United States Department of Labor
Employees' Compensation Appeals Board

E.S., Appellant	)	
and	)	**Docket No. 14-1787**
	)	**Issued: December 1, 2014**
DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, Jeffersonville, IN, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 11, 2014 appellant, through her attorney, filed a timely appeal from a June 5, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her claim for a schedule award. 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 has a permanent impairment of her right ring finger or right upper extremity, entitling her to a schedule award.

FACTUAL HISTORY

On February 22, 2011 appellant, then a 51-year-old geography clerk, filed a traumatic injury claim alleging that on February 9, 2011 she fractured a bone in her right hand. She

[1] 5 U.S.C. § 8101 *et seq.*

stopped work on February 9, 2011 and returned to work on February 11, 2011. OWCP accepted the claim for a closed fracture of the right ring finger phalanx.

On June 9, 2011 Dr. Rodrigo Moreno, an orthopedic surgeon, related that appellant was doing well after her fracture of the right ring finger. He found full range of motion of the right ring finger and grip strength of 55 of the right hand and 66 of the left hand. Dr. Moreno opined that appellant was at maximum medical improvement and released her to return for further treatment as necessary.

Appellant worked until her term appointment ended on September 30, 2011. On February 7, 2013 she filed a claim for a schedule award.

By letter dated February 12, 2013, OWCP requested that appellant submit an impairment evaluation addressing the extent of any permanent impairment in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*).

In a report dated April 25, 2013, Dr. Moreno evaluated appellant for symptoms of trigger finger of the right ring finger for the past year following a fracture at work two years earlier. He diagnosed right ring finger tenosynovitis and found that she could perform her usual employment.

On May 31, 2013 Dr. Moreno requested that right ring finger tenosynovitis "be added to [appellant's] claim as this condition is a result of her previous work-related injury of right ring finger proximal phalanx fracture."

In an impairment evaluation dated June 13, 2013, Dr. Martin Fritzhand, a Board-certified independent examiner, discussed appellant's work-related fracture and subsequent treatment with a cast. Appellant complained of continued pain and discomfort with loss of grip strength and tingling and achiness of the finger. Dr. Fritzhand stated, "On examination of the right hand, the proximal phalanx of the right ring finger is extremely tender to palpation. The finger itself is weak and does not participate in grip. Pinprick and light touch are diminished over both the proximal and middle phalanges of the right ring finger." Using the sixth edition of the A.M.A., *Guides*, he identified the diagnosis as a class 1 proximal phalanx fracture using Table 15-2 on page 393, the digit regional grid. Dr. Fritzhand applied grade modifiers of 2 for functional history based on a *Quick*DASH score of 50, a grade modifier of 1 for physical examination and a grade modifier of 1 for clinical studies. Utilizing the net adjustment formula, he moved the default value one place to the right to find a seven percent impairment of the digit, or a one percent permanent impairment of the right upper extremity.

On September 19, 2013 OWCP requested that an OWCP medical adviser review the medical evidence and provide an opinion on Dr. Fritzhand's June 13, 2013 impairment evaluation. In an accompanying statement of accepted facts, it identified right ring finger tenosynovitis as a nonemployment-related condition. On September 24, 2013 Dr. Morley Slutsky, a Board-certified orthopedic surgeon and OWCP medical adviser, reviewed Dr. Moreno's June 9, 2011 report finding that appellant was at maximum medical improvement with normal range of motion and grip strength and no tenderness or pain. He related that she

would have no impairment based on the findings by Dr. Moreno on June 9, 2011. Dr. Slutsky noted that Dr. Fritzhand did not explain why appellant's condition had deteriorated since she reached maximum medical improvement (MMI). He recommended a second opinion examination as "Dr. Fritzhand's findings may represent a temporary exacerbation as opposed to the claimant's maximal effort at MMI."

By decision dated September 25, 2013, OWCP denied appellant's claim for a schedule award on the grounds that the medical evidence did not support that she had a permanent impairment of the right upper extremity.

On October 1, 2013 appellant, through her attorney, requested a telephone hearing before an OWCP hearing representative. At the hearing, held on March 17, 2014, counsel maintained that Dr. Slutsky recommended a second opinion examination and further asserted that his opinion was biased.

In a decision dated June 5, 2014, an OWCP hearing representative affirmed the September 25, 2013 decision.

On appeal, appellant's attorney contends that an OWCP medical adviser inappropriately weighed the facts and consistently found a lower percentage of impairment.

LEGAL PRECEDENT

The schedule award provision of FECA,[2] and its implementing federal regulations,[3] 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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[4] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[5]

The sixth edition requires identifying the impairment Class of Diagnosis (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).[6] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404.

[4] *Id*. at § 10.404(a).

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[6] A.M.A., *Guides* 494-531.

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility to see that justice is done.[7] The nonadversarial policy of proceedings under FECA is reflected in the regulations at section 10.121.[8]

ANALYSIS

OWCP accepted that on February 9, 2011 appellant sustained a fracture of the phalanx of the right ring finger. On June 9, 2011 Dr. Moreno found that she was at maximum medical improvement and released her to resume her regular employment duties. He measured full range of motion of the right ring finger and grip strength of 55 on the right and 66 on the left.

On April 25, 2013 Dr. Moreno diagnosed right ring finger tenosynovitis. By letter dated May 31, 2013, he opined that the right ring finger tenosynovitis resulted from appellant's employment-related fracture of the proximal phalanx of the right ring finger. Dr. Moreno requested expansion of the claim to include that condition.

Appellant requested a schedule award and, in support of her claim, submitted a June 13, 2013 impairment evaluation from Dr. Fritzhand, who found significant tenderness to palpation of the proximal phalanx of the right ring finger with decreased sensation to pinprick and light touch. Dr. Fritzhand identified the diagnosis as a class 1 proximal phalanx fracture pursuant to Table 15-2 of the A.M.A., *Guides*, which yielded a default value of six percent impairment. After applying grade modifiers, he concluded that appellant had a seven percent impairment of the right ring finger or one percent impairment of the right upper extremity.

Dr. Slutsky, an OWCP medical adviser, reviewed the evidence on September 24, 2013 and opined that there was a significant discrepancy between Dr. Moreno's finding in his June 9, 2011 report that appellant had good grip strength and normal range of motion and Dr. Fritzhand's June 13, 2013 examination findings of tenderness and loss of sensation and grip strength.[9] However, he did not discuss Dr. Moreno's April 25 and May 31, 2013 reports diagnosing tenosynovitis of the right ring finger due to the work-related fracture. In the statement of accepted facts provided to Dr. Slutsky, OWCP indicated that the right ring finger tenosynovitis was a nonemployment-related condition but did not explain what medical evidence it relied upon in reaching its determination. Additionally, Dr. Slutsky recommended that OWCP refer appellant for a second opinion examination to determine the extent of any permanent impairment; however, OWCP did not develop the evidence as suggested.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.[10] The Board finds that the case is not in posture for decision regarding the extent of any permanent

[7] *Jimmy A. Hammons*, 51 ECAB 219 (1999).

[8] 20 C.F.R. § 10.121.

[9] Dr. Moreno found significantly reduced grip strength on the right side as opposed to the left.

[10] *Phillip L. Barnes*, 55 ECAB 426 (2004).

impairment. On remand, OWCP should refer appellant for an impairment evaluation to determine whether she sustained a permanent impairment of the right ring finger due to her accepted February 9, 2011 employment injury. It should further consider whether her claim should be expanded to include tenosynovitis of the right ring finger. Following this and such further development as deemed necessary, OWCP should issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the June 5, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: December 1, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board