

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

M.P., Appellant)	
)	
and)	Docket No. 20-0814
)	Issued: January 26, 2021
U.S. POSTAL SERVICE, POST OFFICE,)	
Cody, WY, Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On March 3, 2020 appellant filed a timely appeal from a September 20, 2019 merit decision and October 31, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish more than 20 percent permanent impairment of the left thumb, for which he previously received a schedule award; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 11, 2019 appellant, then a 60-year-old maintenance mechanic, filed a traumatic injury claim (Form CA-1) alleging that, on that date, his left thumb was amputated when he grabbed a chain on a door to steady himself and a ladder after being startled by an employee entering a garage while in the performance of duty. He stopped work on the date of injury. On January 10, 2019 Dr. Stephen F. Emery, an attending Board-certified orthopedic surgeon, performed a revision amputation of the left thumb and an incision and drainage of the left thumb with primary repair with a two-centimeter total length incision.

In a January 9, 2019 x-ray report, Dr. Travis S. Graham, a Board-certified diagnostic radiologist, noted that appellant sustained an amputation-type injury of the left thumb along the distal tuft with both soft tissue and bony components. There was no radiopaque foreign body appreciated. There were signs of osteoarthritic change at the first carpometacarpal joint and articulation of the scaphoid with the trapezium and trapezoid. There was also some nonspecific cystic change involving the carpus.

On January 31, 2019 OWCP accepted appellant's claim for partial traumatic transphalangeal amputation of the left thumb, initial encounter.

Thereafter, OWCP received an April 1, 2019 bilateral thumb x-ray report by Dr. Greg H. Cross, a Board-certified diagnostic radiologist. Dr. Cross indicated that the x-ray was being compared to the findings of a January 9, 2019 x-ray. He provided an impression of partial amputation of the left thumb distal phalanx.

Appellant filed a claim for a schedule award (Form CA-7) dated January 25, 2019, and received by OWCP on August 1, 2019. In support of his claim, he submitted an April 1, 2019 medical report by Dr. Emery. Dr. Emery noted that appellant returned status post left thumb amputation. He also noted that his wound was doing well. Dr. Emery noted that appellant's thumbs had been x-rayed again. He provided assessments of traumatic amputation of the thumb tip, type 4 (partial loss of terminal phalanx, pulp, and nail including lunular) and partial traumatic transphalangeal amputation of the right thumb, subsequent encounter. Referring to Figure 15-4 on page 426 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),² Dr. Emery graded the amputation of the proximal phalanx of the left thumb against the normal uninvolved thumb, which yielded in 40 percent permanent impairment of the finger due to traumatic amputation. He referred to Table 15-12 on page 422 and noted that 40 percent digit permanent impairment corresponded to 16 percent hand permanent impairment, which represented 14 percent left upper extremity permanent impairment, which converted to nine percent whole person impairment. Dr. Emery advised that, appellant was able to return to his normal activities without restrictions. He released him to full activity as tolerated.

On August 19, 2019 Dr. Jovito Estaris, a Board-certified occupational medicine physician, serving as a district medical adviser (DMA), reviewed a statement of accepted facts (SOAF) and the medical record, including Dr. Emery's April 1, 2019 findings and a left thumb x-ray which

² A.M.A., *Guides* (6th ed. 2009).

showed an amputation-type injury along the distal tuft with both soft tissue and bony components. Referring to Figure 15-11 on page 458 of the A.M.A., *Guides*, he utilized the diagnosis-based impairment (DBI) rating method and noted that appellant's diagnosis of transphalangeal amputation of the left thumb constituted 20 percent permanent impairment of the digit. The DMA noted that there was no digital neuroma. He related that the range of motion (ROM) rating method was not applicable. The DMA determined that appellant reached MMI on April 1, 2019, the date of Dr. Emery's impairment evaluation. He explained that the discrepancy between his and Dr. Emery's impairment ratings was due to the use of different figures. The DMA noted that Dr. Emery used Figure 15-4 instead of Figure 15-11. He indicated that while both figures were the same, Figure 15-4 included transverse sensory loss and Figure 15-11 was specific for thumb amputation. The DMA related that appellant's amputation was transphalangeal, specifically just proximal to the tuft (as stated in the x-ray report), which represented 20 percent digit permanent impairment. He further related that 40 percent digit permanent impairment was almost at the interphalangeal (IP) joint. The DMA maintained that the amputation was not just above the IP joint, but proximal to the tuft. He concluded that the correct digit impairment rating was 20 percent.

By decision dated September 20, 2019, OWCP granted appellant a schedule award for 20 percent permanent impairment of the left thumb. The award ran for 15 weeks from April 1 through July 14, 2019 and was based on the August 19, 2019 impairment rating of DMA Dr. Estaris.

On October 11, 2019 appellant requested reconsideration. In an accompanying undated statement, he contended that DMA Dr. Estaris' opinion was not based on a complete review of the medical records. Appellant asserted that he did not review a final x-ray which clearly supported a 40 percent digit impairment rating based on the A.M.A., *Guides*. He also asserted that the DMA did not take into account his need for revision surgery.

Appellant submitted a September 30, 2019 letter in which Dr. Emery reviewed DMA Dr. Estaris' September 28, 2019 findings and disagreed that appellant had 20 percent permanent impairment of the left thumb. He asserted that the DMA's impairment rating was not based on a review of all of the x-rays which showed a tuft amputation. Dr. Emery contended that his 40 percent left thumb digit permanent impairment rating was supported by the A.M.A., *Guides*.

Appellant also submitted a copy of Dr. Emery's April 1, 2019 report. Additionally, he submitted images from x-rays of his hands dated January 9 and April 1, 2019.

OWCP, by decision dated October 31, 2019, denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA³ and its implementing regulations⁴ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404.

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 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.⁵ As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).⁶ 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.⁷

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 the medical adviser providing rationale for the percentage of impairment specified.⁸

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish more than 20 percent permanent impairment of the left thumb, for which he previously received a schedule award.

In support of his schedule award claim, appellant submitted an April 1, 2019 report from Dr. Emery who found 40 percent digit permanent impairment of the left digit under the sixth edition of the A.M.A., *Guides* for the diagnosis of traumatic amputation of the left thumb tip, type 4 (partial loss of terminal phalanx, pulp and nail including lunular). Referencing Figure 15-4 on page 426 and Table 15-12 on page 422, he determined that appellant's left thumb diagnosis yielded 40 percent permanent impairment of the left digit, or 16 percent impairment of the hand, 14 percent impairment of the upper extremity, or nine percent whole person impairment.

OWCP properly routed Dr. Emery's report to its DMA, Dr. Estaris.⁹ In an August 19, 2019 report, the DMA utilized the DBI rating method and found that under Figure 15-11 on page 458 of the A.M.A., *Guides*, appellant's diagnosis of transphalangeal amputation of the left thumb constituted 20 percent permanent impairment of the left digit. He noted that there was no digital neuroma. The DMA also noted that the ROM rating method was not applicable. He determined that appellant attained MMI as of April 1, 2019, the date of Dr. Emery's impairment evaluation. The DMA explained that the discrepancy between his and Dr. Emery's impairment ratings was

⁵ *Id.* See also, *Ronald R. Kraynak*, 53 ECAB 130 (2001).

⁶ 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 2.808.6a (March 2017).

⁷ *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

⁸ See *supra* note 6 at Chapter 2.808.6(f) (March 2017); see *D.J.*, Docket No. 19-0352 (issued July 24, 2020).

⁹ *Supra* note 8.

due to the figures used. He noted that Dr. Emery used Figure 15-4 instead of Figure 15-11. The DMA indicated that while both figures were the same, Figure 15-4 included transverse sensory loss and Figure 15-11 was specific for thumb amputation. He further indicated that appellant's amputation was transphalangeal, proximal to the tuft as demonstrated by x-ray which represented 20 percent digit permanent impairment, and not above the IP joint which corresponded to 40 percent digit permanent impairment.

The Board finds that the DMA's opinion constitutes the weight of the medical evidence with respect to the permanent impairment of appellant's left thumb because he properly applied the appropriate standards of the A.M.A., *Guides*.¹⁰

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.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.¹¹

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.¹²

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹³ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.¹⁴ If the request is timely, but fails to meet at least one of the

¹⁰ See *O.F.*, Docket No. 19-0986 (issued February 12, 2020); *M.C.*, Docket No. 15-1757 (issued March 17, 2016) (the only medical evidence that demonstrated a proper application of the A.M.A., *Guides* was the report of the DMA).

¹¹ 5 U.S.C. § 8128(a); see *L.D.*, Docket No. 18-1468 (issued February 11, 2019); see also *V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

¹² 20 C.F.R. § 10.606(b)(3); see *L.D.*, *id.*; see also *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

¹³ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

¹⁴ *Id.* at § 10.608(a); see also *M.S.*, 59 ECAB 231 (2007).

requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.¹⁵

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

Appellant filed a timely request for reconsideration on October 11, 2019, but he did not establish that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by OWCP. He contended that DMA Dr. Estaris' opinion did not constitute the weight of the medical evidence as he did not review the complete medical record including a final x-ray which clearly supported 40 percent left thumb digit permanent impairment rating based on the A.M.A., *Guides*. Appellant also asserted that he did not take into account his need for revision surgery. Appellant's lay opinion on the medical evidence is not relevant to the underlying schedule award issue which requires medical evidence establishing a higher rating of permanent impairment.¹⁶ Accordingly, the Board finds that appellant is not entitled to a review of the merits based on either the first or second requirements under 20 C.F.R. § 10.606(b)(3).

The Board further finds that appellant did not submit relevant and pertinent new evidence not previously considered by OWCP. Appellant submitted a new September 30, 2019 letter from Dr. Emery who reiterated his prior opinion, which disagreed with DMA Dr. Estaris' opinion, that appellant had 40 percent digit permanent impairment of the left thumb based on the A.M.A., *Guides*. Dr. Emery reasoned that the DMA's 20 percent left thumb permanent impairment rating was not based on a review of all of the x-rays. Evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.¹⁷ Moreover, Dr. Emery did not provide any relevant and pertinent new evidence regarding impairment of appellant's left thumb attributable to the January 9, 2019 employment injury.¹⁸

Appellant also resubmitted an apparent copy of Dr. Emery's April 1, 2019 report. This evidence was previously of record and considered by OWCP in its September 20, 2019 decision. As noted, evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.¹⁹

¹⁵ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹⁶ *See J.K.*, Docket Nos. 19-1420 and 19-1422 (issued August 12, 2020); *Annette M. Dent*, 44 ECAB 403 (1993).

¹⁷ *See B.O.*, Docket No. 20-0156 (issued May 13, 2020); *M.G.*, Docket No. 18-0654 (issued October 17, 2018); *D.K.*, 59 ECAB 141 (2007).

¹⁸ *See S.M.*, Docket No. 18-1047 (issued February 13, 2019).

¹⁹ *Supra* note 18.

Lastly, appellant submitted images from January 9 and April 1, 2019 x-rays of the hands. The Board finds that submission of this evidence does not constitute relevant and pertinent new evidence and is insufficient to require OWCP to reopen the claim for merit review as it does not contain an opinion addressing the extent of appellant's work-related permanent impairment, which was the issue before OWCP.²⁰ As appellant did not provide relevant and pertinent new evidence, he is not entitled to a merit review based on the third requirement under 20 C.F.R. § 10.606(b)(3).²¹

The Board, accordingly, finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.²²

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish more than 20 percent permanent impairment of the left thumb, for which he previously received a schedule award. The Board further finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

²⁰ See *E.L.*, Docket No. 18-1262 (issued March 11, 2019).

²¹ 20 C.F.R. § 10.606(b)(3)(iii); *T.W.*, Docket No. 18-0821 (issued January 13, 2020).

²² *D.G.*, Docket No. 19-1348 (issued December 2, 2019).

ORDER

IT IS HEREBY ORDERED THAT the October 31 and September 20, 2019 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 26, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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