

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

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**B.A., Appellant** )  
 )  
**and** ) **Docket No. 17-1595**  
 ) **Issued: November 26, 2018**  
**DEPARTMENT OF HEALTH & HUMAN** )  
**SERVICES, NATIONAL INSTITUTES OF** )  
**HEALTH, Bethesda, MD, Employer** )  
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*Appearances:*  
*Appellant, pro se*  
*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 17, 2017 appellant filed a timely appeal from a March 17, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (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 has met his burden of proof to establish permanent impairment of a scheduled member for schedule award purposes.

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<sup>1</sup> Appellant timely requested oral argument before the Board. By order dated December 18, 2017, the Board exercised its discretion and denied the request as the matter could be adequately addressed based on a review of the case record. *Order Denying Request for Oral Argument*, Docket No. 17-1595 (issued December 18, 2017).

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On June 18, 1984 appellant, then a 34-year-old biologist, filed an occupational disease claim (Form CA-2) alleging that he developed a right hand condition that allegedly arose on or about May 2, 1984. He attributed his condition to repetitive use of laboratory equipment. OWCP accepted appellant's claim for right hand tendinitis. Effective June 7, 1985, appellant separated from service due to disability. OWCP paid wage-loss compensation for temporary total disability beginning June 8, 1985, and placed him on the periodic compensation rolls. Effective April 7, 1991, it reduced appellant's compensation based on his ability to earn wages in the selected position of laboratory coordinator.<sup>3</sup> Appellant subsequently elected to receive disability retirement benefits from the Office of Personnel Management in lieu of FECA wage-loss compensation.

After an approximate 20-year lapse in activity on the claim, appellant contacted OWCP in October 2014 and expressed his intent to file a claim for a schedule award (Form CA-7). OWCP then received January through July 1993 treatment records, as well as a July 15, 1994 report from Dr. Robert E. Collins, a Board-certified orthopedic surgeon, who advised that appellant had reached maximum medical improvement (MMI) with regard to his right hand condition.

On August 27, 2015 appellant filed a Form CA-7 requesting a schedule award.

In a September 24, 2015 development letter, OWCP informed appellant that Dr. Collins' 1993-94 records were insufficient to establish entitlement to a schedule award as there was no final rating of permanent impairment in the record. It advised appellant to have his physician prepare an impairment rating in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>4</sup> OWCP further advised that if appellant's physician was either unable or unwilling to provide such a report, he should inform it in writing, and if the circumstances warranted, OWCP would refer him for a second opinion evaluation.

In an October 16, 2015 response, appellant informed OWCP that his current family physician was unable to provide the necessary information, and therefore, he requested OWCP's assistance in obtaining an impairment rating.

OWCP also received additional treatment records from Dr. Collins covering the period June 5, 1984 to April 20, 1994. Included among those records was a June 8, 1987 report from Dr. Collins who indicated there was no disability under the A.M.A., *Guides* because appellant had complete range of motion of the hand and was doing well.

In a March 30, 2016 report, Dr. Robert A. Smith, a Board-certified orthopedic surgeon and OWCP referral physician, found that appellant had reached MMI as of June 8, 1987. He identified appellant's employment-related diagnosis as activity-related flexor tendinitis of the thumb, index,

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<sup>3</sup> OWCP reduced appellant's 28-day periodic roll payment from \$1,502.14 to \$68.66. By decision dated October 31, 1991, a representative of OWCP's Branch of Hearings and Review affirmed the April 16, 1991 loss of wage-earning capacity determination.

<sup>4</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

and middle fingers of the right hand. On physical examination, Dr. Smith noted no deformity or dystrophic signs of the right hand, along with full range of motion of all the finger and wrist joints, intact sensation in all fingers, no evidence of swelling or triggering, and consistent grip strength between his left and right hands. Using the sixth edition of A.M.A., *Guides*, Table 15-2, Digit Regional Grid: Digit Impairments, Dr. Smith identified a class 1 digit impairment based on a diagnosis of “[p]ain in digit\*” (“nonspecific hand pain postacute injury or surgery” -- not otherwise specified). The particular diagnosis offered an alternative rating based upon the loss of range of motion (ROM) methodology, but no such rating was provided. The default digit impairment rating (“C”) was one percent. Dr. Smith noted that the applicable criteria for the class 1 CDX, diagnosis-based impairment (DBI) methodology was a “[h]istory of painful injury, residual symptoms without consistent objective findings...”<sup>5</sup> He then calculated a net adjustment of zero (0) based on grade modifiers of one (1) for both physical examination (GMPE) and functional history (GMFH). Dr. Smith explained that there was no applicable grade modifier for clinical studies (GMCS). With a net adjustment of zero,<sup>6</sup> he found one percent permanent impairment for appellant’s right thumb, one percent for the index finger, and one percent for the middle finger. Dr. Smith then noted that the corresponding digit impairments, when converted to a hand and/or upper extremity impairment, represent zero percent impairment under Table 15-12, A.M.A., *Guides*. He, therefore, concluded that appellant had zero percent upper extremity permanent impairment.

In an April 13, 2016 report, Dr. Arthur S. Harris, a Board-certified orthopedic surgeon and district medical adviser (DMA), similarly found that appellant had zero percent impairment of the right upper extremity. He noted that from a review of the medical record that appellant’s diagnosed condition was right hand tendinitis.

By decision dated May 10, 2016, OWCP denied appellant’s claim for a schedule award, noting that the DMA concluded that the evidence “does not demonstrate a permanent, measurable ... impairment of the right upper extremity.”

Appellant timely requested an oral hearing before a representative of OWCP’s Branch of Hearings and Review. The hearing was held on February 8, 2017. Post-hearing OWCP received additional treatment records from 1983-1986, as well as recent physical therapy records covering the period June 7, 2016 through January 26, 2017. In a December 17, 1986 report, Dr. Collins indicated that appellant had 15 percent permanent disability of his right arm due to recurrent pain.

By decision dated March 17, 2017, the hearing representative affirmed OWCP’s May 10, 2016 decision.

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<sup>5</sup> Table 15-2, A.M.A., *Guides* 391 (6<sup>th</sup> ed. 2009).

<sup>6</sup> Net Adjustment = (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX). See Section 15.3d, A.M.A., *Guides* 411-12 (6<sup>th</sup> ed. 2009).

## 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.<sup>7</sup> The Secretary of Labor has vested the authority to implement the FECA program with the Director of the Office of Workers' Compensation Programs.<sup>8</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>9</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>10</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>11</sup> 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.<sup>12</sup>

## ANALYSIS

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 DBI or the ROM methodology

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<sup>7</sup> 5 U.S.C. § 8149.

<sup>8</sup> See 20 C.F.R. §§ 1.1-1.4.

<sup>9</sup> For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1). FECA also provides compensation for loss of use of the thumb (75 weeks), and first through fourth fingers (46, 30, 25 and 15 weeks, respectively). *Id.* at § 8107(c)(6), (7), (9), (10) and (12).

<sup>10</sup> 20 C.F.R. § 10.404; see also *Ronald R. Kraynak*, 53 ECAB 130 (2001).

<sup>11</sup> 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).

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

when assessing the extent of permanent impairment for schedule award purposes.<sup>13</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>14</sup> 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.<sup>15</sup>

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 March 17, 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,<sup>16</sup> OWCP shall issue a *de novo* decision on appellant's claim for a schedule award.<sup>17</sup>

### **CONCLUSION**

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

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<sup>13</sup> *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

<sup>14</sup> *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

<sup>15</sup> *Supra* note 13.

<sup>16</sup> See FECA Bulletin 17-06 (issued May 8, 2017). FECA Bulletin No. 17-06 provides that, if the rating physician provided an assessment using the DBI method and the A.M.A., *Guides* allows for use of the ROM methodology for the diagnosis in question, the DMA should independently calculate permanent impairment using both the ROM and DBI methodologies and identify the higher rating for the CE.

<sup>17</sup> Although Dr. Smith reported full range of motion of all finger and wrist joints, his March 30, 2016 second opinion report did not include specific ROM measurements. The Board further notes that FECA provides for schedule award benefits for loss of use of the thumb, as well as the other four digits of the hand. Consequently, if appellant has demonstrated permanent impairment of one or more digits, he need not demonstrate a corresponding permanent impairment of either the hand or upper extremity in order to receive FECA schedule award benefits. See *supra* note 9.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 17, 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: November 26, 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