BRB No. 08-0504

J.K.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: 10/30/2008
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Klein Camden L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2004-LHC-1430) of Administrative Law Judge Larry W. Price 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 injured his leg in 1995. The district director awarded claimant temporary partial disability benefits in 1999 pursuant to the parties' agreement. Claimant subsequently filed a motion to modify the award to one for permanent partial disability benefits. 33 U.S.C. §922. The administrative law judge found that claimant's initial filing was not a valid motion for modification such that his later filing was untimely

pursuant to Section 22. The Board affirmed the decision. The United States Court of Appeals for the Fourth Circuit reversed the Board's decision, vacated the denial of benefits, and remanded the case for proceedings on the merits. *Kea v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 113 (2006), *vacated and remanded*, 488 F.3d 606, 41 BRBS 23(CRT) (4th Cir. 2007).

On remand, the only issue before the administrative law judge was the extent of claimant's permanent disability. Dr. Bryant, claimant's treating physician, assessed claimant as having a 35 percent permanent impairment to his right leg, and Dr. Ross, employer's expert, determined that claimant's right leg impairment is 14 percent. Cl. Exs. 1, 2 at 36. Giving both evaluations "additional weight," the administrative law judge averaged the two ratings and awarded claimant permanent partial disability benefits for a 24.5 percent impairment.[1] Decision and Order at 2-3. Employer appeals the award of benefits, and claimant responds, urging affirmance.

Employer contends the administrative law judge's decision is not supported by substantial evidence and is not rational. It argues that Dr. Bryant's opinion is not entitled to "additional weight" merely because Dr. Bryant is claimant's treating physician, as disability is established as of a point in time, and that it is not entitled to be weighed equally with Dr. Ross's opinion which was specifically found to be thorough and clearly explained. Employer also argues that the administrative law judge gave no explanation for arbitrarily accepting claimant's suggestion to average the two rating percentages. Claimant responds, urging the Board to affirm the award.

When a claimant suffers an injury to a scheduled member, recovery for permanent partial disability under Section 8(c) is confined to the schedule in Section 8(c)(1)-(19), 33 U.S.C. §908(c)(1)-(19); *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980), and the claimant is compensated based on the degree of physical impairment. The administrative law judge is not bound by any particular standard or formula but may consider a variety of medical opinions and observations in addition to the claimant's description of symptoms and physical effects of his injury in assessing the extent of his disability under the schedule. The Act does not require impairment ratings to be based on medical opinions using the criteria of the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) except in cases involving compensation for hearing loss and voluntary retirees. *See* 33 U.S.C.

[1]The administrative law judge stated: "Claimant suggest (sic) that the Court average the two ratings and assign Claimant a disability rating of 24.5% based upon the two physicians' opinions. Based on the facts of this case, and considering Dr. Bryant's status as a treating physician and the thoroughness of Dr. Ross's disability assessment, the Court finds this approach reasonable." Decision and Order at 2.

§§908(c)(13), 902(10); *Cotton v. Army & Air Force Exch. Services*, 34 BRBS 88 (2000); *Pimpinella v. Universal Maritime Service Inc.*, 27 BRBS 154 (1993).

Dr. Bryant opined that claimant has a 35 percent impairment. Dr. Bryant diagnosed claimant as having suffered a work-related traumatic injury to his leg which resulted in injuries to his veins, small arteries, fascia of muscles and nerves. Specifically, he diagnosed neurologic injuries, nodular fascitis, swelling, and abnormal gait. Decision and Order at 2; Cl. Ex. 2 at 36. The administrative law judge gave Dr. Bryant's opinion "additional weight" because he treated claimant's condition for several years. The administrative law judge also gave "additional weight" to Dr. Ross's opinion that claimant has a 14 percent impairment because his one-time examination was thorough and he was clear as to the factors he considered in assessing claimant's impairment under the AMA *Guides*. Decision and Order at 2.

We affirm the administrative law judge's decision to average the impairment ratings. Employer has not demonstrated error in the administrative law judge's decision to accord weight both to the opinion of Dr. Bryant based on his long-time treatment of claimant, Cl. Ex. 2 at 36, and to that of Dr. Ross on the basis that his examination was thorough and his explanation was clear, Cl. Ex. 1. *See Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001) (average of two audiograms); *Peterson v. Washington Metropolitan Area Transit Authority*, 13 BRBS 891 (1981) (award for five percent impairment based on ratings of zero, ten and 15 percent). It is well established that an administrative law judge is not bound to accept the opinion or theory of a particular medical examiner but has the discretion to weigh the evidence of record. *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). Thus, it is within the administrative law judge's discretion to assess a degree of disability different from the ratings found by the physicians if that degree is reasonable. *Peterson*, 13 BRBS at 897; *Mazze v. Frank J. Holleran, Inc.*, 9 BRBS 1053 (1978). Consequently, we affirm the administrative law judge's award of benefits as it is rational and supported by substantial evidence.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge