

The issue is whether appellant is entitled to a schedule award for permanent impairment to her legs.

## **FACTUAL HISTORY**

On October 13, 1999 appellant, then a 47-year-old flat sorter machine clerk, filed a claim alleging that she sustained an injury while in the performance of her duties. The Office accepted her claim for the condition of degenerative disc disease of the lumbar spine with facet arthritis and two-level spinal stenosis at L2-3 and L3-4 secondary to disc bulges and facet arthropathy. Appellant received compensation for periods of temporary total disability.

On August 6, 2002 Dr. James M. Loddengaard, a Board-certified orthopedic surgeon and appellant's attending physician, reported that he saw appellant that day for a final evaluation and a permanent impairment. He noted that appellant's back pain was variable. Some days she had no pain, some days the pain was bad. Her pain was 9.5 or 10 on a scale of 10 but infrequently so. Sitting at work eight hours a day could cause some tingling into her toes, which tended to go away once she got up and moved around. Appellant's pain was generally across her low back "and may go to both legs intermittently." Findings on physical examination were essentially normal for the lower extremities. Straight leg raising was negative. Motor examination was normal. Sensation was intact. Thigh and calf circumferences were within a quarter of an inch. Dr. Loddengaard diagnosed mild to moderate stenosis, L3-4 and L4-5, aggravated by work. On the issue of permanent impairment, he reported the following:

"She does have residual impairment, according to the fifth edition of the A[merican] M[edical] A[ssociation,] *Guides to the Evaluation of Permanent Impairment*, she fits into Category 2, on Table 15-3. She has significant radicular complaints, but no specific neurologic changes on physical exam[ination]. Therefore, she has an [eight] percent whole person impairment, according to the A.M.A., *Guides*."<sup>1</sup>

On October 11, 2002 appellant filed a claim for a schedule award. The Office referred her, together with the medical record and a statement of accepted facts, to Dr. Bunsri T. Sophon, a Board-certified orthopedic surgeon, for a second opinion.

On December 15, 2002 Dr. Sophon reported that appellant's chief complaint was low back pain. She described occasional, dull, throbbing, burning low back pain, as well as occasional numbness of both thighs, greater on the right. Her low back pain was made worse by lifting, bending and walking. She reported nausea with severe low back pain. A physical examination of the lower extremities revealed no abnormal findings. Thigh and calf measurements were equal. Straight leg raising, both sitting and supine, was negative bilaterally. Motor strength was grossly within normal limits. Sensation was normal bilaterally. Reflexes were normal. Dr. Sophon diagnosed lumbar spinal stenosis and lumbosacral spondylosis. Completing an impairment form, he indicated that there was no neurological involvement, no pain or discomfort, no weakness and no atrophy.

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<sup>1</sup> See A.M.A., *Guides* 384 (5<sup>th</sup> ed. 2001) (setting forth criteria for rating impairment of the whole person due to lumbar spine injury). No claimant may receive a schedule award for permanent impairment of the spine or back. See *infra* note 6. Also, no claimant may receive a schedule award for permanent impairment of the "whole person." Ernest P. Govednick, 27 ECAB 77 (1975); see *infra* text accompanying note 2.

An Office medical consultant reviewed appellant's file, including the reports of Dr. Loddengaard and Dr. Sophon. He reported as follows:

“Review of these records would support a zero percent impairment of each lower extremity or leg as a result of the individual's work-related back condition. Date of maximum medical improvement would have occurred no later than one year following the onset, or thus by April 27, 2000. It should be noted that this calculated impairment of a zero percent impairment of each lower extremity represents the permanent functional loss of each lower extremity as a result of the back condition, and does not represent a whole-person award.”

In a decision dated June 6, 2003, the Office denied appellant's claim for a schedule award. The Office found that the medical evidence established that she had no compensable impairment of her right or left lower extremity as a result of the accepted employment injury.

### **LEGAL PRECEDENT**

Section 8107 of the Federal Employees' Compensation Act<sup>2</sup> authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. Such loss or loss of use is known as permanent impairment. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.<sup>3</sup>

No schedule award is payable for a member, organ or function of the body that is not specified in the Act or in the implementing regulations.<sup>4</sup> Because neither the Act nor the regulations provide for the payment of a schedule award for permanent loss of use of the back,<sup>5</sup> no claimant is entitled to such an award.<sup>6</sup>

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. 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 originates in the spine.<sup>7</sup>

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<sup>2</sup> 5 U.S.C. § 8107.

<sup>3</sup> 20 C.F.R. § 10.404 (2002).

<sup>4</sup> *William Edwin Muir*, 27 ECAB 579 (1976) (this principle applies equally to body members that are not enumerated in the schedule provision as it read before the 1974 amendment, and to organs that are not enumerated in the regulations promulgated pursuant to the 1974 amendment).

<sup>5</sup> The Act itself specifically excludes the back from the definition of “organ.” 5 U.S.C. § 8101(19).

<sup>6</sup> *E.g., Timothy J. McGuire*, 34 ECAB 189 (1982).

<sup>7</sup> *Rozella L. Skinner*, 37 ECAB 398 (1986); *see* 5 U.S.C. § 8107(c)(2) (providing 288 weeks of compensation for the complete loss of a leg).

## ANALYSIS

The Office accepted appellant's claim for a back condition: degenerative disc disease of the lumbar spine with facet arthritis and two-level spinal stenosis at L2-3 and L3-4 secondary to disc bulges and facet arthropathy. Although appellant may receive no schedule award for permanent impairment to her back, she may be entitled to a schedule award for permanent impairment to her lower extremities if the accepted back condition caused such impairment.

Dr. Loddengaard, an attending Board-certified orthopedic surgeon, and Dr. Sophon, a Board-certified orthopedic surgeon who served as an Office referral physician, examined appellant's lower extremities and reported normal findings. Straight leg raising was negative. Motor strength was normal. Sensation was intact. Thigh and calf circumferences were equal or within a quarter of an inch. Reflexes were normal. The Office medical adviser found no basis for an impairment rating.

Negative clinical findings do not settle the issue in this case; however, because both Dr. Loddengaard and Dr. Sophon reported that appellant had intermittent or occasional radicular complaints. In a report dated August 6, 2002, Dr. Loddengaard stated that appellant reported that some days she had no back pain and some days her back pain was bad "and may go to both legs intermittently." Based on appellant's pain, he provided an impairment estimate. In a report dated December 15, 2002, Dr. Sophon noted that appellant reported that she occasionally had numbness of both thighs, greater on the right. The Board has held that intermittent pain, so long as it is permanent, may constitute a basis for the payment of a schedule award.<sup>8</sup> In *Eddie Chambers*,<sup>9</sup> the Board affirmed as correct and proper the Office medical adviser's estimate of a five percent permanent impairment of the right upper extremity based on descriptions of the claimant's intermittent daily pain and the permanent numbness of his right thumb. In *John P. Adams*,<sup>10</sup> the Board set aside an Office decision denying a schedule award and remanded the case for further development of the issue of permanent impairment, as the medical evidence indicated that the claimant continued to have intermittent pain in his right leg after back surgery.

Because the examining physicians in this case reported that appellant had intermittent or occasional radicular complaints -- "significant" radicular complaints according to the attending physician -- further development of the medical evidence is warranted.

## CONCLUSION

The Board finds that this case is not in posture for a decision on whether appellant is entitled to a schedule award for permanent impairment to her legs. The Board will set aside the Office's June 6, 2003 decision denying a schedule award and remand the case for further development of the medical evidence. The Office shall determine whether the intermittent pain

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<sup>8</sup> *Victoria Johnson*, Docket No. 96-2313 (issued August 12, 1998) (the Office medical adviser erroneously assigned zero percent for pain on the basis that the pain was intermittent).

<sup>9</sup> 30 ECAB 937 (1979).

<sup>10</sup> 34 ECAB 1468 (1983).

and occasional numbness of appellant's lower extremities is a permanent condition and a result of her accepted back injury. After such further development of the evidence as may be necessary, the Office shall issue an appropriate final decision on appellant's entitlement to a schedule award.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 6, 2003 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: February 27, 2004  
Washington, DC

Alec J. Koromilas  
Chairman

Colleen Duffy Kiko  
Member

Michael E. Groom  
Alternate Member