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

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| **ROBERT DREW, Appellant** | ) | |
| **and** | ) | |
| **DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Anchorage, AK, Employer** | ) | **Docket No. 04-1080**<br>**Issued: November 8, 2005** |

*Appearances:*
*Robert Drew, pro se*
*Jim C. Gordon, Jr., Esq.,* for the Director

Oral Argument September 22, 2005

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

### ***JURISDICTION***

On March 15, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated March 1, 2004, which denied merit review. Because more than one year has elapsed between the most recent merit decision dated December 24, 2002 and the filing of this appeal on March 15, 2004, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

### ***ISSUE***

The issue is whether the Office properly denied appellant's request for reconsideration without conducting further merit review.

### ***FACTUAL HISTORY***

On September 10, 2002 appellant, then a 66-year-old former laborer/mechanic, filed an occupational disease claim alleging that he was exposed to toxic material, including Agent Orange and asbestos, while in the performance of duty which caused his health to

deteriorate. He first became aware of the condition on August 7, 1987 and realized the condition was aggravated by factors of his federal employment on the same date. The employing establishment noted that appellant was an employee of the agency from February 14, 1955 until he resigned in 1966.

In support of his claim, appellant submitted various medical records documenting medical treatment for his prostate condition including an operative report dated December 8, 1989, which detailed a pancystoscopy resection of the prostate. Appellant was diagnosed with benign prostatic hypertrophy with obstruction. Appellant was seen in consultation with Dr. Brian Trimble, a Board-certified psychiatrist and neurologist, on August 10, 1990, who treated appellant for transient left sided weakness and numbness. He diagnosed five transient ischemic attacks in the distribution of the right middle cerebral artery with multiple risk factors for stroke. Appellant was also seen by Dr. Ronald C. Petersen, a Board-certified neurologist, on November 8, 1990, who noted that appellant had a malfunctioning artificial genitourinary sphincter. On May 3, 1991 he underwent a flexible cytoscopy to correct the defect. Appellant sought treatment from Dr. Michael Singsaas, a Board-certified urologist, who in reports dated February 7, 1994 to April 26, 2001, noted that appellant underwent a transurethral resection of the prostate in 1990, which caused urinary incontinence and thereafter required the placement of an artificial urinary sphincter. He diagnosed urinary incontinence, post prostatectomy, hypertension, chronic obstructive pulmonary disease and history of atherosclerotic cardiovascular disease. Other treatment notes from Dr. Peter Sapin, a Board-certified internist, dated October 10, 1997 to October 12, 2000, noted evaluation of appellant for chest pain, coronary disease, cardiac catheterization, glaucoma and cataracts, cerebrovascular accident in 1988, prostate cancer in 1990 and resection of the prostate in 1994. Appellant submitted additional reports from 1998 to 2001, for treatment of an artificial sphincter, heart condition, prostate, chronic prostates, a left shoulder injury and urinary incontinence.

By letters dated October 2 and December 17, 2002, the Office requested additional information from appellant noting that the evidence submitted was insufficient to establish his claim. No response was received by the Office.

By decision dated December 24, 2002, the Office denied appellant's claim on the grounds that the evidence of record failed to demonstrate that his claim was timely filed in accordance with 5 U.S.C. § 8122. The Office found that appellant first became aware of his condition on August 7, 1987 and of the relationship between his employment and the claimed condition on the same date. The Office advised that appellant stopped working on December 18, 1965 and did not file a claim until September 10, 2002, which was over three years after he was last exposed to work factors. The Office further noted that there was no evidence that appellant's supervisor had knowledge of the employment-related injury within 30 days.

In an undated letter received by the Office on April 18, 2003, appellant disagreed with the Office's decision noting that he did not know there was a three-year time limit for filing a claim. By letter dated December 16, 2003, appellant filed a request for reconsideration. Appellant indicated that he worked with highly toxic chemicals such as Agent Orange and pesticides and advised that the employing establishment did not provide safety precautions or procedures when handling these materials. He advised that he was not aware of the timeliness rule in filing his claim and stated that, as a native Alaskan Indian, adhering to strict time

constraints was not a part of his culture. Appellant further noted that almost all of his coworkers were deceased and some succumbed to death relating to Agent Orange exposure. He submitted a notice of suspension dated August 16, 1965, prepared by Leonard J. Davis, acting area manager, who proposed to suspend appellant for three days due to unauthorized absence for 28 scheduled workdays. In a letter dated August 26, 1965, Mr. Davis advised appellant that he was formally suspended for three days. Also submitted was an undated witness statement from Thomas J. Flynn, a coworker, who noted that during appellant's tenure as mechanic from 1964-1965, he assisted other plant mechanics with performing maintenance and operation of the airfield buildings and remote sites. Mr. Flynn reported that appellant operated a large sprayer and duster, which spread pesticides to combat mosquitoes, white sox, horse files and other insects. Appellant submitted additional medical records from Dr. Sapin dated October 10, 1997 to October 12, 2000, who addressed treatment for angina chest pain and coronary artery disease. Other treatment notes from January 26, 1998 to August 21, 2002, noted appellant's continued treatment for recurrent angina, chronic obstructive pulmonary disease, prostatitis, left shoulder injury and incontinence. Appellant sought treatment from Dr. Kenneth P. Moore, a Board-certified urologist, on January 15, 2003, who noted a history of a benign growth of the prostate, including partial removal of the prostate gland and later placement of an artificial urinary sphincters for urinary incontinence. Dr. Moore advised that he could not comment on the likelihood that appellant's prostate growth was caused or accelerated by exposure to various chemical substances, since his condition was so common in the general population of men his age. He advised that it may well be that the growth was somewhat accelerated but he had no way to ascertain this.

In a decision dated March 1, 2004, the Office denied appellant's reconsideration request on the grounds that appellant had neither raised a substantive legal question or included new or relevant evidence and was therefore insufficient to warrant review of the prior decision.

## ***LEGAL PRECEDENT***

Under section 8128(a) of the Federal Employees' Compensation Act,[1] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,[2] which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

> "(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
>
> "(ii) Advances a relevant legal argument not previously considered by the [Office]; or

[1] 5 U.S.C. § 8128(a).

[2] 20 C.F.R. § 10.606(b).

"(iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office]."

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[3]

## ***ANALYSIS***

Appellant's December 16, 2003 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office.

In the present case, the Office denied appellant's claim without conducting a merit review on the grounds that the evidence submitted was irrelevant to the issue in the case, specifically, the timeliness of his claim for compensation. In support of his request for reconsideration, appellant did not submit any new evidence relevant to the underlying issue: whether he timely filed his claim. In his reconsideration request, appellant advised that he worked with highly toxic chemicals such as Agent Orange and pesticides and the employing establishment did not provide safety precautions or procedures. Appellant noted that he was not aware of the timeliness rule when filing his claim. However, the Board has held that ignorance of the law "has never been accepted by the Board as sufficient cause or reason for failure to file a timely claim."[4] Therefore, this argument has no reasonable color of validity and is insufficient to require the Office to reopen his claim for review.[5] The Board finds that the Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review. Appellant did not otherwise show that the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact 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).

With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, appellant submitted evidence including a notice of proposed suspension dated August 16, 1965 and an actual letter of suspension dated August 26, 1965, prepared by his manager Mr. Davis. However, Mr. Davis's letters failed to address the issue of timeliness of appellant's claim nor indicate that he was aware appellant had been injured or that he had received notice of an employment-related injury within 30 days. Appellant also submitted various new medical records documenting numerous medical conditions; however, these records are not relevant to the issue of the timeliness of appellant's claim. Finally, appellant submitted a report from Dr. Moore dated January 15, 2003, who advised that appellant

[3] 20 C.F.R. § 10.608(b).

[4] *See Marcelo Crisostomo*, 42 ECAB 339, 342 (1991).

[5] While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening for further review of the merits is not required where the legal contention does not have a reasonable color of validity. *Arlesa Gibbs*, 53 ECAB 204 (2001).

was treated in the past by urologists for benign growth of the prostate, including partial removal of the prostate gland and later placement of an artificial urinary sphincters for urinary incontinence. He advised that he could not comment on the likelihood that his prostate growth was caused or accelerated by exposure to various chemical substances, since his condition is so common in the general population of men his age. As noted this report was not relevant as it did not address the issue of timeliness of appellant's claim. Appellant did not otherwise provide any new and relevant evidence pertaining to the timeliness issue.

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 December 16, 2003 request for reconsideration.

## ***CONCLUSION***

The Board finds that the Office properly denied appellant's compensation claim on the grounds that he did not establish that his claim was filed within the applicable time limitation provisions of the Act and that the Office properly denied appellant's request for reconsideration.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated March 1, 2004 is affirmed.

Issued: November 8, 2005
Washington, DC

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

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

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