United States Department of Labor
Employees' Compensation Appeals Board

E.M., Appellant	)	
	)	**Docket No. 14-1075**
and	)	**Issued: November 3, 2014**
DEPARTMENT OF THE ARMY, FORT McCOY, Sparta, WI, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 7, 2014 appellant, through counsel, filed a timely appeal from a March 13, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant may receive a schedule award for her bilateral upper extremity impairment.

On appeal appellant's counsel argues that OWCP's decision is contrary to fact and law.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case was previously before the Board.[2] Appellant, then a 46-year-old boiler fireman, sustained an injury at work on February 9, 1979 when he bumped his head against a pipe. OWCP accepted his claim for acute muscle spasm with C5-6 radiculopathy, for which he underwent a cervical discectomy and fusion. In a June 20, 1994 decision, OWCP terminated appellant's monetary compensation benefits under section 8106(c) due to his refusal of an offer of suitable work. The termination was effective as of June 18, 1994. The facts as set forth in the Board's prior decisions are hereby incorporated by reference.

On November 21, 2012, January 25 and February 1, 2013 appellant submitted claims for a schedule award.

By decision dated March 12, 2013, OWCP denied appellant's claim for a schedule award. It found that no evidence was submitted to establish the date of maximum medical improvement or any percentage of permanent impairment.

By letter dated March 18, 2013 appellant, through counsel, requested a telephone hearing before an OWCP hearing representative.

In a March 2, 2013 report, Dr. Neil Allen, a Board-certified internist and neurologist, listed a diagnosis of displacement of a cervical intervertebral disc without myelopathy. He applied the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed., 2009) (A.M.A., *Guides*). Dr. Allen determined that appellant had an upper extremity impairment of 35 percent, comprised of 18 percent motor impairment and 17 percent sensory impairment. He made reference to Chapter 17, pertaining to rating impairment of the spine.

The record was referred to Dr. Christopher Gross, an OWCP medical adviser. In a report dated April 28, 2013, Dr. Gross determined that the date of maximum medical improvement was January 2, 1990, as reflected by the report of Dr. Stephen L. Haug, an attending physician. Dr. Haug determined that appellant had degenerative arthritis of the cervical spine with fusion at two levels as a result of the 1979 injury. He stated that appellant's prognosis was poor and he did not foresee any change in the future. Dr. Gross determined, based on the clinical findings by Dr. Allen, that appellant had 23 percent impairment of the right arm and 5 percent impairment of the left arm due to his accepted injury.

By decision dated June 5, 2013, OWCP hearing representative remanded the case to OWCP to further evaluate the medical evidence.

[2] In Docket No. 84-725 (issued June 13, 1984), *petition for recon. denied*, Docket No. 84-725 (issued August 21, 1984), the Board affirmed OWCP's finding that appellant failed to establish disability causally related to his employment after March 12, 1979, the date he returned to his regular duties. In Docket No. 97-2794 (issued April 24, 1998) the Board dismissed appellant's appeal at his request. In Docket No. 06-1946 (issued July 13, 2007), Docket No. 09-511 (issued September 4, 2009), *petition for recon. denied* and Docket No. 09-511 (issued December 24, 2009), the Board affirmed OWCP's denial of reconsideration as his requests were untimely and did not establish clear evidence of error.

A payment history inquiry report reflects that appellant received wage-loss compensation commencing in 1982 for total disability. Appellant was paid wage-loss compensation until June 18, 1994, the date monetary benefits were terminated under section 8106(c)(2) based on his refusal of suitable work. The period of wage-loss payments made to appellant incorporate January 2, 1990, the date of maximum medical improvement as determined by the medical adviser, through September 5, 1991, the date benefits payable under the schedule would cease.

By decision dated August 28, 2013, OWCP found that the weight of medical opinion was represented by Dr. Gross, the medical adviser. It determined that appellant sustained 23 percent impairment to the right upper extremity and 5 percent impairment to the left upper extremity. The date of maximum medical improvement was on January 2, 1990. The decision noted that the schedule awards for the arms equaled 74.88 weeks of compensation, beginning with the date of maximum medical improvement on January 2, 1990 and running through September 5, 1991. OWCP determined that, as appellant received wage-loss compensation for disability during this period, he was not eligible for payment under the schedule award as it would constitute a prohibited dual payment.

On September 5, 2013 appellant, through counsel, requested a telephone hearing.

At the January 27, 2014 hearing, appellant's counsel argued that appellant reached maximum medical improvement prior to the date OWCP terminated his benefits in 1994; therefore, he should be entitled to schedule award benefits accruing prior to such date.

By decision dated March 13, 2014, an OWCP hearing representative affirmed the August 28, 2013 decision.

LEGAL PRECEDENT

The schedule award provision of FECA[3] and its implementing regulations[4] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform stands applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.[5] The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[6]

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

[5] *Id*. For impairment ratings calculated on and after May 1, 2009, OWCP uses the sixth edition. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims,* Chapter 2.808.6.a (January 2010).

[6] *See id.; Jacqueline S. Harris,* 54 ECAB 139 (2002).

Section 8106(c)(2) of FECA provides in pertinent part, that a partially disabled employee who refuses or neglects to work after suitable work is offered is not entitled to compensation.[7] A claimant who refuses suitable work is not entitled to further compensation, including payment of a schedule award, for the permanent impairment of a scheduled member.[8] If, however, a claimant reached maximum medical improvement prior to termination for refusal of suitable employment, he or she would be entitled to payment of any portion of the schedule award due prior to the termination of monetary compensation benefits.[9]

It is 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 accepted employment injury. The Board has explained that maximum medical improvement means that the physical condition of the injured member of the body has stabilized and will not improve further. The determination of whether maximum medical improvement has been reached is based on the probative medical evidence of record and is usually considered to be the date of the evaluation by the attending physician which is accepted as definitive by OWCP.[10]

The Board notes that a claimant is not entitled to concurrent wage-loss compensation and a schedule award for the same injury.[11]

ANALYSIS

The Board finds that appellant is not entitled to schedule award compensation from January 2, 1990 through September 5, 1991, a period during which he already received wage-loss compensation for disability.

Dr. Allen did not list the date of maximum medical improvement. Dr. Gross, OWCP medical adviser, reviewed the medical record and determined that the date of maximum medical improvement was January 2, 1990, the date appellant's then-treating physician noted that his prognosis was poor and did not expect appellant's condition to change in the future. In *Marie J. Born*,[12] the Board reviewed the rule that a period covered by a schedule award commences on the date the employee reached maximum medical improvement. The Board stated that maximum medical improvement "means that the physical condition of the injured member of the

[7] 5 U.S.C. § 8106(c)(2).

[8] *D.S.*, Docket No. 08-885 (issued March 17, 2009); *Sandra A. Sutphen*, 49 ECAB 174 (1997).

[9] *Id.; see also G.S.*, Docket No. 14-408 (issued June 10, 2014).

[10] *Mark A. Holloway*, 55 ECAB 321, 325 (2004).

[11] *See James A. Earle*, 51 ECAB 567 (2000).

[12] 27 ECAB 623 (1976), *petition for recon. denied*, 28 ECAB 89 (1976).

body has stabilized and will not improve further."[13] The question is factual and depends in each case on the medical findings in the record.[14]

In this case, the date of maximum medical improvement is clearly supported by the weight of medical opinion of Dr. Gross, the medical adviser, based on a review of the medical reports of Dr. Haug. Accordingly, the period of appellant's schedule awards for impairment to his arms commenced on January 2, 1990.[15] As the schedule awards for the upper extremities covered 74.88 weeks of compensation, the end date was on September 5, 1991. The record reflects, however, that appellant had already received wage-loss compensation for total disability during this time period.

As held in *Eugenia L. Smith*,[16] a claimant is not entitled to dual workers' compensation benefits for the same injury. A claimant may not receive compensation for temporary total disability based on his or her loss of wage-earning capacity and a schedule award covering the same period of time.[17] Therefore, appellant cannot receive concurrent wage-loss compensation and a schedule award for the same injury.[18]

Counsel for appellant was correct in stating that he reached maximum medical improvement prior to June 20, 1994, when his monetary benefits were terminated under section 8106(c)(2), but the prohibition against dual benefits for the same injury precludes the receipt of schedule award compensation from January 2, 1990 to September 5, 1991 due to the payment of wage-loss compensation for total disability during this period.

CONCLUSION

The Board finds that appellant is precluded from receipt of schedule award compensation for a period he received wage-loss compensation for total disability.

[13] *Id.* at 27 ECAB 629.

[14] *Id*. at 630. *See also James Kennedy*, 40 ECAB 620 (1989).

[15] *See V.B.*, Docket No. 14-8 (issued March 6, 2014).

[16] 41 ECAB 409 (1990).

[17] *Id*. at 412-13.

[18] *James A. Earle*, *supra* note 11.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 13, 2014 is affirmed.

Issued: November 3, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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