

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

_____)
B.T., Appellant)

and)

DEPARTMENT OF JUSTICE, FEDERAL)
BUREAU OF PRISONS, FEDERAL)
CORRECTIONAL INSTITUTION ESTILL,)
Estill, SC, Employer)
_____)

Docket No. 22-0615
Issued: September 16, 2022

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
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On March 23, 2022 appellant filed a timely appeal from a February 25, 2022 merit 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 over the merits of this case.

ISSUE

The issue is whether appellant has met his burden of proof to establish greater than five percent permanent impairment of his right upper extremity for which he previously received a schedule award.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 6, 2018 appellant, then a 47-year-old maintenance supervisor, filed a traumatic injury claim (Form CA-1) alleging that on June 4, 2018 his right hand was smashed between the gate and a stopper while in the performance of duty. He stopped work on June 4, 2018 and returned to work on June 27, 2018. Appellant underwent an open reduction and percutaneous pinning of the open fracture of the right middle phalanx on June 5, 2018. OWCP accepted the claim for displaced fracture of medial phalanx of the right little finger, open fracture, and crushing injury of the right little finger.

On September 30, 2020 appellant filed a claim for compensation (Form CA-7) for a schedule award.

By decision dated March 8, 2021, OWCP granted appellant a schedule award for five percent permanent impairment of the right finger. The award ran from July 26 to 31, 2019.

On March 15, 2021 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. Following a preliminary review, by decision dated April 29, 2021, OWCP's hearing representative vacated the March 8, 2021 decision and remanded the case for a *de novo* decision. The hearing representative issued specific instructions to OWCP to correct multiple errors in the processing of the schedule award claim. The hearing representative also noted that if the treating physician did not provide complete range of motion (ROM) measurements, then OWCP must refer appellant for a second opinion impairment evaluation.

By letter dated May 3, 2021, OWCP outlined the requirements for rating a permanent impairment of a scheduled member under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment (A.M.A., Guides)*.² It requested that appellant present the letter to his treating physician.

In a July 12, 2021 report, Tracy Hill, a physical therapist, noted appellant's history of injury and the accepted conditions. She reported appellant's right little finger examination findings. Under the A.M.A., *Guides*, Ms. Hill opined that appellant had 6 percent impairment of the right little finger based on the diagnosis-based impairment (DBI) methodology and 17 percent impairment of the right little finger based on the ROM impairment methodology.

On September 20, 2021 Dr. Malcom Horry, a Board-certified family practitioner, indicated that he agreed with the July 12, 2021 permanent impairment evaluation and A.M.A., *Guides* impairment rating provided by Ms. Hill.

In a November 18, 2021 letter, OWCP notified appellant that three independent ROM measurements from Dr. Horry were needed for calculation of appellant's upper extremity permanent impairment.

² A.M.A., *Guides* (6th ed. 2009).

On December 1, 2021 OWCP referred appellant, along with the medical record and an October 13, 2021 statement of accepted facts (SOAF), to Dr. John P. George, a Board-certified orthopedic surgeon, for a second opinion evaluation.

In a December 16, 2021 report, Dr. George reviewed the SOAF and presented his examination findings. He opined that appellant reached maximum medical improvement on June 27, 2018, the date he returned to full-time work. Using the DBI method of the A.M.A., *Guides*, Dr. George selected the diagnosis of fracture of fifth digit under Table 15.2. He found a grade modifier for functional history (GMFH) of 1, a grade modifier for physical examination (GMPE) of 1, and a grade modifier for clinical studies (GMCS) of 1. Dr. George calculated a total of 13 percent right digit impairment, which converted to 2 percent right upper extremity permanent impairment. Under the ROM methodology of the A.M.A., *Guides*, he found a flexion/extension measurement of 25 percent of the distal interphalangeal (DIP) joint, which equaled 37 percent digit impairment, and 12 percent of the proximal interphalangeal (PIP) joint, which equaled 21 percent digit impairment. The combined value of 58 percent digit impairment was then converted under Table 15.12 to 5 percent permanent impairment of the upper extremity. Dr. George opined that since the ROM methodology yielded the highest impairment rating, appellant had five percent permanent impairment of the right upper extremity. A copy of Dr. George's December 16, 2021 upper extremity permanent impairment worksheet and a December 16, 2021 work capacity evaluation (Form OWCP-5c) were provided.

On February 2, 2022 OWCP sent a copy of the medical record, including Dr. George's December 16, 2021 report, and an updated February 2, 2022 SOAF to Dr. David J. Slutsky, a Board-certified orthopedic hand surgeon serving as OWCP's district medical adviser (DMA).

In a February 17, 2022 report, Dr. Slutsky indicated that he reviewed the SOAF and appellant's medical records. He opined that appellant attained maximum medical improvement on December 16, 2021, the date of Dr. George's impairment examination. Dr. Slutsky also used Dr. George's December 16, 2021 impairment findings to calculate appellant's impairment. Using the DBI method of the A.M.A., *Guides*, he opined that appellant had six percent digit impairment. Under Table 15.2, Dr. Slutsky selected the class of diagnosis (CDX) of proximal phalanx fracture with residual symptoms. He found a GMPE of 1 and that neither a GMFH or GMCS were applicable. Dr. Slutsky calculated that appellant had a total of six percent digit impairment of his right upper extremity and explained why his impairment calculation differed from that of Dr. George. He also found that the ROM impairment calculation could not be made because Dr. George did not record "three validated upper extremity range of motion measurements for each joint as required per the A.M.A., *Guides*." Dr. Slutsky opined that as the current impairment was less than or equivalent to the previous five percent upper extremity permanent impairment previously awarded, and that no additional impairment had been incurred.

By decision dated February 25, 2022, OWCP denied appellant's claim for an increased schedule award, finding that the medical evidence of record was insufficient to support an increase in permanent impairment greater than the previous award for five percent permanent impairment of the right little finger.

LEGAL PRECEDENT

The schedule award provisions of FECA,³ and its implementing federal regulation,⁴ 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.⁵ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁶

A claimant may seek an increased schedule award if the evidence establishes that he or she sustained an increased impairment causally related to an employment injury.⁷ The medical evidence must include a detailed description of the permanent impairment.⁸

Regarding the application of ROM or DBI impairment methods in rating permanent impairment of the upper extremities, FECA Bulletin No. 17-06 provides:

“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).

“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.)

FECA Bulletin No. 17-06 further provides:

“If the rating physician provided an assessment using the DBI method and the [A.M.A.,] *Guides* allow for use of ROM for the diagnosis in question, the DMA

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404.

⁵ *Id.* See also *T.T.*, Docket No. 18-1622 (issued May 14, 2019).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); Chapter 3.700.2 and Exhibit 1 (January 2010).

⁷ See *T.W.*, Docket No. 20-1547 (issued October 4, 2021).

⁸ See *K.F.*, Docket No. 18-1517 (issued October 9, 2019).

should independently calculate impairment using both the ROM and DBI methods and identify the higher rating for the CE.

“If the medical evidence of record is not sufficient for the DMA to render a rating on ROM, where allowed, the DMA should advise as to the medical evidence necessary to complete the rating. However, the DMA should still render an impairment rating using the DBI method, if possible, given the available evidence.”⁹

OWCP’s procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.¹⁰

ANALYSIS

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

On September 20, 2021 Dr. Horry indicated that he agreed with the July 12, 2021 permanent impairment evaluation performed by Ms. Hill. As noted, FECA Bulletin No. 17-06 requires three independent measurements when evaluating a loss of ROM. However, these ROM measurements were not received despite OWCP’s request for such measurements. As such, the September 20, 2021 report of Dr. Horry does not comply with the A.M.A., *Guides* and is of limited probative value.¹¹

OWCP referred appellant to Dr. George for a second opinion examination. In his December 16, 2021 report, Dr. George opined that appellant had a total 13 percent right digit impairment or 2 percent right upper extremity impairment under the DBI methodology and 58 percent digit impairment or 5 percent right upper extremity impairment under the ROM methodology of the A.M.A., *Guides*.

OWCP routed Dr. George’s report to its DMA, Dr. Slutsky. In a February 17, 2022 report, Dr. Slutsky calculated six percent digit permanent impairment of the right little finger under the DBI rating method for the diagnosis of a fracture of the middle phalanx. He explained why his rating differed from that of Dr. George. Dr. Slutsky explained that pursuant to Table 15 of the A.M.A., *Guides*, a fracture of the middle phalanx had a maximum digit impairment of 8 percent and would not be rated as a 13 percent impairment. Regarding appellant’s rating under the ROM methodology, he found that Dr. George had not provided triplicate ROM measurements. Pursuant to FECA Bulletin No. 17-06, if the ROM method of rating permanent impairment is allowed, and

⁹ FECA Bulletin No. 17-06 (issued May 8, 2017).

¹⁰ *Supra* note 8.

¹¹ *See S.R.*, Docket No. 18-1307 (issued March 27, 2019).

the ROM findings are incomplete, the DMA should advise as to the medical evidence necessary to complete the ROM method of rating and OWCP shall obtain the necessary evidence.¹²

Herein, OWCP did not follow the procedures outlined in FECA Bulletin No. 17-06 after the DMA advised that the measurements for the right little finger were incomplete.¹³

On remand, OWCP shall obtain the necessary evidence as required under FECA Bulletin No. 17-06 from Dr. George.¹⁴ 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 right little finger using both ROM and DBI methods and identify the higher rating.¹⁵ If Dr. George does not fully comply with the A.M.A., *Guides*, OWCP shall refer appellant to a new 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.

¹² *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).

¹³ *C.R.*, Docket No. 21-1265 (issued March 23, 2022); *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).

¹⁴ *C.R.*, *id.*; *J.L.*, *id.*; *J.S.*, Docket No. 19-0483 (issued October 10, 2019).

¹⁵ See *J.L.*, *id.*; *J.V.*, Docket No. 18-1052 (issued November 8, 2018); *M.C.*, Docket No. 18-0526 (issued September 11, 2018).

ORDER

IT IS HEREBY ORDERED THAT the February 25, 2022 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: September 16, 2022
Washington, DC

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

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

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