United States Department of Labor
Employees' Compensation Appeals Board

M.G., Appellant	)	
and	)	**Docket No. 22-1394**
	)	**Issued: May 10, 2023**
DEPARTMENT OF HEALTH & HUMAN SERVICES, THE NATIONAL INSTITUTES OF HEALTH, Bethesda, MD, 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
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On September 12, 2022 appellant filed a timely appeal from a May 23, 2022 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 established greater than 45 percent permanent impairment of the right upper extremity for which she previously received a schedule award.

[1] 5 U.S.C. § 8101 *et seq*.

FACTUAL HISTORY

This case has previously been before the Board on a different issue.[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 May 15, 2014 appellant, then a 63-year-old program assistant, filed an occupational disease claim (Form CA-2) alleging that she injured her right hand due to factors of her federal employment including excessive typing following left thumb tendon surgery.

On May 8, 2014 Dr. Sean T. Johnson, an orthopedic surgeon, performed right ring finger A1 pulley release. He diagnosed right ring finger trigger finger.

Appellant resigned from the employing establishment on November 29, 2014.

By decision dated January 20, 2015, OWCP accepted the claim for right trigger fourth finger.

Dr. Johnson performed right cubital tunnel release on April 27, 2015.

By decision dated December 31, 2015, OWCP expanded the acceptance of appellant's claim to include lesion of the ulnar nerve, right upper limb.

Appellant submitted a March 20, 2018 report from Dr. Johnson advising that she had reached maximum medical improvement (MMI). Dr. Johnson noted that she had unremitting hand pain and persistent refractory pain radiating from her medial elbow related to the ulnar nerve for which he had been unable to find effective treatment. He opined that appellant had a chronic condition and related that he had attempted multiple modalities of treatment, including therapy and medication, in addition to the May 8, 2014 trigger finger A1 pulley release of right ring finger and April 27, 2015 cubital tunnel release.

On February 1, 2019 appellant filed a claim for compensation (Form CA-7) for a schedule award.

By decision dated May 17, 2019, OWCP granted appellant a schedule award for 45 percent permanent impairment of the right upper extremity in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3] The award ran for 140.4 weeks from September 5, 2018 through May 14, 2021.

Appellant subsequently submitted a January 11, 2022 impairment rating from Dr. Joshua B. Macht, a Board-certified internist, who related her history of injury and medical treatment. Dr. Macht reported that her right-hand condition had significantly worsened since her last impairment rating, with significantly worse range of motion (ROM) and a fixed claw deformity of the right hand, rendering her hand essentially useless for daily activities. He diagnosed right

[2] Docket No. 18-0099 (issued April 26, 2018).

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

trigger finger and lesion of ulnar nerve, right upper limb. Dr. Macht utilized Table 15-32 (Wrist Range of Motion), page 473, of the sixth edition of the A.M.A., *Guides*, to find that appellant had three percent permanent impairment of the right upper extremity due to limited flexion of the right wrist. He also utilized the ROM rating method under Table 15-30 (Thumb Range of Motion), page 468, for the right thumb to find 63 percent permanent impairment of the right thumb. Referencing Table 15-31 (Finger Range of Motion), page 470, Dr. Macht calculated 97 percent permanent impairment of the right index finger, 87 percent permanent impairment of the right middle finger, 87 percent permanent impairment of the right ring finger, and 97 percent permanent impairment of the right little finger. He then utilized Table 15-12, pages 422 and 423, to convert the percent permanent impairment of each digit to the percentage of permanent impairment of the right hand, yielding 25 percent permanent impairment of the right hand for the thumb, 19 percent permanent impairment of the right hand for the index finger, 17 percent permanent impairment of the right hand for the middle finger, 9 percent permanent impairment of the right hand for the ring finger, and 10 percent permanent impairment of the right hand for the little finger. Dr. Macht then referenced Table 15-11, page 420 and calculated 80 percent permanent impairment for the right hand, converted to 72 percent permanent impairment of the right upper extremity.

Dr. Macht combined this impairment figure with 3 percent permanent impairment of the right upper extremity due to ROM loss of the right wrist, pursuant to the Combined Values Chart on page 605, to equal 73 percent permanent impairment of the right upper extremity. He then assigned a grade modifier of 4 for decreased ROM, pursuant to Table 15-35 on page 477, and a grade modifier for functional history (GMFH) of 4 based on a *Quick*DASH score of 95, pursuant to Table 15-7 on page 406, which resulted in no change in the overall rating. Thus, Dr. Macht found that appellant had 73 percent permanent impairment of the right upper extremity as a result of ROM loss of the wrist, thumb, and fingers.

Dr. Macht also noted that appellant had an ongoing impairment as a result of her accepted diagnosis of right ulnar neuropathy at the elbow. He referenced Table 15-23, page 449, and assigned a grade modifier for clinical studies (GMCS) of 1, a GMFH of 3, and grade modifier for physical examination (GMPE) of 3. Dr. Macht averaged the grade modifiers for a grade 2 or six percent permanent impairment of the right upper extremity. He combined appellant's 73 percent permanent impairment of the right upper extremity due to decreased ROM of the wrist and hand with the 6 percent permanent impairment of the right upper extremity due to ulnar neuropathy at the elbow, pursuant to the Combined Values Chart on page 605, to equal 75 percent permanent impairment of the right upper extremity. Dr. Macht noted that her total impairment pursuant to the sixth edition of the A.M.A., *Guides*, had increased from 45 percent to 75 percent permanent impairment of the right upper extremity. He found that appellant had reached MMI prior to his evaluation on January 11, 2022.

On March 21, 2022 appellant filed a Form CA-7 for a schedule award.

On March 24, 2022 OWCP referred appellant, together with a statement of accepted facts (SOAF), the medical record, and a series of questions to Dr. Rafael A. Lopez, a Board-certified orthopedic surgeon, for a second opinion permanent impairment evaluation, due to the accepted work-related conditions. It specifically noted that she had previously been granted a schedule award for 45 percent permanent impairment of the right upper extremity.

In a report dated April 30, 2022, Dr. Lopez reviewed the SOAF and appellant's medical record. He set forth her physical examination findings, stated that her subjective complaints were not corroborated by objective findings, and opined that she had reached MMI on November 17, 2016 the date of an electromyogram/nerve conduction velocity (EMG/NCV) study. Dr. Lopez diagnosed status post release of trigger finger and ulnar nerve, as well as a functional, but nonorganic inability to use the right hand. He concluded that appellant had zero percent permanent impairment of the right upper extremity, stating that the ROM method could not be used due to her inability to cooperate with the examination.

By decision dated May 23, 2022, OWCP denied appellant's claim for an additional schedule award.

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 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 impairment for the upper extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the upper extremity to be rated.[9] After a class of diagnosis (CDX) is determined (including identification of a default grade value), the impairment class is then adjusted by grade modifiers based on GMFH, GMPE,

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] *Id.*; *see also B.B.*, Docket No. 20-1187 (issued November 18, 2021); *Ronald R. Kraynak*, 53 ECAB 130 (2001).

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

[8] *B.B.*, *supra* note 6; *M.D.*, Docket No. 20-0007 (issued May 13, 2020); *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

[9] *B.B.*, *id.*; *M.D.*, *id.*; *T.T.*, Docket No. 18-1622 (issued May 14, 2019).

and GMCS.[10] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[11]

Regarding the application of ROM or diagnosis-based impairment (DBI) impairment 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)."[12]

FECA Bulletin further advises:

> "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*." (Emphasis in the original.)[13]

The Bulletin also advises:

> "If the rating physician provided an assessment using the ROM 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."[14]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's 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.[15]

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[10] A.M.A., *Guides* 383-492; *see B.B., id.*; *M.P.*, Docket No. 13-2087 (issued April 8, 2014).

[11] *Id.*

[12] FECA Bulletin No. 17-06 (issued May 8, 2017); *B.B., supra* note 6; *V.L.*, Docket No. 18-0760 (issued November 13, 2018).

[13] *Id.*

[14] *Id.*

[15] *See supra* note 7 at Chapter 2.808.6f (February 2013). *See also D.S.*, Docket No. 20-0670 (issued November 2, 2021); *J.T.*, Docket No. 17-1465 (issued September 25, 2019); *C.K.*, Docket No. 09-2371 (issued August 18, 2010); *Frantz Ghassan*, 57 ECAB 349 (2006).

ANALYSIS

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

Dr. Lopez' opinion contradicts the SOAF, which makes clear that OWCP had accepted as employment-related right trigger finger and lesion of ulnar nerve, right upper limb, and that it had previously granted her schedule award for 45 percent permanent impairment of the right upper extremity. In his report dated April 30, 2022, he related that appellant had zero percent permanent impairment of the right upper extremity, stating that the ROM method could not be used due to her inability to cooperate with the examination. However, Dr. Lopez did not acknowledge her previously granted schedule award. OWCP procedures provide that, when a second opinion or referee physician selected by OWCP 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.[16] As Dr. Lopez disregarded the findings made in the SOAF, the Board finds that his opinion regarding the rating of appellant's permanent impairment was of no probative value.

Once OWCP undertook development of the record, it was required to complete development of the record by procuring medical evidence that would resolve the relevant issue in the case.[17]

On remand, OWCP shall refer appellant and a SOAF to a new physician in the appropriate field of medicine for a second opinion evaluation as to the extent of her permanent impairment due to the accepted conditions of right trigger finger and lesion of ulnar nerve, right upper limb. After this and such other development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

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

[16] *Supra* note 7 at Chapter 2.810.11 (September 2010); *see T.M.*, Docket No. 20-1143 (issued December 14, 2020); *R.T.*, Docket No. 20-0081 (issued June 24, 2020); *Roger W. Griffith*, 51 ECAB 491 (2000).

[17] *See L.B.*, Docket No. 21-0319 (issued August 9, 2021).

ORDER

IT IS HEREBY ORDERED THAT the May 23, 2022 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: May 10, 2023
Washington, DC

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

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

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