United States Department of Labor
Employees' Compensation Appeals Board

C.R., Appellant **and** **DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, METROPOLITAN DETENTION CENTER, Brooklyn, NY, Employer**	)	**Docket No. 21-1265** **Issued: March 23, 2022**

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 19, 2021 appellant, through counsel, filed a timely appeal from a July 2, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

[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] 5 U.S.C. § 8101 *et seq*.

ISSUE

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

FACTUAL HISTORY

On March 7, 2017 appellant, then a 47-year-old material handler supervisor, filed a traumatic injury claim (Form CA-1) alleging that on February 26, 2017 he injured the left side of his body and broke his left small finger when attempting to move a loaded laundry cart which tipped over causing him to fall while in the performance of duty. He stopped work on February 26, 2017 and returned to work on March 7, 2017. On October 15, 2018 OWCP accepted the claim for nondisplaced closed fracture of the distal phalanx of the left little finger and mallet finger of the left little finger.

On July 13, 2017 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In support of his claim, appellant provided an August 3, 2017 report from Dr. John C. L'Insalata, a Board-certified orthopedic surgeon. Dr. L'Insalata described his history of injury on February 26, 2017 and diagnosed fracture of the distal phalanx of the left small finger with a bony mallet component. On physical examination he found prominence over the dorsal aspect of the distal interphalangeal (DIP) joint of the left small finger, lacking about two degrees of full extension of the DIP joint, and 75 degrees of flexion with full strength, and intact sensory and motor examination.

Dr. L'Insalata referred to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[3] and utilized the diagnosis-based impairment (DBI) rating method to find that, under Table 15-2 (Digit Regional Grid), page 392, the class of diagnosis (CDX) for mallet injury including avulsion fracture was a class 1 impairment, grade C, with a default value of six percent for the digit. He assigned a grade modifier for functional history (GMFH) of 2 based on pain symptoms with daily activities per Table 15-7, page 406. Dr. L'Insalata assigned a grade modifier for physical examination (GMPE) of 1 due to mild decreased range of motion (ROM) of the DIP joint, pursuant to Table 15-8, page 408. He assigned a grade modifier for clinical studies (GMCS) of 2 for associated intra-articular fracture of the distal phalanx, which healed with prominence and gapping at the articular surface pursuant to Table 15-9, page 410. Dr. L'Insalata utilized the net adjustment formula (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX) = (2-1) + (1-1) + (2-1) = +2, which resulted in a grade E or eight percent permanent impairment of the left small finger, which he converted to one percent permanent impairment of the left hand and one percent impairment of the left upper extremity, pursuant to Table 15-12, page 421.

On July 12, 2019 Dr. Nathan Hammel, a Board-certified orthopedic surgeon, serving as a district medical adviser (DMA), reviewed a statement of accepted facts (SOAF) and the medical

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

record, including Dr. L'Insalata's August 3, 2017 findings. He concurred with Dr. L'Insalata's findings. Dr. Hammel indicated that the ROM method result could not be applied due to the lack of triplicate measurements provided by Dr. L'Insalata. He found that the date of MMI was August 3, 2017, the evaluation date by Dr. L'Insalata.

On October 28, 2020 OWCP requested that the DMA clarify whether the impairment rating should be for the digit itself or extend into the adjoining area of the member, the hand or upper extremity. In a November 17, 2020 report, the DMA found that appellant was entitled to eight percent permanent impairment of his left small finger. He noted that consistent with OWCP procedures the general loss of less than one digit should be computed in terms of impairments to the digit itself and that the loss of two or more digits should be computed in terms of impairment to the whole hand.[4] The DMA found as only one finger was involved the impairment was best expressed as eight percent impairment of the left small finger.

By decision dated December 11, 2020, OWCP granted appellant a schedule award for eight percent permanent impairment of his left small finger. The award ran for 1.2 weeks during the period August 3 to 11, 2017.

On January 4, 2021 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which took place on April 21, 2021.

By decision dated July 2, 2021, the hearing representative affirmed OWCP's December 11, 2020 decision. She found that the weight of the medical evidence established that appellant had no greater than eight percent permanent impairment of his left finger for which he previously received a schedule award.

LEGAL PRECEDENT

The schedule award provisions of FECA[5] and its implementing 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. 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.[7] As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).[8] The Board has approved the use

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[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5.e (March 2017); *B.H.*, Docket No. 16-0252 (issued October 7, 2016); *Charles B. Carey*, 49 ECAB 528 (1998).

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

[7] *Id*. *See also B.B.*, Docket No. 20-1187 (issued November 18, 2021); *Ronald R. Kraynak*, 53 ECAB 130 (2001).

[8] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); *id*. at Chapter 2.808.5a. (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.[9]

In addressing upper extremity impairments, the sixth edition requires that the evaluator identify the impairment CDX, which is then adjusted by a GMFH, GMPE, and GMCS.[10] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[11]

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.[12] 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.[13] 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.[14]

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.[15] 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 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).
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> "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.)[16]

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

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

[11] *Id.* at 411.

[12] *Id.* at 461.

[13] *Id.* at 473.

[14] *Id.* at 474.

[15] FECA Bulletin No. 17-06 (May 8, 2017).

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

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 [clams examiner]."[17]

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.[18]

ANALYSIS

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

In his August 3, 2017 report, Dr. L'Insalata provided one set of passive ROM measurements for the left small finger. OWCP referred Dr. L'Insalata's report to Dr. Hammel, its DMA, who found that appellant had eight percent permanent impairment of the left small finger under the DBI methodology. Dr. Hammel advised that Dr. L'Insalata's report did not contain three complete ROM measurements for the left small finger.

Pursuant to FECA Bulletin No. 17-06, if the ROM method of rating permanent impairment is allowed, after review of the DBI rating, and the ROM findings are incomplete, the DMA should advise as to the medical evidence necessary to complete the ROM method of rating if the medical evidence of record is insufficient to rate appellant's impairment using ROM.[19]

Herein, OWCP did not follow the procedures outlined in FECA Bulletin No. 17-06 after the DMA advised that the measurements for the left finger were incomplete and there was no documentation to rate appellant's permanent impairment utilizing the ROM methodology.[20]

On remand OWCP shall obtain the necessary evidence as required under FECA Bulletin No. 17-06 from Dr. L'Insalata.[21] After it obtains the evidence necessary to complete the rating as described above, the case shall be referred to a DMA to independently calculate impairment to the left small finger using both ROM and DBI methods and identify the higher rating.[22] If Dr. L'Insalata does not fully comply with the A.M.A., *Guides*, OWCP shall refer appellant to a

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

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

[19] *J.L.*, Docket No. 19-1684 (issued November 20, 2020); *R.L.*, Docket No. 19-1793 (issued August 7, 2020); *E.P.*, Docket No. 19-1708 (issued April 15, 2020).

[20] *C.H.*, Docket No. 20-0529 (issued June 16, 2021); *J.L.*, *R.L.*, *id.*; *C.T.*, Docket No. 18-1716 (issued May 16, 2019).

[21] *J.L.*, *id.*; *J.S.*, Docket No. 19-0483 (issued October 10, 2019).

[22] *See J.L.*, *id.*; *J.V.*, Docket No. 18-1052 (issued November 8, 2018); *M.C.*, Docket No. 18-0526 (issued September 11, 2018).

specialist in the appropriate field of medicine for a second opinion evaluation. Following 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 July 2, 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: March 23, 2022
Washington, DC

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

Janice B. Askin, Judge
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Valerie D. Evans-Harrell, Alternate Judge
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