

surgeon, to whom the Office had referred appellant for an evaluation of his impairment, applied Tables 20 and 83 of the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, to calculate the degree of his L5 nerve root impairment. In a report dated February 16, 2001, an Office medical adviser concurred with Dr. Caruthers that under the fourth edition of the A.M.A., *Guides*, the impairment was one percent for L5 nerve root pain. Appellant also submitted a report dated July 11, 2001 from Dr. Thaddeus Bort, a Board-certified orthopedic surgeon, who opined that he had a 3.5 percent impairment for lumbosacral nerve root impairment under the fourth edition of the A.M.A., *Guides*. On April 9, 2001 the Office granted appellant a schedule award for a one percent impairment of the right lower extremity and subsequently affirmed its April 9, 2001 decision on December 17, 2001.

This is the second appeal on this matter in the present case. In the first appeal,¹ appellant contested the Office's schedule award for a one percent impairment to his right leg. Determining that all of the medical reports of record had been improperly based on the fourth edition of the A.M.A., *Guides*, the Board set aside the Office's decisions dated April 9 and December 17, 2001 and remanded the case for further proceedings. The Board instructed the Office to secure a reasoned medical report with an opinion as to appellant's impairment to a scheduled member or function of the body under the fifth edition of the A.M.A., *Guides*.

On remand the Office referred appellant to Dr. John J. Brannon, a Board-certified orthopedic surgeon, for a second opinion examination and an opinion on the extent of the permanent impairment of his lower extremities. In a report dated November 26, 2003, Dr. Brannon provided a description of the factual and medical history and reported his findings on examination. He stated that motor strength testing showed no weakness in the proximal or distal dermatomes; pinprick and light touch sensation were intact; there was no atrophy or discoloration; nerve tension signs were negative for sciatica, either prone or supine; and radicular symptoms, "although quite real," were [impossible] to reproduce on physical examination. Based on the fifth edition of the A.M.A., *Guides*, Dr. Brannon opined that residuals from the accepted diagnosis of a displaced L5-S1 disc warranted an eight percent whole person impairment rating.

In a report dated April 4, 2004, an Office medical adviser, Dr. Daniel Zimmerman, found Dr. Brannon's rating unacceptable for schedule award purposes. Dr. Zimmerman explained that because motor strength testing showed no weakness in the proximal or distal dermatomes, no rating for weakness of either extremity was warranted. He further stated that Dr. Brannon's finding that pinprick and light touch sensation were intact precluded a rating in the lower extremities for pain or sensory deficit. Dr. Zimmerman accepted Dr. Brannon's medical findings but rejected his application of the fifth edition of the A.M.A., *Guides*, finding that appellant had a zero percent impairment of both lower extremities.

By decision dated April 20, 2004, the Office found that the medical evidence failed to support that appellant sustained an impairment to a member (extremity) of the body in that, although he referred to the fifth edition of the A.M.A., *Guides*, Dr. Brannon did not provide a rating for appellant's lower extremities due to radicular symptoms.

¹ Docket No. 02-1004 (issued September 5, 2002).

On June 7, 2004 appellant requested reconsideration and in support thereof, submitted a personal statement alleging that he suffered residual pain from his accepted injury. By decision dated June 25, 2004, the Office denied modification of its April 20, 2004 decision.

In a supplemental report dated June 18, 2004, Dr. Brannon opined that because appellant suffered a distinct injury, the diagnosis-related estimate method would be the most appropriate method to calculate a rating of his impairment. Referring to Table 15-3 (Category 2), which states that findings may include loss of range of motion, nonverifiable radicular pain without objective findings and no significant radiculopathy, he reiterated his assessment that appellant had an eight percent whole body impairment. In a second supplemental report dated July 14, 2004, Dr. Brannon disagreed with Dr. Zimmerman's rating approach, indicating that appellant's symptoms included pain and episodic discomfort, but did not include myelopathic findings, chronic radicular findings and weakness and that because he suffered from these symptoms, he fully supported that an impairment existed.

In an August 25, 2004 report, the district medical director opined that because there were no permanent radicular residuals of appellant's accepted condition at the lumbar level, there was no basis for a schedule award.

On July 22, 2004 appellant requested reconsideration. By decision dated August 27, 2004, the Office refused to modify its June 25, 2004 decision, finding that the lack of medical evidence of radicular residuals precluded a schedule award.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act² provides that, if there is permanent disability involving the loss or loss of use, of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.³ The schedule award provisions of the Act and its implementing federal regulation⁴ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, the Office has adopted the A.M.A., *Guides* (5th ed. 2001) as the uniform standard applicable to all claimants.⁵

No schedule award is payable for a member, function or organ of the body not specified in the Act or in the implementing regulations.⁶ As neither the Act, nor its regulations provide for

² 5 U.S.C. § 8107(a).

³ *Id.*

⁴ 20 C.F.R. § 10.404.

⁵ *Id.*

⁶ See *Richard R. Lemay*, 56 ECAB ____ (Docket No. 04-1652, issued February 16, 2005); see also *Thomas J. Engelhart*, 50 ECAB 319 (1999).

the payment of a schedule award for the permanent loss of use of the back or the body as a whole, no claimant is entitled to such a schedule award.⁷ The Board notes that section 8109(19) specifically excludes the back from the definition of “organ.”⁸ However, 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.⁹

Section 8123(a) of the Act provides that, when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.¹⁰ When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) to resolve the conflict in the medical evidence.¹¹

Where there exists a conflict of medical opinion and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.¹²

ANALYSIS

The Board finds that the case is not in posture for a decision, due to an unresolved conflict in medical opinion.

Based upon the recommendations of Dr. Caruthers, an orthopedic surgeon, and Dr. Zimmerman, the district medical director, the Office awarded appellant a one percent schedule award on April 9, 2001. Dr. Caruthers based his opinion on the residual sensory abnormalities outlined in Table 20 of the fourth edition of the A.M.A., *Guides*, rating appellant’s impairment at the maximum 25 percent. Then, referencing Table 83, he applied the sensory impairment of a lumbosacral nerve root of 5 percent and concluded that appellant had a 1.25 percent impairment rating of the lower extremity (rounded off to 1 percent). Dr. Zimmerman concurred with this opinion. Dr. Bort, an attending physician, also opined that appellant suffered from sensory deficit resulting from peripheral nerve disorder.

⁷ 5 U.S.C. § 8107; *see also See Richard R. Lemay, supra note 6.*

⁸ 5 U.S.C. § 8109(c).

⁹ *See Richard R. Lemay, supra note 6; see also Thomas J. Engelhart, supra note 6.*

¹⁰ 5 U.S.C. § 8123(a); *see also Raymond A. Fondots, 53 ECAB 637, 640 (2002).*

¹¹ *See Richard R. Lemay, supra note 6; see also William C. Bush, 40 ECAB 1064 (1989).*

¹² *Gloria J. Godfrey, 52 ECAB 486 (2001).*

On appeal the Board found that the medical opinions which formed the basis for the Office's April 9, 2001 schedule award were erroneously based on the fourth edition of the A.M.A., *Guides* and remanded the case, instructing the Office to secure a reasoned medical report with an opinion as to appellant's impairment under the fifth edition of the A.M.A., *Guides*. On remand, in a second opinion report dated November 26, 2003, Dr. Brannon opined that residuals from his diagnosed condition warranted an eight percent whole person impairment rating based on the fifth edition of the A.M.A., *Guides*. He found that radicular symptoms were impossible to reproduce on physical examination; that motor strength testing showed no weakness in the proximal or distal dermatomes; that pinprick and light touch sensation were intact; that there was no atrophy or discoloration; and that nerve tension signs were negative for sciatica. The district medical adviser accepted Dr. Brannon's medical findings, but rejected his application of the fifth edition of the A.M.A., *Guides*. Dr. Zimmerman found that appellant had a zero percent impairment of both lower extremities in that the lack of medical evidence of radicular residuals precluded a schedule award.

Where there exists a conflict of medical opinion and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.¹³ In this case, Dr. Brannon was not an impartial medical specialist for the purpose of resolving the conflict. Rather, he provided a second opinion based upon the fifth edition of the A.M.A., *Guides*. Therefore, his opinion, although rationalized, is not entitled to special weight.

The Board finds that there exists a conflict between the medical opinions of Dr. Bort and Dr. Brannon. Dr. Bort, appellant's treating physician, found that he had a lower extremity impairment due to residual sensory abnormalities of a lumbosacral nerve root, while Dr. Brannon found that appellant's pinprick and light touch sensations were intact and that radicular symptoms were impossible to reproduce on physical examination. The conflict of medical evidence exists because appellant's treating physician has determined that he does have a lumbosacral nerve root impairment, causing sensory abnormalities of the lower extremities, while the Office's second opinion physician has determined that he has no nerve root impairment and, therefore, no lower extremity impairment. Due to the conflict, the case should be remanded so that the Office can refer appellant to an appropriate Board-certified specialist for an impartial rationalized medical opinion as to whether he has an impairment of his lower extremities and, if so, the extent of any such permanent impairment. After such further development as the Office deems necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision with respect to the schedule award determination as further development of the medical evidence is required.

¹³ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 27, June 25 and April 20, 2004 be set aside and the case remanded for action consistent with this decision of the Board.

Issued: May 4, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member