



## **FACTUAL HISTORY**

On June 5, 2000 appellant, then a 35-year-old letter carrier, sustained a traumatic back injury in the performance of duty. Appellant stated that he was pulling a box containing a 50-pound air conditioner out of a tub when the handle broke and the box fell back into the tub. He stopped work on June 6, 2000 and returned to limited-duty work on June 9, 2000. Appellant resumed his regular duties on June 16, 2000.<sup>1</sup> The Office accepted the claim for lumbosacral strain and appellant received continuation of pay for June 6, 7 and 8, 2000.

On September 24, 2002 appellant filed a claim for compensation (Form CA-7) for lost wages beginning April 5, 2002. He asked the Office to expand his claim to include anxiety and panic attacks as conditions related to his June 5, 2000 employment injury. In a report dated June 19, 2000, Dr. David Q. Bui noted that appellant had experienced anxiety attacks, which were triggered by his fall on the job. From June 12 to 16, 2000 Dr. Bui excused appellant from work due to low back pain, stress and anxiety. On August 22, 2001 appellant was diagnosed with a disc herniation at L5-S1 and was placed on temporary total disability for six weeks.<sup>2</sup> Appellant also submitted medical evidence indicating he was experiencing back pain and disabling panic attacks in July 2002. On July 29, 2002 appellant's lower back pain had radiated into his right buttocks and he was advised to undergo a vertebral axial decompression (VAX-D). Dr. E. Michael Gutman, a Board-certified psychiatrist, placed appellant off work from July 29 to August 3, 2002 because of anxiety, panic attacks, low back pain and disc disease. In a report dated August 9, 2002, Dr. Gutman diagnosed bipolar disorder, panic disorder, generalized anxiety disorder, L4-5 disc bulge, degenerative joint disease at L4-5 and central disc protrusion at L5-S1. He noted that appellant injured his back at work on "June 6, 2000" and he explained that the stress of a low back condition appeared to have triggered an aggravation of generalized anxiety disorder, bipolar disorder and panic symptoms. On August 16, 2002 Dr. Gutman indicated that appellant should remain off work for the next three months due to his generalized anxiety and panic attacks.

In a November 7, 2002 decision, the Office denied appellant's claim for wage-loss compensation. The Office found that the record did not establish an injury-related disability for work after June 8, 2000. The Office further indicated that many of the reports furnished by appellant pertained to a "panic disorder[,] which [had] not been shown to be attributable to the injury on June 5, 2000."<sup>3</sup>

Appellant requested an oral hearing, which was held on October 20, 2003. The Office received additional medical evidence, which included an August 18, 2002 fitness-for-duty examination from Dr. Scott D. Levine, a Board-certified internist, who found that appellant's

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<sup>1</sup> Appellant was initially removed from service on August 30, 2000, but was subsequently reinstated. The employing establishment ultimately terminated appellant for cause on August 14, 2001.

<sup>2</sup> Appellant was treated at the Florida Spine Institute; however, the signature of the doctor who signed the August 22, 2001 work status report is illegible.

<sup>3</sup> Where appellant claims that a condition not accepted or approved by the Office was due to his employment injury, he bears the burden of proof to establish that the condition is causally related to the employment injury. *Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996).

back complaints were not consistent with the objective evidence. Dr. Levine further indicated that while appellant's back condition did not preclude him from performing his letter carrier duties, his severe anxiety disorder rendered him unable to work. Appellant also submitted additional treatment records and two medical reports from Dr. Gutman dated October 22 and December 11, 2002. In his December 11, 2002 report, Dr. Gutman indicated that appellant's back condition did not prevent him from working, but from a psychiatric standpoint appellant was still unable to work.

By decision dated January 14, 2004, the Office hearing representative affirmed the November 7, 2002 decision. He concluded that the medical evidence of record was insufficient to establish that the claimed periods of disability were causally related to appellant's June 2000 work injury.

Appellant, with the assistance of counsel, requested reconsideration on May 11, 2005.<sup>4</sup> Counsel submitted copies of prior Office decisions dated January 16, April 17, 2001 and November 7, 2002. He also resubmitted Dr. Gutman's October 22, 2002 report, wherein the doctor stated that appellant's current psychiatric condition was "directly related to his pain from his workers' compensation accident in 2000."

In a decision dated June 28, 2005, the Office denied appellant's May 11, 2005 request for reconsideration because it was untimely filed and appellant failed to demonstrate clear evidence of error on the part of the Office in denying his claim for wage-loss compensation.

### **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>5</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.<sup>6</sup> The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).<sup>7</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>8</sup> In those instances when a request for reconsideration is not timely filed, the Office

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<sup>4</sup> The request for reconsideration identified Exhibits A through H as attachments; however, the record does not include the referenced Exhibits E through H.

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

<sup>6</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>7</sup> 20 C.F.R. § 10.607 (1999).

<sup>8</sup> 20 C.F.R. § 10.607(a) (1999).

will undertake a limited review to determine whether the application presents “clear evidence of error” on the part of the Office in its “most recent merit decision.”<sup>9</sup>

### ANALYSIS

Section 10.607(a) provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.<sup>10</sup> The one-year time limitation begins to run the day following the Office’s January 14, 2004 decision, as this was the last merit decision in the case. Appellant’s request for reconsideration was dated May 11, 2005; therefore, he is not entitled to review of his claim as a matter of right. Because appellant filed his request more than one year after the Office’s January 14, 2004 merit decision, he must demonstrate “clear evidence of error” on the part of the Office in denying his claim for wage-loss compensation.<sup>11</sup>

To establish clear evidence of error, appellant must submit evidence relevant to the issue that was decided by the Office.<sup>12</sup> Counsel argued that the Office committed error when it failed to consider the emotional and psychological conditions that resulted from appellant’s June 5, 2000 back injury.<sup>13</sup> On reconsideration, the Office noted that Dr. Gutman’s October 22, 2002 report did not establish that appellant’s psychiatric condition was employment related.<sup>14</sup> Dr. Gutman indicated that appellant’s panic attacks, depressive disorder and bipolar symptoms were directly related to his pain from his employment injury in 2000. However, he did not fully address how appellant’s current back condition, which reportedly included a disc bulge and degenerative joint disease at L4-5 as well as a central disc protrusion at L5-S1, was related to the June 5, 2000 accepted injury for lumbosacral strain. Moreover, the physician did not adequately explain how appellant’s current back pain either caused or contributed to his psychiatric condition. In fact, the doctor offered no explanation other than reporting that appellant stated that his

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<sup>9</sup> 20 C.F.R. § 10.607(b) (1999). To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. *See Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise and explicit and it must be apparent on its face that the Office committed an error. *See Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. *Id.* Evidence that does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish clear evidence of error. *See Jesus D. Sanchez*, 41 ECAB 964 (1990). 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. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

<sup>10</sup> 20 C.F.R. § 10.607(a) (1999).

<sup>11</sup> 20 C.F.R. § 10.607(b) (1999).

<sup>12</sup> *See Dean D. Beets*, *supra* note 9.

<sup>13</sup> Counsel identified the November 7, 2002 decision as the subject of the request for reconsideration; however, this was not the most recent merit decision. The Office correctly noted in its June 28, 2005 decision that appellant had requested an oral hearing in response to the November 7, 2002 decision and that the Office hearing representative affirmed the prior decision on January 14, 2004.

<sup>14</sup> This report was initially submitted November 24, 2003 when the case was pending before the Branch of Hearings and Review.

psychiatric condition was causally related to his workers' compensation accident. Dr. Gutman's October 22, 2002 report had previously been of record and is not sufficient to establish clear evidence of error in the Office's denial of his claim. Appellant's May 11, 2005 request for reconsideration and the accompanying evidence failed to demonstrate clear evidence of error on the part of the Office in denying his claim for compensation. Accordingly, the Office properly declined to reopen appellant's case for merit review under section 8128(a) of the Act.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 28, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 28, 2005  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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