U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MOE I. FRIEDMAN and DEPARTMENT OF THE NAVY, NEW YORK NAVAL SHIPYARD, SHOP 38, Brooklyn, NY

Docket No. 98-468; Submitted on the Record;
Issued December 27, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs used an appropriate pay rate to calculate a schedule award paid him from April 24, 1995 to October 20, 1996 for occupational lung disease sustained from August 28, 1942 to January 21, 1946; (2) whether the Office properly determined that appellant was not entitled to consumer price index (CPI) adjustments to the schedule award; (3) whether appellant is entitled to a CPI adjustment as the schedule award period was longer than one year; and (4) whether the Office abused its discretion under section 8128 of the Federal Employees' Compensation Act by denying appellant's request to reopen his case for a merit review.

On October 20, 1994 appellant, then an 83-year-old retired machinist, filed a claim for asbestos-related pleural disease sustained from August 28, 1942 to January 21, 1946 when he worked at the employing establishment. The Office accepted that appellant sustained asbestos-related pleural disease. At the time of his voluntary resignation on January 21, 1946, appellant's pay rate was $10.08 per day.[1]

Appellant submitted medical evidence regarding his pulmonary conditions. In an October 31, 1993 report, Dr. Mary O'Sullivan, an attending Board-certified pulmonologist, noted appellant's asbestos exposure in nonfederal employment in 1934, at the employing establishment from 1942 to 1946 and that he smoked two packs of cigarettes per day from 1933 to 1973, quitting at age 60. Dr. O'Sullivan diagnosed "chronic bronchitis, emphysema and asbestos exposure."[2]

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[1] As of May 19, 1943, his pay rate was $9.12 per day.

[2] February 13, 1992 x-rays showed "COPD [chronic obstructive pulmonary disease] with bronchiectasis and chronic pulmonary disease." A December 7, 1993 computerized tomography scan showed "[a]sbestos-related pleural disease," "[c]entrilobular emphysema," "[r]ound atelectasis, right lower lobe, posterior segment."

In a March 17, 1995 note, an Office medical adviser opined that appellant's "emphysema and bronchitis [were] probably related to smoking" two packs of cigarettes a day for 40 years and that his "pleural disease [was] related to asbestos (employment exposure)."

An April 24, 1995 spirometry showed an FEV_1 (forced expiratory volume) of 50 percent.

In a June 15, 1995 report, Dr. Anthony Blau, a Board-certified pulmonologist and second opinion physician, noted examining appellant on April 19, 1995 and reviewing the medical record. Dr. Blau diagnosed chronic obstructive pulmonary disease "of the emphysematous type complicated by asbestosis and asbestos pleural disease." He opined that appellant's condition was "related to his employment injury by aggravation which is permanent."

In a September 1, 1995 report, an Office medical adviser noted that, based on April 24, 1995 pulmonary function test reports, appellant's FEV_1 of 50 percent constituted a 50 percent, class three impairment according to page 162, Table 8 of the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. The medical adviser recommended that appellant be granted a schedule award for a 50 percent impairment of the lungs.

In an October 17, 1995 file memorandum, an Office claims examiner noted that appellant had visited on October 10, 1995 and "explained that the date of injury of June 1, 1962 was … the day he reached retirement age. He worked for the federal government from 1941 to 1946. From 1946 to 1975, appellant was employed in his own" housewares and hardware business, retiring "from all employment in 1975. This was not due to the effects of asbestos, but rather just to retire." The claims examiner noted that, after researching the issue, appellant "would be paid at the rate of when he left federal employment in 1946, a rate of $10.08 per day." An undated 1996 file memorandum notes that the Office had "used wrong pay rate; [appellant's] pay rate should be only $50.40."[3]

By decision dated December 17, 1996, the Office awarded appellant a schedule award for a 50 percent impairment of both lungs, equaling 78 weeks of compensation. Appellant's weekly rate of pay was listed as $50.40. The Office multiplied this figure by the 75 percent rate as appellant had a dependent spouse, to equal a compensation payment of $37.80 per week. The period of the award ran from April 24, 1995 to October 20, 1996, totaling $2,948.40.[4]

[3] An October 17, 1996 daily computation log shows an effective pay rate date of June 1, 1962. However, an October 24, 1996 daily computation log shows an effective pay rate date of April 24, 1995. A November 14, 1996 telephone memorandum notes that appellant wanted an explanation of how the compensation payments were calculated. The Office "[e]xplained to [appellant] that we were having problems concerning his payments and that we are in the process of issuing a check covering the period August 18 through October 12, 1996. We will send [appellant] a letter explaining the breakdown of his payments."

[4] The Office noted that "[d]ue to a problem calculating [appellant's] award the following payments were issued to [him] for the schedule award:" $967.68 for the period April 24, 1995 to May 31, 1996; $421.20 for the period June 1 to August 17, 1996; $1,209.60 for the period July 21 to August 17, 1996; $151.20 for the period October 13 to November 9, 1996; $151.20 for the period November 10 to December 7, 1996; $47.52 for the period April 24, 1995 to October 20, 1996.

In an undated letter received by the Office on April 4, 1997, appellant requested reconsideration, asserting that the Office used an incorrect pay rate in calculating the schedule award, as it was based on his rate of pay "over 50 years ago" with no increases or adjustments.

In the April 4, 1997 letter, appellant also asserted that his pulmonary function had further deteriorated and submitted new medical evidence in support of this contention. In an April 4, 1997 report, Dr. O'Sullivan stated that appellant was totally disabled for work due to severe shortness of breath and status post surgical repair of an aortic aneurysm. In an April 24, 1997 report, she noted that appellant's exercise tolerance had further diminished due to his occupationally-related asbestosis and he could not walk more than one block. Dr. O'Sullivan also noted the presence of "scattered nodules" in both lungs "probably related to asbestos exposure but of great concern because of the risk of malignancy." She prescribed continued medications, oxygen and an exercise regimen. Dr. O'Sullivan enclosed April 22, 1997 spirometry test results showing an FEV_1 of 51 percent, "[m]oderate obstructive airflow limitations with marked bronchodilator response," with "[m]ild relative hypoxemia at rest with exercise-induced oxygen desaturation." These medical reports were received by the Office on April 30, 1997.

By decision dated May 9, 1997, the Office denied appellant's request for reconsideration on the grounds that his April 4, 1997 letter neither raised substantive legal questions nor included new and relevant evidence.

Regarding the first issue, the Board finds that the Office used the correct rate of pay in calculating appellant's schedule award.

Appellant first contends that the Office based its December 17, 1996 schedule award on an incorrect rate of pay, asserting that his pay rate should be prorated to reflect a machinist's pay rate as of April 24, 1995 when the schedule award period began. The Board finds, however, that the Office used the correct rate of pay.

Section 8101(4) of the Federal Employees' Compensation Act[5] defines "monthly pay" for purposes of computing compensation benefits 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." This section applies to compensation benefits paid pursuant to a schedule award.[6] In this case, the Office properly used appellant's pay rate of $10.08 per day, or $50.40 per week at the time of his resignation from federal employment on January 21, 1946, to determine his compensation benefits as delineated in the December 17, 1996 schedule award.[7]

[5] 5 U.S.C. § 8101(a).

[6] *Clarence D. Glenn*, 29 ECAB 779 (1978).

[7] *James C. Stevens*, 32 ECAB 1270 (1981).

Regarding the second issue, the Board finds that appellant is not entitled to receive consumer price index adjustments to his schedule award.

The Act provides for cost-of-living adjustments under section 8146(a),[8] as amended effective October 1, 1966 to allow for consumer price index increases.[9] Section 8146(a) provides that compensation payable on account of disability or death which occurred more than one year before the effective date of a cost-of-living increase shall be increased by the percentage of that increase.[10] The Board has held that section 8146(a) is applicable "only in those situations where a claimant has been entitled to compensation for more than a year prior to the effective date of the increase."[11] In *Anthony M. Kowal*,[12] the Board held that the claimant was not entitled in 1980 to the 1994 CPI increase because he was not disabled during 1993, the year prior to the 1994 CPI effective date.

The Board has held that CPI increases are not payable for injuries occurring prior to October 1, 1966, unless a claimant establishes disability for work more than one year prior to October 1, 1966, related to the accepted injury or condition.[13] The Board interpreted the legislative history of the 1966 amendments to the Act to mean that in order to receive a CPI increase, a claimant "would have to have been entitled to compensation more than one year before the effective date of the cost-of-living increase." [14]

As applied to this case, the Board finds that appellant is not entitled to receive CPI increases as he was injured prior to October 1, 1966 and was not disabled for work for more than one year prior to October 1, 1966.[15] His accepted condition of asbestosis was sustained in the

[8] 5 U.S.C. § 8146(a).

[9] Public Law 89-488. Section 8146(a) was later amended by the Omnibus Budget Reconciliation Act of 1980, which provided that compensation payable due to injury or death occurring more than one year before March 1 of each year, "shall be increased each year on that date by the amount determined to represent the change in the price index published for December of the preceding year over the price index published for December of the year before that, adjusted to the nearest one-tenth of one percent. The first cost-of-living increase based on this law, on March 1, 1981, extended from the last month in which the price index resulted in an adjustment prior to enactment of the new legislation, which was August 1980." Federal (FECA) Procedure Manual, Part 2 -- Claims, Chapter 2.901.12.c, *Consumer Price Index Adjustments* (December 1995).

[10] 5 U.S.C. § 8146(a).

[11] *George W. Cooper*, 40 ECAB 517 (1989).

[12] Docket No. 95-2529 (issued December 10, 1997).

[13] The Office's procedures as of June 1997, one month after the May 9, 1997 decision, indicate that CPI increases are not payable prior to October 1, 1966. No CPI percentage rate is listed for injuries occurring between October 1, 1949 and October 1, 1966. Although this table is effective one month after the May 9, 1997 decision and is therefore not binding in this case, it does reflect the Office's policies and procedures at the time the May 9, 1997 decision was issued. Federal (FECA) Procedure Manual, Part 2 -- Claims, Chapter 2.901, *Computing Compensation, Exhibit One, Minimum Compensation Rates (Disability) and Minimum Pay Rates (Death)* (June 1997).

[14] S. Rep. No. 1285, 89th Cong., 2d Sess. 2, 3 (1966).

[15] *Virginia Chappell*, 45 ECAB 275 (1993); *Franklin L. Armfield*, 29 ECAB 500 (1978) (in which the Board held

performance of duty between August 28, 1942 and January 21, 1946.[16] Where an injury is sustained over a period of time, as in this case, the date of injury is the date of last exposure to the employment factors causing the injury.[17] As appellant resigned from federal employment on January 21, 1946, the Office properly used January 21, 1946 as the date of injury.[18] Appellant has not established that he was disabled for any period during his federal employment due to the accepted asbestosis condition.

Thus, appellant is not entitled to receive CPI increases to his schedule award compensation on the grounds that he was injured prior to October 1, 1966 and has not established that he was disabled for work due to the accepted condition for more than one year prior to October 1, 1966.

Regarding the third issue, the Board further finds that appellant is not entitled to a CPI increase during the schedule award period, even though such period was longer than one year.

The Act's implementing regulations at section § 10.420(b), regarding application of cost-of-living adjustments, provides that a schedule award "[w]here an injury does not result in disability but compensation is payable for permanent impairment of a covered member, organ or function of the body, a beneficiary is eligible for cost-of-living adjustments under 5 U.S.C. § 8146(a) where the award for such impairment began more than one year prior to the date the cost-of-living adjustment took effect."[19] The Office's procedures and Board precedent incorporate the regulation's principle that where a "schedule award represents the first payment

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that the "legislative history of section 8146(a) clearly shows an intent to have a cost-of-living increase apply only in those situations where an employee has been entitled to compensation for more than a year prior to the effective date of the increase."

[16] The Board notes that when appellant sustained his injury between August 28, 1942 and January 21, 1946, the Act did not contain any provision for the payment of schedule awards. On October 14, 1949 the Act was amended, retroactive to January 1, 1940, such that "major" impairments would be covered under the schedule award provisions of 5 U.S.C. § 8107. The record indicates that appellant's asbestosis was accepted under this provision; *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, Chapter 2.808.5(2) (March 1995).

[17] *Sherron A. Roberts*, 47 ECAB 617 (1996); *Jack R. Lindgren*, 35 ECAB 676 (1984).

[18] The Board notes that the date of injury should not be confused the with date of maximum medical improvement used to calculate the schedule award. The period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of his or her employment injury. Maximum improvement means that the physical condition of the injured member of the body has stabilized and will not improve further. *Asline Johnson*, 42 ECAB 619 (1991); *Adela Hernandez-Piris*, 35 ECAB 839 (1984). The determination of the date of maximum improvement is factual in nature and depends primarily on the medical evidence. *Franklin L. Armfield*, 28 ECAB 445 (1977). In this case, for purposes of determining appellant's entitlement to a schedule award, the Office determined that appellant reached maximum medical improvement as of April 24, 1995, when spirometry showed an FEV_1 of 50 percent. Therefore, the Office properly directed that the schedule award period begin to run on April 24, 1995.

[19] 20 C.F.R. § 10.420(b).

for compensable disability, the claimant's entitlement to [CPIs] does not begin until one year after the award begins."[20]

In this case, although the period of the schedule award ran from April 24, 1995 to October 20, 1996, longer than one year, the Board finds that as appellant was injured prior to the enactment of the October 1, 1966 amendments to the Act, he is precluded from receiving a CPI for the schedule award period. In other words, as appellant was not initially entitled to receive CPI as he was injured prior to when the October 1, 1966 amendments went into effect, he cannot receive CPI for any period of compensation paid pursuant to that injury, even if such compensation payments were made during a period where amendments to the Act allowed for CPI.

Regarding the fourth issue, the Board finds that the Office did not abuse its discretion by failing to reopen appellant's case for a merit review.

To require the Office to open a case for reconsideration, section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides in relevant part that a claimant may obtain review of the merits of the claim by written request to the Office, identifying the decision and the specific issue(s) within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed, by showing that the Office erroneously applied or interpreted a point of law, or advancing a point of law or fact not previously considered by the Office, or submitting relevant and pertinent evidence not previously considered by the Office.[21] Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the three requirements will be denied by the Office without review of the merits of the claim.[22]

In this case, appellant requested reconsideration of the December 17, 1996 schedule award by submitting new medical reports dated April 4 and 24, 1997 from Dr. O'Sullivan, his attending pulmonologist, and April 22, 1997 spirometry results. Appellant alleged that this new evidence indicated a worsening of his pulmonary condition following the schedule award period which ended on October 20, 1996. However, the two reports from Dr. O'Sullivan, and the spirometry results, were all prepared in April 1997, approximately six months after the December 17, 1996 schedule award determination. Thus, this evidence does not establish that the December 17, 1996 schedule award was in error, or was not supported by the medical record at the time that decision was issued. Therefore, the Office May 9, 1997 decision denying appellant's request for a merit review was proper.[23]

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[20] *David M. Chillemi*, Docket No. 95-2546 (issued August 14, 1997); *Franklin J. Armfield*, 29 ECAB 500 (1978); Federal (FECA) Procedure Manual, Part 2 -- Claims, Chapter 2.808.7(4) *Schedule Awards and Permanent Disability Claims* (March 1995).

[21] 20 C.F.R. § 10.138(b)(1).

[22] 20 C.F.R. § 10.138(b)(2).

[23] On return of the case to the Office, appellant may request the Office to adjudicate whether he is entitled to an additional schedule award for pulmonary impairment.

The decisions of the Office of Workers' Compensation Programs dated May 9, 1997 and December 17, 1996 are hereby affirmed.

Dated, Washington, D.C.
December 27, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member