U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of AUBREY W. EDWARDS and DEPARTMENT OF THE ARMY, McALESTER ARMY AMMUNITION PLANT, McAlester, OK

Docket No. 03-930; Submitted on the Record;
Issued July 8, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined appellant's pay rate for purposes of calculating his schedule award.

On April 16, 2002 appellant, then a 55-year-old water treatment plant operator supervisor, filed an occupational disease claim alleging that he sustained a hearing loss on July 28, 1975 when lightning struck the building in which he was working. He indicated that his hearing loss was also due to continuous exposure at work to noisy pumps, motors, machinery and booster houses. The Office's statements of accepted facts dated July 17 and November 22, 2002 noted that appellant was exposed to noise from these sources and that he continued to be exposed to noise at work.

In a report dated September 27, 2002, regarding an examination on August 12, 2002, Dr. Dwayne H. Atwell, a Board-certified otolaryngologist, indicated that appellant had a severe hearing loss due to noise trauma based on audiometric testing and examination performed on August 12, 2002. On December 2, 2002 the Office's district medical adviser determined that appellant had a 34.7 percent bilateral hearing loss based on Dr. Atwell's report and the American Medical Association, *Guides to the Evaluation of Permanent Impairment.* He stated that noise exposure on the job was a contributing factor in causing appellant's hearing loss.

On December 5, 2002 the Office accepted appellant's claim for a bilateral noise-induced hearing loss. On December 18, 2002 appellant filed a claim for a schedule award. By decision dated January 15, 2003, the Office granted appellant a schedule award for 69.4 weeks based on a 34.7 percent binaural permanent hearing impairment. The Office based appellant's schedule award on his weekly pay rate as of July 28, 1975.

The Board finds that the Office did not properly determine appellant's pay rate in calculating his schedule award.

Section 8107 of the Federal Employees' Compensation Act provides that compensation for a schedule award shall be based on the employee's "monthly pay."[1] 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…."[2]

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. In this case, the Office utilized appellant's monthly pay rate on July 28, 1975 as the basis for determination of his schedule award pay rate.

In applying section 8101(4), the statute requires the Office to determine the 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). In this case, the Office selected July 28, 1975 as the "date of injury" and the appropriate date for calculation of appellant's monthly pay for schedule award purposes.

The Board has held that where an injury is sustained over a period of time, as in this case, the date of injury is the date of last exposure to those work factors causing injury.[3] In schedule award claims, at issue is the permanent impairment which results from such injury. In schedule award claims where the injury is sustained over a period of time,[4] the Board has recognized that "the claim covers all exposures which occurred up to the filing of the claim."[5] The Board has also recognized, however, that in schedule award claims relevant medical evidence that determines permanent impairment usually is obtained only after the claim is filed. Therefore, the Board has also held that in cases of continuing exposure to employment factors the date of the medical report upon which the Office relies in determining the degree of permanent impairment may constitute the date that "injury" occurred.[6] 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 that substantiates the degree of permanent impairment.[7]

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[1] 5 U.S.C. § 8107(a).

[2] 5 U.S.C. § 8101(4).

[3] *See Sherron A. Roberts*, 47 ECAB 617 (1996); *Hugh A. Feeley*, 45 ECAB 255 (1993).

[4] "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."

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

[6] *Jerome Carmody*, 29 ECAB 588 (1978).

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

The Board has noted in cases such as *Sherron A. Roberts*[8] that the 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 that adversely affects the impairment because every exposure that has an adverse effect (an aggravation) constitutes an injury.[9] In the usual case, the claimant has either retired or is no longer 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." However, in claims such as this, where exposure to work factors continues through the date of the medical examination, the date of injury is the date of last exposure to employment factors that are medically established as causing injury. The Office must determine both the date of last exposure to employment factors and the date of the supporting medical evaluation upon which the degree of permanent impairment is determined. Therefore, the date of last exposure to work factors will constitute the "date of injury" in those cases where exposure ceased even though the extent of permanent impairment may continue to increase thereafter.[10] In those claims where exposure to work factors has ceased, the date of last exposure causing injury is necessarily the date of injury. Conversely, 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.[11]

In this case, the Office indicated in its statements of accepted facts dated July 17 and November 22, 2002 that appellant continued to be exposed to excessive noise levels in his job. Therefore, the date of injury in this case is the date of the medical examination upon which the extent of permanent impairment has been determined, the August 12, 2002 examination addressed in Dr. Atwell's September 7, 2002 report. Because appellant's work-related hazardous noise exposure continued through at least August 12, 2002, the date of his medical examination and "date of injury" under the Act, the Office improperly determined appellant's schedule award pay rate based upon his monthly pay as of July 28, 1975.

[8] *Supra* note 3.

[9] *Louis L. DeFrances*, 33 ECAB 1407 (1982).

[10] *George Crowley*, 34 ECAB 988 (1983).

[11] *See Barbara A. Dunnavant*, *supra* note 7.

The decision of the Office of Workers' Compensation Programs dated January 15, 2003 is set aside and remanded for further proceedings consistent with this opinion.

Dated, Washington, DC
July 8, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member