

Appellant came under the care of Drs. Robert W. Sickler and Stephen I. Esses, both Board-certified orthopedic surgeons. A magnetic resonance imaging scan of January 20, 2003 revealed left posterior foraminal disc protrusion at L5-S1 and minimal bilateral facet joint arthropathy from L3 to S1.

On August 24, 2004 appellant filed a claim for a schedule award. On September 8, 2004 the Office requested that she submit a detailed report from a treating physician which provided an impairment evaluation pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,¹ (A.M.A., *Guides*). Appellant submitted an October 6, 2004 report from Dr. Sickler who advised that appellant sustained five percent whole person impairment in accordance with the A.M.A., *Guides*. Dr. Sickler noted that appellant was a diagnosis-related estimate (DRE) category II, minor impairment resulting in five percent impairment.²

In a report dated December 9, 2004, an Office medical adviser noted that there was no basis for rating an impairment based on appellant's accepted conditions. He referenced Dr. Sickler's October 6, 2004 report which provided a whole person impairment based on diagnosis-based estimates for the lumbar spine. The medical adviser noted that a whole body impairment rating was not a basis for rating impairment as the spine was not a scheduled body member. The medical adviser recommended that the Office refer appellant to another physician for a determination of impairment.³

On February 15, 2005 the Office denied appellant's claim for a schedule award. On August 4, 2005 appellant requested reconsideration. She submitted reports from Dr. Sickler dated April 24, 2003 to May 19, 2005. Dr. Sickler noted little change in her condition. He performed several lumbar epidural steroid injections at L5-S1 and diagnosed lumbar degenerative disc disease with radiculitis.

In a November 4, 2005 decision, the Office denied modification of the prior decision. On March 7, 2006 appellant requested reconsideration. She submitted treatment reports from Dr. Sickler dated September 25, 2003 to February 15, 2006. In a March 22, 2006 decision, the Office denied modification of the February 15, 2005 decision.

On February 13, 2007 appellant requested reconsideration. She submitted a February 7, 2006 note from Dr. Sickler, who performed a branch block and diagnosed vertebrogenic backache. An October 11, 2006 magnetic resonance imaging (MRI) scan of the lumbar spine revealed L5-S1 left paracentral, subligamentous disc protrusion. On February 5, 2007 appellant was treated by Dr. Esses who noted findings of diminished range of motion, no discrete

¹ A.M.A., *Guides* (5th ed. 2001).

² *Id.* at 384, Table 15-3.

³ The Office referred appellant to Dr. David G. Vanderweide, a Board-certified orthopedic surgeon. In a January 11, 2005 report, Dr. Vanderweide opined that there was no evidence of significant radicular pain, sensory deficit or motor impairment of the lower extremities due to the work injury. He found no impairment of the legs under the A.M.A., *Guides*. On February 10, 2005 an Office medical adviser concurred with Dr. Vanderweide's opinion and found no basis for rating impairment.

weakness and pain with straight leg raises. Dr. Esses diagnosed disc herniation on the left at L5-S1.

On May 1, 2007 the Office requested that Dr. Esses submit a detailed report with an impairment evaluation pursuant to the A.M.A., *Guides*. In a May 14, 2007 report, Dr. Esses noted that appellant reached maximum medical improvement and had 10 percent whole person impairment. He diagnosed left S1 radiculopathy. On July 20, 2007 Dr. Esses noted that appellant demonstrated weakness in the left gastrocnemius and soleus group. He opined that she had 10 percent whole person impairment due to loss of function from decreased strength.

On September 11, 2007 appellant filed a claim for a schedule award.

On September 26, 2007 the Office requested that Dr. Esses submit a report which provides an impairment evaluation pursuant to the A.M.A., *Guides*. It advised Dr. Esses that the Office did not utilize whole person impairment ratings of the spine in determining permanent impairment.

In a December 10, 2007 report, Dr. Ricky McShane, an osteopath, opined that appellant reached maximum medical improvement on December 10, 2007 and had five percent whole person impairment. He noted findings upon physical examination of the lumbar spine of loss of normal lordosis, no scoliosis, generalized tenderness around the lower thoracic, upper lumbar musculature and left sacroiliac, leg raise test was negative bilaterally, muscle strength was normal, subjective decrease in soft stimulus perception over the left anterior tibial region with no other sensory abnormalities, no loss of two point discrimination and no atrophy. Dr. McShane diagnosed low back pain, displaced disc of the lumbar spine and lumbar strain. He noted that, pursuant to the A.M.A., *Guides*, appellant was a DRE category 2 for the lumbar spine for five to eight percent whole person impairment rating.⁴ Dr. Shane noted that the MRI scan findings were part age related and therefore assigned appellant five percent whole person impairment pursuant to the A.M.A., *Guides*.

In a March 5, 2008 report, an Office medical adviser opined that there was no basis for rating impairment to the lower extremities based on appellant's accepted conditions. He referenced Dr. McShane's report which found five percent whole person impairment based on diagnosis-related estimates for the lumbar spine. The medical adviser indicated that there was no objective evidence of motor or sensory deficit of the left lower extremity. He noted that the spine was not a scheduled member and therefore could not be the basis for an impairment rating. The medical adviser also advised that whole body impairment rating was a basis for an impairment determination. He noted that there was no medical evidence of radiculopathy and therefore there was no basis for an impairment rating to the lower extremities in accordance with the A.M.A., *Guides*.

In a decision dated August 11, 2008, the Office denied appellant's claim for a schedule award.

⁴ A.M.A., *Guides* 384, Table 15-3.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act⁵ and its implementing regulations⁶ 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.⁷

No schedule award is payable for a member, function or organ of the body not specified in the Act or in the implementing regulations.⁸ Neither the Act nor its regulations provide for the payment of a schedule award for the permanent loss of use of the spine or back or the body as a whole.⁹ The Board notes that section 8101(19) specifically excludes the back from the definition of "organ."¹⁰ However, a claimant may be entitled to a schedule award for permanent impairment to the upper or lower extremities even though the cause of the impairment originated in the neck, shoulders or spine.¹¹

ANALYSIS

On appeal appellant contends that she is entitled to a schedule award for permanent partial impairment of the lower extremities. The Office accepted her claim for aggravation of lumbar spinal stenosis and thoracic or lumbosacral neuritis/radiculitis. However, as noted, the Act does not allow for a schedule award based on impairment to the back or spine. Appellant may receive a schedule award for impairment of the lower extremities if such impairment is established as being due to his accepted low back condition.

In support of her claim, appellant submitted a December 10, 2007 report from Dr. McShane. The Board has reviewed Dr. McShane's report and notes that it does not establish permanent impairment of her lower extremities. Dr. McShane noted examination findings of generalized tenderness around the lower thoracic and left sacroiliac, normal muscle strength, subjective decrease in soft stimulus perception over the left anterior tibial region with no other sensory abnormalities, no loss of two point discrimination and no atrophy. This relates to the region around her spine. Dr. McShane noted that pursuant to the A.M.A., *Guides*, appellant had

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

⁷ *See id.*; *Jacqueline S. Harris*, 54 ECAB 139 (2002).

⁸ *Thomas J. Engelhart*, 50 ECAB 319 (1999).

⁹ *See Jay K. Tomokiyo*, 51 ECAB 361 (2000).

¹⁰ 5 U.S.C. § 8101(19).

¹¹ *Thomas J. Engelhart*, *supra* note 8.

five percent whole person impairment related to the lumbar spine.¹² However, the Act and its regulations do not provide for the payment of a schedule award for whole body impairment or for impairment of the lumbar spine. Appellant may receive a schedule award for permanent impairment to the lower extremities due to an injury of the back or spine.¹³ Dr. McShane did not address any impairment to appellant's lower extremities with reference to Chapter 17.

On March 5, 2008 the Office medical adviser opined that there was no basis for rating impairment based on appellant's back condition. He noted that Dr. McShane's rating of five percent whole person impairment was of the spine, which is not a scheduled member. The medical adviser noted that impairment of the lower extremities was not established as there was no objective evidence of motor or sensory deficit of the left lower extremity and no radiculopathy present. He concluded that in accordance with the A.M.A., *Guides* appellant did not sustain permanent impairment of the lower extremities from the accepted back injury.

Appellant also submitted reports from Drs. Sickler and Esses in support of her schedule award claim. However, these physicians also provided ratings of whole person impairment due to the spine. As noted, the Act does not provide for the payment of a schedule award for the permanent impairment of the body as a whole. Neither physician explained how appellant's accepted condition caused any permanent impairment of her legs. These reports are of diminished probative value and are insufficient to establish permanent impairment.¹⁴

The Board finds that the Office properly determined that appellant had no permanent impairment to a scheduled member of the body pursuant to the A.M.A., *Guides*. There are no medical reports of record, in conformance with the A.M.A., *Guides*, which support that appellant has a ratable impairment to her lower extremities due to her accepted low back condition.

On appeal, appellant asserts that she is entitled to a schedule award for her back and left leg due to lifestyle changes, including the inability to walk normally, to rest in bed at night and an inability to work. However, the Board has held that a schedule award does not take into account the effect that the impairment has on employment opportunities, wage-earning capacity, sports, hobbies or other lifestyle activities.¹⁵

CONCLUSION

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

¹² A.M.A., *Guides* 384, Table 15-3.

¹³ See *supra* notes 8 and 9.

¹⁴ See *Carl J. Cleary*, 57 ECAB 563, 568 at note 14 (2006) (an opinion which is not based upon the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's impairment).

¹⁵ *Ruben Franco*, 54 ECAB 496 (2003).

ORDER

IT IS HEREBY ORDERED THAT the August 11, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 11, 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