

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

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**EFRAIN MOJICA, Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
San Juan, PR, Employer**

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**Docket No. 04-871  
Issued: July 16, 2004**

*Appearances:*  
*Efrain Mojica, pro se*  
*Office of the Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chairman  
MICHAEL E. GROOM, Alternate Member  
A. PETER KANJORSKI, Alternate Member

**JURISDICTION**

On February 17, 2004 appellant filed an appeal of an Office of Workers' Compensation Programs' decision dated November 25, 2003, denying his request for reconsideration. The last decision on the merits of this claim is dated November 18, 2002. Since this is more than one year prior to the filing of this appeal, the Board's jurisdiction is limited to a review of the November 25, 2003 reconsideration decision.<sup>1</sup>

**ISSUE**

The issue is whether the Office properly determined that appellant's November 13, 2003 request for reconsideration and the accompanying evidence submitted were not sufficient to warrant further merit review of his claim.

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<sup>1</sup> See 20 C.F.R § 501.3(d)(2).

## **FACTUAL HISTORY**

This case was before the Board on a prior appeal. In a decision dated October 17, 2000, the Board remanded the case for further development with respect to appellant's permanent impairment to the left leg.<sup>2</sup> The history of the case is contained in the Board's prior decision and is incorporated herein by reference.

By decision dated January 25, 2001, the Office issued a schedule award for an additional 8 percent impairment to the left leg, totaling 66 percent.

In a decision dated September 8, 2001, the Office determined that appellant had not established any additional permanent impairment to his left leg or his right arm. By decision dated November 18, 2002, an Office hearing representative affirmed the September 8, 2001 decision. The hearing representative found that the medical evidence did not establish more than a 30 percent permanent impairment to the right arm.

By letter dated November 13, 2003, appellant requested reconsideration of his claim. He argued that he had an additional impairment to the right arm for his right wrist. Appellant submitted a report dated August 13, 2002 from Dr. Eric R. Javier, a surgeon, who provided a history and results on examination. He reported loss of range of motion for the right wrist, cited Tables 16-28 and 16-31 of the fifth edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* and calculated that appellant had an 18 percent upper extremity impairment due to loss of range of wrist motion. Dr. Javier also cited Table 16-34 with respect to loss of grip strength, determined that appellant had a 20 percent impairment due to loss of grip strength and opined that he had a combined 34 percent upper extremity impairment.

Appellant also submitted a report dated November 5, 2003 from Dr. Jan Zegarra, an orthopedic surgeon, who provided wrist range of motion and grip strength findings, without providing an opinion as to a permanent impairment. He had previously submitted a June 14, 2002 report opining that appellant had a 41 percent right arm impairment and this report was considered by the hearing representative in her November 18, 2002 decision.

In a decision dated November 25, 2003, the Office denied the request for reconsideration. The Office found that appellant did not raise substantive legal questions or include new and relevant evidence, without specifically discussing the report of Dr. Javier. The decision noted that appellant had submitted a November 5, 2003 report from Dr. Zegarra, which seemed to indicate that his medical condition had worsened. According to the Office, "it is improper to utilize what appears to be a worsening of a medical condition and increase in impairment as the basis for a request for reconsideration of a prior decision," citing the Office's procedure manual.

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<sup>2</sup> Docket No. 99-727. Appellant sustained a left femur fracture, left knee laceration, left orbit fracture and a right wrist fracture in a March 4, 1988 motor vehicle accident. On September 11, 1995 the Office granted a schedule award for 25 percent impairment of the left leg. In subsequent schedule awards of April 22, 1997 and September 25, 1998, the Office granted additional awards for 15 percent and 18 percent loss of the left leg for a total of 58 percent impairment. He also received an award for 30 percent impairment of the right arm.

## LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>3</sup> the Office's regulations provides that a claimant may obtain review of the merits of the claim by (1) showing that the Office erroneously applied or interpreted a specific point of law, or (2) advancing a relevant legal argument not previously considered by the Office, or (3) constituting relevant and pertinent evidence not previously considered by the Office.<sup>4</sup> Section 10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.<sup>5</sup>

## ANALYSIS

The underlying merit issue in the case is whether appellant has more than a 30 percent permanent impairment to his right arm for which he received a schedule award. He submitted a report dated August 13, 2002 from Dr. Javier. This report had not been previously reviewed and, therefore, represents new evidence. Moreover, Dr. Javier provided an opinion, based on his physical findings and with reference to specific tables in the A.M.A., *Guides*, as to a permanent impairment to the right arm that was greater than the 30 percent previously awarded.

The issue on reconsideration is not whether the medical evidence is sufficient to establish a greater permanent impairment, but whether it is new and relevant to the issue. Dr. Javier's report provides a relevant and pertinent opinion with respect to the percentage of permanent impairment to the right upper extremity. Pursuant to section 10.606(b)(2), appellant has submitted new and relevant evidence and is entitled to a merit review of his claim.

The Board notes that, in his request for reconsideration, appellant indicated that his condition had been aggravated by work, without providing additional detail. The Office cited its procedure manual, which indicates that there may be circumstances, particularly in hearing loss cases, where a claimant may have been paid a schedule award before the employment exposure ceased and a new claim should be filed one year after the beginning of the date of the last award or the date of last exposure.<sup>6</sup> This is not a hearing loss case with continued noise exposure, nor is it clear from appellant's statement that his claim is based solely on continuing exposure to work factors. He requested reconsideration of a decision that he had no more than a 30 percent permanent impairment to his right arm and he submitted new and relevant medical evidence on that issue. The Board finds that appellant has met the requirements to reopen his claim for merit review.

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<sup>3</sup> 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.")

<sup>4</sup> 20 C.F.R. § 10.606(b)(2).

<sup>5</sup> 20 C.F.R. § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7(b)(3)(b) (August 2002).

**CONCLUSION**

Appellant has submitted new medical evidence with respect to a schedule award to the right arm. The case will be remanded to the Office for a merit review of the claim.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated November 25, 2003 is set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Issued: July 16, 2004  
Washington, DC

Alec J. Koromilas  
Chairman

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member