



On appeal, appellant contends that a mistake was made regarding his fraud conviction as he does not consider his life-long hobby to be a business activity that is work related because no revenue was generated. He contends that he continues to be disabled from his accepted employment injury and that he is unable to support himself with his Social Security Administration benefits. Appellant states that his trade as a journeyman iron worker would have provided him an excellent pension had he not been disabled by his employment injury.

### **FACTUAL HISTORY**

This case has previously been before the Board. In a November 30, 2006 decision,<sup>3</sup> the Board affirmed a February 10, 2006 OWCP decision which terminated appellant's wage-loss compensation and medical benefits effective February 19, 2005 because he was found guilty of violating 18 U.S.C. § 1920, making false statements or reports to obtain federal employees' compensation. In a November 5, 2007 decision,<sup>4</sup> the Board affirmed a January 23, 2007 OWCP decision which found that appellant had forfeited his right to compensation for the period April 30, 1999 to April 9, 2002 due to a conviction for fraud in obtaining compensation benefits under 18 U.S.C. § 1920. This resulted in an overpayment of compensation benefits in the amount of \$138,120.54 for which he was at fault and, therefore, ineligible for waiver of recovery of the overpayment. The finding of fact and conclusions of law from the prior decision are hereby incorporated by reference. The relevant facts are set forth below.<sup>5</sup>

By letter dated July 27, 2014 and received by OWCP on September 10, 2014, appellant requested reconsideration of OWCP's forfeiture and overpayment decision.<sup>6</sup> He contended that to be disabled by his accepted employment injury and that his social security income was not enough to take care of his basic needs. Appellant's Social Security Administration benefits were less as he had been unable to pay into the system since he became disabled on August 1, 1967. He contended that the business he was affiliated with while receiving compensation was a hobby involving the purchase of antique automobiles. The business provided a job to his oldest son who suffered from mental illness and chemical dependency. Appellant was informed by a public defender that, since his case involved a misdemeanor and not a felony, he should have been only fined and the fine should have been deducted from his workers' compensation payment every month instead of being revoked.

In a September 17, 2014 letter, appellant stated that he did not draw any salary from a restaurant business because he was not able to be there to manage it. As a result of his inability to manage the business and loss of revenue, he closed the business.

Medical records dated April 11, 2007 to March 26, 2013 addressed, among other things, appellant's back conditions and treatment.

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<sup>3</sup> Docket No. 06-1194 (issued November 30, 2006).

<sup>4</sup> Docket No. 07-1365 (issued November 5, 2007).

<sup>5</sup> OWCP accepted that on August 1, 1967 appellant, then a 24-year-old iron worker, sustained a lumbar strain when he slipped on a bank at work.

<sup>6</sup> The Board notes that appellant had repaid the overpayment in full as of December 10, 2012.

In an October 9, 2014 decision, OWCP denied appellant's request for reconsideration without a merit review as it was not timely filed and failed to present clear evidence of error.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.<sup>7</sup> OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).<sup>8</sup> One such limitation provides that an application for reconsideration must be submitted within one year of the date of OWCP's decision for which review is sought.<sup>9</sup> The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under 5 U.S.C. § 8128(a).<sup>10</sup>

Section 10.607(b) states that OWCP will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by OWCP in its most recent merit decision. The reconsideration request must establish that OWCP's decision was, on its face, erroneous.<sup>11</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.<sup>12</sup> The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.<sup>13</sup> Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.<sup>14</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>15</sup> This entails a limited review by OWCP 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 OWCP.<sup>16</sup>

To establish 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 OWCP's decision.<sup>17</sup> The

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<sup>7</sup> See *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>8</sup> See *Annette Louise*, 54 ECAB 783, 789-90 (2003).

<sup>9</sup> 20 C.F.R. § 10.607(a).

<sup>10</sup> See *Jesus D. Sanchez*, *supra* note 7; *F.R.*, Docket No. 09-575 (issued January 4, 2010).

<sup>11</sup> 20 C.F.R. § 10.607(b).

<sup>12</sup> See *Nancy Marcano*, 50 ECAB 110, 114 (1998); *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

<sup>13</sup> See *Fidel E. Perez*, 48 ECAB 663, 665 (1997); *M.L.*, Docket No. 09-956 (issued April 15, 2010).

<sup>14</sup> See *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

<sup>15</sup> See *Leona N. Travis*, 43 ECAB 227, 241 (1991).

<sup>16</sup> See *Jimmy L. Day*, 48 ECAB 652 (1997); *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>17</sup> See *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.<sup>18</sup>

### ANALYSIS

The Board finds that appellant's request for reconsideration was untimely. The most recent merit decision in this case was issued on November 5, 2007. Appellant's request for reconsideration was received by OWCP on September 10, 2014. Because more than one year elapsed from the November 5, 2007 merit decision to the filing of his request on September 10, 2014, the Board finds that his request was filed untimely.

The Board also finds that appellant's untimely request failed to demonstrate clear evidence of error. The November 5, 2007 merit decision affirmed OWCP's January 23, 2007 finding that appellant forfeited his right to compensation for the period April 30, 1999 to April 9, 2002 due to a conviction for fraud in obtaining compensation benefits under 18 U.S.C. § 1920. This resulted in an overpayment of benefits in the amount of \$138,120.54 for which he was at fault and, therefore, ineligible for waiver of recovery of the overpayment. In his untimely request for reconsideration, appellant contended that he continued to be disabled by his accepted employment injury and that his Social Security Administration benefits were less as he had been unable to pay into the system since he became disabled on August 1, 1967. He further contended that the business with which he was affiliated while receiving compensation benefits was a hobby, that OWCP was aware of this hobby. Appellant also contended that because his crime was only a misdemeanor he should have only been fined rather than forfeit all compensation on a monthly basis. His arguments pertaining to his continuing employment-related disability and resultant financial difficulties, the nature of his business and crime, and OWCP's awareness about his business have been previously addressed and considered by OWCP and the Board in prior decisions and do not shift the weight of the evidence in his favor.

The medical reports dated April 11, 2007 to March 26, 2013, which addressed appellant's back conditions and medical treatment, are not relevant to the underlying issues in this case of forfeiture and overpayment.<sup>19</sup>

To establish clear evidence of error, it is not sufficient merely to show that the evidence could be construed so as to produce a contrary conclusion. The term clear evidence of error is intended to represent a difficult standard.<sup>20</sup> None of the arguments or evidence submitted manifests on its face that OWCP committed an error in finding that appellant forfeited his right to compensation. Appellant has not otherwise submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision. Thus, the evidence is insufficient to establish clear evidence of error.

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<sup>18</sup> See *Pete F. Dorso*, 52 ECAB 424 (2001); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

<sup>19</sup> *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

<sup>20</sup> See *Dean D. Beets*, *supra* note 12; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5 (October 2011).

On appeal, appellant contended that a mistake was made regarding his fraud conviction as he did not consider his business activity work related because no revenue was generated, and is a life-long hobby. He contended that he continued to be disabled from his accepted employment injury and that he was unable to support himself with his Social Security Administration benefits. Appellant stated that his trade as a journeyman iron worker would have provided him an excellent pension had he not been disabled by his employment injury. As discussed, his contentions have been previously addressed and considered by OWCP and the Board in prior decisions and, thus, are insufficient to shift the weight of the evidence in his favor and raise a substantial question as to the correctness of OWCP's forfeiture and overpayment decision.

**CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration as untimely filed and failing to demonstrate clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 9, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 27, 2015  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board