

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and the circumstances outlined in the Board's prior decision are incorporated herein by reference. The facts relevant to this appeal are set forth below.

On February 22, 2011 appellant, then a 51-year-old geography clerk, filed a traumatic injury claim (Form CA-1) alleging that on February 9, 2011 she fractured a bone in her right hand. She 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 right ring finger fracture. He measured full range of motion (ROM) of the right ring finger and grip strength of 55 for the right hand and 66 for the left hand. Dr. Moreno opined that appellant was at maximum medical improvement and released her to return as necessary.

Appellant's term appointment with the employing establishment ended on September 30, 2011. On February 7, 2013 she filed a claim for a schedule award (Form CA-7).

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

Dr. Moreno, on May 31, 2013, 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."

Dr. Martin Fritzhand, a Board-certified urologist, provided an impairment evaluation on June 13, 2013. Referencing 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 and found seven percent permanent impairment of the digit, or 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 (SOAF), it identified right ring finger tenosynovitis as a nonemployment-related condition.

Dr. Morley Slutsky, a Board-certified orthopedic surgeon and OWCP medical adviser, reviewed the evidence on September 23, 2013 and recommended a second opinion examination.

³ Docket No. 14-1787 (issued December 1, 2014).

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

On October 1, 2013 appellant, through counsel, requested a telephone hearing before an OWCP hearing representative. In a decision dated June 5, 2014, an OWCP hearing representative affirmed the September 25, 2013 decision. She found that the medical evidence of record did not support entitlement to a schedule award.

Appellant appealed to the Board. By decision dated December 1, 2014, the Board set aside the June 5, 2014 decision.⁴ The Board found that OWCP failed to refer her for a second opinion examination as recommended by an OWCP medical adviser and did not explain the basis for its finding that the right ring finger tenosynovitis was not employment related. The Board remanded the case for OWCP to refer appellant for a second opinion examination regarding whether she sustained permanent impairment of the right ring finger due to her February 9, 2011 work injury and to determine whether her claim should be expanded to include right ring finger tenosynovitis.

OWCP, on August 11, 2015, referred appellant to Dr. Edward Gregory Fisher, a Board-certified orthopedic surgeon, for a second opinion examination. It provided him with a SOAF indicating that it had accepted her claim for a closed fracture of the phalanx or phalanges of the right proximal ring finger. OWCP also indicated that appellant fractured her right wrist when she fell on February 9, 2011 and that she had the nonemployment-related condition of tenosynovitis.

In a September 8, 2015 impairment evaluation, Dr. Fisher identified the accepted condition as a closed fracture of the phalanges of the right proximal ring finger. On examination he found normal extension and flexion of the right ring finger with mild soreness of the base and proximal interphalangeal (PIP) joint, but no malalignment, increased warmth, instability, swelling, or loss of sensation. Dr. Fisher related:

“The examination of the right ring finger is normal with no objective findings present only minimal soreness over the PIP and metacarpophalangeal joints. There is no loss of [ROM] of the three joints involving the ring finger. There is no malalignment or malrotation present. The sensation is intact and the motor power both in flexion and extension of the finger is 5/5 and she is able to make a full fist with all her fingers.”

Dr. Fisher opined that there were no objective findings of the accepted condition or of tenosynovitis of the right ring finger, noting that appellant had no “locking or triggering and there was no nodular or soft tissue mass over the base on the volar aspect of the ring finger to support a diagnosis of a tenosynovitis of the right ring finger.” Referencing Table 15-31 on page 470 of the A.M.A., *Guides*, used to determining impairment due to loss of finger motion, he found no impairment of the right upper extremity.

⁴ *Id.*

An OWCP medical adviser and Board-certified orthopedic surgeon, Dr. Andrew Robinson, reviewed the evidence on December 2, 2015 and concurred with Dr. Fisher's finding that appellant had no permanent impairment of the right ring finger. He noted, however, that the SOAF listed a right wrist fracture due to her employment injury. The medical adviser contended that, if so, it might have impaired her function.

By decision dated April 12, 2016, OWCP denied appellant's claim for a schedule award. It found that the weight of the medical evidence failed to establish permanent impairment due to her accepted employment injury.

Appellant, through counsel, on April 22, 2016 requested a telephone hearing. At the telephone hearing, held on December 14, 2016, she related that she experienced pain and aching in her right ring and little fingers with resulting difficulty performing some activities of daily living.

In a decision dated February 3, 2017, OWCP's hearing representative affirmed the April 12, 2016 decision. She found that the opinions of Dr. Fisher and OWCP's medical adviser constituted the weight of the evidence and established that appellant did not have employment-related permanent impairment, warranting a schedule award.⁵

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.⁶ 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.⁷ 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.⁸

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

⁵ The issue statement in the decision actually refers to permanent impairment of the left lower extremity. However, this appears to be a harmless transcription error as the remainder of the decision references appellant's claim for a schedule award involving her right hand and arm.

⁶ See 20 C.F.R. §§ 1.1-1.4.

⁷ For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

⁸ 20 C.F.R. § 10.404. See also *Ronald R. Kraynak*, 53 ECAB 130 (2001).

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).⁹ The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.¹⁰

ANALYSIS

The issue on appeal is whether appellant has a permanent impairment of the right ring finger or right upper extremity causally related to her accepted employment injury.¹¹

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

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 had been followed regarding the proper use of the diagnosis-based impairment (DBI) or the ROM methodology when assessing the extent of permanent impairment for schedule award purposes.¹² The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.¹³ In *T.H.*, the Board concluded that OWCP physicians were 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 observed that physicians interchangeably cited to language in the first printing or the second printing when justifying use of either ROM or DBI methodology. Because OWCP's own physicians were inconsistent in the application of the A.M.A., *Guides*, the Board found that OWCP could no longer ensure consistent results and equal justice under the law for all claimants.¹⁴

In order to ensure a consistent result and equal justice under the law for cases involving upper extremity impairment, the Board will set aside the February 3, 2017 decision. Utilizing a

⁹ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

¹⁰ *Isidoro Rivera*, 12 ECAB 348 (1961).

¹¹ On prior appeal the Board instructed OWCP to develop the issue of whether appellant sustained tenosynovitis of the right finger due to her work injury. In his September 8, 2015 report, Dr. Fisher found no evidence of tenosynovitis. OWCP, however, did not address this issue in its April 12, 2016 and February 3, 2017 decisions and thus it is not before the Board at this time. See 20 C.F.R. § 501.2(c).

¹² *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

¹³ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

¹⁴ *Supra* note 11.

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 upper extremity schedule award.¹⁵ It should further address, as previously instructed by the Board, the issue of whether she sustained right ring finger tenosynovitis causally related to her accepted employment injury.

CONCLUSION

The Board finds this case not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the February 3, 2017 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: August 14, 2017
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

¹⁵ The Board notes that the August 11, 2015 SOAF inaccurately indicated that appellant fractured her right wrist on February 9, 2011.