

pain on September 18, 1996 while unloading a five-gallon jug of water to the facilities in his capacity as an inspector. The Office accepted this claim for low back strain. On August 22, 2003 it doubled the two claims. On June 25, 2003 appellant filed a claim for a schedule award (Form CA-7).

By letter dated June 27, 2003, the Office notified appellant of the deficiencies in his claim and requested that he provide additional information. It also sent a letter to appellant's treating physician, Dr. Barbara A. Bennett, an osteopath, requesting an impairment rating in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), fifth edition.

On August 25, 2003 the Office referred appellant, together with a statement of accepted facts to Dr. E. Gregory Fisher, a Board-certified orthopedic surgeon, for an evaluation regarding whether he sustained any permanent impairment due to the accepted back injuries. Dr. Fisher reviewed appellant's medical and occupational history. Physical examination revealed that his legs were equal length and the circumference of the thighs, calves and ankles were also equal indicating no atrophy. Straight leg raising on the right side was negative and on the left side was about 45 degrees with pain over the back area. Appellant had an absent Achilles reflex on the left side but otherwise the deep tendon reflexes over the knees and right ankle were two plus. The motor power over the lower extremities was 5/5 with no obvious weakness of the muscle groups. Sensation of the lower extremities was intact and appellant had full range of motion in his hips, knees and ankles. Dr. Fisher opined that appellant reached maximum medical improvement in 1997. He stated that there was no atrophy or sensory loss to the lower extremities and appellant had a full range of motion in his hips, knees, ankles and feet. Citing Chapter 17 of the A.M.A., *Guides*, 5th edition, Dr. Fisher found that appellant had no (zero percent) permanent impairment of the lower extremities due to the accepted work injuries.

In an August 5, 2003 medical report, Dr. Bennett stated that appellant injured himself on September 18, 1996 at work and that this injury aggravated his prior 1993 back injury. She stated that diagnostic testing revealed disc bulging at L4-5 and a bone spur and that she previously requested these diagnoses be added to the claim. Dr. Bennett opined that appellant would never recover from his back injuries and would always suffer from chronic back pain due to work-related injuries. She did not specifically address the issue of permanent impairment.

On September 10, 2003 the Office forwarded appellant's file to an Office medical adviser for review. In an October 1, 2003 report, the Office medical adviser found that appellant had no permanent impairment to his lower extremities because he did not experience any atrophy, motion, strength or sensory deficits. He also noted a maximum medical improvement date in 1997.

On October 28, 2003 the Office requested that Dr. Fisher submit an addendum addressing Dr. Bennett's medical reports. On November 6, 2003 Dr. Fisher opined that the disc bulging at L4-5 and bone spur found on a computerized tomography (CT) scan were not related to the 1996 work injury because there was no evidence that they existed at the time of the injury. Rather, he attributed that these conditions to the normal aging process and were extremely common for people in their late 40's. Dr. Fisher stated that all of his physical findings on August 25, 2003 were strictly those of a chronic nature related to the 1993 injury when appellant's disc was

removed at L5-S1. There were no positive physical findings from the 1996 lumbosacral strain injury. In regard to the accepted conditions for the September 18, 1996 injury, appellant had a zero percent impairment rating. Dr. Fisher cited to Table 15-3 in Chapter 15 of the A.M.A., *Guides* and opined that appellant fell into Category 1 using the diagnosis-related method of evaluating impairment.

By decision dated March 9, 2004, the Office denied appellant's claim for a schedule award on the grounds that the medical evidence did not support any permanent impairment to a scheduled member.

On March 11, 2004 appellant, through his representative, filed a request for an oral hearing before an Office hearing representative. The oral hearing took place on August 14, 2008.

By decision dated November 4, 2008, the Office hearing representative affirmed the March 9, 2004 decision, finding that appellant did not submit sufficient evidence to support his claim for permanent impairment due to his accepted injuries.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act¹ and its implementing regulations² set forth the number of weeks of compensation payable to employees sustaining permanent impairment from the 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, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.³

A schedule award is not payable for the loss, or loss of use, of a member or function of the body not specifically listed in the Act and regulations.⁴ The members and functions listed in the schedule award provision and the regulations do not include impairments of the back, brain or the body as a whole.⁵ 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.

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.404.

³ *See id.* *See also James Kennedy, Jr.*, 40 ECAB 620 (1989); *Charles Dionne*, 38 ECAB 306 (1986).

⁴ *James E. Jenkins*, 39 ECAB 860 (1988).

⁵ *See* 5 U.S.C. § 8101(19); *John Litwinka*, 41 ECAB 956 (1990).

ANALYSIS

The issue is whether appellant sustained any permanent impairment to his lower extremities due to his February 12, 1993 and September 18, 1996 back injuries. The Office accepted that appellant sustained an acute lumbosacral strain, disc herniation at L5-S1 and low back strain. Neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or spine.⁶ However, as the schedule award provisions of the Act include the extremities, appellant may be entitled to a schedule award for the permanent impairment to his lower extremities even though the cause of the impairment originates in the spine.⁷

The Office referred appellant to Dr. Fisher for an evaluation of any permanent impairment due to the accepted back injuries. Dr. Fisher opined that, because appellant did not experience atrophy or sensory loss of the lower extremities and had a full range of motion in his hips, knees, ankles and feet, he sustained a zero percent permanent impairment according to the A.M.A., *Guides*.

The Office properly forwarded Dr. Fisher's report to an Office medical adviser for review.⁸ The Office medical adviser agreed that appellant sustained a zero percent permanent impairment because he did not experience any atrophy, motion or sensory deficits.

In response to an August 5, 2003 medical report from appellant's treating physician, Dr. Bennett, the Office requested a supplemental report from Dr. Fisher. In a November 6, 2003 medical report, Dr. Fisher opined that a disc bulging at L4-5 and bone spur found by a CT scan were not related to the September 18, 1996 work injury. He opined that the conditions did not exist at the time of the work injury and were due to the normal aging process. Further, Dr. Fisher did not identify any positive physical findings on examination related to the 1996 employment injury. He reiterated that appellant sustained zero percent permanent impairment in accordance with the A.M.A., *Guides*.

The Board finds that Dr. Fisher's medical reports were well rationalized, based on a complete medical and factual background and described his findings on examination in sufficient detail.⁹ Dr. Fisher stated that he did not find any positive findings related to appellant's employment injury. He did not find any loss of range of motion to appellant's hips, knees or ankles, nor did he find any atrophy or motor or sensory loss to appellant's lower extremities. The Office medical adviser agreed that appellant did not sustain a ratable impairment. The Board finds that appellant did not meet his burden of proof in establishing that he sustained a permanent impairment due to his employment injury.

⁶ See *George E. Williams*, 44 ECAB 530, 533 (1993).

⁷ See *id.*

⁸ Office procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*. *Tommy R. Martin*, 56 ECAB 273 (2005).

⁹ See *Peter C. Belkind*, 56 ECAB 580 (2005); *Tomas Martinez*, 54 ECAB 623 (2003).

CONCLUSION

The Board finds that appellant did not establish that he sustained a ratable impairment causally related to the February 12, 1993 and September 18, 1996 work injuries, entitling him to a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the November 4, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 14, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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