United States Department of Labor
Employees' Compensation Appeals Board

CATHERINE M. MILANO, Appellant	)	
and	)	**Docket No. 04-1111**
	)	**Issued: August 16, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Colorado Springs, CO, Employer	)	

Appearances:
Catherine M. Milano, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On March 22, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated December 23, 2003, granting a schedule award for a four percent impairment of her right lower extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has merit jurisdiction over the schedule award issue in this case.[1]

ISSUE

The issue is whether appellant has more than four percent permanent impairment of her right lower extremity, for which she received a schedule award.

[1] On appeal, appellant contends that she sustained greater than a four percent impairment of the right lower extremity due to constant pain, abnormal motion of the toes of the right foot and a surgical error resulting in an improperly incised muscle.

FACTUAL HISTORY

The Office accepted that, on November 1, 2001, appellant, then a 43-year-old distribution clerk, sustained a right heel contusion when a metal container door closed on her right heel. The Office subsequently accepted right tarsal tunnel syndrome and right plantar nerve neuritis. After physical therapy and conservative measures failed to provide relief, the Office authorized tarsal tunnel release and neuroplasty of the first branch of the lateral plantar nerve, performed on June 28, 2002 by Dr. Jeremy A. McVay, an attending podiatrist. Appellant was released to sedentary duty as of August 9, 2002 but required continuing treatment through October 2002 for postoperative cellulitis and a chronically open incision. In an October 28, 2002 report, Dr. John Ogrodnick, an attending physician Board-certified in occupational medicine, released appellant to full duty.[2] The Office approved continuing physical therapy through December 2002.

Appellant claimed a schedule award on January 16, 2003 and submitted a July 22, 2003 narrative report and worksheets from Dr. McVay, finding that she had attained maximum medical improvement as of July 13, 2003. Dr. McVay diagnosed an abnormal gait, "[c]ontinued foot pain" and abnormal adduction and flexion of the second through fifth toes. He attributed these diagnoses to poor functioning of the quadratus plantae muscle, innervated by the lateral plantar nerve. Dr. McVay evaluated these impairments according to the A.M.A., *Guides* (5th ed. 2001). Dr. McVay referenced Table 17-37, entitled "Impairments Due to Nerve Deficits," which provided that lateral plantar nerve impairment may be rated as a maximum five percent lower extremity impairment each for motor and sensory loss. Dr. McVay then referred to Tables 16-10 and 16-11 of the A.M.A., *Guides* to determine the degree of functional loss due to impairment of the lateral plantar nerve. Regarding sensory deficit or pain, Dr. McVay assigned a Grade 2 impairment according to Table 16-10, denoting moderate pain that may prevent some activities, which he characterized as a 65 percent sensory deficit based on her pre- and post-injury activity levels. Dr. McVay then multiplied the 65 percent impairment by the maximum 5 percent deficit for the lateral plantar nerve, resulting in a 3 percent lower extremity impairment due to pain or sensory loss. Regarding motor impairments, Dr. McVay assigned a Grade 4 impairment according to Table 16-11, connoting a deficit of 1 to 25 percent. Dr. McVay assessed a 15 percent impairment as the quadratus muscle was the "only muscle affected of those that control flexion of the toes," noting that there was no impairment of range of motion of the toes at the metatarsophalangeal joints. He multiplied the 15 percent impairment by the 5 percent for impairment of the lateral plantar nerve, resulting in a 1 percent lower extremity impairment due to motor loss. Dr. McVay used the Combined Values Chart to combine the one percent impairment for motor deficit with the three percent impairment for pain and sensory loss, resulting in a four percent impairment of the right lower extremity.

In a December 10, 2003 report, an Office medical adviser reviewed Dr. McVay's July 22, 2003 report and worksheets, concurred with the method of calculation and agreed that appellant had four percent impairment of her right lower extremity.

[2] In his October 28, 2002 report, Dr. Ogrodnick stated that appellant had a four percent impairment of the right lower extremity according to unspecified tables of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*): two percent for medial plantar nerve involvement and two percent for decreased range of motion of the right ankle. The Office did not undertake development of Dr. Ogrodnick's schedule award evaluation.

By decision dated December 23, 2003, the Office granted appellant a schedule award for four percent permanent impairment of her right lower extremity to run from November 28, 2002 to January 16, 2003.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[3] and its implementing regulation[4] 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.[5]

ANALYSIS

In this case, the Office accepted that appellant sustained a right heel contusion, right tarsal tunnel syndrome and right plantar nerve neuritis related to a November 1, 2001 employment incident in which a metal container door closed on her right heel. On June 28, 2002 appellant underwent a tarsal tunnel release and neuroplasty of the first branch of the lateral plantar nerve. She claimed a schedule award.

In support of her schedule award claim, appellant submitted a July 22, 2003 report and worksheets from Dr. McVay, an attending podiatrist, calculating the percentage of impairment of the right lower extremity according to the A.M.A., *Guides* (5th ed. 2001). Chapter 17 of the A.M.A., *Guides* sets forth the tables and grading schemes used to evaluate impairments of the lower extremities. Section 17.2l, page 550, instructs that peripheral nerve injuries causing sensory or motor deficits should be rated as in the upper extremities. The examiner first refers to Table 16-10, page 482, to determine impairment of the extremity due to sensory deficit or pain.[6] The examiner then consults Table 16-11, page 484, to evaluate impairment due to motor deficits based on individual muscle ratings.[7] Once the examiner has graded the severity of sensory and motor deficits and identified the proper percentages under Tables 16-10 and 16-11, those percentages are to be combined. The examiner identifies the injured nerve and finds the maximum allowed for the lower extremity at Table 17-37, page 552, entitled "Impairments Due

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404 (2003).

[5] *See id.*

[6] Table 16-10 is entitled "Determining Impairment of the Upper Extremity Due to Sensory Deficits or Pain Resulting From Peripheral Nerve Disorders."

[7] Table 16-11 is entitled "Determining Impairment of the Upper Extremity Due to Motor and Loss-of-Power Deficits Resulting From Peripheral Nerve Disorders Based on Individual Muscle Rating."

to Nerve Deficits." Thereafter, the percentages are to be multiplied for calculation of the degree of permanent impairment of the lower extremity as demonstrated in example 17-17, page 552.

Dr. McVay attributed appellant's impairments to poor functioning of the quadratus plantae muscle, innervated by the lateral plantar nerve. Dr. McVay used Table 17-37 of the A.M.A., *Guides* to determine that maximum motor and sensory loss of the lateral plantar nerve were both rated as a maximum five percent impairment of the lower extremity. He then referred to Tables 16-10 and 16-11 of the A.M.A., *Guides* to determine the degree of functional loss caused by impairment of the lateral plantar nerve. Using Table 16-10, Dr. McVay found a Grade 2 impairment due to pain or sensory loss, which he characterized as a 65 percent sensory deficit based on appellant's pre- and post-injury activity levels. He then multiplied the 65 percent impairment by the maximum 5 percent deficit for the lateral plantar nerve, resulting in a 3 percent lower extremity impairment due to pain or sensory loss. Dr. McVay then used Table 16-11 to assign a Grade 4 impairment due to motor loss, which he assessed as a 15 percent impairment as the quadratus plantae muscle was the "only muscle affected of those that control flexion of the toes" and as there was no impairment of range of motion of the toes at the metatarsophalangeal joints. He then multiplied the 15 percent impairment by the 5 percent for impairment of the lateral plantar nerve, resulting in a 1 percent lower extremity impairment due to motor loss. Dr. McVay then used the Combined Values Chart to combine the one percent impairment for motor deficit with the three percent impairment for pain and sensory loss, resulting in a four percent impairment of the right lower extremity.

The Office medical adviser reviewed Dr. McVay's report on December 10, 2003 and concurred with his utilization of the A.M.A., *Guides*, the calculations involved and with the determination of a four percent impairment of the right lower extremity.

On appeal, appellant asserts that Dr. McVay inadvertently cut or damaged an unspecified muscle in her right foot during the June 28, 2002 surgery, resulting in a permanent impairment of the right lower extremity greater than the four percent awarded. However, appellant did not submit medical evidence substantiating her allegation that Dr. McVay improperly cut a muscle or that she has more than a four percent permanent impairment of the right lower extremity. Dr. McVay's July 22, 2003 report and worksheets set forth a clear and correct calculation of a four percent impairment of the right lower extremity according to the appropriate tables and grading schemes of the A.M.A., *Guides*. The Office's December 23, 2003 decision granting appellant a schedule award for a four percent impairment of the right lower extremity was proper under the facts and the circumstances of this case.

CONCLUSION

The Board finds that appellant has not established that she sustained greater than a four percent permanent impairment of the right lower extremity, as she has not submitted medical evidence sufficient to demonstrate a greater percentage of impairment.

ORDER

IT IS HEREBY ORDERED THAT the December 23, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 16, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member