BRB No. 99-1001

EVELYN COTTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ARMY & AIR FORCE EXCHANGE SERVICES	)	DATE ISSUED: June 23, 2000
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Gerald S. Besses, M.D. (Law Office of Steven M. Birnbaum), San Francisco, California, for claimant.

Frank B. Hugg, San Francisco, California, for self-insured employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (98-LHC-1206) of Administrative Law Judge Alexander Karst 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*., as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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 is a warehouse worker who has worked for employer for 17 years. She sustained a work-related injury on August 19, 1995, when she stepped on the edge of a pallet and twisted her left ankle. Claimant returned to work, and was transferred to a different job location where she was given a physically easier, sedentary desk job for reasons which were

unrelated to her work injury. Claimant continues to complain of pain in her ankle, and both physicians of record, Drs. Blackwell and Renbaum, diagnosed chronic ankle pain. Claimant sought an award of permanent partial disability under the schedule.

In his decision, the administrative law judge awarded claimant permanent partial disability compensation benefits pursuant to Section 8(c)(4), 33 U.S.C. §908(c)(4), of the Act, for a 10 percent loss of use of the left foot, or 20.5 weeks of compensation. In so doing, the administrative law judge credited the impairment rating of Dr. Blackwell, which was based on subjective factors. On appeal, employer contends that an award of permanent partial disability for a scheduled injury, based solely on subjective complaints of pain, presents an issue of first impression and that the Board should consider the philosophical and policy implications under the Act of affirming such an award. Employer argues that where the administrative law judge bases an award of impairment on a system other than the American Medical Association *Guides to the Evaluation of Permanent Impairment* (4th Ed. 1993) (AMA *Guides*),[1] such application must be rational, reasonable and in accordance with law. Employer also alleges that the administrative law judge weighed the evidence improperly. Claimant responds, urging affirmance of the decision. Employer replies, reiterating its arguments.

Initially, we reject employer's argument that consideration of medical ratings of impairment based on pain raises an issue of first impression. In the event of an injury to a scheduled member, recovery for a claimant's permanent partial disability under Section 8(c) is confined to the schedule in Section 8(c)(1)-(19), *Potomac Electric Power Co. v. Director, OWCP* [*PEPCO*], 449 U.S. 268, 14 BRBS 363 (1980), and claimant is compensated based on the degree of physical impairment. Loss of wage-earning capacity is not a factor in a scheduled award. *See Rowe v. Newport News Shipbuilding & Dry Dock Co.*, 193 F.3d 836, 33 BRBS 160 (CRT) (4th Cir. 1999). Contrary to employer's contention, the Board has previously affirmed an administrative law judge's decision to rely on a physician's impairment rating based on subjective factors, holding that an administrative law judge is not bound by any particular formula but may rely on a variety of medical opinions and observations in addition to claimant's description of symptoms and physical effects of his

[1]Employer moved below that the administrative law judge take official notice of several sections of the California Labor Code, the California Administrative Code, and the "Schedule for Rating Permanent Disabilities" under the California Labor Code, Cal. Lab. Code §4660. Decision and Order at 2. Claimant did not object.

injury in assessing the extent of disability. *See Pimpinella v. Universal Maritime Service, Inc.*, 27 BRBS 154, 159 (1993).

Employer concedes that the Act does not require that impairment ratings in medical opinions use the criteria of the AMA *Guides* except in cases involving hearing loss and voluntary retirees, *see* 33 U.S.C. §§908(c)(13), 902(10), but asserts that if claimant's impairment rating is not made in accordance with the AMA *Guides*, the administrative law judge's conclusions must nonetheless be rational, reasonable and in accordance with law. We agree that an administrative law judge's findings must be guided by these principles, *see O'Keeffe*, 380 U.S. at 359, and hold that in this case the decision abides by them. The administrative law judge assessed claimant's impairment at 10 percent, based on the opinion of Dr. Blackwell. Dr. Blackwell rated claimant's impairment at 10-15 percent under the guides for impairment of the California Labor Code, *see* Cal. Lab. Code §4660, stating that he considers it a shortcoming of the AMA *Guides* ratings that if a patient does not have objective abnormalities as defined by the *Guides*, the patient cannot be rated as impaired. Tr. at 82. While the *Guides* incorporate an element of pain for a given impairment, Dr. Blackwell stated that unless the patient has objective abnormalities, the pain is dismissed. *Id.* Dr. Blackwell did not provide a rating under the AMA *Guides* because claimant has no impairment from leg/muscle atrophy or lower extremity muscle weakness, and thus does not meet the standards under the *Guides*. Cl. Ex. 2.

The administrative law judge relied on this testimony as well as the fact that the Act does not mandate the use of the AMA *Guides* for scheduled awards in deciding to credit Dr. Blackwell. He also found that Dr. Blackwell's use of subjective factors in arriving at a disability rating was acceptable under the California compensation system. In this regard, the administrative law judge noted that page 2-17 (Section 14.6) of the schedule appears to require immobility or atrophy of the ankle joint in order for the physician to assign a rating, but that section 1.II.B. "Subjective Factors of Disability" provides for the consideration of subjective residuals of an injury such as pain, numbness, weakness, parasthesia, and sensitivity, in assigning a rating. Decision and Order at 8. Employer cites extensively from the California Labor Code in support of its assertion that the administrative law judge erred in his discussion. As employer acknowledges, however, the administrative law judge is not bound by California law in a Longshore case. He permissibly relied on the opinion of Dr. Blackwell, who testified he used the state law as a guide in rating claimant's subjective complaints of pain, and employer has not shown that the administrative law judge erred in relying on this opinion.

Despite employer's attempts to characterize this case as raising novel questions about disability, in fact it involves well-settled principles involving the administrative law judge's authority to weigh medical evidence. The administrative law judge did not base his award on

claimant's allegation of pain alone, but rather on Dr. Blackwell's medical opinion.[2] Contrary to employer's assertion, it was within the administrative law judge's discretion to give more weight to the opinion of Dr. Blackwell, who was able to provide an explanation for claimant's current pain, thus considering the particular situation of this particular claimant and providing an explanation for claimant's continuing pain three years after the injury, than to Dr. Renbaum. Dr. Blackwell explained that his impairment rating of 10-15 percent is not for the pain itself, but the weakness that occurs in the ankle as a result of the pain and claimant's consequent different use or adjustment of the ankle in compensation for the pain.[3] Tr. at 70-72. The administrative law judge found Dr. Renbaum's opinion less persuasive

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[2]Any implication by employer that claimant ought not to be compensated under the schedule for her ankle condition because it has had no effect on her capacity to perform her job or maintain a particular level of income must be rejected under the holding of *Potomac Electric Power Co. v. Director, OWCP [PEPCO]*, 449 U.S. 268, 14 BRBS 363 (1980); *see also Rowe v. Newport News Shipbuilding & Dry Dock Co.*, 193 F.3d 836, 33 BRBS 160 (CRT) (4th Cir. 1999).

[3]Moreover, Dr. Blackwell testified that during her June 6, 1996, visit with Dr. Taylor claimant had the "objective" finding of tenderness upon palpation, in addition to the subjective complaint of pain. Tr. at 55-56. Dr. Renbaum, who examined claimant in September 1998, also found claimant to have medial tenderness, but he characterized this as a "subjective," finding, *i.e.*, claimant's expression of pain upon the doctor's palpation. Tr. at 147-149.

because, while he offered several possible theoretical reasons for claimant's continued pain, he could not relate the possible causes specifically to the claimant and did not have an independent recollection of her. As the administrative law judge fully weighed the medical evidence,[4] and his decision to credit the opinion of Dr. Blackwell over that of Dr. Renbaum is rational, we affirm his award of permanent partial disability benefits as it is supported by substantial evidence.

[4]In fact, while Dr. Blackwell rated claimant's impairment at 10-15 percent, the administrative law judge determined that 10 percent, the lower range of the estimate, is a reasonable estimate of claimant's disability because Dr. Blackwell did not substantiate the additional five percent. Decision and Order at 9.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge