

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

D.H., Appellant

and

**U.S. POSTAL SERVICE, PATRICK HENRY
STATION, Newport News, VA, Employer**

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**Docket No. 09-91
Issued: July 22, 2009**

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
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 15, 2008 appellant, through his representative, filed a timely appeal from the December 19, 2007 merit decision of the Office of Workers' Compensation Programs, which awarded additional schedule compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

ISSUES

The issues are: (1) whether appellant has more than the one percent additional impairment the Office awarded on December 19, 2007; and (2) whether the Office used the correct pay rate. Appellant's attorney asks the Board to review both the percentage impairment and argues that appellant is entitled to a recurrent pay rate.

FACTUAL HISTORY

On June 10, 2003 appellant, then a 43-year-old city letter carrier, filed a claim alleging that he sustained a right rotator cuff tear in the performance of duty. He first became aware of the condition in June 2000. The Office accepted appellant's claim for right rotator cuff tear.

Appellant stopped work on or about December 15, 2001 after undergoing right shoulder surgery. The Office paid compensation for wage loss. On April 1, 2002 Dr. Loel Z. Payne, appellant's orthopedic surgeon, reported that appellant was doing well with his shoulder and was finished with physical therapy and that April 1, 2002 was his first day back at full duty. However, appellant continued to have complaints. On July 12, 2002 Dr. Payne stated that appellant could continue working full duty as long as he did not carry his mailbag on either shoulder. On March 19, 2004 he indicated that appellant was able to perform regular work with no restriction other than to avoid carrying his mailbag on his right shoulder. On April 28, 2004 Dr. Payne reported that appellant appeared to have right shoulder subacromial bursitis. Yet, he completed a duty status report indicating that appellant could perform regular work with no restrictions whatsoever. On June 11, 2004, however, Dr. Payne referred appellant for diagnostic testing to rule out a recurrent rotator cuff tear.

On October 1, 2004 the Office issued a schedule award for a seven percent impairment of the right upper extremity. On April 21, 2006 it issued a schedule award for an additional three percent impairment.

The Office authorized right shoulder revision surgery. On December 29, 2006 appellant underwent right shoulder revision open rotator cuff repair and acromioplasty. Dr. Payne kept appellant off work following surgery. He released appellant to limited duty effective April 10, 2007.

On July 17, 2007 Dr. Payne evaluated appellant's impairment. He noted 120 degrees shoulder flexion, 31 degrees extension, 119 degrees abduction, 23 degrees adduction, 61 degrees external rotation and 62 degrees internal rotation. He calculated that appellant had a total right upper extremity impairment of 12 percent.

On September 13, 2007 appellant, who had received schedule awards for a total 10 percent impairment of his right upper extremity, filed a claim for an additional schedule award.

An Office medical adviser reviewed Dr. Payne's evaluation and determined that appellant had 11 percent impairment of the right upper extremity.

On December 19, 2007 the Office issued a schedule award for an additional one percent impairment of the right upper extremity. It paid compensation based on appellant's pay rate on December 15, 2001, the date disability began.

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of the Federal Employees' Compensation Act¹ authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. Such loss or loss of use is known as permanent impairment. The Office evaluates the degree of

¹ 5 U.S.C. § 8107.

permanent impairment according to the standards set forth in the specified edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.²

ANALYSIS -- ISSUE 1

According to the July 17, 2007 evaluation by Dr. Payne, the attending orthopedic surgeon, appellant had 120 degrees right shoulder flexion. That represents four percent impairment of the upper extremity.³ Appellant's 31 degrees extension represents one percent impairment.⁴ Abduction to 119 degrees represents three percent impairment.⁵ Adduction to 23 degrees represents one percent impairment.⁶ Appellant's 61 degrees external rotation represents no impairment.⁷ His 62 degrees internal rotation represents two percent impairment.⁸

Because the relative upper extremity value of each shoulder functional unit has been taken into consideration in the impairment pie charts, the impairment values contributed by each unit of motion are added to determine the impairment of the upper extremity due to abnormal shoulder motion.⁹ Appellant therefore has 11 percent total impairment of the right upper extremity due to loss of shoulder motion, or 1 percent more than he previously received. The Board will affirm the Office's December 19, 2007 decision on the issue of percentage impairment.

LEGAL PRECEDENT -- ISSUE 2

Monetary compensation for disability or impairment due to an employment injury is paid as a percentage of monthly pay.¹⁰ Section 8101(4) of the Act provides that "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.¹¹

² 20 C.F.R. § 10.404 (1999).

³ A.M.A., *Guides* 476, Table 16-40 (5th ed. 2001).

⁴ *Id.*

⁵ *Id.* at 477, Table 16-43.

⁶ *Id.*

⁷ *Id.* at 479, Table 16-46.

⁸ *Id.*

⁹ *Id.* at 479.

¹⁰ See 5 U.S.C. §§ 8105, 8106, 8107.

¹¹ *Id.* at § 8101(4); *John D. Williamson*, 40 ECAB 1179 (1989).

ANALYSIS -- ISSUE 2

Appellant's attorney argues the Office used the rate of pay when disability began in 2001, notwithstanding a recurrence of temporary total disability due to the 2006 revision surgery. A recurrence of temporary total disability is not alone determinative of whether appellant may receive a later and presumably greater pay rate. The record must also show that the recurrence of compensable disability began more than six months after appellant resumed regular full-time employment with the United States. So the question is whether appellant ever resumed regular full-time employment with the United States, and if so, whether he did so more than six months before his December 29, 2006 revision surgery.

Dr. Payne reported that, following his initial surgery on December 14, 2001, appellant's first day back at full duty was April 1, 2002. Appellant was finished with physical therapy and was doing well with his right shoulder, but restrictions would follow. That July, Dr. Payne stated that appellant could continue working full duty as long as he did not carry his mailbag on either shoulder. Then in March 2004 he indicated that appellant's only restriction was to avoid carrying his mailbag on his right shoulder. However, on April 28, 2004 Dr. Payne reported that appellant could perform regular work with no restrictions whatsoever.

So the medical record, at least, indicates that appellant may have resumed regular full-time employment with the United States on April 1, 2002 and was released to resume regular full-time employment with the United States on April 28, 2004. Whether that employment did resume as a matter of fact is not particularly clear from the record and the Office does not seem to have addressed the matter. The Board will therefore set aside the Office's December 19, 2007 decision on the issue of pay rate and will remand the case for further development and an appropriate final decision on whether appellant is entitled to a recurrent pay rate due to his authorized revision surgery on December 29, 2006.

CONCLUSION

The Board finds that appellant has no more than the one percent additional impairment the Office awarded on December 19, 2007. The Board also finds that further development is warranted on whether the Office used the correct pay rate.

ORDER

IT IS HEREBY ORDERED THAT the December 19, 2007 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further action consistent with this opinion.

Issued: July 22, 2009
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