BRB Nos. 94-2187
and 96-0659

DONALD D. GILCHRIST	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order Denying Greater Permanent Partial Disability Ratings for Either Hand and the Decision and Order Denying Claimant's Petition for Modification of the Decision Issued on March 10, 1994 of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

John H. Klein (Rutter & Montagna), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason & Mason, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Greater Permanent Partial Disability Ratings for Either Hand and the Decision and Order Denying Claimant's Petition for Modification of the Decision Issued on March 10, 1994 (88-LHC-1212) of Administrative Law Judge Richard K. Malamphy 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On February 15, 1984, claimant, a shipfitter, sustained injuries to both of his hands resulting in bilateral carpal tunnel syndrome. Employer voluntarily paid compensation to claimant for temporary total disability, 33 U.S.C. §908(b), and for temporary partial disability, 33 U.S.C. §908(e), for various periods of time. Pursuant to the parties' agreement, District Director B.E. Voultsides entered a Compensation Order - Award of Compensation on December 18, 1991, awarding claimant compensation under the schedule for a ten percent permanent partial disability to each hand. 33 U.S.C. §908(c)(3), (19). Claimant subsequently sought a greater permanent partial disability award.

In his Decision and Order, the administrative law judge, citing *PEPCO v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980), rejected claimant's contention that the economic effects of the loss of use of his hands entitle him to a greater permanent partial disability award; accordingly, the administrative law judge denied claimant's request for additional compensation. Claimant appealed the administrative law judge's decision to the Board, BRB No. 94-2187, and thereafter sought consideration by the Board of the *amicus curiae* brief filed by the American Medical Association (AMA) before the Texas Supreme Court in *Texas Workers' Compensation Commission v. Garcia*, No. D4270. Following the Board's denial of claimant's request, claimant petitioned the administrative law judge for Section 22 modification, 33 U.S.C. §922. Thereafter, the Board dismissed claimant's appeal and remanded the case to the administrative law judge for modification proceedings. After consideration of the brief filed by the AMA in *Garcia*, the administrative law judge denied claimant's request for modification, reaffirming his original determination that the instant case is controlled by the Supreme Court's decision in *PEPCO*. Claimant then appealed the administrative law judge's denial of his request for modification to the Board. BRB No. 96-0659.

On appeal, claimant argues that the administrative law judge erred in determining the extent of claimant's disability.[1] Employer responds, urging affirmance.

It is well-established that the claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1980). In the instant case, claimant concedes on appeal that, consistent with the Supreme Court's decision in *PEPCO*, he is limited to an award under the statutory schedule, 33 U.S.C. §908(c)(3), (19), and is not entitled to recovery under Section 8(c)(21), 33 U.S.C. §908(c)(21).[2] Claimant's argument on appeal, therefore, is confined to the issue of the proper calculation of claimant's

[1]By Order dated March 25, 1996, the Board reinstated claimant's prior appeal, BRB No. 94-2187, and consolidated it for purposes of decision with claimant's appeal of the administrative law judge's Order on Modification, BRB No. 96-0659. The appeal in BRB No. 96-659 and request for reinstatement in BRB No. 94-2187 were filed on February 20, 1996, and thus the one-year period for review does not begin prior to that date.

[2]Moreover, claimant does not contend that he is entitled to permanent total disability compensation as a result of his work-injury.

scheduled award. Specifically, claimant contends that the administrative law judge erred by failing to base claimant's scheduled award on the economic effects of his hand injuries in addition to his medical impairment.

As an initial matter, we note that our review of the record supports the administrative law judge's finding that claimant has provided no medical evidence to support his claim to entitlement to a greater scheduled award than the ten percent permanent disability in each hand for which he previously received compensation. The sole *medical* evidence of record relevant to assessing the extent of claimant's disability is the opinion of Dr. Gwathmey, claimant's treating physician, who opined that claimant suffers a ten percent permanent partial disability in each hand. Claimant contends, however, that a physician's "impairment" rating is not synonymous with the extent of the employee's "disability" under the Act; contrary to claimant's implied assertion of error, however, Dr. Gwathmey does not use the term "impairment" but, rather, states that claimant has "a 10 percent permanent partial disability in each hand...." *See* Emp. Ex. 3. Claimant additionally cites the position of the AMA, as set forth in its *amicus curiae* brief filed in *Garcia*, that disability evaluations should not be based solely on medical impairment ratings based on the AMA *Guides to the Evaluation of Permanent Impairment* (3d ed. 1988) (AMA *Guides).* We need not address the merits of the arguments made in the *Garcia* brief inasmuch as the record in the instant case is devoid of evidence that Dr. Gwathmey relied on the AMA *Guides* in rendering his disability evaluation. Dr. Gwathmey's office notes and reports contain no references to the AMA *Guides,* and claimant has not identified any other evidence which might indicate that Dr. Gwathmey's disability assessment was based on the AMA *Guides*.

The Act does not require impairment ratings based on medical opinions using the criteria of the AMA *Guides* except in cases involving compensation for hearing loss and voluntary retirees. *See* 33 U.S.C. §§908(c)(13), 902(10); *Pimpinella v. Universal Maritime Service Inc.*, 27 BRBS 154, 159 n.4 (1993). Thus, it is well-established that an administrative law judge is not bound by any particular standard or formula in determining the extent of disability sustained by claimant; rather, the administrative law judge may consider a variety of medical opinions and observations in addition to claimant's description of symptoms and physical effects of his injury in assessing the extent of a claimant's disability under the schedule.[3] *Pimpinella*, 27 BRBS at 159-60; *Mazze v. Frank J. Holleran, Inc.*, 9 BRBS 1053 (1978); *Bachich v. Seatrain Terminals of California, Inc.*, 9 BRBS 184 (1978). In the instant case, Dr. Gwathmey's opinion that claimant suffers a ten percent permanent partial disability in each hand constitutes substantial evidence to support the administrative law judge's ultimate determination that claimant sustained a ten percent permanent partial disability to each hand and is not entitled to a scheduled award greater than the compensation for that ten percent permanent partial disability which was previously awarded.

[3]In *PEPCO,* 449 U.S. at 272 n.4, 14 BRBS at 364 n.4, the Supreme Court stated that where an injury results in a partial loss of the use of a scheduled member, Section 8(c)(19), 33 U.S.C. §908(c)(19), provides that compensation is to be calculated as a proportionate loss of use of that member; the Court took note of the *medical* testimony in the *PEPCO* case regarding the percentage loss of the use of the members suffered by the employee.

Finally, claimant argues that where, as here, the claimant's post-injury earning capacity is greatly reduced, his disability rating under the schedule should be commensurate with his loss of wage-earning capacity.[4] This argument, however, was expressly considered and rejected by the Supreme Court in *PEPCO,* which recognized that application of the statutory schedule "may produce certain incongruous results." *PEPCO*, 449 U.S. at 284, 14 BRBS at 369. The Court explicitly acknowledged that "[t]he schedule may seriously undercompensate some employees [with scheduled injuries]...." and that "[t]he result seems particularly unfair when [the employee's] case is compared with an employee who suffers an unscheduled disability resulting in an equivalent impairment of earning capacity." *Id.* Accordingly, as substantial evidence supports the administrative law judge's ultimate findings in this case, we affirm the administrative law judge's determination that claimant suffers from a ten percent permanent partial disability in each hand, and his consequent denial of additional permanent partial disability compensation to claimant. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Pimpinella*, 27 BRBS at 154; *Sam v. Loffland Brothers Co.*, 19 BRBS 228 (1987).

Accordingly, the Decision and Order Denying Greater Permanent Partial Disability Ratings for Either Hand and the Decision and Order Denying Claimant's Petition for Modification of the Decision Issued on March 10, 1994, of the administrative law judge are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

[4]Claimant acknowledges that an award under the schedule presumes a loss in wage-earning capacity. *See, e.g., Henry v. George Hyman Construction Co.*, 749 F.2d 65, 17 BRBS 39 (CRT) (D.C. Cir. 1984).