

of disability claim on July 25, 2005 alleging that on July 22, 2005 she sustained a recurrence of pain after returning to work. The Office accepted this claim on September 27, 2005.

Appellant requested a schedule award on May 29, 2007. The Office requested supportive medical evidence for a schedule award on June 1, 2007. In a May 10, 2007 report, Dr. Jeffrey F. Wirebaugh, a Board-certified family practitioner, found that she had 10.5 percent impairment of the left lower extremity due to motor deficit. He noted that appellant had frequent exacerbations of back pain extending into her left leg and foot. Dr. Wirebaugh stated that appellant reported that her legs became weak and gave out causing her to fall. On physical examination, appellant had difficulty heel standing as well as positive straight leg raising on the left. Dr. Wirebaugh found weakness of the dorsiflexors of the left foot and great toe as well as weakness of the plantar flexors of the left ankle. He stated, "This weakness is classified as [G]rade [4] and is a 25 percent motor deficit. There is no dermatomal or anatomic sensory loss or abnormality."

The Office medical adviser reviewed this report on July 14, 2007. He stated that there was insufficient information to make a finding of permanent impairment based on strength deficits and Dr. Wirebaugh did not indicate that another professional had reproduced the results on a different occasion. The Office medical adviser gave the date of maximum medical improvement as May 10, 2007.¹

The Office referred appellant for a second opinion evaluation on August 8, 2007. Dr. Joseph E. Burkhardt, an osteopath, examined appellant on September 5, 2007 and reviewed her history of injury. He diagnosed degenerative disc disease L1 through S1 with no evidence of radiculopathy. Dr. Burkhardt reported symmetrical deep tendon reflexes, normal straight leg raising, normal gait and normal muscle bulk and strength in the lower extremities with no atrophy. He found no evidence of radiculopathy or asymmetry in muscle strength or bulk as well as normal sensation. Dr. Burkhardt concluded that appellant had no permanent impairment of her lower extremities. The Office medical adviser reviewed this report on October 29, 2007, and concluded that appellant had no permanent impairment of the lower extremities entitling her to a schedule award.

By decision dated November 19, 2007, the Office denied appellant's claim for a schedule award finding that the weight of the medical opinion evidence established that she had no permanent impairment due to her accepted employment injury.

Appellant, through her attorney, requested an oral hearing. At the oral hearing on March 10, 2008 she stated that she experienced nerve impingement which affected the left lower extremity with numbness and tingling and foot drop. Appellant contended that Dr. Burkhardt conducted a very cursory examination while she wore her street clothes.

¹ The Office medical adviser improperly relied on a report from Dr. Michael Raphelson, a Board-certified family practitioner and appellant's attending physician, dated December 16, 2005. Dr. Raphelson stated that appellant's straight leg raising was normal, but he found that she was guarded on the left side. He also noted that she exhibited good strength in her legs. This report was dated two years prior to the date of maximum medical improvement found by the Office medical adviser May 10, 2007 and has little probative value in establishing the extent of appellant's permanent impairment.

By decision dated May 6, 2008, the hearing representative affirmed the November 19, 2007 decision, finding that the weight of the medical evidence established that appellant had no permanent impairment of her left lower extremity.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act² and its implementing regulation³ 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, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

A schedule award is not payable for a member, function or organ of the body not specified in the Act or in the implementing regulations. As neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back, no claimant is entitled to such an award.⁴ However, as the schedule award provisions of the Act include 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.⁵

The Act provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.⁶ The implementing regulation states that if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician of an Office medical adviser or consultant, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case.⁷

ANALYSIS

Appellant submitted a report from Dr. Wirebaugh in support of her claim for a schedule award. Dr. Wirebaugh examined appellant and found that she had difficulty heel standing and positive straight leg raising on the left. He also found weakness in appellant's dorsiflexors and

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404 (1999).

⁴ *George E. Williams*, 44 ECAB 530, 533 (1993).

⁵ *Id.*

⁶ 5 U.S.C. §§ 8101-8193, 8123.

⁷ 20 C.F.R. § 10.321.

plantar flexors in the left leg and concluded that she had a 25 percent motor deficit of the left lower extremity.

The Office then referred appellant for a second opinion evaluation with Dr. Burkhardt, an osteopath, and on September 5, 2007 he found that appellant exhibited no evidence of radiculopathy. Dr. Burkhardt stated that appellant had no asymmetry in muscle strength or bulk and normal sensation in the lower extremities. He opined that appellant had no permanent impairment of the lower extremities due to her accepted employment injury.

The Board finds that there is an unresolved conflict of medical opinion evidence regarding the extent of appellant's permanent impairment due to her accepted employment injury. Appellant's physician, Dr. Wirebaugh, and the Office's second opinion physician, Dr. Burkhardt, made divergent findings on physical examination. While Dr. Wirebaugh found that appellant had muscle weakness in the left lower extremity which he attributed to her employment injury, Dr. Burkhardt found no such impairment. Due to the difference of medical opinion evidence, the Office should refer appellant, a statement of accepted facts and a list of specific questions to an appropriate Board-certified physician to determine if she has any impairment of the left lower extremity due to her accepted employment injury.

CONCLUSION

There is an unresolved conflict of medical opinion. On remand, the Office should undertake further development of the medical evidence consistent with this opinion of the Board.

ORDER

IT IS HEREBY ORDERED THAT the May 6, 2008 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development.

Issued: January 16, 2009
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