



## **FACTUAL HISTORY**

On May 10, 2002 appellant, then a 41-year-old outgoing clerk, filed a claim for compensation alleging that he sustained an L5-S1 condition on October 10, 2001 as a result of bending over repeatedly to drop mail into a general purpose container.<sup>1</sup>

In a decision dated June 27, 2002, the Office denied appellant's claim on the grounds that the evidence was insufficient to establish that he experienced the incident as alleged. The Office noted that a supervisor of distribution operations disputed the incident, as appellant's assignment did not require bending to drop mail into a container or lifting anything heavy. His assignment involved only sitting and casing letters in a manual operation. The Office gave appellant an opportunity to provide additional details about the incident and to submit supportive evidence, but he failed to do so. The Office also noted an unexplained delay of seven months from the date of injury to the time appellant filed his claim. On the date of the alleged injury, a nurse recommended that appellant go to the emergency room for, treatment of high blood pressure and headaches, not for any back condition. The Office explained that there were such inconsistencies in the evidence as to cast doubt on whether appellant experienced the incident as alleged.<sup>2</sup>

In an attached statement of review rights, the Office notified appellant that any request for reconsideration had to be made within one year of the date of the decision.

In a letter dated December 15, 2003, appellant requested reconsideration: "All the evidence is included in this letter, which includes the surgeon report and the occupational report that was [originally?] reported a recurrent of my L5-S1, which I filed back in Oct[ober] [20]01. Would you please reconsider my case."

In a decision dated February 3, 2004, the Office denied appellant's request for reconsideration on the grounds that it was untimely and did not present clear evidence of error in the Office's June 27, 2002 decision.

On February 20, 2005 appellant again requested reconsideration of his claim. He took issue with the Office's finding that he was not taken to the emergency room to be treated for back pain. He submitted an emergency room record dated October 10, 2001 showing a chief complaint of back pain.<sup>3</sup> Appellant took issue with the Office's finding of an unexplained delay

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<sup>1</sup> He dated his signature on the claim form "9, May 01," which is incongruous with an October 10, 2001 date of injury. "Date of this notice" was given as May 10, 2002.

<sup>2</sup> The Office noted that appellant had a previous employment injury: "Your previous claim for a back injury of May 29, 1992, file number 13-0987862, was accepted for lumbar strain and herniated disc, with lumbar fusion surgery performed. Following a period of disability, your benefits under that claim were denied for your failure to accept a job offer which had been found suitable. You subsequently resumed work with the Postal Service. A claim which you filed for recurrence of disability of September 23, 2001 due to the original May 29, 1992 injury was denied in a decision of April 22, 2002, as evidence was insufficient to establish a recurrence of disability due to the original injury."

<sup>3</sup> The document noted a long history of low back pain, with surgery in 1993 and treatment by over-the-counter medications only. More specifically, the document noted a history of low back pain for two weeks with mild right occipital headache that "comes and goes." Also noted was a history of borderline high blood pressure, for which he was never on a prescription.

in filing his claim. He related that he filed an industrial injury report on approximately October 23, 2001, that the Office replied approximately February 2002 and asked for a detailed report. He sent a report from Dr. Leslie A. Oshita, a specialist in occupational health, in March 2002 and that approximately April 22, 2002 the Office stated that he could still file a claim for a new injury.<sup>4</sup> He stated: “After receiving this reply, I immediately filed a [Form] CA-1 on May 9, 2001, [sic] as required by your office.”

Appellant noted that it was John Caoile, the supervisor of distribution operations, who indicated that appellant’s assignment did not involve bending to drop mail into containers. Appellant explained that Mr. Caoile was not and had never been his supervisor. He noted that Mr. Caoile’s assignment was on the third floor while his was on the first, so it would be impossible for Mr. Caoile to know what appellant’s job was and what was assigned to him. Appellant previously notified the Office of the name of the supervisor to whom he reported and the supervisor who was responsible for the transportation on the day of his injury. To his knowledge, appellant stated, at no time was an attempt made to get information from the supervisors who sent him to the postal nurse and arranged his transportation to the hospital on the evening of his injury.

To support his request for reconsideration, appellant submitted witness statements. On February 11, 2004 Marc Clyburn stated:

“I [a]m writing this statement in regards of what I observed of [appellant] and his working duties on October 10, 2001. [He] did everything that everyone in this unit 044 and 030 did including pushing or pulling equipment, bending in GPCs [general purpose containers] or hampers to get mail trays etc.

“Our supervisor I believe was Robert Felix or Yvonne Davis not Juan Caoile, he was not in the area.”

On February 10, 2004 Steven Bowe stated:

“On October 10, 2001 I was working in units 044 and 030 with [appellant]. [He] was performing the following duties: bending over in hampers and GPC’s to get mail and pulling and pushing equipment.

“[Mr.] Caoile was not our supervisor and was not in the area. Ms. Davis was our supervisor.”

Appellant attached a copy of the Office’s June 27, 2002 decision and a copy of an August 11, 2004 letter from the District Director of the San Francisco Office, who explained that appellant’s claim was initially denied because the facts surrounding the claimed injury were unclear. As an alternative appellant could file a Form CA-2 based on his development of back

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<sup>4</sup> This development relates to appellant’s prior back injury of May 29, 1992 under OWCP File No. 13-0987862. Because the Office terminated his compensation for the 1992 injury on the ground that he refused suitable work, appellant would no longer be entitled to compensation for that injury, including any recurrence that might have arisen beginning September 2001.

pain beginning September 2001. Appellant submitted a November 12, 2003 operative report showing that he underwent a reexploration of the left L5-S1 interlaminar space, removal of some disc material and repeat discectomy.

In a March 13, 2002 report, Dr. Oshita noted that, by history, appellant recovered from the original disability resulting from his May 1992 injury without residual symptoms. He returned to “regular” employment in 2001 as a modified distribution clerk. “It appears that he reinjured his lower back and herniated the same L5-S1 disc in October 2001 from loading trays into GPCs at work, involving repetitive bending. By the [magnetic resonance imaging] [scan] of December 2001, there is a herniated disc at L5-S1, but different in appearance to the herniation seen on the earlier (1993) study.” Dr. Oshita stated: “I would not say the initial condition was ‘prone’ to recurrence, but [appellant] gives no history of any factors or activities causing the current herniated disc other than his work duties at the U.S. Postal Service.” Dr. Oshita recommended that appellant proceed with surgery to remove the herniated disc, which was irritating the nerve roots on the left and for possible fusion.

In a decision dated June 9, 2005, the Office denied appellant’s February 20, 2005 request for reconsideration on the grounds that it was untimely and failed to show clear evidence of error in the June 27, 2002 decision.

### **LEGAL PRECEDENT**

Section 8128(a) of the Federal Employees’ Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

- (1) end, decrease, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”<sup>5</sup>

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. The Office will consider an untimely application only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.<sup>6</sup>

The term “clear evidence of error” is intended to represent a difficult standard.<sup>7</sup> If clear evidence of error has not been presented, the Office should deny the application by letter

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<sup>5</sup> 5 U.S.C. § 8128(a).

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

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.c (January 2004).

decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.<sup>8</sup>

### ANALYSIS

The most recent merit decision in this case is the Office's June 27, 2002 decision denying appellant's claim for compensation on the grounds that the evidence was insufficient to establish that he experienced the incident as alleged. The Office properly notified appellant that he had one year from the date of that decision to make any request for reconsideration, *i.e.*, he had until June 27, 2003 to file a timely request. His February 20, 2005 request for reconsideration is well outside this one-year period and is therefore untimely.

Because appellant's February 20, 2005 request for reconsideration is untimely, he is entitled to a merit review of his case only if his request presents clear evidence of error in the Office's June 27, 2002 decision. In that decision, the Office gave three reasons for denying his claim: (1) the employing establishment disputed that the incident occurred, as appellant's assignment did not require bending to drop mail into a container or lifting anything heavy; (2) there was an unexplained delay of seven months from the date of injury to the time appellant filed his claim; and (3) on the date of the alleged injury a nurse recommended that appellant go to the emergency room for high blood pressure and headaches, not for any back condition. Each of these reasons casts doubt on appellant's claim that an injurious incident occurred at work on October 10, 2001.

As to the first reason for denial, appellant argued that the Office's source for his activities on or about October 10, 2001 was in no position to provide reliable information. But Mr. Caoile was a supervisor of distribution operations. From the details he provided in his January 12, 2002 challenge to appellant's claim, he appeared very much to be in a position to provide reliable information about appellant's job assignment.

Appellant submitted statements from two witnesses confirming that he was bending over in hampers and GPCs on October 10, 2001 to get mail, just as he alleged and was pulling and pushing equipment. But these statements come almost two and a half years after the fact and the authors gave no explanation as to how they were able to recall what any one coworker did on any particular date so long ago. Also, the Board notes that the witness statements are brief and very similar in both content and expression, suggesting that they are not the product of independent recollection. At best, this evidence indicates a disagreement with the supervisor of distribution operations about what appellant's assignment did or did not require him to do. This does not establish clear evidence of error.

As to the second reason for denial, appellant's explanation of how he eventually came to file a claim for a traumatic injury does not support that the incident occurred as alleged. Initially, he attributed his low back symptoms to an earlier injury, not to anything traumatic on October 10, 2001. It was only after the Office advised that no compensation was payable for a recurrence of his earlier injury that he filed a claim implicating a traumatic injury on a particular date.

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<sup>8</sup> *Id.* Chapter 2.1602.3.d(1).

As to the third reason for denial, appellant submitted an emergency room record dated October 10, 2001 showing a chief complaint of back pain. In no way does this evidence support that the incident occurred as alleged. The emergency room record indicates that appellant was experiencing low back pain for two weeks before the alleged date of injury, placing the onset in September 2001, consistent with his initial claim of recurrence. This evidence makes no mention of any incident at work on October 10, 2001. Had appellant injured his low back on October 10, 2001 while bending over to drop mail into a general purpose container, he could have related this history to the emergency room personnel who saw him that same date. He did not.

As for Dr. Oshita's March 13, 2002 report, the Board notes that it is not contemporaneous to the alleged date of injury, does not relate that an incident occurred on October 10, 2001 and relies solely on appellant's late account of events, which is what the Office questions. The evidence is not sufficient to overcome the October 10, 2001 emergency room record and its notable failure to mention any incident at work that date.

Because appellant's untimely request for reconsideration raises no substantial question as to the correctness of the Office June 27, 2002 decision,<sup>9</sup> the Board will affirm the denial of that request.

### **CONCLUSION**

The Board finds that the Office properly denied appellant's February 20, 2005 request for reconsideration.

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<sup>9</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 9, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 18, 2006  
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