



## **FACTUAL HISTORY**

On July 8, 2001 appellant, then a 53-year-old ground maintenance laborer, filed an occupational disease claim for an unspecified injury, which allegedly arose on or about April 18, 2001.

Appellant was treated by a physician's assistant on April 18, 2001, and he was placed on work restrictions of no lifting over 10 pounds. However, no specific information was provided regarding appellant's medical condition. On July 8, 2001 appellant was seen at the employing establishment dispensary for complaints of groin pain. Another physician's assistant placed appellant on work restrictions that included no strenuous work, no heavy pushing or pulling, no repetitive bending or squatting and a maximum of 10 pounds lifting.

As appellant did not identify a particular injury or specify what employment factors or events presumably caused or contributed to his injury, the Office advised appellant on August 7, 2001, that the information previously submitted was insufficient to determine his eligibility for benefits. The Office instructed appellant to submit additional factual information regarding his employment-related exposure. Additionally, the Office advised appellant of the need for a medical report that included a specific diagnosis and a discussion of the relationship between the diagnosed condition and appellant's employment.

In an August 23, 2001 letter, appellant indicated that he worked around the theatre, pizza parlor, bowling center and library. He reported that he usually worked alone and sometimes he performed heavy lifting and heavy pulling of grass and weeds. Appellant also stated that he cuts trees with a handsaw. He explained that he now experiences pain and discomfort when he tries to pick up something heavy. Appellant also indicated that he tried to explain his condition and restrictions to his supervisors, but they were not responsive to his need for assistance.

In a September 12, 2001 decision, the Office denied appellant's claim as the evidence was insufficient to establish that appellant sustained an injury as alleged.

By letter dated May 21, 2003, appellant requested reconsideration. In support of his request for reconsideration, appellant submitted medical evidence from Drs. Bobby Korn, Janet Yazdi and Timothy Dresselhaus. He also wrote to the Office on June 5, 2003 indicating that he had a thyroid condition, which affected his eye, a rapid heartbeat and a hernia condition. Additionally, appellant provided an April 11, 2002 letter regarding alleged unsafe conditions at his work site.

By decision dated June 25, 2003, the Office denied appellant's request for reconsideration for the reason that it was not timely filed and failed to present clear evidence of error.

## **LEGAL PRECEDENT**

Section 8128(a) of the Federal Employees' Compensation Act does not entitle a claimant to a review of an Office decision as a matter of right.<sup>1</sup> This section vests the Office with

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<sup>1</sup> 5 U.S.C. § 8128(a); *see Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

discretionary authority to determine whether it will review an award for or against payment of compensation.<sup>2</sup> The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).<sup>3</sup> One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.<sup>4</sup> In those instances when a request for reconsideration is not timely filed, the Office will undertake a limited review to determine whether the application presents “clear evidence of error” on the part of the Office.<sup>5</sup> In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>6</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.<sup>7</sup> The evidence must be positive, precise and explicit, and it must be apparent on its face that the Office committed an error.<sup>8</sup> Evidence that does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish clear evidence of error.<sup>9</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>10</sup> The evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.<sup>11</sup>

### ANALYSIS

The Office issued a merit decision on September 12, 2001, which denied appellant’s claim on the basis that the evidence was insufficient to establish that appellant sustained an injury as alleged. Appellant’s request for reconsideration was dated May 21, 2003. As appellant’s request was filed more than one year after the Office’s September 12, 2001 decision, appellant must demonstrate “clear evidence of error” on the part of the Office in issuing its September 12, 2001 decision.

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<sup>2</sup> Under section 8128 of the Act, “[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.” 5 U.S.C. § 8128(a).

<sup>3</sup> 20 C.F.R. § 10.607 (1999).

<sup>4</sup> 20 C.F.R. § 10.607(a) (1999).

<sup>5</sup> 20 C.F.R. § 10.607(b) (1999).

<sup>6</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>7</sup> See *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>8</sup> See *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>9</sup> See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>10</sup> See *Leona N. Travis*, *supra* note 8.

<sup>11</sup> *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

Appellant submitted a June 5, 2003 letter indicating that he had a thyroid condition, rapid heartbeat and a hernia condition. On remand, the office surmised that appellant's July 8, 2001 claim was for a hernia condition as the thyroid condition postdated the April 18, 2001 onset of injury appellant identified on his claim form. The Office initially denied appellant's claim because the evidence was insufficient to establish that appellant sustained an injury. Furthermore, there was no clear diagnosis of a condition or how appellant's condition was causally related to his employment.

Appellant provided progress notes dating from November 14, 2002 to March 3, 2003. In a November 14, 2002 treatment note, Dr. Yazdi, an internist, indicated that appellant had probable Graves' disease and presented for follow up. In the January 28 and February 13, 2003 notes, Dr. Korn, an ophthalmologist, also diagnosed Graves' disease, but provided no opinion on causal relationship. In the March 3, 2003 treatment notes, Dr. Dresselhaus one of appellant's physicians, indicated that appellant had hypertension, depressive disorder, thyrotox and Graves' disease. He noted that appellant reported a chronic right inguinal mass causing pain after heavy lifting but he did not discuss factors of appellant's employment.

The above-referenced treatment records do not contain a rationalized medical opinion that would establish a causal relationship between appellant's medical condition and factors of his employment.

Appellant also submitted an April 11, 2002 letter from Joy Erdman, head of the employing establishment's Safety and Occupational Health Division. The letter was written in response to safety concerns that appellant had raised with respect to work he performed in 1992. However, Ms. Erdman's letter does not identify the specific concerns raised by appellant or provide any other information regarding appellant's occupational exposure dating back to 1992.

In the instant case, appellant claimed that his condition arose on or about April 18, 2001. Thus, it is not entirely clear how employment incidents dating back to 1992 are relevant to the instant claim. Furthermore, Ms. Erdman's April 11, 2002 letter does not provide any specific information regarding appellant's employment exposure.

Although appellant indicated in his June 5, 2003 correspondence that he had a hernia condition, there is no medical evidence that includes a diagnosis of a hernia. Dr. Dresselhaus' March 3, 2003 treatment notes merely reflect that appellant reported "chronic right inguinal mass causing pain after heavy lifting." He did not provide a diagnosis relevant to appellant's then chief complaint nor did he discuss any specific employment exposure. While appellant attributed his pain to occasional heavy lifting and heavy pulling of weeds and grass, the record does not include a medical diagnosis relevant to his complaints of abdominal and or groin pain. Also, the record is devoid of any medical evidence attributing appellant's current condition to specific factors of his employment. Accordingly, appellant failed to demonstrate clear evidence of error on the part of the Office in denying his claim for compensation.

**CONCLUSION**

The Board finds that the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely filed and failed to show clear evidence of error.

**ORDER**

**IT IS ORDERED THAT** the June 25, 2003 decision of the Office of Workers' Compensation Programs is hereby affirmed.

**Issued: November 21, 2003**  
Washington, DC

Alec J. Koromilas  
Chairman

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member