United States Department of Labor
Employees' Compensation Appeals Board

JANET McCROSSON, claiming as widow of EUGENE J. McCROSSON, Appellant	)	
and	)	**Docket No. 05-1322**
DEPARTMENT OF THE NAVY, PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA, Employer	)	**Issued: December 19, 2005**

Appearances:
Thomas R. Uliase, for the appellant
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge

JURISDICTION

On July 27, 2005 appellant filed a timely appeal from an Office of Workers' Compensation Programs' merit decision dated July 13, 2004. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly found that the employee had no more than a 50 percent impairment to his left upper extremity; (2) whether the Office properly found that the employee's schedule award was payable during the period July 12, 2000 to December 17, 2002; and (3) whether the Office properly converted to schedule award payments, those payments for temporary total disability already received by the employee during that time period.

FACTUAL HISTORY

The employee, a 45-year-old foreman, sustained an injured left wrist on September 7, 1991 which was caused by lifting and pushing. He filed a claim for benefits on September 9, 1991 which the Office accepted for strain of the left hand and wrist. The employee underwent surgery on his left wrist on February 11, 1992 and returned to full duty on May 4, 1992. He sustained another injury to his left wrist on December 15, 1992 when he slipped on some steel steps and used his left arm to keep himself from falling. The claims were combined. The employee continued working after the December 15, 1992 injury until July 16, 1993, when he stopped working in order to undergo additional surgery on his left wrist. He underwent several subsequent surgical procedures on this left wrist. In a report dated July 24, 2000, Dr. Richard Mandel, a Board-certified orthopedic surgeon, stated findings on examination, reviewed the medical records and opined that the employee had reached maximum medical improvement.

By letter dated February 26, 2003, the employee's attorney informed the Office that the employee died of lung cancer on December 17, 2002. The Office paid the employee compensation for total wage loss through December 17, 2002. By letter dated April 1, 2003, the employee's attorney informed the Office that the employee's widow was seeking a posthumous schedule award.

On April 30, 2003 appellant filed a Form CA-7 claim for a posthumous schedule award.

In support of the schedule award, appellant submitted a March 4, 2003 report by Dr. David Weiss, an osteopath. He indicated that he had previously examined the employee and had reviewed his prior medical records. Dr. Weiss stated findings on examination and concluded that the employee had a 66 percent impairment for the left upper extremity, citing the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fifth edition) (A.M.A., *Guides*). He arrived at this rating based on the following calculations: a 16 percent impairment for the left upper brachial plexus sensory deficit, pursuant to Table 16-10 at page 482 and Table 16-14 at page 490; a 4 percent impairment for the left C7 sensory deficit pursuant to Table 16-10 at page 482 and Table 16-14 at page 490; a 24 percent impairment for the left wrist arthroplasty pursuant to Table 16-27 at page 506; a 20 percent impairment for the left grip strength deficit pursuant to Table 16-32 at page 509 and Table 16-32 at page 509; a 21 percent impairment for decreased flexion/extension for the left wrist pursuant to Figure 16-28 at page 467; and a 9 percent impairment for decreased left wrist radial/ulnar deviation ankylosis pursuant to Figure 16-31 at page 469; and a 3 percent impairment for pain pursuant to Figure 18-1 at page 574. Dr. Weiss further found that the date of maximum medical improvement was September 17, 2002.

In an impairment evaluation dated April 18, 2003, an Office medical adviser reviewed Dr. Weiss' report and noted that, although he stated that he had previously examined and treated the employee, Dr. Weiss did not submit any documentation supporting this assertion. He further stated that, although Dr. Weiss found that September 17, 2002 was the date of maximum medical improvement, which was three months prior to the employee's death, he did not explain why he chose this date. In addition, the Office medical adviser advised that there was no evidence that the brachial plexus or C7 neuropathies cited by Dr. Weiss existed prior to the work injury or were causally related to the work injury; thus, they should not be included in the employee's

upper extremity award. He also noted that the A.M.A., *Guides* preclude an additional rating for grip strength where the examiner has already derived an impairment rating based on loss of motion, pursuant to section 16.8a at page 508.

Dr. Weiss submitted a copy of a report he had issued on July 12, 2000 which indicated that he had examined the employee on July 10, 2000. In this report, he found that appellant had a 91 percent impairment of the left upper extremity pursuant to the fourth edition of the A.M.A., *Guides*. Dr. Weiss arrived at this rating based on the following calculations: a 24 percent impairment for the left wrist arthroplasty; a 50 percent left ulnar nerve entrapment at the elbow; a 40 percent impairment for the left median nerve entrapment at the wrist; a 19 percent impairment for the left upper brachial plexus for motor neuropathy; and a 16 percent impairment for the left upper brachial plexus sensory neuropathy. Dr. Weiss also stated in this report, that July 10, 2000 was the date the employee had reached maximum medical improvement.

In an impairment evaluation dated August 1, 2003, an Office medical adviser reviewed Dr. Weiss' July 12, 2000 and April 18, 2003 reports. He stated that he agreed with Dr. Weiss' 24 percent impairment for left wrist arthroplasty and his 30 percent rating accorded for decreased range of motion of the wrist based on a 21 percent impairment for decreased flexion/extension for the left wrist and a 9 percent impairment for decreased left wrist radial/ulnar deviation ankylosis. The Office medical adviser stated that only the medial neuropathy had been accepted for this claim and that there was no indication that any other nerve condition preceded the initial injury. He noted also that because appellant had undergone surgery and had pain symptoms, he rated him a five percent rating for pain, in accordance with page 495 of the A.M.A., *Guides*. The Office medical adviser reiterated that a rating for decreased grip strength was not allowed by the A.M.A., *Guides*, when there is a rating for impairment based on loss of motion had already been rendered. Using the Combined Values Chart, the Office medical adviser stated that the employee had a 50 percent impairment of the left upper extremity and that the date of maximum medical improvement was July 12, 2000, based on Dr. Weiss' initial impairment evaluation.

On September 11, 2003 the Office granted the employee a schedule award for a 50 percent impairment of the left upper extremity. The Office found that appellant's weekly pay rate for the award would be based on a compensation rate of 3/4 for the period July 12, 2000 through December 17, 2002, the date the employee died. For the period December 18, 2002 through July 8, 2003, the award would be based on the 2/3 compensation rate. The Office stated:

> "Your husband's entitlement began on July 12, 2000. He was receiving full compensation benefits at that time and continued to receive benefits through December 17, 2002, his date of death. Because he would not have been entitled to receive both compensation and a schedule award at the same time we have commuted his compensation for the period July 12 through December 17, 2002 to a scheduled award. The remainder of the award from December 18, 2002 through July 8, 2003 was forwarded to you in two checks (December 18 through 28, 2002, $999.43 and December 29, 2002 through July 8, 2003, $17,727.78)."

By letter dated September 16, 2003, appellant's attorney requested an oral hearing which was held on April 21, 2004. Counsel contested the amount of the award and also requested reconsideration of the Office's determination of the period in which the schedule award should

be paid. Appellant contended that the Office erred in finding that the employee reached maximum medical improvement on July 10, 2000, the date Dr. Weiss examined the employee. Noting that his March 4, 2003 report indicated that the employee had reached maximum medical improvement as of September 17, 2002, appellant's attorney contended that there was an unresolved conflict in the medical evidence.

In a decision dated July 13, 2004, an Office hearing representative affirmed the September 11, 2003 decision, denying appellant's claim for an additional award for the left upper extremity and finding that the date of maximum medical improvement was July 12, 2000.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[1] sets forth the number of weeks of compensation to be paid for permanent loss or loss of use, of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.[2] However, the Act does not specify the manner in which the percentage of loss of use, of a member is to be determined. For consistent results and to insure equal justice under the law to all claimants, the Office has adopted the A.M.A., *Guides* (fifth edition) as the standard to be used for evaluating schedule losses.[3]

ANALYSIS -- ISSUE 1

In the present case, the Office medical adviser properly found that the employee had a 50 percent impairment to the left upper extremity based on the following calculations by Dr. Weiss: a 24 percent impairment for the left wrist arthroplasty pursuant; a 21 percent impairment for decreased flexion/extension for the left wrist; and a 9 percent impairment for decreased left wrist radial/ulnar deviation ankylosis. The method for calculating impairments due to arthroplasty of a joint is outlined at section 16.7(b) of the A.M.A., *Guides*. This subsection states that impairment ratings for the upper extremity following arthroplasty of specific joints are listed in Table 16-27 at page 506. As Table 16-27 accords a 24 percent impairment rating for total wrist arthroplasty, the procedure which the employee underwent, the Office medical adviser's rating was rendered in a proper manner pursuant to the A.M.A., *Guides*.

With regard to impairment for decreased flexion/extension for the left wrist, section 16.4(g) of the A.M.A., *Guides* sets out the procedure for rating impairments based on loss of wrist motion. The relative upper extremity functional value is converted pursuant to the guidelines presented in Figures 16-28 at page 467 and 16-31 at page 469. The specific procedure for calculating an impairment rating based on loss of flexion and extension is outlined at page 467 of the A.M.A., *Guides*, which states that ankylosis in functional positions corresponds to a 21 percent upper extremity impairment. Relying on this procedure and on this section of the

[1] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

[2] 5 U.S.C. § 8101(19).

[3] 20 C.F.R. § 10.404; 5 U.S.C. § 8107(c).

A.M.A., *Guides*, Dr. Weiss found that the employee had a 21 percent upper extremity impairment; the Office medical adviser correctly adopted this finding.[4]

The procedure for obtaining an impairment rating for radial and ulnar deviation is discussed at page 468-469 of the A.M.A., *Guides*. In order to render an upper extremity impairment rating based on radial and ulnar deviation, the examiner is instructed to use Figure 16-31 at page 469 for decreased left wrist radial/ulnar deviation ankylosis pursuant to Figure 16-31, at page 469. Example 16-42 at page 470 states that wrist ankylosis which results in lateral deviation yields a nine percent impairment of the upper extremity. Dr. Weiss' calculation of a nine percent impairment for decreased left wrist radial/ulnar deviation ankylosis, adopted by the Office medical adviser was correct. The Office medical adviser accorded an additional five percent for pain pursuant to page 495 of the A.M.A., *Guides*.[5]

Finally, the Office medical adviser found that only medial neuropathy had been accepted for this claim and that there was no indication that any other nerve condition preceded the initial injury. Therefore, he properly disallowed additional impairment based on the left upper brachial plexus sensory deficit and for the left C7 sensory deficit which were not based on accepted conditions. The Office medical adviser reiterated that a rating for decreased grip strength was not allowed by the A.M.A., *Guides*, when there was loss of motion, pursuant to section 16.8a at page 508.[6] Using the combination table, the Office medical adviser properly concluded that the employee had a 50 percent impairment of the left upper extremity.

As there is no other probative medical evidence establishing that the employee sustained any additional impairment, the Office properly found that the employee was not entitled to an award for more than a 50 percent permanent impairment of the employee's left upper extremity.

LEGAL PRECEDENT -- ISSUE 2

It is a well-established principle that a claimant is not entitled to dual workers' compensation benefits for the same injury.[7] With respect to benefits under the Act,[8] the Board

[4] *See* Example 16-42 of the A.M.A., *Guides*.

[5] Dr. Weiss accorded appellant a three percent impairment for pain.

[6] Under section 16.8(a) of the A.M.A., *Guides*, under the heading, *"Principles,"* it is stated at page 508:

> "In as rare case, if the examiner believes the individual's loss of strength represents an impairing factor that has not been considered adequately by other methods in the A.M.A., *Guides*, the loss of strength may be rated separately. An example of this situation would be loss of strength due to a severe muscle tear that healed leaving a palpable muscle defect. If the examiner judges that loss of strength should be rated separately in an extremity that presents other impairments, the impairment due to loss of strength, *could be combined* with the other impairments, *only* if based on unrelated etiologic or pathomechanical causes. *Otherwise, the impairment ratings based on objective anatomic findings take precedence.* Decreased strength cannot be rated in the presence of decreased motion, painful conditions, deformities or absence of parts . . . that prevent effective application of maximal force in the region being evaluated." (Emphasis in the original.)

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

[8] 5 U.S.C. §§ 8101-8193.

has held that "an employee cannot [con]currently receive compensation under a schedule award and compensation for disability for work."[9]

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.[10]

The issue of maximum medical improvement was extensively treated by the Board in its two decisions in *Marie J. Born*.[11] In the 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."[12] 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.[13]

ANALYSIS -- ISSUE 2

In the present case, the evidence establishes that the employee reached maximum medical improvement as of July 12, 2000. Dr. Weiss stated in his July 12, 2000 report, when he last examined the employee, that the date of maximum medical improvement was July 12, 2000. Although he subsequently indicated in his March 4, 2003 report, that the date of maximum medical improvement was September 17, 2002, he did not provide any medical rationale in support of this new date. In addition, Dr. Mandel stated in his July 24, 2000 report -- 12 days after the issuance of Dr. Weiss' initial report -- that the employee had reached maximum medical improvement as of the date of his report.

The record thus, contains persuasive evidence from the employee's attending physician and from Dr. Mandel, that the employee reached maximum medical improvement in July 2000. Although the employee continued to receive treatment for his accepted conditions until the date of his death in December 2002, neither the provisions of the Act, the implementing regulations or Board precedent require an employee to stop receiving medical treatment in order to be considered at maximum medical improvement. The Office medical adviser reviewed the reports of Dr. Weiss and Dr. Mandel and properly found that the employee had reached maximum medical improvement as of July 12, 2000. Accordingly, as the weight of the medical evidence of record establishes that he reached maximum medical improvement on July 10, 1992 the Office

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

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

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

[12] *Id.*

[13] *Id.*

properly converted his compensation for temporary total disability already paid to appellant during the period from July 12, 2000 through December 17, 2002 to schedule award payments.[14]

CONCLUSION

The Board finds that the employee had no more than a 50 percent impairment to his left upper extremity. The Board finds that the Office properly determined that his schedule award should be paid for the period July 10, 2000 to December 17, 2002 and that the Office properly converted to schedule award payments, those payments for temporary total disability already received by the employee during that time period.

ORDER

IT IS HEREBY ORDERED THAT the July 13, 2004 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: December 19, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

[14] *James E. Earle*, 51 ECAB 567 (2000).