United States Department of Labor
Employees' Compensation Appeals Board

PAULETTE D. STREET, Appellant	)	
and	)	**Docket No. 04-912**
	)	**Issued: December 28, 2005**
SOCIAL SECURITY ADMINISTRATION, Livonia, MI, Employer	)	

Appearances:
Alexander S. Street, for the appellant
Jim C. Gordon, Jr., Esq., for the Director

Oral Argument December 14, 2005

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 18, 2004 appellant filed a timely appeal of November 25 and March 4, 2003 decisions of the Office of Workers' Compensation Programs that found she was not entitled to compensation from December 15, 1993 to December 6, 1996 and that the proper pay rate for her compensation beginning December 6, 1996 was the pay she was receiving on December 6, 1996. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUES

The issues are: (1) whether appellant is entitled to compensation for partial disability from December 15, 1993 to December 6, 1996, on the basis that she worked 32 hours per week during this period; and (2) whether the Office based appellant's compensation payments beginning December 6, 1996 on the proper rate of pay.

FACTUAL HISTORY

On November 29, 1996 appellant, then a 41-year-old claims representative, filed a claim for compensation for the occupational disease of bilateral carpal tunnel syndrome and left radial head tendinitis that she attributed to typing, filing and handwriting in her employment. On November 29, 1996 the employing establishment reported that she was working 32 hours per week. Appellant stated that she began experiencing pain in her wrists and left elbow about April 1993, that in fall 1993 she requested a reduction of her work schedule in hopes of reducing the amount of stress and pain to her wrists, arms and elbows. On December 15, 1993 she was granted a reduction of her work week to 32 hours per week, which she has worked since that time.

On January 29, 1997 the Office advised appellant that it had accepted that she sustained bilateral carpal tunnel syndrome and left radial head tendinitis in the performance of duty.

In a January 12, 1999 letter, appellant contended that she was entitled to compensation beginning December 15, 1993, when she reduced her work hours from 40 to 32 per week based on the recommendation of her attending physician. She submitted a February 25, 1999 letter from her manager at the employing establishment stating that on December 12, 1993 her work schedule was changed from full-time to part-time "for medical reasons." Appellant's December 10, 1996 request to reduce her hours stated that it was "made in connection with instructions I have received from my physician treating my carpal tunnel syndrome condition."

By decision dated May 18, 1999, the Office found that appellant was entitled to compensation for partial disability from December 6, 1996 to July 12, 1998 based on working 32 hours per week and to compensation beginning July 13, 1998 based on working 20 hours per week. By decision dated February 14, 2001, the Office terminated her compensation on the basis that she had recovered from her accepted bilateral carpal tunnel syndrome and left radial head tendinitis. This decision was reversed by an Office hearing representative in a June 7, 2001 decision. On November 14, 2001 the Office advised appellant that it had accepted that she sustained aggravation of right elbow lateral epicondylitis in the performance of duty.

On October 17, 2002 appellant called the Office to ascertain whether the compensation she had received was based on her pay when she was working 32 or 40 hours. In a November 22, 2002 letter, the Office advised her that her pay rate was based on the 32-hour per week job she held when she filed her claim and that it would consider changing this rate if she provided probative medical evidence showing that her change to a 32-hour work week in 1993 was necessary as a result of her work-related condition.

Appellant submitted a September 22, 1993 report from Dr. Jeffrey D. Stamp, a Board-certified family practitioner, who noted that appellant had episodic numbness and tingling in the fourth and fifth digits of each hand and diagnosed bilateral medial epicondylitis with ulnar nerve entrapment neuropathy. He stated that she should rest the elbows and hands as much as possible, perform no heavy lifting and limit her work at typing and on the computer and writing to a maximum of two hours per day until October 13, 1993. In a November 5, 1993 report, Dr. Stamp noted that the pain in her elbow and the numbness and tingling in her hands were somewhat better after physical therapy but still bothered her. He recommended no strenuous

activities and stated that they had discussed the possibility of her getting a different job where she did not do as much typing. In a September 11, 1996 report, Dr. Jeffrey H. Dysart, a Board-certified family practitioner, diagnosed bilateral carpal tunnel that was certainly related to her work activities and noted that appellant was thinking about taking leave to take care of her ill father "and also her wrists at the same time." In a September 25, 1996 report, Dr. Dysart stated that appellant did not need to take off time to take care of her father, but now needed to think about herself, as she was in a tough spot, not being able to afford to take time off from work or be off work on workers' compensation disability. In a September 26, 1996 report, Dr. Dysart stated that appellant had work leave that she could start that day because her wrists were driving her crazy and that he would "give her a note for off work for two months and see how that helps her for her carpal tunnel." In a December 6, 1996 report, Dr. Sarju Shah, a Board-certified family practitioner, noted that appellant was taken off work from September 26 to November 29, 1996 by Dr. Dysart and that she started noticing the same symptoms when she returned to work. He stated that she had cut down her hours to 32 since 1993 "because she says her financial situation is much better now than it was before because of her husband." Dr. Shah advised appellant to cut down her hours to six and one-half per day for five days, with no more than half an hour of typing per hour.

By letter dated November 22, 2003, the Office advised appellant that the medical evidence did not reflect a need to reduce her work hours in 1993, but did establish her inability to work more than 32 hours effective December 6, 1996. By decision dated March 4, 2003, the Office found that the evidence did not support her reduction in work hours from 40 to 32 per week on December 15, 1993 was a result of her April 1, 1993 work injury and did not show that she could not work a full-time work schedule until December 6, 1996. It also found that the proper rate of pay for compensation beginning December 6, 1996 was her rate of pay on that date, as that was the date disability began.

Appellant requested reconsideration, stating that Dr. Stamp ordered her to reduce her hours of work because it would be better for her condition and that the Office had established her date of injury as April 1, 1993. By decision dated November 25, 2003, the Office found the evidence insufficient to warrant modification of its prior decision.

LEGAL PRECEDENT -- ISSUE 1

Appellant has the burden of proving by the preponderance of the reliable, probative and substantial evidence that he or she is disabled for work as a result of an employment injury or condition. This burden includes the necessity of submitting medical opinion evidence, based on a proper factual and medical background, establishing such disability and its relationship to employment.[1] Whether a particular injury causes disability for employment is a medical issue that must be resolved by competent medical evidence.[2]

[1] *David H. Goss*, 32 ECAB 24 (1980).

[2] *Maxine J. Sanders*, 46 ECAB 835, 839 (1995).

ANALYSIS -- ISSUE 1

The medical evidence does not show that appellant could work only 32 hours or any number of hours fewer than the 40 she was working up to December 14, 1993, from December 15, 1993 to December 6, 1996. Dr. Stamp stated, in a September 22, 1993 report, that she should limit her typing, computer use and writing to two hours per day, but even this limitation, which does not show she could not work 40 hours, was only extended to October 13, 1993. In a November 5, 1993 report, Dr. Stamp stated that he and appellant discussed a different job with less typing, but this does not establish she could not work 40 hours. Although Dr. Dysart stated, in a September 25, 1996 report, that he would give appellant a note for two months off to see how that helped her carpal tunnel syndrome, the accepted condition, the Office's decisions that are on appeal do not address a period of total disability beginning on September 25, 1996 and the record does not contain a claim for such a period of total disability.

The earliest medical report that states appellant was limited to working only 32 hours a week due to her accepted conditions is Dr. Shah's December 6, 1996 report. The Office began paying compensation for partial disability on that date. Appellant has not submitted medical evidence showing that she was partially disabled before December 6, 1996 and therefore has not met her burden of proving that she was partially disabled from December 15, 1993 to December 6, 1996.

LEGAL PRECEDENT -- ISSUE 2

In all situations under the Federal Employees' Compensation Act, compensation is 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…."[3] In an occupational disease, every exposure that has an adverse effect on the claimant's condition constitutes a new and independent injury.[4]

ANALYSIS -- ISSUE 2

The Office used appellant's pay rate on the date her disability began, December 6, 1996. At that time she was working 32 hours per week. Before December 15, 1993 appellant was working 40 hours per week and had already sustained her injury, even though she has not shown that she was disabled before December 6, 1996.

At oral argument on December 14, 2005, the Solicitor acknowledged that the Office should have used whichever pay rate was higher -- her pay for working 32 hours per week on December 6, 1996 or her pay for working 40 hours per week on December 14, 1993. This is consistent with section 8101(4) of the Act and with Board precedent. Generally, the date the

[3] 5 U.S.C. § 8101(4).

[4] *Daniel J. Alfano*, 34 ECAB 314 (1982); *Louis L. DeFrances*, 33 ECAB 1407 (1982).

employee was last exposed to the injurious employment factor is used as the date of injury in an occupational disease case,[5] and that is generally the employee's highest rate of pay. However, this general rule does not preclude using an earlier date during the period of exposure to the injurious work factor as the date of injury, in the unusual situation where the employee's pay is higher at the earlier date and the medical evidence shows the employee was injured by the date chosen. The case will be remanded to the Office for comparison of appellant's pay on December 14, 1993 to her pay on December 6, 1996 and, if the earlier rate is greater, for payment of her compensation beginning December 6, 1996 at that rate of pay.

CONCLUSION

The medical evidence does not establish that appellant was partially disabled and unable to work 40 hours from December 15, 1993 to December 6, 1996. Further development of the evidence is needed to determine whether the Office paid appellant's compensation beginning December 6, 1996 at the proper rate of pay.

ORDER

IT IS HEREBY ORDERED THAT the November 25 and March 4, 2003 decisions of the Office of Workers' Compensation Programs are affirmed insofar as they found that appellant was not entitled to compensation for partial disability from December 15, 1993 to December 6, 1996. Insofar as these decisions found that appellant's compensation beginning December 6, 1996 should be based on her rate of pay on that date, they are set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Issued: December 28, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

[5] *Barbara A. Dunnavant*, 48 ECAB 517 (1997); *George Crowley*, 34 ECAB 988 (1983).