

**United States Department of Labor
Employees' Compensation Appeals Board**

C.E., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
TRANSPORTATION SECURITY)
ADMINISTRATION Boston, MA, Employer)

Docket No. 08-1004
Issued: September 18, 2008

Appearances:
Marc J. Levy, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 19, 2008 appellant, through her attorney, filed a timely appeal from a November 1, 2007 merit decision of the Office of Workers' Compensation Programs determining her pay rate for compensation purposes and a January 31, 2008 nonmerit decision denying her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and over the January 31, 2008 nonmerit decision.

ISSUES

The issues are: (1) whether the Office properly determined appellant's pay rate for compensation purposes; and (2) whether the Office properly denied her request for reconsideration of the merits of her claim under 5 U.S.C. § 8128.

FACTUAL HISTORY

On June 29, 2004 appellant, then a 55-year-old lead screener, filed an occupational disease claim alleging that she sustained bilateral plantar fasciitis due to prolonged standing on

concrete floors during the course of her federal employment.¹ She initially experienced pain in her feet, legs and back beginning on January 6, 2003. The pain continued through March 13, 2003, when a podiatrist diagnosed plantar fasciitis. Appellant asserted on the claim form that she became aware of her condition and its relationship to her federal employment on January 6, 2003. Her supervisor indicated that she worked five days a week for eight hours per day.

In a form report dated September 19, 2003, a nurse practitioner diagnosed persistent bilateral plantar fasciitis and found that appellant was partially disabled from January 31 to September 19, 2003. On November 25, 2003 Dr. Barbara Rickards, a podiatrist, found that appellant was unable to work beginning November 21, 2003. On November 25, 2003 Dr. Robert Hughes, a Board-certified internist, diagnosed stress fracture syndrome and plantar fasciitis. He found that appellant was totally disabled beginning November 21, 2003.

The Office accepted appellant's claim for an aggravation of bilateral plantar fasciitis. On February 4, 2004 she requested compensation for total disability beginning November 30, 2003. The employing establishment indicated on the claim form that appellant worked a fixed schedule of 40 hours per week.

On February 17, 2004 Dr. Hughes diagnosed employment-related plantar fasciitis and opined that appellant was disabled from employment. He noted that her condition began around January 6, 2003.

In a statement dated February 23, 2004, appellant related that on January 6, 2003 she experienced a sharp pain in her back, legs and feet while lifting a bag. She notified her supervisor and requested information about "what procedure to follow." Appellant's supervisor told her he would try to find her lighter work duties; however, he did not provide any light-duty employment. Appellant repeatedly requested the paperwork necessary to file a claim for workers' compensation but management told her that there was no paperwork. On March 13, 2003 she reduced her work hours from 40 to 24 hours and then to 18 hours. Appellant again requested about how to file a claim. On November 25, 2003 her podiatrist took her off work because her condition had worsened such that she could not recover while performing her work duties.

In a form report dated March 5, 2004, Dr. Hughes diagnosed plantar fasciitis and checked "yes" that the condition was caused or aggravated by employment. He found that appellant was partially disabled beginning January 6, 2003.

On June 29, 2004 appellant related that her employment required standing and walking on concrete floors for 8 hours per day 40 hours per week. She experienced pain in her heels bilaterally radiating into her legs and back beginning January 6, 2003. In March 2003 appellant reduced her schedule to three days a week because of the pain. She rested in bed on her

¹ On November 25, 2003 appellant filed a claim alleging that she sustained a traumatic injury on January 6, 2003 in the performance of duty. By decisions dated January 16 and May 19, 2004, the Office denied her claim, assigned file number 012021310, on the grounds that she failed to establish an injury as alleged. It noted that the medical evidence indicated that she may have an occupational disease.

nonscheduled days. The employing establishment did not accommodate her request for a light-duty assignment.

On October 25, 2004 the employing establishment informed the Office by telephone that appellant worked 8 hours per day 3 days per week for 24-hour workweek. Appellant earned night differential for nine hours per week and Sunday premium pay for eight hours per week. The Office paid appellant compensation beginning November 30, 2003 using a pay rate date of November 23, 2003, the date disability began. It found that she worked 24 hours per week on November 23, 2003.

On September 12, 2005 appellant related that she worked 40 hours per week from July 28, 2002 through March 2004. She stated, "In April 2004 after several requests for a 'light duty office assignment,' based on Forms CA-20 from my doctor, I was forced to curtail my previous schedule of at least 40 hours per week." Appellant related that the employing establishment instructed her not to put a reason for requesting reduced hours. She asserted that she should receive compensation based on a 40-hour workweek.

On March 6 and April 11, 2007 appellant's attorney noted that appellant was "currently being paid compensation for this accepted claim based on a part-time or reduced work schedule which was in effect as of the date she last worked rather than her regular full-time wages which were in effect on the date of injury. He asserted that appellant reduced her hours due to physical limitations from her employment injury and requested that the Office review her pay rate.

On May 15, 2007 the Office noted that as appellant worked 24 hours per week on the date of injury she was not entitled to an increase in her pay rate. On July 2, 2007 appellant's attorney related that appellant worked 40 hours per week on January 6, 2003, the date of injury, and maintained that he had provided evidence documenting that she was a full-time employee on that date.² He noted that the employing establishment did not provide the date that she worked part time when it provided pay rate information to the Office.

By decision dated November 1, 2007, the Office found that appellant was not entitled to receive compensation based on a 40-hour workweek. It determined that she worked only 24 hours on the date disability began, November 25, 2007, and thus was not entitled to receive compensation for wage loss as a full-time employee.

On November 3, 2007 appellant requested reconsideration. In a November 5, 2007 statement, her attorney, citing 5 U.S.C. § 8101(4), argued that her pay rate should be based on the date of injury, January 6, 2003, rather than the date disability began, November 25, 2003.

On January 4, 2008 the employing establishment submitted a notification of personnel action, SF-50, indicating that appellant worked part time beginning April 6, 2003.

By decision dated January 31, 2008, the Office denied appellant's request for reconsideration on the grounds that it was insufficient to warrant a review of the merits of her claim under section 8128.

² Appellant provided time and attendance records to show that she worked full time on January 6, 2003.

LEGAL PRECEDENT -- ISSUE 1

Section 8105(a) of the Federal Employees' Compensation Act³ provides: "If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of [her] monthly pay, which is known as [her] basic compensation for total disability."⁴ Section 8110(b) of the Act provides that total disability compensation will equal three fourths of an employee's monthly pay when the employee has one or more dependents.⁵ Pay rate for compensation purposes is defined in section 8101(4) as the monthly pay at the time of injury, the time disability begins or the time disability recurs, if the recurrence is more than six months after returning to full-time work, whichever is greater.⁶

In an occupational disease, every exposure that has an adverse effect on the claimant's condition constitutes a new and independent injury.⁷ Where an injury is sustained over a period of time, as in an occupational disease claim, the date of injury is the date of last exposure to those work factors causing an injury.⁸

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained an aggravation of bilateral plantar fasciitis due to factors of her federal employment. It paid her compensation using her pay rate on the date disability began, November 25, 2003. At that time appellant worked 24 hours per week.

Appellant contends that the Office should use January 6, 2003, the date she indicated on her occupational disease claim form that she became aware of her condition and its relationship to her employment, to establish her pay rate for compensation purposes.⁹ Section 8101(4) defines the pay rate for compensation purposes as the monthly pay at the time of injury, the time disability begins or the time disability recurs, if the recurrence is more than six months after returning to full-time work, whichever is greater.¹⁰ In an occupational disease claim, the date of injury is generally the date the employee was last exposed to the injurious employment factors.¹¹ The Board has held that the date of injury is the date of the last exposure which

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8105(a).

⁵ 5 U.S.C. § 8110(b).

⁶ 5 U.S.C. §§ 8101(4), 8114; *see also* 20 C.F.R. § 10.5(s).

⁷ *Daniel J. Alfano*, 34 ECAB 314 (1982); *Louis L. DeFrances*, 33 ECAB 1407 (1982).

⁸ *Patricia K. Cummings*, 53 ECAB 623 (2002).

⁹ A traumatic injury is defined 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." 20 C.F.R. § 10.5(ee). An occupational disease is defined as a condition produced by the work environment over a period longer than a single workday or shift." 20 C.F.R. § 10.5(q). Thus, pursuant to regulation the term "injury" includes a condition caused by repeated work stress or strain.

¹⁰ 5 U.S.C. §§ 8101(4), 8114; *see also* 20 C.F.R. § 10.5(s).

¹¹ *See Patricia K. Cummings*, *supra* note 8.

adversely affects the impairment because every exposure which has an adverse effect (an aggravation) constitutes an injury.¹² As appellant continued to be exposed to standing and walking on concrete until November 25, 2003, the date she stopped work, the Office would generally consider this the date of injury as well as the date disability began. This general rule, however, 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.¹³ The Office did not consider whether the medical evidence established that appellant sustained an employment injury prior to November 25, 2003. The case will be remanded for that purpose. Following any further development as is deemed necessary, the Office should issue an appropriate decision.

CONCLUSION

The Board finds that the case is not in posture for decision.¹⁴

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 31, 2008 and November 1, 2007 are set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 18, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

¹² *Id.*; see also *Barbara A. Dunnivant*, 48 ECAB 517 (1997).

¹³ *Paulette D. Street*, Docket No. 04-912 (issued December 28, 2005).

¹⁴ In view of the Board's disposition of the merits, the question of whether the Office properly denied appellant's request for reconsideration is moot.