United States Department of Labor
Employees' Compensation Appeals Board

BARBARA GANZ, Appellant	)	
and	)	**Docket No. 04-946**
	)	**Issued: July 23, 2004**
DEPARTMENT OF THE TREASURY, U.S. CUSTOMS SERVICES, Miami, FL, Employer	)	

Appearances:
Stephen Scavuzzo, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On February 27, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated December 30, 2003 granting her a schedule award for a three percent permanent impairment to her left lower extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award decision.

ISSUE

The issue is whether appellant is entitled to a schedule award for greater than a three percent impairment to her left lower extremity.

FACTUAL HISTORY

On October 9, 1998 appellant, then 39-year-old customs agent, filed a notice of traumatic injury alleging that while inspecting a container she slipped and fell between two platforms. The Office accepted appellant's claim for lumbar strain, disc bulge and radiculopathy. Appellant

remained off work for four months before returning to light duty. Appellant worked light duty until the employing establishment ran out of light duty for her to perform. On August 5, 2002 appellant filed a recurrence claim effective February 18, 2002 that was accepted by the Office in a December 10, 2002 decision.[1]

In a February 13, 2002 report, Dr. Norman Moskowitz diagnosed severe lumbar radiculopathy with involvement of the left common peroneal left posterior tibia at L5-S1 nerve root and L4-5 nerve root impairment. He limited her to no lifting over 20 pounds and stated that she could not return to her date-of-injury job.

In a November 18, 2002 letter, appellant requested a schedule award. In a November 23, 2002 report, Dr. Phillip Mongelluzzo, an orthopedist, stated that he had reviewed appellant's medical history including the results of a magnetic resonance imaging (MRI) scan. He opined that, based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, Table 72, page 110 appellant had a permanent physical impairment in the nature of 10 percent of the whole body and that she was permanently disabled from returning to her date-of-injury job.[2]

The Office referred the case to the district medical adviser. In an August 12, 2003 report, Dr. George Cohen, the district medical adviser, stated that he applied the A.M.A., *Guides* (5th ed. 2001) to determine the percentage of impairment of the right and left lower extremities. He noted that the Federal Employees' Compensation Act's regulations do not allow for impairment of the lumbar spine except insofar as the extremities may be involved. Using Table 15-18, page 424, Dr. Cohen stated that the maximum lower extremity impairment due to pain or sensory deficit when the L5 nerve root is involved is five percent. He noted that Table 16-10, Grade 3, page 482, allows 60 percent for pain that interferes with activities and that 60 percent of 5 percent results in a 3 percent impairment of the right lower extremity and 3 percent impairment to the left lower extremity. He identified the date of maximum medical improvement as October 1999.

The Office referred appellant for a second opinion. In an October 27, 2003 report, Dr. David Bomar, an orthopedic surgeon, stated that electrodiagnostic testing indicated some degree of lower extremity nerve involvement and that her permanent impairment would be best expressed in terms of a lumbar spine or whole person permanent impairment, but that he was asked to give impairment evaluation in terms of the lower extremities. Applying the A.M.A., *Guides* (5th ed.) Table 17-37 a sensory deficit of the sciatic nerve of the left leg gives a maximum of 17 percent impairment. Table 16-10 was then used to create the level of sensory deficit and Dr. Bomar gave appellant a Grade 2 at the lower end that allowed for a 61 percent impairment of the maximum 17 percent for 10 percent impairment to her lower extremities.

The Office referred Dr. Bomar's report to the district medical adviser again and in a November 17, 2003 report Dr. Cohen stated that his impairment rating of three percent had not

[1] She retired due to medical disability in November 2002. Appellant sustained a work-related torn meniscus in her right knee in 2001 and was treated for nonindustrial extreme distress, depression and nervousness.

[2] Dr. Mongelluzzo did not indicate what edition of the A.M.A. *Guides* he was referencing.

changed. He added that Dr. Bomar incorrectly used Table 17-37, page 552 to determine appellant's impairment but that Table 17-37 should be utilized for peripheral nerve injuries affecting lower extremities rather than spinal nerve root involvement as appellant was experiencing.

In a December 30, 2003 decision, the Office awarded appellant a schedule award for a three percent impairment to her left lower extremity finding the weight of the evidence with Dr. Cohen. The Office further noted that appellant had already received a schedule award for a 3 percent impairment to her right lower extremity that had expired on November 22, 2001.

LEGAL PRECEDENT

An employee seeking compensation under the Act[3] has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,[4] including that he sustained an injury in the performance of duty as alleged and that his disability, if any, was causally related to the employment injury.[5]

The schedule award provision of the Act[6] and its implementing regulation[7] 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.[8]

ANALYSIS

The Boards finds that this case is not in posture for decision. Dr. Cohen opined that Dr. Bomar's use of Table 17-37, page 552 of the A.M.A., *Guides* was incorrect as that table should only be used for peripheral nerve injuries affecting the lower extremities and not for spinal nerve root involvement which was what appellant was experiencing. However, the Board notes that Dr. Maskowitz diagnosed severe lumbar radiculopathy with involvement of the left common peroneal, left posterior tibia at L5-S1 nerve root and L4-5 nerve root impairment. It is not clear why Dr. Cohen finds this to be incorrect as Figure 17-9, page 551, suggests that appellant's injury was at L4-5 and L5-S1, where the sciatic nerve is located. A review of Table

[3] 5 U.S.C. §§ 8101-8193.

[4] *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathaniel Milton*, 37 ECAB 712, 722 (1986).

[5] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404 (1999).

[8] *See id.*; *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

17-37, page 552, shows that sensory nerve impairments of the sciatic nerve yield a 17 percent impairment, as Dr. Bomar found.

The Board further finds that the Office needs further clarification from Dr. Cohen as to why Dr. Bomar's use of Table 17-37 is incorrect as it appears to apply to appellant's condition.

CONCLUSION

The case is not in posture for decision and is to be remanded for a clarifying report consistent with the findings above.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 30, 2003 is set aside and the case is remanded for clarification consistent with the findings in this decision.

Issued: July 23, 2004
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member