

STATE OF MAINE
WORKERS' COMPENSATION BOARD

DECISION NO.: WCB-213-08-01

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Any party in interest may request an appeal to the Maine Law Court by filing a copy of this decision with the clerk of the Law Court within 20 days of receipt of this decision, and by filing a petition seeking appellate review with the Law Court within 20 days thereafter. See 39-A M.R.S.A. Section 322.

Pursuant to the Board Rule Chapter 12 Section 19, all evidence and transcripts in this matter may be destroyed after 60 days unless (1) we receive written notification that one or both parties wish to have their exhibits returned to them, or (2) a petition for appellate review is filed. The 60 days will not begin to run until all post-decree motions have been decided or otherwise disposed.

BONNIE HOLMES ADAMS
(Employee)
v.
PRESQUE ISLE NURSING HOME
(Employer)
and
MAINE HEALTH CARE ASSOCIATION
(Insurer)

BEFORE: Hearing Officer Thomas J. Pelletier

Pending before the Board is a Petition for Extension of Benefits Pursuant to 39-A M.R.S.A. §213 (1). By letter dated August 2, 2007, the parties were notified that the Board of Directors voted to delegate authority to hear this petition to the undersigned hearing officer.

A hearing was held on December 13, 2007. At the hearing, the employee, Bonnie Adams testified, and a social worker, Marla Raymond testified. In addition, the Board received Employee Exhibit 1, transcript of deposition of Dr. Stephen Wood dated September 20, 2006; Employee's Exhibit 2, a Warranty Deed for employee's residential real estate; Employee's Exhibit 3, the Mortgage Deed which encumbers the employee's residential real estate; Employee's Exhibit 4, employee's financial statement; Employer's Exhibits 1, 2 and 3 which are decisions of the Board dated, in chronological order, April 19, 1997, May 27, 1997, September 24, 1997 (Exhibit 1); August 24, 1999 and October 18, 2001. In addition, the Board has taken notice of the Board's decision in this matter dated February 9, 2007 finding that the employee had exhausted her entitlement to partial incapacity benefits pursuant to Section 213 and Former Title 39 Section 55-B as well as the decision of the Board with respect to the employee's Motion for Findings of Fact and Conclusions of Law regarding the February 9, 2007 decision issued on April 11, 2007 (dismissing employee's Motion for Findings of Fact and Conclusions of Law). Finally, the Board has considered the pleadings and position papers on file at this time.

Based upon the evidence presented, the Board's relevant findings of fact and conclusions of law are as follows:

Employee sustained compensable neck injuries on May 2, 1992, January 1, 1993 and October 1, 1995. Employee was employed by the same employer and covered by the same insurer on each date of injury. Employee is a 54 year-old nurse's aide who has been unable to resume that occupation for many years as the result of the combined effects of her 3 work injuries. As the result of the August 24, 1999 Board decree finding that employee had a part-time light duty work capacity, employee was receiving 44% partial (amounting to \$91 per week) divided equally between the 3 work-related injuries when the Board decided on February 9, 2007 that the employee had reached the durational limits for partial incapacity for her injuries. On April 11, 2007 the Board denied employee's Motion for Further Findings and Conclusions regarding the February 9, 2007 decision.

The Board decisions dated February 9, 2007 and April 11, 2007 are now final and not subject to further appellate review. The employer has raised 2 affirmative defenses to the pending petition. First, the employer argues that the provision for extension of benefits beyond the durational limit in the case of extreme financial hardship due to the inability to resume gainful employment, does not apply to the employee's May 2, 1992 work injury because the statute is not applicable to injuries occurring prior to January 1, 1993. This defense has merit. The provisions of Section 213 do not apply to matters in which the injury occurred prior to January 1, 1993. Employee's entitlement to partial incapacity for her 1992 date of injury is governed by Former Title 39, M.R.S.A. Section 55-B. See, Cust v. University of Maine, 766 A.2d 566 (ME 2001) at page 569. Former Section 55-B does not provide for any exception for extending partial benefits beyond 520 weeks. Because Section 213 does not apply to the May 2, 1992 date of injury, 1/3 of the employee's weekly benefit amount may not be reinstated pursuant to this decision. See also, 39-A M.R.S.A. Section 201 (6) [in a combined effects or successive injury case, employee's rights for the portion of her disability attributable to a pre-January 1, 1993 work injury "must be determined by the law in effect at the time of the prior injury"].

Second, the employer argues that the employee's Petition for Extension of Benefits was not timely filed, and for that reason should be summarily denied. The pending petition is dated June 12, 2007 and was received by the Board at Central Office in Augusta on June 22, 2007. Board rules require that a Petition to Extend Benefits must be filed within 30 days of the date that benefits expire. W.C.B. Rule, Ch. 2, Section 5.2. Benefits could have been lawfully discontinued in this case on May 2, 2007, pursuant to Sections 205 (9) (B) (2), 318 and 322. (The date when the February 9, 2007 decision became "final"). However, W.C.B. Rule, Chapter 2, Section 5.1 states that before benefits may be discontinued as the result of reaching the durational limit, the employer must send a notice, 21 days in advance of the expiration date, informing the employee that benefits are due to expire, and advising of the right to file a Petition for Extension of Benefits^[1].

Subsection 5.1 then goes on to state: **“Failure to send the required notice will automatically extend the employee’s entitlement to lost time benefits for the period that the notice was not sent.”** (Emphasis added). Because the employer has failed to provide proof that it ever sent the employee the required notice, the employer has not shown the date when the employee’s benefits expired, and therefore has not shown that the pending petition was filed late.

Reaching the merits of the employee’s pending claim, based on the testimony of Dr. Wood, and his medical records attached to his deposition, the Board finds that the employee is presently physically unable to work and totally incapacitated based upon her medical condition as a whole. See, Employee’s Exhibit 1. While part of the employee’s inability to work is based on her work-related neck injuries, she has other nonwork-related medical conditions which contribute to her inability to work. These subsequent non-work conditions were noted in the February 9, 2007 Board decision, and because of Section 201 (5), employee’s benefits could not include compensation for the effects of these on employee’s earning capacity. Cf. Pratt v. Fraser Paper, Ltd, 744A.2d 351, at 355 (Me. 2001). However, in relation to extension of benefits beyond the durational limit, Section 213 (1) does not, by its terms, require that the inability to work be based solely on the work injury. Compare, the wording of 213 (1) with 213 (1-A). The evidence shows that employee’s work-related injuries continue to make a significant contribution to her disability, and that the employee has no physical capacity for work from a medical perspective based on the combination of her work-related neck injuries and her nonwork-related peripheral vascular disease, emphysema and heart disease.

With respect to the employee’s financial situation, the employee’s income does not cover the necessities of daily living, such as her mortgage, electricity, telephone, heating, food, clothing, transportation, personal care and hygiene. The employee is divorced, receives no spousal support, and does not have a driver’s license. Her only income is \$690 per month from

Social Security Disability. She receives public assistance in the form of food stamps, help with heating her home and transportation to town (Mars Hill) to get groceries.

Ms. Adams has met her burden to show that she is currently experiencing extreme financial hardship due to inability to return to gainful employment.

WHEREFORE, the Petition for Extension of Benefits is hereby **GRANTED**, and it is ordered that the employer/insurer reinstate employee's benefits for partial incapacity at the rate of \$60.66 per week (the combined weekly benefit amount for the January 1, 1993 and October 1, 1995 work injuries only), from the date that the employer/insurer ceased benefit payments to the present and ongoing until otherwise ordered by this Board.

So Ordered.

Dated: January 7, 2008
Caribou, Maine

Workers' Compensation Board

THOMAS J. PELLETIER
HEARING OFFICER

¹¹ WCB Rule, Ch. 2, Sec. 5, entitled "Requests for extension of benefits pursuant to 39-A M.R.S.A. §213 (1), provides in subsection 1:

"Prior to cessation of benefits pursuant to 39-A M.R.S.A. §213 (1), the employer/insurer must notify the employee that the employee's lost time benefits are due to expire. The notice must be sent at least 21 days in advance of the expiration date, and must include the date the lost time benefits are due to expire and the following paragraph:

If you are experiencing extreme financial hardship due to inability to return to gainful employment, you may be eligible for an extension of your weekly benefits. To request such an extension, you must file a Petition for Extension of Benefits within 30 calendar days of the date that benefits expire, or, in cases where the expiration date is contested, within 20 calendar days of a final decree as to the expiration date."