

**United States Department of Labor
Employees' Compensation Appeals Board**

A.E., Appellant)
)
and) **Docket No. 17-0128**
) **Issued: May 4, 2017**
DEPARTMENT OF THE ARMY,)
Fort Monmouth, NJ, Employer)
)
)

Appearances:
Thomas R. Uliase, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 27, 2016 appellant, through counsel, filed a timely appeal from a June 30, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 established more than eight percent impairment of the left little finger, for which she previously received a schedule award.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

On appeal counsel asserts that the opinion of Dr. David Weiss, an osteopath, establishes a left upper extremity impairment of 13 percent.

FACTUAL HISTORY

On March 16, 2008 appellant, then a 48-year-old protocol specialist, fractured a phalanx of her left little finger when she tripped and fell at work. She stopped work that day and received continuation of pay and wage-loss compensation.

Dr. Eddy Atik, Board-certified in orthopedic and hand surgery, repaired the finger fracture on March 21, 2008. In a November 18, 2008 report, Dr. Robert D. Goldstein, Board-certified in plastic surgery and an OWCP referral physician, advised that appellant had no functional capacity with her left hand and had developed left hand reflex sympathetic dystrophy (RSD). OWCP additionally accepted RSD also known as complex regional pain syndrome (CRPS).

Dr. Andrew M. Hutter, a Board-certified orthopedic surgeon, provided a second opinion evaluation on December 31, 2009. He diagnosed status post fracture of the left fifth finger and RSD and concluded that appellant could return to modified duty.

Appellant returned to modified duty on March 5, 2009. She thereafter received compensation for medical and therapy appointments.

On November 18, 2015 appellant filed a schedule award claim (Form CA-7). In an October 7, 2013 report, Dr. Weiss provided physical examination findings. He diagnosed status post fracture of the proximal phalanx of the left little finger with surgical repair, post-traumatic contracture deformity of the left little finger, post-traumatic CRPS of the left upper extremity, ulnar nerve neuropathy of the left arm at the cubital tunnel, and post-traumatic median nerve neuropathy (carpal tunnel syndrome) of the left hand.³ Dr. Weiss advised that, in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),⁴ using the range of motion (ROM) methodology, he found a motion deficit of the left fifth digit, under Table 15-31 appellant had 6 percent impairment, and for class 1 CRPS, under Table 15-26 she had 7 percent impairment, for a combined left upper extremity permanent impairment of 13 percent. Dr. Weiss found that appellant reached maximum medical improvement on October 7, 2013.

Dr. Morley Slutsky, an OWCP medical adviser, who is Board-certified in occupational medicine, reviewed the medical record, including Dr. Weiss' report. In a December 5, 2015 report, he found that appellant had zero percent impairment for the CRPS diagnosis, and that, utilizing the diagnosis-based impairment (DBI) method, under Table 15-2, Digit Regional Grid, for a left little finger proximal phalanx fracture, appellant had a class 1 impairment. Dr. Slutsky

³ Initially in Chapter 15, when defining DBI, ROM is noted to be used primarily as a physical examination adjustment factor and only to determine actual impairment values when a grid permits its use as an option. Diagnoses in the particular regional grids that may alternatively be rated using ROM are followed by an asterisk (*). Proximal phalanx fracture is a diagnosed condition listed in the grid followed by an *.

⁴ A.M.A., *Guides* (6th ed. 2009).

found no modifier for functional history, and modifiers of 2 for physical examination and clinical studies. After applying the net adjustment formula, he concluded that appellant had eight percent permanent digit impairment of the left little finger.

By decision dated December 22, 2015, appellant was granted a schedule award for eight percent permanent impairment of the left fifth finger, to run for 1.2 weeks, from October 7 to 15, 2013.

Appellant, through counsel, timely requested a hearing with OWCP's Branch of Hearings and Review. Dr. Weiss updated his October 7, 2013 report on May 2, 2016. He did not reexamine appellant, but reiterated that she had six percent left upper extremity impairment under Table 15-31 of the A.M.A., *Guides*, due to loss of fifth digit ROM. The updated report did not include an impairment rating for CRPS.

At the hearing, held on April 11, 2016, counsel argued that appellant's impairment rating should be based on the ROM method and should not be limited to the left little finger. Appellant described the employment injury and her medical condition, testifying that she continued to have symptoms of RSD with pain that radiated up her arm, decreased hand motion, and limitations in activities of daily living.

In a June 30, 2016 report, an OWCP hearing representative found the weight of the medical evidence rested with Dr. Slutsky and affirmed the December 22, 2015 decision.

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.⁵ 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.⁶ 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.⁷

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 See 20 C.F.R. §§ 1.1-1.4.

⁶ For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

⁷ 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).⁸ 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.⁹

ANALYSIS

The issue on appeal is whether appellant established that she has more than eight percent impairment of the left little finger for which she previously received a schedule award. The accepted conditions in this case are fracture of phalanx of left little finger and RSD.

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 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.¹⁰ The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.¹¹ 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.¹²

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.

⁸ 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).

⁹ *Isidoro Rivera*, 12 ECAB 348 (1961).

¹⁰ *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

¹¹ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

¹² *Supra* note 10.

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 18, 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.

CONCLUSION

The Board finds this case not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the June 30, 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: May 4, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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