

working under a vehicle in the performance of duty. He did not stop work.² On October 17, 2006 the Office accepted appellant's claim for a lumbar strain and herniated nucleus pulposus and paid compensation benefits.

On November 26, 2007 appellant filed a claim for a schedule award.

By letter dated December 28, 2007, the Office requested that appellant's treating physician, Dr. Paul Muratta, an osteopath and Board-certified anesthesiologist, provide an evaluation of permanent impairment. It advised Dr. Muratta to utilize the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*) (5th ed. 2001).

In a February 13, 2008 report, Dr. Muratta noted that appellant had tenderness in the lumbar spine, pain with flexion and extension and negative straight leg raising. He found that appellant's motor strength in the quadriceps, hamstrings, anterior tibia and gastrocnemius was a "5/5 bilaterally." Dr. Muratta diagnosed lumbar herniated disc, insomnia secondary to chronic pain and depression secondary to chronic pain. He also requested authorization for a series of nerve root blocks.

In a February 26, 2008 report, Dr. Michael K. Morris, an osteopath and physiatrist, reviewed appellant's history of injury and treatment, stating that he had no history of lumbar spine surgery. He advised that diagnostic testing revealed degenerative changes with disc bulging at L4-5 as well as a disc herniation at L5-S1 with no impingement on exiting nerve roots. Dr. Morris found that appellant did not have any muscular atrophy in either lower limb, although he had pain with limited strength at both lower limbs and decreased sensation to the right knee and proximal to the right ankle. He referred to section 15.4 and advised that appellant's condition corresponded to the "DRE lumbar category III which correlates to a 10 percent whole person impairment."³ In a March 12, 2008 report, Dr. Morris noted that appellant had some tenderness in the upper buttock area and "good sensation to his lower extremities." He diagnosed cervical spine disease, lumbar spine disease and recommended water therapy and medications for appellant.

In a report dated April 24, 2008, the Office medical adviser reviewed appellant's history of injury and treatment. He agreed that appellant had degenerative lumbar disc disease at L4-5 and L5-S1 and received nonsurgical treatment. The Office medical adviser indicated that diagnostic testing revealed no motor or sensory impairment to the lower extremities related to nerve root innervation. He noted that the Office's procedures did not provide for impairment of the spine or whole person impairment. The Office medical adviser opined that there was no objective evidence of record to support any impairment to the lower extremities and that appellant reached maximum medical improvement on February 26, 2008.

² Appellant was terminated for misconduct on October 5, 2006, during his probationary period.

³ A.M.A., *Guides* 384-388.

On May 5, 2008 the Office denied appellant's claim for a schedule award. It found that the medical evidence of record did not support a permanent impairment to a scheduled member or function of the body.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act⁴ sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.⁵ The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.⁶ The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁷

No schedule award is payable for a member, function or organ of the body not specified in the Act or in the implementing regulations.⁸

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.⁹ 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.¹⁰

ANALYSIS

The evidence of record is insufficient to establish that appellant sustained permanent impairment warranting schedule award.

The Office accepted appellant's claim for a lumbar strain and herniated disc. Appellant claimed a schedule award and submitted a February 26, 2008 report from Dr. Morris who referred to Chapter 15 of the A.M.A., *Guides* at section 15.4 to find that his condition corresponded to the "DRE lumbar category III which correlates to a 10 percent whole person

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 5 U.S.C. § 8107.

⁶ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

⁷ 20 C.F.R. § 10.404.

⁸ *Thomas J. Engelhart*, 50 ECAB 319 (1999).

⁹ *Pamela J. Darling*, 49 ECAB 286 (1998).

¹⁰ *Thomas J. Engelhart*, *supra* note 8.

impairment.” The Board notes that this chapter deals with impairments of the spine. As noted, neither the Act, nor the implementing federal regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole. A claimant is not entitled to such a schedule award.¹¹ The Board notes that section 8101(20) specifically excludes the back from the definition of organ.¹² 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 originates in the spine. However, appellant did not submit sufficient medical evidence to support any impairment to either lower extremity causally related to the accepted low back conditions.¹³

The Office medical adviser reviewed the report of Dr. Morris and noted that Office policies do not provide for schedule awards for impairments of the spine or whole person.¹⁴ He found there was no medical evidence to support impairment to the lower extremities. Appellant did not submit any other medical evidence to support that he sustained impairment of a schedule member of the body under the Act. Accordingly, the Board finds that appellant has not established entitlement to a schedule award.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he was entitled to a schedule award.¹⁵

¹¹ See *supra* note 5; see also *Richard R. Lemay*, 56 ECAB 341 (2006).

¹² 5 U.S.C. § 8101(20).

¹³ See *Richard R. Lemay*, *supra* note 11; see also *Thomas J. Engelhart*, *supra* note 8.

¹⁴ See *supra* note 11.

¹⁵ Following issuance of the Office’s May 5, 2008 decision, appellant submitted additional evidence to the Office. However, the Board may not consider such evidence for the first time on appeal as its review is limited to the evidence that was before the Office at the time of its decision. See 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 5, 2008 is affirmed.

Issued: May 1, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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