U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES E. EARLE and U.S. POSTAL SERVICE,
POST OFFICE, Albuquerque, NM

Docket No. 98-1677; Submitted on the Record;
Issued June 27, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's schedule award should be paid for the period beginning September 21, 1992.

On October 26, 1989 appellant, then a 35-year-old clerk, filed a claim alleging that he sustained a traumatic injury on September 16, 1989 in the performance of duty. The Office accepted appellant's claim for bilateral epicondylitis and authorized a December 4, 1989 surgery on the left elbow and a January 8, 1990 surgery on the right elbow.

By decision dated May 2, 1996, the Office reduced appellant's compensation benefits effective May 26, 1996 on the grounds that he had the capacity to earn wages as a construction estimator.

On August 13, 1996 appellant filed a claim for a schedule award. In a decision dated December 5, 1996, the Office granted appellant a schedule award for a combined 55 percent impairment of the right and left upper extremities. The Office determined that the date of maximum medical improvement was September 21, 1992 and that the schedule award should have been paid during the period September 21, 1992 to January 5, 1996. The Office advised appellant that the temporary total disability benefits he received during this time period would be converted to reflect payment of the schedule award and that he was not entitled to further payment on his schedule award.

By letter dated February 3, 1997, appellant through his representative, requested reconsideration of the Office's determination of the period, in which his schedule award should be paid. Appellant contended that the Office erred in finding that he reached maximum medical improvement in September 1992.

In a decision dated November 10, 1997, the Office vacated its May 6, 1996 wage-earning capacity decision. In another decision of the same date, the Office reduced appellant's compensation benefits effective January 6, 1997 on the grounds that his actual earnings fairly and reasonably represented his wage-earning capacity.[1]

By decision dated January 30, 1998, the Office denied modification of its prior schedule award decision.

The Board finds that the Office properly determined that appellant's schedule award should be paid for the period beginning September 21, 1992 and that the Office properly converted to schedule award payments those payments for temporary total disability already received by appellant during that time period.

It is a well-established principle that a claimant is not entitled to dual workers' compensation benefits for the same injury.[2] With respect to benefits under the Federal Employees' Compensation Act,[3] the Board has held that "an employee cannot [con]currently receive compensation under a schedule award and compensation for disability for work."[4]

It is also well established that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the employment injury.[5] The issue of maximum medical improvement was extensively treated by the Board in its two decisions in *Marie J. Born*.[6]

In the *Marie J. Born* decision, the Board reviewed the well-settled rule that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement and explained that maximum medical improvement "means that the physical condition of the injured member of the body has stabilized and will not improve further."[7] The Board also noted a reluctance to find a date of maximum medical improvement, which is retroactive to the award, as retroactive awards often result in payment of less compensation benefits. The Board, therefore, required persuasive proof of maximum medical improvement for selection of a retroactive date of maximum medical improvement.[8]

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[1] Appellant has not appealed this decision and, therefore, it is not before the Board.

[2] *Benjamin Swain*, 39 ECAB 448 (1988).

[3] 5 U.S.C. §§ 8101-8193.

[4] *Andrew B. Poe*, 27 ECAB 510 (1976).

[5] *Yolandra Librera*, 37 ECAB 388 (1986).

[6] *Marie J. Born*, 27 ECAB 623 (1976), *petition for recon., denied*, 28 ECAB 89 (1976).

[7] *Id.*

[8] *Id.*

In the present case, the evidence clearly and convincingly establishes that appellant reached maximum medical improvement by September 21, 1992. In a report dated October 25, 1991, Dr. Guy R. Fogel, a Board-certified orthopedic surgeon and appellant's attending physician, related that he "would like to declare [appellant] at maximum medical improvement" and recommended that appellant undergo a functional capacity evaluation so he could determine the extent of any permanent impairment. In a report dated September 16, 1992, Dr. Fogel provided an impairment rating in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (3rd ed. rev., 1990).

In a report dated March 1993, Dr. Emmet Thorpe, a Board-certified orthopedic surgeon and Office referral physician, found that appellant had reflex sympathetic dystrophy and could not return to his regular employment. Dr. Thorpe stated, "Also, I do not expect him to make any recovery beyond his current level of functional capability."

In a work restriction evaluation dated July 22, 1993, Dr. Fogel indicated that appellant had reached maximum medical improvement on September 21, 1992.

Following appellant's 1996 claim for a schedule award, the Office requested that Dr. Jonathan Burg, a Board-certified physiatrist and appellant's current attending physician, provide an impairment rating in accordance with the fourth edition of the A.M.A., *Guides*.

In a report dated September 11, 1996, Dr. Burg stated:

> "I reviewed [appellant's] chart and found an office note from Dr. Fogel. As you know he is the physician who took care of [appellant] prior to Dr. Delahoussaye taking over and prior to my taking over. I will forward a copy of that report along with this letter. Basically Dr. Fogel stated that [appellant] was at maximum medical improvement on September 21, 1992. The diagnoses on the form were lateral epicondylitis, bilateral elbows, median nerve entrapment left elbow, radial nerve entrapment right elbow and reflex sympathetic dystrophy left elbow."
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> "Little has occurred since Dr. Fogel wrote that note. He has basically had no further surgery and truly I believe he was at maximum medical improvement. He has had essentially no improvement in his symptoms and things really have not changed at all for that matter."

Dr. Burg further stated that he was "in complete agreement with the date of maximum medical improvement given by Dr. Fogel of September 21, 1992, as well as the impairment rating given him by Dr. Fogel on that date of 28 [percent] upper extremity impairment on the right and 55 [percent] on the left."

An Office medical adviser reviewed the reports of Drs. Burg and Fogel. He found that appellant had obtained maximum medical improvement on September 21, 1992. He applied the fourth edition of the A.M.A., *Guides* to Dr. Fogel's findings and concluded that appellant had a

35 percent impairment of his left upper extremity and a 20 percent impairment of his right upper extremity.[9]

The record thus contains persuasive evidence from two of appellant's attending physicians that he reached maximum medical improvement on September 21, 1992. In his request for reconsideration, appellant submitted a report from Dr. Burg dated January 24, 1997, in which he stated that appellant did not reach maximum medical improvement until the fall of 1995 because under New Mexico state law maximum medical improvement is reached only if no improvement is expected and "no specific treatment is being rendered." Dr. Burg related that appellant "was essentially actively involved in some treatment or another with the hopes of improvement in his overall status up [to] until about October 1995 when he had his last acupuncture treatment." He recommended another functional capacity evaluation to determine whether appellant's condition had improved since 1992. However, Dr. Burg, in his treatment notes and medical reports, consistently found no evidence of any improvement in appellant's condition. In a report dated July 29, 1996, he indicated that appellant's "symptoms have only gotten worse over the years since the surgery was done. The conditions he presents with are degenerative conditions." Further, neither the provisions of the Act, the implementing regulations or Board precedent require an appellant to stop receiving medical treatment in order to be considered at maximum medical improvement. Thus, as the weight of the medical evidence of record clearly and convincingly establishes that appellant reached maximum medical improvement on September 21, 1992, the Office properly converted appellant's compensation for temporary total disability paid during the period from September 21, 1992 to January 5, 1996 to schedule award payments.[10]

[9] Appellant does not dispute the amount of the schedule award.

[10] 5 U.S.C. § 8116(a) prohibits the receipt of dual benefits but would not prohibit an employee from receiving a schedule award at the same time he or she was receiving retirement benefits. The Board notes that appellant's rights under section 8116(a) were not violated as he was not entitled to retirement benefits during the period of his schedule award. It appears from the record that appellant filed a claim for retirement benefits with the Office of Personnel Management on November 21, 1997.

The decision of the Office of Workers' Compensation Programs dated January 30, 1998 is hereby affirmed.

Dated, Washington, D.C.
June 27, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member