United States Department of Labor
Employees' Compensation Appeals Board

J.B., Appellant	)	
and	)	**Docket No. 17-1610**
	)	**Issued: February 22, 2018**
DEPARTMENT OF THE ARMY, U.S. ARMY CORPS OF ENGINEERS, Memphis, TN, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 19, 2017 appellant filed a timely appeal from a June 9, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 met his burden of proof to establish permanent impairment due to his accepted right thumb condition, warranting a schedule award.

FACTUAL HISTORY

On December 15, 2015 appellant, then a 40-year-old metal worker/welder, filed a traumatic injury claim (Form CA-1) alleging that, on November 24, 2015, he sustained a

[1] 5 U.S.C. § 8101 *et seq.*

fracture and laceration of his right thumb at work. He explained that, when he was using an eight-pound sledge hammer to drive a line-up pin out of a ladder, the hammer glanced off the pin and collided with his right thumb. Appellant stopped work on November 24, 2015 and returned on December 3, 2015 in a light-duty job without wage loss.[2]

Appellant received medical treatment for his right thumb condition from Dr. James H. Calandruccio, an attending Board-certified orthopedic surgeon, at the Campbell Clinic the day after the accident at work and, in a November 25, 2015 report, he noted that appellant's right thumb had been sutured the prior day at another Campbell Clinic location. Dr. Calandruccio indicated that appellant would be given an Orthoplast hand splint to protect the thumb and that the sutures would be removed in a week. He noted that x-rays of the right thumb showed a comminuted fracture of the distal phalanx without significant articular components.

In a February 17, 2016 report, Dr. Calandruccio advised that appellant continued to complain of right thumb symptoms, including restricted motion, loss of sensation, and marked sensitivity at the end of the deformed thumbnail. The physical examination of appellant's right thumb on that date revealed that he had an abnormal nail with approximately 20 percent new nail formation, loss of sensation about the radial aspect of the thumb, and interphangeal joint motion from 0 to approximately 30 degrees. Dr. Calandruccio noted that recent x-rays showed further consolidation of the right distal phalanx fracture and indicated that at some point appellant might need a nail plate procedure.

On March 18, 2016 OWCP accepted that appellant sustained a closed displaced fracture of the distal phalanx of the thumb.[3]

On March 28, 2016 appellant filed a claim for a schedule award (Form CA-7). He submitted a March 7, 2016 report, in which Dr. Calandruccio indicated that he was providing a permanent impairment rating under the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*). Dr. Calandruccio noted that, under Table 15-2 on page 393, appellant had six percent permanent impairment of his right thumb due to his distal phalanx fracture, which converted to two percent permanent impairment of his right hand, two percent permanent impairment of his right upper extremity, and one percent permanent impairment of the whole person. Under Table 15-16 on page 427, the radial nerve sensory loss of appellant's right thumb equaled 20 percent permanent impairment of his right thumb, which converted to 8 percent permanent impairment of his right hand, 7 percent permanent impairment of his right upper extremity, and 4 percent whole person permanent impairment. Dr. Calandruccio indicated that the combined total of appellant's whole person impairment was five percent.

In a May 22, 2016 report, Dr. Morley Slutsky, a Board-certified occupational medicine physician serving as an OWCP medical adviser, noted that he had reviewed all the medical evidence of record, including the March 7, 2016 impairment rating report of Dr. Calandruccio. He indicated that, in this report, Dr. Calandruccio provided final permanent impairment numbers

[2] Appellant used leave to cover his absence and did not apply for or receive wage-loss compensation.

[3] OWCP mistakenly indicated that the injury was to the left thumb, rather than appellant's right thumb.

without providing physical examination findings or impairment rating calculations. Dr. Slutsky advised that a November 25, 2015 report of Dr. Calandruccio indicated that appellant required further treatment for his right thumb condition. He requested that he be provided with a medical report of a physical examination, conducted between November 25, 2015 and March 29, 2016, which showed that appellant had reached maximum medical improvement (MMI) with respect to his right thumb condition. Dr. Slutsky indicated that, if such a report was unavailable, then appellant should undergo a second opinion examination with an orthopedic surgeon who would apply the standards of the sixth edition of the A.M.A., *Guides*.

In a June 3, 2016 letter, OWCP requested that Dr. Calandruccio indicate whether appellant reached MMI with respect to his right thumb condition and, if he had, to provide the date he reached MMI and to explain the reasoning for his opinion on MMI. It also asked Dr. Calandruccio to provide an opinion on permanent impairment under the standards of the sixth edition of the A.M.A., *Guides* which included a detailed description of the findings upon which the impairment rating was based.

On June 24, 2016 OWCP received Dr. Calandruccio's handwritten notations on its June 3, 2017 letter. Dr. Calandruccio indicated that appellant had reached MMI on February 7, 2016 and that he had five percent whole person impairment based on distal radius fracture, loss of motion, and radial nerve loss.[4]

OWCP referred appellant for a second opinion examination with Dr. James Galyon, a Board-certified orthopedic surgeon, and requested that he provide an opinion on appellant's permanent impairment under the standards of the sixth edition of the A.M.A., *Guides.*

In an August 17, 2016 report, Dr. Galyon described appellant's history of injury and prior medical treatment, and detailed his findings of the physical examination he conducted on that date. He reported that the sutures in appellant's right thumb were removed approximately eight days after they were applied on November 24, 2015 and that appellant wore a splint for four-to-six weeks after his accident. Appellant had worked continuously since December 2015, although at times with difficulty. Dr. Galyon indicated that, upon physical examination, appellant exhibited loss of sensation in the distal phalanx of his right thumb associated with the radial nerve. At the interphalangeal joint of his right thumb, appellant could flex to 45 degrees, whereas he could flex the interphalangeal joint of his uninjured left thumb to 90 degrees. His pinch strength between thumb and index finger was 15 pounds in the right hand, whereas his pinch strength in his left hand was 120 pounds.[5] With respect to MMI of the right thumb condition, Dr. Galyon indicated that appellant had achieved all of the recovery that he was going to have. He believed that the observed nerve injury, which was 10 months old and resulted in appellant's right thumb only lacing two or three centimeters to reach its terminal end, would not improve any further.

[4] Dr. Calandruccio indicated that reference should be made to his dictation, but he did not indicate to which dictation he referred.

[5] Appellant's grip strength in his right hand was 85 pounds, whereas his grip strength in his left hand was 130 pounds.

With respect to permanent impairment, Dr. Galyon indicated that, under Table 15-16 on page 427 of the sixth edition of the A.M.A., *Guides*, appellant had 10 percent permanent impairment of his right thumb due to the loss of sensation in the distal phalanx of the thumb (associated with the radial nerve). He also found that appellant had further permanent impairment of his right thumb due to loss of thumb strength (associated with the radial nerve).[6] Dr. Galyon indicated that, under Table 15-30 on page 468, appellant had 28 percent permanent impairment of his right thumb due to range of motion (ROM) deficits associated with that thumb. He found that appellant had total permanent impairment of his right thumb of 48 percent. Dr. Galyon advised, that using Table 15-11 beginning on page 421, the 48 percent permanent impairment of appellant's right thumb converted to 19 percent permanent impairment of his right hand and 17 percent permanent impairment of his right upper extremity due to his right thumb condition. He further indicated that he did not believe that surgical reconstruction repair of appellant's right thumb was possible.

OWCP requested that Dr. Slutsky again serve in his capacity as an OWCP medical adviser and review Dr. Galyon's August 17, 2016 report.

In a report dated October 26, 2016, Dr. Slutsky indicated that appellant had reached MMI with respect to his right thumb condition on August 17, 2016, the date of Dr. Galyon's examination. He noted that appellant's accepted right thumb condition had stabilized at that time, with no further treatment planned and no expectation of significant change in the condition. Dr. Slutsky provided calculations for his opinion that appellant had four percent permanent impairment of his right thumb under the sixth edition of the A.M.A., *Guides.* He indicated that, using the diagnosis-based impairment (DBI) rating method of Table 15-2 (Digit Regional Grid) beginning on page 391, appellant had a default value of four percent permanent impairment of his right upper extremity due to his most-impairing diagnosed of right distal phalanx fracture (class 1). Dr. Slutsky found that appellant had a functional history grade modifier of 1, physical examination grade modifier of 1, and clinical studies grade modifier of 1, and noted that application of the Net Adjustment Formula meant that there was no movement from the default value of four percent on Table 15-2. Therefore, appellant had total permanent impairment of his right upper extremity of four percent. Dr. Slutsky noted that Dr. Galyon found that appellant had 48 percent permanent impairment of his right thumb (converted to 17 percent permanent impairment of his right upper extremity) through his application of the sixth edition of the A.M.A., *Guides.* He indicated that his rating impairment differed from that of Dr. Galyon because Dr. Galyon used the ROM impairment rating method, rather than the preferred DBI rating method that he used.

OWCP determined that there was a conflict in the medical opinion evidence between the OWCP referral physician, Dr. Galyon, and OWCP's medical adviser, Dr. Slutksy, regarding the extent of appellant's permanent impairment. It referred appellant to Dr. Rommel G. Childress, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on the matter.

[6] Dr. Galyon did not provide a specific figure for the extent of this permanent impairment.

In a January 20, 2017 report, Dr. Childress discussed appellant's factual and medical histories and detailed the findings of the physical examination he conducted on that date. He indicated that appellant reported that he continued to work, but that he sometimes had to modify his work methods due to the change in his right-hand grip. Dr. Childress noted that, upon physical examination of the right thumb, appellant exhibited lessened sensation in his right thumb, hypersensitivity to pressure over the distal phalanx and metacarpophalangeal joint (which was mildly swollen), and restricted flexion motion of the interphalangeal joint of his right thumb. Appellant's grip strength was "good minus" on the right and "good plus" on the left. Dr. Childress diagnosed crush injury to the right thumb (with open fracture of distal phalanx), loss of nail with regrowth of new nail, hypersensitivity of the right thumb (with neuropathic type pain), and rule out neuroma/minor causalgia (regional pain syndrome).

Dr. Childress further noted that appellant had an active issue with his right thumb that made unrestricted activities somewhat of a concern when handling very heavy weights and working at heights. He indicated that appellant had not reached MMI and felt that he had developed or was developing a symptomatic "neuroma-type situation." Dr. Childress believed that appellant needed active management by an attending physician to see if any intervention would be needed regarding ongoing treatment and work safety issues. He recommended that an attending physician conduct further examination and testing to see if appellant had a diagnosis of neuroma. If appellant were confirmed to have a diagnosis of neuroma by an attending hand surgeon, then any appropriate intervention should be determined by the hand surgeon. Dr. Childress indicated that, after such treatment was carried out and reasonable functioning was obtained, the date of MMI and permanent impairment could be assigned.

In a June 9, 2017 decision, OWCP denied appellant's claim for a schedule award due to his accepted right thumb injury. It found that the evidence did not show that he had permanent impairment of a scheduled member because the weight of the medical evidence rested with the January 20, 2017 report of the impartial medical specialist, Dr. Childress, who found that appellant had not reached MMI with respect to his right thumb. OWCP indicated that permanent impairment could not be assessed until appellant reached MMI with respect to his right thumb.

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 FECA program with the Director of OWCP.[7] 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.[8] It, 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

[7] *See* 20 C.F.R. §§ 1.1-1.4.

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

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.[9]

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).[10] 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.[11]

Permanent impairment may only be rated according to the A.M.A., *Guides* and only after MMI has been achieved.[12] Under the A.M.A., *Guides,* impairment should not be considered permanent until a reasonable time has passed for the healing or recovery to occur and this will depend on the nature of underlying pathology, as the optimal duration for recovery may vary considerably from days to months. The clinical findings must indicate that the medical condition is static and well stabilized for the person to have reached MMI.[13] A preliminary element for considering a schedule award is establishing that the claimant has attained MMI.[14] MMI refers to a date from which further recovery or deterioration is not anticipated, although over time there may be some expected change. Once impairment has reached MMI, a permanent impairment rating may be performed.[15] The determination of the date of MMI is factual in nature and depends primarily on the medical evidence.[16] The date of MMI is usually considered to be the date of the medical examination that determined the extent of the impairment.[17]

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[9] 20 C.F.R. § 10.404. *See also, Ronald R. Kraynak,* 53 ECAB 130 (2001).

[10] *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).

[11] *Isidoro Rivera*, 12 ECAB 348 (1961).

[12] A.M.A., *Guides* 24 (6th ed. 2009); *see Orlando Vivens,* 42 ECAB 303 (1991) (a schedule award is not payable until MMI -- meaning that the physical condition of the injured member of the body has stabilized and will not improve further -- has been reached).

[13] A.M.A., *Guides* 24.

[14] *See J.D.*, Docket No. 12-0481 (issued November 17, 2012).

[15] *See* A.M.A., *Guides* 20, Table 2-1 (6th ed. 2009); *B.C.*, Docket No. 16-1061 (issued November 8, 2016).

[16] *J.B.*, Docket No. 11-1469 (issued February 14, 2012); *Franklin L. Armfield*, 28 ECAB 445 (1977).

[17] *Supra* note 10 at Chapter 3.700.3.a (January 2010); *see Richard Larry Enders*, 48 ECAB 184 (1996) (the date of MMI was the date of the audiologic examination used as the basis of the schedule award).

ANALYSIS

The issue on appeal is whether appellant has permanent impairment due to his accepted right thumb condition, warranting a schedule award.

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

In a June 9, 2017 decision, OWCP denied appellant's claim for a schedule award due to his accepted right thumb injury.[18] Based on Dr. Childress' January 20, 2017 opinion, it found that appellant had not reached MMI with respect to his accepted right thumb injury.

FECA provides that if there is disagreement between an OWCP-designated physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination.[19] For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale."[20] Where OWCP has referred the case to an impartial medical specialist to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well-reasoned and based upon a proper factual background, must be given special weight.[21]

The Board notes that OWCP improperly found that there was a conflict in the medical opinion evidence regarding appellant's permanent impairment. In November 2016, OWCP had advised that it was declaring a conflict in the medical opinion evidence between the August 17, 2016 report of Dr. Galyon, OWCP's referral physician, and the October 26, 2016 report of Dr. Slutsky, OWCP's referral physician. However, under FECA, a conflict in the medical opinion evidence may only be declared between an OWCP-designated physician and the employee's physician. There is no provision for finding a conflict in the medical opinion evidence between two OWCP-designated physicians.[22]

The Board notes that there was no probative report of an attending physician which could have created a conflict in the medical opinion evidence with either the August 17, 2016 report of Dr. Galyon or the October 26, 2016 report of Dr. Slutsky. In a March 7, 2016 report, Dr. Calandruccio provided a permanent impairment rating for appellant's right thumb (converted to right hand, right upper extremity, and whole person impairments) without discussing physical examination findings or explaining how the impairment rating calculations were conducted. In undated notations received on June 24, 2016, he indicated, without elaboration, that appellant had five percent permanent impairment of his whole person due to his right distal radius fracture, loss of motion, and radial nerve loss. The Board notes that a schedule award is not payable under

[18] OWCP accepted that on November 24, 2015 appellant sustained a displaced fracture of the distal phalanx of his right thumb. In March 2016, appellant filed a claim for compensation seeking a schedule award due to his accepted right thumb injury.

[19] 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

[20] *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

[21] *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

[22] *See supra* notes 18 and 19.

section 8107 of FECA for an impairment of the whole person.[23] Dr. Calandruccio's reports are of limited probative value with respect to appellant's permanent impairment because he did not adequately explain how his impairment ratings were derived under the standards of the sixth edition of the A.M.A., *Guides*.[24]

Due to the lack of a conflict in the medical opinion evidence, Dr. Childress would be considered an OWCP referral physician.[25] As such, his report would not be given special weight with respect to the matter of MMI based on impartial medical specialist status.[26] Although Dr. Childress provided an opinion on January 20, 2017 that appellant had not reached MMI with respect to his right thumb condition,[27] the Board notes that the record contains two contemporaneous reports finding that appellant had, in fact, reached MMI. In his August 17, 2016 report, Dr. Galyon determined that appellant had reached MMI with respect to his right thumb condition by the date of his impairment rating examination, *i.e.*, August 17, 2016.[28] In his October 26, 2016 report, Dr. Slutsky also found that appellant had reached MMI by August 17, 2016.[29] The Board has held that determination of the date of MMI depends primarily on the medical evidence.[30] Herein, the Board finds that the medical evidence of record supports that appellant had reached MMI as of August 17, 2016.

The Board notes that the two most comprehensive impairment evaluations of record present differing methods of evaluating permanent impairment, one that incorporated the ROM impairment rating method and another that solely relied on the DBI rating method. In his August 17, 2016 report, Dr. Galyon opined that appellant had 48 percent permanent impairment of his right thumb (which converted to 17 percent permanent impairment of his right upper extremity) due to ROM, sensory, and strength deficits. In his October 26, 2016 report, Dr. Slutsky posited that appellant had four percent permanent impairment of his right upper extremity due to the most-impairing diagnosed condition of distal phalanx fracture.

[23] *See Gordon G. McNeill*, 42 ECAB 140, 145 (1990).

[24] *See James Kennedy, Jr.*, 40 ECAB 620, 626 (1989) (finding that an opinion which is not based upon the standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's permanent impairment).

[25] *See e.g., L.Y.*, Docket No. 16-0012 (issued May 17, 2016) (where an impartial medical specialist was converted to an OWCP referral physician due to the lack of a conflict in the medical opinion evidence).

[26] *See supra* note 20.

[27] Dr. Childress indicated that appellant had not reached MMI with respect to his right thumb condition and felt that he had developed or was developing a symptomatic "neuroma-type situation." He indicated that an attending physician should evaluate whether appellant did, in fact, have a neuroma of his right thumb.

[28] Dr. Galyon noted that appellant had achieved all of the recovery of his right thumb condition that he was going to have. He believed that the observed nerve injury, which was 10 months old and resulted in appellant's right thumb only lacking two or three centimeters to reach its terminal end, would not improve any further.

[29] Dr. Slutsky indicated that appellant had reached MMI with respect to his right thumb condition on August 17, 2016, the date of Dr. Galyon's examination. He noted that appellant's accepted right thumb condition had stabilized at that time, with no further treatment planned and no expectation of significant change in the condition.

[30] *See supra* note 15.

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 DBI or the ROM methodology when assessing the extent of permanent impairment for schedule award purposes.[31] The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.[32] 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.[33]

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 June 9, 2017 decision. Utilizing a consistent method for calculating permanent impairment for upper extremities applied uniformly, and after 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.[34]

CONCLUSION

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

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

[32] *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

[33] *Supra* note 31.

[34] *See* FECA Bulletin No. 17-06 (May 8, 2017).

ORDER

IT IS HEREBY ORDERED THAT the June 9, 2017 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded to OWCP for further action consistent with this decision.

Issued: February 22, 2018
Washington, DC

Patricia H. Fitzgerald, Deputy 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