

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONALD L. MYERS and DEPARTMENT OF LABOR,
MINE SAFETY & HEALTH ADMINISTRATION, Coeur d' Alene, Ida.

*Docket No. 96-2635; Submitted on the Record;
Issued November 20, 1998*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether appellant has more than a 10 percent permanent impairment of each lung.

On December 11, 1990 appellant, then a 56-year-old mine inspector, filed a claim for silicosis which he related to exposure to silica sand and limestone in his inspection of mines. The Office of Workers' Compensation Programs accepted appellant's claim for progressive silicosis with fibrocalcific upper lung masses and began payment of temporary total disability compensation effective June 7, 1991.

In a September 22, 1995 letter, the employing establishment offered appellant a position as a mine safety and health specialist. In an October 30, 1995 response, appellant declined the offered position. In a December 21, 1995 decision, the Office terminated appellant's compensation effective January 6, 1996 for refusing suitable work that had been offered. The Office indicated that appellant forfeited any temporary total disability compensation and schedule award benefits. In a February 6, 1996 note, appellant accepted the position. In an April 26, 1996 decision, the Office found appellant had a 36 percent loss of wage-earning capacity and reduced his compensation effective April 14, 1996 based on his actual earnings in the offered position. In a May 15, 1996 decision, the Office revised its April 26, 1996 decision. In a June 17, 1996 decision, the Office again revised its prior loss of wage-earning capacity determination. In a separate June 17, 1996 decision, the Office issued a schedule award for a 10 percent permanent impairment of each lung for a total 20 percent permanent impairment. The Office indicated that the period of the award was August 12, 1992 to March 18, 1993. It stated that since appellant had received compensation benefits for this period, he would not receive a compensation check for the same period. The Office informed appellant that it had administratively changed the compensation payment for that period to reflect it was paid as a schedule award. It advised appellant that the only additional entitlement he might have would be from the Office of Personnel Management for the same period.

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

The schedule award provision of the Federal Employees' Compensation Act¹ and its implementing regulation² set forth the number of weeks of compensation to be paid for permanent loss, or loss of use, of members or functions of the body listed in the schedule. However, neither the Act nor its regulations specify the manner in which the percentage loss of a member shall be determined. For consistent results and to ensure equal justice to all claimants, the Board has authorized the use of a single set of tables in evaluating schedule losses, so that there may be uniform standards applicable to all claimants seeking schedule awards. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by the Office as a standard for evaluating schedule losses and the Board has concurred in such adoption.³

The Office based its determination of the extent of the permanent impairment of appellant's lungs on an August 12, 1992 report by Dr. Alan C. Whitehouse, a Board-certified pulmonologist, accompanied by pulmonary function tests. Dr. Whitehouse diagnosed silicosis with progressive massive fibrosis. He stated that x-rays showed no evidence of silicosis in 1972 after he left his position as a minor and before he was employed as a mine inspector. Dr. Whitehouse concluded that appellant's silicosis occurred during his employment as a mine inspector. He commented that the condition had been progressive for the prior four to five years. The pulmonary function tests showed a FVC (forced vital capacity) that was 92 percent of the value predicted in the A.M.A., *Guides*, a FEV₁ (forced expiratory volume in one second) that was 77 percent of the predicted value, a FEV₁/FVC ratio that was 83 percent of the predicted value and a D_{co} (diffusion of carbon monoxide in the blood) that was 96 percent of the predicted value. Under the A.M.A., *Guides*, a Class two pulmonary impairment, which equals a 10 percent to 25 percent permanent impairment, exists when either the FVC, FEV₁ or the D_{co} is between 60 percent and 79 percent of the predicted value or the FEV₁/FVC ratio is between 60 percent and 69 percent of the predicted ratio.⁴ As the FEV₁ was 77 percent of the predicted value, appellant's pulmonary impairment was in Class two at the time of the examination. However, appellant's schedule award was issued four years later, in 1996. Therefore, the schedule award was not based on a current evaluation of appellant's pulmonary impairment, particularly as Dr. Whitehouse indicated that appellant's condition was progressive. The case will therefore be remanded for referral of appellant, together with the statement of accepted facts and the case record, to an appropriate specialist for a current evaluation of the permanent impairment of his lungs.

The Office set the date of maximum medical improvement, and thereby the date on which the period of the schedule award would begin, as August 12, 1992. The Board has noted

¹ 5 U.S.C. § 8107(c).

² 20 C.F.R. § 10.304.

³ *Thomas P. Gauthier*, 34 ECAB 1060, 1063 (1983).

⁴ American Medical Association, *Guides to the Evaluation of Permanent Impairment*, p. 125, Table 8 (3d ed. rev., 1990).

that there will often be a small degree of retroactivity involved in establishing the date of maximum improvement since the Office generally establishes the date of maximum improvement as the date appellant was medically evaluated for purposes of making a schedule award. Where the medical evidence establishes that the employee did, in fact, reach maximum improvement by such date, the determination is proper, assuming that it is made within a reasonable time after the date of maximum improvement. In determining a reasonable time for making a retroactive determination, the Board has noted that it would be improper to set hard and fast rules. In *Marie Born*⁵ the Board emphasized that the date may be set at some distant point in the past if the medical evidence establishes that such past date is the date of maximum improvement. Where there is a retroactive determination, the burden is greater on the Office. Because of the adverse effect such a retroactive determination would have on the employee, the evidence must be strong enough so that it “clearly and convincingly” establishes that maximum medical improvement had been reached by the date selected.⁶ In this case, neither Dr. Whitehouse nor the Office medical adviser who reviewed his report addressed the issue of maximum medical improvement. The Office selected the date of August 12, 1992 as the date of maximum medical improvement because that was the date of Dr. Whitehouse’s evaluation. In making the period of the schedule award retroactive by four years, the Office must clearly and convincingly show that appellant had reached maximum medical improvement by August 12, 1992. Since Dr. Whitehouse and the Office medical adviser did not discuss when appellant reached maximum medical improvement, the Office has failed to meet its burden of showing that it properly selected August 12, 1992 as the date of maximum improvement. Therefore, when appellant is referred to an appropriate specialist for a current evaluation of the permanent impairment of his lungs, the specialist should be requested to address the issue of the date of appellant’s maximum medical improvement. After further development as it may find necessary, the Office should issue a *de novo* decision.

⁵ 27 ECAB 623 (1976), *petition for recon. denied*, 28 ECAB 89 (1976).

⁶ *Joseph R. Walples*, 44 ECAB 936 (1993).

The decision of the Office of Workers' Compensation Programs, dated June 17, 1996, is hereby set aside and the case remanded for further action in accordance with this decision.

Dated, Washington, D.C.
November 20, 1998

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member