

**United States Department of Labor  
Employees' Compensation Appeals Board**

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R.S., Appellant )

and )

DEPARTMENT OF VETERANS AFFAIRS, )  
VETERANS ADMINISTRATION MEDICAL )  
CENTER, St. Louis, Mo, Employer )

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**Docket No. 08-1934**  
**Issued: February 23, 2009**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On July 3, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' schedule award decision dated June 5, 2008. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award determination.

**ISSUE**

The issue is whether appellant has met her burden of proof in establishing that she sustained permanent impairment due to her accepted back strain.

**FACTUAL HISTORY**

On November 26, 2000 appellant, then a 38-year-old psychiatric nurse's aide, filed a traumatic injury claim alleging that, on November 25, 2000, she sustained lower back pain while repositioning a patient in bed. She did not stop work.

An April 15, 2004 magnetic resonance imaging (MRI) scan read by Dr. David S. Martin, a radiologist, revealed that the lowest fully formed intervertebral disc space was designated at L5-S1. Dr. Martin noted that there was no cord tethering, syrinx or malignant-appearing focal

marrow replacing process. He advised that the disc spaces were normal in size and signal, and that there was no evidence of disc herniation or spinal canal stenosis. Dr. Martin indicated that there was an adequate volume of fat surrounding the existing nerve roots.

On October 20, 2004 the Office accepted appellant's claim for lumbar strain resolved. Appellant received appropriate compensation benefits.<sup>1</sup>

On November 8, 2006 appellant filed a claim for a schedule award. By decision dated November 22, 2006, the Office denied her claim for a schedule award finding that the back was not a scheduled member of the body specified under the Federal Employees' Compensation Act.<sup>2</sup> On November 29, 2006 appellant requested a hearing, which was held on August 10, 2007.

By letter dated August 14, 2007, the Office advised appellant that to process her claim for a schedule award, she should obtain an assessment of permanent impairment from her physician based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (5<sup>th</sup> ed. 2001) (A.M.A., *Guides*).

In a September 17, 2007 report, Dr. Naseem A. Shekhani, Board-certified in physical medicine and rehabilitation, reviewed appellant's history of injury and treatment. He examined appellant and diagnosed lumbago with arthritis, bilateral hip pain with right thigh numbness, bilateral knee pain, right ankle pain, headache, anxiety and sleep disturbances. Dr. Shekhani found that appellant reached maximum medical improvement. He utilized the A.M.A., *Guides* and referred to Tables 15-8,<sup>3</sup> and 15-9<sup>4</sup> and provided findings for the back, knees and ankles. Dr. Shekhani opined that appellant had 17 percent whole person impairment.

By decision dated November 2, 2007, the Office hearing representative remanded the case for further medical development. Although Dr. Shekhani's report provided impairment for the knee and ankle, these were not accepted injuries. The Office hearing representative directed that an Office medical adviser review Dr. Shekhani's report to ascertain whether it established permanent impairment due to the accepted back condition.

In a February 24, 2008 report, an Office medical adviser noted appellant's history of injury and treatment. Regarding appellant's bilateral hip, knee and right ankle conditions, he noted that the descriptions were vague and nonspecific. The medical adviser also reviewed Dr. Shekhani's September 17, 2007 report and advised that there were no physical findings other than nonlocalized tenderness to palpation and some limited range of motion. He noted that there was no diagnosis given other than "pain." The medical adviser opined that Dr. Shekhani's report was vague and did not explain how appellant's complaints were related to the accepted lumbar strain. He recommended an updated report from the physician. On February 28, 2008 the Office requested that appellant have Dr. Shekhani provide an updated report.

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<sup>1</sup> The Office also accepted appellant's claim for a recurrence on November 6, 2006.

<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> A.M.A., *Guides* 407.

<sup>4</sup> *Id.* at 409.

In a March 15, 2008 report, Dr. Shekhani stated that appellant was initially injured when “manhandled” by a patient on November 25, 2000. On August 19, 2007 appellant’s foot became caught in a chair and she fell. Dr. Shekhani related that appellant complained of low back pain and had arthritic changes demonstrated on the MRI scan with a ligamentous tear of the right knee. Appellant also had myofascial pain syndrome which was chronic in nature. Dr. Shekhani related that appellant had initial back pain and that she sprained her right ankle. He opined that her back was causing her to have an antalgic gait and painful lower extremity. Dr. Shekhani diagnosed degenerative disease of the lumbar spine, aggravated by the work injury, myofascial pain syndrome with lumbago, a right knee injury with anterior cruciate ligament tear with effusion and right ankle sprain. He advised that these conditions were caused or aggravated by appellant’s work injury.

In a May 16, 2008 report, the Office medical adviser reviewed appellant’s history of injury and treatment. He noted that diagnostic tests from April 2004, revealed early degenerative changes without any significant neural impingement of the lumbar spine, normal hips, and tibialis posterior tendon rupture with arthritic changes and spurs of the right ankle. The medical adviser reviewed the March 15, 2008 report of Dr. Shekhani, stating that, while the physician listed appellant’s diagnoses, there were no detailed, objective physical findings provided. He noted that the only description included that appellant had antalgia and radiating pain and an antalgic gait that caused her pain. The Office medical adviser explained that “this could potentially aggravate her lumbar degenerative disc disease”; however, he noted that there were no current descriptions of any focal trauma resulting in an ankle sprain or anterior cruciate ligament tear. He stated that these were “not usually overuse injuries as a result of a gait abnormality.” Regarding the diagnosis of myofascial pain syndrome with lumbago, the medical adviser noted that no detailed physical examination findings were provided to establish that this resulted from her work-related lumbar strain or how her symptoms fit the criteria for myofascial pain syndrome. He concluded that there was not enough medical evidence to support the additional conditions. Regarding the lumbar strain, the medical adviser explained that the A.M.A., *Guides* precluded an impairment award for the axial skeleton or of the person as a whole, only of the extremities. Although appellant experienced pain in the hips, knees and right ankle, it was unclear that her pain was caused by her back condition. There were no nerve root impingement signs and appellant had normal muscle stretch reflexes on physical examination. The medical adviser also noted that the April 1, 2004 MRI scan revealed normal disc spaces in size and signal. The diagnostic studies failed to show evidence of any disc herniation or spinal canal stenosis and appellant had adequate volume of fat surrounding exiting nerve roots. The Office medical adviser opined that the MRI scan findings were unremarkable. He concluded that no impairment was warranted for appellant’s radicular pain.

By decision dated June 5, 2008, the Office denied appellant’s claim for a schedule award, finding that the evidence was insufficient to establish that she sustained any permanent impairment due to her accepted injury.

## LEGAL PRECEDENT

Section 8107 of the Act 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.<sup>5</sup> 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.<sup>6</sup> The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.<sup>7</sup>

No schedule award is payable for a member, function, or organ of the body not specified in the Act or in the regulations.<sup>8</sup> Because neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back,<sup>9</sup> no claimant is entitled to such an award.<sup>10</sup> However, in 1960, amendments to the Act modified the schedule award provision 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. As the schedule award provision of the Act includes 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.<sup>11</sup>

A claimant has the burden of proof to submit medical evidence supporting that she has permanent impairment of a scheduled member of the body.<sup>12</sup> The Board notes that, before applying the A.M.A, *Guides*, the Office must determine whether the claimed impairment of a scheduled member is causally related to the accepted work injury.<sup>13</sup>

## ANALYSIS

The Board finds that the medical evidence of record is insufficient to establish that appellant sustained permanent impairment due to her accepted lumbar strain.

The Office accepted appellant's claim for a resolved lumbar strain. Appellant claimed a schedule award and submitted a September 17, 2007 report from Dr. Shekhani, who diagnosed

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<sup>5</sup> 5 U.S.C. § 8107.

<sup>6</sup> *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

<sup>7</sup> 20 C.F.R. § 10.404.

<sup>8</sup> *Henry B. Floyd, III*, 52 ECAB 220 (2001).

<sup>9</sup> The Act itself specifically excludes the back from the definition of "organ." 5 U.S.C. § 8101(19).

<sup>10</sup> *See Thomas J. Engelhart*, 50 ECAB 319 (1999).

<sup>11</sup> *Id.*; *see also, Rozella L. Skinner*, 37 ECAB 398, 402 (1986).

<sup>12</sup> *See Annette M. Dent*, 44 ECAB 403 (1993).

<sup>13</sup> *Michael S. Mina*, 57 ECAB 379, 385 (2006).

several conditions which were not accepted by the Office as related to her November 25, 2000 injury. Dr. Shekhani opined that appellant had reached maximum medical improvement and generally referred to Tables 15-8,<sup>14</sup> and 15-9<sup>15</sup> to find a 17 percent whole person impairment. As noted, the only accepted condition is a lumbar strain. Dr. Shekhani did not address how the additional diagnoses pertaining to the hips, ankles and knees resulted from the lumbar strain. In a March 15, 2008 report, he stated that the back condition caused appellant to have an antalgic gait and painful lower extremity. However, Dr. Shekhani again failed to address how the accepted back sprain resulted in permanent impairment of the hips, knees or ankle. While the medical opinion of a physician supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute certainty, neither can such opinion be speculative or equivocal. The opinion of a physician supporting causal relationship must be one of reasonable medical certainty that the condition for which compensation is claimed is causally related to federal employment and such relationship must be supported with affirmative evidence, explained by medical rationale and be based upon a complete and accurate medical and factual background of the claimant.<sup>16</sup> The Board notes that schedule awards are not payable for a member, function or organ of the body not specified in the Act or in the implementing regulations.<sup>17</sup> The Act excludes the back from the definition of organ.<sup>18</sup> In making his impairment rating, Dr. Shekhani used the tables of the A.M.A., *Guides* relevant to spinal impairments. Therefore, his impairment rating is of diminished probative value. The Board further notes that the Act does not provide a schedule award based on whole person impairments.<sup>19</sup>

On May 16, 2008 the Office medical adviser noted that diagnostic testing from 2004 revealed that appellant had early degenerative changes without any significant neural impingement of the lumbar spine, normal hips, and tibialis posterior tendon rupture with arthritic changes and spurs of the right ankle.<sup>20</sup> The Office medical adviser found that Dr. Shekhani failed to provide any objective physical findings to support nonaccepted conditions as related to the accepted low back sprain. He indicated that there were no descriptions of any focal trauma that would result in an ankle sprain or an anterior cruciate ligament tear. The Office medical adviser stated that Dr. Shekhani also failed to explain how the additional conditions were causally related to appellant's lumbar strain or how her symptoms fit the criteria for myofascial

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<sup>14</sup> A.M.A., *Guides* 407.

<sup>15</sup> *Id.* at 409.

<sup>16</sup> *Samuel Senkow*, 50 ECAB 370 (1999); *Thomas A. Faber*, 50 ECAB 566 (1999).

<sup>17</sup> *See supra* note 8.

<sup>18</sup> 5 U.S.C. § 8101(19) provides, in pertinent part, that "organ" means a part of the body that performs a special function and for purposes of this subchapter excludes the brain, heart and back...."

<sup>19</sup> *See Tania R. Keka*, 55 ECAB 354 (2004); *James E. Mills*, 43 ECAB 215 (1991) (neither the Act, nor its implementing regulations provide for a schedule award for impairment to the body as a whole).

<sup>20</sup> The Board notes that it is appropriate for an Office medical adviser to review the clinical findings of the treating physician to determine permanent impairment. *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.5(c) (March 1994); *Richard R. LeMay*, 56 ECAB 341 (2006).

pain syndrome. The Office medical adviser found no basis on which to attribute impairment to a scheduled member causally related to the accepted lumbar strain.

The medical evidence does not establish that appellant has permanent impairment to a scheduled member of the body causally related to her accepted injury. Consequently, appellant has not established entitlement to a schedule award.

**CONCLUSION**

The Board finds that the Office properly denied appellant's claim for a schedule award.

**ORDER**

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

Issued: February 23, 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