United States Department of Labor
Employees' Compensation Appeals Board

V.F., Appellant	)	
	)	
and	)	**Docket No. 24-0091**
	)	**Issued: March 8, 2024**
DEPARTMENT OF VETERANS AFFAIRS, DORIS MILLER VA MEDICAL CENTER, Waco, TX, 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 November 9, 2023 appellant, through counsel, filed a timely appeal from an October 24, 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.[3]

[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.*

[3] The Board notes that, following the October 24, 2023 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id*.

ISSUE

The issue is whether appellant has met her burden of proof to establish greater than six percent permanent impairment of her right third finger, for which she previously received a schedule award.

FACTUAL HISTORY

On April 23, 2018 appellant, then a 57-year-old contact representative, filed an occupational disease claim (Form CA-2) alleging that she sustained a right upper extremity injury due to repetitive typing while in the performance of duty.[4] OWCP accepted the claim for carpal tunnel syndrome of the right upper limb. It subsequently expanded the acceptance of appellant's claim to include lesion of ulnar nerve of the right upper limb and trigger finger of the right third and fifth fingers.

On November 7, 2019 appellant underwent OWCP-authorized surgeries including right elbow cubital tunnel release, right elbow flexor carpi ulnaris tendon lengthening, right third finger trigger finger release, and right fifth finger trigger finger release by Dr. George Mundanthanam, a Board-certified orthopedic and hand surgeon.

In a medical report dated September 9, 2020, Dr. Thomas E. Martens, a Board-certified family medicine specialist, opined that appellant had reached maximum medical improvement (MMI) and had returned to full-time work. He noted that she related subjective complaints of tingling with flexion of the right elbow for prolonged periods of time; difficulty opening lids on jars, using a sweeper, pushing a lawn mower, and holding heavy objects for long periods; and tingling when working on a computer for greater than 20 minutes. On physical examination of the hands, Dr. Martens documented full range of motion of all fingers, a click over the A1 pulley release on the right third finger, and Jamar grasp measurements of 40, 42, 40 on the right versus 38, 40, 40 on the left. On examination of the wrists and elbows, he noted full range of motion; healed surgical scars with no swelling and no pain; negative Tinel's signs and Phalen's tests; no thenar, hypothenar or intrinsic atrophy; normal radial and ulnar pulses; and no ganglions, Dupuytren's contracture, or de Quervain's tendinitis. Dr. Martens diagnosed "status post cubital tunnel release and release of trigger fingers right III, V." He utilized Table 15-23, page 449, of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[5] and found two percent permanent impairment of the right upper extremity for cubital tunnel release and one percent permanent right upper extremity impairment for "digits III, V."

On March 11, 2021 appellant filed a claim for compensation (Form CA-7) for a schedule award.

[4] OWCP assigned the present claim OWCP File No. xxxxxx056. Appellant has a previous claim for a March 29, 2001 right hand overuse injury, which OWCP processed as a short form closure under OWCP File No. xxxxxx394. She also has a previously accepted occupational disease claim for a September 30, 2013 sprain of the right shoulder and supraspinatus of the upper right arm and right bicipital tenosynovitis under OWCP File No. xxxxxx058. Appellant received a schedule award of 12 percent of the right upper extremity under OWCP File No. xxxxxx058.

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

In a March 23, 2021 development letter, OWCP requested that appellant submit a report from her treating physician in accordance with the sixth edition of the A.M.A., *Guides* and provide the date that she reached MMI. It afforded her 30 days to submit additional medical evidence in support of her schedule award claim.

On April 22, 2021 OWCP routed Dr. Marten's September 9, 2020 report, a statement of accepted facts (SOAF), and the case record to Dr. David J. Slutsky, a Board-certified orthopedic surgeon, serving as OWCP's district medical adviser (DMA), for review and evaluation of appellant's permanent impairment pursuant to the A.M.A., *Guides*.

In a May 2, 2021 report, Dr. Slutsky indicated his review of the SOAF and Dr. Martens' report and agreed that appellant had reached MMI on September 9, 2020. He found no permanent impairment of the third or fifth fingers of the right hand or of the right elbow/cubital tunnel pursuant to the A.M.A., *Guides*.

On June 2, 2021 OWCP forwarded a copy of Dr. Slutsky's May 2, 2021 report to appellant and requested that she provide it to her treating physician for his review and response.

In an August 5, 2021 medical report, Dr. Martens documented physical examination findings of hypothenar atrophy of the right hand, tenderness of the distal radius of the right wrist, pain with flexion of the right wrist, reduced strength with flexion and extension of the right wrist, and tenderness of the medial epicondyle on the right.

In a September 1, 2021 narrative letter, Dr. Kyriakos Tsalamandris, a treating physician and Board-certified emergency medicine specialist, indicated that a reexamination of appellant had occurred on August 11, 2021.[6] He agreed with Dr. Slutsky that there was no ratable impairment under the A.M.A., *Guides* for the diagnosis of right cubital tunnel syndrome. Dr. Tsalamandris further noted that examination of the right third digit revealed full range of motion with ongoing trigger phenomenon, a demonstrable click, and some catching. Using Table 15-2 (Digit Regional Grid), page 392, the class of diagnosis (CDX) for digital stenosing tenosynovitis was a Class 1 impairment, grade C, with a default value of six percent of the third middle finger. Dr. Tsalamandris assigned "all grade modifiers" a value of 1 and found six percent permanent impairment of the right third finger, which he converted to one percent permanent impairment of the right hand or one percent permanent impairment of the right upper extremity, pursuant to the A.M.A., *Guides*.

On September 2, 2021 OWCP routed the September 1, 2021 report of Dr. Tsalamandris to Dr. Slutsky and requested a supplemental report.

In a supplemental report dated September 13, 2021, Dr. Slutsky reviewed Dr. Tsalamandris' September 2, 2021 report, and agreed that appellant had a six percent digit impairment for triggering of the right third finger. Utilizing the A.M.A., *Guides*, diagnosis-based impairment (DBI) rating method, Dr. Slutsky referred to Table 15-2, page 392, and indicated the CDX for digital stenosing tenosynovitis 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 1 based on mild triggering. Dr. Slutsky assigned a grade modifier for physical examination (GMPE) of 1

[6] The record does not contain a report for date of service on August 11, 2021.

for apparently normal range of motion, but noted that validated measurements were not performed. He found that a grade modifier for clinical studies (GMCS) was not applicable. Dr. Slutsky utilized the net adjustment formula (GMFH – CDX) + (GMPE – CDX) = (1-1) + (1+1) = 0, which resulted in a grade C or six percent permanent impairment of the right third finger. He noted that there was otherwise no new information, and therefore, the impairment rating of zero percent for right cubital tunnel syndrome and triggering of the right fifth finger remained unchanged.

In medical reports dated September 7, 2021 and January 20, 2022, Dr. Tsalamandris and Dr. Martens, respectively, noted physical examination findings in the base of the right thumb, right wrist, and right elbow.

On March 11, 2022 OWCP again requested a supplemental report from Dr. Slutsky as to whether the 6 percent impairment of the right third finger was in addition to the prior award of 12 percent of the right upper extremity under OWCP File No. xxxxxx058.[7]

In a supplemental report dated March 19, 2022, Dr. Slutsky opined that appellant had zero percent permanent impairment of the right third finger in addition to the previous award of 12 percent of the right upper extremity. He further noted that there was no proximal hand involvement and therefore the impairment remained at the digit level.

By decision dated March 31, 2022, OWCP granted appellant a schedule award of six percent of the right third finger. The award ran for 1.8 weeks from September 9 through 21, 2020 and was based on Dr. Slutsky's November 6, 2021 and March 19, 2022 reports.

On April 12, 2022 appellant, through counsel, requested a telephonic hearing by a representative of OWCP's Branch of Hearings and Review, which was conducted on August 10, 2022. Appellant testified that she still experienced cramping in her right fifth finger while working and doing chores.

OWCP also received April 7 and June 2, 2022 medical reports by Dr. Martens, who documented physical examination findings in the base of the right thumb, right wrist, and right elbow.

By decision dated October 3, 2022, OWCP's hearing representative vacated the March 31, 2022 decision and remanded the claim for OWCP to obtain clarification from its DMA as to permanent impairment of the third and fifth fingers of the right hand.[8]

On November 4, 2022 OWCP provided an updated SOAF and medical records to Dr. Slutsky and requested that he provide an explanation as to the reason he assigned a grade modifier of 1 for physical examination for the right third finger and a grade modifier of 0 for physical examination of the right fifth finger. It further requested that he explain, with medical

[7] *Supra* note 4.

[8] The hearing representative also instructed OWCP to administratively combine OWCP File Nos. xxxxxx394 and xxxxxx058 with OWCP File No. xxxxxx056. OWCP thereafter administratively combined the files, with OWCP File No. xxxxxx056 serving as the master file.

rationale, whether there was evidence that residuals of appellant's injury to the right third and fifth fingers extended into the right hand or arm.

In a supplemental report dated November 22, 2022, Dr. Slutsky noted that Dr. Martens' September 9, 2020 report indicated full range of motion of all fingers of both hands, and a demonstrable click or A1 pulley release in the right third finger only. He explained that, based on those findings, he chose a grade modifier of 1 for the physical examination of the right third finger which resulted in a six percent digit impairment of the right third finger using the DBI rating method under the A.M.A., *Guides*. Dr. Slutsky further opined that the impairment was limited to the digit level as there was no proximal hand involvement.

By decision dated November 30, 2022, OWCP denied appellant's claim for an increased schedule award.

On December 2, 2022 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on May 2, 2023.

By decision dated July 19, 2023, OWCP's hearing representative affirmed the October 3, 2022 decision.

On October 2, 2023 appellant, through counsel, requested reconsideration of the July 19, 2023 decision. In support of the request, appellant submitted an August 23, 2023 medical report by Dr. Mundanthanam, who noted that she related complaints of right elbow pain and right third and fifth finger numbness, locking, and triggering. Dr. Mundanthanam noted her surgeries and performed a physical examination, which revealed residual scar tissue at the right elbow, third, and fifth fingers and normal strength, sensation, and capillary refill throughout. He further indicated that appellant could make a complete fist, could fully open her hand, and that her extensor and flexor pollicis longus tendons were intact. Dr. Mundanthanam opined that she was functional and did not require any further surgery.

By decision dated October 24, 2023, OWCP denied modification of the July 19, 2023 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA[9] and its implementing regulations[10] 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

[9] *Supra* note 2.

[10] 20 C.F.R. § 10.404.

the Board has concurred in such adoption.[11] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2009.[12]

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.[13] 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*.[14]

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.[15] After a CDX is determined (including identification of a default grade value), the impairment class is then adjusted by grade modifiers based on a GMFH, GMPE, and/or GMCS.[16] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[17]

The Board has held that where the residuals of an injury to a member of the body specified in the schedule award provisions of FECA[18] 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.[19]

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.[20]

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

[12] 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).

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

[14] *Supra* note 12 at Chapter 2.808.5 (March 2017).

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

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

[17] *Id*. at 411.

[18] 5 U.S.C. § 8107.

[19] *C.W.*, Docket No. 17-0791 (issued December 14, 2018); *Asline Johnson*, 42 ECAB 619 (1991); *Manuel Gonzales*, 34 ECAB 1022 (1983). *See* note 12 at 2.808.5(e) (March 2017).

[20] *See supra* note 12 at Chapter 2.808.6(f) (March 2017). *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).

ANALYSIS

The Board finds that appellant did not meet her burden of proof to establish greater than six percent impairment of her right third finger, for which she received a schedule award.

Regarding the accepted diagnosis of right cubital tunnel syndrome, in his May 2, 2021 report, OWCP's DMA Dr. Slutsky explained that there was no ratable impairment in the right upper extremity due the right elbow/cubital tunnel under the A.M.A., *Guides*. In his September 1, 2021 narrative letter, Dr. Tsalamandris, appellant's treating physician, likewise found no ratable impairment under the A.M.A., *Guides* for the diagnosis of right cubital tunnel syndrome. Accordingly, the medical evidence negated any claim for permanent impairment of the right upper extremity due to the accepted right elbow/cubital tunnel condition.[21]

Regarding the accepted right third and fifth finger conditions, in his September 9, 2020 report, Dr. Martens found one percent right upper extremity impairment for the third and fifth fingers, pursuant to the A.M.A., *Guides*. Dr. Tsalamandris, in his September 1, 2021 narrative letter, found six percent permanent impairment of the right third finger, pursuant to the A.M.A., *Guides*.

In a report dated September 13, 2021, Dr. Slutsky indicated his review of Dr. Tsalamandris' September 2, 2021 report and agreed that appellant had six percent digit impairment for triggering of the right third finger. In a supplemental report dated November 22, 2022, Dr. Slutsky noted that Dr. Martens' September 9, 2020 report indicated full range of motion of all fingers of both hands, and a demonstrable click or A1 pulley release in the right third finger only. Dr. Slutsky explained that, based on those findings, he chose a grade modifier of 1 for the physical examination of the right third finger which resulted in a six percent digit impairment of the right third finger using the DBI rating method under the A.M.A., *Guides*. He properly noted that, under Table 15-2 on page 392 of the sixth edition of the A.M.A., *Guides*, appellant's right third finger fell under the diagnosis category for digital stenosing tenosynovitis, a Class 1, grade C impairment, and that after application of the net adjustment formula to the grade modifiers (GMFH of 1, GMPE of 1, and no GMCS) that the resulting impairment rating was the default value of six percent of the right third finger.[22] Therefore, appellant has a right third finger impairment of six percent. The record does not contain a rationalized impairment rating showing that she has more than six percent permanent impairment of her right third finger.

In the present case, the evidence demonstrates that appellant sustained six percent permanent impairment of her right third finger. Although Drs. Martens and Tsalamandris noted that, utilizing Table 15-2, the six percent impairment rating of the right third finger would convert to a one percent impairment of the right hand or one percent permanent impairment of the right upper extremity, neither physician provided an explanation of how appellant's right third finger impairment extended into her right hand or right upper extremity.[23] In contrast, Dr. Slutsky, in his March 19 and November 22, 2022 reports, explained that her impairment was limited to the digit

[21] *See C.L.*, Docket No. 21-0729 (issued December 1, 2022); *see also K.R.*, Docket No. 19-0730 (issued June 5, 2020).

[22] *Supra* note 16 at 391-405.

[23] *See S.B.*, Docket No. 16-1112 (issued September 19, 2016).

level as there was no proximal hand involvement. Consequently, the Board finds that there is no evidence that residuals of appellant's work injury to her right third finger extended into an adjoining area of the affected member. Therefore, there is no basis for converting the schedule award to an award for the right hand or right upper extremity. For these reasons, appellant has not shown that she has more than six percent impairment of her right third finger.[24]

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not established greater than six percent permanent impairment of the right third finger, for which she previously received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the October 24, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 8, 2024
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] *Id*.