

FACTUAL HISTORY

On July 14, 1994 appellant, then a 64-year-old retired mechanical engineering technician, filed a claim alleging an injury arising from his occupational exposure to asbestos. The Office accepted his claim for asbestosis. Appellant had retired on March 1, 1985 with annual earnings of \$33,413.00.

In a prior claim, OWCP File No. xxxxxx867, the Office accepted that appellant sustained a minimal bilateral pleural thickening in the performance of duty. Appellant received a schedule award on August 19, 2003 for a 25 percent impairment of each lung. The Office based this award on his March 1, 1985 pay rate. The period of the award ran from July 25, 2002 to January 21, 2004.

On March 16, 2008 appellant filed a claim for an increased schedule award.

On May 14, 2007 Dr. John L. Brottem, a specialist in pulmonary diseases, found that appellant's occupational exposure to asbestos was competent to have caused his severe chronic respiratory failure. He reported: "[Appellant] has severe impairment which I would categorize as 100 percent impairment resulting in pulmonary hypertension, cor pulmonale, chronic hypoxemic and hypercapnic respiratory failure. [He] is probably at maximum medical improvement at present." Dr. Brottem recommended January 2002 as the date disability began, based on a June 27, 2002 medical note that appellant experienced a reduced exercise tolerance about that time. An Office medical adviser reviewed Dr. Brottem's findings and agreed that appellant had advanced end-stage asbestosis with a 100 percent impairment of each lung.

On August 7, 2007 the Office issued a schedule award for a 75 percent impairment of each lung. It noted that appellant had already received a schedule award for the other 25 percent. The Office found that appellant was entitled to 234 weeks' compensation beginning May 14, 2007. It based the award on appellant's March 1, 1985 pay rate.

Appellant disagreed with the award. He argued that benefits under the Longshore and Harbor Workers' Compensation Act were more advantageous, which seemed discriminatory. Appellant submitted information from a March 22, 2006 symposium co-hosted by the Department of Labor and Commerce Inspectors General on the Federal Employees' Compensation Act program. The symposium covered the history of the program, including the periodic rolls management that began in the 1990s. The symposium also addressed proposed reform legislation, such as paying all schedule awards at an average salary rate equal to that of a GS-11, Step 3 employee. Appellant asked the Office whether he was entitled to this reform. Later, he questioned the date of injury and the pay rate used for his schedule award. Appellant stated that he would accept the expertise of the doctors who stated that disability began in 2002.

Appellant presented arguments at a November 15, 2007 oral hearing before an Office hearing representative. He stated his main problem was that when the Office computed his pay, it used his pay rate in 1985 and never gave him any of his yearly pay increases: "They didn't give me any, so I lost 17 of them." The result was that appellant could receive more money by electing benefits from the Office of Personnel Management. He indicated that this effectively kept him out of the Federal Employees' Compensation Act program. Appellant explained that

he did not understand how the date of injury could be the date he retired in 1985. He argued that there were controls in place at that time and that he got asbestosis in the 1960s and 1970s, when there were no controls. After the hearing, appellant clarified his disagreement with the schedule award: “I disagreed with using date of injury of 1985 for basing my pay for schedule awards and by using this 1985 as date of injury have denied me OWCP benefits.” He continued to ask whether the proposals at the Inspectors General Symposium applied.

In a decision dated January 31, 2008, the Office hearing representative affirmed the August 7, 2007 schedule award. The hearing representative addressed appellant’s concern as follows: “Regarding the claimant’s disagreement with the Office’s decision to use 1985 as his pay rate, I find that the Office correctly established that the pay rate as of March 1, 1985 the date of last exposure, the date the claimant retired was correct.”

LEGAL PRECEDENT

Section 8107 of the Federal Employees’ Compensation Act authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body: “If there is permanent disability involving the loss, or loss of use, of a member or function of the body or involving disfigurement, the employee is entitled to basic compensation for the disability, as provided by the schedule in subsection (c) of this section, at the rate of 66 2/3 percent of his monthly pay.”²

Section 8101(4) of the Federal Employees’ Compensation Act 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 When the injury is caused by exposure to an occupational hazard, the date of injury is the date the employee was last exposed to the hazardous condition.⁴

If it is determined after payment of a schedule award that the claimant is entitled to a greater percentage of loss, an amended award should be issued. The pay rate will remain the same, and the revised award will begin on the day following the end of the award issued previously.⁵

Section 8146a of the Federal Employees’ Compensation Act authorizes cost-of-living increases to compensation, but only where the entitlement to such compensation occurred more than one year before the effective date of the cost-of-living increase.⁶ The disability need not

² 5 U.S.C. § 8107(a).

³ *Id.* at § 8101(4).

⁴ *Manuel Carbajal*, 37 ECAB 216 (1985).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.7.b(1) (November 1998).

⁶ *Franklin L. Armfield*, 29 ECAB 500 (1978).

have been continuous for the whole year before the increase.⁷ Where a schedule award represents the first payment for compensable disability, the claimant's entitlement to cost-of-living increases does not begin until one year after the award begins.⁸

ANALYSIS

On appeal, appellant stated that the hearing representative's January 31, 2008 decision did not address some of his questions. He wanted to know why he was not being paid at the average salary rate of a GS-11, Step 3 employee, as stated at the Inspectors General Symposium. He also noted information from the Occupational Health and Safety Administration that where the date of injury cannot be determined, the date the employee reported symptoms or received treatment must be used.

The proposal presented at the 2006 symposium to pay all schedule awards at an average salary rate was just that, a proposal. It does not reflect the current state of the law. Appellant was not being paid at the average salary rate of a GS-11, Step 3 employee because the Federal Employees' Compensation Act expressly pays schedule awards based on the injured employee's monthly pay, which means 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.

In an occupational disease case, the date of injury is the date the employee was last exposed to the hazardous condition. The Office considered appellant's date of injury to be March 1, 1985, the date he retired. This was the date of his last possible exposure to asbestos in the workplace. Appellant argued that controls were in place when he retired, and that he was actually last exposed to asbestos in the 1960s and 1970s but that is an argument against his economic interests. Because his pay in those earlier decades was no doubt significantly lower than his pay when he retired, the Office gave appellant every benefit in selecting March 1, 1985 as his date of injury.⁹

The question is whether appellant's pay on March 1, 1985 was greater than his pay on the date disability began. Dr. Brottem, the specialist in pulmonary diseases, reviewed appellant's record and saw a June 27, 2002 medical note reporting that appellant had a reduced exercise tolerance beginning six to eight months earlier. He therefore recommended January 1, 2002 as

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.901.12.a(1) (December 1995).

⁸ *Id.* at Chapter 2.808.7.a(4) (November 1998).

⁹ The employee in *Angelo D. Morganto*, 29 ECAB 518 (1978), made a similar argument. He sustained a left-sided hearing loss working at the Boston Naval Shipyard and retired on March 30, 1974. The Office used this date as the date of injury because it was the date of his last exposure to excessive noise. The employee argued that the Office should have used December 9, 1958, the date a hearing test first established his loss of hearing. The Board observed: "It would be to appellant's disadvantage to accept his contention that the date of injury was December 9, 1958; this would result in using his pay rate on that date, rather than the greater pay rate on March 30, 1974, in computing his compensation."

the date disability began but appellant was retired and had no monthly pay on January 1, 2002.¹⁰ Because his monthly pay on March 1, 1985 was greater than his monthly pay on the date disability began, and because the case did not involve a recurrence of disability, the Federal Employees' Compensation Act required the Office to base appellant's schedule award on his March 1, 1985 pay rate.

The case of *Manuel Carbajal*¹¹ is instructive. The employee developed asbestosis as a result of his exposure to asbestos at the Long Beach Naval Shipyard. The date of his last possible exposure was April 21, 1969, when he retired. His disability, however, did not start until June 13, 1979. The Board held that as the employee was not earning monthly pay as of the date disability began, the Office properly selected his monthly pay on April 21, 1969 to compute his pay rate for compensation purposes.

The Board finds that the Office properly based appellant's schedule award on his March 1, 1985 pay rate. This was the date he retired, the date of his last possible exposure to asbestos in the workplace and therefore the date of injury but appellant made a further argument. He felt the Office should have given him yearly increases since 1985. Section 8146a of the Federal Employees' Compensation Act does authorize cost-of-living increases, but only where the entitlement to compensation occurred more than one year before the effective date of the cost-of-living increase.

The Board squarely addressed this issue in the case of *Franklin L. Armfield*.¹² The employee sustained a binaural hearing loss working at the Puget Sound Naval Shipyard. He retired on disability effective October 7, 1971, the date of his last exposure to excessive noise. His schedule award began on October 29, 1975. The employee's attorney agreed that the Office should have based the schedule award on the October 7, 1971 pay rate but argued that compensation should have been adjusted for cost-of-living increases that became effective after October 7, 1972. The Board disagreed. The legislative history of section 8146a clearly showed the intent of Congress to apply cost-of-living increases to "existing" awards, where an employee was receiving compensation for more than a year prior to the effective date of the relevant increase. Because the employee was not on the compensation rolls prior to October 29, 1975, when his schedule award began, the Board found that the Office properly excluded cost-of-living increases that became effective prior to that date. The Board explained that the employee would be entitled only to those cost-of-living increases that became effective after October 29, 1976, or one year after his schedule award began.¹³

¹⁰ There is, at least, no evidence he was earning more on January 1, 2002 than he did when he retired.

¹¹ See *supra* note 4.

¹² See *supra* note 6.

¹³ In *Yolanda Librera (Michael Librera)*, 37 ECAB 388 (1986), the period of the employee's schedule award began January 21, 1981. The Office included cost-of-living increases from January 16, 1966, the date of his last exposure to injurious noise. The Board found that the employee was not entitled to these increases because he did not become entitled to compensation until his schedule award began on January 21, 1981. Including the cost-of-living increases since 1966 caused an overpayment of compensation.

If appellant's August 7, 2007 schedule award represented his first payment for compensable disability, he would not be entitled to cost-of-living increases until one year after the award began. However, the record shows that he was previously on the compensation rolls. He received a schedule award on August 19, 2003 for a 25 percent impairment of each lung. The period of that award ran from July 25, 2002 to January 21, 2004. The Board finds, therefore, that the one-year waiting period for cost-of-living increases began on July 25, 2002. Appellant was thus entitled to any cost-of-living increases that became effective after July 25, 2003.

Appellant's March 16, 2008 claim for a schedule award must be considered a claim for an amended award. He was not claiming an additional award due to a new injury or additional exposure to work-related factors. He was simply alleging a greater percentage of loss resulting from his previously accepted injury. The period of his revised award on August 7, 2007, therefore, should have begun on January 22, 2004, the day following the end of the award issued previously.

The Board will set aside the Office's August 7, 2007 and January 31, 2008 decisions and will remand the case for a proper calculation of appellant's pay rate, one that includes any cost-of-living increases that became effective after July 25, 2003. Following such further development as may be necessary, the Office shall issue an appropriate final decision on appellant's entitlement to an amended schedule award.

CONCLUSION

The Board finds that the Office properly based appellant's August 7, 2007 schedule award on his March 1, 1985 pay rate. The Board further finds, however, that the Office should have applied any cost-of-living increases that became effective after July 25, 2003.

ORDER

IT IS HEREBY ORDERED THAT the January 31, 2008 and August 7, 2007 decisions of the Office of Workers' Compensation Programs are set aside. The case is remanded for further action consistent with this opinion.

Issued: March 3, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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