

Appellant filed a recurrence of disability claim on July 19, 1996 alleging that he stopped work on July 9, 1996 due to a recurrence of total disability causally related to his accepted employment injury. The Office instructed appellant to file a second claim for occupational disease and he did so on May 12, 1997 alleging that he experienced upper back, shoulder and lower neck pain due to his employment duties. Appellant accepted a rehabilitation position as a modified mark-up clerk on November 14, 1997 earning \$36,161.00 per year. On October 20, 1997 the Office accepted that he developed a cervical strain as a result of his federal employment and that the strain resolved by May 16, 1997.

Appellant filed an occupational disease claim on November 20, 1997 alleging that he had developed bilateral carpal tunnel syndrome due to his employment duties. He first became aware of his condition on November 19, 1997 and first attributed this condition to his employment on that date. On the reverse of the form, appellant's supervisor indicated that appellant did not stop work, but instead performed light duties. The Office accepted appellant's claim for bilateral carpal tunnel syndrome on February 3, 1998.

Appellant filed an additional occupational disease claim on December 12, 1997 alleging that he developed bursitis due to his keying duties. He was aware of his condition on November 9, 1997 and stated that he first attributed his condition to his employment on December 19, 1995. Appellant attributed his current condition to his December 15, 1995 employment injury and did not stop work. The Office accepted this claim for herniated cervical discs at C5-6 and C6-7 on January 25, 2000.

Appellant filed a recurrence of disability claim on May 2, 2001 and alleged a recurrence of disability on April 20, 2001 causally related to his November 19, 1997 employment injury of bilateral carpal tunnel syndrome. The employing establishment noted that appellant voluntarily resigned from his limited-duty job on May 2, 2001. The Office accepted the claim for a recurrence of total disability on April 20, 2001 by decision dated October 10, 2002. The Office entered appellant on the periodic rolls on March 27, 2003. The Office calculated appellant's weekly rate of pay as \$769.87.

Dr. Joe A. Jackson, appellant's attending physician, completed a report on April 13, 2000 and rated appellant's permanent impairments based on the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.¹ He found that appellant had 12 percent impairment of the median nerve bilaterally. Dr. Jackson also opined that appellant had six percent impairment of the whole person due to cervical radiculopathy.²

¹ Although Dr. Jackson diagnosed right cubital tunnel syndrome and entrapment of the ulnar nerve since 1997. He opined that these conditions are causally related to appellant's accepted employment duties, but did not offer any medical reasoning in support of his opinions. The Office has not accepted this aspect of appellant's claim.

² Because neither the Federal Employees' Compensation Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or cervical spine, no claimant is entitled to such an award. *Tomas Martinez*, 54 ECAB 623, 625-26 (2003).

The Office medical adviser reviewed the record on September 25, 2001 and determined that appellant had five percent impairment of each upper extremity due to carpal tunnel syndrome under the fifth edition of the A.M.A., *Guides*.

The Office referred appellant for a second opinion evaluation on May 24, 2004 with Dr. Timothy Jackson, a Board-certified orthopedic surgeon. Dr. Jackson completed his report on June 11, 2004. He reviewed appellant's history of injury and medical history and diagnosed cervical degenerative disc disease at C5-6 and C6-7 as well as carpal tunnel syndrome as employment related. Dr. Jackson also found that appellant had nonemployment-related mild right cubital tunnel syndrome which was asymptomatic. On physical examination he reported positive Tinel's test bilaterally over the carpal canal with reproduction of the wrist, hand and forearm pains mostly and some light paresthesias into the central digits and possible the small finger more than the thumb and index finger. He recommended surgical treatment of both of appellant's diagnosed conditions.

In a letter dated March 15, 2005, the Office informed appellant that the limited-duty position of mark-up clerk offered by the employing establishment was suitable work. The Office allowed appellant 30 days to accept the position or to offer his reasons for refusal. Appellant returned to work on June 11, 2005. He received compensation benefits up to June 10, 2005.

Dr. Joe Jackson completed a report on May 2, 2005 providing appellant's impairment rating for schedule award purposes. He found abnormal two-point discrimination on the right, weakness of abductor pollicis brevis on the right, questionable on the left and weakness of intrinsic muscles of both hands more on the right. Dr. Jackson reported mild weakness of the biceps and pronator tere consistent with appellant's C5-6 radiculopathy. He applied the fifth edition of the A.M.A., *Guides* and found that on the left appellant had a 25 percent sensory impairment of the median nerve on the left and 50 percent sensory impairment of the median nerve on the right.³ Dr. Jackson concluded that appellant had 50 percent impairment of median nerve which has a maximum upper extremity impairment of 39 percent⁴ or 19.5 percent impairment of the right upper extremity due to sensory deficit of the median nerve. He found that appellant had 10 percent sensory impairment of the left median nerve. In regard to motor impairment, Dr. Jackson found that appellant had 25 percent impairment of his median nerve⁵ on the right, three percent impairment of the upper extremity and on the left 20 percent impairment of the median nerve, two percent impairment of the upper extremity.

Dr. Jackson also found appellant had 4 percent impairment due to sensory loss of the ulnar nerve in the right upper extremity and 12 percent impairment due to motor strength loss of the ulnar nerve on the right. He concluded that appellant had two percent impairment due to sensory loss of the ulnar nerve in the left upper extremity and nine percent impairment of the left upper extremity due to motor deficits of the ulnar nerve.

³ A.M.A., *Guides*, 482, Table 16-10.

⁴ *Id.* at 492, Table 16-15.

⁵ *Id.* at 484, Table 16-11.

Dr. Jackson also provided appellant's whole person impairment rating due to his cervical spine impairments. He concluded that appellant had a total whole person impairment rating of 42 percent.

The Office medical adviser reviewed Dr. Jackson's report on June 16, 2005. He found that appellant's accepted conditions impacted the median nerve only. He stated that the ulnar nerve above the elbow and the C5-6 nerve root were not part of appellant's accepted employment injuries. Based only on the bilateral median nerve impairments, the Office medical adviser concluded that appellant had 22 percent impairment of the right upper extremity and 12 percent impairment of the left upper extremity. Dr. Jackson concluded that appellant reached maximum medical improvement on June 7, 2005.

By decision dated July 28, 2005, the Office reduced appellant's compensation benefits to zero based on his actual earnings as a modified mark-up clerk. The Office noted that appellant was earning \$871.00 per week effective May 23, 2005. The Office stated that, as appellant had demonstrated the ability to perform the duties of this job for more than two months, the position fairly and reasonably represented his wage-earning capacity.

In a letter dated August 4, 2005, appellant stated that he was willing to accept the Office medical adviser's impairment rating regarding his bilateral carpal tunnel syndrome. He asked if he was entitled to a schedule award for cervical radiculopathy. Appellant also stated that he agreed with the decision of the Office that his current position fairly and reasonably represented his wage-earning capacity noting that his reemployment date was June 11, 2005 rather than May 23, 2005.

Appellant requested a lump-sum payment of his schedule award on August 13, 2005.⁶ By decision dated September 30, 2005, the Office granted appellant schedule awards for 22 percent impairment of his right arm and 12 percent impairment of his left arm totaling \$63,226.30 in a lump-sum settlement. The Office based this payment on appellant's weekly pay rate of \$769.87.

By letter dated October 10, 2005, appellant noted that his weekly pay rate for schedule award purposes was calculated to be \$769.87. He noted that his weekly pay rate at maximum medical improvement was \$871.00 per week and that his current weekly pay rate was \$884.56. Appellant requested an oral hearing on the issue of the correct rate of pay for schedule award purposes.

In a memorandum dated February 22, 2005, the Office noted that appellant's lump-sum schedule award covered the period June 11, 2005 through February 23, 2007 and that he was not entitled to any additional compensation payments during this time.

Appellant testified in a telephonic oral hearing on May 15, 2006 and opined that he was entitled to have his schedule award based on his pay rate at the time of maximum medical improvement. By decision dated May 3, 2006, the hearing representative affirmed the Office's September 30, 2005 decision regarding appellant's pay rate.

⁶ The Office noted that appellant resided in the area severely affected by Hurricane Katrina.

LEGAL PRECEDENT

Section 8107 of the Act⁷ provides that compensation for a schedule award shall be based on the employee's monthly pay.⁸ Section 8105(a) of the Act 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 his monthly pay, which is known as his basic compensation for total disability."⁹

Section 8101(4) of the Act defines monthly pay for purposes of computing compensation benefits as follows: "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."¹⁰ Office regulations provide that a recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition resulting from a previous injury or illness without a new or intervening injury.¹¹

In applying section 8101(4), the statute requires the Office to determine 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).¹²

The Board has held that where an injury is sustained over a period of time, the date of injury is the date of last exposure to those work factors causing injury.¹³ In schedule award claim, at issue is the permanent impairment sustained resulting from such injury. Under the Act, the possibility of a future injury does not constitute an "injury."¹⁴ In schedule award claims where the injury is sustained over a period of time, the Board has recognized that the claim covers all exposures which occurred up to the filing of the claim. The Board has also recognized, however, that in schedule award claims, relevant medical evidence which determines

⁷ 5 U.S.C. §§ 8101-8193.

⁸ 5 U.S.C. § 8107.

⁹ 5 U.S.C. § 8105(a). 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 U.S.C. § 8110(b).

¹⁰ 5 U.S.C. § 8101(4). In an occupational disease claim, the date of injury is the date of last exposure to the employment factors which caused or aggravated the claimed condition. *Patricia K. Cummings*, 53 ECAB 623, 626 (2002).

¹¹ 20 C.F.R. § 10.5(x).

¹² *Robert A. Flint*, 57 ECAB ____ (Docket No. 05-1106, issued February 7, 2006).

¹³ *Patricia K. Cummings*, 53 ECAB 623, 626 (2002).

¹⁴ *Id.*

permanent impairment, including referral and second opinion evaluations, are usually obtained only after the claim is filed. Therefore, the Board has held that in cases of continuing exposure to employment factors that the date of the medical report upon which the Office relies in determining the degree of permanent impairment may constitute the date that an “injury” occurred. This holding is consistent with a long-established precedent that the degree of functional impairment or injury, is essentially a medical question which can only be established by medical evidence. Thus 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 which substantiates the degree of permanent impairment.¹⁵

The Board has held 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 found that the date of injury is the date of the last exposure which adversely affects the impairment because every exposure which has an adverse effect (an aggravation) constitutes an injury.¹⁶

In the usual case, the claimant has either retired or is no longer being 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.” Where exposure to work factors continues, the date of injury is the date of relevant medical evaluation, *i.e.*, the date of the medical examination upon which the extent of permanent impairment has been determined.¹⁷

ANALYSIS

The Office accepted that appellant developed sbluxations of his spine on April 11, 1996, bilateral carpal tunnel syndrome on February 3, 1998 and herniated cervical discs at C5-6 and C6-7 on January 25, 2000. He filed a recurrence of disability claim on May 2, 2001 alleging that on April 20, 2001 he sustained a recurrence of total disability on that dated due to his bilateral carpal tunnel syndrome. Appellant received a fixed annual rate of pay, for a position that provided employment for substantially the whole year preceding the injury. The Office calculated his pay rate on April 20, 2001 as \$769.87 per week based on reports from the employing establishment. The Office based appellant’s September 30, 2005 schedule awards on the April 20, 2001 recurrent pay rate. Appellant contended that the Office should have based the schedule award on his pay rate as of his date of maximum medical improvement, June 7, 2005.

Appellant stopped work on April 20, 2001 due to his bilateral carpal tunnel syndrome. He returned to work in a suitable work position on June 11, 2005. The Office medical adviser reviewed the May 2, 2005 report from Dr. Joe Jackson, appellant’s attending physician, on June 16, 2005 and concluded that appellant had reached maximum medical improvement on June 7, 2005.

¹⁵ *Id.*

¹⁶ *Id.* at 627.

¹⁷ *Id.*

Appellant's pay rate for schedule award purposes is no more than \$769.87, his pay rate at the time of his April 20, 2001 recurrence of disability. At the time of Dr. Jackson's May 2, 2005 report and the Office medical adviser's determination of maximum medical improvement on June 7, 2005, appellant's date of last exposure to work factors causing injury was April 20, 2001, the date he stopped work due to his recurrence of disability. Appellant did not return to work until June 11, 2005, after the medical examinations. Therefore any possible exposure to further injurious work factors occurred after the medical evaluations which substantiated the degree of permanent impairment in his current schedule award. The Office properly calculated appellant's pay rate for the purposes of his September 30, 2005 schedule awards for bilateral carpal tunnel syndrome.

CONCLUSION

The Board finds that the Office properly calculated appellant's pay rate for the purposes of his schedule award as \$769.87 as appellant has a clearly defined date of last exposure to injurious work factors of April 20, 2004.

ORDER

IT IS HEREBY ORDERED THAT the May 3, 2006 and September 30, 2005 decisions of the Office of Workers' Compensation Programs are affirmed as to appellant's pay rate.

Issued: February 16, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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