



follow instructions.<sup>1</sup> The employing establishment submitted statements from several witnesses, including Mr. Johnson, who denied pushing or having any physical contact with appellant. Michael Ghee stated that Mr. Johnson and appellant exchanged words and he stepped in to separate the two employees. The witnesses did not see appellant strike the APC.

On May 3, 1989 the claims examiner made a telephone call to appellant to discuss the disputed claim. He noted that appellant was not available and his father could not provide a good time to return the call. The claims examiner had a conference call with the employing establishment injury compensation specialist that day. There was no dispute that an argument arose between appellant and Mr. Johnson but individuals witnessing the incident did not support that physical contact was made between the parties. The employing establishment noted that appellant had recently injured his back in a nonemployment-related accident on February 5, 1989 and returned to work at light duty on March 10, 1989.

On May 11, 1989 the claims examiner met in conference with appellant and a union representative at the district Office. Appellant acknowledged being injured on February 5, 1989 in a trolley accident but contended that he had only injured his right shoulder and not his back. He claimed that, prior to the March 20, 1989 incident, Mr. Johnson had harassed him about his light-duty assignment which gave rise to an argument. Appellant stated that he and Mr. Johnson initially rubbed stomachs and that Mr. Johnson was pulled away by Mr. Ghee. Mr. Johnson then rammed into appellant twice with his whole body. Appellant stated that his supervisor did not witness the event and contended that the coworkers who provided witness statements were friends of Mr. Johnson. Appellant went to the dispensary for treatment. The claims examiner noted that the dispensary records reflected a history of a back injury in the trolley accident. The claims examiner also noted that appellant's depiction of the March 20, 1989 incident was not supported by the statement of Mr. Ghee and no explanation for these discrepancies was provided.

In a May 19, 1989 decision, the Office denied appellant's claim finding that he failed to establish that the March 20, 1989 incident occurred at the time, place and in the manner alleged.<sup>2</sup>

Appellant sought reconsideration on May 31, 1989. He submitted treatment notes from Dr. Maurice Singer, an osteopath, who noted treating appellant on March 20, 1989 and that he was presently disabled for work. An authorization for medical attention dated March 20, 1989 related the history that appellant banged his back against an APC after being pushed by another employee. The medical unit physician indicated that appellant could return to work that day under his physical restrictions. In a May 26, 1989 letter, the administrator for the West Philadelphia Medical Center noted that appellant had been treated since February 6, 1989 following a trolley-to-trolley collision. He was released to return to light duty on March 10, 1989 and was next seen on March 21, 1989 by a Dr. Gunnar Ek. The notes of the examining physician indicated that appellant related reinjuring his back and shoulder while at work the

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<sup>1</sup> The employing establishment noted that, at the time of the incident, appellant was on limited duty due to a prior nonwork-related back injury.

<sup>2</sup> The appeal rights attached to the decision advised appellant that he had one year in which to request reconsideration and submit additional evidence.

previous day. The medical center could not judge whether or not the exacerbation of appellant's injuries was a result of "a happening at work."

By decision dated August 9, 1989, the Office found that the evidence submitted did not warrant modification of the May 19, 1989 decision.<sup>3</sup>

On January 24, 2000 appellant stated that the employing establishment had information relevant to his claim which just became available to him. He noted that he was separated from the employing establishment but the matter was in litigation. Appellant added that his letter was not a request for reconsideration but to "request an investigation into this matter." He contended that he sustained injury on March 20, 1989 and that the employing establishment had withheld relevant medical evidence. Appellant enclosed materials pertaining to an April 3, 1989 fitness-for-duty appointment which referenced the March 20, 1989 history of injury, an April 7, 1989 disability certificate from Germantown Orthopaedic Associates designating that he was totally disabled from March 20 to April 10, 1989, and an April 17, 1990 decision of the Pennsylvania Unemployment Compensation Board of Review. The Board of Review found that appellant was not ineligible for benefits under the unemployment compensation law as "the employer has failed to prove by competent first-hand testimony that the March 20, 1989 pushing incident did not occur...."

On February 1, 2000 appellant noted that his claim would have to be reopened to be investigated, contending that the agency held back vital evidence supporting his claim. He also made reference to the unemployment compensation decision. Appellant stated, "... I am technically entitled to workers' compensation from March 21, 1989 to November 9, 1989 at which time I was ordered back to work by my treating physician...." By letter dated February 18, 2000, appellant again requested the Office to further investigate his claim. He submitted correspondence with an attorney he contacted regarding representation. Counsel noted that another request for reconsideration could be filed but evidence in support of appellant's case should be submitted at the same time.<sup>4</sup> In a January 15, 2001 letter to the Secretary of Labor, appellant further inquired into his claim. He repeated his allegation that the employing establishment had withheld medical evidence which established his disability. In a January 20, 2001 response, the Director advised that appellant could contact the district Office where the claim was adjudicated, noting that it had remained dormant since 1989. By letter dated February 13, 2001, the Director noted that, although the period for requesting reconsideration had expired, appellant could submit evidence of clear evidence of error to the Office for consideration.

On March 6, 2001 appellant advised the Office that he was "submit[ting] clear evidence of error" for reconsideration. He stated that at no time did he ever deny injuring his back in the trolley accident and addressed the medical evidence of record. Appellant contended that the denial of his claim was in error as the dispensary record showed that he hurt his back and the March 26, 1989 letter from the medical center established that he had exacerbated his back

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<sup>3</sup> Appellant was again apprised of the one-year time limitation for seeking reconsideration before the Office.

<sup>4</sup> On February 29, 2000 appellant visited the district Office, where he noted that he had been terminated by the postal service and was interested in pursuing his claim

condition at work. He argued that the Office should have referred him for a second opinion examination. Appellant characterized the statements of Mr. Johnson as self-serving and that the other statements should not have been accepted as the witnesses were friends of his coworker and biased. He contended that the employing establishment withheld medical documents which, if had been timely submitted, would have established his claim. Appellant again noted the finding of the Pennsylvania Unemployment Compensation Review Board, stating that it also supported his claim. He stated that the Office was biased in rejecting his claim.

The Office responded on March 9, 2001, advising appellant that the denial of his claim was premised on the fact that he failed to establish a physical altercation by pushing or shoving in the March 20, 1989 incident. The letter addressed aspects of the claim and cited deficiencies in the medical evidence. Appellant replied on March 20, 2001, raising additional contentions regarding the medical evidence and alleging that his records had been tampered with as important documents were missing. In an April 10, 2001 letter, the Office responded to the matters raised in appellant's reply.

After this flurry of correspondence, the matter was again dormant until September 14, 2004 when appellant made a request to reopen his claim. On September 18, 2004, he noted that he was terminated from the employing establishment for filing a compensation claim. Appellant stated that the employing establishment did not establish that he filed a false claim, and contended that the statements obtained from the witnesses were false. "However, none of the statements denied the fact that I injured my lower back and exaggerated [sic] my upper back injury when I fell backwards into a mail container.... I am not trying to appeal the case; I just want my job back." In a November 18, 2004 letter, appellant requested reconsideration, contending that he never received a developmental letter from the Office regarding his claim. He noted that he was unaware of obtaining a CA-20 and that the Office never helped him with his burden of proof. Appellant contended that neither he nor his physician received proper instructions concerning the processing of his claim such that the Office's August 8, 1989 decision should be reversed.

Appellant attached an October 21, 2004 letter from Dr. Maurice Singer, who stated that he had discussed appellant's medical records and the incidents of February 5, 1989 and March 20, 1989. "[He] stated that, following the initial incident, he sustained injury to his back and right shoulder. [Appellant] further stated that the incident that occurred on March 20, 1989 exacerbated those conditions. [He] asked me to write a letter affirming these statements." Dr. Singer advised appellant that no records relating to these incidents existed and that none of the individuals who participated in his care remained on staff. He noted having no personal knowledge of any of the aforementioned events.

In a December 15, 2004 addendum, appellant reiterated that he did not receive a development letter after initially filing his claim. He alleged other errors, contending a due process violation as the Office failed to assist him in his burden of proof and to request more specific details from his attending physicians.

In a January 3, 2005 decision, the Office denied appellant's request for reconsideration. It found that the request was untimely filed as his letters of September 18 and December 15, 2004 were submitted outside one year following the August 9, 1989 decision. The Office

conducted a limited review of the evidence submitted and found that it did not establish clear evidence of error in the denial of his claim. The Office noted that, although appellant was not sent a developmental letter, a telephone conference was held and all evidence he submitted was considered. The claim was denied on the basis that the evidence did not establish that he was pushed by another employee as claimed and that the lack of medical evidence was a secondary issue. The new evidence submitted and arguments raised did not establish that the March 20, 1989 incident took place as alleged.

### **LEGAL PRECEDENT**

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.<sup>5</sup> The Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.<sup>6</sup> When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.<sup>7</sup> The Office's procedures state that it will reopen a claimant's claim for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's application for review shows clear evidence of error on the part of the Office.<sup>8</sup> The Office will limit its focus to a review of how the newly submitted evidence bears on the evidence of record.<sup>9</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>10</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office. Such evidence 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's decision. The Board makes an independent determination of whether a claimant has submitted clear evidence

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<sup>5</sup> 5 U.S.C. § 8128(a).

<sup>6</sup> 20 C.F.R. § 10.607. *See Alan G. Williams*, 52 ECAB 180 (2000).

<sup>7</sup> *George C. Vernon*, 54 ECAB 319 (2003); *Charles J. Prudencio*, 41 ECAB 499 (1990).

<sup>8</sup> The implementing regulations provide that the Office will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on its part in the most recent decision. 20 C.F.R. § 10.607(b). *See Gladys Mercado*, 52 ECAB 255 (2001).

<sup>9</sup> *See Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>10</sup> *See Alberta Dukes*, 56 ECAB \_\_\_\_ (Docket No. 04-2028, issued January 11, 2005). *Compare Pasquale C. D'Arco*, 54 ECAB 560 (2003).

of error on the part of the Office such that it abused its discretion in denying further merit review in the face of such evidence.<sup>11</sup>

### ANALYSIS

The Office properly determined that appellant failed to file a timely request for reconsideration. Appellant's claim of injury was denied by the Office in a May 19, 1989 decision which found that he did not establish that the March 20, 1989 incident occurred as alleged. Appellant sought reconsideration and, in an August 9, 1989 decision, the Office denied modification of the prior decision. This was the last merit review of the claim. Appellant's September 14, 2004 and subsequent letters requesting reconsideration were submitted 15 years after the August 9, 1989 merit decision. Consequently, he must demonstrate clear evidence of error by the Office in denying the claim.

Appellant's contentions concerning the denial of his claim consist of three primary points: the Office failed to assist in the development of the claim violating his due process rights; the employing establishment withheld relevant medical information; and that the weight of the evidence of record establishes that he sustained injury on March 20, 1989.

As noted, the denial of appellant's claim was not premised on any deficiency in the medical evidence. Rather, the Office found that there was conflicting and inconsistent evidence of record pertaining to the manner in which the alleged injury occurred. Appellant originally alleged that he was pushed by a coworker and struck an APC container. However, evidence was submitted from witnesses who disputed his allegations. The Office did not accept that appellant was pushed or shoved by Mr. Johnson on March 20, 1989, relying primarily on the statements of coworkers. Mr. Ghee noted that he intervened and separated the two employees. Other statements did not note appellant striking an APC. The Office did not send appellant a developmental letter; however, this is not clear evidence of error. The record contains a May 3, 1989 notice sent to appellant that a conference would be held before the claims examiner on May 11, 1989 at the district Office. On May 11, 1989 appellant appeared with a representative and was questioned by the claims examiner as to the manner of injury and notified orally of certain discrepancies in the record. He then described having rubbed stomachs with Mr. Johnson who, after being pulled away by Mr. Ghee, rammed into appellant twice with his whole body. The claims examiner noted that appellant's further depiction of the incident was not supported by any witness statements.

The May 19, 1989 denial of his claim was premised on the fact he did not establish that the March 20, 1989 incident occurred at the time, place or in the manner alleged. The claims examiner noted that the employing establishment submitted evidence which disputed appellant's version of how he sustained injury and that he had no witnesses to support his description of events. Appellant sought reconsideration and submitted medical evidence in support of his contention that he had sustained an injury and was disabled. However, this evidence was not relevant to the basis on which his claim was denied. On August 9, 1989 the Office again denied the claim following a merit review.

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<sup>11</sup> See *Leon J. Modrowski*, 55 ECAB \_\_\_\_ (Docket No. 03-1702, issued January 2, 2004); *Dennis G. Nivens*, 46 ECAB 926 (1995).

Appellant argues that he was denied due process as the Office failed to properly assist him in the development of his claim. Initially, this argument raises a constitutional question. The Supreme Court has held that constitutional questions are unsuited to resolution in administrative hearing procedures.<sup>12</sup> As the Board is an administrative body, it does not have jurisdiction to review a constitutional claim such as that made by appellant.<sup>13</sup> The federal courts retain jurisdiction over decisions under the Act where there is a charge of a violation of a clear statutory mandate or there is a constitutional due process claim.<sup>14</sup>

The Board notes, however, that, subsequent to the allegedly erroneous May 19, 1989 decision, appellant received further merit review of his claim on August 9, 1989 before the Office. The record reflects that appellant met with a claims examiner on May 11, 1989 and was notified of inconsistencies concerning his depiction of the March 20, 1989 incident. Following the May 19, 1989 denial, appellant did not submit any additional evidence to the Office relevant to this aspect of the claim. Although he was advised by the claims examiner at the conference and clearly on notice that the claimed incident was not accepted as occurring as alleged, appellant did not submit any further evidence relevant to this point. Following the August 9, 1989 merit review, appellant did not timely seek reconsideration or submit additional evidence to strengthen his version of how the incident occurred. Appellant bore the burden of proof to establish fact of injury. The record reflects that he was apprised by the Office of the deficiencies in his claim and given the opportunity to cure them. Appellant's contends that the statements submitted from his coworkers should not be believed because they were friends of Mr. Johnson and are therefore biased. He did not submit any evidence to substantiate this allegation. The Office weighed the evidence of record and found that appellant did not establish that he was pushed, shoved or had any other physical interaction with Mr. Johnson during the March 20, 1989 incident. Under the circumstances of this case, appellant has not established clear evidence of error on the part of the Office due to any deficiency in assisting him in the development of his claim.

Appellant's arguments that the employing establishment withheld relevant medical evidence and that the dispensary and other medical records establish his injury are not relevant to the point on which this claim was denied. The Office's consideration of fact of injury consists of two elements that are considered in conjunction with one another: whether the employee actually experienced the employment incident alleged to have occurred and whether this incident caused a personal injury.<sup>15</sup> The evidence highlighted by appellant does not cure the factual deficiencies in the claim. Appellant was provided the opportunity to submit additional evidence in support of his contentions but failed to establish the March 20, 1989 incident occurred as he alleged. Much of the medical evidence lists a history of the incident as obtained from appellant, but this does not establish that appellant's version of events occurred. This is highlighted by

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<sup>12</sup> See *Johnson v. Robinson*, 415 U.S. 361 (1974) and cases cited therein.

<sup>13</sup> See *Robert F. Stone*, 57 ECAB \_\_\_\_ (Docket No. 04-1451, issued December 22, 2005); *Dianna L. Smith*, 56 ECAB \_\_\_\_ (Docket No. 04-2256, issued May 6, 2005); *Vittorio Pittelli*, 49 ECAB 181 (1997).

<sup>14</sup> See *Woodruff v. U.S. Department of Labor*, 954 F.2d 634 (11<sup>th</sup> Cir. 1992); *Harry D. Butler*, 43 ECAB 859 (1992).

<sup>15</sup> See, e.g., *Tracey P. Spillane*, 54 ECAB 608 (2003).

Dr. Singer's October 21, 2004 letter acknowledging that he had no personal knowledge of the events related by appellant. This evidence does not establish clear evidence of error in the Office's decisions denying the claim.

The decision of the Pennsylvania Unemployment Compensation Board of Review does not establish clear evidence that the Office erred in denying appellant's claim. It is well established that decisions by other federal agencies or governmental bodies are not dispositive to issues raised under the Act.<sup>16</sup> Decisions made by such tribunals are pursuant to different statutes which have varying standards for establishing disability and eligibility for benefits. The finding that appellant was eligible for unemployment compensation in Pennsylvania is not determinative of his rights under the Act. Appellant cites to that aspect of the Board of Review decision which noted that "the employer has failed to prove by competent first hand testimony that the March 20, 1989 pushing incident did not occur..." The evidentiary record and testimony submitted before the Board of Review is not obvious from their decision. In this case, appellant's claim before the Office arising under the Act was controverted by the employer and evidence was submitted from witnesses disputing his description of the March 20, 1989 incident. The decision of the Board of Review does not establish clear evidence that the Office erred in denying appellant's claim based on the evidence submitted to the record.

### **CONCLUSION**

The Board finds that the Office properly found appellant's request for reconsideration to be untimely filed and that he failed to establish clear evidence of error in the denial of his claim for compensation.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the January 3, 2005 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: May 12, 2006  
Washington, DC

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

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

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<sup>16</sup> See *Raj B. Thackurdeen*, 54 ECAB 396 (2003); *Wayne E. Boyd*, 49 ECAB 202 (1997).