

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

J.R., Appellant)
)
and)
)
U.S. POSTAL SERVICE, POST OFFICE,)
Manchester, CT, Employer)

**Docket No. 19-0217
Issued: July 25, 2019**

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On November 7, 2018 appellant, through counsel, filed a timely appeal from an August 17, 2018 merit decision of the Office of Workers’ Compensation Programs (OWCP). Pursuant to the Federal Employees’ Compensation Act² (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 greater than seven percent permanent impairment of the right upper extremity, for which he previously received schedule awards.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On November 3, 2011 appellant, then a 46-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on October 28, 2011 he injured his right hand while in the performance of duty. OWCP accepted the claim for a right wrist sprain and a loose body in the right wrist.

OWCP previously had accepted that in 2003 appellant sustained a left shoulder strain. It assigned OWCP File No. xxxxxx425 to his left shoulder claim. OWCP granted appellant a schedule award for 10 percent permanent impairment of the left upper extremity under OWCP File No. xxxxxx425.

On November 8, 2012 appellant underwent an authorized excision of a nonunion hook of the hamate, reconstruction of a right flexor digitorum profundus tendon rupture, a palmaris longus ipsilateral graft of the right fifth digit, and a repair of a partial rupture of right flexor digitorum profundus tendon fourth digit. On January 2, 2014 he underwent an authorized right ulnar shortening osteotomy and right palm fasciotomy. Appellant resumed his usual employment on July 2, 2014.

On April 7, 2015 appellant filed a claim for a schedule award (Form CA-7).

In a May 20, 2015 impairment evaluation, Dr. Stephen F. Scarangella, a Board-certified orthopedic surgeon, determined that appellant had 20 percent permanent impairment of the right hand due to loss of grip strength and reduced range of motion (ROM) of the small finger.

On January 5, 2016 Dr. Arthur S. Harris, a Board-certified orthopedic surgeon, serving as a district medical adviser (DMA), opined that appellant had three percent permanent impairment of the right upper extremity due to loss of ROM of the digits in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁴

On February 25, 2016 OWCP referred appellant to Dr. John R. Corsetti, a Board-certified orthopedic surgeon, for a second opinion examination.

³ Docket No. 16-1904 (issued September 14, 2017).

⁴ A.M.A., *Guides* (6th ed. 2009).

In an April 4, 2016 report, Dr. Corsetti opined that appellant had three percent permanent impairment of the right upper extremity due to an impairment of the right fifth digit and the right wrist using the diagnosis-based impairment (DBI) method as set forth in the A.M.A., *Guides*.

Dr. Harris reviewed the medical record on August 18, 2016 and found that appellant had five percent permanent impairment of the right upper extremity following an excision of a nonunion of the hook of the hamate pursuant to Table 15-3 on page 396 of the A.M.A., *Guides*. He further determined that appellant had five percent impairment of the right fifth digit due to loss of ROM, which constituted no impairment of the upper extremity.

By decision dated August 30, 2016, OWCP granted appellant a schedule award for five percent permanent impairment of the right upper extremity.

Appellant appealed to the Board. By decision dated September 14, 2017, the Board set aside the August 30, 2016 decision.⁵ The Board noted that OWCP had inconsistently applied Chapter 15 of the sixth edition of the A.M.A., *Guides* regarding the proper use of either the ROM or DBI method in assessing the extent of upper extremity permanent impairment. The Board remanded the case for OWCP to issue a *de novo* decision after development of a consistent method for calculating permanent impairment of the upper extremities.

Following remand, on November 22, 2017, OWCP referred appellant, together with a statement of accepted facts (SOAF) and the medical record to Dr. Robert I. Moskowitz, a Board-certified orthopedic surgeon, for a second opinion examination.

In a December 26, 2017 impairment evaluation, Dr. Moskowitz found full ROM and good muscle strength of the wrist. He measured full flexion in all digits, a loss of 20 degrees extension of the proximal interphalangeal (PIP) joint and distal interphalangeal (DIP) joint of appellant's right fifth finger, and a loss of a degree or two of extension of the PIP joint of the right fourth finger. Dr. Moskowitz indicated that OWCP had only accepted a right wrist sprain and a loose body in the right wrist. He advised that appellant was a "rigorous upper body exerciser" who regularly lifted weights, golfed, and bowled using his left hand. Dr. Moskowitz found that appellant's loose body in his right wrist probably preexisted his injury as imaging studies had failed to demonstrate a new wrist injury. He related:

"Therefore, it follows that it is my opinion that [appellant's] alleged unwitnessed job[-]related injury was only a sprain with a preexisting loose body (which was what was approved by SOAF) and does not have any significant relationship to the subsequent development of a hook of the hamate fracture, ruptures of his FDP [flexor digitorum profundus] tendons, the development of a palmar fasciitis subsequent to the operative repair of a FDP tendon, a dorsal ganglion or extensor tendinitis, or an ulnar abutment syndrome."

Dr. Moskowitz rated appellant's wrist impairment using the DBI method, noting that he had normal ROM of the wrist. He attributed the additional conditions of the wrist and hand to preexisting ulnar abutment syndrome and nonemployment-related stressors. Dr. Moskowitz

⁵ *Id.*

identified the diagnosis as a wrist sprain using Table 15-3 on page 395, which yielded a default value of one. He applied a grade modifier for function history of zero and a grade modifier for findings on physical examination of two, no grade modifier for clinical studies, to find no adjustment from the default value of one percent. Dr. Moskowitz related, "As far as [appellant's] other diagnoses, especially FDP ruptures, since it is my opinion that they were not caused by his alleged unwitnessed work[-]related injury they would not be entitled to a rating."

On March 16, 2018 Dr. Harris reviewed the evidence and noted that Dr. Moskowitz had not provided an impairment rating for the digits as he did not feel the digit conditions were employment related. He advised, however, that OWCP had "accepted the injury to the digits as being work related and, in addition, the claimant is entitled to impairment for his digits even if it is not considered to be a work-related condition." Dr. Harris identified the diagnosis as residuals problems after surgery including an FDP repair using Table 15-2 on page 392, which yielded six percent impairment of the right ring finger using the DBI method. He further found three percent impairment of the right ring finger for reduced ROM in extension of the PIP joint. Using the DBI method, as it provided a higher impairment rating, Dr. Harris found six percent impairment of the right ring finger, or one percent impairment of the right upper extremity. For the right fifth digit, he found six percent impairment for continued problems after an FDP repair, or one percent impairment of the upper extremity. Using the ROM method, Dr. Harris found two percent impairment due to reduced motion at the DIP joint and three percent impairment for reduced motion of the PIP joint, for five percent impairment of the fifth digit, a one percent impairment of the hand, and no impairment of the upper extremity.

For the right wrist, Dr. Harris found that appellant had no permanent impairment using the ROM method. Using the DBI method, he found five percent impairment of the wrist using CDX for problems after surgeries including an excision of a nonunion of the hook of the hamate and no impairment using the ROM method. Dr. Harris combined the five percent impairment of the wrist, one percent impairment of the ring finger, and one percent impairment of the fifth digit to find a combined seven percent permanent impairment of the right upper extremity.

By decision dated April 2, 2018, OWCP granted appellant a schedule award for an additional two percent permanent impairment of the right upper extremity, for a combined right upper extremity impairment of seven percent. The period of the award ran for 6.24 weeks for the period December 26, 2017 to February 7, 2018.

On May 11, 2018 appellant requested reconsideration. He asserted that Dr. Moskowitz had questioned causation. Appellant challenged his assertion that he was a body builder and described his limitations from his employment injury and his work duties. He maintained that Dr. Scarangella was the physician most familiar with his injury.

By decision dated August 17, 2018, OWCP denied modification of its April 2, 2018 decision.

On appeal counsel asserts that Dr. Moskowitz questioned the occurrence of the employment injury and found that the loose body in his right wrist should not have been accepted as resulting from the October 28, 2011 employment injury. He notes that he failed to provide an impairment rating for the digits, even though the DMA found that the digit impairment was

employment related. Counsel contends that Dr. Moskowitz focused on causal relationship rather than the extent of impairment. He questions why OWCP failed to refer appellant for an impartial medical examination, asserting that a conflict had arisen between Dr. Scarangella and Dr. Harris.

LEGAL PRECEDENT

The schedule award provision of FECA,⁶ and its implementing federal 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 loss of a member shall be determined. The method used in making such a determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.⁸ 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.⁹

The sixth edition of the A.M.A., *Guides* provides a DBI method of evaluation utilizing the World Health Organization's International Classification of Functioning Disability and Health (ICF).¹⁰ Under the sixth edition, the evaluator identifies the impairment class of diagnosis (CDX), which is then adjusted by grade modifiers based on functional history (GMFH), physical examination (GMPE), and clinical studies (GMCS).¹¹ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹² Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.¹³

The A.M.A., *Guides* also provide that the ROM impairment method is to be used as a stand-alone rating for upper extremity impairments when other grids direct its use or when no other

⁶ *Supra* note 2.

⁷ 20 C.F.R. § 10.404.

⁸ For decisions issued after May 1, 2009 the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides*, (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6 (March 2017); *see also id.* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

⁹ *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

¹⁰ A.M.A., *Guides* (6th ed. 2009), p.3, section 1.3, ICF: A Contemporary Model of Disablement.

¹¹ *Id.* at 494-531.

¹² *Id.* at 411.

¹³ *R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

diagnosis-based sections are applicable.¹⁴ If ROM is used as a stand-alone impairment rating method, the total of ROM impairment for all units of function must be calculated. All values for the joint are measured and combined.¹⁵ 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.¹⁶

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).

“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.*”¹⁷ (Emphasis in the original).

ANALYSIS

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

On prior appeal, the Board remanded the case for OWCP to reevaluate the extent of appellant’s permanent impairment of his right upper extremity after it had determined a consistent method for rating upper extremity impairments under the sixth edition of the A.M.A., *Guides*. On remand, OWCP indicated that, FECA Bulletin No. 17-06 provides that, if the A.M.A., *Guides* allowed both the DBI and ROM methods for calculating an identified diagnosis, the method that yielded the higher impairment rating should be used.¹⁸ It referred appellant to Dr. Moskowitz for a second opinion examination.

In a December 26, 2017 impairment evaluation, Dr. Moskowitz advised that appellant had full ROM of the wrist, full flexion of the digits of the right hand, and a loss of 20 degrees extension of the PIP and DIP joints of his right fifth finger. The Board finds that Dr. Moskowitz did not

¹⁴ A.M.A., *Guides* 461.

¹⁵ *Id.* at 473.

¹⁶ *Id.* at 474.

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

¹⁸ *Id.*; *see also D.F.*, Docket No. 17-1474 (issued January 23, 2018).

provide a second opinion report in compliance with the accepted conditions of the SOAF presented to him by OWCP. OWCP's procedures provide, "[w]hen the DMA [district medical adviser], second opinion specialist or referee physician renders a medical opinion based on a SOAF which is incomplete or inaccurate or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether."¹⁹ Therefore, Dr. Moskowitz' report is insufficient to establish the extent of appellant's permanent impairment.

The Board further finds that Dr. Moskowitz did not provide his ROM measurements for the wrist or complete ROM measurements for the digits. Dr. Moskowitz further failed to indicate that appellant had obtained three independent ROM measurements, as required by the A.M.A., *Guides*.²⁰ He found one percent permanent impairment of the right upper extremity due to wrist sprain using the DBI method pursuant to Table 15-3. Dr. Moskowitz found that appellant had no permanent impairment of the digits as OWCP had not accepted a digit condition as employment related.

The Board finds that the report of Dr. Moskowitz lacks probative value as he failed to render an opinion in compliance with the accepted conditions of the SOAF. Further, as OWCP did not follow the procedures outlined in FECA Bulletin No. 17-06, the case must be remanded.²¹ On remand, it should send appellant to a new second opinion physician and further develop the claim to obtain three independent ROM measurements as required under FECA Bulletin No. 17-06. Following this and other such development as deemed necessary, it shall issue a *de novo* decision.²²

CONCLUSION

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

¹⁹ See *J.B.*, Docket No. 17-2021 (issued August 8, 2018); *supra* note 8 at Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600(3) (October 1990).

²⁰ A.M.A., *Guides* 464.

²¹ *R.A.*, Docket No. 18-1331 (issued April 24, 2019); *F.V.*, Docket No. 18-0427 (issued November 9, 2018).

²² *J.F.*, Docket No. 17-1726 (issued March 12, 2018).

ORDER

IT IS HEREBY ORDERED THAT the August 17, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: July 25, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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