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

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| **S.S., Appellant** | ) | |
| **and** | ) | **Docket No. 21-0306** |
| | ) | **Issued: August 21, 2023** |
| **U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Pittsburgh, PA, 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
JANICE B. ASKIN, Judge

### ***JURISDICTION***

On December 29, 2020 appellant, through counsel, filed a timely appeal from a November 30, 2020 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 greater than one percent permanent impairment of the right upper extremity (RUE), for which he previously received a schedule award.

## ***FACTUAL HISTORY***

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

On December 14, 2015 appellant, then a 32-year-old casual mail handler, filed a traumatic injury claim (Form CA-1) alleging that he injured his right index finger that same day while in the performance of duty. He was assembling a two-shelf all-purpose container when one of the shelves dislodged and slammed down on his right index finger. On the reverse side of the claim form, the employing establishment indicated that appellant stopped work on December 14, 2015. On February 18, 2016 OWCP accepted his claim for traumatic rupture of the right ulnar collateral ligament. Effective January 9, 2016, it paid appellant wage-loss compensation for temporary total disability on the supplemental rolls.

On June 16, 2017 OWCP referred appellant to Dr. Michael J. Rytel, a Board-certified orthopedic surgeon. In a report dated July 13, 2017, Dr. Rytel examined appellant's right upper extremity and observed tenderness over the second and third digits from the tips of appellant's fingers to the palm, exclusively on the palmar side of the fingers and hand. Appellant's active range of motion (ROM) of the second and third fingers was diminished approximately 50 percent due to pain, with 20 percent of passive flexion diminished due to pain. The right upper extremity was otherwise normal. Dr. Rytel noted that, while the accepted condition under this claim was a traumatic rupture of the right-hand index finger ulnar collateral ligament, appellant had not ruptured the ligament nor any tendons as indicated on the initial examination, as that diagnosis was based on tenderness to palpation and reported pain to stress of the ulnar collateral ligament, initial x-ray evaluation showed no fracture or dislocation. He noted that nonetheless, traumatic rupture of the right-hand index finger ulnar collateral ligament was the only diagnosis falling within the statement of accepted facts (SOAF). In answering the questions posed by OWCP, Dr. Rytel found that there were no objective residuals of appellant's accepted condition and no objective findings supporting a diagnosis of type 1 complex regional pain syndrome. He noted that as appellant's physical limitations were related to subjective complaints, appellant was capable of performing the position he had held at the time of injury. Dr. Rytel listed current diagnoses related to the work injury as finger contusion, ulnar collateral ligament sprain, and chronic pain.

On May 2, 2018 appellant filed a claim for a schedule award (Form CA-7).

By development letter dated June 12, 2018, OWCP informed appellant that he had not submitted sufficient medical evidence in support of his schedule award claim. It requested that he

[3] *Order Remanding Case*, Docket No. 19-1737 (issued April 7, 2020); Docket No. 19-1091 (issued December 3, 2019).

submit a detailed narrative report from his treating physician, including the physician's opinion as to the date of maximum medical improvement (MMI), the diagnosis upon which the impairment rating was based, a detailed description of any preexisting permanent impairment of the same member or function, and a final rating of the permanent impairment and a discussion of the rationale for calculation of the impairment, with reference to the applicable criteria and tables in the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[4] OWCP afforded appellant 30 days to submit the requested medical evidence.

In a report dated June 16, 2018, Dr. Robert W. Macht, a general surgeon, reviewed appellant's history of injury and the medical record, noting that x-rays of his right hand were unremarkable for fracture or subluxation. On physical examination, he observed pain with motion of the right index finger and middle fingers. ROM of appellant's hand and wrist were intact, with tenderness to palpation about the proximal interphalangeal joint. He had pain with resistance against active motion of the right index finger with mild weakness of that finger and his right-hand grip, along with pain on squeezing, and no laxity of the joints of his index or middle fingers. Dr. Macht diagnosed a traumatic injury of the right ulnar collateral ligament. He reported that appellant's *Quick*DASH score was 66. Referring to Table 15-7, page 406, of the sixth edition of the A.M.A., *Guides*, Dr. Macht advised that this score would constitute a grade modifier for functional history (GMFH) of 3. Referring to Table 15-8, page 408, he found that appellant's minimal palpatory findings consistently documented without observed abnormalities would constitute a grade modifier for physical examination (GMPE) of 1. Referring to Table 15-2, page 393, Dr. Macht noted that there was an ulnar collateral ligament injury of the proximal interphalangeal (PIP) joint of the index finger, Class 1. He noted that as the (GMFH was 2 higher, the default position was selected. Dr. Macht stated that, as the physical examination was the same Class as the impairment, a rating of 10 percent impairment of the right index finger was assigned per Table 15-2. Referring to Table 15-12, page 421, he observed that 10 percent impairment of the index finger translated to 2 percent permanent impairment of the RUE. Dr. Macht stated that appellant reached MMI by September 25, 2017.

On July 10, 2018 OWCP requested additional information from Dr. Rytel. In an addendum report dated August 22, 2018, Dr. Rytel observed that appellant's chronic pain condition was subjective in nature and did not present objective symptoms, and that as such, it could not be attributed to the December 14, 2015 incident.

On September 10, 2018 OWCP referred appellant's case to Dr. Jovito Estaris, a physician Board-certified in occupational medicine serving as a district medical adviser (DMA). It requested that Dr. Estaris evaluate appellant's RUE permanent impairment under the sixth edition A.M.A. *Guides*. In a report dated September 16, 2018, the DMA reviewed the medical record, including the evaluation of Dr. Macht. He assessed appellant's impairment using the diagnosis-based impairment (DBI) and ROM methods and identified the higher rating as DBI, because appellant had full ROM of the index finger according to Dr. Macht's examination. Referring to Table 15-2, page 392, of the sixth edition A.M.A., *Guides*, the DMA noted a diagnosis of ulnar collateral ligament injury of the right index finger, utilizing a DBI of sprain/strain, which was Class 1

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

impairment with a default value of 6 due to residual pain with normal motion. Referring to Table 15-7, page 406, he assigned a GMFH of 3 due to appellant's *Quick*DASH score of 66, along with right hand and index finger pain. Referring to Table 15-8, page 408, the DMA assigned a GMPE of 1 due to tenderness over the PIP joint of the right index finger with normal ROM and no atrophy. A grade modifier for clinical studies (GMCS) was not used, as there was no clinical study of record to support ulnar collateral ligament injury or strain. The DMA noted that the GMFH was 2 grades more than the GMPE and that the report was deemed unreliable, and so it was not used in the grading process. Referring to page 406 of the sixth edition of the A.M.A., *Guides*, he calculated that there was no net adjustment due to grade modifiers, resulting in a six percent digit impairment rating. Using Table 15-12, page 421, the DMA converted this six percent digit impairment of the index finger to a one percent permanent impairment rating of the RUE. He explained that the discrepancy between his and Dr. Macht's impairment ratings were due to the use of different DBI diagnoses. Dr. Macht chose the DBI of joint dislocation or sprain, but the criteria for a Class 1 finger PIP joint dislocation or sprain was less than 10 degrees of instability. His examination of the index finger demonstrated no laxity of the index or middle fingers, and thus, his use of the DBI of joint dislocation or sprain was incorrect. The DMA explained that the proper DBI is sprain/strain of the finger with residual pain and normal motion. He noted that the date of MMI was June 11, 2018, the date of examination and impairment rating of Dr. Macht.

By decision dated November 9, 2018, OWCP granted appellant a schedule award for one percent permanent impairment of the RUE. The award covered a period of 3.12 weeks from June 11 through July 2, 2018.

By letter dated November 15, 2018, appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

The hearing was held on March 20, 2019. The hearing representative held the record open for 30 days for the submission of additional evidence.

By letter dated March 28, 2019, received by OWCP on April 1, 2019 and enclosed with a letter from counsel, Dr. Macht responded to the DMA's report of September 10, 2018. He explained that, under the sixth edition of the A.M.A., *Guides*, there was no reason to use the generalized sprain/strain DBI found on page 392 when an accurate diagnosis for DBI was on the next page. Dr. Macht noted that in the sixth edition of the A.M.A., *Guides*, there was a Class 1 impairment with less than 10 degrees instability and residual findings, and that appellant had a grade 1C impairment, yielding two percent RUE permanent impairment for the specific diagnosis of right proximal interphalangeal index joint sprain.

By decision dated May 3, 2019, OWCP's hearing representative affirmed the November 9, 2018 decision, finding that the weight of medical evidence rested with the DMA.

On August 16, 2019 appellant, through counsel, filed a timely appeal from OWCP's May 3, 2019 decision regarding appellant's entitlement to additional schedule award compensation.

By order dated April 7, 2020, the Board found that the case was not in posture for decision, as in its May 3, 2019 decision regarding appellant's entitlement to increased schedule award

compensation, as OWCP did not note receipt or consideration of Dr. Macht's March 28, 2019 response to the DMA's September 16, 2018 report. The Board set aside the decision of May 3, 2019 and remanded the case to OWCP to properly consider all of the evidence of record and to conduct other such further development as deemed necessary.[5]

On May 8, 2020 OWCP requested that Dr. Estaris review Dr. Macht's letter of March 28, 2019 and respond as to whether the letter modified his previous opinion as to appellant's permanent impairment of the RUE, and to explain as to any points of disagreement.

In an addendum report dated May 20, 2020, Dr. Estaris responded to Dr. Macht's March 28, 2019 letter. He noted that in his report of September 16, 2018, he rendered an impairment rating for six percent digit impairment of the right index finger. Dr. Estaris also reviewed the reports of Dr. Rytel dated July 13, 2017 and August 22, 2018, as well as Dr. Macht's June 16, 2018 report. He indicated that in Dr. Rytel's July 13, 2017 examination, he noted that the PIP joints of the index and middle fingers were stable to varus and valgus stress, and that Dr. Rytel diagnosed contusion and ulnar collateral ligament sprain. Dr. Estaris further indicated that in Dr. Rytel's August 22, 2018 report, he noted that a typical sprain of the ulnar collateral ligament of the finger would have been approximately six weeks to return to appellant's preinjury position at full duty. He stated that Dr. Rytel did not have a diagnosis of joint dislocation or sprain, as the index finger was stable to varus and valgus deformity, which supported a finding of no instability of the PIP joint of the index finger. Dr. Estaris further noted that Dr. Macht's impairment report demonstrated no laxity of the joints of the index or middle fingers, which would mean no instability. He noted that the letter of March 27, 2019 stated that no examining physician would be able to detect 1 degree of laxity, but that a threshold of at least 5 degrees of laxity would be required for a positive text.

Dr. Estaris stated that Dr. Macht did not provide any degree of instability measurement and that if, as Dr. Macht stated, at least 5 degrees of laxity would be required for a positive test, then Dr. Macht should have documented 5 degrees or less than 10 degrees of laxity at the PIP joint of the right index finger. Instead, he noted, neither Dr. Macht nor other examining physicians found laxity of the joints of the index or middle fingers. Dr. Estaris explained that, in order to use the diagnosis of joint dislocation or sprain, Class 1, under the DBI method, there had to be a recorded measurement of the degree of instability, but that, per Dr. Macht, there was no laxity. As such, he opined that the use of the diagnosis of joint dislocation or sprain under the DBI method was not supported by physical findings and that the most appropriate diagnosis to use was sprain/strain of the index finger. Dr. Estaris opined that the impairment rating of six percent digit impairment of the right index finger was not modified.

By decision dated June 1, 2020, OWCP issued a *de novo* decision denying appellant's additional schedule award claim for more than one percent impairment of the RUE. In rendering its decision, it considered Dr. Macht's letter of March 28, 2019 as well as Dr. Estaris' report of May 20, 2020.

On June 8, 2020 appellant, through counsel, requested a telephonic hearing before a hearing representative regarding the June 1, 2020 schedule award decision. The hearing was held

[5] *Supra* note 3 Docket No. 19-1737.

on September 16, 2020. During the hearing, counsel requested that the hearing representative compare Dr. Macht's reports to the DMA's reports.

By decision dated November 30, 2020, the representative of OWCP's Branch of Hearings and Review affirmed the June 1, 2020 schedule award decision.

## ***LEGAL PRECEDENT***

The schedule award provisions 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*, published in 2009.[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 GMFH, GMPE, and GMCS.[10] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[11] The standards for evaluation of permanent impairment of an extremity under the A.M.A., *Guides* are based on all factors that prevent a limb from functioning normally, such as pain, sensory deficit, and loss of strength.[12]

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[13] 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

[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 Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Chapter 3.700, Exhibit 1 (January 2010).

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

[10] *Id*. at 383-492.

[11] *Id*. at 411.

[12] *P.W.*, Docket No. 19-1493 (issued August 12, 2020); *C.H.*, Docket No. 17-1065 (issued December 14, 2017); *E.B.*, Docket No. 10-0670 (issued October 5, 2010); *Robert V. Disalvatore*, 54 ECAB 351 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

[13] 5 U.S.C. § 8107.

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.[14]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the percentage of permanent impairment using the A.M.A., *Guides*.[15]

Section 8123(a) of FECA which provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician known as an IME who shall make an examination.[16] This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[17] When there exists opposing reports of virtually equal weight and rationale and the case is referred to an IME for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[18]

## ***ANALYSIS***

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

OWCP initially received the June 16, 2018 report from Dr. Macht. Dr. Macht noted that on physical examination appellant had pain with resistance against active motion of the right index finger with mild weakness of that finger and his right-hand grip, along with pain on squeezing, and no laxity of the joints of his index or middle fingers. He diagnosed a traumatic injury of the right ulnar collateral ligament. Using the DBI method with a diagnosis of traumatic injury of the right ulnar collateral ligament, Dr. Macht calculated a 10 percent impairment of the right index finger was assigned per Table 15-2, at page 393. Referring to Table 15-12, page 421, he observed that a 10 percent impairment of the index finger translated to a 2 percent permanent impairment of the RUE.

In accordance with its procedures, OWCP referred appellant's case to Dr. Estaris and serving as a DMA and requested that Dr. Estaris evaluate appellant's RUE permanent impairment under the sixth edition of the A.M.A. *Guides*. In a report dated September 16, 2018, Dr. Estaris noted that appellant had full ROM of the index finger according to Dr. Macht's examination. Referring to Table 15-2, page 392, of the sixth edition of the A.M.A., *Guides*, he noted a diagnosis

[14] *D.C.*, Docket No. 20-1655 (issued August 9, 2021); *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 8 at Chapter 2.808.5(e) (March 2017).

[15] *A.C.*, Docket No. 19-1333 (issued January 8, 2020); *B.B.*, Docket No. 18-0782 (issued January 11, 2019); *supra* note 8 at Chapter 2.808.6(f) (March 2017).

[16] 5 U.S.C. § 8123(a); *J.K.*, Docket No. 20-0907 (issued February 12, 2021); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009); *M.S.*, 58 ECAB 328 (2007).

[17] 20 C.F.R. § 10.321; *R.C.*, 58 ECAB 238 (2006).

[18] *See J.K.*, *supra* note 16; *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

of ulnar collateral ligament injury of the right index finger, utilizing a diagnosis of sprain/strain, which was a Class 1 impairment with a default value of 6 due to residual pain with normal motion. Referring to page 406 of the sixth edition of the A.M.A., *Guides*, Dr. Estaris calculated that there was no net adjustment due to grade modifiers, resulting in a six percent digit impairment rating. Using Table 15-12, page 421, the DMA converted this six percent digit impairment of the index finger to a one percent permanent impairment rating of the RUE. He explained that the discrepancy between his and Dr. Macht's impairment ratings was due to the use of different DBI diagnoses. Dr. Macht chose the DBI of joint dislocation or sprain, but the criteria for a Class 1 finger PIP joint dislocation or sprain was less than 10 degrees of instability. His examination of the index finger demonstrated no laxity of the index or middle fingers, and thus, his use of the DBI of joint dislocation or sprain was incorrect. The DMA explained that the proper DBI was sprain/strain of the finger with residual pain and normal motion.

Subsequent to its November 9, 2018 decision granting appellant a schedule award for one percent permanent impairment of the RUE, OWCP received the letter dated March 28, 2019 from Dr. Macht. Dr. Macht explained that under the sixth edition of the A.M.A., *Guides*, there was no reason to use the generalized sprain/strain DBI found on page 392 when an accurate diagnosis for DBI was on the next page. He noted that, in the sixth edition of the A.M.A., *Guides*, a joint dislocation or sprain of a distal proximal digit of a finger was a Class 1 impairment if the claimant had less than 10 degrees instability and residual findings. Dr. Macht explained that appellant had a CDX 1 grade C impairment, yielding two percent RUE permanent impairment for the specific diagnosis of right proximal interphalangeal index joint dislocation or sprain, on page 393 of the A.M.A., *Guides*.

OWCP forwarded Dr. Macht's March 28, 2019 letter to Dr. Estaris for review and response. On May 20, 2020 Dr. Estaris responded to Dr. Macht's March 28, 2019 letter. He stated that Dr. Macht did not provide any degree of instability measurement and that neither Dr. Macht nor other examining physicians found laxity of the joints of the index or middle fingers. Dr. Estaris explained that, in order to use the diagnosis of joint dislocation or sprain, Class 1, under the DBI method, there had to be a recorded measurement of the degree of instability, but that per Dr. Macht, there was no laxity. As such, he opined that the use of the diagnosis of joint dislocation or sprain under the DBI method was not supported by physical findings and that the most appropriate diagnosis to use was sprain/strain of the index finger.

The Board finds that there is a conflict of medical opinion between Dr. Macht, appellant's treating physician, and Dr. Estaris, the DMA, regarding the diagnosis to be used to rate appellant's permanent impairment. Consequently, the case must be referred to an IME to resolve the above-described conflict in the medical opinion evidence regarding appellant's permanent impairment due to her accepted conditions. On remand, OWCP shall refer appellant, along with the case file and an undated SOAF, to a specialist in the appropriate field of medicine for an impartial medical evaluation and report including a rationalized opinion regarding the proper diagnosis to use for rating appellant's permanent impairment. After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision regarding his schedule award claim.

## ***CONCLUSION***

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

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the November 30, 2020 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: August 21, 2023
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board