

The Board, however, remanded the case to the Office for further development of the medical evidence to determine whether appellant was entitled to a schedule award prior to May 22, 1998. The Board also found that the Office properly denied appellant's August 2, 2004 request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error. The facts and the circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The facts and the history relevant to the present issue are hereafter set forth.²

On remand the Office requested that an Office medical adviser review appellant's medical records to determine whether she was entitled to a schedule award for the period prior to May 22, 1998. On June 21, 2005 an Office medical adviser reviewed appellant's medical records. He determined that she reached maximum medical improvement (MMI) on May 20, 1998. The Office medical adviser stated that appellant sustained chronic cervical and lumbosacral disc disease with superimposed lumbar strain due to her 1997 employment-related fall. He noted the findings of appellant's attending physician that she had an 18 percent impairment of the cervical spine and a 13 percent impairment of the lumbar spine. The Office medical adviser noted that the Federal Employees' Compensation Act does not provide for a schedule award for impairment to the spine. He determined that appellant had a Grade 4 sensory deficit of the L5 nerve root of the right leg. Utilizing Table 15-15 and Table 15-18 on page 424 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*), the Office medical adviser determined that appellant sustained a one percent impairment of the right lower extremity.

By decision dated August 12, 2005, the Office granted appellant a schedule award for a one percent impairment of the right leg based on the Office medical adviser's June 21, 2005 opinion. In a letter dated August 18, 2005, appellant requested a review of the written record before an Office hearing representative. She submitted a November 23, 2004 medical report of Dr. Ernest L. Howard, a Board-certified physiatrist, who opined that appellant sustained an 18 percent whole person impairment of the cervical spine which constituted a 30 percent impairment of the upper extremities based on the A.M.A., *Guides*. He further determined that she had a 13 percent whole person impairment of the lumbar spine which constituted a 32 percent impairment of the lower extremities based on the A.M.A., *Guides*.

By decision dated November 14, 2005, an Office hearing representative set aside the Office's August 12, 2005 decision and remanded the case for further development. He found that the Office medical adviser's opinion was not sufficiently rationalized to establish appellant's entitlement to a schedule award. The hearing representative stated that it was unknown how the Office medical adviser determined that appellant reached MMI on May 20, 1998. In addition, the medical adviser failed to explain the basis for his finding that appellant had a one percent impairment of the right lower extremity based on the A.M.A., *Guides*. On remand the hearing representative instructed the Office to obtain clarification from the medical adviser.

² On July 21, 1997 appellant, then a 40-year-old distribution clerk, filed a traumatic injury claim alleging that on July 19, 1997 she experienced pain radiating from her lower back down through her right thigh when she lifted a flat box weighing 25 to 45 pounds out of an all-purpose container. By letter dated October 28, 1997, the Office accepted her claim for a lumbosacral strain. On April 10, 2004 appellant filed a claim for a schedule award (Form CA-7).

On November 29, 2005 the Office medical adviser stated that appellant reached MMI on April 21, 1998 and not May 20, 1998 as he previously stated, based on an April 21, 1998 report of Dr. Susan J. Dreyer, a Board-certified physiatrist.³ He further stated that the basis for his one percent impairment rating of the right lower extremity was based on Dr. Howard's October 8, 2004 report.⁴

On February 2, 2006 the Office medical adviser stated that Dr. Howard's October 8, 2004 medical report was for a different case and did not apply to appellant's schedule award claim. He noted Dr. Dreyer's April 21, 1998 findings that appellant sustained degenerative lumbar disc and low back pain. The Office medical adviser further noted Dr. Dreyer's finding that appellant's range of motion of the lumbar spine was restricted with a negative straight leg raising test and a constant limp. In addition, he found no signs or evidence of radiculopathy or myelopathy. The medical adviser stated that Dr. Dreyer concurred that appellant reached MMI on April 21, 1998. Based on Dr. Dreyer's examination on that date, the medical adviser determined that appellant had no impairment of the right lower extremity. He concluded that she had zero percent impairment of the right lower extremity.

In a decision dated February 21, 2006, the Office found that appellant was not entitled to a schedule award for the lower extremities based on the medical adviser's February 2, 2006 opinion.

By letter dated February 27, 2006, appellant requested an oral hearing before a hearing representative.

By decision dated November 13, 2006, a hearing representative affirmed the Office's February 21, 2006 decision. The evidence of record was insufficient to establish that appellant was entitled to a schedule award.

³ In an April 21, 1998 report, Dr. Dreyer provided a history of appellant's July 19, 1997 employment injury and medical treatment and reviewed her medical records. On physical examination, she reported full range of motion of appellant's cervical spine, restricted range of motion of her lumbar spine with straight leg raising and an exaggerated limp. Dr. Dreyer stated that appellant suffered from chronic low back pain with lumbar spondylosis/degenerative disc but found no evidence of radiculopathy or myelopathy. She concurred that appellant had reached maximum medical improvement.

⁴ On October 8, 2004 Dr. Howard diagnosed cervical spondylosis, multiple degenerative disc disease, history of appellant's work-related injury, positive multiple cervical disc protrusion at C3-4, C4-5 and C5-6, clinical signs and symptoms of cervical radiculopathy, lumbar spondylosis with degenerative disc disease and posterior central disc intrusion at L4-5 and L5-S1 by work-related history. He determined that appellant had an 18 percent whole person impairment of the cervical spine and a 13 percent whole person impairment of the lumbar spine (A.M.A., *Guides* 384, section 15.6). Utilizing the Combined Values Chart, Dr. Howard determined that appellant sustained a 29 percent whole person impairment based on work-related cervical and lumbar radiculopathy (A.M.A., *Guides* 604). He stated that these impairment ratings were accurate and that they should not change plus or minus one percent over the next two years based on his examination findings. Dr. Howard noted that his impairment ratings did not include appellant's history of pulmonary sarcoid disease, hypertension, uterine disease, hemorrhoid surgery, direct fibromyalgia chronic pain residual sequela or other nonwork-related medical illnesses.

LEGAL PRECEDENT

An employee seeking compensation under the Act⁵ has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence.⁶

The schedule award provision of the Act⁷ and its implementing regulation⁸ set forth the number of weeks of compensation to be paid for permanent loss or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage of loss of use.⁹ However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants, the Office adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment and the Board has concurred in such adoption.¹⁰

ANALYSIS

The Office accepted appellant's claim for a lumbosacral strain. On April 10, 2004 she filed a claim for a schedule award for permanent impairment. On June 21, 2005 an Office medical adviser determined that appellant reached MMI on May 22, 1998. He further determined that she sustained a Grade 4 sensory deficit of the L5 nerve root of the right leg. The medical adviser opined that appellant had a one percent impairment of the right lower extremity (A.M.A., *Guides* 424, Tables 15-15 and 15-18).

Based on the hearing representative's remand instructions, the medical adviser clarified his impairment rating. On November 29, 2005 he stated that the date of MMI was April 21, 1998 instead of May 20, 1998, based on Dr. Dreyer's April 21, 1998 report. The medical adviser further stated that his one percent impairment rating was based on Dr. Howard's October 8, 2004 report.

On February 2, 2006 the Office medical adviser stated that Dr. Howard's October 8, 2004 medical report did not pertain to appellant's current low back claim. Instead, he noted Dr. Dreyer's April 21, 1998 findings. The Office medical adviser noted that Dr. Dreyer discussed appellant's degenerative lumbar disc, low back pain, range of motion, straight leg raising results and limp and found no signs or evidence of radiculopathy or myelopathy. Dr. Dreyer agreed that appellant reached MMI on April 21, 1998. She made no objective findings of any permanent impairment to appellant's right lower extremity due to the accepted

⁵ 5 U.S.C. §§ 8101-8193.

⁶ *Gary J. Watling*, 52 ECAB 278 (2001).

⁷ 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

⁸ 20 C.F.R. § 10.404 (1999).

⁹ 5 U.S.C. § 8107(c)(19).

¹⁰ 20 C.F.R. § 10.404 (1999); *see also Joseph Lawrence, Jr.*, 53 ECAB 331 (2002); *Tommy R. Martin*, 56 ECAB ____ (Docket No. 03-1491, issued January 21, 2005).

lumbosacral strain. Based on Dr. Dreyer's report, the medical adviser determined that appellant had no permanent impairment of the right lower extremity.

Dr. Howard's November 23, 2004 report found that appellant sustained an 18 percent whole person impairment of the cervical spine which constituted a 30 percent impairment of the upper extremities and a 13 percent whole person impairment of the lumbosacral spine which constituted a 32 percent impairment of the lower extremities based on the A.M.A., *Guides*. He combined the 30 percent impairment of the upper extremities with the 32 percent impairment of the lower extremities to determine that appellant sustained a 29 percent impairment of the whole person (A.M.A., *Guides* 604). Dr. Howard, however, failed to identify the specific tables and figures of the A.M.A., *Guides* that he used to determine the impairment ratings for appellant's upper and lower extremities. Moreover, he did not state that appellant reached MMI prior to May 22, 1998 or that her impairment was causally related to her accepted employment injury. The Board, therefore, finds that Dr. Howard's report is insufficient to establish appellant's entitlement to a schedule award.

The Board finds that the weight of the medical opinion evidence is represented by the Office medical adviser's opinion, based on the clinical findings of Dr. Dreyer, that appellant did not sustain any employment-related permanent impairment of her right lower extremity prior to May 20, 1998, as it is sufficiently rationalized and based on a proper factual and medical background.

The Board finds that appellant submitted no rationalized medical evidence that establishes any permanent impairment to her right lower extremity causally related to her accepted employment-related lumbosacral strain.

CONCLUSION

The Board finds that appellant has failed to establish that she is entitled to a schedule award as a result of her accepted employment injury.

ORDER

IT IS HEREBY ORDERED THAT the November 13, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 20, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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