



## **FACTUAL HISTORY**

On December 13, 2012 appellant, then a 46-year-old supervisory information technology specialist, injured both hands upon exiting the employing establishment when the gate barricade at the military base in Germany where he was working rose up and hit the rear wheel of his bicycle, throwing him to the ground. Appellant stopped work that day. An employing establishment report dated December 14, 2012 indicates that appellant was taken home by military personnel, and went to the hospital the next day where it was determined that he had multiple fractures on both hands.

Appellant had corrective surgery on December 21, 2012. He returned to work on February 12, 2013.

On March 1, 2013 OWCP accepted closed fracture of metacarpal bone, closed fractures of multiple sites of bilateral phalanges, and bilateral contusions of the wrist and hand. Appellant received intermittent compensation for medical and therapy appointments.

On February 11, 2016 appellant submitted a schedule award claim (Form CA-7).<sup>2</sup> In an attached medical report, Dr. M. M. Malek, a Board-certified orthopedic surgeon, noted the history of injury and appellant's complaints of dull upper extremity pain, and difficulty with activities that required pushing and pulling, including driving. Upper extremity examination of both shoulders and both wrists was normal. Examination of the right and left hands revealed about 10 degrees of valgus angulation at the distal interphalangeal (DIP) joint of the left third finger with no other deformity noted. Strength evaluation and grip examination utilizing manual dynamometer demonstrated 22 pounds of force application on the right and 18 pounds of force application on the left. Tinel's and Phalen's tests are negative. Dr. Malek reviewed x-rays done on December 14, 2012. He diagnosed post-traumatic contusion and sprain of the right and left wrists, post-traumatic comminuted fracture of the right fourth finger metacarpal, post-traumatic oblique fracture of the third digit, right hand, and post-traumatic fracture of the fifth metacarpal left hand. Dr. Malek advised that appellant had reached maximum medical improvement. He advised that, in accordance with the appropriate charts, tables, and chapter of the latest edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (hereinafter A.M.A., *Guides*) with a reasonable degree of medical probability and consideration of appellant's level of pain, weakness, atrophy, loss of endurance, and loss of function (range of motion (ROM)), appellant had 15 percent permanent impairment of the left upper extremity and 15 percent permanent impairment of the right upper extremity.

OWCP forwarded the medical evidence, including Dr. Malek's report, to its medical adviser, Dr. Arthur S. Harris, a Board-certified orthopedic surgeon, for review and an impairment evaluation. In a March 21, 2016 report, Dr. Harris noted his review of the record and the accepted conditions. He disagreed with Dr. Malek's assessment, noting the only abnormality found was some deformity of the right middle digit. Dr. Harris advised that, in

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<sup>2</sup> Appellant had initially submitted one page of a schedule award claim on May 4, 2015. By letter dated June 1, 2015 OWCP informed him that it would take no further action on the claim until it received a claim form, completed and certified by the appropriate employing establishment.

accordance with the sixth edition of the A.M.A., *Guides*,<sup>3</sup> and using the diagnosis-based impairment (DBI) rating under Table 15-2, Digit Regional Grid, for residual problems with fractures of right middle and ring digits, appellant had six percent digit impairment for each, which was equivalent to one percent right upper extremity impairment for each, or a total two percent right upper extremity impairment. He found that for residual problems with fracture of left small digit, appellant had six percent digit impairment or one percent left upper extremity impairment. OWCP's medical adviser found the date of maximum medical improvement was November 12, 2015, when appellant was examined by Dr. Malek.

By decision dated April 20, 2016, appellant was granted a schedule award for one percent permanent impairment of the left upper extremity and two percent permanent impairment of the right upper extremity, to run for 9.36 weeks, from November 12, 2015 to January 16, 2016.

### **LEGAL PRECEDENT**

Section 8149 of FECA delegates to the Secretary of Labor the authority to prescribe rules and regulations for the administration and enforcement of FECA. The Secretary of Labor has vested the authority to implement the FECA program with the Director of OWCP.<sup>4</sup> Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body.<sup>5</sup> FECA, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.<sup>6</sup>

The sixth edition of the A.M.A., *Guides* was first printed in 2008. Within months of the initial printing, the A.M.A. issued a 52-page document entitled "Clarifications and Corrections, Sixth Edition, *Guides to the Evaluation of Permanent Impairment*." The document included various changes to the original text, intended to serve as an *erratum*/supplement to the first printing of the A.M.A., *Guides*. In April 2009, these changes were formally incorporated into the second printing of the sixth edition.

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).<sup>7</sup> The Board has approved the use by OWCP of the A.M.A.,

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<sup>3</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

<sup>4</sup> See 20 C.F.R. §§ 1.1-1.4.

<sup>5</sup> For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

<sup>6</sup> 20 C.F.R. § 10.404; see also *Ronald R. Kraynak*, 53 ECAB 130 (2001).

<sup>7</sup> See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 1 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

*Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.<sup>8</sup>

### ANALYSIS

The issue on appeal is whether appellant established more than two percent permanent impairment of the right upper extremity and one percent permanent impairment of the left upper extremity for which he previously received schedule awards. The accepted conditions in this case are closed fracture of metacarpal bone, closed fractures of multiple sites of bilateral phalanges, and bilateral contusions of the wrist and hand. Appellant received a schedule award dated April 20, 2016 for a total one percent permanent impairment of the left upper extremity and two percent permanent impairment on the right upper extremity.

The Board has found that OWCP has inconsistently applied Chapter 15 of the sixth edition of the A.M.A., *Guides* when granting schedule awards for upper extremity claims. No consistent interpretation has been followed regarding the proper use of the DBI or the ROM methodology when assessing the extent of permanent impairment for schedule award purposes.<sup>9</sup> The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.<sup>10</sup> In *T.H.*, the Board concluded that OWCP physicians are at odds over the proper methodology for rating upper extremity impairment, having observed attending physicians, evaluating physicians, second opinion physicians, impartial medical examiners, and district medical advisers use both DBI and ROM methodologies interchangeably without any consistent basis. Furthermore, the Board has observed that physicians interchangeably cite to language in the first printing or the second printing when justifying use of either ROM or DBI methodology. Because OWCP's own physicians are inconsistent in the application of the A.M.A., *Guides*, the Board finds that OWCP can no longer ensure consistent results and equal justice under the law for all claimants.<sup>11</sup>

In light of the conflicting interpretation by OWCP of the sixth edition with respect to upper extremity impairment ratings, it is incumbent upon OWCP, through its implementing regulations and/or internal procedures, to establish a consistent method for rating upper extremity impairment.

In order to ensure consistent results and equal justice under the law for cases involving upper extremity impairment, the Board will set aside the April 20, 2016 decision. Following OWCP's development of a consistent method for calculating permanent impairment for upper extremities to be applied uniformly, and such other development as may be deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim for an additional right upper extremity schedule award.

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<sup>8</sup> *Isidoro Rivera*, 12 ECAB 348 (1961).

<sup>9</sup> *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

<sup>10</sup> *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

<sup>11</sup> *Supra* note 8.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 20, 2016 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: April 18, 2017  
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board