BRB No. 98-825

WESLEY SHIPMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SEA-LAND SERVICE, INCORPORATED	)	DATE ISSUED:_____
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Philip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Keith L. Flicker and Kenneth M. Simon (Flicker, Garelick & Associates), New York, New York, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (96-LHC-591) of Administrative Law Judge Robert D. Kaplan 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 was injured on September 27, 1992, while driving a hustler at employer's Port Elizabeth, New Jersey facility. He hit his knees against the dashboard and his head against the roof of the truck. He stopped work immediately and was taken to the hospital where his fractured right knee was placed in a cast and his forehead laceration was sutured with 11 stitches. Tr. at 32-33. After being treated by the hospital doctors, claimant was referred to Dr. Gallick's office for treatment of his knees. Tr. at 36. Although employer paid disability and medical benefits to claimant, the parties disputed the extent of claimant's disability and his entitlement to continuing benefits. Jt. Ex. 1.

The administrative law judge determined that claimant failed to establish a disability caused by his head injury. Decision and Order at 7. Further, he found that employer established the availability of suitable alternate employment, as it presented evidence of suitable work and claimant did not establish due diligence in rebuttal. *Id.* at 10-11. The administrative law judge also determined that claimant's right knee has a 15 percent impairment and his left knee has a 2.5 percent impairment due to the work injury. Thus, he held employer liable for temporary total disability benefits from September 28, 1992, through December 19, 1993, and permanent total disability benefits from the stipulated date of maximum medical improvement, December 20, 1993, through December 21, 1993. From December 22, 1993, the date employer established the availability of suitable alternate employment, and continuing for 50.4 weeks, he held employer liable to claimant for permanent partial disability benefits pursuant to Section 8(c)(2), 33 U.S.C. §908(c)(2). *Id.* at 11-13. Finally, he determined that employer is not entitled to either a credit for holiday pay or Section 8(f), 33 U.S.C. §908(f), relief. *Id.* at 13-15. Claimant appeals the award of benefits, and employer responds, urging affirmance.

Claimant first contends the administrative law judge erred in finding he did not sustain a disability due to his work-related head injury.[1] The administrative law judge rejected as too uncertain claimant's testimony concerning his headaches, and he stated that Dr. Heublum's opinion does not constitute independent evidence of the alleged headaches, as he merely relied on claimant's subjective complaints. Moreover, he noted that claimant told the vocational counselor that his headaches had gone away at the time she interviewed him. Decision and Order at 6-7; Emp. Ex. WW at 7-10. In view of this, the administrative law judge rationally concluded that he is unable to determine whether claimant suffers from headaches or, if he does, whether they are disabling. Thus, claimant failed to meet his

[1]Claimant also argues the administrative law judge failed to rule on his submission of a second opinion. We reject this assertion. Employer objected to the submission of Dr. Baldinger's report as being filed in an untimely manner, claimant conceded the untimeliness of the report, and, after a discussion of the post-hearing procedures in this case, the administrative law judge sustained employer's objection. Decision and Order at 2 n.2.

burden of proof. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT) (1994); *Santoro v. Maher Terminal, Inc.*, 30 BRBS 171 (1996). Therefore, we affirm the administrative law judge's conclusion that claimant suffers from no disability related to the head injury, and he is not entitled to continuing permanent partial disability benefits. *Trask v. Lockheed Shipbuilding & Const. Co.*, 17 BRBS 56 (1985); *Peterson v. Washington Metropolitan Area Transit Authority*, 13 BRBS 891 (1981).

Claimant next contends the administrative law judge erred in determining the extent of the disability to his knees, arguing that he is totally disabled because employer failed to establish the availability of suitable alternate employment. Alternatively, claimant contends the administrative law judge erred in assessing partial impairment to his knees based on Dr. Gallick's opinion. Contrary to claimant's contentions, the administrative law judge acted within his discretion in crediting Dr. Gallick's opinion over that of Dr. Charko.[2] *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Dr. Gallick, claimant's "treating physician,"[3] stated that claimant's knee condition had reached maximum medical improvement and that he could not return to his usual work. Emp. Exs. B, VV. Based on the restrictions imposed by Dr. Gallick, Ms. Jackson identified sedentary jobs claimant could perform, obtaining Dr. Gallick's approval of the types of jobs. Emp. Ex. C. After comparing the job requirements with claimant's restrictions and concluding that claimant is able to perform the work identified, the administrative law judge found that employer established the availability of suitable alternate employment. Decision and Order at 8-10. This conclusion is supported by substantial evidence and is therefore affirmed. *Mendoza v. Marine Personnel*

[2]We reject claimant's argument that Dr. Gallick's opinion should not have been credited because of his adherence to the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*). Although claimant correctly states that physicians need not rely solely on the AMA *Guides* to ascertain impairment except when assessing hearing loss or disabilities of retired employees, 33 U.S.C. §§902(10), 908(c)(13); *Pimpinella v. Universal Maritime Service, Inc.*, 27 BRBS 154, 159 n.4 (1993), it is not unreasonable for the administrative law judge to credit the opinion of a physician using the AMA *Guides* to assess impairment.

[3]We reject claimant's argument that Dr. Gallick is not his "treating physician." Claimant did not raise this issue before the administrative law judge and cannot raise it now for the first time on appeal. *Boyd v. Ceres Terminals*, 30 BRBS 218 (1997); *Maples v. Textports Stevedores Co.*, 23 BRBS 303 (1990), *aff'd sub nom. Textports Stevedores Co. v. Director, OWCP*, 931 F.2d 331, 28 BRBS 1 (CRT) (5th Cir. 1991). Moreover, claimant did not request a change of physician, despite being aware of his rights, Tr. at 52, and he continued to treat with Dr. Gallick. *Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994), *aff'd mem*, No. 95-1035, 29 BRBS 105 (CRT) (4th Cir. July 19, 1995).

Co., Inc., 46 F.3d 498, 29 BRBS 79 (CRT) (5th Cir. 1995).

Further, as we have stated that it is reasonable to have credited the opinion of Dr. Gallick, we affirm the administrative law judge's determination that claimant has a 15 percent impairment to his right lower extremity and a 7.5 percent impairment to his left lower extremity, 2.5 percent of which is attributable to the 1992 injury.[4] *Wright v. Superior Boat Works*, 16 BRBS 17 (1983); *Bachich v. Seatrain Terminals of California*, 9 BRBS 184 (1978). Therefore, as the administrative law judge found, claimant is entitled to only permanent partial disability benefits pursuant to Section 8(c)(2) for his knee condition. *Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915, 32 BRBS 15 (CRT) (4th Cir. 1998); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998); *Andrews v. Jeffboat, Inc.*, 23 BRBS 169 (1990); *Walker v. National Steel & Shipbuilding Co.*, 13 BRBS 369 (1981).

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

SO ORDERED.

_____
BETTY JEAN HALL, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
JAMES F. BROWN
Administrative Appeals Judge

[4]Although claimant has a pre-existing impairment of five percent to his left knee, he has not raised an allegation of error with regard to the administrative law judge's determination that employer is liable for benefits for a 2.5 percent impairment of the left knee as opposed to the entire 7.5 percent. *Cf. Director, OWCP v. Bethlehem Steel Corp. [Brown]*, 868 F.2d 759, 22 BRBS 47 (CRT) (5th Cir. 1989).