United States Department of Labor
Employees' Compensation Appeals Board

WILLARD G. FONTENOT, Appellant	)	
and	)	**Docket No. 06-272**
	)	**Issued: April 4, 2006**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECUTIRY ADMINISTRATION, San Diego, CA, Employer	)	

Appearances:
Willard G. Fontenot, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 14, 2005 appellant filed a timely appeal from January 24 and August 17, 2005 merit decisions of the Office of Workers' Compensation Programs, which awarded compensation for a four percent permanent impairment of his right upper extremity. Pursuant to 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 four percent permanent impairment of his right upper extremity, for which he received a schedule award.

FACTUAL HISTORY

On June 12, 2003 appellant, then a 42-year-old security screener, filed a traumatic injury claim for injuries incurred while he was lifting heavy bags. The Office accepted his claim for right shoulder calcifying tendinitis. On November 24, 2003 appellant filed a claim for a

recurrence of disability. On January 16, 2004 the Office accepted his recurrence claim for superior glenoid labrum and neck sprain/strain.

In a January 12, 2004 report, Dr. Robert Pedowitz, a Board-certified orthopedic surgeon, diagnosed cervical herniated disc C6-7, slap tear, calcific tendinitis and bursitis. Stating that he had not reviewed any of appellant's previous medical records, Dr. Pedowitz indicated that appellant's condition was not stationary and permanent at that time. In follow-up reports dated February 26 to April 8, 2004, he indicated that appellant continued to experience residual problems with his right shoulder.

In a report dated April 26, 2004, Dr. Choll W. Kim, a Board-certified orthopedic surgeon, provided a diagnosis of C6-7 displaced disc and opined that appellant had reached maximum medical improvement. Based on his examination, Dr. Kim determined that appellant had 4+/5 weakness of the right triceps and 4++/5 weakness of the right wrist flexors consistent with C7 radiculopathy.

On July 6, 2004 appellant filed a claim for a schedule award.

The Office referred the medical records and a statement of accepted facts to the district medical adviser for review. In a report dated July 12, 2004, Dr. Arthur S. Harris, a Board-certified orthopedic surgeon, opined that appellant had a 15 percent impairment of the right upper extremity based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). Dr. Harris concluded that the date of maximum medical improvement was April 26, 2004, the date of Dr. Kim's most recent examination. Dr. Harris found that appellant had Grade 3 pain/sensory deficit that interfered with some activity of 60 percent (Table 16-10, page 482). He identified the axillary nerve/deltoid muscle, for which 5 percent maximum impairment is provided (Table 16-15, page 492),[1] resulting in a 3 percent impairment of the right upper extremity for pain that interfered with some activity. He found further that appellant had no impairment for loss of motion, muscle weakness, atrophy or instability. As a result of residual right cervical radiculopathy related to his disc herniation at C7, Dr. Harris determined that appellant had Grade 3 pain/sensory deficit that interfered with some activity of 60 percent (Table 16-10, page 482) of the C7 nerve root, for which 5 percent maximum impairment provided (Table 16-13, page 489),[2] resulting in a 3 percent impairment for pain, which interferes with function. He further found that appellant had Grade 4 muscle strength of 28 percent (Table 16-11, page 484) of the C7 nerve root, for which 35 percent maximum impairment is provided (Table 16-13, page 489),[3] resulting in a 9 percent impairment for residual muscle weakness related to cervical radiculopathy. Using combined values for 3 percent impairment for C7 pain, which interfered with function and 9 percent impairment for residual C7 strength deficit resulting from cervical radiculopathy, Dr. Harris determined that appellant had a 12 percent impairment of his right upper extremity for residual problems with cervical radiculopathy. Using combined values for 3 percent impairment

[1] A.M.A., *Guides*, 482, 492, Tables 16-10, 16-15.

[2] A.M.A., *Guides*, 482, 489, Tables 16-10, 16-13.

[3] A.M.A., *Guides*, 484, 489, Tables 16-11, 16-13.

for axillary sensory loss and the 12 percent impairment for residual problems associated with cervical radiculopathy, Dr. Harris concluded that appellant had a total right upper extremity impairment of 15 percent.

In a May 24, 2004 report, Dr. Pedowitz opined that appellant had reached maximum medical improvement as of the date of the report and provided a diagnosis of superior labrale tear. On physical examination, Dr. Pedowitz found that appellant's neck had full range of motion and was painless. His shoulder also had full range of motion with a positive O'Briens. Appellant experienced some pain down his arm, that was exacerbated by both pronation and supination of the forearm.

The Office referred appellant, together with a statement of accepted facts and the medical record, to Dr. Thomas Sabourin, a Board-certified orthopedic surgeon, for a second opinion examination and an assessment of his permanent impairment. In a report dated October 28, 2004, Dr. Sabourin reviewed appellant's medical history and determined that he had reached maximum medical improvement. He provided diagnoses of: degenerative disc disease at C6-7 with herniated disc; calcific tendinitis of the right shoulder; and tear of the superior labrum, right shoulder (slap lesion). Examination of the shoulder revealed no tenderness. Compression test of the head of the humerus against the superior labrum was negative. All other provocative tests, including speed and impingement tests, were negative. Range of motion of the elbows, wrists, hands and fingers was grossly normal. Dr. Sabourin found that appellant had normal motor strength throughout his upper and lower extremities bilaterally, noting specifically that "very careful testing was done of the upper extremities and the patient was found to have no weakness at this point." He noted mild to moderate decreased sensation on the index finger and thumb on the right side. Dr. Sabourin concluded that appellant had no shoulder symptoms whatsoever and no objective findings on examination. He also stated that appellant's neck problems had resolved to a great extent and that there was no weakness in his triceps or any other muscle groups in his right or left extremity. He noted, however, that x-rays revealed some residual calcification in the area of the greater trochanter. Dr. Sabourin opined that his findings differed from those of Drs. Pedowitz and Kim due to the improvement in appellant's condition in the six-month interval between examinations.

In a November 18, 2004 report, the district medical adviser, Dr. Harris, reviewed Dr. Sabourin's October 28, 2004 evaluation, a statement of accepted facts and the medical record. Referencing Table 16-10, page 482 and Table 16-15, page 492 of the A.M.A., *Guides*, Dr. Harris concluded that appellant had Grade 4 pain/decreased sensation that is forgotten with activity 25 percent of the axillary nerve/deltoid muscle, resulting in a 1 percent impairment of the right upper extremity for pain that is forgotten with activity. Referencing Table 16-10, page 482 and Table 16-13, page 489, he noted that appellant had Grade 3 pain/decreased sensation that interfered with some activity 60 percent of his C7 nerve root, resulting in a 3 percent impairment. Utilizing combined values for one percent impairment for axillary sensory deficit and three percent impairment for C7 sensory deficit, Dr. Harris determined that appellant had a four percent total impairment of his right upper extremity. He concluded that the date of maximum medical improvement was October 25, 2004, the date of Dr. Sabourin's examination. Dr. Harris noted that, at the time of Dr. Sabourin's examination, appellant's condition had improved since his April 26, 2004 evaluation by Dr. Kim. He found that appellant had no additional impairment

strength deficit or weakness from right C7 radiculopathy, in that Dr. Sabourin found no weakness in appellant's upper extremity.

On January 24, 2005 the Office granted appellant a schedule award for a four percent impairment of his right upper extremity for the period from January 12 to April 9, 2005.

On February 22, 2005 appellant requested review of the written record on the grounds that he was not personally examined by Dr. Harris and that he had residual pain related to his accepted condition.

By decision dated August 17, 2005, the Office hearing representative affirmed the January 24, 2005 schedule award, finding that appellant had no more than a four percent impairment of his right upper extremity.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[4] and its implementing regulation[5] 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* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[6]

The Office procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.[7]

ANALYSIS

The Board finds that the weight of the medical evidence rests with the October 28, 2004 report of Dr. Sabourin, who submitted a well-rationalized medical opinion based upon a complete and accurate factual and medical history. He performed a complete examination, reviewed the record and concluded that appellant had no shoulder symptoms whatsoever and no objective findings on examination. He also found that appellant's cervical problems had resolved to a great extent and that there was no weakness or strength deficit in his triceps or any other muscle groups in his right or left extremity. He noted that x-rays revealed some residual

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] A.M.A., *Guides* (5th ed. 2001).

[7] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (March 1995).

calcification in the area of the greater trochanter and mild to moderate decreased sensation on the index finger and thumb on the right side. Dr. Sabourin opined that his findings differed from those of Drs. Pedowitz and Kim due to an improvement in appellant's condition in the six-month interval between examinations.

The district medical adviser followed proper Office procedure and correctly applied the appropriate tables and figures in the fifth edition of the A.M.A., *Guides* to Dr. Sabourin's findings, in determining that appellant had a four percent impairment to his right upper extremity due to sensory deficit or pain. Section 16.5 of the A.M.A., *Guides* outlines the procedures to be used when evaluating impairment of the upper extremities due to peripheral nerve disorders.[8] Properly referencing Table 16-10, page 482 and Table 16-15, page 492 of the A.M.A., *Guides*,[9] Dr. Harris concluded that appellant had Grade 4 pain/decreased sensation that is forgotten with activity of 25 percent of the axillary nerve/deltoid muscle, resulting in a 1 percent impairment of the right upper extremity for pain that is forgotten with activity. Referencing Tables 16-10, page 482 and 16-13, page 489,[10] he noted that appellant had Grade 3 pain/decreased sensation that interfered with some activity of 60 percent of his C7 nerve root, resulting in 3 percent impairment. He properly combined the impairment values for one percent impairment of the axillary nerve and three percent impairment of C7. Dr. Harris determined that appellant had a four percent total impairment of his right upper extremity. He concluded that the date of maximum medical improvement was October 25, 2004, the date of Dr. Sabourin's examination. Dr. Harris noted that, at the time of Dr. Sabourin's examination, appellant's condition had much improved since the time of his April 26, 2004 evaluation by Dr. Kim. He properly found that appellant was no longer entitled to an additional impairment rating for weakness from right C7 radiculopathy, in that his examination by Dr. Sabourin revealed no weakness in his upper extremity.

The Board finds that there is no other probative medical evidence of record to establish that appellant has more than a four percent impairment of his right upper extremity, for which he received a schedule award. The opinions of Drs. Pedowitz and Kim are of limited probative value, in that their medical conclusions were based on conditions which did not exist at the time of Dr. Sabourin's October 25, 2004 examination of appellant. Accordingly, the Board finds that appellant has no more than a four percent permanent impairment of his right upper extremity.

CONCLUSION

The Board finds that appellant failed to establish that he has greater than four percent impairment of his right upper extremity.

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[8] A.M.A., *Guides*, 480-97.

[9] A.M.A., *Guides*, 482, 492, Tables 16-10, 16-15.

[10] A.M.A., *Guides*, 482, 489, Tables 16-10, 16-13.

ORDER

IT IS HEREBY ORDERED THAT the August 17 and January 24, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 4, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board