

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

C.R., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
MICHAEL E. DeBAKEY VETERANS)
ADMINISTRATION MEDICAL CENTER,)
Houston, TX, Employer)

Docket No. 19-0523
Issued: January 7, 2020

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
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 4, 2019 appellant filed a timely appeal from a November 7, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP) and a December 19, 2018 nonmerit decision. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish greater than 71 percent permanent impairment of the left index finger for which she previously received a

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence to OWCP following the December 19, 2018 decision. 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.*

schedule award; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of her claim under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On November 17, 2014 appellant, then a 51-year-old food service worker, filed a traumatic injury claim (Form CA-1) alleging that on November 16, 2014 she fractured and lacerated her left index finger while in the performance of duty. OWCP accepted the claim for a closed fracture of the left middle or proximal phalanx or phalanges, and an open wound of the left finger with complications. On November 18, 2014 appellant underwent a left index finger debridement and reduction of an open fracture and pin fixation of an open distal phalanx fracture. She underwent additional left index finger surgeries on February 24 and March 28, 2016. OWCP paid appellant intermittent wage-loss compensation. In July 2016, appellant resumed work with restrictions following her March 28, 2016 surgery.

In a September 21, 2016 impairment evaluation, Dr. Lubor Jarolimek, an orthopedic surgeon, diagnosed a healed fracture of the left index finger and complex regional pain syndrome of the left index finger. He measured range of motion (ROM) of the left index finger. Citing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*),³ Dr. Jarolimek found that appellant had one percent permanent impairment of the left upper extremity. He noted that she had obtained maximum medical improvement (MMI) around July 20, 2016.

On November 22, 2016 appellant filed a claim for a schedule award (Form CA-7).

On November 30, 2016 Dr. Albert E. Sanders, a Board-certified orthopedic surgeon and OWCP referral physician, evaluated appellant to determine the extent of her current condition and employment-related disability. He measured ROM of the left index finger, left middle finger, and left wrist. Dr. Sanders found abnormal sensitivity of the left index finger. He diagnosed a laceration, digital nerve injury, and closed fracture of the middle or proximal phalanx of the left index finger and opined that appellant had continued residuals of her employment injury. Dr. Sanders found that she could perform light-duty work.

In a January 19, 2017 letter, OWCP requested that appellant provide a report from her attending physician addressing whether she had reached MMI. It afforded her 30 days to submit the requested information.

By decision dated March 15, 2017, OWCP denied appellant's schedule award claim, finding that the evidence of record was insufficient to establish that she had reached MMI.

In a report dated March 23, 2017, Dr. J. Don Jackson, Jr., a surgeon, reviewed appellant's history of an employment injury to her left index finger and resulting surgeries. He agreed with Dr. Jarolimek that she had one percent permanent impairment of the left upper extremity and had reached MMI on or around July 20, 2016.

³ A.M.A., *Guides* (6th ed. 2009).

On April 4, 2017 appellant requested reconsideration.

On May 29, 2017 Dr. David J. Slutsky, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), reviewed the evidence and opined that appellant had 24 percent permanent impairment of the left index finger using the diagnosis-based impairment (DBI) method set forth in Table 15-12 on page 421 of the A.M.A., *Guides*. He further found 41 percent permanent impairment of the left index finger using the ROM impairment rating method.

On November 27, 2017 OWCP informed appellant that it had authorized surgery for her accepted condition and that therefore a schedule award was not payable at the current time.

On December 6, 2017 Dr. Gerard T. Gabel, a Board-certified orthopedic surgeon, performed a digital nerve index neurectomy and deep transposition at the first web space, and a left index ulnar nerve neurectomy and deep transposition of the level distal hand.

In an impairment evaluation dated February 14, 2018, Dr. Gabel opined that appellant had 65 percent permanent impairment of the left index finger due to loss of ROM, which equates to 13 percent permanent impairment of the left hand or 12 percent permanent impairment of the left upper extremity.⁴

On May 16, 2018 appellant filed a claim for a schedule award (Form CA-7).

In a letter dated May 21, 2018, OWCP advised appellant that Dr. Gabel's February 14, 2018 report was insufficient to establish her schedule award claim as he had failed to address whether she had reached MMI and had failed to obtain three independent ROM measurements for the left finger. It afforded her 30 days to submit the requested information.

OWCP subsequently received a report dated May 30, 2018, wherein Dr. Gabel advised that appellant's condition was stable and that she had reached MMI on February 14, 2018. Dr. Gabel asserted that he had obtained three ROM measurements of the left index finger on multiple occasions. He noted that appellant had "little-to-no hyperesthesia within the index finger."

On July 28, 2018 Dr. Slutsky determined that Dr. Gabel had not performed valid ROM measurements. He therefore used the ROM measurements from Dr. Sanders' November 30, 2016 report. Dr. Slutsky found that appellant had 50 percent impairment of the digit "due to a longitudinal sensory loss along the entire length of her finger of both digital nerves" according to Table 15-17 on page 427 of the A.M.A., *Guides*. He additionally found 41 percent permanent impairment of the index finger due to loss of ROM, which he combined with the sensory impairment to find 71 percent permanent impairment of the digit. Dr. Slutsky opined that appellant had reached MMI on November 30, 2016.

In a report dated September 27, 2018, Dr. Gabel noted that OWCP had found 71 percent permanent impairment of the digit, not 65 percent impairment, and indicated that a variation in

⁴ On February 20, 2018 appellant again filed a claim for a schedule award (Form CA-7). In a letter dated February 26, 2018, OWCP advised her that it was taking no action on her schedule award claim as the evidence of record was insufficient to establish that she had reached MMI.

ROM was “within reason.” He disagreed with the date of MMI as it was before appellant’s most recent surgery.

By decision dated November 7, 2018, OWCP granted appellant a schedule award for 71 percent permanent impairment of the left index finger. The period of the award ran for 32.66 weeks from February 15 to October 1, 2018.

On December 5, 2018 appellant requested reconsideration. She contended that OWCP’s regulations provided that the loss of a first finger constituted 46 weeks of compensation instead of 32.66 weeks.

By decision dated December 19, 2018, OWCP denied appellant’s request for reconsideration of the merits of her schedule award claim.

LEGAL PRECEDENT

The schedule award provisions of FECA,⁵ and its implementing federal regulations,⁶ 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. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such a determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*, published in 2009.⁷ 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.⁸

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization’s International Classification of Functioning Disability and Health (ICF).⁹ Under the sixth edition, the evaluator identifies the impairment class of diagnosis (CDX), which is then adjusted by grade modifiers based on functional history (GMFH), physical examination (GMPE), and clinical studies (GMCS).¹⁰ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹¹ Evaluators are directed to provide reasons

⁵ *Supra* note 2.

⁶ 20 C.F.R. § 10.404.

⁷ For decisions issued after May 1, 2009 the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides* (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6 (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

⁸ *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

⁹ A.M.A., *Guides* (6th ed. 2009), p.3, section 1.3, International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

¹⁰ *Id.* at 494-531.

¹¹ *Id.* at 411.

for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.¹²

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP's DMA for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with OWCP's DMA providing rationale for the percentage of impairment specified.¹³

Before an award may be made, it must be medically determined that no further improvement can be anticipated and the impairment must reach a fixed and permanent state, which is known as MMI.¹⁴ The Board has explained that MMI means that the physical condition of the injured member of the body has stabilized and will not improve further.¹⁵ The determination of whether MMI has been reached is based on the probative medical evidence of record and is usually considered to be the date of the evaluation by the attending physician which is accepted as definitive by OWCP.¹⁶ Only when an impairment has reached MMI can a permanent impairment rating be performed.¹⁷

ANALYSIS

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

OWCP accepted that appellant sustained a closed fracture of the left middle or proximal phalanx or phalanges and an open wound of the left finger with complications. Appellant underwent surgeries on her left index finger on November 18, 2014, February 24 and March 28, 2016, and December 6, 2017.

In an impairment evaluation dated February 14, 2018, Dr. Gabel advised that appellant had 65 percent permanent impairment of the left index finger due to loss of ROM. In a supplemental report dated May 30, 2018, he opined that she had reached MMI. Dr. Gabel indicated that he had obtained three ROM of the left index finger on multiple occasions. His report, however, does not contain three valid ROM measurements of appellant's left index finger as required by the A.M.A., *Guides* and this it is of diminished probative value.¹⁸

Dr. Slutsky, a DMA, reviewed the evidence on July 28, 2018 and found that Dr. Gabel had failed to validly measure ROM. He therefore rated appellant's impairment using the ROM measurements from Dr. Sanders' November 30, 2016 report. However, this report was dated prior

¹² *R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

¹³ *Supra* note 7 at Chapter 2.808.5 (March 2017); *see also R.E.*, Docket No. 18-1661 (issued May 28, 2019).

¹⁴ *Supra* note 7 at Chapter 3.700.3.a (January 2010).

¹⁵ *See C.R.*, Docket No. 17-1872 (issued March 8, 2018).

¹⁶ *See E.M.*, Docket No. 19-0664 (issued November 19, 2019).

¹⁷ A.M.A., *Guides* 19; *G.B.*, Docket No. 15-0445 (issued May 4, 2015).

¹⁸ *Id.* at 464; *see also M.S.*, Docket No. 19-0282 (issued August 2, 2019).

to her December 6, 2017 left index finger surgery and therefore she had not obtained MMI. As noted, a claimant must obtain MMI prior to impairment rating.¹⁹ Consequently, the evidence the DMA relied upon in rating appellant's impairment is of no probative value as she had not yet reached MMI.²⁰

The Board thus finds that the medical evidence requires clarification to resolve the issue of the extent of appellant's permanent impairment of left index finger.²¹ The case will be remanded for further development of the medical evidence and a reasoned opinion regarding the degree of permanent impairment of the left index finger. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.²²

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the December 19 and November 7, 2018 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: January 7, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹⁹ *Id.*

²⁰ *K.S.*, Docket No. 15-1082 (issued April 18, 2017).

²¹ *Id.*; *see also R.B.*, Docket No. 12-1669 (issued February 21, 2013).

²² In light of the Board's disposition in Issue 1, Issue 2 is rendered moot.