

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

D.C., Appellant)

and)

DEPARTMENT OF THE ARMY,)
ANNISTON ARMY DEPOT, Anniston, AL,)
Employer)

**Docket No. 09-1759
Issued: April 2, 2010**

Appearances:
Appellant, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 29, 2009 appellant filed a timely appeal from the decision of the Office of Workers' Compensation Programs dated April 30, 2009. 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 a two percent permanent impairment to her right upper extremity.

FACTUAL HISTORY

Appellant, a 55-year-old information technology specialist, injured her right shoulder when she fell and struck her shoulder against a wall on January 12, 2007. She filed a claim for benefits on January 29, 2007, which the Office accepted for right humeral neck fracture.

On October 21, 2008 appellant filed a Form CA-7 claim for a schedule award based on a partial loss of use of her right upper extremity.

In a report dated August 20, 2007, Dr. Perry L. Savage, Board-certified in orthopedic surgery, noted that appellant had sustained a proximal humerus fracture, which was healing. He stated that she continued to experience right shoulder joint pain. Dr. Savage diagnosed osteoarthritis of the right shoulder, right rotator cuff tendinitis and subacromial bursitis. He advised that a magnetic resonance imaging (MRI) scan of the right shoulder demonstrated acromioclavicular joint arthritis with no rotator cuff tear and no superior labrum tear. Dr. Savage recommended arthroscopic surgery of the right shoulder if she was unable to live with this condition.

In a June 11, 2008 report, Dr. Savage stated that appellant had a loss of abduction in the right shoulder of 150 degrees in addition to limited internal rotation. Based on these findings, he rated a six percent impairment for the right shoulder. Dr. Savage noted that appellant's right humerus fracture had healed and determined that appellant reached maximum medical improvement on August 20, 2007.

In a report dated October 27, 2008, an Office medical adviser indicated that there was no factual basis for Dr. Savage's six percent impairment rating. He stated that appellant could be accorded a rating of two percent of the right upper extremity based on the finding of 150 degrees loss of abduction; however, he recommended that the case be referred for further development of the medical evidence.

In order to determine the proper degree of impairment stemming from appellant's accepted right humerus condition, the Office referred appellant to Dr. C. William Hartzog, Board-certified in orthopedic surgery, for a second opinion examination.

In a March 10, 2009 report, Dr. Hartzog indicated his concurrence with Dr. Savage's finding of a six percent permanent impairment of the right upper extremity. He stated that he saw no significant impairment due to loss of function from sensory deficit, pain or discomfort other than the six percent impairment rated by Dr. Savage. However, Dr. Hartzog did not provide any rationale for this statement. In addition, his March 10, 2009 report included a form wherein he recorded 160 degrees of active flexion and 30 degrees of retained extension.

In a March 17, 2009 report, the Office medical adviser found that Dr. Hartzog's report did not provide any additional support for an impairment greater than the two percent right upper extremity impairment he derived in his October 27, 2008 report.

On April 30, 2009 the Office granted appellant a schedule award for a two percent permanent impairment to his right upper extremity for the period August 21 to October 3, 2007, for a total of 6.24 weeks of compensation.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act¹ 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

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

compensation is paid in proportion to the percentage loss of use.² However, the Act does not specify the manner in which the percentage of loss of use of a member is to be determined. For consistent results and to ensure equal justice under the law to all claimants, the Office has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fifth edition) (A.M.A., *Guides*) as the standard to be used for evaluating schedule losses.³ The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.

ANALYSIS

In the instant case, the Office accepted a claim for fractured right humerus. In his August 20, 2007 report, Dr. Savage rated a six percent permanent impairment for the right upper extremity based on a 150 degree loss of abduction in the right shoulder. He indicated that appellant had 150 degrees of retained abduction of the shoulder. Dr. Savage did not provide any other objective findings of permanent impairment. Pursuant to Figure 16-43 at page 477 of the A.M.A., *Guides*, 150 degrees of retained abduction would result in a one percent permanent impairment of the right upper extremity. Dr. Hartzog stated his agreement with this rating in his March 10, 2009 report; however, he did not provide any explanation as to why he believed appellant rated a six percent right upper extremity impairment. Moreover, he included an impairment evaluation form with this report, which indicated that he measured 160 degrees of active flexion and 30 degrees of retained extension for appellant's right shoulder. Dr. Hartzog stated that appellant had no other impairment findings. Pursuant to Figure 16-40⁴ of the A.M.A., *Guides*, which measures upper extremity motion impairments due to lack of flexion and extension of the shoulder, retained flexion of 160 degrees and his retained extension of 30 degrees are each rated as one percent impairment. The Office medical adviser therefore properly reviewed these reports and determined that pursuant to the medical evidence of record appellant had at most a total of two percent right upper extremity impairment for loss of range of motion of the shoulder.

There is no other probative medical evidence establishing that appellant has greater permanent impairment. Appellant has no more than a two percent permanent impairment to her right upper extremity.

CONCLUSION

The Board finds that appellant has no more than a two percent impairment of the right upper extremity.

² *Id.* at § 8107(c)(19).

³ 20 C.F.R. § 10.404.

⁴ A.M.A., *Guides* at 476.

ORDER

IT IS HEREBY ORDERED THAT the April 30, 2009 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: April 2, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board