

intervertebral disc without myelopathy. Appellant returned to light-duty work on October 31, 2000.¹

On November 30, 2000 Dr. David Chandler, a treating physician, diagnosed back pain, sciatica, lumbar spondylosis, herniated nucleus pulposus and lumbar strain. Using the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), he determined that appellant had a five percent whole person impairment due to his thoracolumbar spine impairment. The Office authorized L5-S1 discectomy surgery, which was performed on March 15, 2001. Appellant returned to light-duty work on September 26, 2001, stopped on October 2, 2002 and returned to light-duty work on January 2, 2003.

On January 6 and September 30, 2001 appellant filed claims for a schedule award.

By letters dated September 5, 2002 and July 14, 2003, the Office requested Dr. Henry H. Barnard, II, a treating Board-certified orthopedic surgeon, to provide an impairment rating for appellant's lower extremities using the fifth edition of the A.M.A., *Guides*.

In a February 24, 2004 form report, Dr. Barnard diagnosed herniated nucleus pulposus of the lumbar spine. He was unable to provide a permanent impairment rating as appellant had not reached maximum medical improvement at that time.

By letter dated July 28, 2004, the Office requested Dr. Barnard provide an impairment rating for appellant's lower extremities using the fifth edition of the A.M.A., *Guides*.

In a report dated August 6, 2004, Dr. Barnard noted that appellant's medical history had become complicated since his April 2000 employment injury which resulted in L5-S1 discogenic pain and that he underwent transforminal lumbar interbody fusion. Using the A.M.A., *Guides*, he determined that appellant had 10 percent whole person impairment as a result of his back fusion surgery.

In a letter dated March 2, 2006, the Office informed Dr. Barnard that a schedule award was not paid for an impairment to the back or for whole body impairments. It noted that a schedule award was payable for any impairment to appellant's lower extremities.

In a June 4, 2007 report, Dr. Barnard reported that appellant was unchanged neurologically and had "no focal motor or strength deficits, reflex asymmetry or sensory changes."

In an August 16, 2007 report, the Office medical adviser determined that appellant had no impairment to his lower extremities. He noted that appellant underwent a spiral fusion with good results and no focal motor or sensory deficits to the lower extremities as noted by Dr. Barnard.

By decision dated August 28, 2007, the Office denied appellant's claim for a schedule award on the grounds that he had no lower extremity impairment.

¹ In an April 24, 2007 letter, appellant noted that he had retired from the employing establishment.

On September 1, 2007 appellant requested an oral hearing before an Office hearing representative, which was held on March 5, 2008.

In a report dated March 10, 2008, Dr. Barnard noted that appellant had back pain and sustained 20 percent whole person impairment pursuant to the A.M.A., *Guides*. A physical examination revealed appellant was unchanged neurologically and that he had “no focal motor or strength deficits, reflex asymmetry or sensory changes.”

By decision dated May 19, 2008, the Office hearing representative affirmed the August 28, 2007 decision.² He found that the Office properly determined that the medical evidence was insufficient to establish any permanent impairment to appellant’s lower extremities.

LEGAL PRECEDENT

Pursuant to section 8107 of the Federal Employees’ Compensation Act³ and section 10.404 of the implementing federal regulation,⁴ schedule awards are payable for permanent impairment of specified body members, functions or organs. The Act, however, does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides*⁵ has been adopted by the Office, and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.⁶

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under the Act for injury to the spine.⁷ 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. Therefore, as the schedule award provisions of the Act include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.⁸

² The Board notes that, following the hearing representative’s May 19, 2008 decision, the Office received additional evidence. However, the Board may not consider new evidence on appeal. See 20 C.F.R. §§ 501.2(c); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

³ 5 U.S.C. § 8107(c).

⁴ 20 C.F.R. § 10.404.

⁵ A.M.A., *Guides* (5th ed. 2001)

⁶ *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

⁷ *D.N.*, 59 ECAB ___ (Docket No. 07-1940, issued June 17, 2008); *Pamela J. Darling*, 49 ECAB 286 (1998).

⁸ See *J.Q.*, 59 ECAB __ (Docket No. 06-2152, issued March 5, 2008); *Vanessa Young*, 55 ECAB 575 (2004).

ANALYSIS

The Board finds that the medical evidence fails to establish that appellant sustained any permanent impairment to a scheduled member of the body. The Office accepted appellant's claim for displacement of lumbar intervertebral disc without myelopathy. Although appellant may not receive a schedule award for permanent impairment to his back,⁹ he may be entitled to a schedule award for any permanent impairment to his lower extremities, provided the medical evidence establishes such impairment.¹⁰ The Board finds that the medical evidence of record does not establish that he sustained permanent impairment to his legs due to the accepted back conditions.

Dr. Barnard advised that appellant had a spinal fusion surgery and residual back pain. He determined that appellant had 10 percent whole person impairment due to his back surgery and found 20 percent whole person impairment in a June 4, 2007 report. In a November 30, 2000 report, Dr. Chandler concluded that appellant had five percent whole person impairment due to his spinal condition. The whole person impairment ratings made by both physicians with regard to appellant's back is not compensable under the Act. As noted, the Act does not authorize schedule awards for permanent impairment of the spine or for the whole person.¹¹ Therefore, the opinions of Drs. Barnard and Chandler do not establish a ratable impairment to a scheduled member. Moreover, Dr. Barnard advised that appellant had no sensory or motor deficits in the lower extremities. Thus, reports by Dr. Barnard and Chandler are insufficient to establish appellant's entitlement to a schedule award.

The Office medical adviser properly reviewed the medical evidence and found no basis for rating impairment to a scheduled member of the body.¹² He noted that Dr. Barnard's whole person rating, which was based on appellant's spinal impairment, was not in reference to a scheduled member of the body. The medical adviser properly concluded that there was no medical evidence of impairment to either lower extremity resulting from the accepted conditions and that, therefore, there was no ratable impairment in this case.

Appellant did not submit sufficient medical evidence to establish that he sustained a permanent impairment to a specified member, organ or function of the body listed in the Act or its implementing regulations. The medical evidence of record supports that he has no lower extremity impairment. The Board finds that appellant is not entitled to a schedule award as a result of his employment-related accepted back condition.

⁹ 5 U.S.C. § 8101(19); R.S., 58 ECAB ____ (Docket No. 06-1346, issued February 16, 2007); *James E. Mills*, 43 ECAB 215 (1991).

¹⁰ *N.M.*, 58 ECAB ____ (Docket No. 06-2054, issued January 12, 2007); *George E. Williams*, 44 ECAB 530 (1993).

¹¹ *See D.H.*, 58 ECAB ____ (Docket No. 06-2160, issued February 12, 2007). *See also Jesse Mendoza*, 54 ECAB 802 (2003). The Act provides at section 8101(20) that the brain, heart and back are excluded under the term organ. 5 U.S.C. § 8101(20).

¹² The Board notes that it is appropriate for an Office medical adviser to review the clinical findings of the treating physician to determine the permanent impairment. *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.5(c) (March 1994); *Richard R. LeMay*, 56 ECAB 341 (2006).

CONCLUSION

The Board finds that the Office properly denied appellant's claim for a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 19, 2008 and August 28, 2007 are affirmed.

Issued: February 2, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board