributable to his preexisting defect. [footnote omitted]. I find that Claimant's work injury did not worsen his pre-existing left arm condition, and his work injury did not cause his left arm's defect.

Decision and Order at 21.

In challenging the administrative law judge's decision, claimant does not cite any evidence that his left arm defect was affected by the work injury to his right arm. Rather, claimant argues that an impairment rating to his whole person should be used to compensate him under Section 8(c)(1) of the Act.[2] The Act's schedule, however, assigns

[2] In support of his position, claimant cites the deposition testimony of Dr. Nimlos, who gave the following impairment ratings:

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| Right upper extremity impairment from injury: | 39% |
| Right upper extremity impairment converted to whole person: | 23% |
| Pre-existing left upper extremity impairment: | 95% |
| Left upper extremity impairment converted to whole person: | 57% |
| Overall whole person impairment (23% and 57% converted): | 67% |

CX 1 at 21-24.

a set number of weeks of compensation for the loss of a specified member. Section 8(c)(1) allows for 312 weeks of compensation for a 100 percent impairment to an arm. In cases such as this one where a claimant sustains a partial loss of use, Section 8(c)(19) of the Act, 33 U.S.C. §908(c)(19), provides an award for the number of weeks proportionate to the impairment rating to the enumerated body part.[3] *See Potomac Elec. Power Co. v. Director, OWCP* [*PEPCO*], 449 U.S. 268, 14 BRBS 363 (1980); *Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003). Contrary to claimant's assertion, there is no mechanism in the Act that permits a scheduled partial disability award for a whole person impairment rating.[4] We therefore reject claimant's contention of error and affirm the finding that he is limited to an award only for his right arm impairment under the schedule.

Claimant next challenges the administrative law judge's findings with respect to the extent of his permanent right arm impairment. He asserts the administrative law judge erred in failing to give determinative weight to Dr. Nimlos's opinion under the 5th Edition of the Guides.

In this case, two physicians addressed the extent of claimant's work-related right arm impairment. Dr. Nanos diagnosed claimant with work-related right lateral epicondylitis. Without taking into consideration any nerve damage claimant sustained as a result of his work injury, Dr. Nanos used the 6th Edition of the Guides to opine that claimant sustained a two percent right arm impairment. EX 5 at 16-18. Dr. Nimlos similarly diagnosed claimant with work-related right lateral epicondylitis and, additionally, credited claimant's complaints of nerve dysfunction. Using the 5th Edition of the Guides, Dr. Nimlos opined that claimant has a 39 percent right arm impairment.[5] CX 1 at 12-24.

The administrative law judge found each opinion problematic. He found Dr. Nanos's opinion entitled to more weight than that of Dr. Nimlos, in part because the 5th Edition does not specifically address epicondylitis whereas the 6th Edition does. Decision

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[3] As loss of wage-earning capacity is presumed in cases arising under the schedule, economic factors are not taken into consideration in determining the degree of loss. *See Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915, 32 BRBS 15(CRT) (4th Cir. 1998).

[4] As noted, claimant did not alleged that the work injury aggravated the pre-existing left arm defect.

[5] Dr. Nimlos agreed that Dr. Nanos's rating was a "fair" application of the 6th Edition of the Guides. CX 10 at 236; *see infra*.

and Order at 22. He stated that because the 5th Edition does not specifically rate epicondylitis, use of that edition permitted a rating that inflated the degree of impairment. Thus, he rejected Dr. Nimlos's rating. *Id.*; *see also* Decision and Order at 15-17. The administrative law judge also found that Dr. Nanos's rating does not adequately account for claimant's work-related nerve dysfunction.[6] He therefore concluded that Dr. Nanos underrated claimant's impairment. *Id.* at 23. Having declined to adopt either of the doctors' opinions in full, the administrative law judge stated:

> [T]he record demonstrates that Claimant's complaints of nerve disruption are related to his November 13, 2012 injury and that any ratable impairment stemming from it should factor into and supplement the impairment rating assigned to Claimant's arm by Dr. Nanos. [footnote omitted]. Therefore, although I reject the impairment ratings of Dr. Nimlos for Claimant's nerve disruption, I find that there is a preponderance of the evidence in the record supporting Claimant's subjective complaints of pain and numbness in his right arm after he injured himself at work. I find it appropriate and reasonable to assign an impairment rating for Claimant's right arm of 10 percent to reflect the extent of Claimant's injury including the nerve dysfunction, based on the medical evidence and Claimant's credible description of his symptoms and the physical effects of his injury. I reject a higher rating because the *6th Edition* does not specifically account for the use of nerve dysfunction in the rating, but given the particular circumstances of this case and Claimant's continued ability to use his right arm, I find that 10 percent total impairment accounts for the numbness. Further, Dr. Nimlos agreed that a 2 percent rating was "fair" if the *6th Edition* of the AMA Guides were used, even though the *6th Edition* does not include additions for numbness experienced by Claimant. Given the totality of the evidence, 10 percent fairly compensates the impairment of Claimant's right arm. The higher rating offered by Claimant primarily relying upon the *5th Edition* were [sic] not supported by the evidence in the record.

Decision and Order at 24-25.

We affirm the administrative law judge's award based on a 10 percent impairment. In adjudicating a claim, it is well-established that an administrative law judge is entitled to

[6] The administrative law judge specifically gave substantial weight to claimant's subjective complaints of nerve pain, as diagnosed by Dr. Nimlos. Decision and Order at 24. Claimant testified that he experiences such symptoms when using a computer or driving. *Id.*

weigh the evidence and draw his own inferences from it and that the Board may not substitute its view for those of the administrative law judge. *See, e.g., Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). 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 Guides in this type of case, the administrative law judge may rely on medical opinions that rate a claimant's impairment under these criteria, as it is a standard medical reference. *Pisaturo v. Logistec, Inc.*, 49 BRBS 77 (2015); *Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195 (2001). The administrative law judge also has the discretion to evaluate a variety of medical opinions and observations, as well as claimant's description of his symptoms, in determining the extent of claimant's disability under the schedule. *See Pimpinella*, 27 BRBS 154; *Mazze v. Frank J. Holleran, Inc*., 9 BRBS 1053 (1978); *Bachich v. Seatrain Terminals of California*, 9 BRBS 184 (1978); *Tangorra v. National Steel & Shipbuilding Co.*, 6 BRBS 427 (1977), *aff'd in part and vac. in part on other grounds*, 607 F.2d 1009 (9th Cir. 1979).

The administrative law judge addressed the deficiencies in each medical opinion: the 5th Edition of the Guides used by Dr. Nimlos does not specifically address epicondylitis and resulted in his overrating claimant's impairment; the 6th Edition used by Dr. Nanos does not account for nerve damage and underrates claimant's impairment. Having found claimant's subjective complaints credible, the administrative law judge concluded that the impairment rating should take into consideration both conditions. Consequently, he supplemented Dr. Nanos's two percent rating for epicondylitis to account for nerve dysfunction, while acknowledging claimant's continued ability to use his right arm. Decision and Order at 25.[7]

The administrative law judge's rejection of Dr. Nimlos's opinion is well within his discretion.[8] *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th

[7] The administrative law judge noted that employer's counsel conceded that a "two percent [rating] is probably low." Decision and Order at 25 n.26.

[8] Because the administrative law judge permissibly rejected Dr. Nimlos's opinion in part because the 5th Edition does not contain a specific rating for epicondylitis whereas the 6th Edition does, we need not address the contention that the administrative law judge erred in stating that Dr. Nimlos should have used the more recent edition of the Guides. *See* Decision and Order at 15-16.

Cir. 2010). Moreover, he permissibly supplemented Dr. Nanos's opinion to account for claimant's nerve dysfunction given that the 6th Edition of the Guides does not address that condition. *Pimpinella*, 27 BRBS at 159. Thus, because it is rational, supported by substantial evidence and in accordance with law, we affirm the administrative law judge's conclusion that claimant sustained a 10 percent permanent partial disability to his right arm. *Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3(CRT) (9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991); *Peterson v. Washington Metro. Area Transit Auth.*, 13 BRBS 891 (1981) (Board affirms the finding of a five percent impairment to claimant's right arm where the physicians of record opined that claimant's impairment ranged from zero to 15 percent); *Collington v. Ira S. Bushey & Sons*, 13 BRBS 768 (1981) (Board affirms administrative law judge's use of a "compromise" percentage of impairment).

Lastly, claimant contends that the administrative law judge erred in denying his claim for a nominal award. An injured employee may be entitled to a nominal award if he has no current loss of wage-earning capacity as a result of his injury but has established the significant possibility that his injury will cause future economic harm. *See Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997) (Court holds that a nominal award is a present award under Section 8(c)(21), (h) of the Act). The Act's schedule, however, is the exclusive remedy for permanent partial disability sustained to body parts listed therein, and benefits paid pursuant to the schedule fully compensate claimants for their permanent partial disabilities, as those payments presume a loss of wage-earning capacity. *See PEPCO*, 449 U.S. 268, 14 BRBS 363. The contention claimant raises was fully addressed by the Board in *Porter v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 113 (2002), wherein the Board rejected the contention that a nominal award may be granted in a claim involving a scheduled injury. Thus, we reject claimant's contention.

Additionally, claimant's reliance on *Gillus v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 93(2003), *aff'd*, 84 F. App'x 333, 37 BRBS 120(CRT) (4th Cir. 2004), is misplaced. In *Gillus*, the claimant sustained a knee injury, which had not reached maximum medical improvement. As an award of temporary partial disability under Section 8(e) is predicated on a loss of wage-earning capacity under Section 8(h), as is an award under Section 8(c)(21), the Board held that the claimant could receive a nominal award. In contrast, claimant concedes his claim is only one for permanent partial disability benefits under the schedule. Consequently, the administrative law judge properly denied the claim for a nominal award. *Porter*, 36 BRBS at 118.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge