

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

_____)	
J.S., Appellant)	
)	
and)	Docket No. 19-1567
)	Issued: April 1, 2020
U.S. POSTAL SERVICE, POST OFFICE,)	
Bellingham, MA, Employer)	
_____)	

Appearances: *Case Submitted on the Record*
*William Bothwell, representative, for the appellant*¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On July 17, 2019 appellant, through his representative, filed a timely appeal from a June 26, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).²

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 Appellant timely requested oral argument before the Board. By order dated March 25, 2020, 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 Oral Argument*, Docket No. 19-1567 (issued March 25, 2020).

Pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.⁴

ISSUE

The issue is whether appellant has met his burden of proof to establish more than 10 percent permanent impairment of his left hand, for which he previously received a schedule award.

FACTUAL HISTORY

This case has previously been before the Board.⁵ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are set forth below.

On March 12, 2012 appellant, then a 43-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he developed left thumb pain due to factors of his federal employment, including 30 years of repetitive casing and sorting mail. By decision dated March 22, 2012, OWCP accepted the claim for left thumb osteoarthritis. Appellant underwent an OWCP-approved left thumb carpometacarpal arthroplasty with interposition on June 11, 2012, performed by Dr. Philip Blazar, a Board-certified orthopedic surgeon.

In a July 26, 2017 report, Dr. Frank A. Graf, a Board-certified orthopedic surgeon, evaluated appellant and provided findings pertaining to his left thumb. He diagnosed left thumb basilar degenerative osteoarthritis with diminished pinch and grasp status post arthroplasty and soft tissue procedure of the basilar joint of the left thumb. Dr. Graf opined that appellant's left thumb carpometacarpal (CMC) joint condition had reached maximum medical improvement (MMI) and that there were permanent changes of the joint. Utilizing Table 15-2, Digit Regional Grid, of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),⁶ he determined that CMC joint instability warranted the default value of 15 percent permanent impairment of the left thumb.⁷

On September 6, 2017 appellant filed a claim for a schedule award (Form CA-7).

On September 27, 2017 OWCP routed Dr. Graf's report and the case file to Dr. Herbert White Jr., a Board-certified occupational medicine physician serving as a district medical adviser

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

⁵ Docket No. 18-1635 (issued May 15, 2019).

⁶ A.M.A., *Guides* (6th ed. 2009).

⁷ *Id.* at 393, Table 15-2.

(DMA), for review and a determination of whether appellant was at MMI and, if so, whether he had sustained permanent impairment of his left thumb.

In an October 1, 2017 report, the DMA discussed findings from the medical records pertaining to appellant's left thumb and noted that x-rays dated February 14, 2013 revealed postsurgical changes of the left thumb CMC joint. He also utilized Table 15-2 of the A.M.A., *Guides*, providing a diagnosis-based impairment (DBI) rating based upon a thumb CMC joint arthroplasty.⁸ The DMA utilized the net adjustment formula to calculate 26 percent permanent impairment of the left thumb.⁹ He reported that, because the CMC joint involved the hand, the digit impairment would be converted to a hand impairment. In accordance with Table 15-12, the DMA converted the 26 percent digit impairment to 10 percent permanent impairment of the left hand.¹⁰ He further reported that he was unable to render a rating based on the range of motion (ROM) method because no thumb ROM findings were provided in the medical records.

The DMA explained that Dr. Graf obtained a left digit impairment of 15 percent using the DBI method with the diagnosis of thumb CMC joint instability while he calculated 26 percent impairment using the diagnosis of CMC joint arthroplasty. He reported that the A.M.A., *Guides* provide that if there is more than one method to rate a particular impairment, the method producing the higher rating should be used. In this instance, the CMC joint arthroplasty diagnosis produced the higher rating. The DMA concluded that appellant sustained 10 percent permanent impairment of the left hand and that MMI was reached on July 26, 2017, the date of Dr. Graf's examination.

On February 6, 2018 OWCP routed the DMA's October 1, 2017 report to Dr. Graf for comment pertaining to appellant's left thumb impairment rating. By letter dated April 24, 2018, Dr. Graf noted review of the DMA's report and indicated that the DMA's calculation was proper.

On June 21, 2018 OWCP routed the case file and referred appellant to Dr. Christopher Geary, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature and extent of permanent impairment of the left thumb using both ROM and DBI rating methods.

In his July 11, 2018 report, Dr. Geary provided three measurements pertaining to appellant's left thumb ROM. He measured interphalangeal (IP) joint flexion at 60 degrees for a rating of one percent permanent impairment, extension at 20 degrees for a rating of zero percent permanent impairment, metacarpophalangeal (MCP) joint flexion at 40 degrees for a rating of two percent permanent impairment, MCP joint extension at 10 degrees for a rating of zero percent permanent impairment, CMC joint adduction at three centimeters for a rating of four percent permanent impairment, CMC joint abduction at 40 degrees for a rating of two percent permanent impairment, and MCP joint opposition at four centimeters for a rating of nine percent permanent

⁸ *Id.* at 394, Table 15-2.

⁹ *Id.* at 411.

¹⁰ *Id.* at 421, Table 15-12.

impairment. These ratings were combined to equal 18 percent permanent impairment of appellant's left thumb based on the ROM method.

Dr. Geary reported that, utilizing the DBI method, he would rate appellant based upon the diagnosis of left thumb CMC arthritis with subsequent arthroplasty.¹¹ Application of the net adjustment formula resulted in 26 percent digit impairment. Dr. Geary explained that the DBI method should be used since it provided a higher rating than the ROM method. He converted the 26 percent left thumb impairment to 10 percent permanent impairment of the left hand. Dr. Geary concluded that appellant had reached MMI on the date of Dr. Graf's examination, July 26, 2017.

By decision dated August 17, 2018, OWCP granted appellant a schedule award for 10 percent permanent impairment of the left hand. It determined that the date of MMI was July 26, 2017 and the award ran for a period of 24.4 weeks from July 26, 2017 to January 12, 2018.

Appellant filed a timely appeal from OWCP's August 17, 2018 decision to the Board.

By decision dated May 15, 2019, the Board set aside OWCP's August 17, 2018 decision. The Board found that, consistent with OWCP's procedures, Dr. Geary's July 11, 2018 report and the case record should have been referred to an OWCP DMA to determine the extent of permanent impairment of appellant's left thumb for schedule award purposes.

On remand OWCP referred the case record, including Dr. Geary's July 11, 2018 report, and an updated statement of accepted facts, to its DMA to determine the extent of appellant's permanent impairment for schedule award purposes.

In a May 25, 2019 report, Dr. White, again serving as a DMA, reviewed appellant's medical records along with Dr. Geary's July 11, 2018 report pertaining to appellant's left thumb. He reported that he concurred with both Dr. Geary's left thumb DBI impairment rating of 26 percent and his ROM impairment rating of 18 percent. Dr. White indicated that the method producing the higher impairment rating was the DBI method at 26 percent. The DMA converted the left upper extremity digit impairment of 26 percent to 10 percent left hand impairment because the CMC joint also involved the hand.¹² He further reported that the date of MMI remained at July 26, 2017, which corresponded to the date of appellant's initial impairment rating, noting that Dr. Geary's evaluation did not change the initial impairment rating. The DMA indicated that since appellant previously received a schedule award for 10 percent permanent impairment of the left hand, no additional impairment was warranted.

By decision dated June 26, 2019, OWCP denied an additional schedule award finding that the weight of the medical evidence rested with Dr. Geary and the DMA, who concluded that

¹¹ *Supra* note 6.

¹² *See supra* note 10.

appellant had no more than 10 percent permanent impairment of the left hand, for which he previously received a schedule award.

LEGAL PRECEDENT

The schedule award provisions of FECA and its implementing regulations set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use of scheduled members or functions of the body.¹³ However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be 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.¹⁴ Commencing May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).¹⁵

In addressing upper extremity impairments, the sixth edition requires identification of the impairment class of diagnosis (CDX) condition, which is then adjusted by a grade modifier for functional history (GMFH), grade modifier for physical examination (GMPE), and grade modifier for clinical studies (GMCS).¹⁶ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹⁷

The A.M.A., *Guides* also provide that ROM impairment methodology is to be used as a stand-alone rating for upper extremity impairments when other grids direct its use or when no other DBI sections are applicable.¹⁸ If ROM is used as a stand-alone approach, the total of motion impairment for all units of function must be calculated. All values for the joint are measured and added.¹⁹ Adjustments for functional history may be made if the evaluator determines that the resulting impairment does not adequately reflect functional loss and functional reports are determined to be reliable.²⁰

¹³ 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

¹⁴ *Id.* at § 10.404; *L.T.*, Docket No. 18-1031 (issued March 5, 2019); *see also Ronald R. Kraynak*, 53 ECAB 130 (2001).

¹⁵ *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5 (March 2017).

¹⁶ A.M.A., *Guides* 383-492.

¹⁷ *Id.* at 411.

¹⁸ *Id.* at 461.

¹⁹ *Id.* at 473.

²⁰ *Id.* at 474.

OWCP issued FECA Bulletin No. 17-06 to explain the use of the DBI methodology versus the ROM methodology for rating of upper extremity impairments.²¹ Regarding the application of ROM or DBI impairment methodologies in rating permanent impairment of the upper extremities, FECA Bulletin No. 17-06 provides in pertinent part:

“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); and (2) whether the applicable tables in Chapter 15 of the [A.M.A.,] *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.*” (Emphasis in the original.)²²

The Bulletin further advises:

“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 CE.”²³

The Board has held that where the residuals of an injury to a member of the body specified in the schedule award provisions of FECA²⁴ extend into an adjoining area of a member also enumerated in the schedule, such as an injury of a finger into the hand, of a hand into the arm or of a foot into the leg, the schedule award should be made on the basis of the percentage loss of use of the larger member.²⁵

OWCP’s procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with OWCP’s medical adviser providing rationale for the percentage of impairment specified.²⁶

²¹ FECA Bulletin No. 17-06 (May 8, 2017).

²² A.M.A., *Guides* 477.

²³ FECA Bulletin No. 17-06 (May 8, 2017); *V.L.*, Docket No. 18-0760 (issued November 13, 2018); *A.G.*, Docket No. 18-0329 (issued July 26, 2018).

²⁴ 5 U.S.C. § 8107.

²⁵ *C.W.*, Docket No. 17-0791 (issued December 14, 2018); *Asline Johnson*, 42 ECAB 619 (1991); *Manuel Gonzales*, 34 ECAB 1022 (1983). *See supra* note 15 at Chapter 2.808.5(e) (March 2017).

²⁶ *See supra* note 15 at Chapter 2.808.6(f) (March 2017).

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish more than 10 percent permanent impairment of his left hand, for which he previously received a schedule award.

Preliminarily, the Board notes that findings made in prior Board decisions are *res judicata* absent further review by OWCP under section 8128 of FECA and therefore the evidence considered in the Board's prior decision need not be addressed again in this decision.²⁷

Following the Board's remand in this case, OWCP referred the case file, including Dr. Geary's July 11, 2018 report, to its DMA. In his May 25, 2019 report, the DMA reported that Dr. Geary's additional report did not change the initial rating. He also reported his concurrence with Dr. Geary's left thumb impairment ratings under both the DBI and ROM impairment methodologies.

Dr. Geary provided three measurements pertaining to appellant's left thumb ROM. Utilizing the ROM methodology from Table 15-30, page 468, he properly found flexion at 60 degrees equaled 1 percent impairment and extension at 20 degrees equaled 0 percent impairment, for a total 1 percent impairment of the IP joint. Dr. Geary also properly found joint flexion at 40 degrees equaled 2 percent impairment and joint extension at 10 degrees equaled 0 percent impairment, for a 2 percent total impairment of the MCP joint. He further found that joint adduction at 3 centimeters equaled a 4 percent impairment, joint abduction at 40 degrees equaled a 2 percent impairment, and opposition at 4 centimeters equaled a 9 percent impairment, for a total 15 percent permanent impairment of the CMC joint, and phalangeal joint. These findings were then totaled to equal an 18 percent permanent impairment of the left thumb based on the ROM method.

Utilizing Table 15-2, page 394, of the A.M.A., *Guides*, Dr. Geary provided a DBI rating based upon left thumb CMC arthroplasty.²⁸ He found the CDX was Class 3, with a default rating (grade C) of 30 percent digit impairment. Dr. Geary assigned appropriate grade modifiers. Pursuant to Table 15-7, page 406, of the A.M.A., *Guides*, he assigned a grade modifier of 1 for GMFH, pursuant to Table 15-8, page 408 he assigned a grade modifier of 2 for GMPE, and pursuant to Table 15-9, page 410 he excluded a grade modifier for GMCS as it was used for diagnostic placement. Dr. Geary applied the net adjustment formula and calculated a minus 3 adjustment, which moved the default impairment down three grades from C to A, or 26 percent digit impairment.²⁹

²⁷ *R.B.*, Docket No. 19-0848 (issued February 11, 2020).

²⁸ *See supra* note 8.

²⁹ $(GMFH - CDX)(1-3) + (GMPE - CDX)(2-3) = -3$.

Both Dr. Geary and the DMA properly explained appellant's left hand permanent impairment should be rated based on DBI methodology as it yielded a higher permanent impairment rating than the ROM methodology.³⁰

The DMA further reported that, because the joint involved the hand, the digit impairment would be converted to a hand impairment. In accordance with Table 15-12, the DMA converted the 26 percent digit impairment to 10 percent permanent impairment of the left hand.³¹

The Board finds that OWCP properly determined that the clinical findings and reports of Dr. Geary and the DMA constituted the weight of the medical evidence.³² There is no probative medical evidence of record demonstrating greater impairment than previously awarded.³³

On appeal appellant, through his representative, does not contest the calculation of the schedule award for permanent impairment of the left hand. Rather, he contends that OWCP erred in not awarding compensation for an impairment of the upper extremity as it yielded a more favorable allowance than that of an impairment of the hand. However, OWCP only accepted a thumb condition and there is no evidence that residuals of the accepted condition extended beyond appellant's hand.³⁴

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish more than 10 percent permanent impairment of his left hand, for which he previously received a schedule award.

³⁰ See *supra* note 23.

³¹ See *supra* note 25.

³² *J.H.*, Docket No. 18-1207 (issued June 20, 2019); *M.C.*, Docket No. 15-1757 (issued March 17, 2016).

³³ See *J.M.*, Docket No. 18-1334 (issued March 7, 2019).

³⁴ See *S.B.*, Docket No. 16-1112 (issued September 19, 2016) (where the residuals of an injury to a member of the body specified in the schedule extend into an adjoining area of a member also in the schedule, the schedule award should be made on the basis of the percentage of loss of use of the larger member, such as an injury of a finger extending into the hand, of a hand into the arm, or of a foot into the leg).

ORDER

IT IS HEREBY ORDERED THAT the June 26, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 1, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board