

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

BOBBY HUGHLEY, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
New York, NY, Employer**

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**Docket No. 04-12
Issued: May 10, 2004**

Appearances:
Bobby Hughley, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On September 29, 2003 appellant filed an application for review of a June 26, 2003 decision of the Office of Workers' Compensation Programs that found appellant's request for reconsideration was not timely filed and did not demonstrate clear evidence of error. As the case record contains no merit decision of the Office issued within one year of September 29, 2003, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

FACTUAL HISTORY

This case was previously on appeal before the Board. By decision and order dated September 10, 2001, the Board found that appellant forfeited his entitlement to all compensation benefits, effective March 22, 1999, the date a jury found him guilty of committing fraud in

connection with his claim for benefits under the Federal Employees' Compensation Act. The Board further found that appellant forfeited his right to compensation for the period July 23, 1994 to March 12, 1997 for knowingly failing to report earnings from self-employment.¹

Appellant filed a petition for reconsideration of the Board's September 10, 2001 decision, contending that the investigative reports from postal inspectors were an insufficient basis for a finding of forfeiture and that his earnings during the period in question were a return on investment rather than the product of his work. By order dated January 23, 2002, the Board denied appellant's petition for reconsideration on the basis that it failed to establish any error of fact or law in the Board's September 10, 2001 decision and order warranting further consideration.

By letter to the Office dated April 7, 2003, appellant requested reconsideration contending that the Office knew of his employment activities before the commencement of the forfeited period, and that other claimants in similar circumstances were not reprimanded so severely. Appellant cited four Board cases as support for his contentions. In a May 5, 2003 addendum to his request for reconsideration, appellant contended that it was "against procedure" for postal inspectors to obtain evidence for his prosecution for fraud from the Office.

By decision dated June 26, 2003, the Office found that appellant's request for reconsideration was not timely filed and did not present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the 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."

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(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." The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).²

The Office, however, may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority

¹ Docket No. 00-17 (issued September 10, 2001).

² *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

granted under 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application shows “clear evidence of error” on the part of the Office.³ 20 C.F.R. § 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 [the Office] in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.”

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁴ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁵ Evidence which does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish clear evidence of error.⁶ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁷ 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.⁸ 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.⁹ 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.¹⁰

ANALYSIS

In the present case, the most recent merit decision was the one issued by the Board on September 10, 2001. Appellant had one year from the date of this decision to request reconsideration, and did not do so until April 7, 2003. The Office properly determined that appellant’s application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.607(a).

³ *Charles J. Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁴ *See Dean D. Beets*, 43 ECAB 1153 (1992).

⁵ *See Leona N. Travis*, 43 ECAB 227 (1991).

⁶ *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁷ *See Leona N. Travis*, *supra* note 5.

⁸ *Nelson T. Thompson*, 43 ECAB 919 (1992).

⁹ *Leon D. Faidley, Jr.*, *supra* note 2.

¹⁰ *Gregory Griffin*, *supra* note 3.

Appellant did not submit any new evidence with his April 7, 2003 request for reconsideration. The arguments contained in his request for reconsideration and addendum¹¹ are the same arguments already considered and rejected by the Board in its September 10, 2001 decision and order and its January 23, 2002 order denying petition for reconsideration.¹² For this reason alone, appellant's request for reconsideration cannot demonstrate clear evidence of error in the Board's or Office's decisions on appellant's forfeiture of compensation.

CONCLUSION

Appellant's April 9, 2003 request for reconsideration was not timely filed and did not demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the June 26, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 10, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

¹¹ The cases cited in appellant's addendum are the same cases he cited in his petition for reconsideration of the Board's September 10, 2001 decision and order.

¹² The one new argument appellant raised was that other claimants who did not report their earnings received lesser sanctions. As appellant has not shown a basis in fact for this allegation, it cannot show clear evidence of error.