U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY A. HILL and DEPARTMENT OF THE TREASURY, U. S. MINT, San Francisco, Calif.

Docket No. 97-2320; Submitted on the Record;
Issued May 5, 1999

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT, A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

The only Office decision before the Board on this appeal is the Office's May 14, 1997 decision finding that appellant's application for review was not sufficient to warrant review of its prior decision. Since more than one year elapsed between the date of the Office's most recent merit decision on February 8, 1996 and the filing of appellant's appeal on July 9, 1997, the Board lacks jurisdiction to review the merits of appellant's claim.[1]

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
>
> (1) end, decrease, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law, by advancing a point of law or fact not previously considered by the Office, or by submitting relevant and pertinent evidence not previously considered by the Office. Section 10.138(b)(2) provides that

[1] 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office final decision being appealed.

when an application for review of the merits of a claim does not meet at least one of these three requirements the Office will deny the application for review without reviewing the merits of the claim.

In the present case, the Office issued appellant a schedule award for a 13 percent loss of use of her right arm on February 8, 1996. By letter dated January 10, 1997, appellant, through her Congressional representative, requested reconsideration, contending that the date the schedule award began to be paid, February 5, 1995, was disadvantageous to appellant, as it had the effect of converting previously paid compensation for temporary total disability into payments pursuant to the schedule award. Appellant contended that the schedule award should begin to be paid, effective October 1, 1995, the date she elected benefits under the Civil Service Retirement Act. By decision dated May 14, 1997, the Office found that the request for reconsideration was not sufficient to warrant review of its prior decision.

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

It is well established that the period covered by a schedule award commences on the date that the employee reaches maximum improvement from the residuals of the employment injury, and that maximum medical improvement means that the physical condition of the injured member of the body has stabilized and will not improve further.[2] In addressing a situation where the effective date of the schedule award is set at a date in the past when the employee was receiving compensation for disability, the Board stated in *Marie J. Born*:

> "[A] determination setting the date of maximum improvement for schedule award purposes should not fix it at some distant time in the past on a date that was prior to the time when the employee was able to return to work on a regular basis, unless the evidence clearly and convincingly establishes that maximum improvement had in fact been reached by that date and unless the employee's rights under section 8116(a) can be fully protected."[3]

In its decision on a petition for reconsideration in *Marie J. Born*, the Board stated:

> "The only new concept spelled out by the Board in the decision is that the burden, in setting the date of maximum improvement, is greater on the Office in a situation where it fixes that date 'at some distant time in the past that was prior to the time when the employee was able to return to work on a regular basis.' It is emphasized that even in such a situation, the date of maximum improvement may properly be set at 'some distant time in the past,' if the medical evidence establishes this was the proper date."[4]

[2] *Joseph R. Waples*, 44 ECAB 936 (1993).

[3] *Marie J. Born*, 27 ECAB 623 at 630 (1976).

[4] *Marie J. Born*, 28 ECAB 90 at 94 (1976).

In the present case, the medical evidence clearly and convincingly establishes that appellant reached maximum medical improvement by January 30, 1995. In a report dated February 21, 1995, appellant's attending physician, Dr. Robert E. Markison, stated that appellant's condition had become permanent and stationary on January 30, 1995. Dr. Markison reiterated this opinion in a report dated June 30, 1995, a date on which he reexamined appellant. This is clear and convincing evidence that appellant reached maximum medical improvement on January 30, 1995. The Office properly commenced payment of appellant's schedule award at the beginning of its next pay cycle following the date of maximum improvement, and appellant's rights under section 8116(a) of the Federal Employees' Compensation Act[5] were not violated, as she was not entitled to retirement benefits until September 30, 1995. Appellant's argument on reconsideration does not meet the criteria of 20 C.F.R. § 10.138(b). The Office properly refused to reopen appellant's case for further review of the merits of her claim.

The decision of the Office of Workers' Compensation Programs dated May 14, 1997 is affirmed.

Dated, Washington, D.C.
May 5, 1999

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

[5] 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.