United States Department of Labor
Employees' Compensation Appeals Board

R.C., Appellant	)	
and	)	**Docket Nos. 17-1585 & 17-1815**
DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, Fort Dix, NJ, Employer	)	**Issued: February 16, 2018**

Appearances:
Thomas R. Uliase, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 14, 2017 appellant, through counsel, filed a timely appeal from a May 24, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP), to which the Board assigned Docket No. 17-1585, and on August 24, 2017 he filed a timely appeal from an August 16, 2017 merit decision of OWCP, to which the Board assigned Docket No. 17-1815. Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[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.*

ISSUE

The issue is whether appellant met his burden of proof to establish more than 25 percent permanent impairment of his right second digit, for which he previously received a schedule award.

FACTUAL HISTORY

On March 20, 2014 appellant, then a 28-year-old corrections officer, filed a traumatic injury claim (Form CA-1) alleging that on March 20, 2014 he sustained injury to the second digit of his right hand at work. He asserted that a razor wire sliced a tendon on his right second digit when he was scraping a fence with a screwdriver to detect radio monitor zones.[3] Appellant stopped work on March 20, 2014 and returned to work shortly thereafter.

OWCP accepted appellant's claim for open wound of his right second digit with tendon involvement and the condition of mallet finger.

In a June 4, 2015 report, Dr. Nicholas Diamond, an attending Board-certified osteopath, applied the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[4] Using Table 15-31 to evaluate permanent impairment due to restricted range of motion (ROM) of the fingers, he found that appellant had 25 percent permanent impairment of his right second digit due to 20 degrees of flexion of the distal interphalangeal joint and 1 percent permanent impairment of his right second digit due to 5 degrees of extension of the distal interphalangeal joint. Dr. Diamond combined these values to find that the total permanent impairment of appellant's right second digit was 26 percent, which equaled 5 percent permanent impairment of his right upper extremity. He indicated that appellant reached maximum medical improvement by June 4, 2015.

On December 2, 2015 appellant filed a claim for compensation (Form CA-7) seeking a schedule award due to his accepted employment injury.

OWCP referred Dr. Diamond's June 4, 2015 report and the case record to Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), and requested that he provide an opinion on permanent impairment under the sixth edition of the A.M.A., *Guides*.

In a January 5, 2015 report, Dr. Harris indicated that he agreed with Dr. Diamond that the total permanent impairment of appellant's right second digit was 26 percent, which equaled 5 percent permanent impairment of his right upper extremity.

[3] The right second digit is more commonly known as the right middle finger.

[4] A.M.A., *Guides* (6th ed. 2009).

By decision dated April 29, 2016, OWCP granted appellant a schedule award for 26 percent permanent impairment of his right third digit. The award ran for 6.5 weeks from June 4 to July 19, 2015.[5]

Appellant disagreed with the April 29, 2016 decision and, through counsel, requested a hearing with a representative of OWCP's Branch of Hearings and Review. Prior to the hearing being, an OWCP hearing representative conducted a preliminary review and issued a July 28, 2016 decision setting aside OWCP's April 29, 2016 decision. The case was remanded to OWCP in order to confirm that appellant's right second digit (rather than his right third digit) was being rated, to determine whether or not the right second digit injury extended into his right hand, and to evaluate whether or not the five percent right upper extremity rating was simply a conversion from the digit rating. The hearing representative explained that appellant had injured his right second digit and that 26 percent permanent impairment of the right second digit equated to 7.5 weeks of compensation, but noted that he was only awarded 6.5 weeks of compensation for the incorrect finger (right third digit). She directed OWCP to issue an appropriate decision after completing this development.

OWCP referred the case to Dr. Harris, the DMA, for the directed clarification. In a report dated September 1, 2016, Dr. Harris explained his impairment rating, noting that the impairment did not extend into the right hand and that the five percent right upper extremity rating was simply a conversion. He determined that, under Table 15-31, appellant had 25 percent permanent impairment of his right second finger due to restricted ROM of the distal interphalangeal joint upon flexion. Dr. Harris advised that the five degrees of extension of appellant's right distal interphalangeal joint did not warrant an impairment rating.

By decision dated October 19, 2016, OWCP found that Dr. Harris properly determined that appellant had 25 percent permanent impairment of his right second finger and that appellant had not established that he sustained a greater degree of permanent impairment of his right second digit. It determined that appellant had been overpaid for one percent permanent impairment and indicated that the overpayment would be addressed within a separate decision.

Appellant disagreed with the October 19, 2016 decision and, through counsel, requested a video hearing with a representative of OWCP's Branch of Hearings and Review. During the February 28, 2016 hearing, counsel argued that appellant was owed additional compensation because OWCP granted a schedule award for the wrong finger, although this had already been acknowledged and resolved. He also asserted that there was a conflict in the medical opinion evidence between the opinion of Dr. Diamond and the opinion of Dr. Harris.

By decision dated May 24, 2017, OWCP's hearing representative affirmed OWCP's October 19, 2016 decision, as modified, to correct an error with respect to the identified impaired finger. The hearing representative found that Dr. Harris, the DMA, properly determined that appellant had 25 percent permanent impairment of his right second finger and that appellant had not established a greater degree of permanent impairment of his right second digit. She noted, however, that appellant was entitled to additional compensation because OWCP originally had

[5] OWCP granted the award for appellant's right third digit, *i.e.*, right ring finger, but it was later determined that it should have granted it for his right second digit.

erroneously granted a schedule award for the right third digit, rather than for the right second digit. The hearing representative indicated that appellant received 6.5 weeks of schedule award compensation under OWCP's April 29, 2016 decision, but was entitled to receive 7.5 weeks of schedule award compensation. She directed OWCP to issue an amended decision reflecting the 25 percent permanent impairment of his right second finger and his entitlement to an additional week of schedule award compensation.

By decision dated August 16, 2017, OWCP granted appellant a schedule award based on the finding that he had 25 percent permanent impairment of his right second digit. It noted that such an award entitled him to 7.5 weeks of schedule award compensation. As appellant already received 6.5 weeks of schedule award compensation under OWCP's April 29, 2016 decision, he was effectively entitled to receive an additional one week of schedule award compensation.

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's 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] 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 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 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]

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[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).

[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).

ANALYSIS

OWCP accepted appellant's claim for open wound of the right second digit with tendon involvement and the condition of mallet finger. The issue on appeal is whether appellant has met his burden of proof to establish more than 25 percent permanent impairment of his right second digit, for which he previously received a schedule award.

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

Dr. Diamond, an attending physician, evaluated the permanent impairment of appellant's right second digit using the ROM method under Table 15-31 of the sixth edition of the A.M.A., *Guides*.[11] Dr. Harris, the DMA, also evaluated the permanent impairment of appellant's right second digit using this ROM method. The Board finds that Table 15-2 (Digit Regional Grid) provides that a rupture/laceration of a digit's extensor or flexor tendon may be evaluated using the diagnosis-based impairment (DBI) rating method or alternatively, by asterisk, using the ROM method.[12]

The Board has previously found that OWCP had 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.[13] The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.[14] 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 DMAs 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. The Board therefore found that OWCP should develop a consistent method for calculating permanent impairment for upper extremities, which could be applied uniformly.

In response, OWCP issued FECA Bulletin No. 17-06.[15] Its revised procedures provide that:

> "4. Upon initial review of a referral for upper extremity impairment evaluation, the DMA should identify (1) the methodology used by the rating physician (*i.e.* DBI or ROM) (2) whether the applicable tables in Chapter 15 of the [A.M.A.,

[11] *See* A.M.A., *Guides* 470, Table 15-31.

[12] *See id.* at 392, Table 15-2.

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

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

[15] FECA Bulletin No. 17-06. This Bulletin was effective for all decisions issued by OWCP on and after May 8, 2017.

Guides] identify a diagnosis that can alternatively be rated by ROM. *If the [A.M.A., Guides] allow for the use of both the DBI and ROM methods to calculate an impairment rating for the diagnosis in question, the method producing the higher rating should be used*.

"5. If the rating physician provided an assessment using the ROM method and the [A.M.A., *Guides*] allow for use of ROM for the diagnosis in question, the DMA should independently calculate impairment using both the ROM and DBI methods and identify the higher rating for the [claims examiner].

"6. If the rating physician provided an assessment using the ROM method and the [A.M.A., *Guides*] do not allow for the use of ROM for the diagnosis in question, the DMA should independently calculate impairment using the DBI method and clearly explain in the report, citing applicable tables in Chapter 15 of the [A.M.A., *Guides*], that ROM is not permitted as an alternative rating method for the diagnosis in question."

The Board therefore finds that this case requires further development of the medical evidence. Since Dr. Diamond provided a rating based upon appellant's loss of ROM of the right second digit, which is allowed (by asterick) pursuant to Table 15-2 of the A.M.A., *Guides*, Dr. Harris should have independently calculated appellant's impairment using both the ROM and DBI methods and identified the higher rating for the claims examiner. If the medical evidence of record was not sufficient for Dr. Harris to render a rating using the ROM or DBI method, he should advise as to the medical evidence necessary to complete the rating.[16]

This case will therefore be remanded for application of the new OWCP procedures found in FECA Bulletin No. 17-06. After such further development of the medical evidence as necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

[16] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the August 16 and May 24, 2017 decisions of the Office of Workers' Compensation Programs are set aside, and the case is remanded for further action consistent with this decision.

Issued: February 16, 2018
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