

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

DANIEL BRAY, Appellant

and

**U.S. POSTAL SERVICE, PROCESSING &
DISTRIBUTION CENTER, Reno, NV,
Employer**

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**Docket No. 05-450
Issued: May 4, 2005**

Appearances:
Daniel Bray, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On December 13, 2004 appellant filed a timely appeal of a September 17, 2004 decision of the Office of Workers' Compensation Programs, finding that appellant's request for reconsideration was insufficient to warrant merit review of an August 4, 2003 decision. Pursuant to 20 C.F.R. § 501.3(d)(2), the Board's jurisdiction is limited to final decisions issued within one year of the filing of the appeal. The only decision before the Board on this appeal is the September 17, 2004 decision.

ISSUE

The issue is whether the Office properly determined that appellant's request for reconsideration was insufficient to warrant merit review of an August 4, 2003 decision finding that appellant did not have more than a four percent permanent impairment to his right leg.

FACTUAL HISTORY

The case record contains two claims for traumatic injury to the lower back. On March 7, 1994 appellant, then a 36-year-old electronic technician, filed a traumatic injury claim for

continuation of pay/compensation (Form CA-1) alleging a back injury on March 4, 1994 while engaged in recreational activity during a training session. The claim was accepted for lumbosacral strain and aggravation of a preexisting L5-S1 condition. On December 1, 1997 appellant filed a Form CA-1 for an injury on that date to his low back and hips while working on thermal printers. The Office accepted the claim for back strain with radiculopathy and aggravation of L5-S1 herniated nucleus pulposus. The record also indicates that appellant had an earlier claim for a back injury on November 5, 1990, which was accepted for back strain and disc disruption with sciatica L5-S1.

On April 25, 2001 appellant completed a claim for compensation (Form CA-7) and indicated that he was claiming a schedule award. The Office referred appellant to a Board-certified neurologist, Dr. William Torch, and Dr. M.P. Reddy, Board-certified in physical medicine and rehabilitation. In a report dated May 6, 2002, an Office medical adviser opined that appellant had a four percent permanent impairment due to pain radiating into the right leg.

By decision dated May 20, 2002, the Office issued a schedule award for a four percent permanent impairment to the right leg. The period of the award was 11.52 weeks from April 2, 2002.

Appellant requested a hearing before an Office hearing representative, which was held on December 16, 2002. He submitted medical reports dated November 12, 1992, November 9 and 15, 1993, from Dr. Charles Quagliari, a Board-certified neurologist. These reports refer to the November 5, 1990 injury and provide an opinion that appellant had an 8 percent whole body impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (second edition 1984).

In a decision dated April 10, 2003, the Office hearing representative affirmed the May 20, 2002 schedule award decision. The hearing representative noted that Dr. Quagliari's reports were dated and were based on impairment to the back, which is not a scheduled member of the body under the Act.

Appellant requested reconsideration by letter dated July 3, 2003. He argued that Dr. Quagliari provided the most complete reports and should represent the weight of the evidence.

In a decision dated August 4, 2003, the Office reviewed the case on its merits and denied modification of the schedule award. Appellant requested reconsideration in a letter dated July 25, 2004. He argued that Dr. Quagliari provided a thorough examination and opinion as to permanent impairment. Appellant stated that he had requested a copy of Dr. Quagliari's findings but did not receive a copy until 1999, when the Office refused to reimburse him for medication as a result of his injuries. He also requested that he be reimbursed for use of sick leave. In addition, appellant submitted reports from an attending physician, Dr. Bruce E. Witmer, a physical medicine specialist, regarding appellant's continuing treatment. Dr. Witmer did not provide an opinion as to the degree of permanent impairment.

By decision dated September 17, 2004, the Office determined that the request for reconsideration and the evidence submitted were not sufficient to warrant a merit review of the claim.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,¹ the Office's regulations provides that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains evidence that either: "(i) shows that [the Office] erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by [the Office]; or (iii) constitutes relevant and pertinent evidence not previously considered by [the Office]."² 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.³

ANALYSIS

The July 25, 2004 request for reconsideration argued that the Office should have relied on the reports of Dr. Quaglieri in determining the degree of permanent impairment. Appellant had previously raised this argument, and the Office had explained that Dr. Quaglieri did not use the current edition of the A.M.A., *Guides* and his opinion was based on impairment to the back, which is not a scheduled member or function of the body under the Act.⁴ Appellant's statements regarding reimbursement for medical prescriptions and sick leave are not relevant to the issue of a four percent permanent impairment to the right leg. The Board finds that appellant did not show the Office erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by the Office.

The medical evidence submitted after August 4, 2003 does not discuss the degree of permanent impairment to a scheduled member of the body. Dr. Witmer's reports indicate that appellant continued to receive treatment for a back condition but he did not discuss the relevant medical issues regarding a permanent impairment under the A.M.A., *Guides*. The evidence submitted is not relevant and pertinent evidence and is not sufficient to require a merit review of the claim.

¹ 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.")

² 20 C.F.R. § 10.606(b)(2).

³ 20 C.F.R. § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

⁴ *See James E. Jenkins*, 39 ECAB 860 (1988); 5 U.S.C. § 8101(20). The Board also notes that Dr. Quaglieri expressed his opinion as a whole body impairment, which is not appropriate under the Act. *See Janae J. Triplette*, 54 ECAB ____ (Docket No. 03-1545, issued September 4, 2003).

The Board finds that appellant did not meet any of the requirements of section 10.606(b)(2) in this case. Accordingly, the Board finds that the Office properly denied the request for reconsideration without merit review of the schedule award issue.

CONCLUSION

The Board finds that appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or submit relevant and pertinent evidence not previously considered. Appellant is therefore not entitled to a merit review of his claim.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 17, 2004 is affirmed.

Issued: May 4, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

A. Peter Kanjorski
Alternate Member