

**United States Department of Labor
Employees' Compensation Appeals Board**

DONNA S. DIAZ, Appellant)	
)	
and)	Docket No. 05-1342
)	Issued: November 16, 2005
DEPARTMENT OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION, Baltimore, MD, Employer)	
)	

Appearances:
Donna S. Diaz, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge

JURISDICTION

On June 7, 2005 appellant filed a timely appeal from a December 10, 2004 merit decision of the Office of Workers' Compensation Programs granting her a schedule award for a 12 percent permanent impairment of the left lower extremity. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has more than 12 percent impairment of the left lower extremity, for which she received a schedule award.

FACTUAL HISTORY

On March 7, 1996 appellant, then a 49-year-old claims authorizer, filed an occupational disease claim alleging that she fell at work causing pain on the left side of her back.

On May 29, 1996 the Office accepted her claim for lumbar strain and a herniated disc at L4-5 and authorized an L5-S1 fusion with left sacroiliac joint fusion using bone graphs. After her 1997 fusion surgery, she did not return to work. The Office paid appropriate compensation benefits.

On September 20, 2004 appellant filed a claim for a schedule award. Appellant submitted a June 16, 2004 report from Dr. John W. Ellis, an attending Board-certified family practitioner, who noted that in accordance with Table 15-15 and 15-17, for L5 nerve root, appellant had a Grade 3 sensory deficit (pain) rated at 50 percent and a Grade 3 motor deficit (weakness) rated at 30 percent. Dr. Ellis then noted the maximum percentage loss of function due to sensory deficit or pain was 5 percent and the maximum percentage loss of function due to motor deficit or weakness was 37 percent. He then multiplied appellant's 50 percent pain rating (Table 15-15) times the 5 percent (Table 15-18)¹ allowable for the L5 nerve impairment due to pain, which resulted in a 2.5 percent permanent impairment due to pain. Thereafter he multiplied appellant's 30 percent weakness rating (Table 15-16)² times the 37 percent allowable for the L-5 nerve impairment due to weakness, which resulted in an 11.1 percent permanent impairment due to weakness. Using the Combined Values Chart, Dr. Ellis combined the 2.5 percent impairment due to pain and the 11 percent impairment due to weakness and arrived at a total of 13.6, which he rounded to 13 percent permanent impairment of appellant's left lower extremity based on L5.

For S1, Dr. Ellis noted that appellant had a Grade 3 sensory deficit (pain) rated at 50 percent and a Grade 3 motor deficit (weakness), rated at 30 percent. Dr. Ellis then noted the maximum percentage loss of function due to sensory deficit or pain was 5 percent and the maximum percentage loss of function due to motor deficit or weakness was 20 percent. He then multiplied appellant's 50 percent pain rating times the 5 percent allowable for the S1 nerve impairment due to pain which resulted in a 2.5 percent permanent impairment due to pain. He then multiplied appellant's 30 percent weakness rating³ times the 20 percent (Table 15-18) allowable for the S1 nerve impairment due to weakness which resulted in a 6 percent permanent impairment due to weakness. Using the Combined Values Chart Dr. Ellis combined the 2.5 percent impairment due to pain and the 6 percent impairment due to weakness and arrived at a total of 8.5, which he rounded to 8 percent permanent impairment of appellant's left lower extremity based on S1.

He then combined the 13 percent and 8 percent in accordance with the Combined Values Chart and found that appellant had a 20 percent impairment of the left lower extremity.

On November 21, 2004 an Office medical adviser reviewed Dr. Ellis' report and noted that in accordance with Table 15-18 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) for L5, appellant had a maximum sensory loss of 5 percent and maximum strength loss of 37 percent and maximum S1 sensory

¹ Dr. Ellis stated it was Table 15-17.

² Dr. Ellis again cited Table 15-15 and 15-17 when it should have been 15-16 and 15-18.

³ Dr. Ellis again cited Table 15-15 which is for sensory loss and 15-17 when it should have been 15-16 for power and motor loss and 15-18.

loss of 5 percent. Dr. Ellis then noted that a 5 percent sensory loss was a Grade 4 impairment, with a sensory loss of 25 percent, an L5 sensory loss of 25 percent times 5 percent equals 1.25 percent, an S1 sensory loss of 25 percent times 5 percent equals 1.25 percent for a combined 2.50 percent loss. Under Table 15-16, Grade 4 equals 25 percent, 25 percent times 37 percent equals 9.25 percent. Using the Combined Values Chart, 604, 2.5, when rounded, becomes 3, combined with 9.25, when rounded becomes 9, when combined equals 12 percent impairment of the left lower extremity with a maximum medical improvement date of June 16, 2004.

By decision dated December 10, 2004, the Office granted appellant a 12 percent impairment to the left lower extremity. The award was for 34.56 weeks and ran from November 28, 2004 to July 27, 2005.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act⁴ and its implementing regulation⁵ sets 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* (5th ed. 2001) has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.⁶

ANALYSIS

In this case, the Office accepted that appellant sustained a work-related lumbar sprain and strain and displacement of lumbar intervertebral disc without myelopathy and developed the claim for an impairment rating.

Appellant submitted a report from Dr. Ellis, who stated that in accordance with the A.M.A., *Guides* appellant had a 20 percent impairment rating of the left lower extremity. The Office medical adviser, relying on Dr. Ellis' evaluation and the A.M.A., *Guides*, determined that appellant had a 12 percent impairment rating. Dr. Ellis determined that appellant had a Grade 3 sensory deficit based on Table 15-15, while the Office medical adviser noted a Grade 4. However, Dr. Ellis stated that appellant had pain radiating into the left buttock and down the left leg to the foot and was symptomatic with numbness and tingling in the left lower extremity, with weakness, stiffness and tightness in the left lower extremity. Prolonged sitting, standing or walking and driving a motor vehicle increased and aggravated her pain. Appellant had difficulty sleeping due to her difficulty in finding a comfortable position and that she would be frequently awakened during the night because of her back and the left extremity pain. As a result of her

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *Willie C. Howard*, 55 ECAB ____ (Docket No. 04-342 & 04-464, issued May 27, 2004).

pain, appellant favored the left lower extremity and walks with a letter. This narrative report outlines characteristics of pain more accurately described as a Grade 3 classification, which states a distorted superficial tactile sensibility with some abnormal sensations or slight pain that interferes with some activity. Appellant's symptoms clearly interfere with a range of activities including sleeping, driving and any prolonged activity.

Conversely, a Grade 4 classification notes pain that is forgotten during activity. Appellant's history supports that her subjective complaints of pain are not forgotten during activity and indeed often interfere with the most routine of tasks. Further, the Board has held that the opinion of an examining physician in the appropriate field of medicine takes precedence over the opinion of an Office medical adviser when considering subjective factors.⁷ The Board notes further that the Office medical adviser did not provide any reasoning to support his determination that appellant sustained a Grade 4 sensory impairment.

The Office's schedule award of 12 percent therefore must be set aside and the case remanded to the Office to evaluate appellant's impairment based on a Grade 3 classification in accordance with Table 15-15 of the A.M.A., *Guides*. After such development as the Office deems necessary, it will issue a *de novo* decision regarding appellant's claim for a schedule award.

⁷ *Michelle L. Collins*, 56 ECAB ____ (Docket No. 05-443, issued May 15, 2005).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the December 10, 2004 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to the Office for further development in accordance with this decision.

Issued: November 16, 2005
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board