United States Department of Labor
Employees' Compensation Appeals Board

Q.N., Appellant	)	
and	)	**Docket No. 23-0636**
	)	**Issued: October 31, 2023**
DEPARTMENT OF HOMELAND SECURITY, U.S. CUSTOMS AND BORDER PROTECTION, U.S. BORDER PATROL, Yuma, AZ, Employer	)	

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
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On March 27, 2023 appellant, through counsel, filed a timely appeal from a March 8, 2023 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 his burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

FACTUAL HISTORY

On July 21, 2020 appellant, then a 43-year-old criminal investigator, filed a traumatic injury claim (Form CA-1) alleging that on July 17, 2020 he injured his right elbow and left thumb when he fell during an investigation while in the performance of duty.[3] He did not stop work. OWCP accepted the claim for right elbow strain and traumatic rupture of the left thumb ligament.

In a medical report dated October 4, 2021, Dr. Leber, a Board-certified orthopedic and hand surgeon, noted that appellant had reached maximum medical improvement (MMI) and had returned to work without restrictions. On physical examination of the left thumb, he documented flexion and extension at the metacarpophalangeal (MCP) joint from 0 to 75 degrees with no gross instability. Dr. Leber reviewed x-rays, which revealed no arthritic changes or joint subluxation. His impression was status-post left thumb MCP radial collateral ligament repair. Dr. Leber utilized Table 15-2 (Digit Regional Grid: Digit Impairments), page 392, of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[4] and noted an impairment rating of four percent of the left upper extremity.

On October 8, 2021 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In a November 1, 2021 development letter, OWCP requested that appellant submit a report from his treating physician in accordance with the sixth edition of the A.M.A., *Guides* and provide the date that he reached MMI. It afforded him 30 days to submit additional medical evidence in support of his schedule award claim.

In a letter dated November 2, 2021, Dr. Leber indicated that appellant had reached MMI as of October 4, 2021. He explained that the final rating of four percent of the left thumb was due to impairment from appellant's left thumb MCP joint sprain/ligament tear with surgical repair. Dr. Leber reiterated that he relied upon Table 15-2, page 392, of the sixth edition of the A.M.A., *Guides* and that the rating was based upon appellant's diagnosis and functional impairment relative to the injury, with no instability.

On January 27, 2022 OWCP routed Dr. Leber's October 4 and November 2, 2021 reports, a statement of accepted facts (SOAF), and the case record, to Dr. Nathan Hammel, a Board-certified orthopedic surgeon, serving as OWCP's district medical adviser (DMA), for review and

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[3] OWCP assigned the present claim OWCP File No. xxxxxx345. Appellant has previously accepted traumatic injury claims for a March 11, 2011 right rotator syndrome and allied disorders and a November 12, 2019 right elbow injury, under OWCP File Nos. xxxxxx061 and xxxxxx070, respectively. OWCP has administratively combined OWCP File Nos. xxxxxx061, xxxxxx070, and xxxxxx345 on August 2, 2022, with the latter serving as the master file.

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

evaluation of appellant's permanent impairment of his "upper left thumb" pursuant to the A.M.A., *Guides*.[5]

In a February 8, 2022 report, Dr. Hammel indicated his review of the SOAF and Dr. Leber's reports and that appellant had reached MMI on October 15, 2021. He noted that the most recent clinical examination documented tenderness and intermittent thumb pain after surgical repair and mild restriction in ROM. Utilizing the A.M.A., *Guides*, diagnosis-based impairment (DBI) rating method, Dr. Hammel referred to Table 15-2, page 392, and indicated the class of diagnosis (CDX) for thumb MCP sprain, with no instability, was a class zero impairment. He also utilized the ROM rating method and referenced Table 15-30, page 468, and determined that appellant had zero percent permanent impairment. Dr. Hammel reported that since the ROM and DBI rating methods provided an identical impairment rating, either model was appropriate for assigning impairment for the left thumb.

By decision dated March 10, 2022, OWCP denied appellant's claim for a schedule award, finding that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body due to his accepted employment injury. It found that the weight of the medical evidence regarding the percentage of permanent impairment rested with the DMA, Dr. Hammel.

On April 3, 2022 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

By decision dated July 14, 2022, OWCP's hearing representative affirmed the March 10, 2022 decision.

OWCP thereafter received an October 29, 2022 letter by Dr. Leber, who again indicated that appellant reached MMI on October 4, 2021.

On February 16, 2023 appellant, through counsel, requested reconsideration of OWCP's July 14, 2022 decision. In support of his request, he submitted a February 2, 2023 impairment rating evaluation report from Dr. George T. Ricks, a family physician, who described the July 17, 2020 employment injury and appellant's subsequent surgery. Dr. Ricks noted appellant's complaints of mild pain in the left wrist/thumb and right elbow, which increased with activity. On physical examination of the right elbow, he observed no tenderness and full ROM. On physical examination of the left wrist and thumb, Dr. Ricks noted palpable tenderness, full range of motion with discomfort in the extreme ranges, reduced sensation in the left thumb, and weak left handgrip. He also reviewed diagnostic studies and noted that appellant's *Quick*DASH score was 14. Dr. Ricks diagnosed left radial collateral ligament rupture, status-post left thumb surgery, and right elbow sprain. He applied the sixth edition of the A.M.A., *Guides* and, regarding the right elbow, found no permanent impairment. Regarding the "left wrist/thumb," Dr. Ricks utilized the DBI rating method to find that, under Table 15-3 (Wrist Regional Grid), page 395, the CDX for ruptured muscle/tendon, was a Class 1 impairment, grade C, with a default value of five percent. He assigned a grade modifier for functional history (GMFH) of 0 based on a *Quick*DASH score of 14 and a grade modifier for physical examination (GMPE) of 1 for palpatory findings. Dr. Ricks

[5] *Id*.

found a grade modifier for clinical studies (GMCS) of 1 for positive findings on the MRI scan of the left hand. He utilized the net adjustment formula, (GMFH - CDX) + (GMPE - CDX) = (0 - 1) + (1 - 1) = -1, which resulted in a final permanent impairment rating of four percent of the left upper extremity. Dr. Ricks noted that the ROM method was not applicable, as appellant had no ROM limitations of the left wrist and thumb other than discomfort reported at extreme ranges.

By decision dated March 8, 2023, OWCP denied modification of its July 14, 2022 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA[6] and its implementing regulations[7] 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. The method used in making such determination is a matter which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by OWCP as a standard for evaluation of schedule losses and the Board has concurred in such adoption.[8] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2009.[9]

It is the claimant's burden of proof to establish permanent impairment of the scheduled member or function of the body as a result of an employment injury.[10] OWCP procedures provide that, to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred (date of MMI), describes the impairment in sufficient detail so that it can be visualized on review, and computes the percentage of impairment in accordance with the A.M.A., *Guides.*[11]

In addressing impairment for the upper extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the upper extremity to be rated.[12] After a CDX is determined (including identification of a default grade value), the

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[6] *Supra* note 2.

[7] 20 C.F.R. § 10.404.

[8] *Id*.; *see also Jacqueline S. Harris*, 54 ECAB 139 (2002).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2022); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[10] *E.D.*, Docket No. 19-1562 (issued March 3, 2020); *Edward Spohr*, 54 ECAB 806, 810 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

[11] *Supra* note 9 at Chapter 2.808.5 (February 2022).

[12] *M.D.*, Docket No. 20-0007 (issued May 13, 2020); *T.T.*, Docket No. 18-1622 (issued May 14, 2019).

impairment class is then adjusted by grade modifiers based on a GMFH, GMPE, and/or GMCS.[13] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[14]

Regarding the application of ROM or DBI methodologies 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)."[15]

The FECA Bulletin further advises:

> "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."[16]

> "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 impairment rating for the diagnosis in question, the method producing the higher rating should be used*." (Emphasis in the original.)[17]

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."[18]

Before the A.M.A., *Guides* can be utilized, a description of the impairment must be obtained from his or her physician. In obtaining medical evidence required for a schedule award, the evaluation made by the attending physician must include a description of the impairment

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

[14] *Id*. at 411.

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

[16] *Id*.

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

[18] *Id*.

including, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decrease in strength or disturbance of sensation, or other pertinent descriptions of the impairment. This description must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.[19]

A claimant may seek increased schedule award compensation if the evidence establishes that he or she sustained an increased impairment causally related to an employment injury.[20]

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.[21]

ANALYSIS

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

OWCP accepted appellant's July 17, 2020 traumatic injury claim for a right elbow sprain and traumatic rupture of the left thumb ligament (traumatic rupture of left radial collateral ligament). By decisions dated March 10 and July 14, 2022, it denied his claim for schedule award compensation based upon the February 8, 2022 opinions of its DMA, Dr. Hammel. In support of his February 16, 2023 request for reconsideration of OWCP's July 14, 2022 decision, appellant, through counsel, submitted a February 2, 2023 impairment rating report by Dr. Ricks. Utilizing Table 15-3, page 395, Dr. Ricks determined that under the DBI method, appellant had a four percent permanent impairment of the left upper extremity for the "left wrist/thumb."

By decision dated March 8, 2023, OWCP denied modification of its July 14, 2022 decision. However, it did not refer appellant's file, including Dr. Ricks' February 2, 2023 report, back to its DMA for review and comment prior to issuing the March 8, 2023 decision. As noted above, 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.[22]

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.[23] While the claimant has the responsibility to establish entitlement to compensation,

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[19] *A.T.*, Docket No. 18-0864 (issued October 9, 2018).

[20] *R.A.,* Docket No. 19-1798 (issued November 4, 2020); *Rose V. Ford*, 55 ECAB 449 (2004).

[21] *See supra* note 9 at Chapter 2.808.6f) (February 2013). *See also J.T.*, Docket No. 17-1465 (issued September 25, 2019); *C.K.*, Docket No. 09-2371 (issued August 18, 2010); *Frantz Ghassan*, 57 ECAB 349 (2006).

[22] *Id*.

[23] *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).

OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.[24] 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.[25]

The Board will, therefore, remand this case for OWCP to route the file, including Dr. Ricks' February 2, 2023 report, to a DMA for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides* and FECA Bulletin No. 17-06. 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.

ORDER

IT IS HEREBY ORDERED THAT the March 8, 2023 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: October 31, 2023
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

[24] *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).

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