BRB No. 01-583

HILEE LOVE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEPCO INDUSTRIES, INCORPORATED	)	DATE ISSUED: March 21, 2002
	)	
and	)	
	)	
LOUISIANA WORKERS' COMPENSATION CORPORATION	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Louis H. Schultz, Covington, Louisiana, for claimant.

Ted Williams (Egan, Johnson & Stiltner), Baton Rouge, Louisiana, for employer/carrier.

Before: SMITH, McGRANERY and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2000-LHC-1231) of Administrative Law Judge James W. Kerr, 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).

Claimant fell and broke his leg during the course of his employment on September 3,

1997. He was taken to the hospital and operated on that day. His physician, Dr. Johnson, diagnosed and treated claimant for a left tibia shaft fracture extending into the tibia plafond. By August 27, 1998, Dr. Johnson determined that claimant's condition had reached maximum medical improvement, although he stated there was still muscle atrophy, some recurrent pain, decreased range of motion of the left ankle, and claimant walked with a limp. Cl. Ex. 1. Claimant testified that he continues to use either a cane or an ankle brace frequently for these residual symptoms and that he uses the ankle brace when working his new job as a cab driver for ambulatory patients. Tr. at 8-9. On September 21, 1998, using the American Medical Association *Guides to the Evaluation of Permanent Impairment* (4th ed.), Table 36 p. 76, Dr. Johnson determined that claimant has a 20 percent impairment to the whole person, and he extrapolated this rating to equate to a 50 percent impairment of the lower extremity. Cl. Exs. 1-2. Dr. Faust, at employer's request, examined claimant on December 29, 1998, found that claimant's fractured left tibia and ankle had healed, but that claimant still has ankle pain, swelling, laxity and joint narrowing of the left ankle. Dr. Faust rated claimant as having a 21 percent impairment to the left foot. Emp. Ex. 1; Emp. Ex. 2 at 11-12, 16. Employer split the difference between the two ratings and paid claimant benefits for a 35.5 percent impairment of the foot. Tr. at 16-17. A dispute arose over which rating was correct and under which section of the Act claimant's injury is properly compensated.

The administrative law judge discussed the two subsections under which claimant could be compensated for his injury, 33 U.S.C. §908(c)(2), (4), and he assigned Dr. Johnson's rating for an impairment to the leg determinative weight. He found that Dr. Johnson's opinion was based on a more thorough examination as well as greater familiarity with claimant's history. Decision and Order at 8. Therefore, the administrative law judge awarded claimant permanent partial disability benefits under Section 8(c)(2) of the Act for a 50 percent impairment to the left leg. *Id.* at 9. Employer appeals, and claimant responds, urging affirmance.

Employer contends the administrative law judge erred in awarding claimant benefits for an impairment to the left leg, as injuries below the knees are classified in reference to the foot and not to the leg. Thus, employer argues that claimant's disability should have been compensated under Section 8(c)(4) of the Act and benefits should have been awarded pursuant to Dr. Faust's opinion, for a 21 percent impairment to the left foot. Alternatively, employer argues that, if benefits are properly awarded for an impairment to the leg, then Dr. Faust's extrapolation of a 15 percent impairment to the leg is the appropriate rating given the evidence of record. As a final alternative, employer suggests it would be fair to average the two ratings and award claimant benefits for a 32.5 percent impairment of the foot.

Section 8(c)(1)-(20) of the Act provides for awards for permanent partial disability for injuries to scheduled members. 33 U.S.C. §908(c)(1)-(20). It states in pertinent part:

> In case of disability partial in character but permanent in quality the compensation shall be $66^{2/3}$ per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subsection (b) or subsection (e) of this section, respectively, and shall be paid to the employee, as follows:
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> (2) Leg lost, two hundred and eighty-eight weeks' compensation.
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> (4) Foot lost, two hundred and five weeks' compensation.

33 U.S.C. §908(c)(2), (4). Contrary to employer's argument, injuries below the knee do not require an administrative law judge to award benefits for an impairment to the foot. *Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989). Such rationale applies, pursuant to Section 8(c)(15), 33 U.S.C. §908(c)(15), only if there has been an amputation. *Mason*, 22 BRBS at 417. In the absence of an amputation, the schedule itself accounts for impairments caused to smaller members as a result of injuries to larger members. *Id.* at 416; *see also Young v. Todd Pacific Shipyards Corp.*, 17 BRBS 201 (1985) (where a claimant sustains an injury to a smaller member which results in an impairment to a larger member, a claimant is permitted to receive an award for loss of the use of the larger member). Thus, depending on the record evidence, a claimant who sustained an injury to his ankle could receive an award under Section 8(c)(2) for loss of the use of the leg or Section 8(c)(4) for loss of the use of the foot. *See Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195, 200 n.5 (2001). In this instance, claimant injured his left leg. Residuals from this injury affect his left ankle. Accordingly, the facts and Dr. Johnson's report rating claimant as having an impairment of the left lower extremity support the administrative law judge's decision to award claimant benefits for the loss of the use of his leg under Section 8(c)(2); therefore, we reject employer's argument that the administrative law judge erred in awarding benefits under Section 8(c)(2). *Mason*, 22 BRBS at 416-417.

We also reject employer's alternate arguments that the administrative law judge erred in awarding claimant benefits for a 50 percent impairment rather than a 15 percent impairment as estimated by Dr. Faust and in failing to average the two ratings to reach a middle ground. It is for the administrative law judge to determine how he will weigh and credit the evidence, including medical evidence, and he may accept or reject any or all of that evidence. *See generally 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); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969); *see also, e.g., Mazze v. Frank J. Holleran, Inc.*, 9 BRBS 1053 (1978). In this case, the administrative law judge accepted and gave determinative weight to Dr. Johnson's opinion. He found that Dr. Johnson was claimant's

treating physician and that Dr. Johnson based his impairment rating on a more thorough examination, considering factors such as claimant's loss of range of motion and altered gait. Decision and Order at 8-9. As Dr. Johnson rated claimant as having a 50 percent impairment to the left leg as a result of his work injury, the administrative law judge's award of benefits for a 50 percent impairment to the leg is supported by substantial evidence.[1] *Mason*, 22 BRBS at 417.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge

[1]Although the administrative law judge stated he gave less weight to Dr. Faust's opinion because Dr. Faust did not use the most recent edition of the AMA *Guides*, we need not address employer's argument that Dr. Faust used the most recent edition in making his computations. First, the Act does not require the use of the AMA *Guides* to calculate a claimant's impairment rating under the schedule unless the case involves hearing loss. *Pimpinella v. Universal Maritime Service, Inc.*, 27 BRBS 154, 159 n.4 (1993). Moreover, this was not the administrative law judge's only reason for giving greater weight to Dr. Johnson's opinion.