

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

FRANK E. RODGERS, JR., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Detroit, MI, Employer**

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**Docket No. 04-311
Issued: April 6, 2004**

Appearances:

*Frank E. Rodgers, Jr., pro se
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On November 17, 2003 appellant filed a timely appeal from a nonmerit decision of the Office of Workers' Compensation Programs dated October 16, 2003 in which the Office denied appellant's untimely request for reconsideration of the most recent merit decision, a June 10, 1999 decision of the Board. Because more than one year has elapsed between the last merit decision, the Board's June 10, 1999 decision, and the filing of this appeal, 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). As the only decision filed within one year from the date of appeal is the nonmerit decision of October 16, 2003, the Board has jurisdiction to review such decision under 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that his request for reconsideration was not timely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board. In a decision dated June 10, 1999, the Board affirmed the Office's decisions dated May 10 and October 24, 1996 which found that appellant forfeited his right to compensation for the periods August 4, 1986 through November 4, 1987, August 10, 1988 through January 16, 1992 and May 31, 1992 through April 28, 1994 based on his failure to report earnings and that he was at fault in the subsequent creation of the \$60,492.05 overpayment. The Board further found that the Office did not abuse its discretion by refusing to reopen appellant's claim for a merit review.¹ The law and the facts as set forth in the Board's prior decision are herein incorporated by reference.

Appellant requested reconsideration of the Board's June 10, 1999 decision by letters dated September 15 and December 20, 1999. The Board rejected appellant's requests for reconsideration.²

In a February 18, 2000 letter, appellant requested that the Office review his case as a procedural anomaly had prevented him from obtaining a reconsideration request through the Board. In numerous letters, the Office advised appellant that the appeal rights which were provided with the Board's June 10, 1999 prior decision had long since expired and that no further action could be taken on his claim. The Office further noted that appellant's request for review by the Board had also been previously addressed by the Board in its February 10, 2000 letter.³

In an October 1, 2002 letter, appellant requested reconsideration from the Office and essentially argued that the forfeiture action should never have occurred.

By letter dated October 16, 2002, the Office advised that it reviewed the claim and noted that the matter concerned the overpayment of \$60,492.05. The Office advised that, since it had written off the entire debt as not recoverable, no further issue remained to be resolved.⁴

In a June 26, 2003 letter, which the Office received July 18, 2003, appellant requested reconsideration. He argued that the Office had not addressed specific facts and the evidence

¹ Docket No. 97-1139 (issued June 10, 1999).

² Appellant was advised that his requests for reconsideration were not received within the 30-day period in which the Board could entertain a petition for reconsideration of its decision and order. The Board noted that a copy of the Board's Rules of Procedures was sent when appellant first docketed his appeal which explained the procedures of the Board. The Board further stated that it had sent appellant its June 10, 1999 decision, during the normal course of business through certified mail. Appellant was advised that the Board no longer had jurisdiction over appellant's appeal docketed as 97-1139 and all correspondence should be directed to the district Office.

³ In his February 18, 2000 letter, appellant merely stated that he was unable to timely file a request for reconsideration of the Board's decision within the 30 days. He failed to present any evidence or arguments from which the Office might consider constituted a petition for reconsideration. See 20 C.F.R. § 10.606.

⁴ The record reveals that the Office, on November 19, 1997, had written off the entire debt amount as the cost of further action to collect the remaining debt would exceed any amount recovered. The record further reveals that appellant inquired about his concerns as to whether his reconsideration request had been forwarded to the Board in letters dated February 17 and 26, 2003.

proffered in its October 16, 2002 "review." In a 10-page statement dated June 26, 2003, appellant referenced Docket No. 97-1139 and argued that he was not cognizant enough to request a 30-day extension of the 30-day time limit to respond to the January 9, 1995 proposed termination of compensation letter or request extensions of the decisions which were subsequently issued on February 9, 1995. Appellant also submitted multiple exhibits in support of his request for reconsideration. This included: one page of the February 9, 1995 preliminary finding of fault in the matter of the \$60,492.05 overpayment; a June 17, 1994 cover letter from the Office requesting appellant to sign a release to allow the Office to obtain wage information from the Social Security Administration; copies of letters dated June 14 and 15, 1994 from the Office to the employing establishment to obtain information pertaining to any benefits appellant was receiving; page number three of an August 30, 1994 medical report from an unidentified physician noting an impression of probable mild degenerative disc disease about the lumbar spine; copy of a March 19, 1994 hospital discharge from Hermann Hospital; copy of an April 8, 1994 work evaluation form from Dr. B.T. Wright; a September 23, 1992 medical report concerning a medical condition of appellant's wife; copies of labels for prescriptions dispensed on March 12, April 8 and September 18, 1993; copy of a June 26, 2003 letter to Senator Hutchison; copy of an article regarding Adult Attention Deficit Disorder; copy of a June 15, 1994 letter from the Office to the employing establishment pertaining to issues raised as a result of the investigation conducted by the U.S. Postal Investigation Service; an excerpt from a FECA Program Memorandum addressing modification of loss of wage-earning capacity determination; copy of a July 11, 2003 communication from Senator Hutchison's office along with a copy of appellant's June 26, 2003 letter; copy of a May 24, 2001 bill for anesthesiologist services; a June 17, 2003 letter from the Board pertaining to appellant's request for reconsideration of Docket No. 1997-1139; copy of the Office's October 16, 2002 letter advising appellant that the overpayment had been written off and that there was no further issues to contest; copy of the Office's February 9, 1995 cover letter which terminated appellant's entitlement to monetary and medical benefits; and an incomplete copy of the February 9, 1995 forfeiture compensation order.

In a decision dated October 16, 2003, the Office denied further review of the claim on the grounds that appellant's reconsideration request was untimely filed and did not establish clear evidence of error. The Office further noted that appellant had never exercised his appeal rights to appeal the February 9, 1995 decision terminating his entitlement to compensation benefits and stated that his arguments pertaining to the termination decision was not relevant to the Board's

June 10, 1999 decision, which had affirmed the Office's May 10 and October 24, 1996 decisions.⁵

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.⁶ 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.⁷ 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.⁸ 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.⁹ In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹⁰

ANALYSIS

The Office properly determined in this case that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.¹¹ The last merit decision in this case was the

⁵ The Board notes that the Office did not address appellant's contention pertaining to the Office's October 16, 2002 correspondence. Accordingly, the issue becomes whether the October 16, 2002 correspondence constitutes a final Office decision. *See* 20 C.F.R. § 501.2(c). Section 10.126 of the Office's regulations provides that a decision of the Office shall contain findings of fact and a statement of reasons and is accompanied by information about the claimant's appeal rights. 20 C.F.R. § 10.126. The Board notes that the Office's October 16, 2002 correspondence does not, on its face, have the appearance of a final decision. It does not formally identify itself as a final decision, and the Office attached no appeal rights for appellant to pursue. Nonetheless, it is the content and not the form of the paper that is significant. In pertinent part, the October 16, 2002 correspondence stated: "the Office has determined that as all the decisions involved an overpayment of \$60,492.05 and, as the Office had written off the entire debt as not recoverable, no further issue remains to be resolved." The determination that all the decisions reviewed involved an overpayment of \$60,492.05 and that the Office had written off the entire debt is informational in nature and merely notes the logical conclusion or effect on the overpayment matter. The Board therefore finds that the Office's October 16, 2002 correspondence is not a final Office decision.

⁶ 5 U.S.C. §§ 8101-8193.

⁷ 20 C.F.R. § 10.607 (1999); *see also* Alan G. Williams, 52 ECAB 180 (2000).

⁸ *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁹ *See Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: "[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] 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).

¹⁰ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹¹ *Velella C. Coleman*, 48 ECAB 367 (1997); *Larry L. Lilton*, 44 ECAB 243 (1992).

Board's *de novo* review of the issues concerning forfeiture and overpayment issued on June 10, 1999. As appellant's June 26, 2003 letter requesting reconsideration was submitted more than one year after the last merit decision of record the Board's June 10, 1999 decision, it was untimely.

As appellant's request was filed more than one year after the Board's June 10, 1999 decision, appellant must demonstrate "clear evidence of error" on the issue which was decided by the Office. 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 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.¹²

The Board finds that the arguments and evidence submitted by appellant in support of his application for review do not raise a substantial question as to the correctness of the Office's decisions of May 10 and October 24, 1996 concerning forfeiture and overpayment. In support of his request for reconsideration, appellant submitted numerous duplicate copies of Office and Board correspondence and decisions, and copies of medical reports and services. Material which is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case.¹³ Appellant also submitted copies of Congressional correspondence, evidence which concerned his wife's health, copies of prescriptions he received in 1993, his hospital discharge on March 19, 1994, and a copy of a medical bill for services rendered in 2001. This information, however, is not relevant or pertinent to the issues concerning overpayment and forfeiture and, thus, is not sufficient to establish clear evidence of error.¹⁴ Appellant's arguments pertaining to the finding of fault in the matter of the overpayment and the forfeiture of compensation due to the nonreporting of self-employment earnings has been previously addressed and considered by the Office. Accordingly, the Board finds that the arguments and evidence submitted by appellant in support of his application for review do not raise a substantial question as to the correctness of the Office's

¹² See *John Crawford*, 52 ECAB 395 (2001); *Pete F. Dorso*, 52 ECAB 424 (2001).

¹³ See *Linda I. Sprague*, 48 ECAB 386 (1997); *James A. England*, 47 ECAB 115 (1995); *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

¹⁴ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

May 10 and October 24, 1996 decisions pertaining to the issues of forfeiture and overpayment and thus are insufficient to demonstrate clear evidence of error.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for reconsideration of the merits on the issues of forfeiture and overpayment on the grounds that it was untimely filed and failed to show clear evidence of error.¹⁵

ORDER

IT IS HEREBY ORDERED THAT the October 16, 2003 decision of the Office of Workers' Compensation Programs is affirmed with regard to the forfeiture and overpayment issues.

Issued: April 6, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁵ The Board notes that appellant, in his June 26, 2003 letter, also presented arguments pertaining to the termination of his monetary and medical benefits in the Office's February 9, 1995 decision which the Office did not address. To the extent that appellant's June 26, 2003 letter constitutes a petition for reconsideration of the Office's February 9, 1995 termination decision, the Board has no jurisdiction to review this matter as the Office has not issued a final decision. 20 C.F.R. § 501.2(c).