BRB No. 92-2477

JAMES M. CHAMBLEE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING	)	
AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION AND ORDER

Appeal of the Decision and Order of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter & Montagna), Norfolk, Virginia, for claimant.

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

PER CURIAM:

Claimant appeals the Decision and Order (91-LHC-2251) of Administrative Law Judge Daniel A. Sarno, Jr. awarding benefits 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).

Claimant, a shipfitter for employer for almost twenty-three years, sought permanent partial disability compensation under the schedule for a left elbow injury he sustained at work on July 25, 1985. As of the time of the hearing, the only issue pending for adjudication was the extent of claimant's permanent physical impairment of his left arm under Section 8(c)(1) and (19) of the Act, 33 U.S.C. §908(c)(1), (19).[1]

[1]The administrative law judge accepted the parties' stipulations regarding causation, the timeliness of the notice and the claim, the applicable average weekly wage, employer's acceptance of medical benefits, and that various payments of temporary total and temporary partial disability compensation and permanent partial disability compensation for a ten percent impairment of the left arm had been made.

After rejecting claimant's argument that Dr. Bartlett's impairment rating in conjunction with claimant's own testimony warrants a finding of a 50 percent scheduled permanent impairment, the administrative law judge credited the impairment rating provided by Dr. Neff, Employer's Exhibit 11:4, over the 35 percent rating provided by claimant's treating physician, Dr. Bartlett, Employer's Exhibit 10:6, and awarded claimant compensation for a 25 percent scheduled permanent impairment accordingly.

On appeal, claimant contends that in assessing the extent of his disability the administrative law judge erred by totally disregarding his testimony regarding the extent to which his disability limits him in his ability to perform his job duties and by crediting the 25 percent physical impairment rating provided by Dr. Neff, a non-treating physician, over the 35 percent impairment rating provided by his treating physician, Dr. Bartlett. Claimant contends that he has identified factors such as his work limitations, change in job duties, weakness in the left hand, use of medications, and his need for assistance by co-workers which are sufficient to establish a much higher percentage of impairment than the 25 percent found by the administrative law judge. Employer has not responded to claimant's appeal.

After review of the Decision and Order in light of the relevant evidence, we affirm the administrative law judge's finding regarding the extent of claimant's permanent physical impairment. We initially reject claimant's contention that the administrative law judge failed to account for claimant's testimony in assessing the extent of his disability. Claimant correctly asserts that the Act does not require impairment ratings using the American Medical Association *Guides to the Evaluation of Permanent Impairment* (the AMA *Guides*), except in cases involving hearing loss and voluntary retirees, and that a variety of medical opinions and observations may be considered. *See Pimpinella v. Universal Maritime Service Inc.*, 27 BRBS 154 (1993). In the present case, however, the administrative law judge did consider claimant's testimony regarding the extent to which claimant's injury interferes in the performance of his job but found it insufficient to support a finding of a 50 percent permanent partial disability award under the schedule.[2] In so concluding, the administrative law judge recognized that scheduled awards are intended to compensate for physical impairment alone, that the physical factors cited by claimant are already encompassed in the physical impairment assessments made, and that the economic factors relied upon by claimant are irrelevant under the schedule as loss in wage-earning capacity is presumed. Because the administrative law judge's finding in this regard, is rational and consistent with applicable law, we affirm this determination.[3] *See generally Potomac Electric Power Co. v. Director, OWCP*, 449 U.S.

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[2]In making his findings of fact, the administrative law judge noted that claimant is under permanent restrictions against heavy gripping, lifting and pulling with his arm. *See* Decision and Order at 4. In addition, he recognized that claimant testified that these permanent restrictions have affected his ability to perform the work of a fitter, in that he is unable to do the climbing, and some of the heavy lifting required, and that he experiences radiating pain for which he takes pain killers. *Id.* at 5.

[3]In making his disability finding, the administrative law judge erred in stating that the Board held in *Young v. Todd Pacific Shipyards Corp.*, 17 BRBS 201 (1985), that pain and discomfort will not

268, 14 BRBS 363 (1980); *Burson v. T. Smith & Son, Inc.*, 22 BRBS 124, 127 (1989).

We also reject claimant's argument that the administrative law judge erred in crediting Dr. Neff's 25 percent disability assessment over the 35 percent assessment provided by claimant's treating physician, Dr. Bartlett.[4] Contrary to claimant's assertions, the administrative law judge is not bound to accept the opinion or theory of any particular medical examiner, but is entitled to evaluate the credibility of all witnesses, including doctors, and to accept or reject all or any part of any witnesses' testimony as he sees fit. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT) (5th Cir. 1992); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). In rejecting Dr. Bartlett's opinion, which referred to future problems claimant might experience, including the need for medical care, surgery, permanent work restrictions and restrictions on settling the claim, the administrative law judge reasonably found that it bordered on being a legal rather that a medical determination. In so concluding, he noted that Dr. Bartlett seemed more concerned with claimant's future problems and settlement issues than with the extent of claimant's present physical impairment. Moreover, the administrative law judge found that Dr. Bartlett failed to adequately explain his increase in claimant's disability rating from 5 percent on March 6, 1986, to 35 percent on March, 18, 1987. *Compare* Employer's Exhibits 10:4 and 10:6. In contrast, the administrative law judge found that Dr. Neff's March 12, 1992, disability assessment, which was based on his review of his medical notes and an x-ray performed at the time of his January 8, 1991, independent medical examination, was premised on a sound medical foundation. Because the administrative law judge reasonably rejected the 35 percent disability rating of Dr. Bartlett in favor of the 25 percent assessment provided by Dr. Neff, we affirm this credibility determination. *See generally Thompson v. Northwest Enviro Services*, 26 BRBS 53 (1992); *Wheeler v. Interocean Stevedoring Co.,* 21 BRBS 33 (1988). Inasmuch as Dr. Neff's opinion provides substantial evidence to support the administrative law judge's finding regarding the extent of claimant's disability, and claimant has failed to raise any reversible error made by the administrative law judge in weighing the conflicting evidence and making credibility determinations, the administrative law judge's award for a 25 percent permanent physical impairment under the scheduled is affirmed. *See generally Uglesich v. Stevedoring Services of America*, 24 BRBS 180, 183 (1991).

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be included in permanent partial disability under the schedule, Decision and Order at 7. In *Young*, the Board stated only that a doctor's impairment rating should not be amplified so as to separately compensate claimant for "pain and suffering" as in a tort case. *See Pimpinella v. Universal Maritime Service Inc.*, 27 BRBS 154 (1993). Any error is harmless, however, inasmuch as Dr. Neff considered claimant's pain and discomfort in making his disability assessment. *See* Employer's Exhibit 11.

[4]In addition to Drs. Bartlett and Neff, claimant was also seen by Dr. Bobbitt, employer's clinic physician, who initially opined on December 19, 1986, that claimant had reached maximum medical improvement and had a 5 percent permanent disability rating. On January 14, 1988, however, Dr. Bobbit, increased claimant's disability rating to 10 percent. Employer's Exhibit 8:47. Moreover, claimant received treatment between March 1987 and April 1989 by Dr. Giannotto, who also assigned a 10 percent permanent partial disability rating. Employer's Exhibit 9:5.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge