United States Department of Labor
Employees' Compensation Appeals Board

D.H., Appellant	)	
and	)	**Docket No. 07-427**
	)	**Issued: January 7, 2008**
U.S. POSTAL SERVICE, VEHICLE MAINTENANCE FACILITY, Philadelphia, PA, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 6, 2006 appellant, through his attorney, filed a timely appeal from a November 22, 2006 schedule award by the Office of Workers' Compensation Programs for 14 percent impairment of the left upper extremity and 15 percent impairment of the 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.

ISSUES

The issues are: (1) whether appellant has established that he has more than 14 percent impairment of the upper left extremity and 15 percent impairment of the right upper extremity; and (2) whether the Office properly determined appellant's correct pay rate for schedule award purposes. On appeal appellant's attorney contends that the schedule award was based on an incorrect pay rate.

FACTUAL HISTORY

On June 20, 2000 appellant, then a 58-year-old tractor trailer operator, filed a traumatic injury claim alleging that on May 25, 2000 he sustained an injury to his right shoulder while in the performance of duty. On September 27, 2000 the Office accepted appellant's claim for derangement of the right shoulder and arthroscopic surgery was performed on September 29, 2000. Appellant was off work from September 29 to November 17, 2000. He returned to work full duty. An acromioplasty and rotator cuff repair was performed on the left shoulder on July 7, 2005 and accepted by the Office.

On August 30, 2006 appellant filed a claim for a schedule award.

In a medical report dated June 1, 2006, Dr. Richard I. Zamarin, a Board-certified orthopedic surgeon, opined that appellant had reached maximum medical improvement with regard to both upper extremities. Utilizing the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001), he determined that appellant had a four percent impairment to his right upper extremity[1] and a seven percent impairment of the left upper extremity.[2] Dr. Zamarin stated that, pursuant to the A.M.A., *Guides*, appellant had 22 percent upper extremity impairment based on 24 percent hand deficit. He opined that appellant's regular duties caused a permanent aggravation of his cervical degenerative disc disease as well as the degenerative joint disease of his right shoulder. Dr. Zamarin opined that compensation for the condition of his right shoulder caused him to injure his left shoulder, thereby, causing the need for surgery on the left shoulder. He believed that appellant had reached maximum medical improvement.

By letter dated September 25, 2006, the Office referred appellant to Dr. F. Hanley, a Board-certified orthopedic surgeon, for a second opinion. In a report dated October 17, 2006, Dr. Hanley diagnosed post irreparable rotator cuff tear of the right shoulder and rotator cuff tear of the left shoulder, both surgically treated. He stated that appellant reached maximum medical improvement as of September 29, 2001. Dr. Hanley noted that appellant had left-sided symptomatology at least in some degree due to the overuse because of his right shoulder problems. Utilizing the A.M.A., *Guides*, he found that appellant had an impairment of seven percent of his left upper extremity.[3] Dr. Hanley noted no impairment of the right shoulder.

[1] Dr. Zamarin based his finding of seven percent impairment of the left upper extremity on two percent impairment due to flexion and two percent impairment in extension.

[2] Dr. Zamarin based his finding of four percent impairment of the right upper extremity on three percent impairment in flexion and four percent impairment in abduction.

[3] Dr. Hanley found that forward flexion was 180 and extension was 40 and that this would equal one percent impairment. A.M.A., *Guides* 476, Figure 16-40. Abduction of 140 and adduction of 30 is equal to three percent impairment and internal rotation of 70 and external rotation of 80 is one percent. A.M.A., *Guides* 477, Figure 16-46; 479, Figure 16-46. Dr. Hanley then found that external rotation weakness of 4/5 gave him two percent additional impairment for a total of seven percent impairment of the left upper extremity as a consequence of his current findings. A.M.A., *Guides* 510, Table 16-35.

In a report dated November 2, 2006, the Office medical adviser noted that Dr. Zamarin proposed a schedule award for appellant's cervical spine complaints. However, the Office medical adviser noted that appellant's cervical spine disorders did not represent an accepted condition and that there is no medical evidence to support its addition to the list of accepted conditions. The Office medical adviser concluded that Dr. Zamarin's various calculations of hand function and sensory loss could not be accepted as contributing to a schedule award. He noted that Dr. Hanley did not find any cervical spine degenerative condition and did not recommend a schedule award for the cervical spine. The Office medical adviser further noted that Dr. Hanley recommended a schedule award for the right upper extremity but did not recommend one for the left upper extremity. However, he noted that Dr. Hanley did recommend that the left shoulder condition was secondary to overuse because of the right shoulder problems and that therefore it should be an accepted conditions. The Office medical adviser stated:

> "In regard to the right upper extremity, page 506, [T]able 16-27, Impairment of Upper Extremity after Arthroplasty of Specific Bones and Joints, right shoulder resection arthroplasty of the distal clavicle which was done as part of this claimant's operative procedures is equivalent to 10 percent impairment of the right upper extremity for resection arthroplasty. The range of motion of the [right] shoulder calculation is made utilizing page 476, [F]igure 16-40, Pie Chart of Upper Extremity Motion Impairments due to lack of Flexion Extension of the Shoulder, forward flexion is 180 degrees, extension is 40 degrees, and forward flexion results in zero impairment and the extensor results at one percent impairment of the right upper extremity. Utilizing page 477, [F]igure 16-43, *Pie Chart of Upper Extremity Motion Impairments due to Lack of Abduction and Adduction of the Shoulder,* abduction is 140 degrees, which is equivalent to two percent impairment and adduction is 30 degrees which is equivalent to one percent impairment because both arise from the same pie chart, they can be added for a three percent impairment, *i.e.,* 2 + 1. Utilizing page 479, [F]igure 16-46, *Pie Chart of Upper Extremity and Impairments Due to Lack of Internal and External Rotation of the Shoulder*, internal rotation is 70 degrees which is equivalent to one percent impairment, external rotation is 80 degrees which is equivalent to zero percent impairment, therefore, in regard to internal and external rotation represents one percent impairment. The range-of-motion measurements therefore represent one percent plus three percent plus one percent equals five percent impairment. The 10 percent impairment for arthroplasty is combined with 5 percent for range of motion and 5 percent plus 10 percent equals 15 percent. Therefore, it is my recommendation in regard to this claimant's right upper extremity represents a 15 percent impairment.
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> "In regard to [appellant's] left upper extremity, based on his shoulder impairment, utilizing page 506, [T]able 16-27, *Impairment of Upper Extremity after Arthroplasty of Specific Bones and Joints*, resection arthroplasty distal clavicle equals 10 percent impairment. The range-of-motion measurements noted by Dr. Hanley indicated a reduced range of motion. Utilizing page 476, [F]igure 16-40, *Pie Chart of Upper Extremity Motion Impairments Due to Lack of Flexion Extension of the Shoulder,* forward flexion is 170 degrees which represents one percent impairment; adduction is 40 degrees and represents one percent

impairment. Utilizing page 477, [F]igure 16-43, *Pie Chart of Upper Extremity Motion Impairments Due to Lack of Abduction and Adduction of the Shoulder,* abduction is 140 degrees which represents two percent impairment and adduction is 40 degrees and represents zero percent impairment. Therefore, abduction/adduction represents two percent impairment of the left shoulder. Utilizing [F]igure 16-46, page 479, *Pie Chart of Upper Extremity Impairments Due to Lack of Internal and External Rotation of the Shoulder,* external rotation of 70 degrees equals zero percent impairment and internal rotation of 70 degrees equals one percent impairment. Therefore, based upon the left shoulder range of motion restrictions, there is a four percent impairment. The 10 percent arthroplasty may be combined with the four percent range-of motion impairment utilizing page 604, *Combined Value[s] Chart*, 10 plus 4 equals 14 percent impairment to the left upper extremity.

"Therefore, in summary, it is my recommendation that the right upper extremity equals 15 percent impairment and the left upper extremity equals 14 percent impairment. The date of maximum medical improvement on Dr. Zamarin's examination was June 1, 2006.

On November 22, 2006 the Office issued schedule awards for 15 percent impairment to the right upper extremity and 14 percent to the left upper extremity. The date of maximum medical improvement was found to be June 1, 2006 based on Dr. Zamarin's examination. The Office also found that appellant's effective date of pay rate was September 29, 2000.

LEGAL PRECEDENT -- ISSUE 1

The schedule award of the Federal Employees' Compensation Act[4] and its implementing regulations at 20 C.F.R. § 10.404 provide for compensation to employees sustaining impairment from loss or loss of use of specified members of the body. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of the Office. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tales so that there may be uniform standards applicable to all claimants. The A.MA., *Guides* has been adopted by the Office as a standard for evaluation of schedule losses and the Board has concurred in such adoption.[5] As of February 1, 2001, schedule awards are calculated according to the fifth edition of the A.M.A., *Guides*, published in 2000.[6]

[4] 5 U.S.C. §§ 8101-8193.

[5] *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

[6] A.M.A., *Guides* 467, Figure 28.

ANALYSIS -- ISSUE 1

The Office medical adviser properly applied the A.M.A., *Guides* and provided rationale for rating 15 percent impairment of the right upper extremity and 14 percent impairment of the left upper extremity.

When evaluating appellant's impairment in his right upper extremity, the Office medical adviser stated that appellant would be entitled to an impairment rating of 10 percent of his right upper extremity for the resection arthroplasty of the distal clavicle.[7] He noted that appellant had forward flexion of 180 degrees which resulted in zero percent impairment, but that 40 degrees of extension resulted in one percent impairment.[8] The Office medical adviser advised that appellant's abduction of 140 degrees was equivalent to two percent impairment and adduction of 30 degrees was equivalent to one percent impairment.[9] He then determined that appellant had one percent impairment for internal rotation of 70 degrees and zero percent impairment for external rotation of 80 degrees.[10] The Office medical adviser properly combined the 10 percent impairment for arthroplasty resection with the loss of range of motion impairment of 5 percent to find 15 percent impairment of the right upper extremity. These findings are supported by the A.M.A., *Guides.* Accordingly, the Board finds that the Office properly relied upon the report of the Office medical adviser in finding that appellant had 15 percent impairment to his right upper extremity.

With regard to appellant's impairment to his left upper extremity, the Office medical adviser again noted that, as appellant underwent a resection arthroplasty of the distal clavicle, representing 10 percent impairment pursuant to the A.M.A., *Guides*.[11] As to the range of motion measurements, appellant had forward flexion of 170 degrees which represented one percent impairment,[12] abduction of 140 degrees which represented two percent impairment, adduction of 40 degrees which equaled zero percent impairment,[13] external rotation of 70 degrees which equaled zero percent impairment and internal rotation of 70 degrees which equaled one percent impairment.[14] Combining the 4 percent loss of range of motion with the 10 percent arthroplasty resection, the Office medical adviser properly found that appellant had 14 percent impairment of the left upper extremity pursuant to the A.M.A., *Guides.*

[7] *Id.* at 506, Table 16-27.

[8] *Id.* at 476, Figure 16-40.

[9] *Id.* at 477, Figure 16-43.

[10] *Id.* at 479, Figure 16-46.

[11] *Id.* at 506, Table 16-27.

[12] *Id.* at 476, Figure 16-40.

[13] *Id.* at 477, Figure 16-43.

[14] *Id.* at 477, Figure 16-46.

Although Dr. Zamarin stated that appellant had 24 percent impairment of his right hand which he reported resulted in an additional 22 percent impairment of the right upper extremity, the Office medical adviser properly noted that the claim was not accepted for any impairment to the cervical spine or the hand. The Board finds that the opinion of the Office medical adviser represents the weight of the medical evidence of record and establishes that appellant has no more than 15 percent impairment of his right upper extremity and 14 percent impairment of his left upper extremity.

LEGAL PRECEDENT -- ISSUE 2

Under 5 U.S.C. § 8101(4), monthly pay means the monthly pay at the time of injury, or the monthly pay at the time disability begins or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater.

ANALYSIS -- ISSUE 2

With regard to appellant's right shoulder the effective pay date would be either the date of the injury, June 20, 2000, or the date of disability, September 29, 2000, whichever is greater. The Office properly utilized the date of appellant's disability, *i.e.*, the date of his surgery on his right shoulder, as the effective date of pay rate. Appellant's attorney argues on appeal that pursuant to *Patricia K. Cummings*,[15] the correct date for calculating the pay rate should be the date of the report of Dr. Hanley. Counsel contends that this report is the date of the medical evaluation which substantiated the degree of impairment. Pursuant to *Cummings*, this should be the effective date of pay rate. This case is easily distinguishable from *Cummings*. In *Cummings*, the schedule award was a result of an occupational disease claim for carpal tunnel syndrome which the employee sustained over a period of time. In that case, the Board held that in schedule award claims wherein the injury is sustained over a period of time, to determine the "date of injury" the Office must ascertain the date of last exposure to employment factors as well as the date of the medical evaluation which substantiates the degree of permanent impairment. In this case, appellant sustained his injury as a result of a traumatic injury which occurred on June 20, 2000. Therefore, the proper pay rate is determined by the date of injury or the date of disability, not the date of last exposure or the date of medical examination wherein permanent impairment is determined. Accordingly, the Office properly determined that pay rate as of the date of appellant's disability with regard to impairment for the right upper extremity.

As to the left upper extremity there is evidence in the record that appellant sustained a consequential injury to his left upper extremity due to overuse of his right upper extremity. The Office never officially accepted that appellant sustained an injury to his left upper extremity. This is necessary as a preliminary matter prior to the determination of the date of the effective rate of pay for a schedule award for the left upper extremity. Accordingly, the Board finds that this case is not in posture for decision with regard to the date of the effective rate of pay for the injury to the left upper extremity, and will remand the case in order for the Office to officially

[15] 53 ECAB 623 (2002).

accept appellant's claim for an injury to the left upper extremity and, if necessary, recalculate the amount of the schedule award based on any change in the effective date of pay rate.

CONCLUSION

Appellant has no more than 14 percent impairment of the left upper extremity and 15 percent impairment of the right upper extremity. The Board further finds that the Office properly determined appellant's rate of pay for his right upper extremity impairment. However, the case is remanded for further consideration with regard to the rate of pay for appellant's left upper extremity impairment, in accordance with this decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 22, 2006 is affirmed in part and vacated in part, and this case is remanded for further consideration consistent with this opinion.

Issued: January 7, 2008
Washington, DC

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

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

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