BRB No. 02-0576

LUGENE HINTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: May 16, 2003
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

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

Gregory E. Camden (Montagna Breit Klein Camden, LLP), Norfolk, Virginia, for claimant.

Christopher R. Hedrick (Mason, Mason, Walker & Hedrick), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order and Order Denying Motion for Reconsideration (01-LHC-0693) of Administrative Law Judge Daniel A. Sarno, Jr., 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 October 12, 1999, claimant sustained a work-related injury to his left knee. Claimant was examined by Dr. Tornberg, who diagnosed a torn medial meniscus and recommended arthroscopic surgery.[1] Dr. Stiles, claimant=s treating physician, performed arthroscopic surgery on claimant=s left knee on November 11, 1999.[2] Claimant returned to work with permanent restrictions on squatting, kneeling and bending. Tr. 16-17; CX 5. Although claimant has been able to work successfully within his restrictions, he continued to report pain and stiffness in his left leg. Tr. at 17-18, 21-22. In October 2000, before the case was referred to the administrative law judge, employer paid claimant permanent partial disability benefits for a two percent leg impairment. CX 6. After the case was referred to the administrative law judge, employer tendered benefits for a six percent impairment to the leg. Before the administrative law judge, claimant contended he was entitled to benefits for a 27 percent impairment under the Fifth Edition of the American Medical Association=s *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*), based on Dr. Stiles=s opinion. Employer countered that claimant is entitled to benefits for a four percent impairment, based on Dr. Tornberg=s assessment, also made pursuant to the Fifth Edition of the AMA *Guides.*

In his Decision and Order, the administrative law judge credited the opinion of Dr. Tornberg over that of Dr. Stiles. Thus, the administrative law judge awarded claimant permanent partial disability benefits under the schedule for a four percent impairment to the lower left extremity. 33 U.S.C. '908(c)(2). Additionally, the administrative judge awarded claimant interest and medical benefits. The administrative law judge, however, denied claimant=s counsel an attorney=s fee,

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[1]Dr. Tornberg is a Board-certified orthopedic surgeon and a Board-certified independent medical examiner who works as Medical Director for employer. Tr. at 27; EX 4.

[2]Dr. Stiles is a Board-certified orthopedic surgeon, who diagnosed claimant=s injury as a Atear of the medial meniscus, a partial anterior cruciate ligament tear, and chrondromalacia of the patella.@ Tr. at 16, 24; CX 5 at 2; CX 8. The parties stipulated that Dr. Stiles is claimant=s treating physician.

stating that A[e]mployer has consistently taken the position that a four percent disability rating is appropriate.@ Decision and Order at 9 n.10. Claimant filed a motion for reconsideration of the denial of an attorney=s fee, which the administrative law judge denied. The administrative law judge stated that employer had agreed all along that claimant had at least a four percent impairment, and that claimant therefore did not successfully prosecute his claim under Section 28(a), 33 U.S.C. '928(a).

On appeal, claimant contends that, since his injury occurred in 1999, the administrative law judge should have relied on the edition of the AMA *Guides* in effect at that time, namely the Fourth Edition. Thus, claimant contends that he is entitled to permanent partial disability benefits for a six percent impairment, as Dr. Tornberg stated that claimant has a six percent impairment utilizing the Fourth Edition of the AMA *Guides.*[3] Claimant also challenges the administrative law judge=s denial of an attorney=s fee. Employer responds, urging affirmance of the administrative law judge=s decisions in all respects.

The Act does not require that permanent partial disability awards under the schedule be based on impairments rated under the criteria of the AMA *Guides*, except in cases involving hearing loss. *See* 33 U.S.C. '908(c)(13); *see also* 33 U.S.C. ''902(10), 908(c)(23) (permanent partial disability awards for voluntary retirees must be based on AMA *Guides*). Generally, therefore, the administrative law judge is not bound by any particular standard or formula but 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 claimant=s partial disability to a scheduled member. *Pimpinella v. Universal Maritime Service, Inc*., 27 BRBS 154 (1993); *Mazze v. Frank J. Holleran, Inc.*, 9 BRBS 184 (1978). Nonetheless, the administrative law judge rationally stated that, as both claimant and employer relied exclusively on medical experts who utilized the AMA *Guides*, a determination of claimant=s impairment rating necessarily must be based on the AMA *Guides.*

We reject claimant=s argument that the administrative law judge was required to credit Dr. Tornberg=s opinion of a six percent impairment rating under the Fourth Edition of the AMA *Guides* because that version was in effect at the time claimant sustained his injury as well as when the doctors initially rated claimant=s impairment. When the Fifth Edition of the *Guides* was issued, Drs. Tornberg and Stiles were

[3]Claimant does not challenge the administrative law judge=s crediting of the opinion of Dr. Tornberg over that of Dr. Stiles.

asked to give their opinion as to claimant=s impairment under the newer edition.[4] We hold that the administrative law judge rationally relied on Dr. Tornberg=s June 6, 2001, opinion, which was based on the Fifth Edition of the

[4]Dr. Stiles opined that claimant=s impairment was 30 percent under the Fourth Edition and 27 percent under the Fifth Edition. CX 5, 8. At the hearing, claimant urged acceptance of Dr. Stiles=s rating of 27 percent.

AMA *Guides*, the current version at the time Dr. Tornberg=s opinion was rendered.[5] *See Alexander v. Triple A Machine Shop*, 34 BRBS 34 (2000), *rev=d on other grounds sub nom. Alexander v. Director, OWCP*, 297 F.3d 805, 36 BRBS 25(CRT) (9th Cir. 2002). Moreover, claimant urged the administrative law judge to credit Dr. Stiles=s opinion rendered pursuant to the Fifth Edition. Thus, as the administrative law judge=s determination that claimant has a four percent permanent partial disability is rational, supported by substantial evidence, and in accordance with law, it is affirmed.

We next address claimant=s contention that the administrative law judge erred in denying him an attorney=s fee payable by employer. In this case, employer paid claimant benefits without an award in October 2000, for a two percent impairment, while the case was before the district director. CX 6. Thereafter, on November 30, 2000, the case was transferred to the Office of Administrative Law Judges. On December 12, 2000, employer tendered benefits for a six percent impairment. *See Armor v. Maryland Shipbuilding & Dry Dock Co.*, 19 BRBS 119 (1986). The administrative law judge awarded claimant benefits for a four percent impairment, which is more than employer paid in October 2000, but less than employer tendered on December 12, 2000. The administrative law judge stated that claimant is not entitled to an attorney=s fee payable by employer under Section 28(a) because claimant did not successfully prosecute his claim, in that employer, at all relevant times, conceded liability for a four percent impairment. Order Denying Motion for Reconsideration at 2.

[5]Under the Fourth Edition, Dr. Tornberg assigned a four percent impairment based on atrophy and a two percent impairment for a partial medial meniscectomy for a combined six percent disability rating. EX 4. Dr. Tornberg testified that the Fifth Edition does not allow the combination of these impairments, and thus Dr. Tornberg opined that claimant=s impairment is four percent. Tr. at 30, 33, 46.

We cannot affirm the administrative law judge=s finding that employer is not liable for any of claimant=s attorney=s fee. Contrary to the administrative law judge=s finding, the record indicates that claimant did successfully prosecute his claim up to a point. Employer paid claimant benefits for a two percent impairment while the case was before the district director, CX 6, and claimant thereafter requested a formal hearing. The administrative law judge awarded claimant benefits for a four percent impairment, which thus represents a successful prosecution of the claim.[6] 33 U.S.C. '928(a). However, since the benefits claimant obtained are less than those tendered by employer on December 12, 2000, *see Armor*, 19 BRBS 119, employer is liable only for those necessary services performed by counsel between the time of referral on November 30, 2000 and employer=s tender on December 12, 2000. 33 U.S.C. '928(b); *see Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984); *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833 (1981). Consequently, we vacate the administrative law judge=s denial of an attorney=s fee, and remand the case for the administrative law judge to determine the amount of any fee for which employer is liable, after claimant=s counsel submits a fee petition prepared in accordance with the regulations at 20 C.F.R. '702.132.

Accordingly, we affirm the administrative law judge=s award of benefits. The administrative law judge=s denial of an attorney=s fee is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this decision.

SO ORDERED.

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[6]The administrative law judge stated that employer conceded all along that claimant=s impairment was at least four percent. Decision and Order at 9 n.10. This is not borne out by the record. On August 17, 2000, employer wrote to the district director stating that Dr. Stiles had rated claimant=s impairment as 30 percent and that Dr. Tornberg had rated it at 6 percent. Employer then requested that the district director have claimant evaluated by an independent physician. This letter does not support the administrative law judge=s finding that employer had agreed Aall along@ that claimant=s impairment was at least four percent in light of the fact that employer=s later voluntary payment of benefits was for only a two percent impairment. CX 6.

[7]Moreover, on remand, the administrative law judge should consider whether his award of interest and medical benefits entitles claimant to an additional attorney=s fee. *See* Decision and Order at 9.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge