U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN M. RICHMOND and DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, Washington, D.C.

Docket No. 02-1; Submitted on the Record;
Issued July 26, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs used the proper pay rate in calculating appellant's schedule award.

The Office accepted appellant's claim for back strain and disc herniation. He underwent a hemilaminectomy on July 23, 1986 and repeat procedures consisting of a right L5-S1 foraminotomy on July 10, 1987, a lumbar laminectomy on May 31, 1989 and a laminectomy at L4-5 on December 2, 1991. The record establishes that the surgeries on July 10, 1987 and May 31, 1989 were accepted, but it is not clear from the record whether the December 2, 1991 surgery was accepted. A statement of accepted facts dated March 9, 1999 stated that the December 2, 1991 surgery was accepted. A handwritten note on the Office Form, CA-110, dated November 17, 1991 indicates that surgery of lumbar laminectomy was approved but on the same type of form dated November 26, 1991, the Office noted that surgery was not authorized. The nonfatal summary does not indicate that the December 2, 1991 surgery was authorized. Appellant stated in his request for reconsideration that it was unclear whether the Office ever paid the bill for the surgery.

Appellant was totally disabled from June 9 to September 1, 1986 and from April 3 to August 29, 1987 and had intermittent periods of disability ending approximately on October 22, 1989. He retired from his employment on January 1, 1999. In a report dated May 24, 1999, the Office medical adviser determined that appellant reached maximum medical improvement on April 13, 1999 and that he had a permanent impairment of 14 percent to his left lower extremity and 8 percent to his right lower extremity.

In a decision dated June 3, 1999, the Office issued appellant a schedule award for a permanent impairment of 14 percent to his left lower extremity and 8 percent to his right lower extremity from April 13, 1999 to June 29, 2000 based on a weekly pay of $1,074.98. In calculating the schedule award, the Office determined that appellant's last recurrence of disability was on May 27, 1989 and used his pay rate on that date in its calculation.

By letter dated June 2, 2000, appellant requested reconsideration of the Office's decision. He submitted additional evidence consisting of a statement dated May 31, 2000, a medical report from his treating physician, Dr. William L. Caton, a Board-certified neurological surgeon, dated June 2, 2000, a copy of the Board's decision in *Barbara A. Dunnavant*[1] and a copy of a claim he filed on July 15, 1993 for a recurrence of disability due to the March 3, 1986 employment injury, commencing "[March] 18, 19 [and] 20, [1986]" with no time missed from work. In his statement dated May 31, 2000, appellant stated that following his return to work in January 1992 after his fourth surgery, his condition progressively worsened and eventually led to his retirement on January 1, 1999. He stated that at the time of the 1991 recurrence of disability, his annual salary was $69,836.00 or $1,343.20 a week, at the time of the 1993 recurrence of disability his salary was $83,376.00 or $1,603.38 a week and at the time of his retirement, his salary was $98,348.00 or $1,891.31 a week. Appellant stated that after he returned to work in January 1992, 80 percent of his time was spent sitting in vehicles out in the field doing surveillance and that his leg and back pain increased after sitting for hours each day.

In his June 2, 2000 report, Dr. Caton stated that he had treated appellant for approximately 11 years for his "industrial injury." He stated that he performed appellant's fourth surgery, a lumbar laminectomy, in December 1991 and appellant returned to work with limitations including no prolonged sitting. Dr. Caton stated that it was "his understanding that from early 1992 onward until" appellant retired, "he spent the majority of his workday sitting in vehicles doing surveillance." He opined that "these work duties" aggravated appellant's "industrial injury" and the underlying medical conditions resulting from that injury. Dr. Caton stated that "[c]linically [appellant] presented over time as increasingly uncomfortable and in pain while working, with multiple aggravations and exacerbation of his back condition and sciatica of the years after 1992 due to his continuing work duties." He stated that appellant "certainly was disabled from his surveillance duties at the time he retired."

By decision dated October 3, 2000, the Office denied appellant's request for modification.

The Board finds that this case is not in posture for decision.[2]

In all situations under the Federal Employees' Compensation Act, compensation is based on the employee's pay rate as determined under section 8101(4). This section defines "monthly pay" as: "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."[3]

On appeal, appellant contends that the Office erred in using his pay rate in 1989 to calculate his schedule award. He contends that the Office erred in failing to use the date of either

[1] 48 ECAB 517, 519-21 (1997).

[2] In appellant's request for reconsideration dated June 2, 2000, which appellant incorporated into his appeal to the Board, he stated that he was not challenging the sufficiency of the impairment ratings.

[3] 5 U.S.C. § 8101(4); *Jeffrey T. Hunter*, 52 ECAB ___ (Docket No. 99-2385, issued September 5, 2001).

the 1991 or 1993 recurrences "which are matters of record in the Office's files." Appellant stated that his annual pay rate in 1991 was $69,846.00 and in 1993 was $88,009.00 and either rate would be greater than his pay rate in 1989. Further, in the alternative, appellant contends that his annual pay rate of $98,348.00 in 1998 should be used because the date of his last exposure was the date of his retirement and his employment continued to aggravate his back until his retirement.

Regarding the 1991 recurrence, appellant stated that he was disabled for six weeks from the date of his lumbar laminectomy from December 2, 1991 to approximately January 15, 1992 and, therefore, his pay rate in 1991, not 1989, should be used. Regarding the 1993 recurrence, he stated that he was disabled at that time as evidenced by use of his sick leave and Dr. Caton's findings, in his report dated July 1, 1993, that appellant had an exacerbation of his L5-S1 radiculopathy. Appellant noted that he filed a claim for a recurrence of disability on July 15, 1993 although on that form he indicated that he did not stop working. Appellant stated that the Office did not address the claim in its decision and he stated that he was going to file a new claim to "ensure that the Office does not continue to ignore the claim" he had already filed.

In its October 3, 2000 decision, the Office found that appellant did not sustain any disability from work within the meaning of the Act after the 1991 and 1993 recurrences of disability. "Disability" under the Act has been defined as "the inability to work" or "incapacity to work" because of the injury or when the injury prevents the employee from performing his regular duties.[4] As stated above, the record is conflicting as to whether appellant had a recurrence of disability in 1991. The case will be remanded for the Office to resolve the inconsistencies in the record as to whether appellant's back surgery in 1991 and resulting disability constituted a recurrence of disability. Should the Office find that the back surgery in 1991 constituted a recurrence of disability, it must make the appropriate evaluation as to whether appellant's pay rate in 1991 or 1989 should be used.

Regarding appellant's contention that he also sustained a recurrence of disability in 1993, appellant's statements as to whether he missed work are conflicting in that on the July 15, 1993 claim and in his request for reconsideration to the Office, he indicated that he did not miss any work but in his appeal to the Board he stated that he took sick leave at that time. In any event, appellant acknowledged that the Office did not accept his claim for a recurrence of disability. Since the Office did not accept his claim, his alleged disability in 1993 does not constitute a recurrence of disability and, therefore, is not relevant in determining appellant's rate of pay.[5]

Appellant's contention that his pay rate should be calculated as of the date of last exposure, December 31, 1998, when he retired is invalid. He contends that consistent with the holding in *Dunnavant*, the "date of injury" should be his retirement (date of last exposure) date because Dr. Caton's June 2, 2000 report establishes his continued exposure to factors at work worsened his condition through the date of his retirement. In *Dunnavant*, the Office accepted the employee's claim for an occupational disease and she filed a claim for a schedule award prior to

[4] *Merle J. Marceau*, 53 ECAB ___ (Docket No. 00-1995, issued November 1, 2001); *Charles P. Mulholland*, 48 ECAB 604, 606 (1997).

[5] Appellant, however, may file a new claim with the Office for a recurrence of disability.

the date of her last exposure. The "date of injury" was the date of the medical evaluation, which substantiated that her permanent impairment had stabilized.[6] The Board noted, however, that if the employee's continued exposure to injurious factors at work worsened his condition, the date of injury would then be the date the medical evidence established that appellant's condition worsened.[7] *Dunnavant* is not applicable to this case, however, because appellant's claim was accepted for a traumatic injury. In *Dunnavant*, the claim for aggravation of right carpal tunnel syndrome and a left carpal syndrome was accepted for an occupational disease. Dr. Caton's June 2, 2000 report indicates that since 1993 appellant's back condition worsened due to his extensive sitting at work and resulted in his retiring at the end of 1998. Because the Office accepted appellant's claim for a traumatic injury and recurrences of disability resulting from that injury, any aggravation of his back condition due to work factors since his return to work would not constitute a recurrence of disability but an aggravation of his existing condition or a new injury.[8] Appellant would, therefore, need to file a new claim to establish an aggravation or to establish that he sustained an occupational disease within the meaning of the Act. The date of last exposure and the holding in *Dunnavant* are not relevant to this claim.

The case will be remanded for the Office to address whether appellant sustained a recurrence of disability on December 2, 1991, when he underwent a laminectomy at L4-5 and if so, to redetermine which rate of pay should be used, his pay rate in 1989 or the one in December 1991. If, however, on remand, the Office determines that the December 2, 1991 back surgery and resulting disability was not an accepted condition, its original calculation of the schedule award based on appellant's pay rate in 1989 would be proper.

[6] *Barbara A. Dunnavant*, *supra* note 1 at 521.

[7] *Id*.

[8] 20 C.F.R. § 10.104; *see Willie J. Clements, Jr.*, 43 ECAB 244, 247 n.8 (1991).

The October 3, 2000 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision.

Dated, Washington, DC
July 26, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member