U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HEATHER A. SANTOS and U.S. POSTAL SERVICE, POST OFFICE, Westport, MA

Docket No. 01-1582; Submitted on the Record; Issued March 14, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, A. PETER KANJORSKI

The issues are: (1) whether appellant has greater than a 10 percent impairment of his left upper extremity and a 10 percent impairment of his right upper extremity; (2) whether the Office of Workers' Compensation Programs properly calculated her schedule award based on her right wrist carpal tunnel syndrome.

On October 20, 1989 appellant, then a 22-year-old clerk, filed a claim for traumatic injury alleging that on that day she injured her left wrist. The Office accepted appellant's claim for strain and sprain, left wrist.

Appellant returned to full duty on June 17, 1991 after left wrist surgery on June 3, 1991. On July 29, 1991 the Office expanded the accepted injuries to include the "conditions of left trigger finger, ganglion of the wrist and a resolved traumatic carpal tunnel syndrome" as a result of the work-related injury on October 20, 1989.

In a report dated June 2, 1997, Dr. Glenn Dubler, appellant's treating physician and a Board-certified orthopedic surgeon, stated that appellant had a right wrist ganglion cyst and mild carpal tunnel syndrome, left upper.

In a report dated September 27, 1997, Dr. Dubler stated that appellant was restricted to "20 hours per week -- maximum work and follow up with me in about 4 to 6 weeks after obtaining an ultrasound study of the dorsum of the wrist to evaluate the area for possible cyst versus scar tissue."

In a report dated December 22, 1997, Dr. Dubler stated that his examination revealed positive bilateral wrist flexion test with lateral positive carpal compression and bilateral positive Tinel's sign over medial nerve at wrist. No thenar atrophy was noted. He stated that appellant had probable bilateral carpal tunnel syndrome.

In a report dated the same day, Dr. Dubler stated that appellant could return to light duty, not more than 20 hours a week, with restrictions against repeated grasping or manipulations by either hand.

On January 9, 1998 appellant filed a claim for recurrence of disability alleging that she injured her right hand by overuse on December 22, 1997 as a result of her left hand work-related injury.

In a report dated January 9, 1998, Dr. Mary Lussier, Board-certified in psychiatry and neurology, stated that she performed electromyography and nerve conduction tests on that date and noted normal findings. She noted no signs of carpal tunnel syndrome, ulnar neuropathy, thoracic outlet syndrome nor peripheral polyneuropathy in either arm.

In a report dated that same date, Dr. Steven G. McCloy, a specialist in internal medicine, stated that, upon examination, appellant showed a negative Tinel's sign over both wrists with no thenal thickening, a normal two-point discrimination bilaterally and a normal Semmes-Weinstein filament testing in both hands. He concluded that appellant had symptoms of bilateral hand and wrist pain but "does not have any objective evidence by my testing for median neuropathy." Dr. McCloy stated that appellant "has an overuse syndrome involving both hands and arising out of her work. She may have carpal tunnel syndrome or she may just be at risk for carpal tunnel syndrome." Dr. McCloy noted that she was capable of working with restrictions as noted by Dr. Dubler.

In a report dated January 23, 1998, Dr. McCloy noted appellant's negative nerve conduction study. He noted that he had discussed the negative result with Dr. Dubler and that they "are both of the opinion that [appellant] has mild bilateral carpal tunnel syndrome which is currently electrodiagnostically negative."

In a report dated February 2, 1998, Dr. Dubler stated that, based on appellant's "history of her occupational activity," she had mild electronegative bilateral carpal tunnel syndrome."

On the same day, appellant filed a claim for an occupational disease alleging that her right wrist, carpal tunnel syndrome, was work related. Appellant did not stop work. The employing establishment noted that appellant was working 20 hours a week at the time of the claim and remained at 20 hours a week after her claim was filed.

In a report dated February 5, 1998, appellant's supervisor noted that he is "[s]till keeping her on limited duty with her restrictions. She is working 20 hours per week as she requested in her light-duty request back in August when she had surgery for her cyst removal."

In a report dated March 2, 1998, Dr. Dubler stated that appellant could work an eight-hour day with restrictions.

In a decision dated March 3, 1998, the Office accepted appellant's December 22, 1997 claim for right carpal tunnel syndrome.

In a report dated April 27, 1998, Dr. Dubler stated that appellant could return to light duty for 4 hours a day, not to exceed 20 hours a week. On June 3, 1998 appellant accepted a revised limited-duty job offer.

In a decision dated October 19, 1998, the Office found that appellant sustained a recurrence of disability of left carpal tunnel syndrome on December 22, 1997.

On January 4, 1999 appellant filed a Form CA-7 claim for wage loss for the period December 22, 1997 to December 22, 1998. She noted that her pay rate was $18.65 an hour and that she earned $18,581.45 in that time frame.[1] In a time analysis form, appellant stated that she "used 20 hours leave-without-pay per week for 52 weeks" as per her doctor's restrictions.

On February 5, 1999 the Office requested that the employing establishment provide appellant's actual earnings from December 22, 1996 to December 22, 1997 in order to determine appellant's compensation.[2]

In a report dated March 3, 1999, the Office calculated that appellant's wage-earning capacity at the time of her injury on December 22, 1997 was $386.44, that the current pay rate for that job is $395.51, that she had earned $357.34, and that her weekly wage-earning capacity loss was $28.55, or $115.96 every 4 weeks.

In a letter dated March 30, 1999, the employing establishment stated that appellant worked 21.23 hours a week prior to her December 22, 1997 work-related injury and that she has since returned to light duty of 20 hours per week. The compensation difference in what she earned before and after the December 22, 1997 injury, $1,142.93, will be sent to her by checks no later than April 2, 1999.

In a letter dated April 14, 1999, appellant stated that at the time of her left wrist work-related injury on October 20, 1989 she was working "40 plus hours per week." At the time of her December 22, 1997 right hand injury, she was working 20 hours a week due to right hand surgery performed on July 8, 1997. Appellant noted that the Office paid her less compensation than she should have received. She noted that the Office issued two checks for $1,142.93 for her right hand injury, "which is wrong."

On May 8, 1999 the Office received appellant's claim for wage loss from December 23, 1998 to January 29, 1999.

In a report dated May 17, 1999, Dr. Dubler rated appellant for a left carpal tunnel syndrome impairment rating. He noted that active range of motion was performed with 15 degrees of radial deviation, 45 degrees of ulnar deviation, 60 degrees of dorsiflexion-flexion and 70 degrees of palmar-flexion. Appellant had full pronation and supination of the forearm. Dr. Dubler stated that appellant had hot tingling sensation on the left median nerve which interferes with activity; he also noted that it swells and causes her to wake from sleep. Based on

[1] Appellant also stated she earned $18.63 an hour in a February 12, 1999 CA-8 form.

[2] Appellant submitted multiple wage-loss claim forms from December 22, 1998.

the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993),[3] he stated that "the median nerve entrapment at the wrist, with moderate severity, is assigned 20 percent upper extremity impairment."

In a report dated June 28, 1999, Dr. Dubler stated that, in accordance with the A.M.A., *Guides,* appellant has a 20 percent right upper extremity impairment based on her median nerve entrapment at the wrist of moderate severity.

In a statement of accepted facts dated August 13, 1999, the Office stated that it accepted among other conditions left carpal tunnel syndrome based on an injury sustained on October 20, 1989 and right carpal tunnel syndrome based on a February 2, 1998 claim.

In a report dated August 24, 1999, Dr. Barry W. Levine, an Office medical adviser, reviewed Dr. Dubler's May 17, 1999 evaluation and determined that appellant had paresthesias of the left hand which wakens her, limitations of use of the left hand and slight limitation of radial deviation. He found that appellant had a moderate impairment due to median nerve entrapment giving her a 20 percent upper extremity impairment.[4]

In a report dated October 21, 1999, Dr. George L. Cohen, an Office medical adviser, reviewed Dr. Dubler's May 1999 evaluation of appellant's impairment. He noted that appellant had full range of motion in both wrists and noted the absence of any atrophy. Relying on the A.M.A., *Guides*, Dr. Cohen stated:

> "Using Table 16, page 57, for carpal tunnel syndrome in the right and left upper extremities, of a mild degree of severity, there is a 10 percent impairment of the left upper extremity and a 10 percent impairment of the right upper extremity. The condition is categorized as mild since there is no atrophy, range of motion is relatively good and electrodiagnostic studies were normal. When Table 16 is used, there is no additional impairment for pain, weakness or for abnormal motion."

By decision dated January 25, 2000, the Office awarded appellant a schedule award of 10 percent impairment of the left arm. Her award was calculated on a weekly pay scale of $646.40.[5]

By decision dated the same day, the Office awarded appellant a schedule award of 10 percent impairment of the right arm. Her award was calculated on a weekly pay scale of $385.32.

By letter dated February 23, 2000, appellant, through counsel, requested an oral hearing.

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[3] A.M.A., *Guides* 57, Table 16.

[4] *Id.*

[5] Appellant's pay rate at the time she stopped work on account of her October 20, 1989 work-related injury was $16.16 an hour. Appellant worked 40 hours a week prior to the October 1989 injury.

In a report dated February 29, 2000, the Office noted that appellant was earning $18.15 an hour at the time of her right wrist injury and had worked 21.21 hours a week for the preceding year. She was then working 20 hours a week earning $19.76 an hour. Current pay for the date-of-injury position was $19.16.

In a July 11, 2000 statement of accepted facts, the Office stated that Dr. Dubler noted on March 3, 1998 that appellant could return to an eight-hour day with limited use of her hands.[6] The Office also stated that appellant had a 20 percent impairment of the bilateral upper extremity.

A hearing was held on December 11, 2000. Appellant testified that she initially injured her left hand on October 20, 1989 and that she returned to full duty following surgeries performed on June 3, 1991 and December 17, 1993. She then testified that she returned to restricted work of 20 hours a week as a result of the December 22, 1997 work-related injury. Appellant noted that she asked for a reduction in her workload in 1995 for childcare purposes. She noted that her work varied from 15 to 38 hours a week, depending on the needs of the office. After December 22, 1997, appellant's workweek was reduced to 20 hours a week and work restrictions were added to her position description. The last time she was out of work for either hand was in 1993.[7] Appellant's left hand schedule award was based on a 40-hour workweek as a result of her October 20, 1989 work-related injury. However, she noted that she was receiving $385.32 a week in December 1997 for 20 hours of work each week and that she was disputing the use of that pay scale as the basis for her right wrist schedule award. Appellant's representative stated that the pay rate for her right arm was improperly based on a 20-hour workweek and that it should have been based on a 40-hour workweek. Counsel argued that it was unfair to use a part-time pay rate because the reason for the part-time position was childcare. The hearing representative identified the issues in the case as to whether appellant's schedule awards should be 20 percent for each arm and whether the pay scales used to calculate her compensation from both awards should be based on a 40-hour workweek.

In a decision dated February 22, 2001, the hearing representative affirmed the Office's January 25, 2000 decisions. The Office also noted that the district office would adjudicate the claim for loss of wage-earning capacity based on 20 hours a week effective December 23, 1997.

The Board finds that appellant failed to establish that she sustained more than a 10 percent impairment for either arm for which she received a schedule award.

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[6] Dr. Dubler stated, in an OWCP-5 report dated March 16, 1998, that appellant could return to work for eight hours a day in June 1998. In a CA-17 dated March 2, 1998, Dr. Dubler stated appellant could return to work for eight hours with restrictions but did not check any of the appropriate boxes indicating when she would return to work for that length of time.

[7] In a January 2, 2001 letter, the employing establishment stated that appellant was out of work after her July 24, 1997 surgery and that she did not return to full-time work from that date.

The schedule award provisions of the Federal Employees' Compensation Act[8] and its implementing regulation[9] 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 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* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[10]

Regarding the left wrist impairment, Dr. Dubler, appellant's treating physician, stated that her 20 percent rating was supported by her subjective complaints of a hot tingling sensation of the left median nerve which interfered with activity, that it swells and that it causes her to wake from sleep. However, he was unable to support that rating based on his earlier agreement with Dr. McCloy's finding that appellant's bilateral carpal tunnel syndrome was based on essentially negative diagnostic test results such as a negative Tinel's sign, a negative two-point discrimination test and a negative Semmes-Weinstein test. Dr. Dubler's range of motion findings established that appellant had essentially bilateral full range of motion. Thus, his opinion was insufficient to establish that appellant had a moderate impairment of the median nerve in either wrist.

On the other hand, Dr. Cohen, the Office medical adviser, relied on the data from the treating physician's May 1999 findings,[11] Dr. McCloy's January 1998 report and Dr. McCloy's and Dr. Dubler's February 1998 report which stated that appellant had a mild bilateral carpal tunnel syndrome. He noted no atrophy and appellant's relatively good range of motion as well as the negative diagnostic tests in finding that appellant sustained mild bilateral carpal tunnel syndrome and, based on the A.M.A., *Guides*, recommended a 10 percent impairment rating for each of appellant's wrists.[12]

The medical evidence of record, therefore, does not establish more than a 10 percent impairment to the left upper extremity and a 10 percent impairment rating to the right upper extremity in this case.

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[8] 5 U.S.C. § 8107.

[9] 20 C.F.R. § 10.404 (1999).

[10] *Id*.

[11] *See generally Thomas L. Iverson*, 50 ECAB 515 (1999) (the treating physician in this case cited the A.M.A., *Guides* but does not support his opinion that appellant had a moderate impairment. The Office medical adviser relied on Dr. Dubler and Dr. McCloy's reports to rate appellant as having a mild impairment).

[12] A.M.A., *Guides* (4th ed. 1993) 57, Table 16. The Board notes that the Office medical adviser incorrectly referred to Dr. Dubler's report as May 1998, rather than 1999. The Board also notes that the Office medical adviser improperly stated that the May 1999 medical report from Dr. Dubler included both the right and left wrist. That report evaluated only appellant's left wrist. However, the Office medical adviser also stated that he had reviewed the "January 1998" report which included both wrists and several neuropathy tests and which "was negative for objective findings of carpal tunnel syndrome." Dr. McCloy found mild bilateral carpal tunnel syndrome in a subsequent report which the Office medical adviser supported.

The Board also finds that the Office properly calculated the amount of appellant's schedule award entitlement based on her date-of-injury pay rate.

Under the Act, compensation is based on an employee's monthly pay, which is defined under 5 U.S.C. § 8101(4) as the rate of pay at the time of injury, or the rate of pay at the time disability begins or the rate of pay at the time compensable disability recurs if it recurs more than six months after an employee resumes full-time employment with the United States, whichever is the greatest. The word "disability" is used in several sections of the Act. With the exception of certain sections where the statutory context or the legislative history clearly shows that a different meaning was intended, the word as used in the Act means "Incapacity because of injury in employment to earn the wages which the employee was receiving at the time of such injury.[13] This meaning, for brevity, is expressed as "disability for work." Regarding section 8101(4), the section at issue in this case, the Board finds that the context and legislative history clearly show that the term "disability" was intended to have the general meaning which it has in the Act, namely "disability for work."

Appellant contends upon appeal that her rate of compensation for her right hand carpal tunnel syndrome should be based on her full-time wages at the time of her right hand injury or recurrence of disability date. Both her recurrence of disability and her right wrist were accepted as occurring on December 22, 1997. The Board notes that compensation is to be based on the pay rate either at the time of injury, the rate at the time disability for work begins or the rate at the time of recurrence of disability of the type described in section 8101(4), whichever is greater.[14] This holding is in accord with the prior decisions of the Board involving this issue.[15]

The employing establishment noted, in her recurrence of disability claim form filed on February 3, 1998, that appellant was working no more than 20 hours a week in a limited-duty position at the time of her injury on December 22, 1997. There is no support in the Act, its implementing regulations or in case law, to base appellant's pay rate at the time of her injury to a pay rate greater than what she was receiving at the time of the injury.[16]

[13] *Franklin L. Armfield*, 28 ECAB 445 (1977); *Elden H. Tietze*, 2 ECAB 38 (1948).

[14] Appellant was cleared to return to full duty on June 17, 1991 after her initial claim for left wrist injury.

[15] *Henry F. McGinnis*, 24 ECAB 25 (1973); *Evlyn M. Egan*, 23 ECAB 20 (1971).

[16] Appellant in her appeal noted disagreement generally with the rate of pay used to calculate her schedule award. However, at the hearing, appellant's representative noted agreement with the rate of pay used for appellant's left wrist schedule award and did not raise that issue on appeal.

The decision of the Office of Workers' Compensation Programs dated February 22, 2001 is affirmed.

Dated, Washington, DC
March 14, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member