BRB No. 08-0435

G.R.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
AAPM TERMINALS, INORPORATED	)	DATE ISSUED: 09/29/2008
	)	
and	)	
	)	
SCHAFFER COMPANY, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order and the Decision and Order on Reconsideration of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Myles R. Eisenstein, Baltimore, Maryland, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order and the Decision and Order on Reconsideration (2007-LHC-00129) of Administrative Law Judge Daniel F. Solomon 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 left thumb in a work-related accident on October 6, 2005. Employer paid claimant temporary total disability benefits from October 7, 2005, through March 10, 2006. The parties stipulated that claimant's injury reached maximum medical improvement on March 10, 2006. Claimant contended that his injury rendered him permanently totally disabled. Claimant alternatively argued he is entitled to permanent partial disability benefits for a 48 percent impairment to the thumb, or a 19 percent impairment to the hand, or a 17 percent impairment of the left upper extremity. Employer contended claimant is limited to a schedule award for an impairment to his thumb.

It is undisputed that claimant cannot return to his usual employment as a lasher due to his 2005 injury. The administrative law judge found that employer established the availability of suitable alternate employment as a checker or crane operator. The administrative law judge also found that claimant's self-employment in his own probate accounting business constitutes suitable alternate employment. Thus, the administrative law judge found claimant limited to an award under the schedule. The administrative law judge found that claimant's injury is confined to his thumb and that, therefore, claimant's recovery is provided by Section 8(c)(6) of the Act, 33 U.S.C. §908(c)(6).[1] In his Decision and Order and Decision and Order on Reconsideration, the administrative law judge credited Dr. Segalman's opinion that claimant has a 20 percent impairment to his thumb, and awarded benefits accordingly. 33 U.S.C. §908(c)(6), (19).

On appeal, claimant contends the administrative law judge erred in failing to award permanent total disability benefits.[2] Alternatively, claimant contends he is entitled to a greater award under the schedule. Employer responds, urging affirmance.

[1] Section 8(c)(6) provides 75 weeks' compensation for a total loss of the thumb. 33 U.S.C. §908(c)(6).

[2] Claimant timely filed a notice of appeal on March 4, 2008, after the administrative law judge issued his Decision and Order on Reconsideration. On February 28, 2001, employer had filed a motion to correct a typographical error, in that the administrative law judge incorrectly stated, in one place, the dollar figure due claimant for a 20 percent impairment. He correctly stated the figure elsewhere. The administrative law judge issued an Errata Order on March 17, 2008. As the Board stated in its Order dated June 4, 2008, claimant's contention that the administrative law judge lacked authority to correct a typographical error after an appeal was filed is without merit. *See generally Graham-Stevenson v. Frigitemp Marine Div.*, 13 BRBS 558 (1981); Fed. R. Civ. P. 60(a).

Claimant contends the administrative law judge erred in finding that he is only partially disabled because claimant cannot work as a checker. Claimant thus contends employer did not establish the availability of suitable alternate employment. We need not address this contention. The administrative law judge also found that claimant could work as a crane operator and that his self-employment as a probate accountant constitutes suitable alternate employment. Claimant does not challenge these findings on appeal. *Scalio v. Ceres Marine Terminal, Inc.*, 41 BRBS 57 (2007). Therefore, we affirm the administrative law judge's finding that employer established the availability of suitable alternate employment and that claimant is limited to an award under the schedule. *Potomac Electric Power Co. v. Director, OWCP*, 49 U.S. 268, 14 BRBS 363 (1980); *Gregory v. Norfolk Shipbuilding & Dry Dock Co.*, 32 BRBS 264 (1998).

Claimant also contends that the administrative law judge erred by awarding him benefits for only a 20 percent thumb impairment. Claimant contends the administrative law judge should have credited the opinion of Dr. Carlton that claimant has a 48 percent thumb impairment. We reject this contention. The administrative law judge noted the various ratings provided by the four physicians.[3] The administrative law judge noted that the rating each physician provided under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*), is similar – five to seven percent. The difference in the ultimate ratings is based on the doctors' additional ratings of claimant's pain and diminished strength. The administrative law judge found that Dr. Carlton gave excessive weight to claimant's complaints of pain and weakness, which the administrative law judge found to be "less than credible," Decision and Order at 16, and for loss of functions that are not documented by objective tests. *Id.* The administrative law judge credited Dr. Segalman's 20 percent rating because he was claimant's treating physician and appropriately accounted for some degree of claimant's pain. *Id.*

In determining the degree of claimant's permanent impairment, the administrative law judge is not bound by any particular formula but may rely on medical opinions and observations, in addition to a claimant's credible description of his symptoms and limitations. *Cotton v. Army & Air Force Exch.*, 34 BRBS 88 (2000); *Pimpinella v. Universal Mar. Serv., Inc.*, 27 BRBS 154 (1993). The administrative law judge is entitled to determine the weight to be accorded to the evidence of record. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). In this case, the administrative law judge rationally credited the opinion of the treating physician, as Dr. Segalman applied the AMA *Guides* and provided a moderate additional impairment rating for claimant's subjective complaints. *Brown v. Nat'l Steel & Shipbuilding Co.*, 34

[3] Dr. Brigham rated the thumb impairment at 5 percent, EX 23; Dr. Segalman, at 20 percent, EX 41; Dr. Innis, at 27 percent, CX 10; and Dr. Carlton, at 48 percent. CX 3.

BRBS 195 (2001). As substantial evidence supports the administrative law judge's decision, we affirm the award for a 20 percent thumb impairment.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge