

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

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J.M., Appellant)

and)

DEPARTMENT OF THE ARMY, U.S. ARMY)
CORPS OF ENGINEERS, MISSISSIPPI RIVER)
PROJECT OFFICE, Pleasant Valley, IA,)
Employer)
-----)

Docket No. 23-0751
Issued: October 31, 2023

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 April 26, 2023 appellant filed a timely appeal from a March 13, 2023 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 met his burden of proof to establish greater than 32 percent permanent impairment of the left hand, for which he previously received a schedule award.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 22, 2016 appellant, then a 53-year-old welder, filed a traumatic injury claim (Form CA-1) alleging that on June 21, 2016 his left hand was crushed between a strut arm and hydraulic ram while in the performance of duty. He stopped work June 21, 2016 and on that date underwent an open reduction and internal fixation (ORIF) left index finger proximal phalanx. Appellant returned to work on August 29, 2016. OWCP accepted the claim for crushing injury of left hand, displaced fracture of proximal phalanx of left index finger, crushing injury of left index finger and injury of other nerves at wrist, and hand level of left arm. On December 1, 2016 appellant underwent a revision ORIF for nonunion, left index finger proximal phalanx. OWCP paid all appropriate compensation benefits.

On January 17, 2018 appellant filed a claim for compensation (Form CA-7) for a schedule award.

By decision dated May 4, 2018, OWCP granted appellant a schedule award for 32 percent permanent impairment of the left hand. The award ran for 78.08 weeks from July 9, 2017 to January 6, 2019.

On May 24, 2018 appellant requested a review of the written record before a representative of OWCP's Branch of Hearings and Review.

By decision dated September 5, 2018, an OWCP hearing representative affirmed OWCP's May 4, 2018 decision.

On January 3, 2022 appellant filed a Form CA-7 for an increased schedule award.

On May 3, 2022 appellant underwent a left index finger ray resection (amputation), which was performed by Dr. Ericka A. Lawler, a Board-certified orthopedic hand surgeon.

In a September 15, 2022 report, Dr. Lawler indicated that appellant was at maximum medical improvement (MMI) following his May 3, 2022 left index finger ray resection. Using the diagnosis-based impairment (DBI) methodology of the A.M.A., *Guides*, she opined, under Table 15-29, amputation impairment, he had 20 percent left upper extremity impairment.

On September 16, 2022 appellant filed another Form CA-7 for an increased schedule award.

On November 9, 2022 OWCP referred appellant, along with the medical record and a November 9, 2022 statement of accepted facts (SOAF), to Dr. Tyson Cobb, a Board-certified orthopedic hand surgeon, for a second opinion evaluation.

In a December 5, 2022 report, Dr. Cobb reviewed the SOAF and presented appellant's examination findings. He noted that appellant had reduced range of motion (ROM) and decreased grip strength of the left hand/wrist/fingers. Dr. Cobb provided three ROM measurements for the right and left wrist as well as two-point discrimination of digit ROM of the thumb to small finger and the long, middle and small fingers for both right and left fingers. He indicated that ROM impairment methodology could not be used to rate appellant's impairment due to the amount of

variation between the three assessments. Under the DBI methodology, Dr. Cobb opined that appellant had 30 percent total left-hand impairment. Citing Figure 15-5, Digit Impairment due to Finger Amputation at Various Lengths, page 426 he found for the left index finger 100 percent loss which, under Table 15-11, converted to 20 percent hand impairment. For the left thumb, Dr. Cobb found, under Figure 15-4 page 426, 25 percent total transverse sensory loss which, under Table 15-11, converted to 10 percent hand impairment. For the middle finger, he found, under Figure 15-5 page 426, 50 percent impairment for total transverse sensory loss, which converted, under Table 15-11, to 10 percent hand impairment. For the ring finger, Dr. Cobb found, under Figure 15-5 page 426, 50 percent impairment for total transverse sensory loss which, under Table 15-11, converted to 6 percent hand impairment. Utilizing the Combined Values Chart on page 604, he combined the hand impairments of 20 percent, 10 percent, 10 percent, and 6 percent for a total of 30 percent left hand permanent impairment.

On February 8, 2023 OWCP forwarded a copy of the medical record, including Dr. Cobb's December 5, 2022 report, and an updated February 2, 2022 SOAF to Dr. Nathan Hammel, a Board-certified orthopedic surgeon, serving as OWCP's district medical adviser (DMA) for review.

In a March 3, 2023 report, Dr. Hammel indicated that he reviewed the SOAF and appellant's medical records. He opined that appellant attained MMI on December 5, 2022 the date of Dr. Cobb's impairment examination. Dr. Hammel also used Dr. Cobb's impairment findings to calculate appellant's impairment. Using the DBI method of the A.M.A., *Guides*, he concurred with Dr. Cobb's impairment calculation of 30 percent left-hand permanent impairment. Dr. Hammel further found that as the current impairment was less than the prior award for 32 percent permanent impairment of the left hand, no additional impairment had been incurred. Regarding ROM of appellant's left hand, he noted, "The most recent clinical exam[ination] note documents ongoing pain after crush injury to the left hand. The examination shows reduced [ROM] of the right left as well as decreased grip strength." Dr. Hammel stated "both the [ROM] method and the [DBI] methods are calculated when applicable."

By decision dated March 13, 2023, OWCP denied appellant's claim for an increased schedule award, finding that the medical evidence of record was insufficient to establish greater than the 32 percent permanent impairment of the left hand previously awarded.

LEGAL PRECEDENT

The schedule award provisions of FECA² and its implementing regulations³ 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

² *Id.*, at § 8107.

³ 20 C.F.R. § 10.404.

standard for evaluating schedule losses.⁴ As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).⁵ The Board has approved the use 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.⁶

The Board has held that, where the residuals of an injury to a member of the body specified in the schedule award provisions of FECA⁷ extend into an adjoining area of a member also enumerated in the schedule, such as an injury of a finger into the hand, of 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.⁸

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's *International Classification of Functioning Disability and Health (ICF): A Contemporary Model of Disablement*.⁹ Under the sixth edition, the evaluator identifies the impairment class of diagnosis (CDX), which is then adjusted by a grade modifier for functional history (GMFH), a grade modifier for physical examination (GMPE), and/or a grade modifier for clinical studies (GMCS).¹⁰ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹¹ Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.¹²

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.¹³ If ROM is used as a stand-alone approach, the total impairment for all units of function must be calculated. All values for the joint are measured and added.¹⁴

⁴ *Id.* See also, *T.S.*, Docket No. 22-0924 (issued April 27, 2023); *Ronald R. Kraynak*, 53 ECAB 130 (2001).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *id.* at Chapter 3.700.2 and Exhibit 1 (January 2010).

⁶ *K.R.*, Docket No. 21-0247 (issued February 25, 2022); *J.D., widow of J.D.*, Docket No. 19-1168 (issued March 29, 2021); *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

⁷ 5 U.S.C. § 8107.

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 5 at Chapter 2.808.5(e) (March 2017).

⁹ A.M.A., *Guides* (6th ed. 2009), p.3, section 1.3.

¹⁰ *Id.* at 494-531.

¹¹ *Id.* 411.

¹² *H.C.*, Docket No. 21-0761 (issued May 5, 2022); *R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

¹³ A.M.A., *Guides* 461.

¹⁴ *Id.* at 473.

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.¹⁵

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.¹⁶ 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.)¹⁷

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].”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.

In a report dated September 15, 2022, Dr. Lawler examined appellant and opined, without explanation, that he had 20 percent permanent left-hand impairment pursuant to Table 15-29, Amputation Impairment. Section 15 and Section 15.6e of the A.M.A., *Guides* allows for adjustment for proximal problems and adjustment for functional history, physical examination and clinical studies, which Dr. Lawler failed to address. She also failed to explain how she arrived at

¹⁵ *Id.* at 474.

¹⁶ FECA Bulletin No. 17-06 (issued May 8, 2017). *See also* L.G., Docket No. 18-0519 (issued March 8, 2019); D.F., Docket No. 17-1474 (issued January 23, 2018).

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

¹⁸ *Id.* *See also* L.G., Docket No. 18-0519 (issued March 8, 2019); V.L., Docket No. 18-0760 (issued November 13, 2018); A.G., Docket No. 18-0329 (issued July 26, 2018); D.F., Docket No. 17-1474 (issued January 23, 2018).

¹⁹ *See supra* note 5 at Chapter 2.808.6f (March 2017); *see* D.J., Docket No. 19-0352 (issued July 24, 2020); K.F., Docket No. 18-1517 (issued October 9, 2019).

the 20 percent impairment under Table 15-29. Thus, Dr. Lawler's impairment rating is of diminished probative value.²⁰

OWCP subsequently referred appellant to Dr. Cobb for a second opinion evaluation and impairment rating utilizing both DBI and ROM methodology for rating permanent impairment. In his December 5, 2022 report, Dr. Cobb determined that appellant had 30 percent permanent left-hand impairment under the DBI methodology. He noted the applicable tables of the A.M.A., *Guides* and explained how he rated the wrist and each finger impairment, and how he converted each rating to permanent impairment of the left hand. Dr. Cobb also indicated that ROM impairment methodology was not used due to the amount of variation between the three assessments.

On March 3, 2023 Dr. Hammel, OWCP's DMA, concurred with Dr. Cobb's DBI impairment rating and methodology. As noted, Dr. Cobb also provided ROM measurements of the wrist and fingers, which he noted were inconsistent. Page 459 of the A.M.A., *Guides* allows for impairments resulting from loss of or restricted motion of proximal joints. However, Dr. Hammel did not review such measurements or calculate an impairment rating under the ROM impairment methodology. As previously noted, OWCP procedures require that, 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.²¹ Dr. Hammel merely noted that appellant's permanent impairment had been assessed under both DBI and ROM methodologies, if applicable.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.²² 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.²³ 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.²⁴

The case must be remanded to Dr. Hammel, OWCP's DMA, for a supplemental opinion properly applying FECA Bulletin No. 17-06.²⁵ After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

²⁰ See *J.D.*, *supra* note 6; *C.S.*, Docket No. 19-0172 (issued April 24, 2019).

²¹ *Supra* note 18.

²² *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).

²³ *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).

²⁴ *T.K.*, Docket No. 20-0150 (issued July 9, 2020); *T.C.*, Docket No. 17-1906 (issued January 10, 2018).

²⁵ See *K.W.*, Docket No. 22-0320 (issued July 28, 2022); *N.G.*, Docket No. 20-0557 (issued January 5, 2021).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the March 13, 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

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