U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY M. MARKS and U.S. POSTAL SERVICE,
POST OFFICE, Suitland, Md.

Docket No. 96-460; Submitted on the Record;
Issued April 20, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined appellant's pay rate for compensation purposes.

In the present case, appellant filed a claim alleging that she injured her right shoulder in the performance of duty on March 20, 1985. The Office accepted the claim for chronic right shoulder tendinitis. Appellant returned to a modified general clerk position on January 16, 1988, and worked intermittently through December 17, 1988. She also worked on intermittent dates from May 3 to 15, 1989. On April 15, 1992 appellant filed a claim for carpal tunnel syndrome causally related to her federal employment. The Office accepted the claim for carpal tunnel syndrome. Appellant was retroactively paid compensation based on a pay rate of March 20, 1985. By decision dated September 11, 1995, the Office determined that the pay rate on March 20, 1985 was properly used to calculate appellant's compensation.

The Board finds that the case is not in posture for decision.

Under the Federal Employees' Compensation Act, compensation is 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…."[1]

In the present case the Office used the monthly pay at the time of injury for the right shoulder injury, March 20, 1985. Appellant requested that the Office use a later date, and the

[1] 5 U.S.C. § 8101(4); *see also Ralph W. Moody*, 42 ECAB 364 (1991).

Office considered two alternatives; (1) the time of injury for the carpal tunnel syndrome, and (2) the date of a recurrence of disability.

With regard to the carpal tunnel syndrome, the Board notes that the Office referred to the date November 16, 1988, which is the date appellant indicated that she became aware of the condition and its relationship to federal employment. The date of injury in an occupational disease claim, however, is the date of last exposure to the implicated employment factors.[2] As noted by a hearing representative, in connection with the issue of timeliness of the filing of the claim, the date of last possible exposure appears to be May 15, 1989. The Board also notes that if the time disability begins is later than the date of injury and would result in a higher monthly pay, then this date would be appropriate under section 8101(4).

In order to establish a date of injury or date disability began for the carpal tunnel syndrome as proper under section 8101(4), there must be evidence that the carpal tunnel syndrome was a disabling condition entitling appellant to compensation for wage loss. The medical evidence of record indicates that a diagnosis of carpal tunnel syndrome was made on November 20, 1991, when Dr. A. Kulkarni reported the electromyogram (EMG) and nerve conduction studies were consistent with right carpal tunnel syndrome. In a form report (Form CA-20) dated September 4, 1992, Dr. Patrick Noel, an orthopedic surgeon, diagnosed right carpal tunnel syndrome and appeared to indicate a period of disability from November 16, 1988 to September 4, 1992.[3] Dr. Noel does not provide an accurate history or any explanation with regard to a period of disability, and therefore it is of little probative value. The Board finds no probative medical evidence as to a period of disability associated with the carpal tunnel syndrome, and therefore "monthly pay" cannot properly be based on the date of this injury or the time disability began for this injury.

With regard to a date of recurrence of disability for the right shoulder injury, the Board finds that the record requires further development.

In the September 11, 1995 decision, the Office stated, "To qualify for a recurrent pay rate the claimant must work full time, *without major interruption*, for, at least, six months." (Emphasis added.) The Office noted that there was evidence that appellant was not working from May 20 to June 17, 1988, and that appellant had filed a Form CA-8 (claim for continuing compensation on account of disability) for the period May 20 to July 15, 1988. It appears that the Office was erroneously interpreting section 8101(4) as requiring a continuous six months of full-time employment prior to the recurrence of disability. This interpretation was specifically rejected by the Board in *Johnny Muro*.[4] In *Muro*, the Board found that there was no sound basis for reading the word "continuous" into the phrase "resumes regular full-time employment." The proper procedure is to first determine whether there was a resumption of regular full-time employment, and if there is, to determine the calendar date six months after the date of

[2] *Hugh A. Feeley*, 45 ECAB 255 (1993).

[3] The date was altered from its original.

[4] 17 ECAB 597 (1966) (interpreting 5 U.S.C. § 790(f), which was later recodified as 5 U.S.C. § 8101(4)).

resumption of work. The final step is to determine whether the employee had a recurrence of disability which began after the six-month period.[5]

In this case the record contains an offer of a full-time modified clerk position effective January 16, 1988, although there does not appear to be specific information from the employing establishment confirming that appellant returned to full-time duties on that date. On remand the Office should make findings as to whether appellant returned to "regular" full-time employment,[6] and determine if appellant has established a recurrence of disability on December 17, 1988 or May 15, 1989 that would entitle her to an adjusted pay rate under 5 U.S.C. § 8101(4). After such further development as the Office deems necessary, it should issue an appropriate decision.

The decision of the Office of Workers' Compensation Programs dated September 11, 1995 is set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, D.C.
April 20, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

[5] *Id.*

[6] With respect to "regular" employment, *see, e.g., Ralph W. Moody*, 42 ECAB 364 (1991); *Eltore Chinchillo*, 18 ECAB 647 (1967).