United States Department of Labor
Employees' Compensation Appeals Board

B.T., Appellant	)	
and	)	**Docket No. 24-0174**
	)	**Issued: April 12, 2024**
DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, FEDERAL CORRECTIONAL INSTITUTION ESTILL, Estill, SC, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 13, 2023 appellant filed a timely appeal from a June 15, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 has met his burden of proof to establish greater than five percent permanent impairment of his right upper extremity for which he previously received a schedule award.

[1] 5 U.S.C. § 8101 *et seq*.

FACTUAL HISTORY

This case has previously been before the Board.[2] 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 June 6, 2018 appellant, then a 47-year-old maintenance supervisor, filed a traumatic injury claim (Form CA-1) alleging that on June 4, 2018 when closing a gate, his right hand was smashed between a gate and a stopper while in the performance of duty. He stopped work on June 4, 2018 and returned to work on June 27, 2018. Appellant underwent an open reduction and percutaneous pinning of the open fracture of the middle phalanx of the right little finger on June 5, 2018. OWCP accepted the claim for displaced fracture of medial phalanx of the right little finger, open fracture, and crushing injury of the right little finger.

On September 30, 2020 appellant filed a claim for compensation (Form CA-7) for a schedule award.

By decision dated March 8, 2021, OWCP granted appellant a schedule award for five percent permanent impairment of the right small finger. The award ran from July 26 to 31, 2019.

On March 15, 2021 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. Following a preliminary review, by decision dated April 29, 2021, OWCP's hearing representative vacated the March 8, 2021 decision and remanded the case for a *de novo* decision. The hearing representative issued specific instructions to OWCP to correct multiple errors in the processing of the schedule award claim. The hearing representative also noted that if the treating physician did not provide complete range of motion (ROM) measurements, then OWCP must refer appellant for a second opinion impairment evaluation.

By letter dated May 3, 2021, OWCP outlined the requirements for rating a permanent impairment of a scheduled member under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3] It requested that appellant present the letter to his treating physician.

In a July 12, 2021 report, Tracy Hill, a physical therapist, noted appellant's history of injury and the accepted conditions. She reported appellant's right little finger examination findings. Under the A.M.A., *Guides,* Ms. Hill opined that appellant had 6 percent impairment of the right little finger based on the diagnosis-based impairment (DBI) methodology and 17 percent impairment of the right little finger based on the ROM impairment methodology.

[2] Docket No. 22-0615 (issued September 16, 2022).

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

On September 20, 2021 Dr. Malcom Horry, a Board-certified family practitioner, indicated that he agreed with the July 12, 2021 permanent impairment evaluation and rating provided by Ms. Hill.

On December 1, 2021 OWCP referred appellant, along with the medical record and an October 13, 2021 statement of accepted facts (SOAF), to Dr. John P. George, a Board-certified orthopedic surgeon, for a second opinion evaluation.

In a December 16, 2021 report, using the DBI method of the A.M.A., *Guides*, Dr. George selected the diagnosis of fracture of fifth digit under Table 15-2. He calculated a total of 13 percent right digit impairment, which converted to 2 percent right upper extremity permanent impairment. Under the ROM methodology of the A.M.A., *Guides*, Dr. George found 58 percent digit impairment, which converted under Table 15-12 to 5 percent permanent impairment of the upper extremity. He opined that since the ROM methodology yielded the highest impairment rating, appellant had five percent permanent impairment of the right upper extremity. A copy of Dr. George's December 16, 2021 upper extremity permanent impairment worksheet and a December 16, 2021 work capacity evaluation (Form OWCP-5c) were provided.

On February 2, 2022 OWCP sent a copy of the medical record, including Dr. George's December 16, 2021 report, to Dr. David J. Slutsky, a Board-certified orthopedic hand surgeon serving as OWCP's district medical adviser (DMA).

In a February 17, 2022 report, Dr. Slutsky used Dr. George's December 16, 2021 impairment findings to calculate appellant's impairment. Using the DBI method of the A.M.A., *Guides*, he opined that appellant had six percent permanent impairment of the right small digit. Dr. Slutsky also found that a ROM impairment calculation could not be made because Dr. George did not record three validated upper extremity range of motion measurements for each joint as required per the A.M.A., *Guides*. He opined that as the current impairment was less than or equivalent to the previous five percent upper extremity permanent impairment previously awarded.

By decision dated February 25, 2022, OWCP denied appellant's claim for an increased schedule award, finding that the medical evidence of record was insufficient to support an increase in permanent impairment greater than the previous award for five percent permanent impairment of the right little finger.

Appellant appealed to the Board. By decision dated September 16, 2022, the Board set aside the February 25, 2022 decision, and remanded the case to OWCP for further development of the medical evidence necessary to complete the ROM method of impairment rating for appellant's right little finger. Thereafter, the DMA was to independently calculate impairment to the right little finger using both ROM and DBI methods of impairment and identify the higher rating.[4]

On October 25, 2022 OWCP requested that Dr. George provide an updated second opinion impairment evaluation and addendum report. It noted the specific requirements for rating permanent impairment if the A.M.A., *Guides* allowed for the use of both the DBI and ROM

[4] *Supra* note 2.

methods to calculate an impairment rating. OWCP also advised that the report should document three independent measurements of ROM if there was an organic basis for restricted ROM.

In a December 6, 2022 addendum report, Dr. George, using the ROM methodology, noted one set of physical examination findings and concluded that appellant's loss of ROM of 58 percent of the right small digit, which converted under Table 15-12 to 5 percent permanent impairment of the right upper extremity. He opined that since the ROM methodology yielded the highest impairment rating, appellant had five percent permanent impairment of the right upper extremity.

On January 27, 2023 OWCP sent a copy of the medical record, including Dr. George's December 7, 2022 addendum report, to Dr. Slutsky, OWCP's DMA.

In a February 19, 2023 report, Dr. Slutsky used Dr. George's December 7, 2022 permanent impairment findings to calculate appellant's permanent impairment. Using the DBI method of the A.M.A., *Guides*, he opined that appellant had five percent permanent impairment of the right small finger resulting from a diagnosis of middle phalanx fracture. Dr. Slutsky also found that the ROM impairment calculation could not be made because Dr. George did not perform three documented upper extremity range of motion measurements for each joint. He noted that appellant had previously been awarded five percent permanent impairment of the right small finger.

On March 20, 2023 OWCP sent a copy of the medical record and an updated February 24, 2023 SOAF to Dr. Seth L. Jaffe, an osteopath specializing in orthopedic surgery, for a second opinion evaluation.

In an April 4, 2023 report, Dr. Jaffe used the DBI method of the A.M.A., *Guides*, selected the diagnosis of fracture of the middle phalanx of the right small finger under Table 15-2, and calculated that appellant had six percent right small finger digit impairment. He also reported that he measured the ROM multiple times on both the right and left hand. Under the ROM methodology of the A.M.A., *Guides* for the right small finger, Dr. Jaffe found the proximal interphalangeal (PIP) joint had 80-degree flexion, 21 percent impairment of the digit; the distal interphalangeal (DIP) joint lacked 5 degrees of extension, for 2 percent digit impairment; and the DIP joint could only flex to and 25 degrees flexion, which equaled 25 percent impairment for flexion for the DIP joint. He concluded that appellant had a total right small finger permanent impairment of 48 percent.

On April 20, 2023 OWCP sent a copy of the medical records, including Dr. Jaffe's April 4, 2023 report, Dr. Slutsky, OWCP's DMA.

In a May 10, 2023 report, Dr. Slutsky indicated that he reviewed the SOAF and appellant's medical records. He opined that appellant attained maximum medical improvement (MMI) on April 4, 2023, the date of Dr. Jaffe's impairment examination. Dr. Slutsky also used Dr. Jaffe's April 4, 2023 impairment findings to calculate appellant's impairment. Using the DBI method of the A.M.A., *Guides*, he opined that appellant had five percent digit impairment under Table 15-2 for the diagnosis of middle phalanx fracture with residual symptoms. Dr. Slutsky also found that the ROM impairment calculation could not be made because Dr. Jaffe did not provide three validated upper extremity range of motion measurements.

On May 18, 2023 OWCP requested that Dr. Slutsky clarify his May 10, 2023 report.

In a June 8, 2023 addendum report, Dr. Slutsky reiterated his prior calculations and comments from his May 10, 2023 report. He related that appellant had five percent permanent impairment of the right small finger under the DBI methodology, for the diagnosis of middle phalanx fracture of the right small finger. Dr. Slutsky also noted that while Dr. Jaffe calculated 48 percent digit impairment based on loss of finger motion, he did not perform three validated upper extremity range of motion measurements. He opined that the current five percent digital impairment included the prior percentage awarded such that no additional permanent impairment had been incurred.

By decision dated June 15, 2023, OWCP denied appellant's claim for an increased schedule award, finding that the medical evidence of record was insufficient to support an increase in permanent impairment greater than the previous award for five percent permanent impairment of the right little finger.

LEGAL PRECEDENT

The schedule award provisions of FECA,[5] and its implementing federal regulation,[6] 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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[7] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[8]

Regarding the application of ROM or DBI impairment methods 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*

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

[7] *Id. See also T.T.*, Docket No. 18-1622 (issued May 14, 2019).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *id.* at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

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

FECA Bulletin No. 17-06 further provides:

"If the rating physician provided an assessment using the DBI 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.

"If the medical evidence of record is not sufficient for the DMA to render a rating on ROM, where allowed, the DMA should advise as to the medical evidence necessary to complete the rating. However, the DMA should still render an impairment rating using the DBI method, if possible, given the available evidence."[9]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a 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.[10]

ANALYSIS

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

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's February 25, 2022 decision because the Board considered that evidence in its September 16, 2022 decision. Findings made in prior Board decisions are *res judicata* absent further review by OWCP under section 8128 of FECA.[11]

Following the Board's September 16, 2022 decision, OWCP requested an addendum report from Dr. George. It specifically advised that the report should document three independent measurements of ROM if there was an organic basis for restricted ROM. In his December 7, 2022 addendum report, Dr. George failed to provide triplicate ROM measurements. As such his report did not comply with the A.M.A., *Guides* and is of limited probative value.[12]

OWCP thereafter referred appellant to Dr. Jaffe for a second opinion examination. In his April 4, 2023 report, Dr. Jaffe opined that appellant had 6 percent right digit impairment under the

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

[10] *Supra* note 1.

[11] *See M.H.*, Docket No. 21-1055 (issued March 30, 2022); *C.D.*, Docket No. 19-1973 (issued May 21, 2020); *B.W.*, Docket No. 17-0366 (issued June 7, 2017); *Clinton E. Anthony, Jr.*, 49 ECAB 476, 479 (1998).

[12] *See S.R.*, Docket No. 18-1307 (issued March 27, 2019).

DBI methodology and 48 percent digit impairment under the ROM methodology of the A.M.A., *Guides*. He noted that he had measured appellant's ROM of the right hand multiple times.

OWCP routed Dr. Jaffe's report to its DMA, Dr. Slutsky. In his May 10, 2023 report, Dr. Slutsky calculated five percent digit permanent impairment of the right little finger under the DBI rating method for the diagnosis of middle phalanx fracture. Regarding appellant's rating under the ROM methodology, he found that Dr. Jaffe had not provided validated triplicate ROM measurements, and therefore appellant's permanent impairment pursuant to the ROM methodology could not be calculated.

The Board notes that pursuant to FECA Bulletin No. 17-06, if the ROM method of rating permanent impairment is allowed, and the ROM findings are incomplete, the DMA should advise as to the medical evidence necessary to complete the ROM method of rating and OWCP shall obtain the necessary evidence.[13] While Dr. Jaffe indicated that he had measured appellant's ROM multiple times, Dr. Slutsky noted that he had not provided validated triplicate measurements, pursuant to the A.M.A., *Guides*.

Herein, OWCP did not follow the procedures outlined in FECA Bulletin No. 17-06 after the DMA advised that the measurements for the right little finger were incomplete.[14]

On remand OWCP shall obtain the necessary evidence as required under FECA Bulletin No. 17-06 from Dr. Jaffe.[15] After it obtains the evidence necessary to complete the rating as described above, the case shall be referred to a DMA to independently calculate impairment to the right little finger using both ROM and DBI methods and identify the higher rating.[16] If Dr. Jaffe does not fully comply with the A.M.A., *Guides*, OWCP shall refer appellant to a new specialist in the appropriate field of medicine for a second opinion evaluation.[17] Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

[13] *J.L.*, Docket No. 19-1684 (issued November 20, 2020); *R.L.*, Docket No. 19-1793 (issued August 7, 2020); *E.P.*, Docket No. 19-1708 (issued April 15, 2020).

[14] *C.R.*, Docket No. 21-1265 (issued March 23, 2022); *C.H.*, Docket No. 20-0529 (issued June 16, 2021); *J.L.*; *R.L.*, *id.*; *C.T.*, Docket No. 18-1716 (issued May 16, 2019).

[15] *C.R.*, *id.*; *J.L.*, *id.*; *J.S.*, Docket No. 19-0483 (issued October 10, 2019).

[16] *See J.L.*, *id.*; *J.V.*, Docket No. 18-1052 (issued November 8, 2018); *M.C.*, Docket No. 18-0526 (issued September 11, 2018).

[17] *See A.J.*, Docket No. 23-0404 (issued September 8, 2023); *T.B.*, Docket No. 22-1170 (issued April 24, 2023); *see also M.W.*, Docket No. 21-1260 (issued September 9, 2022).

ORDER

IT IS HEREBY ORDERED THAT the June 15, 2023 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: April 12, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board