United States Department of Labor
Employees' Compensation Appeals Board

S.M., Appellant	)	
and	)	**Docket No. 24-0372**
	)	**Issued: June 3, 2024**
U.S. POSTAL SERVICE, WEST RICHMOND POST OFFICE, West Richmond, WA, 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:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On February 27, 2024 appellant, through counsel, filed a timely appeal from a January 31, 2024 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 her burden of proof to establish greater than 26 percent permanent impairment of her right thumb and/or greater than 26 percent permanent impairment of her left thumb, for which she previously received a schedule award.

FACTUAL HISTORY

On October 24, 2011 appellant, then a 49-year-old substitute rural carrier, filed an occupational disease claim (Form CA-2) alleging that she developed bilateral hand conditions due to factors of her federal employment. She noted that she first became aware that her conditions were related to her federal employment on October 7, 2011. OWCP accepted the claim for left ulnar nerve lesion, bilateral tenosynovitis of the hands and wrists, and bilateral thumb carpometacarpal (CMC) arthritis. Appellant underwent OWCP-authorized left cubital tunnel release surgery in June 2012, right thumb surgery in July 2015, and left thumb surgery in March 2016. OWCP paid her wage-loss compensation on the supplemental and periodic rolls as of June 7, 2012.

On April 12, 2017 OWCP referred appellant, a statement of accepted facts (SOAF), the medical record, and a series of questions to Dr. Kenneth Bode, a Board-certified orthopedic surgeon, for a second opinion examination.

In an August 26, 2017 report, Dr. Bode utilized the SOAF, and the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment,* (A.M.A., *Guides*)[3] to rate appellant's permanent impairment. He performed an examination of her thumbs and measured her thumb range of motion (ROM). Dr. Bode related that bilateral ROM of appellant's thumbs showed 50 degrees of abduction and full adduction, thumb "interphalangeal" 20 degrees of extension and 80 degrees of flexion; "metaphalangeal" 30 degrees of extension and 60 degrees of flexion. He completed a work capacity evaluation and advised that she could not perform her job without restrictions, which were permanent, as she was status post ligament reconstruction, tendon interposition bilaterally. Dr. Bode referred to the A.M.A., *Guides,* Table 15-2, and noted that the class of diagnosis (CDX) for a thumb CMC arthroplasty was a Class 3 impairment, with a grade modifier for functional history (GMFH) of 1; a grade modifier for physical examination (GMPE) of 0; and a grade modifier for clinical studies (GMCS) of 0. Applying the net adjustment formula, he calculated that appellant had 26 percent permanent impairment of each thumb. Dr. Bode further opined that she had 18 percent permanent impairment of the hand, which converted to 16 percent permanent impairment of the upper extremity, and 10 percent permanent impairment of the whole person.

On February 24, 2021 OWCP referred Dr. Bode's report to Dr. Michael M. Katz, a Board-certified orthopedic surgeon, serving as an OWCP district medical adviser (DMA).

In a March 1, 2021 report, Dr. Katz, the DMA, reviewed the SOAF and the medical evidence of record, including Dr. Bode's report. He explained that no discrepancies were noted with respect to the impairment percentage and that minor differences were present in the

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

assignment of modifiers, but this did not affect the final impairment. Dr. Katz opined that appellant had 26 percent permanent impairment of the right thumb and 26 percent permanent impairment of the left thumb and that appellant reached maximum medical improvement (MMI) on August 26, 2017, the date of Dr. Bode's report. He also noted that, as Dr. Bode had documented normal ROM, appellant had no ratable ROM permanent impairment.

On July 20, 2021 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In a June 21, 2021 report, Dr. Thomas L. Gritzka, Board-certified in orthopedic surgery, noted appellant's history of injury and medical course. He recounted her current complaints. Dr. Gritzka examined appellant and noted that she had a good result from surgery on her left ulnar nerve, with no ratable impairment. With regard to the CMC arthritis of the thumbs, he noted that she had bilateral ligamentous reconstruction and tendon interposition arthroplasty at the thumb CMC joint bilaterally, that postoperatively she lost thumb radial abduction, and that normal thumb radial abduction was 20 degrees, but appellant had 0 degrees radial abduction. Dr. Gritzka explained that using the A.M.A., *Guides* page 394, Table 15-2, Digit Regional Grid: Digital impairments, impairment of the thumb CMC joint was a Class 3 impairment, which resulted in 30 percent impairment. He noted that appellant's physical findings were essentially the same for both thumbs and there were no net adjustments for functional history, physical examination, or clinical studies. Dr. Gritzka further noted that Table 15-2, page 394, indicated that if loss of motion is present, the impairment may alternately be assessed using the ROM method and that according to Table 15-32, page 473, appellant's 0 degrees of wrist radial deviation would be equal to four percent impairment of the upper extremity. He explained that 28 percent impairment of the thumb would be equal to 10 percent of the upper extremity and a 31 percent impairment of the thumb would be equal to 11 percent impairment of the upper extremity, therefore the closest match to appellant's thumb impairment was equal to 11 percent upper extremity impairment. Dr. Gritzka opined that appellant had no ratable impairment of her left ulnar nerve and explained that the surgical procedure was successful, and it resulted in no residuals.

By decision dated October 1, 2021, OWCP granted appellant a schedule award for 26 percent permanent impairment of the right thumb and 26 percent permanent impairment of the left thumb. The period of the award ran for 39 weeks from April 1 through December 29, 2018. OWCP explained that the award was based upon the August 26, 2017 report of Dr. Bode and the March 1, 2021 report of the DMA, Dr. Katz.

On October 6, 2021 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearing's and Review. By decision dated November 3, 2021, OWCP's hearing representative found that the case was not in posture for decision. The hearing representative related that OWCP should refer Dr. Gritzka's report to a DMA for further consideration.

In a report dated March 22, 2022, Dr. Katz, acting as OWCP's DMA reviewed Dr. Gritzka's report and noted that it lacked sufficient detail to establish the grade modifiers. Therefore, he again concluded that appellant had 26 percent permanent impairment of each thumb.

By decision dated April 21, 2022, OWCP denied an increased schedule award.

On April 26, 2022 appellant, through counsel, requested an oral hearing before a representative of OWCP. A hearing was held on August 8, 2022.

By decision dated October 25, 2022, OWCP vacated the April 21, 2022 decision. Its hearing representative set aside the April 21, 2022 decision and explained that the case should be sent back for consideration of impairment of the upper extremities, not just the thumbs. The OWCP hearing representative explained the medical evidence was stale, Dr. Gritzka's examination findings were unreliable and referral for another second opinion evaluation was warranted.

On February 9, 2023 OWCP referred appellant for a second opinion evaluation with Dr. Moon Lee, Board-certified in orthopedic surgery, to determine the extent of appellant's permanent impairment.

In a March 10, 2023 report, Dr. Lee reviewed the SOAF and the medical evidence of record. He noted that appellant's left ulnar nerve neuropathy was treated with cubital tunnel release in 2012 and found she did not have any symptoms of ulnar nerve neuropathy. Dr. Lee found that appellant had done well after the bilateral thumb CMC joint resection arthroplasty and tendon interposition, with good relief of pain, but with bilateral hand decreased grip strength. He noted that bilateral forearm pain had resolved and there was no evidence of tendentious or tenosynovitis or any evidence of bilateral wrists or hands sprain. Dr. Lee noted that appellant had reached MMI and estimated the date of MMI as August 26, 2017, the date of Dr. Bode's examination. With regard to rating appellant's permanent impairment, he referred to the A.M.A., *Guides* at Table 15-2, Digit Regional Grid: Digit Impairments, at page 394, and noted that CMC arthroplasty was CDX 3, with a default impairment rating of 30 percent. Dr. Lee then applied the grade modifiers and for the right thumb found 1 for GMFH based on mild symptoms; 1 for GMPE based on mild tenderness to palpitation and very slight movement at the based on the metacarpal; and GMCS of 0, which resulted in a net adjustment of -2 and a Grade A permanent impairment of 26 percent. For the left thumb, he again noted that CMC joint arthroplasty was CDX 3 with a default impairment of 30 percent. For the grade modifiers, Dr. Lee noted 1 for GMFH based on mild problem; GMPE of 0 as the examination was normal; and GMCS of 0, resulted in a net adjustment of -2 and a 26 percent permanent impairment of the thumb. He noted that she had no ratable impairment for the left cubital tunnel and bilateral dorsal extensor tendinitis.

In a June 27, 2023 report, Dr. Katz, the DMA reviewed the additional medical evidence. For the right upper extremity, he referred to the A.M.A., *Guides* at Table 15-2, Digit Regional Grid: Digit Impairments, at page 394, and noted that the diagnosis of thumb CMC arthroplasty, residual symptoms, consistent objective findings, was a CDX 3 permanent impairment with a default value of 30 percent for the thumb. Dr. Katz noted that the CDX was 3 with GMFH of 1; GMPE of 1; and GMCS of 0. He calculated the net adjustment as (GMPH - CDX)(1-3) = -2; (GMPE - CDX) (1-3) = -2, and (GMCS - CDX) (0-3) = -3, for a net adjustment of -2 (the maximum). Dr. Katz noted that a CDX 3 with an adjustment of -2 from the default value C resulted in a CDX 3, Grade A or 26 percent permanent impairment of the right thumb. He also noted with regard to the right wrist, the diagnostic factor was tenosynovitis and there were no objective abnormal findings at MMI, so the rating was zero, and the right upper extremity permanent impairment was 26 percent for the thumb.

For the left upper extremity, Dr. Katz again referred to the A.M.A., *Guides* at Table 15-2, Digit Regional Grid: Digit Impairments, at page 394, and noted that the diagnosis of thumb CMC arthroplasty, residual symptoms, consistent objective findings, was a Class 3 impairment with a default value of 30 percent permanent impairment for the thumb. He noted a GMFH of 1, a GMPE of 1, and a GMCS of 0. Dr. Katz applied the next adjustment formula and found that a CDX of 3 with an adjustment of -2 from the default value C resulted in a Class 3, Grade A impairment, or 26 percent permanent impairment of the left thumb. He also noted that there was no evidence of entrapment/compression neuropathy of the left ulnar nerve and therefore the permanent impairment rating was 26 percent permanent impairment of the left thumb.

Dr. Katz noted that the diagnosis-based impairment (DBI) method yielded a higher impairment rating than the ROM method and, therefore, the DBI rating was used. He also referred to Dr. Lee's report and noted no discrepancies with regard to the impairment percentage and that any minor differences in the assignment of modifiers did not affect the final impairment. Dr. Katz identified the date of MMI as March 10, 2023, the date of Dr. Lee's examination. He noted that as appellant had previously received a schedule award for 26 percent permanent impairment of the thumbs, no increased award was warranted.

By decision dated July 26, 2023, OWCP denied appellant's claim for an increased schedule award.

On August 3, 20232 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on November 17, 2023.

By decision dated January 31, 2024, OWCP's hearing representative affirmed the July 26, 2023 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA[4] and its implementing regulations[5] 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 to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[6] As of May 1, 2009, schedule awards are determined in

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] *Id. See also Ronald R. Kraynak*, 53 ECAB 130 (2001).

accordance with the sixth edition of the A.M.A., *Guides* (2009).[7] 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.[8]

In addressing upper extremity impairments, the sixth edition requires identification of the CDX, which is then adjusted by a GMFH, GMPE, and/or GMCS.[9] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[10] Under Chapter 2.3, evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.[11]

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 diagnosis-based sections are applicable.[12] If ROM is used as a stand-alone approach, the total of motion impairment for all units of function must be calculated. All values for the joint are measured and added.[13] 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.[14]

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 district medical adviser (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*

[7] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); *id*. at Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017).

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

[9] A.M.A., *Guides* 383-492.

[10] *Id*. at 411.

[11] *Id*. at 23-28.

[12] *Id*. at 461.

[13] *Id*. at 473.

[14] *Id*. at 474.

methods to calculate an impairment rating for the diagnosis in question, the method producing the higher rating should be used."[15] (Emphasis in the original.)

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.[16]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish greater than 26 percent permanent impairment of her right thumb or greater than 26 percent permanent impairment of her left thumb, for which she previously received a schedule award.

By decision dated October 1, 2021, OWCP granted appellant a schedule award for 26 percent permanent impairment of the right thumb and 26 percent permanent impairment of the left thumb. The award was based upon the August 26, 2017 report of Dr. Bode and the March 1, 2021 report of the DMA, Dr. Katz.

In support of her schedule award claim, appellant had submitted a June 21, 2021 report from Dr. Gritzka. The Board notes that Dr. Gritzka referred to the A.M.A., *Guides*, Table 15-2, and found that the impairment of the thumb CMC joint was a Class 3, rated at 30 percent; however, he did not apply grade modifiers for functional history, physical examination, or clinical studies. The Board finds his opinion was incomplete and unreliable, and did not comport with OWCP's procedures. It is, therefore, insufficient to establish an increased impairment.[17]

Pursuant to the October 25, 2022 decision, OWCP referred the evidence of record to Dr. Lee for a second opinion permanent impairment evaluation. In a March 10, 2023 report, Dr. Lee used Table 15-2, at page 394 of the A.M.A., *Guides* and noted that the CDX for CMC arthroplasty was a Class 3 impairment, with a default impairment rating of 30 percent. He then applied the grade modifiers and the net adjustment formula which resulted in a grade modifier of -2 and a Grade A permanent impairment of 26 percent of each thumb. Dr. Lee noted that appellant had no ratable impairment for the left cubital tunnel and bilateral dorsal extensor tendinitis conditions.

OWCP properly referred the evidence of record, including Dr. Lee's report, to the DMA, Dr. Katz, for review and an impairment rating. In his report dated June 27, 2023, Dr. Katz referred to Table 15-2, at page 394 of the A.M.A., *Guides*, noted that CMC arthroplasty was CDX 3, with a default impairment rating of 30 percent, applied the grade modifiers and the net adjustment formula, which resulted in a grade modifier of -2 and a Grade A impairment of 26 percent of each thumb. He also noted that, with regard to the right wrist, the diagnostic factor was tenosynovitis

[15] FECA Bulletin No. 17-06 (issued May 8, 2017); *V.L.*, Docket No. 18-0760 (issued November 13, 2018).

[16] *See supra* note 7 at Chapter 2.808.6(f) (March 2017). *See also P.W.*, Docket No. 19-1493 (issued August 12, 2020); *Frantz Ghassan*, 57 ECAB 349 (2006).

[17] *See M.M.*, Docket No. 17-0197 (issued May 1, 2018).

and there were no objective abnormal findings at MMI, so the rating was zero, he also explained that there was no evidence of entrapment/compression neuropathy of the left ulnar nerve. Dr. Katz, therefore, concluded that appellant remained entitled to a schedule award for permanent impairment of her thumbs.

OWCP granted appellant a schedule award based on the opinions of the second opinion physician, Dr. Lee and the DMA, Dr. Katz, who concurred that appellant had 26 percent permanent impairment of each thumb. The Board has reviewed the calculations provided by Dr. Lee and Dr. Katz and finds that they properly rated appellant's bilateral thumb permanent impairment.

The Board finds that Dr. Katz properly rated appellant's permanent impairment as an impairment of the thumbs, as she only had impairment of one digit on each hand, and there was no evidence of record that she had a permanent impairment which extended into an adjoining member of the hand and upper extremity.

As there is no current medical evidence of record in conformance with the sixth edition of the A.M.A., *Guides* showing a greater percentage of permanent impairment than that which was previously awarded, the Board finds that appellant has not met her burden of proof.

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure, or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased permanent impairment.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish greater than 26 percent permanent impairment of her right thumb or greater than 26 percent permanent impairment of her left thumb, for which she previously received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the January 31, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 3, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board