

U. S. DEPARTMENT OF LABOR
Employees' Compensation Appeals Board

In the Matter of GEORGIA B. HALL and DEPARTMENT OF DEFENSE,
DEFENSE DEPOT, Ogden, Utah

*Docket No. 95-3088; Submitted on the Record;
Issued March 12, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether appellant has established her entitlement to a schedule award for permanent partial impairment of her lower extremities resulting from her back injury.

The Board has carefully reviewed the case record and finds that appellant has failed to meet her burden of proof in establishing that her back condition resulted in permanent partial impairment of a scheduled member.

Under section 8107 of the Federal Employees' Compensation Act¹ and section 10.304 of the implementing federal regulations,² schedule awards are payable for the permanent impairment of specified bodily members, functions and organs. However, no schedule award is payable for a member, function or organ of the body not specified in the Act or in the regulations.³ This principle applies to body members that are not enumerated in the schedule award provision before the 1974 amendment⁴ as well as to organs that are not enumerated in the regulations promulgated pursuant to the 1974 amendment.⁵ Thus, because spinal injuries are not listed in the compensation schedule, no award may be issued for permanent impairment of the back.

¹ 5 U.S.C. § 8101 *et seq.* (1974); 5 U.S.C. § 8107.

² 20 C.F.R. § 10.304.

³ *William Edwin Muir*, 27 ECAB 579, 581 (1976); *see Terry E. Mills*, 47 ECAB ____ (Docket No. 94-837, issued January 30, 1996) (listing the members and organs of the body for which the loss or loss of use is compensable under the schedule award provisions).

⁴ The Act itself specifically excludes the back from the definition of "organ." 5 U.S.C. § 8101(19).

⁵ *John F. Critz*, 44 ECAB 788, 792-93 (1993) (brain disorder); *Ted W. Dietderich*, 40 ECAB 963, 965 (1989) (gallbladder); *Thomas E. Stubbs*, 40 ECAB 647, 649 (1989) (spleen).

In 1960, amendments to the Act modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Thus, a claimant may be entitled to a schedule award for permanent impairment to an upper or lower extremity even though the cause of the impairment originated in the neck, shoulders, or spine.⁶

However, neither the Act nor the regulations specify the method by which the percentage of impairment shall be determined.⁷ The method used in making such determinations rests in the sound discretion of the Office.⁸ For consistent results and to ensure equal justice for all claimants, the Office has adopted, and the Board has approved, the use of the appropriate edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) as the uniform standard applicable to all claimants for determining the percentage of permanent impairment.⁹

This case has previously been before the Board. In a decision dated March 17, 1995, the Board remanded the case for the Office to develop the evidence and determine whether appellant sustained a permanent impairment of her lower extremities, which would entitle her to a schedule award. The factual background of appellant's claim filed on June 6, 1966 is incorporated into this decision by reference.¹⁰

On remand, the Office wrote to Dr. Gilbert G. Tobler, a Board-certified orthopedic surgeon and appellant's treating physician, informing him that while the Act did not provide for any spinal impairment, it did cover impairment of an extremity secondary to neurological deficit arising from affected spinal nerve roots due to the accepted back condition. The Office asked Dr. Tobler to respond to four questions, using the 4th edition of the A.M.A., *Guides*:

- (1) State which extremity is impaired and whether that impairment is left, right or both.
- (2) Specify the spinal root(s) involved: for cervical, use page 51, Table 13; for lumbar, use page 130, Table 83.
- (3) Give the grading with reason for the grade selected: for sensory impairment, use page 48, Table 11; for motor impairment, use page 49, Table 12.
- (4) State the date on which the claimant reached maximum medical improvement.

⁶ Rozella L. Skinner, 37 ECAB 398, 402 (1986).

⁷ A. George Lampo, 45 ECAB 441, 443 (1994).

⁸ George E. Williams, 44 ECAB 530, 532 (1993).

⁹ James J. Hjort, 45 ECAB 595, 599 (1994).

¹⁰ Docket No. 93-2286 (issued March 17, 1995).

Dr. Tobler responded on May 25, 1995 that appellant had received a rating of 17 percent impairment of the whole person but that he had not been aware of the Act's guidelines. Dr. Tobler noted that a Dr. Hess had rated appellant as 15 percent impairment of the person before her last surgery (in 1989).

Upon physical examination of appellant, Dr. Tobler found sluggish reflexes, a little tenderness in the low back and sciatic notch, extension of 15 to 20 degrees, lateral bending of 30 degrees, but no extensor hallucis weakness or decreased sensation. Dr. Tobler added that appellant's major muscle groups of the lower extremities "show no evidence of weakness." He indicated that he would answer the questions posed by the Office.

The Office referred Dr. Tobler's report to the Office medical adviser, who stated on June 30, 1995 that the "attached report does not provide any of the necessary data on which to provide a schedule award."

On July 18, 1995 the Office denied appellant's request for a schedule award on the grounds that the medical evidence indicated no ratable impairment. The Office noted that under the Act in effect on the date of appellant's injury, there was no provision for an impairment rating of the whole person or for the back. The Office added that while Dr. Tobler provided specific measurements, he found no impairment of the lower extremities.

The Board finds that no schedule award is payable under the Act for appellant's work-related injury. Dr. Tobler, appellant's treating physician for the past several years, found no neurological impairment of appellant's lower extremities on May 25, 1995 when he examined her. Therefore, there can be no schedule award for any identifiable impairment of the extremities such as loss of sensation or range of movement.¹¹

Dr. Tobler assessed a 17 percent impairment rating of the whole person. While the A.M.A., *Guides* provides tables for calculating the percentage of impairment to the whole person, the Act provides schedule awards only for specific parts of the body, not for the body in total. Thus, the Board finds that appellant has failed to meet her burden of proof in establishing entitlement to a schedule award.¹²

Appellant argues on appeal that, while she understands that her back injury cannot be rated, she has incurred significant pain and suffering from her back, leg, and hip and requests further time in which to present medical evidence in view of the fact that her treating physician has retired. By letter dated September 25, 1995, the Board informed appellant that it has no jurisdiction to review any new evidence for the first time on appeal.¹³ The Board added that if appellant had new evidence to submit, she should request reconsideration before the Office.

¹¹ See *James E. Jenkins*, 39 ECAB 860, 867 (1988) (finding that the medical evidence failed to describe impairment to appellant's upper extremity based on his cervical injury).

¹² See *George E. Williams*, 44 ECAB 530, 533 (1993) (finding that the medical evidence was insufficient to support permanent impairment of appellant's lower extremities as a result of his spinal condition).

¹³ The Board's jurisdiction of a case is limited to reviewing that evidence which was before the Office at the time

The July 18, 1995 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
March 12, 1998

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

of its final decision. 20 C.F.R. § 501.2(c); *William A. Couch*, 41 ECAB 548, 553 (1990).