

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KAREN E. MYERS and U.S. POSTAL SERVICE,
POST OFFICE, Baton Rouge, LA

*Docket No. 03-245; Submitted on the Record;
Issued December 10, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant has met her burden of proof to establish that she is entitled to more than the 31 percent impairment of the left lower extremity previously awarded; (2) whether the Office of Workers' Compensation Programs determined the proper pay rate; and (3) whether the Office abused its discretion by refusing to reopen appellant's case for further review on the merits of her pay rate under 5 U.S.C. § 8123(a) in its October 16, 2002 decision.

On February 23, 1995 appellant, then a 47-year-old rural carrier associate, filed a notice of occupational disease claiming a ganglion cyst of the left ankle with synovectomy and excision December 28, 1994 was related to her driving requirements on and prior to October 15, 1992. She additionally claimed a recurrent ganglion cyst of the same ankle with synovectomy sinus tarsi, which she attributed to driving at work from 1992 through 1994. The Office accepted the conditions of a ganglion cyst aggravation, which required ganglion cyst excision, and the recurrent ganglion cyst, which required fibroma excision, an ankle arthroscopy and a synovectomy. Appellant received appropriate compensation benefits and returned to light-duty work.

By decision dated April 6, 2001, appellant was awarded a schedule award for a 12 percent permanent impairment to her left lower extremity. The period of the award ran from December 28, 1994 through August 26, 1995.

By decision dated November 21, 2001, appellant was found entitled to an additional 19 percent permanent impairment to her left lower extremity. Accordingly, in a decision dated November 26, 2001, appellant was awarded the additional 19 percent impairment rating for her left lower extremity. This equated to a total schedule award to appellant's left lower extremity of 31 percent impairment. The period of the award ran from August 27, 1995 through September 13, 1996.

By decision dated May 7, 2002, the Office modified appellant's claim to show the date of maximum medical improvement to be December 1, 1995. This was based on the most recent medical reports of record which established the date of maximum medical improvement as being December 1995. As the date of appellant's maximum medical improvement was modified to December 1, 1995, the Office found that the schedule award should have started on that date. Appellant received additional compensation, based on the adjusted schedule award, as a result of the later issuance of the schedule award.

In a reconsideration request dated May 15, 2002, appellant argued for an increased schedule award and to have her pay rate changed on her schedule awards. In a March 5, 2002 report, Dr. Rita R. Fontenot, a podiatrist, advised that appellant had been at maximum medical improvement since December 1995. However, due to the formation of increased scar tissue, the posterior tibial branch of the sciatic nerve was now causing constant burning pain in the ankle area, which radiates down the foot and up her leg. The arthritis in appellant's foot and ankle was also noted as being more severe. Due to those factors, Dr. Fontenot recommended that appellant be placed in a permanent modified job assignment with restrictions. In an April 5, 2002 medical report, Dr. Fontenot advised that appellant underwent an impairment evaluation on March 15, 2002 and she concurred with the results. Dr. Fontenot reiterated her previous opinion that appellant had a maximum medical improvement date of December 1995.

In her March 15, 2002 report, Dr. Fontenot advised that appellant was diagnosed with left foot and ankle degenerative arthritis and left mid foot osteoarthritis. She noted that appellant was injured on October 15, 1992 as a result of cumulative trauma of using her left foot to operate her car while delivering mail from passenger side window and developed a cyst on the medial side. Appellant had surgery in 1992 and 1994 to remove the cyst. Dr. Fontenot reported that, during the impairment evaluation, appellant appeared to be cooperative and consistent. She reported chronic bilateral foot and hand chronic numbness. Dr. Fontenot could discern light touch, two point and sharp-dull discrimination. She advised that arthritis, peripheral nerve injury and vascular disease methods were used for the lower extremity impairment summary. It was noted that the gait derangement method could not be combined with the above methods.¹ Dr. Fontenot advised that appellant was found to exhibit a Grade 5 upper extremity and lower extremity strength and, therefore, no strength impairment was afforded. Per Table 17-2, page 526, she noted that the muscle strength method could not be combined with the other methods used. A worksheet with values for the left lower extremity pertaining to the hip, knee, ankle/foot; peripheral vascular system and gait derangement was supplied. The final combined impairment rating for the left lower extremity was noted to be 83 percent and not reduced to the whole person.

By decision dated August 6, 2002, the Office denied appellant's request for reconsideration on the basis that no new and relevant evidence or new legal arguments were advanced to overturn the Office's previous decision.²

¹ See Table 17-2, page 526.

² It is unclear whether this decision pertained to appellant's request for an increased schedule award or her request to have her pay rate changed on the schedule award.

In a letter dated August 30, 2002, appellant again requested reconsideration arguing for an increased schedule award and to have her pay rate changed on her schedule awards. A copy of Dr. Fontenot's March 5, 2002 report was resubmitted.

In a September 23, 2002 letter, the Office requested the Office medical adviser to review the medical report of March 15, 2002 for schedule award consideration. In a report dated October 8, 2002, the Office medical adviser reported that he reviewed the statement of accepted facts dated January 23, 2002 and the March 15, 2002 impairment evaluation from Dr. Fontenot of the left lower extremity. The accepted conditions were noted as being aggravation of an ankle ganglion cyst, ganglion cyst excision and ankle arthroscopy. The Office medical adviser noted that Dr. Fontenot reported a combined 83 percent left lower extremity impairment consisting of 10 percent for limited hip range of motion, 11 percent for limited ankle range of motion, 63 percent for degenerative joint disease of the ankle and 40 percent for vascular disease. It was further noted that Dr. Fontenot listed impairments for arthritis, peripheral nerve injury and vascular disease. The Office medical adviser opined that the report did not meet the requirements of the Office regulations for a schedule award determination because the final impairment figure far exceeded that which one would expect from the accepted conditions and the descriptions of the duties as detailed in the statement of accepted facts. The Office medical adviser requested an updated statement of accepted facts, which clearly stated the accepted conditions. He recommended that, once an updated statement of accepted facts is obtained, the case be referred to a specialist for an impairment evaluation who is familiar with the fifth edition of the American Medical Association (A.M.A.), *Guides to the Evaluation of Permanent Impairment*.

In an October 23, 2002 report, the Office medical adviser reported that he reviewed an updated statement of accepted facts dated October 16, 2002. He reiterated his opinion that Dr. Fontenot's final impairment figures exceed the impairment that one would expect from the accepted conditions and the statement of accepted facts.

By decision dated October 16, 2002, the Office denied appellant's request for review of its May 7, 2002 decision, which modified the date of maximum medical improvement and start date of the schedule award to December 1, 1995.

By decision dated October 23, 2002, the Office denied modification of its prior decision concerning impairment ratings.

The Board finds the case is not in posture for decision regarding whether appellant met her burden of proof to establish that she is entitled to more than the 31 percent impairment of the left lower extremity which the Office had previously awarded.

The schedule award provision of the Federal Employees' Compensation Act³ and its implementing regulation⁴ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use of scheduled members or functions of

³ 5 U. S. C. § 8107.

⁴ 20 C. F. R. § 10.404 (1999).

the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides*⁵ has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.⁶

In denying appellant's claim for an additional schedule award, the Office relied on the October 8 and October 23, 2002 reports of the Office medical adviser, who opined that the March 15, 2002 report of Dr. Fontenot provided a final impairment figure which far exceeded an amount expected for appellant's accepted conditions. The Office further noted that Dr. Fontenot's report "raises the issue as to whether or not she is familiar with the fifth edition of the A.M.A., *Guides*. Her report fails to provide a detailed description of the objective findings that leads her to her rating as well as a description of any pertinent subjective complaints. Furthermore, her report fails to correlate any valid impairment ratings with her accepted conditions, as she does not properly apply the A.M.A., *Guides*. Dr. Fontenot also fails to reference the percent impairment in the proper tables in the A.M.A., *Guides* that she used when making her rating."

In this case, the Board notes that, although Dr. Fontenot's March 15, 2002 report contains findings upon which an impairment rating may possibly be derived, her report requires clarification on the extent and nature of appellant's left lower extremity condition. Her report did not provide specific physical examination findings which could be correlated with the specific tables in the A.M.A., *Guides*.⁷ The Board further notes that, in his October 8, 2002 report, the Office medical adviser reviewed Dr. Fontenot's March 15, 2002 report and requested that the Office obtain an updated statement of accepted facts and refer the case to a specialist who has familiarity with the fifth edition of the A.M.A., *Guides*. The Office, however, provided an updated statement of accepted facts and asked the Office medical adviser to rereview Dr. Fontenot's March 15, 2002 report. Inasmuch as the Office medical adviser was aware of the deficiencies in Dr. Fontenot's March 15, 2002 report and had notified the Office that the case should be referred for a second opinion evaluation by a physician familiar with the fifth edition of the A.M.A., *Guides*, the Office should have secured a second opinion evaluation. Instead, the Office reissued an updated statement of accepted facts and had its Office medical adviser review Dr. Fontenot's March 15, 2002 report. The Office may not avoid in its responsibility in the development of the evidence by denying a claim for an increased schedule award on the grounds which it had been notified by its Office medical adviser needed further development. It is well established that proceedings under the Act are not adversarial in nature and while the claimant

⁵ A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB ____ (Docket No. 01-1361, issued February 4, 2002).

⁶ *Ronald R. Kraynak*, 53 ECAB ____ (Docket No. 00-1541, issued October 2, 2001).

⁷ For example, it is difficult to ascertain how the calculated impairment values were made and what table was utilized in determining an ankle/foot impairment rating as no objective findings were reported and it is difficult, if not impossible, to figure out which charts were used from the form utilized.

has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.⁸

In light of the fact that the Office shares in the development of the evidence and did not follow the advice of its own Office medical adviser, the Board will set aside the Office's October 23, 2002 decision and remand the case for a second opinion. Following such further development as may be necessary, the Office shall issue an appropriate final decision on appellant's entitlement to an additional schedule award.

The Board further finds that the Office improperly determined the pay rate used in administering appellant's additional schedule award of a 19 percent permanent impairment.

On November 26, 2001 the Office issued appellant a schedule award for an additional 19 percent permanent loss of use of the left lower extremity. The award had been based on appellant's weekly pay rate of \$352.16 at the time of maximum medical improvement of August 27, 1995. The Office stated that the award represented 54.72 weeks of compensation at \$264.12, which was 75 percent of appellant's weekly pay of \$352.16 and that it covered the period from August 27, 1995 to September 13, 1996.⁹ In its May 7, 2002 decision, the Office modified the date of maximum medical improvement to December 1, 1995, but determined that appellant was not entitled to an adjusted pay rate as the pay rate in effect on December 1, 1995 was the pay rate used when the schedule award was issued.¹⁰

Appellant contends that an incorrect pay rate was used to calculate her May 7, 2002 schedule award. She argues that the Office did not use the pay rate that was actually in effect on December 1, 1995, the date she was found to have reached maximum medical improvement. Also, she has asserted that a recurrent pay rate in effect at the time of her March 2001 recurrence should be used.¹¹

Section 8107 of the Federal Employees' Compensation Act provides that compensation for a schedule award shall be based on the employee's "monthly pay."¹² For all claims under the Act, compensation is to be based on the pay rate as determined under section 8101(4) of the Act which defines "monthly pay" as:

⁸ *Dorothy L. Sidwell*, 36 ECAB 699 (1985); *William J. Cantrell*, 34 ECAB 1233 (1983).

⁹ The original award of a 12 percent permanent impairment to the left lower extremity was based on a date of maximum medical improvement of December 28, 1994, a weekly pay of \$352.16 of which 75 percent equated to a weekly compensation of \$264.12.

¹⁰ This amounted to a weekly pay of \$352.16 of which 75 percent equated to a weekly compensation of \$264.12.

¹¹ The Board notes that the recurrence date should be April 1 as opposed to March 1, 2000. The record reflects that on May 8, 2000, appellant filed a notice of recurrence commencing April 1, 2000. Appellant stopped work April 5, 2000 and returned to work April 14, 2000. The record reflects that the Office accepted the April 1, 2000 recurrence for medical costs only.

¹² 5 U.S.C. § 8107(a).

“[T]he 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.”¹³

Pursuant to the statute, the Office must therefore determine whether appellant’s monthly pay was greater at the time of injury, the time disability began, or at the time of recurrent disability. The date disability began is noted as being October 24, 1992, with a weekly pay rate of \$259.37. In issuing appellant’s May 7, 2002 schedule award, the Office selected the date of recurrence of December 28, 1994, which had a weekly pay of \$352.16.

Appellant has argued that she should be entitled to an amended pay rate in computing her schedule award payment based on her pay rate in effect on December 1, 1995, the date she was found to have reached maximum medical improvement, or based on the pay rate in effect on April 1, 2000, when she had a subsequent recurrence.

Initially, the Board finds that while the record indicates that appellant suffered a subsequent recurrence on April 1, 2000, she is not entitled to a new recurrence pay rate. In *Johnny A. Muro*,¹⁴ the Board noted that if appellant has one recurrence which meets the requirements of 8101(4), any subsequent recurrence would also meet such requirements and would entitle appellant to a new recurrence pay rate. The Office accepted appellant’s April 1, 2000 recurrence for medical costs only and the record does not reflect that any compensable disability was associated with it. Accordingly, appellant’s April 1, 2000 recurrence does not meet the statutory criteria for a new recurrence pay rate. As appellant’s schedule award was paid for the period December 28, 1994 through August 26, 1995, and as appellant does not appear to have been entitled to a recurrent pay rate, other than the December 28, 1994 recurrent pay rate, during the time period of her schedule award, she would not be entitled to a new recurrence pay rate.

Appellant has contended that she should be entitled to an amended pay rate based on her pay rate in effect on December 1, 1995, the date she was found to have reached maximum medical improvement. The Board, however, has rejected the contention that a schedule award should be computed on the basis of the employee’s pay rate as of the date of maximum medical improvement.¹⁵

In *Charles P. Mulholland, Jr.*, the Board held that section 8101(4) entitles claimants to the greater of the three pay rates and found that monthly pay was greater on the date of injury, rather than on the date of disability; therefore the employee’s pay rate should have been calculated as of date of injury.¹⁶ In this case, the Office’s selection of the date of recurrence of December 28,

¹³ 5 U.S.C. § 8101(4).

¹⁴ 17 ECAB 537 (1966).

¹⁵ *Russell E. Wageneck*, 46 ECAB 653 (1995); *Clarence D. Glenn*, 29 ECAB 779 (1978).

¹⁶ *Charles P. Mulholland, Jr.*, 48 ECAB 604 (1997); *George Crowley*, 34 ECAB 988 (1983).

1994 for calculation of monthly pay, without evaluation of whether date-of-injury monthly pay would be greater, has no basis in statute or case law and constitutes error.¹⁷

The Board has held that where an injury is sustained over a period of time, as in the present case, the date of injury is the date of last exposure to those work factors causing injury.¹⁸ “Injury means a wound or condition of the body induced by accident or trauma, and includes a disease or illness proximately caused by the employment for which benefits are provided under the Act.”¹⁹ In schedule award claims, at issue is the permanent impairment sustained resulting from such injury. Under the Act the possibility of a future injury does not constitute “injury.”²⁰ In schedule award claims where the injury is sustained over a period of time,²¹ the Board has recognized that “the claim covers all exposures which occurred up to the filing of the claim.”²² The Board has also recognized, however, that in schedule award claims relevant medical evidence which determines permanent impairment, including referral and second opinion evaluations, are usually obtained only after the claim is filed. Therefore, the Board has held in cases of continuing exposure to employment factors that the date of the medical report upon which the Office relies in determining the degree of permanent impairment may constitute the date that “injury” occurred.²³ This holding is consistent with long-established precedent that the degree of functional impairment, or injury, is essentially a medical question which can only be established by medical evidence.²⁴ Thus, in schedule award claims wherein 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.

¹⁷ *Barbara A. Dunnivant*, 48 ECAB 517 (1997).

¹⁸ See *Patricia K. Cummings*, 53 ECAB ____ (Docket No. 01-1672, issued June 20, 2002); *Sherron A. Roberts*, 47 ECAB 617 (1996); *Hugh A. Feeley*, 45 ECAB 255 (1993); *Jack R. Lindgren*, 35 ECAB 676 (1984).

¹⁹ See generally 20 CFR § 10.5(14).

²⁰ See *William A. Kandel*, 43 ECAB 1011 (1991); *Mary A. Geary*, 43 ECAB 300 (1991); *Nicholas R. Kothe*, 29 ECAB 4 (1977). (Fear of recurrence of the disease if the employee returns to work does not constitute a valid basis for compensation).

²¹ 20 CFR § 10.5 defines the terms “injury” and “occupational disease or illness.” “Injury” is defined by section 10.5(c)(14) as “a wound or condition of the body induced by accident or trauma, and includes a disease or illness proximately caused by the employment...” “Occupational disease or illness” is defined by 20 CFR § 10.5(c)(16) as “a condition produced in the work environment over a period longer than a single workday or shift by such factors as ... continued or repeated stress or strain...” Thus, pursuant to this regulation the term “injury” includes a condition caused by repeated work stress or strain.

²² See *Barbara A. Dunnivant*, *supra* note 20; *Leonard E. Redway*, 28 ECAB 242 (1977).

²³ See *Barbara A. Dunnivant*, *supra* note 20; *Jerome Carmody*, 29 ECAB 588, 591 (1978).

²⁴ *Maxine J. Sanders*, 46 ECAB 835 (1995); *Arnold A. Alley*, 44 ECAB 912 (1993); *Theresa K. Daly*, 22 ECAB 19 (1970).

The Board has noted in cases such as *Patricia K. Cummings*,²⁵ *Sherron A. Roberts*²⁶ and *Jack R. Lindgren*²⁷ that date of injury is the date of last exposure to the work factors causing injury. This necessarily occurs prior to the medical examination relied upon for determining the extent of permanent impairment. The Board has held that the date of injury is the date of the last exposure which adversely affects the impairment because every exposure which has an adverse effect (an aggravation) constitutes an injury.²⁸ In the usual case, the claimant has either retired or is no longer being exposed to any injurious work factors prior to the date of the medical examination, and, as a result, there is a clearly defined “date of last exposure.” However, in claims such as this, where there is continuing exposure to work factors through the date of the medical examination, the date of injury is the date of last exposure to employment factors which are medically established as causing injury. The Board has long recognized and applied this principle.²⁹ Therefore, the date of last exposure to work factors will constitute the “date of injury” in those cases where the exposure ceased even though the extent of permanent impairment may continue to increase thereafter.³⁰ In those claims where exposure to work factors has ceased, the date of last exposure causing injury is necessarily the date of injury. Conversely, where exposure to work factors continues, the date of injury is the date of the relevant medical evaluation, *i.e.*, the date of the medical examination upon which the extent of permanent impairment has been determined.³¹

In a claim for increased schedule award with alleged continuing exposure to the harmful employment factors, the Office should evaluate whether the date of injury is the date of last exposure or whether exposure has ceased and the date of injury would be considered to be the date of the medical evaluation which substantiates the stabilized permanent impairment. Accordingly, the Board finds that the Office improperly determined appellant’s pay rate based upon her monthly pay on the date of recurrence, December 28, 1994, without evaluation of monthly pay on the date of injury. The case will be remanded to the Office for further proceedings consistent with this opinion.³²

The decision of the Office of Workers’ Compensation Programs dated October 23, 2002 pertaining to an increased schedule award and the October 16, August 6, and May 7, 2002 decisions regarding the issue of pay rate in computing the amount of compensation paid to

²⁵ *Patricia K. Cummings*, *supra* note 21.

²⁶ *Id.*, *supra*. note 21.

²⁷ *Id.*, *supra* note 21.

²⁸ *Patricia K. Cummings*, *supra* note 21; *Sherron A. Roberts*, *supra* note 21; *Louis L. DeFrances*, 33 ECAB 1407 (1982).

²⁹ See *Barbara A. Dunnivant*, *supra* note 20; *Leonard E. Redway*, *supra* note 20; *Jerome Carmody*, *supra* note 26.

³⁰ See *Charles P. Mulholland, Jr.*, *supra* note 19; *George Crowley*, *supra* note 19.

³¹ See *Barbara A. Dunnivant*, *supra* note 20; *Leonard E. Redway*, *supra* note 20.

³² In light of the disposition of the pay rate issue, the third issue in this case is hereby rendered moot.

appellant under her additional schedule award of a 19 percent permanent impairment of the left lower extremity are hereby set aside and the case is remanded to the Office for further proceedings consistent with this opinion.

Dated, Washington, DC
December 10, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member