

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

LINDA B. BOYD, Appellant

and

**U.S. POSTAL SERVICE, BULK MAIL
CENTER, Memphis, TN, Employer**

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**Docket No. 05-1471
Issued: October 14, 2005**

Appearances:
Linda B. Boyd, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 5, 2005 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated May 17, 2005, denying modification of the pay rate used in calculating her schedule award. 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 the Office used the proper pay rate in calculating appellant's schedule award. On appeal, appellant contends that the pay rate should have been based on her 1997 salary when she sustained a recurrence of disability.¹

¹ The Board notes that appellant did not appeal from the determination of a 21 percent impairment. The record, however, contains medical evidence relevant to her entitlement to a schedule award for her left lower extremity. The record does not indicate that the Office has issued a final schedule award decision regarding appellant's left lower extremity.

FACTUAL HISTORY

On November 27, 1976 appellant, then a 25-year-old file clerk, sustained an employment-related lumbosacral strain and contusion to the lumbosacral area when the back of her chair collapsed and she fell to the floor. The Office later accepted that she also sustained discogenic lumbar disease at L4-5. Appellant stopped work in 1979 and returned on March 31, 1984 for three hours a day at an annual pay rate of \$22,597.00 or \$434.56 per week. Although she was scheduled to return to full duty on May 7, 1984 appellant continued to work approximately five hours per day, until she stopped work on June 13, 1984. She received wage-loss compensation until October 17, 1984 based on the pay rate effective March 31, 1984. On April 4, 1985 appellant filed a recurrence claim, stating that she sustained a recurrence of disability on January 4, 1984 and noted that she stopped work on June 13, 1984. She returned to modified duty as a file clerk in October 1985.

Appellant applied for leave buy back for intermittent periods. In a decision dated December 8, 1986, the Office found that she was not entitled to wage-loss compensation for the period June 24, 1984 to April 21, 1986, because the medical evidence did not establish that her disability was caused by the accepted conditions.² The Office noted that during this period appellant was being treated for gallstones, pneumonia, cervical spondylosis and carpal tunnel syndrome, none of which was accepted as employment related.³

On October 6, 1993 appellant filed a schedule award claim. In a medical report dated October 20, 1993, Dr. John P. Howser, Board-certified in neurosurgery, advised that she had a 25 percent disability of the body as a whole as the result of her neurological difficulties. By decision dated February 3, 1995, the Office determined that appellant was not entitled to a schedule award.

On April 16, 1997 appellant filed a recurrence of disability claim, stating that she was on permanent limited-duty status. She did not stop work. By letter dated May 13, 1997, the Office informed appellant that her claim had been reopened for medical benefits and, if she lost time from work, she should file a CA-7 claim form, advising her to support any disability claimed with rationalized medical evidence.

Appellant came under the care of Dr. Robert T. Bobo, a Board-certified orthopedic surgeon, who advised on October 21, 1997 that maximum medical improvement had been reached. On September 18, 2000 she again filed a schedule award claim. In letters dated November 9, 2000 and February 21, 2001, the Office requested that Dr. Bobo submit additional information in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.⁴ On June 13, 2002 Dr. Bobo submitted his treatment notes, adding that appellant was last seen on May 21, 1999.

² Appellant initially requested a hearing from this decision, but withdrew her request.

³ Medical evidence of record indicates that appellant had gallbladder surgery in 1985.

⁴ A.M.A., *Guides to* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

On April 17, 2003 appellant informed the Office that she was applying for disability retirement. On October 17, 2004 she filed a schedule award claim and submitted a July 27, 2004 report from Dr. John W. Ellis, a Board-certified family practitioner. He provided findings in accordance with the fifth edition of the A.M.A., *Guides* and advised that appellant had lower extremity impairments of 14 and 21 percent on the left and right respectively. In a December 14, 2004 report, an Office medical adviser reviewed Dr. Ellis' report regarding appellant's right lower extremity. He advised that maximum medical improvement had been reached on October 21, 1997 and concurred that she had a 21 percent right lower extremity impairment. In a February 22, 2005 report, the Office medical adviser advised that maximum medical improvement had been reached on October 21, 1997 and concurred with Dr. Ellis' conclusion that appellant had a 14 percent left lower extremity impairment.

By decision dated March 28, 2005, appellant was granted a schedule award for a 21 percent impairment of the right leg, for 60.48 weeks of compensation to run from October 21, 1997 to December 18, 1998. The Office based the schedule award on her pay rate effective March 31, 1984. On April 3, 2005 appellant requested reconsideration, alleging that the pay rate for her schedule award was incorrect. She stated that her pay rate as of October 21, 1997 should be used as this was the date she reached maximum medical improvement. In a May 17, 2005 decision, the Office denied modification of the prior schedule award, finding that in 1997 appellant's case was reopened merely for medical benefits and, as the record did not show that she lost time from work from 1997 to the present due to the employment injuries, a recurrent pay rate was not appropriate. The Office further noted that the date of maximum medical improvement did not apply in determining pay rate.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act⁵ provides that compensation for a schedule award shall be based on the employee's "monthly pay."⁶ For all claims under the Act, compensation is to be based on the pay rate as determined under section 8101(4), which 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...."⁷

In applying section 8101(4), the statute requires the Office to determine monthly pay by determining the date of the greater pay rate, based on the date of injury, date of disability or the date of recurrent disability. The Board has held that rate of pay for schedule award purposes is the highest rate which satisfies the terms of section 8101(4).

⁵ 5 U.S.C. §§ 8101-8193.

⁶ 5 U.S.C. § 8107.

⁷ 5 U.S.C. § 8101(4).

Office regulations provide that a recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness;⁸ a recurrence of medical condition means a documented need for further medical treatment after release from treatment for the accepted condition or injury when there is no accompanying work stoppage. Continuous treatment for the original condition or injury is not considered a “need for further medical treatment after release from treatment,” nor is an examination without treatment.⁹

Disability is not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used under the Act and is not entitled to compensation for loss of wage-earning capacity.¹⁰

ANALYSIS

The Office utilized the pay rate effective March 31, 1984, or \$434.56 weekly, the date appellant returned to work following her employment injury. At that time she returned to work for three hours a day and continued to receive compensation benefits for her physical disability. Although appellant was scheduled to return to full duty on May 7, 1984 she continued to work approximately five hours per day, until she stopped work on June 13, 1984. She continued to receive wage-loss compensation until October 18, 1984. In a decision dated December 8, 1986, the Office found that appellant was not entitled to compensation beginning June 24, 1984 because the medical evidence did not establish that her disability was caused by the accepted condition but was rather due to medical conditions not accepted as employment related. She returned to modified duty in October 1985 and did not claim wage-loss compensation for the accepted injuries after that time.

Although appellant contends that she sustained a recurrence of disability in 1997, the record reflects that at that time the Office reopened her claim for medical benefits and does not reflect that she received wage-loss compensation for any period subsequent to that date. The Board finds that she has not established that she sustained a recurrence of disability in 1997 as defined by Office regulations,¹¹ but rather sustained a recurrence of medical condition without any absence from work.¹² Thus, appellant’s alleged disability in 1997 is not relevant in

⁸ 20 C.F.R. § 10.5(x).

⁹ 20 C.F.R. § 10.5(y).

¹⁰ See *Merle J. Marceau*, 53 ECAB 197 (2001).

¹¹ 20 C.F.R. § 10.5(x).

¹² 20 C.F.R. § 10.5(y).

determining her rate of pay.¹³ The Office, therefore, properly determined that the March 31, 1984 pay rate was the proper rate of pay to be used in calculating her schedule award.¹⁴

Appellant also contends on appeal that her due process rights were violated because she was not issued a decision with appeal rights in 1997. The Federal Courts retain jurisdiction over final decisions of the Office where there is a charge of a violation of a clear statutory mandate or where there is a constitutional claim.¹⁵ In the March 13, 1997 letter notifying appellant that her claim had been reopened for medical benefits, the Office clearly informed her that she could file a claim for wage-loss compensation should she lose time from work in the future. As stated above, the record does not support that she filed any claims for wage-loss compensation after that time.

CONCLUSION

The Board finds that the Office used the proper pay rate in calculating appellant's schedule award.

¹³ The Board notes that the *Barbara A. Dunnivant* case is not applicable in the instant case as in *Dunnivant*, the claim was for an occupational disease with continued exposure and the claim here is for a traumatic injury sustained on November 27, 1976. See *Barbara A. Dunnivant*, 48 ECAB 517 (1997).

¹⁴ This would constitute "the date disability began," inasmuch as appellant returned to part-time work on that day but continued to receive compensation to supplement her wages. See 5 U.S.C. § 8101(4); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Establishing a Pay Rate*, Chapter 2.900.2(b) (April 2002).

¹⁵ *Lan Thi Do*, 46 ECAB 366 (1994).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 17 and March 28, 2005 be affirmed.

Issued: October 14, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

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