

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of MARY R. STROMBERG-KELLY and U.S. POSTAL SERVICE,  
POST OFFICE, Jersey City, NJ

*Docket No. 03-811; Submitted on the Record;  
Issued July 16, 2003*

---

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether appellant has greater than a four percent impairment of the right lower extremity for which she received a schedule award.

This is the second appeal in this case.<sup>1</sup> On the first appeal, the Board affirmed a February 6, 1998 decision of the Office of Workers' Compensation Programs on the grounds that appellant had failed to establish that she sustained a recurrence of disability on June 6, 1997, causally related to her accepted employment injuries.<sup>2</sup> The complete facts of this case are set forth in the Board's October 27, 2000 decision and are herein incorporated by reference.

Following a request for a schedule award, the Office, in a decision dated May 14, 2001, denied appellant's claim on the basis that schedule awards are not payable for the back or other parts of the body not outlined in section 8107 of the Federal Employees' Compensation Act.<sup>3</sup> In a letter dated May 21, 2001, appellant through counsel requested a hearing.

Upon review of the case file, an Office hearing representative determined that the claim for a schedule award required further development and by decision dated June 21, 2001, the Office hearing representative remanded the case. Following development, the Office issued a decision dated September 24, 2001, in which it denied appellant's claim for a schedule award on the grounds that the evidence failed to demonstrate that appellant sustained a permanent impairment as claimed.

---

<sup>1</sup> Docket No. 99-1827 (issued October 27, 2000).

<sup>2</sup> The Office accepted that on or about October 20, 1993 appellant, then a 50-year-old clerk, sustained a lumbosacral strain and sciatica neuritis in the performance of duty.

<sup>3</sup> 5 U.S.C. § 8107.

In a letter dated September 27, 2001, appellant through counsel submitted medical evidence and requested a hearing, which was held on March 6, 2002. During the hearing, an Office hearing representative issued a summary decision, which set aside the Office's September 24, 2001 decision and remanded the case to the Office for further development. The Office hearing representative determined that there was sufficient medical evidence to address the question of appellant's entitlement to a schedule award for both lower extremities. The summary decision of the Office hearing representative was finalized on April 8, 2002.

On remand, the Office requested that a district medical adviser review a January 8, 2002 report of Dr. Clay Irving, III, a Board-certified orthopedic surgeon, and a December 14, 2000 report of Dr. Nicholas Diamond, an osteopath, submitted in support of the claim. The Office requested that the district medical adviser provide a rating for schedule award based upon such evidence in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5<sup>th</sup> ed. 2001).<sup>4</sup>

Dr. Irving indicated in his January 8, 2002 report that appellant's lower extremity impairment resulted from her lumbar spinal stenosis with right lower extremity myelopathy. He stated:

"Using the A.M.A., [*Guides*] for [u]nilateral [s]pinal [n]erve [r]oot [i]mpairment [a]ffecting the [l]ower [e]xtremity the right L5 root is 5 percent loss of function due to pain and the strength deficit is 20 percent for a total of 25 percent. As I indicated in my April 5, 2001 correspondence she has a two block claudication when walking and has right leg pain when sitting more than one hour. Her right Achilles reflex remains absent (left 1+0 even with reinforcement).

"I believe maximum medical improvement occurred at the June 7, 2000 examination....

"With regard to her left leg her Achilles reflex is present and I demonstrate no weakness when she is asked to heel walk and resistively dorsiflex her left great toe and ankle (5/5 motor strength), but she now gets left posterior thigh and posterolateral calf pain at 2 blocks walking so her pain score is 5 percent. Her total lower extremity percentage of deficit is therefore 30 percent...."

Dr. Diamond determined in his report dated December 14, 2000 that appellant reached maximum medical improvement on December 14, 2000. He further reported that the examination of appellant's lumbar spine revealed restricted range of motion with pain at the extremes in all range of motions. Dr. Diamond noted that straight leg raising was positive on the right at 40 degrees above the horizontal and that sitting root sign was positive on the right. Regarding impairment, he outlined:

"For the right S1 nerve root impairment equal 4 percent (based on [T]able 83, page 130 and [T]able 11, page 48 of the [f]ourth [e]dition of the A.M.A., *Guides*). For the right 4/5 motor strength deficit ankle dorsiflexion equal 12 percent

---

<sup>4</sup> The fifth edition of the A.M.A., *Guides* became effective February 1, 2001.

([T]able 39, pg. 77). Combined right lower extremity equal 16 percent. For the left 4/5 motor strength deficit ankle dorsiflexion equal 12 percent ([T]able 39, p[a]g[e]. 77). Total left lower extremity equal 12 percent.”

In a July 2, 2002 report, the district medical adviser reviewed the physician’s findings and determined that the maximum medical improvement was December 14, 2000. He stated that appellant’s right S1 root impairment was 4 percent based on Table 11 on page 48 and Table 83 on page 130 and noted that 4/5 ankle dorsiflexion was included in S1 root impairment, thus the right lower extremity totaled 4 percent. The district medical adviser indicated that based on examination findings regarding appellant’s impairment on the left, 4/5 ankle deficit equaled 12 percent based on Table 39 on page 77.

By decision dated July 12, 2002, the Office issued appellant schedule awards for a permanent impairment of four percent for the right leg and twelve percent for the left leg.

In the instant appeal, appellant through counsel is only requesting review of the July 12, 2002 schedule award for four percent permanent impairment of the right leg. Appellant’s counsel contends that the medical evidence submitted by both Drs. Diamond and Irving establishes that appellant has sustained greater than a four percent impairment of the right lower extremity or at a minimum, the evidence reveals that a conflict in the medical evidence exists, which requires resolution.

The Board finds that the case is not in posture for a decision.

The schedule award provisions of the Act and its implementing regulation<sup>5</sup> 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.<sup>6</sup> Chapters 13 and 15 of the fifth edition of the A.M.A., *Guides* provide the procedure for determining impairment of the lower extremity due to spinal nerve root impairment.<sup>7</sup>

On remand, the Office requested that a district medical adviser review the most recent reports of Drs. Diamond and Irving to rate the permanent loss of use of appellant’s right and left leg related to her back condition in accordance with the appropriate tables of the A.M.A., *Guides*. On appeal the issue is whether appellant has greater than a four percent impairment of the right lower extremity for which she received a schedule award.

---

<sup>5</sup> 20 C.F.R. § 10.404 (1999).

<sup>6</sup> 5 U.S.C. § 8107.

<sup>7</sup> *Id.*

Dr. Irving, in his most recent report dated January 8, 2002, failed to multiply the percentage of the impaired S1 nerve root by the percentage that represented the grade and degree of sensory impairment and therefore, his impairment rating of the right S1 root is inaccurate. Moreover, Dr. Irving did not explain his opinion that appellant had a 20 percent impairment due to loss of strength. The record reflects that the district medical adviser calculated appellant's impairment based on the findings set forth in Dr. Diamond's most recent report dated December 14, 2000.

The district medical adviser determined that appellant sustained a four percent impairment of the right lower extremity due to sensory loss.<sup>8</sup> The district medical adviser further determined that appellant was not entitled to 12 percent impairment for motor loss as provided by Dr. Diamond in his December 14, 2000 report. The Board notes that while it is true that Dr. Diamond incorrectly evaluated the motor loss using the section for peripheral nerve impairment,<sup>9</sup> the findings of Dr. Diamond still show that appellant has some form of right lower extremity impairment due to motor loss. Because appellant's problem was based directly at S1 in the spine itself and not somewhere down the spine along an S1 root (*i.e.* peripheral nerve injury), Dr. Diamond applied the wrong table. It appears that Dr. Diamond should have applied the table relating to motor loss for a spinal based disorder.<sup>10</sup> Therefore the case should be remanded to better evaluate appellant's motor loss.

---

<sup>8</sup> See 5<sup>th</sup> ed., p. 424. At the time of Dr. Diamond's December 14, 2000 report, the Office was using the fourth edition of the A.M.A., *Guides*. Per FECA Bulletin No. 01-05, issued January 29, 2001, the Office began using the fifth edition of the A.M.A., *Guides* effective February 1, 2001. As the corresponding tables in the fourth and fifth editions contain identical numerical values for the impairments rated in this case, the Office's use of the fourth rather than the fifth edition of the A.M.A., *Guides* as the basis of its July 12, 2002 schedule award had no effect on that award.

<sup>9</sup> See 5<sup>th</sup> ed., pp. 531-32.

<sup>10</sup> 5<sup>th</sup> ed., p. 424, Tables 15-16, 15-18.

The July 12, 2002 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Dated, Washington, DC  
July 16, 2003

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member