United States Department of Labor
Employees' Compensation Appeals Board

M.J., Appellant	)	
and	)	
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, CHARLOTTE DOUGLAS INTERNATIONAL AIRPORT, Charlotte, NC, Employer	)	**Docket No. 22-0787** **Issued: March 24, 2023**

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
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 26, 2022 appellant, through counsel, filed a timely appeal from a February 24, 2022 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 over 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 her burden of proof to establish greater than seven percent permanent impairment of her right fourth finger, for which she previously received a schedule award.

FACTUAL HISTORY

On February 9, 2016 appellant, then a 30-year-old transportation security officer, filed a traumatic injury claim (Form CA-1) alleging that on February 8, 2016 she sustained a right ring finger injury when her finger became pinned between bins while in the performance of duty. OWCP accepted the claim for unspecified injury of the muscle/fascial tendon of the fourth digit of the right hand. It subsequently expanded acceptance of her claim to include trigger finger of the right little finger.

Appellant underwent OWCP-approved right ring finger pulley release surgery in February 2016, right small finger pulley release surgery in November 2016, and additional right small finger release surgery in November 2018. OWCP paid appellant wage-loss compensation for intermittent periods of disability. On January 22, 2019 appellant returned to full duty.

On March 21, 2019 appellant filed a claim for compensation (Form CA-7) for a schedule award. After development of the evidence, by decision dated June 13, 2019, OWCP denied appellant's schedule award claim finding that the medical evidence of record was insufficient to establish that she sustained a permanent impairment due to her accepted February 8, 2016 employment injury.

In a letter dated November 16, 2020, appellant, through counsel, again requested a schedule award.

Counsel submitted a report dated November 4, 2020, from Dr. Joshua Macht, Board-certified in internal medicine, who described the February 8, 2016 employment injury and appellant's subsequent surgeries. Dr. Macht recounted appellant's complaints of mild-to-severe pain in the right hand and localized pain to the little finger metacarpal phalangeal (MCP) joint level. On physical examination, he observed tenderness to palpation at the fifth MCP joint and motor weakness at the little finger and pain with resisted motion. Dr. Macht indicated that range of motion (ROM) of the right ring finger demonstrated MCP flexion of 85, 85, and 87 degrees, proximal interphalangeal (PIP) flexion of 105, 105, and 105 degrees, and distal interphalangeal (DIP) flexion of 70, 70, and 70 degrees. Range of motion of the right little finger showed MCP flexion of 80, 80, and 78 degrees, PIP flexion of 100, 100, and 100 degrees, and DIP flexion of 80, 80, and 80 degrees. Dr. Macht diagnosed postoperative state of the right hand.

Dr. Macht opined that appellant's right ring finger symptoms had resolved, but that she still experienced triggering, pain, loss of function, and weakness of the little finger. He 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

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

to find that, under Table 15-2 (Digit Regional Grid), page 392, the class of diagnosis (CDX), stenosing tenosynovitis, was a class 1 impairment, grade C, with a default value of six percent. Dr. Macht assigned a grade modifier for functional history (GMFH) of 1 based on a *Quick*DASH score of 39 and a grade modifier for physical examination (GMPE) of 1. He found that a grade modifier for clinical studies (GMCS) was not applicable and concluded that appellant had six percent impairment of the right little finger. Dr. Macht also utilized the ROM rating method and referenced Table 15-31, page 470, to determine that appellant had six percent permanent impairment due to limitation in MCP joint flexion of the right little finger. He reported that since the ROM and DBI rating methods provided an identical impairment rating, either model was appropriate for assigning impairment for the right little finger. Dr. Macht referred to Table 15-2, page 421, and indicated that six percent impairment of the right little finger translated to one percent permanent impairment of the right upper extremity. He noted that appellant had reached maximum medical improvement (MMI) on October 30, 2020.

In a report dated July 6, 2021, Dr. David J. Slutsky, a Board-certified orthopedic surgeon, serving as a district medical adviser (DMA), reviewed a statement of accepted facts and the medical record. He noted appellant's accepted conditions of injury to the fourth finger of the right hand and trigger finger of the fifth finger of the right hand. Utilizing the A.M.A., *Guides*, DBI rating method, Dr. Slutsky referred to Table 15-2, page 392, and indicated that for a CDX of trigger digit with residual symptoms, appellant was a class 1 impairment, with a default value of six percent. He assigned a GMFH of 1 due to a *Quick*DASH score of 39 and assigned a GMPE of 1 due to minimal palpatory findings. Dr. Slutsky found that a grade modifier for GMCS was not applicable. He utilized the net adjustment formula, (GMFH - CDX) + (GMPE - CDX) = (1 - 1) + (1 - 1) = 0, which resulted in a final permanent impairment rating of six percent digit impairment for the right small finger. Utilizing the ROM rating method to rate the right small finger, Dr. Slutsky referred to Table 15-31 and determined that appellant had zero percent digit impairment for 90 degrees DIP flexion, zero percent digit impairment for zero degrees DIP extension, zero percent digit impairment for 105 degrees PIP flexion, zero percent digit impairment for zero degrees PIP extension, zero percent digit impairment for 90 degrees MP flexion, and seven percent digit impairment for zero degrees MP extension. He disagreed with Dr. Macht's assessment of six percent digit impairment of the right small finger due to MCP flexion and explained that according to Dr. Macht's physical examination, appellant had 90 degrees MCP flexion, which correlated to zero percent digit impairment. Dr. Slutsky concluded that appellant had seven percent permanent impairment of the right small finger and that she had reached MMI on November 4, 2020, the date of Dr. Macht's impairment examination.

By decision dated August 6, 2021, OWCP granted appellant a schedule award for seven percent permanent impairment of the right small finger.[4] The period of the award ran for 1.05 weeks for the period November 4 through 11, 2020, and was based on the opinion of the DMA.

On August 16, 2021 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on December 10, 2021.

[4] Although the August 6, 2021 decision noted the right fourth finger, this appears to be a notation error as Dr. Slutsky, the DMA, provided an impairment rating for appellant's right small finger.

By decision dated February 24, 2022, OWCP's hearing representative affirmed the August 6, 2021 decision.

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. FECA, however, does not specify the manner in which the percentage of loss of a member 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 and the Board has concurred in such adoption.[7] As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, is used to calculate schedule awards.[8]

In addressing impairment of the upper extremities, the sixth edition of the A.M.A., *Guides* requires identifying the impairment for the CDX, which is then adjusted by grade modifiers based on GMFH, GMPE, and GMCS.[9] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[10] Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[11]

The A.M.A., *Guides* also provide that the 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]

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

[7] *Id*. at § 10.404 (a); *see also T.T.*, Docket No. 18-1622 (issued May 14, 2019); *Jacqueline S. Harris*, 54 ECAB 139 (2002).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *see also id*. at Chapter 3.700.2 and Exhibit 1 (January 2010).

[9] A.M.A., *Guides* 383-492; *see M.P.*, Docket No. 13-2087 (issued April 8, 2014).

[10] *Id*. at 411.

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

[12] A.M.A., *Guides* 461.

[13] *Id*. at 473.

[14] *Id*. at 474.

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).
>
> "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* allows 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."[16]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's 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.[17]

ANALYSIS

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

In support of her schedule award claim, appellant submitted a November 4, 2020 impairment rating report by Dr. Macht. Utilizing Table 15-2, page 392, he determined that under the DBI method, appellant had six percent digit impairment of her right little finger for the CDX of residual symptoms of tenosynovitis. Under the ROM method, Dr. Macht referred to Table 15-31, page 470, to determine that appellant had six percent permanent impairment due to 80 degrees MCP joint flexion of the right little finger.

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

[16] *Id*.

[17] *See supra* note 8 at Chapter 2.808.6f (March 2017). *R.M.*, Docket No. 18-1313 (issued April 11, 2019); *C.K.*, Docket No. 09-2371 (issued August 18, 2010).

In a July 6, 2021 report, Dr. Slutsky, a DMA, indicated that he agreed with Dr. Macht's impairment evaluation under the DBI method for six percent digit impairment for the right small finger. Utilizing the ROM rating method to rate the right small finger, Dr. Slutsky referred to Table 15-31 and determined that appellant had zero percent digit impairment for 90 degrees MP flexion and seven percent digit impairment for zero degrees MP extension. He reported that Dr. Macht should have assigned zero percent digit impairment for 90 degrees MCP flexion, instead of six percent digit impairment.

The DMA, however, did not properly apply Dr. Macht's ROM measurements for appellant's right small finger in accordance with the A.M.A., *Guides*. Under the ROM method, the DMA indicated that ROM measurements of 90 degrees MP flexion resulted in zero percent permanent impairment. However, in his November 4, 2020 report, Dr. Macht noted ROM measurements for appellant's right little finger of 80 degrees MP flexion. A ROM measurement of 80 degrees MP flexion resulted in six percent permanent impairment.[18] Thus, the DMA did not adequately explain why he assigned zero percent digit impairment for 90 degrees MP flexion when appellant showed 80 degrees MP flexion on Dr. Macht's physical examination.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.[19] 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 justice is done.[20] As OWCP undertook development of the evidence by referring appellant to an DMA, it had an obligation to do a complete job and obtain a proper evaluation and report that would resolve the issue in this case.[21]

The Board will, therefore, remand this case for further clarification from the DMA, Dr. Slutsky, regarding why he chose zero percent digit impairment instead of six percent digit impairment for 80 degrees MP flexion and to conduct a proper analysis under the A.M.A., *Guides*. Following this and other such further development as deemed necessary, it shall issue a *de novo* decision.

CONCLUSION

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

[18] A.M.A., *Guides* 470, Table 15-31.

[19] *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).

[20] *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).

[21] *G.M.*, Docket No. 19-1931 (issued May 28, 2020); *W.W.*, Docket No. 18-0093 (issued October 9, 2018).

ORDER

IT IS HEREBY ORDERED THAT the February 24, 2022 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 24, 2023
Washington, DC

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

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

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