U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES L. TURMAN and DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF PRISONS, Florence, CO

Docket No. 98-182; Submitted on the Record;
Issued July 20, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether appellant is entitled to more than a three percent permanent loss of use of the left finger.

The Office of Workers' Compensation Programs accepted appellant's claim for subungual hematoma of the left middle finger and for exploratory surgery of the left middle finger. On October 7, 1996 appellant filed a claim for a schedule award. In a report dated August 24, 1996, appellant's treating physician, Dr. Eric Carlson, a Board-certified orthopedic surgeon, noted that appellant underwent surgery to his left middle fingertip and returned to the office for a followup on August 20, 1996. Dr. Carlson stated that appellant had reached maximum medical improvement. He found that appellant had a 50 percent sensory loss to the left middle fingertip at the longitudinal level on the radial side based on Table 5, p. 22 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1994). Dr. Carlson stated that appellant had a six percent impairment of his hand, and that "60 percent of that is 3.6 percent as [appellant did] not have a complete loss of sensation." He stated that the 3.6 percent translated to 4 percent of the upper extremity based on Table 2, p. 19 and to a 2 percent whole person impairment based on Table 3, p. 20.

By letter dated September 5, 1996, the district medical adviser noted Dr. Carlson's observation that appellant had a radial loss at the middle fingertip and stated that the proper table is No. 9 for total loss, radial side, "'tip (10 [percent])' which translates to a permanent impairment of 3 percent."

By decision dated November 13, 1996, the Office granted appellant a schedule award for a three percent permanent loss of use of the left middle finger. The period of the award ran from August 24 to 30, 1996 in the amount of $737.44.

By letter dated December 11, 1996, appellant requested reconsideration of the Office's decision. Appellant did not submit any additional evidence.

By decision dated December 20, 1996, the Office denied appellant's reconsideration request.

By letter dated February 1, 1997, appellant requested reconsideration of the decision and submitted a medical report from Dr. Carlson dated January 31, 1997. In his January 31, 1997 report, Dr. Carlson stated that, in his August 24, 1996 report, he only addressed one side of appellant's finger but based on his discussions with appellant, appellant had a longitudinal sensory loss on both sides of the finger. Using the A.M.A., *Guides* (4th ed. 1994), he stated that the length of loss was determined by Figure 17 on page 3/30. Dr. Carlson stated that the ulnar finger "is partial loss, 60 [percent] length level, (middle phalanx)" and the radial finger "is partial loss, 40 [percent] length level (DIP [distal interphangeal] joint)." Using Table 9 on page 3 to 31, he determined that appellant had a 6 percent ulnar finger loss and had a 6 percent radial finger loss or a total 12 percent finger loss. Dr. Carlson attached copies of pages 3 to 30 and 3 to 31 from the A.M.A., *Guides,* and marked the graphs in Figure 17 and on Table 9 with circles and lines to show how he obtained his figures.

In a report dated March 12, 1997, the district medical adviser reviewed Dr. Carlson's January 31, 1997 report and concluded that three percent was the proper impairment rating for appellant's right middle finger. The district medical adviser stated that he reached his conclusion by consulting with two other physicians, one of whom stated that appellant's middle finger should be rated five percent permanently impaired, and the other who rated appellant three percent permanently impaired. Addressing the marks Dr. Carlson made on pages 3 to 30 and 3 to 31 of the A.M.A., *Guides* (4th ed. 1994), the district medical adviser stated:

> "Circular mark [is] presumably for the purpose of emphasis, but it lacks any explanation. I presume the remarks themselves mean to imply sympathy for the physician who has to adapt his usually nonmathematics and legal orientation to a confusing situation, and that [this] is definitely not applicable to protocol matters. The next circular mark surrounds Table 9 on 3/31 to which there are internal additions without coherent explanation."

It should be noted that, in his report, the district medical adviser twice refers to appellant's "right" middle finger when the finger in question is appellant's left middle finger.

By decision dated April 30, 1997, the Office denied appellant's request for modification of the decision.

The Board finds that this case is not in posture for decision and requires further evidentiary development.

The schedule award provision of the Federal Employees' Compensation Act[1] provides for compensation to employees sustaining permanent impairment from loss or loss of use of specified members of the body. The Act's compensation schedule specifies the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and

[1] 5 U.S.C. § 8107 *et seq.*

organs of the body. The Act does not, however, specify the manner by which the percentage loss of a member, function or organ shall be determined. The method used in making such a determination is a matter that rests in the sound discretion of the Office.[2] 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 standards applicable to all claimants.[3]

In the present case, in his January 31, 1997 report, Dr. Carlson explained that in his August 24, 1996 report he neglected to evaluate the extent of appellant's impairment to both sides of his left middle finger and only addressed one side of appellant's finger. Using Figure 17 on page 3 to 30 of the A.M.A., *Guides* (4th ed. 1994), he determined that the ulnar finger was a loss of 60 percent at the middle phalanx length level and the radial finger was a 40 percent loss at the DIP joint. Using Table 9, he determined that the 60 percent loss of the ulnar finger and the 40 percent loss of the radial finger each translated to a 6 percent finger impairment and therefore appellant had a total finger impairment of 12 percent. The figures Dr. Carlson obtained were consistent with the A.M.A., *Guides* (4th ed. 1994).

In his March 12, 1997 report, the district medical adviser claimed not to understand Dr. Carlson's calculation as indicated by his circular marks on the copy of pages 3 to 30 and 3 to 31 of the A.M.A., *Guides*, (4th ed. 1994) and stated that both marks lacked any coherent explanation. He, however, did not indicate that he considered the significance of Dr. Carlson's statement in his January 31, 1997 report that Dr. Carlson had previously failed to consider both sides of appellant's finger in rating appellant three percent impaired. Moreover, to ascertain the correct figure, the district medical adviser did not provide any meaningful explanation as to how he obtained three percent but stated, without mentioning their names or credentials, that he asked other doctors for their opinions, and that one said three percent and another said five percent.

The case must therefore be remanded to a second opinion physician to evaluate the evidence and appellant, if necessary, and to explicitly state which findings regarding appellant's left middle finger are being used, to use those figures in obtaining the percentage of impairment from the A.M.A., *Guides* (4th ed. 1994), and to explain how they use those figures and the A.M.A., *Guides* (4th ed. 1994), with reference to the page and table or figure, to make their determination. The fact that Dr. Carlson, the treating physician, believed that his initial three percent permanent impairment rating was erroneous because he did not address both sides of appellant's finger should be considered. Further, the second opinion physician should address the extent of impairment to appellant's left middle finger, not the right middle finger. On remand, after developing the evidence further as is appropriate, the Office should then make a *de novo* decision based on the augmented record.

The decisions of the Office of Workers' Compensation Programs dated April 30, 1997, December 20 and November 13, 1996 are hereby vacated and the case is remanded for further consideration consistent with this opinion.

[2] *Arthur E. Anderson*, 43 ECAB 691, 697 (1992); *Danniel C. Goings*, 37 ECAB 781, 783 (1986).

[3] *Arthur E. Anderson*, *supra* note 2 at 697; *Henry L. King*, 25 ECAB 39, 44 (1973).

Dated, Washington, D.C.
July 20, 1999

George E. Rivers
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member