



## **FACTUAL HISTORY**

On August 2, 2004 appellant, a 46-year-old senior correctional officer, filed a traumatic injury claim alleging that he sustained injuries to his lower back and left leg on that date when he fell on a trail at work. The Office accepted his claim for lumbar back pain, aggravation of degenerative disc disease and aggravation of a herniated disc. Appellant underwent lumbar discectomy on November 29, 2004 and lumbar spine fusion and low back disc surgery on August 31, 2005. He returned to work with restrictions on December 14, 2005.

On March 22, 2006 appellant requested a schedule award. He submitted reports dated March 6 and May 8, 2006 from Dr. Michael C. Chabot, a treating physician, who opined that appellant had sustained an eight percent whole body impairment for persistent complaints associated with his accepted conditions. However, Dr. Chabot stated that appellant's neurological examination was normal, with no significant functional deficits involving the lower extremities and opined that appellant had no permanent impairment of his lower extremities pursuant to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

In a letter dated September 8, 2006, the Office informed appellant that he had not submitted evidence establishing a permanent impairment of a specific body part and that, therefore, his schedule award claim could not be considered at that time.

On February 16, 2007 appellant again requested a schedule award. He submitted a December 28, 2006 report from Dr. Sued A. Abdul Khader, a treating physician, who provided examination findings reflecting that appellant had no sensory deficit and normal motor strength. Dr. Khader's diagnoses included lumbar facet arthropathy; lumbar degenerative joint disease status post instrumentation; and possible right L5-S1 radiculopathy. In a February 6, 2007 report, Dr. Juan M. Alvarez, a Board-certified internist, stated that, as a result of his accepted injury, appellant had chronic back pain and "neuropathic-type pain" in both legs when he walked. He opined that appellant had reached maximum medical improvement.

On March 5, 2007 the Office informed appellant that the evidence submitted was insufficient to establish that he sustained a permanent impairment to any extremity. It advised him to obtain a physician's report which contained an opinion as to whether he had sustained a permanent impairment to a specific body part as a result of his accepted condition and, if so, the degree of impairment.

On March 8, 2007 Dr. Alvarez opined that appellant had reached maximum medical improvement. On March 30, 2007 he concluded that appellant had sustained a 10 percent impairment for his initial herniated lumbar disc, and an additional 7 percent for his second herniated disc under Table 15-7 at page 404 of the A.M.A., *Guides*. Dr. Alvarez noted that appellant did not qualify for an impairment rating under the A.M.A., *Guides* for any activity-related complaints.

The Office referred appellant's case to the district medical adviser for review and an opinion as to whether appellant sustained any permanent impairment of a specific body part pursuant to the A.M.A., *Guides*. The medical adviser stated that Dr. Alvarez had provided a

whole body impairment rating, which is not acceptable for consideration of possible radicular residuals of the extremities. He recommended that the Office refer appellant for a second opinion evaluation.

The Office referred appellant, together with the medical record and statement of accepted facts, to Dr. John A. Gragnani, a Board-certified physiatrist, for an opinion as to whether he had any permanent impairment of his extremities causally related to his accepted condition. In a report dated June 13, 2007, Dr. Gragnani provided a complete history of injury and treatment and findings on examination. Although appellant had subjective complaints of decreased sensitivity for contact touch in the right lower extremity in multiple dermatomes, no specific dermatome level could be identified for the lumbar spine. Dr. Gragnani also found no evidence of atrophy. He advised that, without evidence of motor loss, sensory loss or atrophy, there was no measurable loss of function to appellant's lower extremities that constituted a permanent impairment due to radiculopathy and, therefore, no rating values could be calculated under Table 15-15 or 15-16 of the A.M.A., *Guides*. Dr. Gragnani found that appellant had no ratable permanent impairment of either lower extremity as a result of his accepted condition.

In a June 18, 2007 report, the Office medical adviser concurred with Dr. Gragnani's conclusion that appellant had no permanent impairment of his lower extremities, noting that the rating was correctly based on consideration of radicular residuals of appellant's lumbar disc disease. He opined that appellant had a zero percent impairment of each lower extremity, and that he reached maximum medical improvement on June 13, 2007.

In a decision dated June 20, 2007, the Office denied appellant's request for a schedule award. It found that the evidence was insufficient to establish that he sustained any permanent impairment to a scheduled member due to the accepted work injury.

On June 20, 2008 appellant, through his attorney, submitted a request for reconsideration.

Subsequent to the June 20, 2007 decision, appellant submitted a November 2, 2007 report of an electromyogram and nerve conduction study reflecting "normal nerve conduction study for both lower extremities." He also submitted a July 7, 2005 report from Dr. Anthony H. Guarino, a Board-certified anesthesiologist, specializing in pain medicine, who diagnosed degenerative disc disease.

In a July 30, 2008 decision, the Office denied appellant's request for reconsideration on the grounds that the evidence was insufficient to warrant further merit review.

### **LEGAL PRECEDENT**

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>2</sup> the Office regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously

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<sup>2</sup> 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.<sup>3</sup> To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>4</sup> When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.<sup>5</sup>

The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>6</sup>

### **ANALYSIS**

Appellant's June 20, 2008 request for reconsideration neither alleged, nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

In support of his request for reconsideration, appellant submitted a November 2, 2007 report of an electromyogram and nerve conduction study reflecting "normal nerve conduction study for both lower extremities," and a July 7, 2005 report from Dr. Guarino, who diagnosed degenerative disc disease. This evidence does not address the relevant issue in this case, namely, whether appellant sustained any permanent impairment of a scheduled member. Therefore, it does not constitute relevant and pertinent new evidence not previously considered by the Office and is insufficient to warrant further merit review.<sup>7</sup>

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2), and properly denied his June 20, 2008 request for reconsideration.

### **CONCLUSION**

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

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<sup>3</sup> 20 C.F.R. § 10.606(b)(2).

<sup>4</sup> *Id.* at § 10.607(a).

<sup>5</sup> *Id.* at § 10.608(b).

<sup>6</sup> *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

<sup>7</sup> *See Susan A. Filkins*, 57 ECAB 630 (2006).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 30, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 21, 2009  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board