

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of KIM G. STEPHENS and DEPARTMENT OF JUSTICE,  
FEDERAL PRISON SYSTEMS, U.S. PENITENTIARY, Florence, CO

*Docket No. 02-1862; Submitted on the Record;  
Issued December 6, 2002*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128 on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

On March 30, 2000 appellant, then a 31-year-old paint foreman, filed a traumatic injury claim alleging that on March 27, 2000 slivers of glass flew in his right eye while he was removing a pane of broken glass. He stopped work on March 28, 2000 and has not returned. By letter dated May 2, 2000, the Office informed appellant of the type of evidence needed to support his claim and appellant submitted medical evidence. By decision dated June 15, 2000, the Office found that the March 27, 2000 incident occurred but that appellant failed to establish that he sustained an employment-related injury.

On June 27, 2000 appellant requested reconsideration and submitted additional medical evidence. By decision dated July 3, 2000, the Office denied appellant's reconsideration request, finding that the evidence submitted was repetitious. Appellant again requested reconsideration and submitted additional medical evidence. In a July 27, 2000 decision, the Office denied modification of the prior decision. On October 3, 2000 appellant, through counsel, requested reconsideration and submitted additional medical evidence. By decision dated October 18, 2000, the Office denied the request. On January 12, 2001 appellant again requested reconsideration and submitted additional medical evidence. By decision dated January 29, 2001, the Office denied modification of the prior decision.

On March 21, 2002 appellant, through counsel, requested reconsideration and submitted additional medical evidence. By decision dated June 18, 2002, the Office denied appellant's reconsideration request, finding that it had not been filed within one year of the January 29, 2001 merit decision and did not show clear evidence of error.

The Board finds that the Office did not abuse its discretion in denying appellant's request for reconsideration.

In the instant case, as more than one year had elapsed from the date of issuance of the Office's January 29, 2001 merit decision and appellant's request for reconsideration dated March 21, 2002, his request for reconsideration was untimely.

The only decision before the Board is the June 18, 2002 decision of the Office denying appellant's request for reconsideration of the January 29, 2001 decision. Because more than one year had elapsed between the issuance of this decision and March 21, 2002, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the January 29, 2001 Office decision.<sup>1</sup>

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>2</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>3</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>4</sup> In those cases where a request for reconsideration is not timely filed, the Board has held that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request. Office procedures state that the Office will reopen a claimant's case 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>5</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 be 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. 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. To show clear evidence of error, 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. The Board makes an

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<sup>1</sup> See 20 C.F.R. § 501.3(d)(2).

<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> 20 C.F.R. § 10.607 (1999); see also *Alan G. Williams*, 52 ECAB \_\_\_\_ (Docket No. 99-1082, issued December 19, 2000).

<sup>4</sup> *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>5</sup> See *Gladys Mercado*, 52 ECAB \_\_\_\_ (Docket No. 00-898, issued February 12, 2001). Section 10.607(b) provides: "OWCP will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b) (1999).

independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.<sup>6</sup>

With his March 21, 2001 request for reconsideration, appellant submitted a report from Dr. C. Stephen Bonney, a psychiatrist, and a May 10, 2000 report from Dr. Michael J. Hawes, a Board-certified ophthalmologist. The Board notes that Dr. Bonney's report is not relevant to the merit issue in the instant case, *i.e.*, whether appellant established that his eye condition is causally related to the March 27, 2000 employment incident. While appellant's attorney argues that Dr. Hawes' report is sufficient to establish that appellant has an injury in his right eye, the Office reviewed this report in its initial June 18, 2002 decision in this case and found that it did not contain sufficient causal relationship. The Board, therefore, finds this report duplicative. Therefore, appellant failed to establish clear evidence of error and the Office did not abuse its discretion in denying a merit review of his claim.

The June 18, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
December 6, 2002

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>6</sup> *Howard Y. Miyashiro*, 51 ECAB 253 (1999).