

temporary total disability. Appellant was treated by Dr. Jose Medina, a Board-certified neurologist, who continued her off work and recommended physical therapy. She was terminated and removed from the employing establishment compensation rolls in August 2006 and she elected Office of Personnel Management disability retirement benefits effective December 2, 2006.

On February 2, 2007 appellant filed a claim for a schedule award. In a March 3, 2007 report, Dr. Medina referenced Tables 15-15, 15-16 and 15-18 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001). He found that appellant had a 1 percent impairment of her left leg due to a Grade 4 sensory loss (25 percent) associated with her left S1 nerve and a 5 percent impairment of her left leg due to a Grade 4 weakness (25 percent) associated with her left S1 nerve which equaled a 6 percent permanent impairment of the right leg. Dr. Medina also found that appellant had a 1 percent impairment of her right leg due to a Grade 4 sensory loss (25 percent) associated with her right L5 nerve, a 1 percent impairment of her right leg due to a Grade 4 sensory loss (25 percent) associated with her right S1 nerve, and a 5 percent impairment of her right leg due to a Grade 4 (25 percent) weakness associated with her right S1 nerve which equaled a 7 percent permanent impairment of her right leg.

On July 27, 2007 the Office referred appellant's medical records, including Dr. Medina's report, to Dr. Robert Wysocki, a Board-certified orthopedic surgeon, who served as an Office medical adviser, for review and calculation of any ratable permanent impairment. In a July 31, 2007 report, Dr. Wysocki explained that permanent partial impairment could not be calculated as there were no recent clinical notes identifying appellant's recent symptoms or any information concerning whether she had reached maximum medical improvement. He recommended that appellant undergo a current neurological examination and that new magnetic resonance imaging (MRI) scan testing be obtained.

Dr. Medina ordered an MRI scan and provided the November 5, 2007 results, as well as copies of recent progress reports. The MRI scan showed degenerative changes and disc disease of the lumbar spine between L2-3 and L5-S1 with the most significant findings at L4-5 where there was mild to moderate central stenosis and mild to moderate bi-foraminal stenosis.

The Office referred the case back to Dr. Wysocki for review. In a December 20, 2007 report, Dr. Wysocki outlined the results of testing and made reference to the recently submitted progress notes. He stated:

“An MRI [scan] performed November 5, [20]07 showed broad[-]based bulge at L4-L5 with mild to moderate central and foraminal stenosis and minimal posterior bulging at L5-S1 with mild foraminal narrowing. An EMG/NCS [electromyogram/nerve conduction study] performed [o]n June 1, [20]07 revealed severe left L5 and moderate S1 radiculopathy. Currently the claimant complains of mild, intermittent low back pain. Physical examination revealed hypesthesias of right posterolateral leg, lumbar spine stiffness and unsteady gait. No lower extremity weakness or hyporeflexia is documented.”

For the right leg, Dr. Wysocki indicated that based on Tables 15-15 and 15-18 on page 424 there was a one percent rating for high severity Grade 4 sensory loss in the S1 nerve and a one percent rating for high severity Grade 4 sensory loss in the L5 nerve for an award of two percent permanent impairment of the right leg (using the Combined Values Chart to combine the two values). For the left leg, Dr. Wysocki awarded a one percent rating for high severity Grade 4 sensory loss in the S1 nerve. The date of maximum medical improvement was determined to be March 3, 2007, the date of Dr. Medina's impairment evaluation. Dr. Wysocki further explained that no award could be given for motor impairment as no lower extremity deficits were documented in recent clinical notes.

In an April 30, 2008 decision, the Office granted appellant a schedule award for a two percent permanent impairment of her right leg and a one percent permanent impairment of her left leg.

Appellant disagreed with this determination and requested a telephone hearing through her attorney. During the September 12, 2008 telephone hearing, counsel noted the difference in percentages stated by Dr. Medina and Dr. Wysocki. He contended that Dr. Wysocki had accepted some findings but improperly rejected the lower extremity motor deficit ratings cited by Dr. Medina. No further medical documentation was received by the Office following the hearing.

In a December 4, 2008 decision, the Office hearing representative affirmed the April 30, 2008 decision.

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 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 regulation as the appropriate standard for evaluating schedule losses.³

Section 8123(a) of the Act provides in pertinent part: "If there is 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."⁴ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.404 (1999).

³ *Id.*

⁴ 5 U.S.C. § 8123(a).

medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.⁵

ANALYSIS

The Office accepted that on August 13, 2005 appellant sustained a lumbar sprain/strain and bilateral contusions of her knees due to a fall at work. The Office granted appellant schedule awards for a two percent permanent impairment of her right leg and a one percent permanent impairment of her left leg. The award was based on the opinion of Dr. Wysocki, a Board-certified orthopedic surgeon, who served as an Office medical adviser.

In a March 3, 2007 report, Dr. Medina, an attending Board-certified neurologist, referenced Tables 15-15, 15-16 and 15-18 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001). He found that appellant had a 1 percent impairment of her left leg due to a Grade 4 sensory loss (25 percent) associated with her left S1 nerve and a 5 percent impairment of her left leg due to a Grade 4 weakness (25 percent) associated with her left S1 nerve which equaled a 6 percent permanent impairment of the right leg. Dr. Medina also found that appellant had a 1 percent impairment of her right leg due to a Grade 4 sensory loss (25 percent) associated with her right L5 nerve, a 1 percent impairment of her right leg due to a Grade 4 sensory loss (25 percent) associated with her right S1 nerve, and a 5 percent impairment of her right leg due to a Grade 4 (25 percent) weakness associated with her right S1 nerve which equaled a 7 percent permanent impairment of her right leg.

On December 20, 2007 Dr. Wysocki agreed with Dr. Medina's calculations concerning sensory loss in appellant's legs. He also found that she had a two percent permanent impairment of the right leg comprised of a one percent rating for Grade 4 sensory loss in the S1 nerve combined with a one percent rating for a Grade 4 sensory loss in the L5 nerve. For the left leg, Dr. Wysocki also awarded a one percent rating for Grade 4 sensory loss in the S1 nerve. However, Dr. Wysocki's opinion conflicts with that of Dr. Medina in that he felt that Dr. Medina's assignment of impairment ratings for weakness or motor loss to both legs were not warranted by the findings on examination and diagnostic testing. In this regard, the opinion of the Office physician, Dr. Wysocki conflicts with that of appellant's physician, Dr. Medina, regarding the extent of appellant's leg impairment.

Due to this conflict in the medical evidence, the case should be remanded to an impartial medical specialist for an impartial medical examination and opinion regarding the extent of appellant's leg impairment.⁶ After such development as it deems necessary, the Office should issue an appropriate decision on this matter.

⁵ *William C. Bush*, 40 ECAB 1064, 1975 (1989).

⁶ *See supra* notes 4 and 5 and accompanying text.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant has more than a two percent permanent impairment of her right leg and a one percent permanent impairment of her left leg.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' December 4, 2008 merit decision is set aside and the case remanded for further proceedings consistent with this decision of the Board.

Issued: September 28, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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