

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

)	
R.P., Appellant)	
)	
and)	
)	Docket No. 25-0025
DEPARTMENT OF HOMELAND SECURITY,)	Issued: December 4, 2024
U.S. CUSTOMS AND BORDER PROTECTION,)	
U.S. BORDER PATROL, Imperial, CA,)	
Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
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 October 14, 2024 appellant, through counsel, filed a timely appeal from a September 25, 2024 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 15 percent permanent impairment of the left upper extremity, for which he previously received schedule award compensation.

FACTUAL HISTORY

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

On February 20, 2014 appellant, then a 37-year-old border patrol agent, filed a traumatic injury claim (Form CA-1) alleging that on February 13, 2014, he sustained an injury to his left thumb when conducting a takedown training scenario while in the performance of duty. OWCP assigned this claim OWCP File No. xxxxxx106. On April 17, 2014 it accepted the claim for sprain of hand, metacarpophalangeal (MCP) left, and closed dislocation of finger MCP left.⁴

Appellant submitted a September 12, 2014 report from Dr. David M. Kupfer, an orthopedic hand surgeon Board-certified in plastic surgery, who recounted that appellant had sustained a specific injury to his left hand and thumb. He was found to have gross instability in the MCP joint with a rupture of the ulnar collateral ligament. Surgical repair was authorized and was performed on April 23, 2014. Dr. Kupfer concluded that appellant had reached maximum medical improvement (MMI), but had no permanent impairment of the thumb, based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A. *Guides*).⁵

On February 17, 2023 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In a March 14, 2023 report, Dr. Kupfer noted that he had reevaluated appellant and found that appellant had discomfort with forceful gripping and mild compromise in active motion of the left thumb. He related that based on the sixth edition of the A.M.A., *Guides* Table 15-2 at page 392, appellant had less than 10 percent instability of the MCP joint leading to a three percent whole person impairment.

³ *Order Remanding Case*, Docket No. 24-0266 (issued April 15, 2024).

⁴ The record reflects that appellant has several other claims. Under OWCP File No. xxxxxx073, OWCP accepted an October 14, 2010 traumatic injury claim for left shoulder sprain, left shoulder impingement, and left lateral epicondylitis. On November 6, 2012 it granted appellant a schedule award for 11 percent permanent impairment of the left upper extremity. Under OWCP File No. xxxxxx635, OWCP accepted a June 27, 2022 traumatic injury claim for contusions of the left shoulder and elbow; strain of the muscle, fascia, tendon of the left arm biceps; contusion of the left forearm; and left shoulder bicipital tendinitis. On February 10, 2023 it granted a schedule award for four percent permanent impairment of the left upper extremity.

⁵ A.M.A., *Guides* (6th ed. 2009).

On April 6, 2023 OWCP referred the claim to Dr. Nathan Hammel, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), for a review of the medical record and an opinion regarding permanent impairment.

In an April 18, 2023 report, Dr. Hammel opined that appellant had no permanent impairment of the left thumb, under the range of motion (ROM) or diagnosis-based impairment (DBI) rating methodologies. He concluded that MMI was reached on March 14, 2023.

By letters dated April 20 and May 31, 2023, OWCP requested that Dr. Kupfer review the DMA's report and provide his response. No response was received.

On July 19, 2023 OWCP referred appellant to Dr. Qing-Men Chen, a Board-certified orthopedic surgeon, for a second opinion evaluation.

In an October 17, 2023 report, Dr. Chen found that appellant reached MMI on the date of his examination. He noted objective findings including some loss of motion of the left thumb, which correlated with subjective complaints of stiffness. Dr. Chen opined that appellant had a four percent digit impairment, which would convert to two percent permanent impairment of the left hand and one percent permanent impairment of the left upper extremity. He concluded that appellant had received a schedule award for 11 percent permanent impairment of the left upper extremity due to his left shoulder impairment, and that his left thumb permanent impairment was less than the prior award for the left upper extremity.

By decision dated October 24, 2023, OWCP denied appellant's schedule award claim, finding that the medical evidence of record did not support an increase in the impairment already compensated.

On January 22, 2024 appellant filed a timely appeal from the October 24, 2023 merit decision. By order dated April 15, 2024, the Board remanded the case for OWCP to administratively combine appellant's left upper extremity claims with the current File No. xxxxxx106, as the claims concerned permanent impairment of the same region of the body. It instructed OWCP to prepare an updated statement of accepted facts (SOAF) and refer appellant for a second opinion examination, to be followed by a *de novo* decision.

On April 17, 2024 OWCP administratively combined OWCP File No. xxxxxx106, with File No. xxxxxx073, and File No. xxxxxx635, designating File Nos. xxxxxx073 as the master case file.

On May 3, 2024 OWCP referred appellant, along with the case record, a SOAF, and a series of questions to Dr. Jon Kelly, a Board-certified orthopedic surgeon, for a second opinion evaluation.

In a June 27, 2024 report, Dr. Kelly related that appellant indicated that all his claims for left upper extremity injuries had been combined. He noted that appellant's left thumb injury was accepted as a left-hand sprain in a closed dislocation of the left thumb. Dr. Kelly referred to the A.M.A., *Guides*, Table 15-2, the digital regional grid, at page 392, for thumb MCP joint dislocation, and noted that he found no instability. He also referred to Table 15-30 at page 468 and found that the IP joint flexed to just 30 degrees which resulted in a three percent digital

impairment. Dr. Kelly also found that opposition was limited, due to limited composite IP flexion to 6 cm, resulting in an additional four percent digital impairment. He noted that as appellant had previously received schedule awards for 15 percent left upper extremity impairment, an additional permanent impairment award was not warranted.

On July 10, 2024 OWCP referred Dr. Kelly's report to Dr. Hammel the DMA, for review and an opinion regarding appellant's permanent impairment.

In a July 22, 2024 report, Dr. Hammel noted the date of MMI was Dr. Kelly's examination on June 27, 2024. He used the A.M.A., *Guides* and determined that with regard to the left thumb, using Table 15-30, page 468 (finger range of motion) resulted in seven percent digital impairment. Dr. Hammel noted that using the DBI method, the diagnosis of thumb MCP instability was a Class 0 impairment as appellant had no residual instability. He converted the seven percent thumb digit impairment to an upper extremity impairment using Table 15-12 and found three percent left upper extremity permanent impairment for the thumb. Dr. Hammel concluded that since appellant had previously received a greater award for the left upper extremity, he was not entitled to an additional award.

By decision dated July 23, 2024, issued under OWCP File No. xxxxxx073 and File No. xxxxxx106, OWCP denied appellant's claim for a schedule award. It explained that no additional award was established as appellant had previously received schedule awards for 11 percent left upper extremity impairment under OWCP File No. xxxxxx073, and 4 percent left upper extremity impairment under OWCP File No. xxxxxx635.⁶

On September 18, 2024 counsel for appellant requested reconsideration in OWCP File No. xxxxxx106. He noted that appellant's claim was for a left thumb injury and that neither of the other upper extremity claims involved the hand or the thumb. Counsel argued that the claim should have been sent to the DMA for a determination as to whether the new impairment for the left thumb injury in whole or in part duplicated the prior awards.

By decision dated September 25, 2024, in OWCP File No. xxxxxx106, OWCP denied modification of its prior decision.

LEGAL PRECEDENT

The schedule award provisions of FECA⁷ and its implementing regulations⁸ 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. 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 and the Board has concurred in such

⁶ Counsel requested a hearing before OWCP's Branch of Hearings and review following the July 23, 2024 decision in OWCP File No. xxxxxx073.

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404.

adoption.⁹ As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, is used to calculate schedule awards.¹⁰

It is well established that benefits payable under 5 U.S.C. § 8107(c) are reduced by the period of compensation paid under the schedule for an earlier injury if: (1) compensation in both cases is for impairment of the same member or function or different parts of the same member or function; and (2) the latter impairment in whole or in part would duplicate the compensation payable for the preexisting impairment.¹¹

ANALYSIS

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

OWCP accepted appellant's February 13, 2014 traumatic injury claim for sprain of hand, MCP left; and closed dislocation of finger, MCP left. It assigned this claim OWCP File No. xxxxxx106.

By order dated April 15, 2024, the Board remanded this case for OWCP to administratively combine this claim with appellant's other accepted left upper extremity claims. OWCP was then to prepare a new SOAF and refer appellant for a new second opinion evaluation to determine appellant's entitlement to an additional schedule award, to be followed by a *de novo* decision.

OWCP referred appellant to second opinion physician, Dr. Kelly. In a June 27, 2024 report, Dr. Kelly opined that appellant had seven percent digital impairment for the thumb based on three percent impairment for the IP joint flexion to just 30 degrees and four percent impairment for the limited opposition. He also opined that no additional schedule award was warranted as appellant had received an award for 15 percent impairment to the left upper extremity. The DMA, Dr. Hammel, in a July 22, 2024 report concurred with Dr. Kelly's finding of seven percent digital impairment. He converted the seven percent digital impairment to a three percent upper extremity impairment for the left thumb.

The Board finds that the reports from Dr. Kelly and Dr. Hammel addressed appellant's left thumb injury and provided a permanent impairment rating. OWCP, however, issued a July 23, 2024 decision, in both OWCP File No. xxxxxx106 and OWCP File No. xxxxxx073, finding that appellant's left digit permanent impairment did not entitle him to a schedule award as he had previously received a greater schedule award for left upper extremity impairment in his other claims.

⁹ *Id.* at § 10.404(a); *see R.M.*, Docket No. 20-1278 (issued May 4, 2022); *see also Jacqueline S. Harris*, 54 ECAB 139 (2002).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5.a (March 2017); *id.* at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

¹¹ *T.S.*, Docket No. 16-1406 (issued August 9, 2017); *T.S.*, Docket No. 09-1308 (issued December 22, 2009).

Thereafter counsel requested reconsideration in OWCP File No. xxxxxx106. By decision dated September 25, 2024, in OWCP File No. xxxxxx106, OWCP denied modification of its prior decision.

As previously noted, benefits payable under 5 U.S.C. § 8107(c) are reduced by the period of compensation paid under the schedule for an earlier injury if the latter impairment in whole or in part would duplicate the compensation payable for the prior impairment.¹²

The Board notes that a claimant is not precluded from an additional schedule award solely because he or she received a greater award to the same scheduled member from another claim.¹³ The Board has previously held that simply comparing the prior percentage of permanent impairment awarded to the current impairment for the same member is not always sufficient to deny an increased schedule award claim.¹⁴ The issue is not whether the current permanent impairment rating is greater than the prior impairment ratings, but whether it duplicates in whole or in part the prior impairment rating.¹⁵ Therefore, the Board finds that OWCP has not properly developed appellant's entitlement to schedule award benefits in the present claim for his accepted left digit impairment.¹⁶ OWCP shall complete development of the combined claims, and thereafter, refer the medical evidence of record to a DMA to determine whether appellant's left thumb permanent impairment is duplicative of his prior permanent impairments for which he has received schedule award compensation. Following any further necessary development, OWCP shall issue a *de novo* decision in this case.¹⁷

CONCLUSION

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

¹² *Id.*

¹³ *See S.M.*, Docket No. 17-1826 (issued February 26, 2018).

¹⁴ *R.K.*, Docket No. 19-0247 (issued August 1, 2019); *M.K.*, Docket No. 18-1614 (issued March 25, 2019); *T.S.*, Docket No. 16-1406 (issued August 9, 2017).

¹⁵ *Id.*

¹⁶ The Board further notes that while OWCP indicated that it had administratively combined the records for OWCP File Nos. xxxxxx106, xxxxxx073, and xxxxxx635, it proceeded with review by the Branch of Hearing and Review in OWCP File No. xxxxxx073. Prior to this October 14, 2024 appeal to the Board, by decision dated October 10, 2024, an OWCP hearing representative vacated the July 23, 2024 decision in OWCP File No. xxxxxx073. The hearing representative noted counsel's argument that appellant's claim for left hand and finger injury, was separate from his claims for left shoulder injury. The hearing representative concluded that the case should be returned for clarification from the DMA regarding an explanation and comparison of the impairment of the left upper extremity and whether the award duplicated in whole or in part the prior rating. Counsel has not appealed the October 10, 2024 decision issued in OWCP File No. xxxxxx073.

¹⁷ The Board notes that OWCP shall also take such administrative steps necessary to ensure that the combined claim files do not allow for multiple appeals from the same decision.

ORDER

IT IS HEREBY ORDERED THAT the September 25, 2024 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: December 4, 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