

Rodriguez, a Board-certified physiatrist, nor the Office medical adviser properly applied the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*) in determining the extent of his permanent impairment. The Board remanded the case for further development of the medical evidence and an appropriate decision.

On remand, the Office determined that a conflict existed between Dr. Rodriguez and the Office medical adviser. The Office referred appellant to Dr. Andrew J. Gelman, an osteopath, for an impartial medical examination.

In a report dated October 21, 2005, Dr. Gelman, noted appellant's complaints of back pain and numbness of the lower extremities and "some erectile difficulties." He found that his sensation was intact and that appellant had good motor tone, reflexes, sensation and joint movement. Dr. Gelman related:

"It is my opinion that [appellant] does not qualify for any permanency rating with regards to the lower extremities. The basis for my opinion is derived via the [A.M.A., *Guides*]. Citing section 15.2, '[t]he [Diagnosis Related Estimates] DRE method is the principle methodology used to evaluate an individual who has had a distinct injury.' It is my opinion that [appellant] does not qualify for a permanency impairment utilizing the range of motion method as cited within the [A.M.A., *Guides*]."

Dr. Gelman quoted the Board's statement in its prior decision that any lower extremity impairment due to spinal pathology would usually be considered in the spinal impairment rating. He disagreed with Dr. Rodriguez utilization of Tables 17-37 and 16-11, as appellant had no peripheral nerve injury. Dr. Gelman further found that the Office medical adviser used range of motion in his calculations. He stated:

"Referencing section 15.12, [p]age 423, the assessment with regards to motor and/or sensory deficits (Tables 15-15, 15-16 and 15-18) is with regards to the range of motion methodology. It does not appear that the [O]ffice medical adviser considered any other parameters within the range of motion method."

Dr. Gelman opined that the range of motion method did not apply to appellant and that an additional award due to pain under Chapter 18 was "not warranted." He stated:

"Finally, reviewing the DRE method for the purpose of spinal impairment, it is evident that various categories do take into consideration radicular complaints. Those radicular complaints, affecting [appellant's] lower extremity are thus, taken into consideration within the DRE method."

Dr. Gelman concluded that appellant had no impairment of the right or left lower extremity.

By decision dated December 16, 2005, the Office denied appellant's claim for a schedule award on the grounds that the evidence was insufficient to establish a permanent impairment of a scheduled member due to his accepted employment injury. The Office found that the opinion of Dr. Gelman, the impartial medical examiner, constituted the weight of the medical evidence.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act² and its implementing federal regulation³ sets 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 for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁴ The Office procedures direct the use of the fifth edition of the A.M.A., *Guides*, issued in 2001 for all decisions made after February 1, 2001.⁵

ANALYSIS

In its prior decision, the Board found that the record contained no probative evidence on the extent of appellant's permanent impairment of the lower extremity and remanded the case for further development of the evidence. On remand, the Office found that a conflict in medical opinion existed between Dr. Rodriguez and the Office medical adviser and referred appellant to Dr. Gelman for an impartial medical examination.

The Board initially notes that the record did not contain a conflict in medical opinion at the time of the Office's referral of appellant to Dr. Gelman as in the prior decision. The Board found that neither Dr. Rodriguez nor the Office medical adviser properly applied the A.M.A., *Guides* in reaching an impairment determination. Thus, Dr. Gelman served as a second opinion physician rather than an impartial medical examiner.

The Board further finds that the opinion of Dr. Gelman is insufficient to determine whether appellant has a permanent impairment of the lower extremities. In a report dated October 21, 2005, he described appellant's complaints of back pain, numbness in the lower extremities and erectile difficulties. Dr. Gelman noted that he had good motor tone, reflexes, sensation and joint movement of the lower extremities. He found that appellant's permanent impairment should be evaluated according to the DRE in Chapter 15 of the A.M.A., *Guides*. The Board notes, however, that the DRE in Chapter 15 of the A.M.A., *Guides* apply only to determining the extent of any permanent impairment of the back. A schedule award is not payable for the loss or loss of use, of any member of the body not specifically enumerated, nor is it payable for the body as a whole.⁶ The schedule award provision under the Act limits an award to specific members or functions of the body enumerated under 5 U.S.C. § 8107 and its implementing regulations.⁷ The Act specifically excludes the back from the definition of

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404.

⁴ 20 C.F.R. § 10.404(a).

⁵ See FECA Bulletin No. 01-05, issued January 29, 2001.

⁶ *Janet C. Anderson*, 54 ECAB 394 (2003).

⁷ 5 U.S.C. § 8107; 20 C.F.R. § 10.404; *Jacqueline S. Harris*, 54 ECAB 139 (2002).

“organ.”⁸ The DRE of Chapter 15 is thus, inapplicable to determining the extent of appellant’s lower extremity impairment.

Dr. Gelman further found that appellant did “not qualify for a permanency impairment utilizing the range of motion method....” He noted that Tables 15-15, 15-16 and 15-18 of the A.M.A., *Guides*, which assess impairments due to motor and sensory deficits, were within the “range of motion methodology” and consequently “did not apply” to him. Dr. Gelman concluded that appellant had no impairment of the right or left lower extremity. He did not, however, sufficiently explain why the range of motion method did not apply to him other than to find that the DRE method was preferred under the A.M.A., *Guides* to determine the extent of a spinal impairment. The Board, however, has found that Tables 15-15, 15-16 and 15-18 are applicable when determining impairments due to a sensory loss or motor deficit of the lower extremity originating from a spinal nerve root.⁹

It is well established that proceedings under the Act are not adversarial in nature and, while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.¹⁰ Accordingly, once the Office undertakes development of the medical evidence, it has the responsibility to do so in a proper manner.¹¹ The Board, therefore, finds that the case must be remanded for further development of the medical evidence and a reasoned opinion regarding whether appellant has a permanent impairment of the lower extremities due to his accepted employment injury. Following such further development as deemed necessary, the Office shall issue a *de novo* decision.

On appeal, counsel argues that the Office should further develop the issue of whether appellant’s erectile dysfunction resulted from his employment injury. The Office, however, has not adjudicated this aspect of his claim and thus, it is not before the Board at this time.

CONCLUSION

The Board finds that the case is not in posture for decision.

⁸ 5 U.S.C. § 8107; *Tomas Martinez*, 54 ECAB 623 (2003).

⁹ See *Belinda H. Wilson*, 57 ECAB ____ (Docket No. 05-1426, issued October 19, 2005); *Shalanya Ellison*, 56 ECAB ____ (Docket No. 04-824, issued November 10, 2004).

¹⁰ *Richard E. Simpson*, 55 ECAB ____ (Docket No. 04-14, issued May 3, 2004).

¹¹ *Melvin James*, 55 ECAB ____ (Docket No. 03-2140, issued March 25, 2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 16, 2005 is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 16, 2006
Washington, DC

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

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