United States Department of Labor
Employees' Compensation Appeals Board

K.W., Appellant	)	
and	)	**Docket No. 22-0320**
	)	**Issued: July 28 2022**
DEPARTMENT OF THE ARMY, U.S. ARMY CORPS OF ENGINEERS, Fort Riley, KS, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On December 1, 2021 appellant filed a timely appeal from an October 12, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that, following the October 12, 2021 decision, OWCP received additional evidence. 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*

ISSUE

The issue is whether appellant has met his burden of proof to establish greater than 50 percent permanent impairment of his left middle finger, for which he previously received a schedule award.

FACTUAL HISTORY

On April 15, 2019 appellant, then a 50-year-old winchman, filed a traumatic injury claim (Form CA-1) alleging that on April 1, 2019 he severed and broke his left middle finger when a pipe wrench broke, in the performance of duty. He stopped work on April 22, 2019. OWCP accepted the claim for left distal phalanx middle finger displaced fracture and left middle finger crushing injury. It authorized left middle finger amputation, which appellant underwent on October 2, 2019 and left middle finger revision amputation with neurectomies, which he underwent on October 28, 2020. OWCP paid him wage-loss compensation on the supplemental rolls commencing May 17, 2019 and on the periodic rolls commencing June 23, 2019. On March 11, 2021 appellant accepted a modified job offer and returned to work. The modified job was withdrawn on June 20, 2021 and OWCP again paid him on the periodic rolls.

In a January 20, 2021 report, Dr. W. Jake Weller, a Board-certified orthopedic surgeon, related appellant's physical examination findings including nontender proximal phalanx neck level amputation stump, metacarpophalangeal (MCP) range of motion (ROM) of 0 to 40, left grip strength of 25 pounds, and right grip strength of 100 pounds.

On March 9, 2021 appellant filed a claim for a schedule award (Form CA-7).

On May 3, 2021 Dr. Morley Slutsky, a physician Board-certified in occupational medicine serving as a district medical adviser (DMA), reviewed a statement of accepted facts (SOAF) and appellant's medical record, including Dr. Weller's January 20, 2021 report. He advised that additional information was needed. Dr. Slutsky related that the surgical note was unclear regarding the percentage of appellant's digit amputation. He also noted that Dr. Weller had not provided three measurements of appellant's left finger MCP flexion and extension, and he had not provided findings from two-point discrimination testing. Dr. Slutsky requested that OWCP obtain further examination findings from Dr. Weller.

On July 28, 2021 OWCP referred appellant, along with a SOAF and a series of questions, to Dr. James T. Galyon, a Board-certified orthopedic surgeon, for a second opinion evaluation. In an August 23, 2021 report, Dr. Galyon described appellant's April 1, 2019 employment injury. He discussed appellant's medical history and provided findings on physical examination. Findings on examination of appellant's left middle finger included flexion contracture at the metaphalangeal and posterior interphalangeal joints and normal sensation in the left middle finger stump. He also reported left hand hypersensitivity, tenderness in the left palm, and diminished left hand grip. Dr. Galyon opined that appellant had a permanent disability. Referencing Table 15-28, Impairment of Upper Limb Amputation at Various Levels, sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[3] page 457 he found that appellant had 50 percent permanent impairment of the left middle finger for left middle

[3] A.M.A., *Guides* (6th ed. 2009).

finger amputation of the distal phalanx. Dr. Galyon also found 45 percent permanent impairment of the middle finger of the left hand due to middle finger distal interphalangeal (DIP) joint amputation.

On September 25, 2021 Dr. Slutsky reviewed Dr. Gaylon's report and requested that OWCP obtain a supplemental report as Dr. Galyon had not provided proper examination findings or an impairment rating for appellant's left third finger amputation. He related that Dr. Gaylon should provide proper sensory testing as a finding of hypersensitivity was not ratable, two-point discrimination testing results, and valid finger ROM measurements. Dr. Slutsky then applied Table 15-17 for any potential finger sensory deficits. He noted that Figure 15-2, page 458 should be used to rate amputation through the DIP joint level. Utilizing the diagnosis-based impairment (DBI) method under Table 15-2 (Digit Regional Grid), pages 391-94 of the A.M.A., *Guides*, Dr. Slutsky determined that the class of diagnosis (CDX) for left third finger DIP joint amputation was CDX 1, grade C. He assigned a grade modifier functional history (GMFH) of 1 per Table 15-7, page 406. Dr. Slutsky assigned a grade modifier physical examination (GMPE) of 1 pursuant to Table 15 -8, page 408. He assigned a grade modifier clinical study (GMCS) of 2 pursuant to Table 15-9, page 410. Dr. Slutsky utilized the net adjustment formula (1 - 1) + (1 - 1) + (2-1) = 1, which resulted in a grade D or nine percent permanent impairment of the left upper extremity. Applying Table 15-12, page 421, he found that a 9 percent permanent impairment of the upper extremity converted to a 50 percent permanent impairment of the left middle finger.

By decision dated October 12, 2021, OWCP granted appellant a schedule award for 50 percent permanent impairment of the left middle finger. The award covered a 12.5 week period from October 10, 2021 to January 5, 2022.

LEGAL PRECEDENT

The schedule award provisions of FECA[4] and its implementing regulations[5] 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 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.[6] As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).[7] The Board has approved the use

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] *Id*. *See also*, *Ronald R. Kraynak*, 53 ECAB 130 (2001).

[7] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); *id*. at Chapter 2.808.5(a) (March 2017).

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]

In addressing upper extremity impairments, the sixth edition requires identification of the impairment CDX condition, which is then adjusted by a GMFH, GMPE, and GMCS.[9] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[10]

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.[11] 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.[12] 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.[13]

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.[14] 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.)"[15]

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

[8] *K.R.*, Docket No. 21-0247 (issued February 25, 2022); *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

[9] A.M.A., *Guides* 383-492.

[10] *Id.* at 411.

[11] *Id.* at 461.

[12] *Id.* at 473.

[13] *Id.* at 474.

[14] FECA Bulletin No. 17-006 (issued May 8, 2017).

[15] A.M.A., *Guides* 477.

should independently calculate impairment using both the ROM and DBI methods and identify the higher rating for the [claims examiner] CE."[16]

The Board has held that where the residuals of an injury to a member of the body specified in the schedule award provisions of FECA[17] extend into an adjoining area of a member also enumerated in the schedule, such as an injury of a finger into the hand, or 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.[18]

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.[19]

ANALYSIS

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

OWCP referred appellant to Dr. Galyon for a second opinion examination to determine whether appellant had a permanent impairment due to his accepted left distal phalanx middle finger displaced fracture and left middle finger crushing injury. In a report dated August 23, 2021, Dr. Gaylon found 50 percent permanent impairment of the left middle finger for left middle finger amputation of the distal phalanx, and 45 percent permanent impairment of the middle finger of the left hand due to middle finger DIP joint amputation. However, as he did not provide proper sensory testing results or valid finger ROM measurements in accordance with the sixth edition of the A.M.A., *Guides*, the Board finds that the case must be remanded for a supplemental opinion regarding the nature and extent of appellant's permanent impairment.[20]

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.[21] While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that

[16] FECA Bulletin No. 17-06 (issued May 8, 2017); *K.R., supra* note 8; *V.L.*, Docket No. 18-0760 (issued November 13, 2018); *A.G.*, Docket No. 18-0329 (issued July 26, 2018).

[17] *Supra* note 4.

[18] *K.R., supra* note 8; *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 7 at Chapter 2.808.5(e) (March 2017).

[19] *See supra* note 7 at Chapter 2.808.6(f) (March 2017); *see K.R., supra* note 8; *D.J.*, Docket No. 19-0352 (issued July 24, 2020).

[20] *See N.G.*, Docket No. 20-0557 (issued January 5, 2021).

[21] *K.R., supra* note 8; *N.L.*, Docket No. 19-1592 (issued March 12, 2020); *M.T.*, Docket No. 19-0373 (issued August 22, 2019); *B.A.*, Docket No. 17-1360 (issued January 10, 2018).

justice is done.[22] Once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.[23]

On remand, OWCP shall request a supplemental opinion from Dr. Gaylon which provides ROM findings based upon three ROM trials in accordance with the A.M.A., *Guides*, provides proper sensory testing, and includes two-point discrimination testing in order to determine the extent of any impairment appellant has from his accepted left distal phalanx middle finger displaced fracture and left middle finger crushing injury. If Dr. Gaylon is unavailable or unwilling to provide a supplemental opinion, OWCP shall refer appellant, a SOAF, and a list of questions to a new second opinion physician in the appropriate field of medicine. After this, and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the October 12, 2021 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: July 28, 2022
Washington, DC

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

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board

[22] *K.R., id.*; *S.S.*, Docket No. 18-0397 (issued January 15, 2019); *Donald R. Gervasi,* 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

[23] *K.R., id.*; *T.K.*, Docket No. 20-0150 (issued July 9, 2020); *T.C.*, Docket No. 17-1906 (issued January 10, 2018).