

claim for wage-loss compensation for the period March 2 to 12, 2002 due to the lack of competent medical evidence. The facts and the circumstances of the case are set forth in the Board's prior decision and are incorporated herein by reference.²

On August 15, 2007 appellant filed a claim for a schedule award.

In September 4, 2007 letter, the Office advised appellant that conditions of the back were not eligible for a schedule award unless it leads to a permanent impairment of an eligible scheduled member.

By decision dated October 25, 2007, the Office denied appellant's schedule award claim.

On November 13, 2007 appellant requested reconsideration of the denial of her schedule award claim. She submitted a December 6, 2007 report from Dr. Robert W. Macht, an examining Board-certified surgeon. Based upon a physical examination and review of the medical history, Dr. Macht diagnosed back sprain with radiculopathy. On physical examination, he found 90 degrees left hip flexion, 20 degrees left hip adduction, mild weakness of the left hip, 100 degrees left knee flexion and bilateral negative straight leg testing. Dr. Macht stated that appellant had a 10 percent impairment of her left leg due to a Grade 2 sensory loss (25 percent) associated with her left L4 nerve using Tables 15-15 and 15-18, page 424. Using Tables 17-9 and 17-10, page 537, he found a 10 percent impairment due to loss of range of motion of her knee and a 5 percent impairment due to left hip loss of flexion. Dr. Macht also found a Grade 4 left hip weakness using Table 17-8, page 532. Combining appellant's radiculopathy and range of motion loss resulted in a total 24 percent left lower extremity impairment.

In a December 23, 2007 report, Dr. Arnold T. Berman, an Office medical adviser and Board-certified orthopedic surgeon, reviewed Dr. Macht's report. He disagreed with the rating that appellant had a 24 percent left lower extremity impairment. Dr. Berman noted that Dr. Macht's Grade 2 sensory loss recommendation could not be utilized as it had not been documented on physical examination or the other reports of record.³ He advised that maximum medical improvement was reached on December 6, 2007 and that appellant had a one percent left lower extremity impairment. Under Table 15-18, page 424, a maximum sensory loss of five percent is provided for an L4 sensory deficit. A Grade 4 sensory loss under Table 15-15, is a 25 percent deficit. The medical adviser multiplied the 5 percent maximum by 25 percent to equal a 1.25 percent L4 impairment. He rounded down to a 1 percent impairment sensory loss.

By decision dated January 14, 2008, the Office granted appellant a schedule award for a one percent left lower extremity impairment.

On January 14, 2008 appellant requested a written review of the record by an Office hearing representative. She submitted reports dated September 2 and 9 and November 4, 2004

² On January 26, 2002 appellant, then a 46-year-old mail processor, injured her low back while bending over to pull a full tray of mail. The Office accepted the claim for a lumbar strain/sprain on September 24, 2002. Appellant resigned from the employing establishment as of June 14, 2003.

³ An August 27, 2002 magnetic resonance imaging (MRI) scan revealed mild degenerative disease. An April 29, 2003 functional capacity evaluation showed no loss of sensation and full range of motion.

from Dr. Enzo J. Leone, a podiatrist; a March 4, 2004 right ankle MRI scan and an April 11, 2003 left foot MRI scan; a March 4, 2003 left foot x-ray; an August 27, 2002 lumbar spine MRI scan; an April 11, 2003 left hip x-ray; a September 3, 2007 x-ray of both knees and ankles and a November 15, 2007 x-ray of the back. Appellant also submitted reports dated October 3 and 22, 2007 from Dr. Rhonda F. Kroll, a treating Board-certified internist.

By decision dated May 14, 2008, the Office affirmed the January 14, 2008 decision.

By letters dated May 23 and July 28, 2008, appellant disagreed with the hearing representative's decision and requested that the case be sent to an impartial medical examiner to resolve the conflict in the medical opinion evidence between Dr. Macht and the Office medical adviser as to her impairment rating.

By decision dated October 6, 2008, the Office denied appellant's request for reconsideration of the merits of her claim.⁴

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act⁵ and its implementing regulations⁶ set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage of loss of use.⁷ However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants, the Office adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment and the Board has concurred in such adoption.⁸

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.⁹ As neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or spine, no claimant is entitled to such an award.¹⁰ However, as the Act makes provision for the lower extremities, a claimant may be entitled to a schedule award for permanent impairment to a lower

⁴ The Board notes that, following the October 6, 2008 decision, the Office received additional evidence. However, the Board may not consider new evidence on appeal. See 20 C.F.R. § 501.2(c); *J.T.*, 59 ECAB ____ (Docket No. 07-1898, issued January 7, 2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

⁵ 5 U.S.C. §§ 8101-8193; see 5 U.S.C. § 8107(c).

⁶ 20 C.F.R. § 10.404.

⁷ *Id.* at § 8107(c)(19).

⁸ *Id.* at § 10.404; see *I.F.*, 60 ECAB ____ (Docket No. 08-2321, issued May 21, 2009); *A.A.*, 59 ECAB ____ (Docket No. 08-951, issued September 22, 2008).

⁹ *W.C.*, 59 ECAB ____ (Docket No. 07-2257, issued March 5, 2008); *Anna V. Burke*, 57 ECAB 521 (2006).

¹⁰ *D.N.*, 59 ECAB ____ (Docket No. 07-1940, issued June 17, 2008).

extremity even though the cause of the impairment originates in the spine, if the medical evidence establishes impairment as a result of the employment injury.¹¹

Section 8123 of the Act provides that, 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.¹²

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for a lumbar strain/sprain. It granted appellant schedule awards for a one percent permanent impairment of her left lower extremity. The award was based on the opinion of Dr. Berman, a Board-certified orthopedic surgeon, who served as an Office medical adviser. On appeal appellant contends there is a conflict in the medical opinion evidence.

Dr. Macht reported that appellant had a 10 percent impairment of her left leg due to a Grade 2 sensory loss (25 percent) associated with her left L4 nerve using Tables 15-15 and 15-18, page 524. Using Tables 17-9 and 17-10, page 537, he also found 10 percent impairment due to loss of range of motion of her knee and 5 percent impairment due to left hip loss of flexion. Dr. Macht also found a Grade 4 left hip weakness using Table 17-8, page 532. Combining appellant's radiculopathy and range of motion loss by using the Combined Values Chart resulted in a total 24 percent left lower extremity impairment.

In a December 23, 2007 report, Dr. Berman reviewed the medical evidence of record including Dr. Macht's report and disagreed with his conclusion that appellant had a 24 percent left lower extremity impairment. The medical adviser determined that appellant's left L4 sensory deficit constituted a Grade 4 or 25 percent sensory deficit under Table 15-15, page 424. He then multiplied the 25 percent sensory deficit rating by the 5 percent maximum sensory loss to find 1 percent impairment. Dr. Berman found that Dr. Macht's impairment rating for sensory loss to the left lower extremity was not warranted by the findings on examination or diagnostic testing. In this regard, the Board finds that the opinion of the Office medical adviser, Dr. Berman, conflicts with that of appellant's physician, Dr. Macht, regarding the extent of her left lower extremity impairment. The case will be remanded to the Office for referral to an impartial medial examiner for resolution of the conflict.¹³ Following this and any necessary further development, the Office shall issue a *de novo* decision with regard to the extent of appellant's permanent impairment.

CONCLUSION

The Board finds that this case is not in posture for decision due to an unresolved conflict in the medical opinion.

¹¹ *J.Q.*, 59 ECAB ___ (Docket No. 06-2152, issued March 5, 2008).

¹² 5 U.S.C. § 8123(a). *See B.K.*, 60 ECAB ___ (Docket No. 08-2002, issued June 16, 2009).

¹³ In light of the Board's resolution of the first issue, the second issue is moot.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 6 and May 14, 2008 are set aside and the case remanded for further proceedings consistent with the decision of the Board.

Issued: March 11, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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