

BRB No. 09-0100

R.H.)
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 Claimant-Petitioner)
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 v.)
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 NEWPORT NEWS SHIPBUILDING AND) DATE ISSUED: 05/22/2009
 DRY DOCK COMPANY)
)
 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of the Decision and Order-Awarding Benefits of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter Mills, 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 Judges, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order-Awarding Benefits (2008-LHC-00318) of Administrative Law Judge Alan L. Bergstrom 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, a marine painter, suffered a work-related injury on May 31, 2006, when he fell onto his right wrist. Claimant sought treatment from Dr. Stiles, an orthopedic surgeon, who performed arthroscopic surgery on claimant's right wrist on April 24, 2006. The parties stipulated that claimant's injury reached maximum medical improvement on March 29, 2007. Claimant returned to work on March 30, 2007. Employer paid claimant

permanent partial disability benefits for a ten percent impairment to the right arm, commencing May 24, 2007.

Before the administrative law judge, the parties disputed the extent of claimant's permanent impairment. Claimant sought benefits for a 23 percent impairment, based on Dr. Stiles's opinion, or for a 31 percent impairment based on Dr. Freund's opinion, as supported by claimant's testimony concerning his restrictions. Employer contended that claimant was entitled to benefits for a six percent impairment under the Sixth Edition to the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) or an 11 percent impairment under the Fifth Edition of the AMA *Guides*.

Dr. Stiles, claimant's surgeon, opined on March 27, 2009, that claimant has a 23 percent impairment under the Fifth Edition to the AMA *Guides*.¹ CX A at 17. Dr. Freund performed an independent medical examination at the request of the district director. CX B at 1. On August, 17, 2007, he diagnosed claimant's condition as SLAC wrist, a condition developed secondary to total disruption of the scapholunate ligament and progressive carpal instability. He assigned a 31 percent impairment rating under the Fifth Edition of the *Guides*.² CX B at 4-5. Dr. Stiles concurred with Dr. Freund's opinion in a form letter dated January 31, 2008. CX C. To establish that Dr. Freund had incorrectly applied the *Guides*, employer submitted the report of Dr. Swanson, a reviewing expert, who had been the "chapter chair" of the "Upper Extremities" chapter of the Fifth Edition of the *Guides*. She stated that Dr. Freund should not have added together the ratings for loss of grip strength and loss of range of motion. EXs 8-10. Dr. Swanson reviewed the measurements of claimant's wrist taken on January 22, 2007 by Mr. MacMaster, on February 26, 2007 by Dr. Davlin, on March 29, 2007 by Dr. Stiles, and on August 27, 2007 by Dr. Freund. Dr. Swanson stated that Dr. Stiles's measurements as to extension, flexion and radial deviation are lower than the other three examiners. EX 8 at 3. She opined that the January measurements result in a 12 percent impairment under the Fifth Edition of the *Guides*, the February measurements result in a

¹ This is comprised of a five percent rating for lack of ulnar deviation, a four percent rating for a lack of radial deviation, a seven percent rating for loss of flexion, and a seven percent rating for loss of extension and post-traumatic arthritis. CX A at 17.

² This is comprised of a rating of 11 percent for loss of range of motion and a rating of 20 percent for loss of grip strength. CX B at 6. Dr. Freund stated that the *Guides* permit the addition of these two ratings. *Id.* at 7.

10 percent impairment, and the August measurements result in an 11 percent impairment.³ *Id.*

In his decision, the administrative law judge gave little weight to Dr. Stiles's impairment rating of 23 percent because his results on the extension and flexion measurements were not consistent with those of the other three examiners. Decision and Order at 10. The administrative law judge found that the results of Mr. MacMaster and Drs. Davlin and Freund were relatively consistent with each other. *Id.* at 11. The administrative law judge also found that under the Sixth Edition of the *Guides* loss of range of motion should be the primary measure of impairment rather than loss of grip strength. The administrative law judge credited Dr. Swanson's opinion that these two components should not be added together under the Fifth Edition either, thus invalidating Dr. Freund's 31 percent impairment rating. *Id.* The administrative law judge concluded that the "credible medical opinions made in accordance with the AMA Guides establish [that] Claimant [has] an 11% impairment rating to the right upper extremity." *Id.* at 12.

On appeal, claimant contends that the administrative law judge erred in determining the extent of his permanent impairment. Employer responds, urging affirmance of the administrative law judge's decision, stating that the award is supported by Dr. Swanson's opinion.

In the event of an injury to a scheduled member, recovery for a claimant's permanent partial disability under Section 8(c), 33 U.S.C. §908(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). In cases other than those involving hearing loss, *see* 33 U.S.C. §908(c)(13)(E), or a voluntary retiree, *see* 33 U.S.C. §§902(10), 908(c)(23), the administrative law judge is not bound by any particular standard or formula but may consider medical opinions and observations in addition to claimant's description of symptoms and the physical effects of his injury in assessing the extent of claimant's permanent impairment. *See, e.g., Cotton v. Army & Air Force Exch. Services*, 34 BRBS 88 (2000); *Pimpinella v. Universal Mar. Serv., Inc.*, 27 BRBS 154 (1993). The administrative law judge may, however, rely on opinions that rate claimant's impairment under the *AMA Guides*. *See Jones v. I.T.O. Corp. of Baltimore*, 9 BRBS 583 (1979).

³ Dr. Swanson agreed that Dr. Stiles's measurements would result in an impairment of 23 percent, as Dr. Stiles had stated. EX 8 at 3. Similarly, Dr. Apostoles reviewed the examinations of Mr. MacMaster, Dr. Davlin and Dr. Stiles and applied their measurements to the *Guides*. He recorded the same results as Dr. Swanson. EX 6.

We reject claimant's contention of error. The administrative law judge acted within his discretion in rejecting the opinion of Dr. Stiles that claimant has a 23 percent impairment because his measurements of claimant's wrist were inconsistent with the other three sets of measurements. *See generally Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); Decision and Order at 10. The administrative law judge also rationally discounted Dr. Freund's opinion that claimant has a 31 percent impairment based on his crediting of Dr. Swanson's opinion that it is inappropriate to add together impairment ratings for loss of range of motion and loss of grip strength. The administrative law judge rationally credited Dr. Swanson's opinion on the basis of her credentials as an expert concerning the "upper extremity" chapter of the *AMA Guides*. *See generally Whitmore v. AFIA Worldwide Ins.*, 837 F.2d 513, 20 BRBS 84(CRT) (D.C. Cir. 1988). Moreover, the award for an 11 percent impairment is supported by the opinions of Dr. Swanson, Dr. Freund, and Dr. Apostoles that the August 2007 test results based only on loss of range of motion establish this degree of impairment, as well as by the fact that this rating is the average of the ratings resulting from the three credited sets of measurements. *Mazze v. Frank J. Holleran, Inc.*, 9 BRBS 1053 (1978). As claimant has failed to identify any reversible error in the administrative law judge's weighing of the medical evidence and as substantial evidence supports the administrative law judge's decision, we affirm the award of benefits for an 11 percent impairment to the arm. 33 U.S.C. §908(c)(2); *O'Keefe*, 380 U.S. 359.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge