

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

M.C., Appellant	)	
	)	
and	)	Docket No. 19-1428
	)	Issued: February 3, 2020
U.S. POSTAL SERVICE, POST OFFICE,	)	
West Sacramento, CA, Employer	)	
	)	

*Appearances:*  
John Casey, for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

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

**JURISDICTION**

On June 21, 2019 appellant, through her representative, filed a timely appeal from a January 2, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>2</sup>

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<sup>1</sup> 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.

<sup>2</sup> The Board notes that appellant, through her representative, specifically appealed OWCP's January 2, 2019 merit decision. Although OWCP's June 7, 2019 nonmerit decision, which denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a), is within the Board's jurisdiction, appellant has not appealed that decision. Therefore, the Board will not address the June 7, 2019 nonmerit decision in this appeal. *See* 20 C.F.R. § 501.3(a) and (c).

Pursuant to the Federal Employees' Compensation Act<sup>3</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

### **ISSUE**

The issue is whether appellant has met her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

### **FACTUAL HISTORY**

On March 22, 2016 appellant, then, a 57-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that, on January 19, 2016, she broke her right thumb when a shelf she was lowering on a cage fell on it while she was in the performance of duty. On May 13, 2016 OWCP accepted the claim for fracture of unspecified phalanx of the right thumb, initial encounter for closed fracture, and paid appellant wage-loss compensation on the supplemental rolls from July 5 through August 3, 2016.

On May 25, 2016 appellant filed a claim for a schedule award (Form CA-7).

On December 1, 2016 OWCP referred appellant, together with a statement of accepted facts (SOAF), the medical record, and a set of questions, to Dr. Mark D. Bernhard, a Board-certified physiatrist, for a second opinion evaluation to determine the extent of her employment-related permanent impairment of the right thumb based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)<sup>4</sup> and the date she reached maximum medical improvement (MMI).

In a December 16, 2016 medical report and a March 8, 2017 supplemental report, Dr. Bernhard opined that appellant had zero percent permanent impairment of her right thumb under the sixth edition of the A.M.A., *Guides*. He utilized Table 15-2, page 393, and determined that her diagnosed distal phalanx fracture of the right thumb fell under a class 0 impairment with no residual findings.

On April 17, 2017 Dr. Jovito Estaris, a Board-certified occupational medicine physician serving as an OWCP district medical adviser (DMA), agreed with Dr. Bernhard's impairment rating determination of zero percent right thumb permanent impairment under Table 15-2, page 393, of the sixth edition of the A.M.A., *Guides* due to a diagnosis of closed fracture of the right thumb.

By decision dated June 16, 2017, OWCP denied appellant's schedule award claim finding that the opinions of Dr. Bernhard and Dr. Estaris constituted the weight of the medical evidence and established that appellant had no permanent impairment of a scheduled member or function of the body due to her accepted January 19, 2016 employment injury.

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<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

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

Appellant filed a second schedule award claim (Form CA-7) on July 30, 2018. She submitted a May 18, 2018 report from Dr. Varsha R. Sikka, a Board-certified physiatrist. Dr. Sikka noted a history of the accepted January 19, 2016 employment injury. She provided essentially normal findings on physical examination of appellant's bilateral wrists and hands with the exception of swelling on the right thumb with tenderness on palpation, decreased sensation at the tip of the thumb on the right, painful and slightly restricted range of motion (ROM) on flexion and extension of the first interphalangeal (IP) joint on the right thumb compared to the left side, and slightly decreased pinch and grip strengths on the right compared to the left side. Appellant's ROM measurements for the right thumb were recorded as 80 degrees flexion, 70 degrees extension, 20 degrees radial deviation, and 30 degrees ulnar deviation. Dr. Sikka indicated that appellant was right-hand dominant. On neurological examination, she also provided essentially normal findings with the exception of decreased sensation at the tip of the thumb on the right. Dr. Sikka provided impressions of fracture of the distal thumb, osteoarthritis of the first distal IP joint, right hand, and right thumb pain due to fracture. She noted that although appellant had pain, she was capable of performing her regular work and activities of daily living with no restrictions. Dr. Sikka determined that appellant had reached MMI on May 18, 2018, the date of her examination. She utilized Table 15-2, page 394, of the sixth edition of the A.M.A., *Guides*, and determined that appellant's right thumb condition fell under a class 3 impairment with a default value of 30 percent digit impairment, which equaled 11 percent permanent impairment of the right upper extremity. Dr. Sikka referred to "Table 15-3, page 395," and determined that her wrist pain was a class 1 impairment with a default value of 10 percent, which equaled 4 percent permanent impairment of the right upper extremity. She combined the 11 percent permanent impairment rating of the right thumb with the 4 percent permanent impairment rating of the right wrist to find 15 percent permanent impairment of the right upper extremity.

OWCP, in an October 16, 2018 development letter, acknowledged receipt of appellant's schedule award claim and Dr. Sikka's May 18, 2018 report. It requested that she submit an impairment evaluation from her attending physician addressing whether she had attained MMI with an impairment rating in accordance with the sixth edition of the A.M.A., *Guides*. No additional evidence was received by OWCP.

On November 7, 2018 OWCP again referred appellant's case to the DMA. It asked the DMA to review the SOAF and the medical record, and to provide an opinion on appellant's permanent impairment under the standards of the sixth edition of the A.M.A., *Guides*.

In a December 28, 2018 letter, the DMA noted that he had reviewed the SOAF and the medical record, including Dr. Sikka's May 18, 2018 report. He referenced his prior April 17, 2017 opinion that appellant had zero percent permanent impairment of the right upper extremity. The DMA disagreed with Dr. Sikka's right upper extremity ratings explaining that they were not in conformance with the sixth edition of the A.M.A., *Guides*. He noted that her 11 percent right upper extremity permanent impairment rating under Table 15-2, page 394 was improper because it was based on a diagnosis of thumb carpometacarpal (CMC) arthroplasty and appellant never had arthroplasty of the thumb. The DMA indicated that appellant had a fracture in the distal phalange of thumb. In addition, he noted that while Dr. Sikka found that appellant had four percent permanent impairment of the right upper extremity due to wrist pain under Table 15-3, page 395, the highest impairment rating for wrist pain under Table 15-3 was one percent. The DMA concluded that appellant had zero percent right upper extremity permanent impairment.

By decision dated January 2, 2019, OWCP denied appellant's claim for a schedule award.

### **LEGAL PRECEDENT**

The schedule award provisions of FECA,<sup>5</sup> and its implementing federal regulations,<sup>6</sup> 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. 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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.<sup>7</sup> As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>8</sup>

The A.M.A., *Guides* provide a diagnosis-based impairment (DBI) method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF) for upper extremity impairments. The evaluator identifies the impairment for the class of diagnosis (CDX) condition, which is then adjusted by grade modifiers based on functional history (GMFH), physical examination (GMPE), and clinical studies (GMCS).<sup>9</sup> The net adjustment formula is (GMFH-CDX) + (GMPE-CDX).<sup>10</sup>

The A.M.A., *Guides* also provide that the ROM impairment method is to be used as a stand-alone rating for upper extremity impairments when other grids direct its use or when no other diagnosis-based sections are applicable.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup>

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<sup>5</sup> 5 U.S.C. § 8107.

<sup>6</sup> 20 C.F.R. § 10.404.

<sup>7</sup> *Id.* at § 10.404(a).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

<sup>9</sup> A.M.A., *Guides* 385-419; *see M.P.*, Docket No. 13-2087 (issued April 8, 2014).

<sup>10</sup> *Id.*

<sup>11</sup> A.M.A., *Guides* 461.

<sup>12</sup> *Id.* at 473.

<sup>13</sup> *Id.* at 474.

OWCP issued FECA Bulletin No. 17-06 to explain the use of DBI methodology *versus* ROM methodology for rating of upper extremity impairments.<sup>14</sup> 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:

“As the [A.M.A.,] *Guides* caution that if it is clear to the evaluator evaluating the loss of ROM that a restricted ROM has an organic basis, three independent measurements should be obtained and the greatest ROM should be used for the determination of impairment, the CE [claims examiner] should provide this information (*via* the updated instructions noted above) to the rating physician(s).

“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 rate 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.)<sup>15</sup>

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.”<sup>16</sup>

### ANALYSIS

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

Dr. Sikka provided ROM findings for appellant’s right thumb. However, she did not provide an impairment rating based upon the ROM methodology. Rather, Dr. Sikka only used the ROM findings in applying the DBI rating methodology pursuant to Table 15-2, page 394, of the A.M.A., *Guides*, for a diagnosis of right thumb CMC arthroplasty. The Board notes that OWCP has not accepted a work-related right thumb CMC arthroplasty condition and the medical evidence of record does not otherwise establish the existence of such a condition, whether preexisting or

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<sup>14</sup> FECA Bulletin No. 17-06. This Bulletin was effective for all decisions issued by OWCP on and after May 8, 2017.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

work related in nature.<sup>17</sup> The Board further notes that Dr. Sikka also diagnosed fracture of the distal thumb, but did not provide an impairment rating based on this accepted condition.

OWCP's DMA reviewed Dr. Sikka's report and rated appellant's permanent impairment of the right thumb under Table 15-2, page 393, for a DBI rating based on the accepted diagnosis of closed fracture of the distal phalanx of the right thumb. The Board notes that Table 15-2, the Digit Regional Grid: Digit Impairments, does allow, by asterisk, that fractures of the digits be alternatively evaluated as a ROM impairment.<sup>18</sup>

As noted above, FECA Bulletin No. 17-06 provides in pertinent part that, if the A.M.A., *Guides* allow for the use of the DBI and ROM methods to calculate an impairment rating for the diagnosis in question, the method producing the higher rating should be used.<sup>19</sup>

Therefore, the DMA should have independently calculated appellant's impairment rating using both the ROM and DBI method and identified the higher rating for the claims examiner.<sup>20</sup>

The case will therefore be remanded for further development consistent with OWCP's procedures found in FECA Bulletin No. 17-06. Following this and any other development deemed necessary, OWCP shall issue a *de novo* decision.

### **CONCLUSION**

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

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<sup>17</sup> It is well established that, in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body are to be included. *D.H.*, Docket No. 17-0530 (issued July 2, 2018); *D.F.*, 59 ECAB 288 (2007); *Kenneth E. Leone*, 46 ECAB 133 (1994).

<sup>18</sup> See A.M.A., *Guides* 393, Table 15-2.

<sup>19</sup> *Supra* note 14.

<sup>20</sup> See *J.B.*, Docket No. 18-0419 (issued October 1, 2018); *B.N.*, Docket No. 17-1923 (issued April 17, 2018).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 2, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: February 3, 2020  
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board