

accepted appellant's claim for lumbar strain and right knee contusion. Appellant received appropriate compensation benefits.¹

In a report dated August 12, 2003, Dr. George W. Wharton, a Board-certified orthopedic surgeon, noted appellant's history of injury and treatment. He opined that she had an impairment of 32 percent to the right leg or 13 percent whole person impairment. In a separate report, also dated August 12, 2003, Dr. Wharton opined that appellant was entitled to a whole person impairment of five percent based upon the diagnostic-related estimates (DRE) lumbar category II.

On January 26, 2004 the Office received appellant's claim for a schedule award. On August 12, 2004 it requested that an Office medical adviser review Dr. Wharton's impairment rating and provide an opinion regarding the extent of appellant's impairment in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*) (5th ed. 2001).

In an August 19, 2004 report, the Office medical adviser explained that the rating of Dr. Wharton was not probative for a schedule award determination because it was lacking in clarity and an adequate description of the impairment. He recommended that the Office obtain another impairment rating.²

In an October 11, 2006 report, Dr. E. Kano Mayer, a Board-certified physiatrist, reviewed electromyography (EMG) studies, which revealed normal right extremity sensory responses. Motor responses showed decreased amplitude on both tibial and peroneal sensory responses with normal latency and normal conduction velocity. Dr. E. Kano Mayer also indicated that the needle EMG revealed increased amplitude, increased duration and increased polyphasic responses in the right gastrocs, right peroneus longus and right gluteus medius. He determined that appellant's examination was abnormal and advised that there was evidence of chronic right lower extremity S1 lumbosacral neuritis without evidence of other mononeuropathy or polyneuropathy.

In an October 13, 2006 report, Dr. Tom Mayer, a Board certified orthopedic surgeon and an associate of Dr. E. Kano Mayer, noted appellant's history of injury and treatment. He noted that appellant requested that he provide an impairment rating using the A.M.A., *Guides*. Dr. Tom Mayer advised that appellant did not undergo surgery due to the injury and that she had some radicular complaints. The EMG demonstrated that appellant had right S1 nerve chronic radiculopathy. Dr. Tom Mayer advised that appellant met the criteria for DRE category III for the lumbar region or a 10 percent whole person impairment rating.

In an April 22, 2008 report, the Office medical adviser noted appellant's history of injury and treatment. He determined that the evaluation of Dr. Tom Mayer indicated that appellant had reached maximum medical improvement on October 13, 2006. The Office medical adviser

¹ The Office also accepted appellant's claim for a recurrence on April 13, 2003.

² It appears that the Office was in the process of obtaining an opinion from a second opinion physician. It apparently halted this process when appellant submitted a report from one of her treating physicians.

advised that appellant's lumbar pain was treated conservatively and noted that the EMG study revealed decreased sensation to pin prick in the S1 dermatome, but no weakness. He referred to Table 15-18, for unilateral spinal nerve root impairment affecting the lower extremity and noted that the maximum impairment for sensory deficit or pain of the S1 nerve root was five percent.³ The Office medical adviser referred to Table 15-15 and explained that appellant should receive a Grade 3 or a 60 percent sensory deficit. Under the procedure in Table 15-15, he multiplied the 60 percent deficit by the 5 percent maximum impairment value for sensory deficit of the S1 nerve root to find that appellant had an impairment of 3 percent to the right lower extremity.

On July 16, 2008 the Office granted appellant a schedule award for three percent permanent impairment of the right lower extremity. The award covered a period of 8.64 weeks from October 13 to December 12, 2006.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act⁴ and its implementing regulations⁵ 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 A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁶

The Board notes that the fifth edition of the A.M.A., *Guides* was adopted by the Office effective February 1, 2001.⁷ Additionally, the fifth edition of the A.M.A., *Guides* provides a method for calculating nerve root and/or spinal cord impairment for the lumbosacral spine, which affects the lower extremities, specifically Tables 15-15, 15-16 and 15-18.⁸

ANALYSIS

The Office accepted appellant's claim for lumbar strain and right knee contusion.

In a report dated October 3, 2006, Dr. Tom Mayer, appellant's treating physician, referred to the DRE III for the lumbar region and opined that she had 10 percent whole person impairment rating. However, neither the Act nor its regulations provide for a schedule award for

³ A.M.A., *Guides* 424.

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404 (1999).

⁶ *Id.*

⁷ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003); *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

⁸ A.M.A., *Guides* 424, Table 15-15, 15-16, 15-18.

impairment to the back or to the body as a whole. The back is specifically excluded from the definition of organ under the Act.⁹ Therefore, the impairment rating for appellant's lumbar spine is not probative.

An Office medical adviser referred to Dr. Tom Mayer's October 13, 2006 report and applied the relevant standards of the A.M.A., *Guides* to determine the impairment of her right leg. He noted that diagnostic testing revealed that appellant had decreased sensation in the S1 dermatome affecting the right leg. The medical adviser noted that the maximum lower extremity impairment for sensory deficit in the distribution of the S1 nerve root was five percent under Table 15-18.¹⁰ The Office medical adviser classified appellant as a Grade 3, or a 60 percent sensory deficit, based on her decreased sensation to pin prick in the S1 dermatome under Table 15-15.¹¹ The Office medical adviser then followed the procedure in Table 15-15 and multiplied the 60 percent deficit by the 5 percent maximum allowed for the S1 nerve root to total arrive at 3 percent impairment. The Board finds that the Office medical adviser properly applied to the A.M.A., *Guides* in calculating appellant's permanent impairment.

As the April 22, 2008 report of the Office medical adviser provides the only evaluation which conforms to the A.M.A., *Guides*, it constitutes the weight of the medical evidence and establishes that appellant has no more than a three percent permanent impairment of the right lower extremity.¹²

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she has more than a three percent impairment of her right lower extremity, for which she received a schedule award.

⁹ See *James E. Jenkins*, 39 ECAB 860 (1988); 5 U.S.C. § 8101(19).

¹⁰ See *supra* note 3.

¹¹ *Id.*

¹² Following issuance of the Office's July 16, 2008 decision, appellant submitted additional evidence to the Office. However, the Board may not consider such evidence for the first time on appeal as its review is limited to the evidence that was before the Office at the time of its decision. See 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 16, 2008 is affirmed.

Issued: June 2, 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