

knowingly obtain and exercise control over a thing of value of the United States Department of Labor, Office of Workers' Compensation Programs, to wit: money as workers' compensation insurance benefits, "by deception." Appellant pleaded guilty to an amended count, reducing the charge from a Class 3 Felony to a Class 2 Misdemeanor, and was sentenced on October 7, 2004 to serve one year unsupervised probation.

In a decision dated December 20, 2004, the Office found, pursuant to 5 U.S.C. § 8106, that appellant forfeited his entitlement to compensation for wage loss for the period January 24, 1996 through November 27, 2004. Appellant knowingly omitted or understated any part of his earnings on Forms CA-1032. On January 26, 2007 the Office found him at fault in the creation of a \$309,368.01 overpayment of compensation resulting from that forfeiture.

In a second decision dated December 20, 2004, the Office found, pursuant to 5 U.S.C. § 8148, that appellant also forfeited his entitlement to any further compensation benefits. He was convicted of a violation of a state criminal statute relating to fraud in the application for or receipt of any benefit under the Federal Employees' Compensation Act.

On August 3, 2005 an Office hearing representative affirmed the December 20, 2004 decisions. The Office again reviewed the merits of appellant's case on November 15, 2005 and March 16, 2007 and denied modification of its prior decisions.

On June 27, 2008 appellant requested another merit review of his case.¹ He noted that he was found guilty of theft under state law, but the charge of forgery was dropped. Appellant argued that theft was not listed under state law as an offense involving fraud, so "how can theft be related to fraud?" He argued that a conviction for theft under state law was not related to fraud. Appellant alleged that the Office's investigation was biased and unsupported, that the state attorney general brought forth no charges for "[the Office] claim." He cited Title 29 of the U.S. Code and sections under Title 5 relating to recovery of overpayment and forfeiture of benefits. Appellant cited regulations relating to waiver of overpayment and reduction or termination of compensation. He stated that payment ceased, yet he was still disabled; that his disability continues to be related to employment; that he was totally disabled throughout the entire period 1993 to 2004; that he returned to work but in a diminished capacity, still disabled from the same work-related injury; that he was not convicted of fraud; and that the Office decision based on the current facts is in error.

In a decision dated November 12, 2008, the Office denied a merit review of appellant's case. It found that appellant's request for reconsideration was untimely and failed to present clear evidence of error in the Office's last merit decision.

¹ The date of the letter was typed June 17, 2008, but he dated his signature June 27, 2008.

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.”²

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.³

The term “clear evidence of error” is intended to represent a difficult standard.⁴ If clear evidence of error has not been presented, the Office should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.⁵

ANALYSIS

The most recent merit decision in this case is the Office’s March 16, 2007 decision denying modification of its prior decisions. Appellant had until March 17, 2008 to request reconsideration.⁶ His June 27, 2008 request is, therefore, untimely. To warrant a merit review of his case, appellant’s request must demonstrate that the Office’s final decisions on forfeiture or overpayment were clearly erroneous.

Appellant contended that his criminal conduct had nothing to do with fraud. However, in making his argument, he omitted any reference to element of deception. Appellant claimed the theft was unspecified, but the complaint/information filed against him charged him with Theft “by Deception.” The count was amended to strike the value of the property and insert a lesser value, making the charge a misdemeanor. It did not strike the element of deception. Appellant

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.607.

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.c (January 2004).

⁵ *Id.* Chapter 2.1602.3.d(1).

⁶ March 16, 2008 was a Sunday.

knowingly deceived the United States Government into paying him compensation for having no capacity to earn wages or salary. Deceit, trickery, perversion of the truth to obtain control over a thing of value of another is practically the definition of fraud, regardless of how his crime is organized under the Colorado Revised Statutes. However, 5 U.S.C. § 8148 does not require a narrow conviction for fraud *per se*; it requires only a conviction “relating to fraud.” Appellant’s untimely request for reconsideration does not prove that his criminal deception bore no relation to fraud.

Whether appellant’s criminal conduct was a misdemeanor or a felony is immaterial to the substantive provisions of 5 U.S.C. § 8106 or § 8148. That is, whether he knowingly omitted or understated any part of his earnings on Forms CA-1032, or whether he was convicted of a violation of a state criminal statute relating to fraud in the application for or receipt of any benefits under subchapter I of the Act.

Appellant set out the provisions of various statutes and regulations. In the end, he simply made bald assertions, such as he was still disabled as a result of his employment and totally disabled throughout the entire period 1993 to 2004, which he has returned to work in a diminished capacity, that he was not convicted of fraud and that the Office’s decision is in error. Appellant also made assertions that the Office’s investigation was biased and unsupported, that there were no charges brought by the Colorado Attorney General “for [the Office] claim,” and that the Office’s decision was premature and without legal or factual basis. None of his assertions demonstrated that the Office decisions were clearly erroneous.

On appeal, appellant has submitted information that is largely irrelevant to his untimely request for reconsideration, including his disability status as a veteran, recognitions, congratulations, promotions, information and documents relating to the deferred judgment and “nol-pros” of the forgery count, general information on depression and medical reports. The issue before the Board is whether the Office properly denied that request under the clear evidence of error standard.⁷ Because appellant’s untimely request for reconsideration fails to demonstrate clear evidence of error in the Office’s most recent merit decision, the Board finds that it properly refused to reopen his case for a review on the merits. The Board will affirm the Office’s November 12, 2008 decision.

CONCLUSION

The Board finds that the Office properly denied appellant’s June 27, 2008 request for reconsideration.

⁷ The Board’s jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the November 12, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 3, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board