U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 18-0609

IRWIN PIERCE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 12/07/2020
ELECTRIC BOAT CORPORATION	)	
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Granting Modification of Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

Aida R. Carini (Embry, Neusner, Arscott & Shafner), Groton, Connecticut, for Claimant.

Robert J. Quigley, Jr. (McKenney, Quigley & Clarkin, L.L.P.), Providence, Rhode Island, for self-insured Employer.

Edward Waldman (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge Jonathan C. Calianos's Decision and Order Granting Modification (2018-LHC-00113) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant is a voluntary retiree. In 1992, he was diagnosed with an asbestos-related lung injury and filed a claim under the Act. Employer voluntarily paid benefits beginning on June 20, 1992. Following Claimant's claim for additional benefits, Administrative Law Judge Geraghty awarded compensation in 2015 for a 57.5% impairment based on the parties' stipulations.[1] Due to his deteriorating condition, Claimant filed a motion for modification alleging his impairment had increased to 100% as of May 15, 2017.

The parties submitted joint stipulations to Administrative Law Judge Calianos (the administrative law judge) on April 6, 2018. They agreed on all issues except the extent of Claimant's impairment and set forth the dispute as follows:

> The Claimant presently receives benefits based on a 57.5% rating, based on the 6th Edition of the AMA *Guides to the Evaluation of Permanent Impairment*. He now seeks benefits under the Act for a 100% impairment rating based on the 5th Edition of the AMA *Guides to the Evaluation of Permanent Impairment*. [Employer] denies that the Claimant's impairment has increased and, further, states that any rating should be determined based on the 6th Edition of the AMA *Guides*.

[1] She found Claimant entitled to the following permanent partial disability benefits based on an average weekly wage of $631.28: 1) from May 29, 1992 to December 25, 2000, $58.92 per week (14% impairment); 2) from December 26, 2000 to November 23, 2003, $126.26 per week (30% impairment); 3) from November 24, 2003 to September 6, 2011, $136.78 per week (32.5% impairment); 4) from September 7, 2011 to July 24, 2014, $199.90 per week (47.5% impairment); and 5) continuing from July 25, 2014, $241.99 per week (57.5% impairment). Neither her decision nor the signed 2015 stipulations indicated how the impairment percentages were determined. However, the stipulations agreed upon in 2018 stated the prior ratings were calculated using the 6th Edition of the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*). *See* 2018 Jt. Stips. at 1-2.

2018 Jt. Stips. at 1-2. The administrative law judge accepted the parties' stipulations and identified the issue as whether Claimant's lung impairment worsened since 2015. Based on Claimant's credible testimony[2] and the medical opinions of Drs. Stephen Matarese and Michael Teiger, he found Claimant's whole-man impairment increased to 65% based on the 6th Edition of the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) and awarded benefits accordingly.[3] Decision and Order at 2-7, 9.

Claimant appeals the administrative law judge's award. Employer and the Director, Office of Workers' Compensation Programs (Director), respond, urging affirmance.[4] Claimant filed a reply brief.

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[2] Claimant described more coughing, mucous, and shortness of breath than in 2015, which in turn caused extreme right-side pain, high heart rate, and two hernias. Because he is easily exhausted, he no longer does chores or hobbies. Tr. at 29-35.

[3] Dr. Matarese, Claimant's treating physician, noted progressive decline in Claimant's pulmonary function from 2015 to 2017. CXs 1-2. Using the AMA *Guides*, he diagnosed a Class IV pulmonary impairment of 100% (5th Edition), 65% (6th Edition), and 50-100% (3rd Edition). CXs 1-2. At his deposition on April 5, 2018, Dr. Matarese explained he used the 3rd and 5th Editions at Claimant's request. CX 2 at 13, 16, 26.

Dr. Teiger is Employer's expert. He has examined Claimant multiple times since 2004 and stated Claimant's condition "progressed significantly" between 2004 and 2014 when he diagnosed a Class IV impairment. EX 2 at 8. By 2017, he noted Claimant's pulmonary function tests were "even worse," but his impairment had not increased substantially. EXs 1, 3. Using the 6th Edition of the AMA *Guides*, he identified "at least 50%" impairment but said he "wouldn't quibble" over the difference between his rating and Dr. Matarese's 6th Edition rating. EXs 1-2. The administrative law judge accepted this opinion as a persuasive endorsement of Dr. Matarese's 65% rating. Decision and Order at 9.

Drs. Matarese and Teiger followed the AMA's advice to use the most recent edition to determine impairment ratings. CX 2 at 26-27; EX 1 at 1; Section 2.5d (Changes in Impairment from Prior Ratings), AMA *Guides* (6th Edition).

[4] By Order dated June 13, 2019, the Benefits Review Board ordered the Director to file a brief in this case. The Board permitted Claimant and Employer to respond.

Claimant contends the administrative law judge should have rated his impairment under the 3rd Edition of the AMA *Guides*, the version in effect at the time of his injury.[5] He argues retroactive application of newer versions to his injury deprives him of vested rights and is an unconstitutional *ex post facto* modification.[6] Claimant asserts the 6th Edition of the *Guides*:

> adopted a radical and scientifically invalid 'paradigm' which greatly reduced impairment ratings, and is perceived to be violently anti-worker. The 6th Edition reduces benefits levels and impairment levels by 25 to 40 percent across the board, and in some cases eliminates benefits altogether, thereby reducing the benefit levels enacted as a matter of law by the Congress in 1984. Not surprisingly it has evoked substantial controversy, which has resulted in a significant number of jurisdictions specifically declining to adopt the 6th Edition.

Cl. Br. at 12.[7]

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[5] In the 2018 Joint Stipulations, Claimant sought benefits under the 5th Edition. At the hearing on his modification claim and in his post-hearing briefs, he asserted entitlement to a rating based on the 3rd Edition – effectively abandoning his request to apply the 5th Edition to his worsening condition. Decision and Order at 8; Tr. at 9, 13. Claimant also explained in his post-hearing reply brief he was not seeking to retroactively change the 2015 award under the 6th Edition to the rating provided in an earlier edition.

[6] Claimant cites *Bradley v. Sch. Bd. of City of Richmond*, 416 U.S. 696 (1974). *Bradley* explains the general rule is to apply the law in effect at the time of the decision unless "manifest injustice" would ensue. *Bradley*, 416 U.S. at 716-721.

[7] Claimant describes the 6th Edition as a "radical departure . . . from past practice" which "highlight[s] the risks inherent in delegation of legislative powers to private bodies." Cl. Br. at 11. He also asserts the elemental basis for the *Guides* changed in the 6th Edition (using new classifications) and definitions of certain terms are significantly different and conflict with their meanings under the Act. Cl. Reply at 8-10. Moreover, Chapter 1 reveals the 6th Edition underwent a "paradigm shift" to include a "Standardized assessment of Activities of Daily Living (ADL) limitations associated with physical impairments" as well as "functional assessment tools" and "improvements in interrater . . . consistency." The editors adopted the International Classification of Functioning, Disability and Health, which they assert results in a simplified "contemporary model of disablement" that corrects deficiencies in the 5th Edition and makes ratings more functionally based. Section 1.2 (New Directions for the Sixth Edition), AMA *Guides* (6th Edition).

Claimant contends Congress improperly delegated, or the Department of Labor (Department) improperly sub-delegated, the power to calculate benefits to the AMA, a private entity. By doing so, he asserts, Congress gave the AMA significant power over claimants' benefits under the Act. In the alternative, if there was no improper delegation, Claimant contends the AMA has gone so far afield with the 6th Edition that Congress could not have foreseen such a significant departure from the *Guides* originally adopted, and use of this edition unconstitutionally deprives him of due process. As his injury occurred in 1992, he contends the 3rd Edition is controlling for his injury for all times, including the initial assessment and all modifications of impairment ratings related to that injury. He asks the Benefits Review Board to remand the case for the administrative law judge to award benefits using the 3rd Edition's rating scale.

Employer and the Director disagree with Claimant. They assert the administrative law judge correctly used the 6th Edition based on the plain language of Section 2(10) of the Act, 33 U.S.C. §902(10), and its implementing regulation, 20 C.F.R. §702.601(b), which instructs the use of the most current version to take advantage of scientific and medical advancements.[8]

With respect to the constitutional issues raised, the Director asserts Congress adopted the technical expertise and standards of an independent, respected authority and did not delegate its power. Because there was no delegation, there was no need for an intelligible principle for doing so, and there was no improper sub-delegation by the Department.[9] Employer contends the Board, like the administrative law judge, lacks jurisdiction to address constitutional questions; the Director, however, presumes the Board has the authority to address this question and asserts Claimant has not overcome the presumption that the statute is valid. Employer maintains Claimant's remaining challenges to the substance of the 6th Edition should be addressed by Congress. Both Employer and the Director urge the Board to affirm the administrative law judge's award on modification.

[8] The Director asserts "the most natural reading of the phrase 'modified from time to time' [in Section 2(10)] is that the edition of the *Guides* to be applied in any given case is the edition in effect at the time the impairment determination is made." Dir. Br. at 8. Therefore, the Director avers the Act is unambiguous; however, if any ambiguity exists, she asserts the regulation's language "could hardly be clearer." *Id.* at 13.

[9] She alternatively argues if Congress delegated any power, it provided a sufficient intelligible principle by requiring use of the uniform methodology of the AMA *Guides* in two specific subsets of cases. Dir. Br. at 16.

Statutory Interpretation

As Claimant is a voluntary retiree whose occupational disease manifested after his retirement, Section 8(c)(23) of the Act controls his entitlement to benefits. It provides:

> Notwithstanding paragraphs (1) through (22), with respect to a claim for permanent partial disability for which the average weekly wages are determined under section 910(d)(2) of this title, the compensation shall be $66^{2/3}$ per centum of such average weekly wages multiplied by the percentage of permanent impairment, *as determined under the guides referred to in section 902(10) of this title*, payable during the continuance of such impairment.

33 U.S.C. §908(c)(23) (emphasis added). Section 2(10) of the Act states:

> "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment; but such term shall mean permanent impairment, determined (to the extent covered thereby) *under the guides to the evaluation of permanent impairment promulgated and modified from time to time by the American Medical Association*, in the case of an individual whose claim is described in section 910(d)(2) of this title.

33 U.S.C. §902(10) (emphasis added).[10]

When interpreting a statute, the starting point is the plain meaning of its words. *Mallard v. U.S. Dist. Ct. for the Southern Dist. of Iowa*, 490 U.S. 296 (1989). Courts should give effect, if possible, to every word of the statute. *Conn. Dep't of Income Maint. v. Heckler*, 471 U.S. 524, 530 n. 15 (1985); *Bowsher v. Merck & Co.*, 460 U.S. 824, 833 (1983); *Mastro Plastics Corp. v. Nat'l Labor Relations Bd.*, 350 U.S. 270, 298 (1956). Words must be read in their context as well as within the broader context of the whole statute. *Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302, 321 (2014); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

Congress first incorporated the AMA *Guides* into the Longshore Act in 1984 when it introduced them in three sections related to hearing loss and retiree benefits, 33 U.S.C.

[10] Section 10(d)(2) addresses the calculation of average weekly wage when an occupational disease manifests after an employee's retirement. 33 U.S.C. §910(d)(2).

§§902(10), 908(c)(13)(E), 908(c)(23); *see Pimpinella v. Universal Mar. Serv., Inc.*, 27 BRBS 154, 159 n.4 (1993) (AMA *Guides* not required for other claims); *see also* 20 C.F.R. §702.441(d) (evaluation of hearing impairment). In doing so, it acknowledged the AMA *Guides* would be used in determining permanent impairment, and the AMA would update its *Guides* "from time to time." 33 U.S.C. §§902(10), 908(c)(13)(E).

Without more, this provision is reasonably interpreted as a mandate to use the *Guides* with the acknowledgement they would undergo periodic modifications. But Section 2(10) is silent on the matter of which edition of the *Guides* is to be used for a claimant's impairment rating and does not adopt any particular edition into the law.[11] As Congress did not convey its intent in the plain language of the statute, it left a gap, making the statute ambiguous and requiring us to look to the regulation promulgated by the Department to interpret the statute.[12] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984); *Helen Mining Co. v. Elliott*, 859 F.3d 226 (3d Cir. 2017); *Belt v. P.F. Chang's China Bistro, Inc.*, 401 F. Supp. 3d 512, 527 (E.D. Pa. 2019). "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight," and "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843-844.

The Secretary of Labor has the authority to make rules and regulations to administer the Act. 33 U.S.C. §939(a). The promulgated regulation, 20 C.F.R. §702.601(b), fills the gap in Section 2(10). *See Helen Mining*, 859 F.3d at 235; *Belt*, 401 F. Supp. 3d at 528. Section 702.601(b) states, in pertinent part:

> With regard to an occupational disease for which the time of injury, as defined in §702.601(a), occurs after the employee was retired, disability shall mean permanent impairment as determined according to the *Guides to the Evaluation of Permanent Impairment* which is prepared and modified from

[11] As of the date of enactment, September 28, 1984, the AMA had published the 2nd Edition of the AMA *Guides*. The various versions of the AMA *Guides* were first published in the following years: 1st Edition – 1971; 2nd Edition – 1984; 3rd Edition – 1988; 4th Edition – 1993; 5th Edition – 2000; 6th Edition – 2007.

[12] When the statute is silent, "such silence, after all, normally creates ambiguity. It does not resolve it." *Helen Mining, Co. v. Elliott*, 859 F.3d 226, 235 (3d Cir. 2017) (quoting *Barnhart v. Walton*, 535 U.S. 212, 218 (2002)). Therefore, we reject the Director's assertion that the statute is unambiguous.

> time-to-time by the American Medical Association, **using the most currently revised edition of this publication**. * * * The disability described in this paragraph shall be limited to permanent partial disability.

20 C.F.R. §702.601(b) (bolded emphasis added).[13] The regulation acknowledges the AMA *Guides* will be "prepared and modified from time to time," as does the Act, and expressly addresses which edition of the *Guides* to use to assess a retiree's impairment, thereby filling the gap left by Congress.

A review of the legislative history of the 1984 Amendments to the Act, specifically the pre-enactment commentary, confirms the regulation is "a permissible construction of the statute." *Chevron*, 467 U.S. at 843-844; *see D.C. v. Heller*, 554 U.S. 570, 605 (2008) ("'[L]egislative history,' of course, refers to the pre-enactment statements of those who drafted or voted for a law; it is considered persuasive by some . . . because the legislators who heard or read those statements presumably voted with that understanding.").[14] Prior to the September 28, 1984 enactment of the 1984 Amendments, legislative commentary related to retirees with occupational diseases stated benefits will be determined in accordance with the AMA *Guides*. 130 Cong. Rec. Part 18, 98th Cong. 2d Session, 25902, 25908 (Sept. 18, 1984). Congressman Miller, member of the House Committee on Education and Labor and appointed conferee, stated the Amendments modified the definition of a retiree's "disability" to mean "a permanent impairment as determined under the most up-to-date guides of the [AMA]." *Id.* at 25903. In addressing use of the *Guides* with respect to hearing loss claims, a companion amendment, he explained:

> Hereafter, determinations of hearing loss will be *grounded on a uniform external and professionally acceptable basis* – the AMA Guides to the Evaluation of Permanent Impairment. Currently, there is no single formula by which hearing loss claims under the act can be evaluated; and deputy commissioners and administrative law judges are free to use whatever

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[13] *See also* 20 C.F.R. §702.441(d), which similarly fills the gap in Section 8(c)(13)(E) of the Act.

[14] "[P]ostenactment legislative history," on the other hand, is "a deprecatory contradiction in terms, [which] refers to statements of those who drafted or voted for the law that are made after its enactment and hence could have had no effect on the congressional vote." *D.C. v. Heller*, 554 U.S. 570, 605 (2008).

> formula they desire. This has produced unpredictibility (sic) and nonuniform impairment determinations. . . .

Id. at 25906 (emphasis added). Further, "[t]he conferees view[ed] the AMA Guides to be the most widely accepted medical standards and wish[ed] to assure that determinations will always be in accordance with *the most recently revised edition*." H.R. Conf. Rep. No. 1027, 98th Cong., 2d Sess. 1984, 1984 U.S.C.A.A.N. 2771, 2778 (Sept. 14, 1984) (emphasis added).[15] Because Congress introduced the requirement to use the AMA *Guides* for retirees and hearing loss claimants simultaneously, we infer the hearing loss rationale applies similarly to retiree impairment.

The regulation comports with the stated Congressional intent by specifying "the most currently revised edition" is to be used in awarding retiree benefits. Despite this unambiguous language, Claimant next disputes the meaning of "the most currently revised edition" and asserts it cannot mean the 6th Edition for his case. Rather, he contends Section 702.601(b) should be interpreted as requiring use of the most current edition in relation to the "time of injury," as signified by its reference to Section 702.601(a). We disagree.

The equation for retiree benefits consists of two components, average weekly wage and percent of impairment, 33 U.S.C. §908(c)(23), and the two components are defined in different sections of the statute. 33 U.S.C. §§902(10), 910. Section 10(d)(2) identifies the time period for assessing average weekly wage in a retiree case. 33 U.S.C. §910(d)(2).[16] Section 2(10) defines retiree impairment. Only one, average weekly wage, is restricted by the "time of injury." 33 U.S.C. §910(d)(2).

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[15] Claimant asserts the House nevertheless acknowledged there may come a time when the AMA *Guides* "were no longer congruent with their intent for treatment of occupational diseases," Cl. Reply at 4, because the House stated: "If those guides do not evaluate the impairment, the conferees intend that other professionally recognized standards be utilized in the determination of impairment." 1984 U.S.C.C.A.N. at 2779. Contrary to Claimant's assertion, this language implies another method may be used if a particular impairment is not addressed in the AMA *Guides*, not that another method may be used if a party dislikes the *Guides'* application. *See* 33 U.S.C. §902(10) (permanent impairment ratings must be determined using the *Guides* "to the extent covered thereby").

[16] Section 10(d)(2)(b) provides that the applicable average weekly wage shall be the national average weekly wage at the time of the injury when the injury manifests more than one year after the claimant retires. 33 U.S.C. §910(d)(2)(b).

Section 702.601(a) of the regulations, 20 C.F.R. §702.601(a), defines the "time of injury" of an occupational disease as when the employee becomes aware of the relationship between his employment, his disease, and his disability, making it a term of art. The definition applies for "purposes of this subpart" and, specifically, Sections 702.603 and 702.604 use the "time of injury" to determine the calculation of retirees' average weekly wages. 20 C.F.R. §§702.603, 702.604. Thus, the average weekly wage on which benefits are based is determined as of the "time of injury." *Id.*

Section 702.601(b), which implements and expands on Section 2(10)'s definition of disability for retirees, uses the term of art only to indicate the subsection is applicable in cases involving occupational diseases which manifest after retirement. In those cases, Section 702.601(b), which affects the equation's percent of impairment component, requires use of the AMA *Guides*. It does not, however, limit the rater to using the *Guides* in effect at the "time of injury," and the structure of the sentence bears this out. 20 C.F.R. §702.601(b). As is eminently clear, "time of injury" does not modify the version of the AMA *Guides* and therefore does not affect which version of the AMA *Guides* is to be used to assess the retiree's impairment. In no uncertain terms, the regulation requires a retiree's impairment to be rated using "the most currently revised edition" of the AMA *Guides*. *See generally Chevron*, 467 U.S. at 843-844; *Helen Mining*, 859 F.3d at 234. We see no way to interpret this language as a mandate to use the version in effect at the time of Claimant's injury. *See Kisor v. Wilkie*, 139 S.Ct. 2400 (2019) (plain language of unambiguous regulation applies).

Moreover, the phrase "the most currently revised edition" of the AMA *Guides* means doctors are to use the most recent edition as of the date they render their medical opinions. *Alexander v. Triple A Mach. Shop*, 34 BRBS 34 (2000), *rev'd on other grounds sub nom. Alexander v. Director, OWCP*, 297 F.3d 805, 35 BRBS 25(CRT) (9th Cir. 2002). In *Alexander*, the claimant was a voluntary retiree with an asbestos-related lung condition. Based on the disease's onset in 1983, the employer asserted the claimant's respiratory impairment should have been rated using the 1st, not the 3rd, Edition of the AMA *Guides*. The claimant underwent testing in 1983 and 1989, and the doctor interpreted both sets of test results in 1989 using the 3rd Edition, which was the then-most-current edition.

The Board held it was rational for the administrative law judge to determine the claimant's disability based on the doctor's opinion that used criteria from the edition of the *Guides* in effect in 1989 when he rendered his opinion because it "represented state of the art standards" for evaluating and rating the claimant's impairment reflected on testing

conducted in both 1983 and 1989. *Alexander*, 34 BRBS at 37.[17] This issue was not raised on appeal to the circuit court, and no one raised a constitutional issue.

Claimant's argument for use of the 3rd Edition because it was in effect at the time of his injury thus is contrary to both the regulation and *Alexander*.[18] *Alexander*, 34 BRBS at 37; 20 C.F.R. §702.601(b).

Constitutional Challenges

Claimant contends Congress improperly delegated, or the Department improperly sub-delegated, legislative powers for calculating benefits under the Act to the AMA.[19] He

[17] Claimant asserts the Board did not address in *Alexander* "whether the [version of the AMA *Guides*] becomes fixed in determining future modifications during the pendency of a claim," such that once a particular edition is used to assess impairment, it must always be used. Cl. Br. at 5. *Alexander*'s holding implies the version is not fixed. When a retiree claimant undergoes a medical evaluation in a modification claim, the doctor must use the then-current AMA *Guides* to rate the retiree's impairment.

[18] It is also contrary to the structure of the statute. Congress knew how to and could have specified the "time of injury," a date certain, for both factors for disability compensation if it so chose. "Congress did not write the statute that way." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Naftalin*, 441 U.S. 768, 773 (1979)); *see* 33 U.S.C. §§902(10), 908(c)(23), 910(d)(2).

[19] Contrary to Employer's contention, the Board has the authority to address constitutional challenges to the Act or regulations. 33 U.S.C. §921(b)(3) (Board is "authorized to hear and determine appeals raising a substantial question of law or fact"); *Duck v. Fluid Crane & Constr. Co.*, 36 BRBS 120, 122 n.4 (2002) (Board possesses sufficient authority to decide the constitutional validity of statutes and regulations within its jurisdiction); *Herrington v. Savannah Mach. & Shipyard Co.*, 17 BRBS 194, 196 (1985); *see also Island Creek Coal Co. v. Bryan*, 937 F.3d 738, 753 (6th Cir. 2019) ("Board serves the same functions that district courts performed before its 1972 creation"); *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1118 (6th Cir. 1984) (a question of law "clearly implies the power to determine whether a regulation is in accord with the Act"); *Shaw v. Bath Iron Works Corp.*, 22 BRBS 73 (1989) (Board was created to perform the functions previously performed by the district courts). Further, as a party may appeal the Board's decision to the appropriate Article III court, there is effective judicial review of any constitutional issue the Board addresses. *Califano v. Sanders*, 430 U.S. 99, 108-109

asserts it is improper to grant such power to a private entity with no accountability.[20] Claimant asserts the regulation's phrase "using the most currently revised edition" automatically incorporates future editions of the AMA *Guides* into the Act, without specific congressional or agency approval, and violates his rights.[21] If there has been no improper delegation, Claimant alternatively contends the application of the 6th Edition of the AMA *Guides* is generally unconstitutional because it represents a "paradigm" change from prior versions. *See* n.7, *supra*. Employer and the Director assert there has been no improper delegation of authority or other constitutional violation.

Non-Delegation Doctrine

The non-delegation doctrine question is one of Congressional power. Under the Constitution, "[a]ll legislative powers" are vested with Congress. U.S. Const. art. I, §1. Congress is authorized to "make all Laws[,]" art. I §8, par. 18, and "is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935). While this is true, the Supreme Court explained:

> the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply.

(1977); *Kreschollek v. Southern Stevedoring Co.*, 78 F.3d 868, 871, 30 BRBS 21, 26(CRT) (3d Cir. 1996).

[20] Claimant also asserts Longshore Act benefits arise under Admiralty powers and, as such, are controlled only by the Federal Government; if they cannot be delegated to the states, *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), they cannot be delegated to a private entity.

[21] We reject Claimant's *ex post facto* violation argument. The Supreme Court has long recognized "the constitutional prohibition on *ex post facto* laws applies only to penal statutes" of which the Longshore Act is not. *Collins v. Youngblood*, 497 U.S. 37, 41 (1990); *see also* U.S. Const. art. I, §10, cl. 1; *Smith v. Doe*, 538 U.S. 84 (2003); *Calder v. Bull*, 3 U.S. 386 (1798).

Schechter Poultry, 295 U.S. at 530 (citing *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935)). This allows Congress to "obtain[] the assistance of its coordinate Branches." *Mistretta v. United States*, 488 U.S. 361, 372 (1989). The Court stated:

> In a passage now enshrined in our jurisprudence, Chief Justice Taft, writing for the Court, explained our approach to such cooperative ventures: 'In determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the government co-ordination.' So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.'

Id. (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406, 409 (1928)). The intelligible principle must "clearly delineate[] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta*, 488 U.S. at 372-373 (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)). This standard is "not demanding" and even a broad delegation is sufficient. *Gundy v. U.S.*, 139 S.Ct. 2116, 2129, *reh'g denied* (2019).

In that vein, courts generally do not second-guess the legislature because "other branches of Government have vested powers of their own that can be used in ways that resemble lawmaking."[22] *Dep't of Transp. v. Ass'n of Am. Railroads [Amtrak]*, 575 U.S. 43, 61 (2015) (Alito, J., concurring); *Gundy*, 139 S.Ct. at 2129. While it is not unusual for Congress to permit the executive agencies to promulgate regulations to administer Congressional statutes, Congress may not give legislative power to private entities. *Amtrak*, 575 U.S. at 62 (citing *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936)); *Schechter Poultry*, 295 U.S. 495; *Texas v. Rettig*, 968 F.3d 402 (5th Cir. 2020).

Congress may, however, rely on the work of private entities "in matters of a more or less technical nature" to use their expertise by, for example, adopting their well-

[22] The Supreme Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474-475 (2001) (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)). The non-delegation doctrine has now, generally, been "limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional." *Mistretta*, 488 U.S. at 373 n.7.

established, uniform standards. *Schechter Poultry*, 295 U.S. at 537; *Ryan*, 293 U.S. 388 (petroleum production); *St. Louis, I.M. & S. Ry. Co. v. Taylor*, 210 U.S. 281 (1908) (railcar drawbar heights); *Buttfield v. Stranahan*, 192 U.S. 470 (1904) (tea grades); Dir. Br. at 16-17. In *Buttfield*, the Court determined Congress "legislated on the subject as far as reasonably practicable" and left the technical details to experts who were better positioned and equipped to identify inferior teas. *Buttfield*, 192 U.S. at 496; *see also St. Louis*, 210 U.S. at 287 (Court summarily relied on *Buttfield* analysis to uphold statute relying on private entity's standards to establish a uniform height for railcar drawbars to allow coupling with other railcars in interstate commerce). Logistics such as time, cost, and expertise affect whether a legislature will develop its own standards or adopt those of an expert in the field, even if periodically revised, and courts have not penalized legislatures for taking the latter path. *See id.*[23]

Does the Act or Regulation Violate the Non-Delegation Doctrine?

As we stated above, the Act mandates use of the AMA *Guides* as "modified from time to time" for retiree impairment, leaving a gap as to which edition is applicable for any given claimant. The regulation fills that gap by stating impairment is to be measured using the "most currently revised" version. Claimant contends this language improperly delegates authority over claimants' benefits to the AMA.

We presume the statute is constitutional; Claimant, as the challenger, bears the heavy burden of showing it is not. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976); *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Gillmor v. Thomas*, 490 F.3d 791 (10th Cir. 2007). Claimant has made no such showing. There is no improper delegation of legislative power to the AMA: Congress legislated as far as reasonably possible, *Buttfield*,

[23] *See also, e.g., Madrid v. St. Joseph Hosp.*, 928 P.2d 250, 256 (N.M. 1996) (adoption reasonable if the standards "were not made in response" to the statute using them); *Board of Trustees of the Employees' Retirement Sys. of the City of Baltimore v. Mayor & City Council of Baltimore*, 562 A.2d 720, 731 (Md. 1989) (adoption reasonable if the standards are "issued by a well-recognized, independent authority, and provide guidance on technical and complex matters within the entity's area of expertise"). Courts have applied a similar rationale to the incorporation of private standards into their own rules. *In re Hansen*, 275 N.W.2d 790, 796-797 (Minn. 1978), *appeal dismissed*, 441 U.S. 938 (1979) (Supreme Court of Minnesota concluded its adoption of a rule requiring bar applicants to graduate from an American Bar Association (ABA)-accredited law school was not an unlawful delegation to the ABA: "We have neither the time nor the expertise to investigate individually [each applicant's specific training or law school] and any attempt by us to do so would be inefficient and chaotic.").

192 U.S. at 496, and then, for a small subset of claims under the Act, adopted the pre-existing expertise of the AMA for the purpose of assessing retiree impairments. This enactment was made with the understanding the AMA would modify its *Guides* occasionally to keep up-to-date with the most current scientific and medical knowledge. 1984 U.S.C.A.A.N. at 2778; *see, e.g.*, *Madrid v. St. Joseph Hosp.*, 928 P.2d 250 (N.M. 1996) (interpreting similar language in a state workers' compensation statute adopting the AMA *Guides*).[24] The mandate to use the *Guides* for retiree benefits does not delegate power to the AMA. *See Gundy*, 139 S.Ct. 2116. Instead, it merely prescribes the method by which doctors may calculate a retiree's impairment. *See Madrid*, 928 P.2d at 258-259.

The AMA publishes the *Guides*, the industry standard, to assist physicians in the difficult task of rating an injured person's impairment, generally for workers' compensation benefits. It would be "impractical to expect [the] Legislature to establish standards for evaluating physical [or psychological] impairment in workers' compensation claims." *Madrid*, 928 P.2d at 258-259. Moreover, Longshore Act participants are not the only users of the AMA *Guides*, *see, e.g.*, *id.* at 258, and the AMA did not create the *Guides* for Congress or the Longshore Act. Consequently, mandating use of "a private entity's standards cannot be construed as a deliberate law-making act when" they "have a

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[24] *See also Protz v. Workers' Comp. Appeal Bd. (Derry Area School District)*, 161 A.3d 827, 842 (Pa. 2017) (Baer, J., dissenting) (interpreting similar language in a state workers' compensation statute adopting the AMA *Guides*):

> [T]he challenged statutory provision delegates preliminary determinations of claimant impairment ratings to board-certified physicians licensed in the Commonwealth who are active in clinical practice. The statute directs these physicians to utilize the most recent edition of the AMA Guides in connection with their initial impairment determination. There is no constitutional infirmity in this approach as it merely evinces the General Assembly's policy determination to adopt the most up-to-date medical advances as the methodology to be utilized by physicians when evaluating whether to classify a claimant as totally or partially disabled. Stated differently, requiring the use of the most recent AMA Guides is not delegating the authority to make law; it is simply declaring the applicable standard by which physicians should conduct impairment rating evaluations. * * * Accordingly, I would hold that the General Assembly's common sense decision to direct physicians to utilize the most current medical knowledge when making impairment determinations is a constitutionally sustainable policy decision that should be left undisturbed.

significance independent of a legislative enactment. . . ." *Id.* at 257; *see, e.g., In re Hansen*, 275 N. W. 2d at 790 (court rule requiring graduation from American Bar Association (ABA)-accredited law school did not delegate authority to ABA – it set a standard of "educational excellence"); *see also Amtrak*, 575 U.S. 43.

Similarly, we disagree with Claimant's assertion that the regulatory phrase "most currently revised" causes a delegation violation. The AMA published the 2nd Edition of the *Guides* prior to the enactment of the 1984 Amendments. Congress clearly adopted this standard and acknowledged the *Guides* would be "modified from time to time," and the AMA has updated its work four times since the 2nd Edition. We agree with the court's rationale in *Madrid*:

> Periodic revisions of the standard will not transform an otherwise constitutional and non-delegatory statutory provision into an unconstitutional delegation of legislative power. Where a standard is periodically updated because of new scientific developments recognized by eminent professionals interested in maintaining high standards in science, the standard may still be adopted by the Legislature.

Madrid, 928 P.2d at 259.[25]

Congress instructed the Department and its administrative law judges to use the AMA *Guides* to award retiree benefits under the Longshore Act; it did not delegate to the AMA the power to control a claimant's award of benefits. As no delegation occurred, we need not examine whether an intelligible principle was provided. The Department then required the most current edition be used to assess impairment. It did not sub-delegate power to award benefits to the AMA, but only adopted the industry standard's periodic updates to ensure uniform application of the newest developments in medical approaches to impairment ratings.[26] Accordingly, we hold the regulation, consistent with

[25] Notably, the Supreme Court has found the federal non-delegation doctrine violated only twice. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *see Whitman*, 531 U.S. at 474-476.

[26] Were we to hold otherwise, Claimant still would not succeed in having his benefits calculated under the 3rd Edition. Rather, under some states' rationales limiting use of the AMA *Guides* to those in effect at the time of the statute's enactment, if there was an improper delegation to the AMA, such impropriety would have occurred upon the publication of the 3rd Edition, 32 years ago, and we would be compelled to apply nothing after the 2nd Edition, which was in effect at the time of enactment of Section 8(c)(23). *See Hill v. Am. Medical Response*, 423 P.2d 1119 (Okla. 2018); *McCabe*, 567 N.W.2d 201. In

Congressional intent, is properly interpreted as requiring application of the "most current" edition of the AMA *Guides*, meaning the edition in effect at the time a doctor renders a determination on a retiree's impairment. This mandate is not an unconstitutional delegation of power to the AMA. *See generally Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475-476 (2001); *Mistretta*, 488 U.S. 361.

Further, under the Act, an administrative law judge considers all relevant evidence in rendering a decision on benefits, including the doctors' impairment ratings. *See Picinich v. Seattle Stevedore Co.*, 19 BRBS 63 (1986); 20 C.F.R. §702.338. The administrative law judge has the authority to evaluate, credit, and weigh all evidence and testimony, including that of medical witnesses. *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). It is solely within his discretion to accept or reject all or any part of any testimony according to his judgment. *Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969). While the administrative law judge cannot substitute his opinion for that of a medical professional, *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997), he may address differences among the doctors' impairment ratings by considering the pertinent facts, resolving any conflicts, and deciding which among the medical ratings is entitled to greater weight. Therefore, we reject Claimant's assertion that use of the most recent AMA *Guides* for retiree benefits deprives the administrative law judge of his decision-making authority.[27]

Challenges to 6th Edition

Claimant contends if there is no improper delegation, then application of the 6th Edition is, nevertheless, an unconstitutional violation of due process. He asserts the editors acknowledged the 6th Edition is a "paradigm change" from previous editions, and he asserts the changes are not based on any scientific or updated medical method. Cl. Br. at 12; n.7, *supra*. Therefore, he concludes there is no compelling basis to use a controversial edition which reduces ratings or deviates from prior versions. As additional support, he

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light of the Act's differing language, specifically mentioning periodic updates, we decline to read the Act and regulation in such a manner as to eliminate 36 years of technical and medical advancements and law since the 1984 Amendments were enacted.

[27] We do not foreclose the possibility a retiree claimant could obtain an impairment rating under the 6th Edition which is higher than the purported 65% "cap" for a respiratory impairment alone if the evidence and application of the AMA *Guides* support such rating. *Ponder v. Peter Kiewit Sons' Co.*, 24 BRBS 46 (1990) (if supported by evidence, a claimant is entitled to a "combined impairment" rating for separate asbestos-related impairments); *see generally Young v. Todd Pacific Shipyards Corp.*, 17 BRBS 201 (1985).

points out the 6th Edition is the first edition to adopt its classification scheme from the International Classification of Functioning, Disability and Health of the World Health Organization, a classification that did not exist when the 1984 Amendments were enacted. Consequently, he posits, the 6th Edition is a far cry from the version adopted by Congress, or the three most recent prior versions, and cannot be applied to his case.

To the extent Claimant is arguing either an as-applied or a facial due process challenge to the statute, we reject his argument.[28] The administrative law judge correctly applied the law and, using the 6th Edition, awarded Claimant additional benefits for his deteriorating condition. Consequently, Claimant's claim the Act is an unconstitutional violation of his due process is without merit. *See Pietsch v. Ward County*, 446 F. Supp. 3d 513 (D.N.D. 2020), *appeal pending*, No. 20-1728 (8th Cir.); *compare with Pardo v. United*

[28] In this respect, we reject Claimant's contention that use of the 6th Edition denies him a vested right. While Claimant has a vested interest in receiving workers' compensation benefits for the duration of his work-related disability, 33 U.S.C. §908(c)(23), he is receiving them. He does not have a vested interest in receiving benefits for a *100%* impairment; he was never rated as 100% impaired while an edition supporting such rating was in effect. Immediately prior to these proceedings, Claimant was receiving benefits based on a 57.5% impairment rating under the 6th Edition. Further, use of the 6th Edition does not constitute an improper "retroactive" application of a future law to a past injury, and Claimant's reliance on *Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006), and *Barscz v. Director, OWCP*, 486 F.3d 744, 41 BRBS 17(CRT) (2d Cir. 2007), is misplaced. If a party considers filing a modification claim on the grounds of a change in the retiree's condition, the modification claim and the potentially-changed condition are "new" though the original injury is "old." Therefore, the doctor would consider the retiree's diagnoses, functionality, and other medical facts to arrive at an impairment rating using the version of the AMA *Guides* in effect at the time he renders his opinion of the new condition, and the edition would be current with that evaluation/condition. A reduction in an impairment rating, caused only by a change in scale between versions of the AMA *Guides* as opposed to an actual change in the retiree's physical condition, may not be sufficient to warrant a modification of benefits, as the party seeking modification has the burden to demonstrate a change in the retiree's physical condition or a mistake in a determination of fact; moreover, granting modification is a matter of discretion. 33 U.S.C. §922; *Metro. Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). Thus, contrary to Claimant's statement, Cl. Br. at 8, even if he had been receiving benefits for a 100% impairment prior to 2007 when the 6th Edition came into effect, its mere publication would not automatically compel a reduction of his benefits to 65%. *See* 33 U.S.C. §922.

Parcel Services, 422 P.3d 1185 (Kan. Ct. App. 2018);[29] *see also Johnson v. U.S. Food Serv.*, 427 P.3d 996 (Kan. Ct. App. 2018).[30]

To the extent Claimant is, as Employer asserts, challenging the substantive merits, value, appropriateness, and methodology of the 6th Edition, we decline to address those arguments. Regardless of whether Claimant's litany of complaints against the 6th Edition has merit, and we take no position on the matter, the Board does not have the power to legislate and cannot hold that any particular version of the *Guides* should not be used on those grounds. *See Dodd v. United States*, 545 U.S. 353, 359 (2005) (court cannot amend statutes); *Andrepont v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009) (policy arguments under the Act are best addressed by Congress, not courts). As the statute contemplates future revisions to the AMA Guides and the regulations require use of the most currently revised edition, such allegations must be brought to the attention of Congress or the Department.

[29] In *Pardo,* a Kansas statute specifically required use of the 6th Edition of the AMA *Guides* to assess workers' compensation impairments for injuries occurring after a certain date. Pardo was rated with a 15% impairment for a prior work-related injury and suffered a new and distinct work injury to the same member after that particular date. The appellate court held the law violated Pardo's right to due process because he had no recovery right under the statute (the 6th Edition limited his impairment rating to a one-time 0-2% award for injury to a member), and he had no access to the courts (the statute eliminated his right to a common law remedy). The court found the law requiring use of the 6th Edition unconstitutional as it applied to Pardo. *Pardo*, 422 P.3d at 1196-1203.

[30] In *Johnson*, addressing the same statute as in *Pardo*, the court held the statute's specific requirement to use the 6th Edition of the AMA *Guides* was unconstitutional on its face. Johnson suffered an injury to his neck. Using the 6th Edition, his doctor rated him 6% impaired. However, the doctor said the 4th Edition's 25% rating was more accurate for Johnson's condition, and he found no justification for the different 6th Edition rating. *Johnson*, 427 P.3d at 1001, 1008. The court held there were numerous other problems with the 6th Edition's methodology which left injured workers in situations like "that of Monty Python's Black Knight." It struck the reference to the 6th Edition and reverted to using the 4th Edition. *Id.* at 1009-1014.

Conclusion

In this case, the administrative law judge credited and gave weight to Dr. Matarese's 65% impairment rating, based on the 6th Edition of the AMA *Guides* and supported by Dr. Teiger's concurrence. As his decision comports with our legal conclusion herein, we affirm the decision to grant Claimant's motion for modification and to award benefits for a 65% impairment.

Accordingly, we hold Section 2(10) of the Act and Section 702.601(b) of the regulations require use of the most recent version of the AMA *Guides*, as of the time the doctor renders a rating opinion, to determine a retiree's impairment under the Act.[31] We affirm the administrative law judge's Decision and Order Granting Modification.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[31] We emphasize our holding in this case applies only to situations which require the use of the AMA *Guides* to determine a claimant's impairment rating, such as in retiree or hearing loss claims. 33 U.S.C. §908(c)(13)(E), (c)(23). It does not apply to injuries to body parts such as arms and legs for which the use of the AMA *Guides* is not required. *See* 33 U.S.C. §908(c)(1)-(12), (14)-(20); *Cotton v. Army & Air Force Exch. Services*, 34 BRBS 88 (2000).