

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of JUDITH BOULAIS and DEPARTMENT OF THE AIR FORCE,  
AIR FORCE STUDIES & ANALYSES, Washington, D.C.

*Docket No. 96-1889; Submitted on the Record;  
Issued September 18, 1998*

---

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined the rate of pay to be used in calculating appellant's compensation.

On August 29, 1988 appellant, then a 44-year-old analyst, slipped in a wet corridor and fell, landing on her back and neck. Her pay rate at that time was \$48,235.00 a year. She was sent home that day and received continuation of pay from August 30 through September 1, 1988. She was on annual leave from September 2 through 9, 1988 and was on sick leave for surgery unrelated to her employment injury from September 12 through 20, 1988. She returned to work on September 21, 1988. She did not work on September 29, October 5, 12, 18 and 19, 1988 and received continuation of pay for those dates. She stopped working again on October 21, 1988 and received continuation of pay through November 26, 1988. She was on sick leave from November 27, 1988 through January 2, 1989. The Office accepted appellant's claim for herniated C5-6 and C6-7 discs and began payment of temporary total disability compensation effective January 3, 1989. She underwent surgery on January 13, 1989 for discectomy and fusion of the herniated cervical discs.<sup>1</sup>

In a February 28, 1990 letter, appellant contended that her compensation should have been based on her pay rate of \$24.84 an hour as of January 3, 1989 when the compensation payments began. She stated that the Office, however, was paying compensation on the basis of her pay rate as of August 29, 1988 when she was receiving \$23.11 an hour. She argued that her absence from work due to the employment injury did not begin until January 3, 1989. In subsequent letters, appellant contended that her disability did not begin until she began to receive the temporary total disability compensation payments. The employing establishment indicated that appellant's pay as of August 29, 1988 was \$48,235.00. It noted that she received a merit

---

<sup>1</sup> After the surgery, appellant developed severe gastrointestinal problems. The Office has not made a final decision on whether the gastrointestinal condition and related conditions are causally related to appellant's employment injury.

increase on October 9, 1988 to \$49,791.00 and a pay adjustment to \$51,837.00 on January 1, 1989.

Appellant attempted to return to work, four hours a day, 20 hours a week on April 8, 1990 but stopped working the same day. Her pay rate at that time was to be based on the current pay for her former position which was \$55,376.00 a year. She did not return to work thereafter.

In a June 2, 1994 decision, the Office found that appellant's pay rate for basis of computing compensation was her pay rate as of August 29, 1988, the date of injury. The Office found that appellant was immediately disabled as a result of the injury. It further found that appellant was not entitled to use her pay rate at the time of recurrence of disability because the recurrence of disability occurred less than six months after her return to regular, full-time employment. Appellant requested a hearing before an Office hearing representative which was conducted on October 24, 1995. In a March 13, 1996 decision, the Office hearing representative affirmed the Office's June 2, 1994 decision.

The Board finds that the Office properly used appellant's pay rate as of the date of injury, August 29, 1988, in computing her compensation.

Under section 8101(4)<sup>2</sup> the monthly pay to be used in computing compensation is to be the greater of either appellant's monthly pay at the time of injury, at the time disability begins or at the time compensable disability recurs, if it recurs more than six months after the injured employee resumes regular full-time employment. In this case, appellant was injured on August 29, 1988. The term "disability" has been given two definitions in prior Board cases; the inability of an employee to perform the kind of work he or she was doing at the time of the employment-related injury,<sup>3</sup> or the inability to earn the wages that the employee was receiving at the time of the injury.<sup>4</sup> In determining monthly pay for compensation purposes, the Board in *Ronald Blais*<sup>5</sup> used the former definition of an inability to perform the duties of the position held at the time of injury.<sup>6</sup> In that case, the claimant was injured on December 10, 1969 and stopped working that day. He used sick leave until January 5, 1970, receiving full pay during his period of sick leave. On December 22, 1969 while on sick leave, he received a pay increase. He contended that his pay rate should be based on his pay rate at the time his compensation payments began on January 6, 1970, the same argument made by appellant. The Board, however, held in this case that appellant's disability began on December 10, 1969, the date of injury, even though he used sick leave rather than compensation at the beginning of the disability. Therefore, in this case appellant's disability began the same date as the date of injury because she was unable to perform the duties of her position after she fell at work. She cannot argue that her disability began on the date that she began receiving compensation payments

---

<sup>2</sup> 5 U.S.C. § 8101(4).

<sup>3</sup> *Yolanda Librera*, (*Michael Librera*), 37 ECAB 388 (1986).

<sup>4</sup> *Frazier V. Nichol*, 37 ECAB 528 (1986).

<sup>5</sup> 22 ECAB 115 (1970).

<sup>6</sup> *Arthur L. Gunning*, 33 ECAB 1808 (1982); *Johnny A. Muro*, 17 ECAB 537 (1966); 19 ECAB 104 (1967).

because her inability to perform her duties occurred as of the date of injury. She, therefore, cannot assert on this basis that her pay rate as of January 3, 1989 should be used for computing her compensation because she used continuation of pay and sick leave rather than receive compensation in the initial periods of her disability.

Appellant returned to regular full-time work on September 21, 1988. She stopped working again on October 21, 1988, one month later. She, therefore, would not be entitled to use of her pay rate as of October 21, 1988 because the recurrence of disability did not occur more than six months after her return to regular, full-time employment. Appellant returned to work again on April 8, 1990 but stopped working again that same day. This event would be considered a recurrence of disability. It is not required that a claimant work six continuous months after returning to regular, full-time employment but only that a recurrence occur more than six months after a return to regular, full-time employment.<sup>7</sup> It is also not required that any subsequent return to work be to a full-time position if the first return to work is to regular full-time employment. However, appellant was returning to a part-time position at 20 hours a week. Her monthly pay at that time, therefore, was less than her monthly pay at the time of injury. The Office, therefore, properly determined under section 8101(4) that appellant's pay rate at the time of injury, which also was the time that disability began, was to be used in computing appellant's compensation.

The decision of the Office of Workers' Compensation Programs, dated March 13, 1996, is hereby affirmed.

Dated, Washington, D.C.  
September 18, 1998

George E. Rivers  
Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member

---

<sup>7</sup> *Id.*