U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICIA K. CUMMINGS and GENERAL SERVICES ADMINISTRATION, EMPLOYEE & LABOR RELATIONS BRANCH, Fort Worth, TX

Docket No. 01-1672; Submitted on the Record;
Issued June 20, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs determined the correct pay rate for a schedule award granted to appellant for 20 percent permanent impairment of each upper extremity.

On September 19, 1997 appellant, then a 36-year-old employee relations specialist, filed a claim alleging that she sustained bilateral carpal tunnel syndrome while in the performance of duty. She stated that she became aware of her condition on February 5, 1991 and related it to her employment at that time. Appellant did not stop work. The Office accepted the claim for bilateral tendinitis and bilateral carpal tunnel syndrome. Also, on February 2, 2000 appellant filed a claim for a schedule award.

Accompanying appellant's claim were medical records from Dr. Michael Horoda, a general practitioner, dated February to April 1991. He treated appellant for early carpal tunnel syndrome.

Subsequently appellant submitted medical records from Dr. Scott Pulliam, a Board-certified family practitioner, dated February 9 to July 28, 1997; a medical report from Dr. Gary Gottfried, Board-certified in physical medicine and rehabilitation, dated May 18, 1998; and treatment notes from Dr. John Malonis, a Board-certified orthopedist, dated April 23, 1998. Dr. Pulliam diagnosed appellant with carpal tunnel syndrome which was exacerbated by appellant's keyboarding duties. Dr. Gottfried performed electrodiagnostic studies which demonstrated median nerve conduction slowing across both wrists and hands consistent with moderately severe bilateral carpal tunnel syndrome. Dr. Malonis diagnosed appellant with bilateral carpal tunnel syndrome.

In a letter dated April 6, 1999, the Office requested that Dr. Malonis submit an impairment determination of appellant's condition in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (fourth edition 1993). By report dated July 13, 1999, he determined that appellant reached maximum medical improvement

and sustained a 20 percent permanent impairment of the upper extremities, 10 percent for the left upper extremity and 10 percent for the right upper extremity.[1]

On February 1, 2000 an Office medical adviser reviewed Dr. Malonis' report dated July 13, 1999. The Office medical adviser concurred with Dr. Malonis' impairment rating and determined, after applying the A.M.A., *Guides*, that appellant sustained 10 percent for the left upper extremity and 10 percent for the right upper extremity and was entitled to a schedule award of 10 percent permanent impairment of each upper extremity.[2]

By decision dated March 21, 2000, the Office determined that appellant sustained a 20 percent permanent loss of use of the bilateral upper extremities.[3] The Office determined appellant's pay rate to be $593.98 per week. The period of the schedule award was from July 13, 1999 to September 22, 2000.

Appellant was issued checks for the period July 13, 1999 to February 26, 2000 for $14,573.89; seven separate payments for the period February 27 to September 9, 2000 of $1,781.96, totaling $12,473.72; and for the period September 10 to September 21, 2000 a payment of $763.68.

In a letter dated April 6, 2000, appellant requested an oral hearing before an Office hearing representative. She testified that she did not contest the percentage of impairment granted by the Office, rather she indicated that the compensation benefits were based on the incorrect pay rate.

In a decision dated January 16, 2001, the Office hearing representative vacated the Office's decision dated March 21, 2000 and remanded the case for further development of the pay rate issue.

In a memorandum dated March 7, 2001, the Office noted that appellant first lost time for the accepted condition of bilateral carpal tunnel syndrome on March 31, 1997. The Office determined that this date was the effective pay rate date and compensation rate. The weekly pay rate as of March 31, 1997 was $965.38. The total payment was $27,811.29.

In a decision dated March 13, 2001, the Office determined that appellant's effective pay rate for the period July 13, 1999 to September 21, 2000 was $965.38. The Office noted that the effective date of March 31, 1997 was the first date of lost time for appellant's accepted condition of carpal tunnel syndrome. The Office noted that appellant would receive an additional award of $18,661.74 for the period July 13, 1999 to September 21, 2000.

The Board has duly reviewed the case record and concludes that the Office did not properly determine appellant's pay rate for computation of her schedule award.

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[1] *See* Table 16, page 57, of the A.M.A., *Guides.*

[2] *Id*.

[3] The context of the record indicates that there was a 10 percent award for each of the upper extemities.

Section 8107 of the Federal Employees' Compensation Act provides that compensation for a schedule award shall be based on the employee's "monthly pay."[4] 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...."[5] (Emphasis supplied.)

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 within the parameters described above. In the present case, the Office initially utilized appellant's monthly pay at the date of injury for an unrelated condition in 1990. The hearing representative determined, in a decision dated January 16, 2001, that this was incorrect and remanded the case for further development with regard to the pay rate issue. On remand the Office used appellant's monthly pay at the date disability began for appellant's carpal tunnel syndrome, March 31, 1997, the date appellant began losing time due to her accepted condition. As she had no recurrent disability, the issue in the present case is whether the Office should have selected the date of injury or the date of disability as the date for computation of monthly pay.

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).[6] In the present case, the Office selected the date of disability as the appropriate date for calculation of appellant's monthly pay for schedule award purposes.[7]

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.[8] 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 an "injury."[9] In schedule award claims where the injury is sustained over a period of time,[10] the Board has

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[4] 5 U.S.C. § 8107(a).

[5] 5 U.S.C. § 8101(4).

[6] *See Herbert L. Blatt*, 31 ECAB 648 (1980).

[7] *See Barbara A. Dunnavant,* 48 ECAB 517 (1997).

[8] *See Sherron A. Roberts*, 47 ECAB 617 (1996); *Hugh A. Feeley*, 45 ECAB 255 (1993); *Jack R. Lindgren*, 35 ECAB 676 (1984).

[9] *See 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).

[10] 20 C.F.R. § 10.5(ee) defines the terms "injury" and "occupational disease or illness." "Injury" is defined by

recognized that "the claim covers all exposures which occurred up to the filing of the claim."[11] 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 an "injury" occurred.[12] This holding is consistent with a long-established precedent that the degree of functional impairment or injury, is essentially a medical question which can only be established by medical evidence.[13] 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.

The Board has noted in cases such as *Sherron A. Roberts*[14] and *Jack R. Lindgren*[15] 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.[16]

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." 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.[17]

The Board finds that the Office improperly determined appellant's pay rate based upon her monthly pay on the date of disability when appellant first lost time due to her injury instead

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section 10.5(ee) as a condition of the body caused by a specific event or incident or series of events or incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member or function of the body affected. "Occupational disease or illness" is defined by 20 C.F.R. § 10.5(q) as "a condition produced by the work environment over a period longer than a single workday or shift." Thus, pursuant to this regulation the term "injury" includes a condition caused by repeated work stress or strain.

[11] *Leonard E. Redway*, 28 ECAB 242 (1977).

[12] *Jerome Carmody*, 29 ECAB 588, 591 (1978); *see also Barbara A. Dunnavant*, *supra* note 6.

[13] *Theresa K. Daly*, 22 ECAB 19 (1970).

[14] *Supra* note 7.

[15] *Supra* note 7.

[16] *See Barbara A. Dunnavant*, *supra* note 6; *Louis L. DeFrances*, 33 ECAB 1407 (1982).

[17] *See Redway supra* note 11.

of the appropriate calculation based on the date of the medical evaluation which substantiated the degree of permanent impairment. In the present case, the medical examination relied upon for determining the extent of permanent impairment was a July 13, 1999 report from Dr. Malonis. Therefore, the proper pay rate should be appellant's pay rate as of July 13, 1999. Consequently, the case must be remanded for calculation of the pay rate.

The decision of the Office of Workers' Compensation Programs dated March 31, 2001 is set aside and the case is remanded to the Office for further proceedings consistent with this opinion.

Dated, Washington, DC
June 20, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member