

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

C.M., Appellant)	
)	
and)	Docket No. 18-0341
)	Issued: August 9, 2018
)	
TENNESSEE VALLEY AUTHORITY,)	
PARADISE STEAM PLANT, Drakesboro, KY,)	
Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 6, 2017 appellant filed a timely appeal from a September 5, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The most recent merit decision was a Board decision dated November 5, 2007, which became final after 30 days of issuance and is not subject to further review.¹ As there was no merit decision by OWCP within 180 days of the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.

¹ 20 C.F.R. § 501.6(d); *see T.B.*, Docket No. 15-0001 (issued July 1, 2015); *C.M.*, Docket No. 15-0471 (issued April 27, 2015); *D.A.*, Docket No. 08-1217 (issued October 6, 2008).

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's August 14, 2017 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On January 8, 1968 appellant, then a 25-year-old iron worker, filed a traumatic injury claim (Form CA-1) alleging that, on August 1, 1967, he slipped on a bank, causing him to fall while in the performance of duty. As he fell, he hit his back on a 2x4 wooden board, causing a lumbar strain. Appellant performed light-duty work until he was laid off from work by the employing establishment on December 12, 1967. OWCP accepted the claim for lumbar strain and paid him temporary total disability compensation from December 13, 1967 through July 3, 1969.

By decision dated June 23, 1969, OWCP found that the constructed position of general office clerk fairly and reasonably represented appellant's wage-earning capacity and reduced his wage-loss compensation benefits, effective July 3, 1969. By decision dated November 6, 1981, it further reduced his compensation based on his actual earnings as the owner and manager of a trucking business.⁴ Appellant subsequently requested reconsideration. By decision dated March 9, 1982, OWCP denied modification of its November 6, 1981 loss of wage-earning capacity decision.

By decision dated February 15, 1983, OWCP terminated appellant's wage-loss compensation and medical benefits, effective March 24, 1983 based on the medical opinion of an impartial medical specialist who found that he no longer had residuals or disability stemming from the accepted August 1, 1967 employment injury.

By decision dated March 24, 1987, OWCP denied appellant's claim for a recurrence of disability commencing in November 1985 based on the medical opinion of a second impartial medical specialist who found that appellant's medical condition was not causally related to the accepted work injury. An OWCP hearing representative, by decision dated November 9, 1987 and finalized on November 10, 1987, affirmed OWCP's March 24, 1987 decision.

Appellant appealed to the Board on January 20, 1988. By decision dated June 27, 1988, the Board set aside OWCP's hearing representative's November 10, 1987 decision and remanded the case to OWCP to obtain further elaboration from the impartial medical specialist regarding his

³ Docket No. 88-0587 (issued June 27, 1988); Docket No. 06-1194 (issued November 30, 2006); Docket No. 07-1365 (issued November 5, 2007); Docket No. 15-0471 (issued December 29, 2014); and Docket No. 15-0471 (issued April 27, 2015).

⁴ Appellant sold his trucking business to his son in January 1984.

opinion that appellant's current medical condition was not causally related to the August 1, 1967 work injury.⁵

By decision dated March 29, 2005, OWCP terminated appellant's wage-loss compensation and medical benefits, effective February 19, 2005 pursuant to 5 U.S.C. § 8148 based on his conviction for fraud regarding his receipt of workers' compensation benefits from 1999 to 2002. It noted that he was found guilty of providing false answers on EN1032 forms dated April 30, 1999 to April 9, 2002. Appellant requested an oral hearing. By February 10, 2006 decision, an OWCP hearing representative affirmed OWCP's March 29, 2005 termination decision.

On April 17, 2006 OWCP made a preliminary determination that appellant forfeited his entitlement to compensation for the period April 30, 1999 to April 9, 2002 based on his conviction for fraud in obtaining FECA compensation benefits under 18 U.S.C. § 1920. It noted that he completed four EN1032 forms dated April 30, 1999 to April 9, 2002 indicating that he did not work for the 15 months prior to each date while the evidence of record established that he ran a business during the stated period. OWCP further noted that an overpayment of compensation subject to recovery was created due to the forfeiture determination.

On April 17, 2006 appellant appealed OWCP's hearing representative's February 10, 2006 termination decision to the Board. By decision dated November 30, 2006, the Board affirmed the February 10, 2006 decision and found that OWCP met its burden of proof to terminate appellant's compensation as he was found guilty of compensation fraud.⁶

By decision dated January 23, 2007, an OWCP hearing representative finalized the April 17, 2006 preliminary determination that an overpayment of compensation in the amount of \$138,120.54 had been created due to the forfeiture of compensation and that appellant was at fault in the creation of the overpayment, and therefore, ineligible for waiver of recovery of the overpayment. Recovery was directed by monthly payments in the amount of \$150.00. On April 25, 2007 appellant again appealed to the Board. By decision dated November 5, 2007, the Board affirmed OWCP's hearing representative's January 23, 2007 decision.⁷ The Board found 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 which 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.

On September 10, 2014 appellant requested reconsideration of OWCP's forfeiture decision. OWCP denied his request by an October 9, 2014 nonmerit decision, finding that it was untimely filed and failed to demonstrate clear evidence of error.

⁵ Docket No. 88-587 (issued June 27, 1988).

⁶ Docket No. 06-1194 (issued November 30, 2006).

⁷ Docket No. 07-1365 (issued November 5, 2007).

By decision dated December 15, 2014, OWCP denied appellant's claim for disability (Form CA-7) for the period February 9, 2005 through June 30, 2014 as it previously found that he forfeited his entitlement to compensation due to his fraud conviction.

Appellant appealed OWCP's October 9, 2014 nonmerit decision to the Board on December 29, 2014. By decision dated April 27, 2015, the Board affirmed the October 9, 2014 nonmerit decision.⁸ The Board determined that appellant's September 10, 2014 request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

On August 14, 2017 appellant again requested reconsideration of OWCP's forfeiture decision. He requested that his compensation benefits be reinstated as his medical condition had further declined since his last appeal. Appellant claimed that he dealt with pain and suffering due to his original 1967 employment injury and that he was unable to work. He asserted that his Social Security Administration (SSA) benefits were less as he had been unable to contribute into the system. Appellant further asserted that he was innocent and that he was not working in the business with which he was affiliated while receiving compensation benefits. Rather, he maintained that he was overseeing people who were helping him move and vacate business property due to a land dispute. Appellant contended that he did not draw any income from any work. He also contended that he did not knowingly or willfully commit fraud.

By decision dated September 5, 2017, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁹ This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹⁰ Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS)).¹¹ Imposition of this one-year filing limitation does not constitute an abuse of discretion.¹²

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's application for review is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error. If an application

⁸ Docket No. 15-0471 (issued April 27, 2015).

⁹ 5 U.S.C. § 8128(a); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

¹⁰ 20 C.F.R. § 10.607(a).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.4(b) (February 2016).

¹² *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

demonstrates clear evidence of error, OWCP will reopen the case for merit review.¹³ To demonstrate clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP,¹⁴ is positive, precise, and explicit, and manifests on its face that OWCP committed an error.¹⁵ The evidence must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must also shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision for which review is sought. Evidence that does not raise a substantial question is insufficient to demonstrate clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. A determination of whether the claimant has demonstrated clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.¹⁶

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. On August 14, 2017 appellant requested reconsideration regarding the determination that he forfeited his right to compensation for the period April 30, 1999 to April 9, 2002 due to his conviction for fraud under 18 U.S.C. § 1920. OWCP's regulations¹⁷ and procedures¹⁸ establish a one-year time limit for requesting reconsideration, which begins on the date of the most recent merit decision. The most recent merit decision regarding the forfeiture determination was the Board's November 5, 2007 decision. Appellant had one year from the date of that decision to make a timely request for reconsideration. As his August 14, 2017 request for reconsideration was received more than one year after the November 5, 2007 merit decision, it was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in finding that he forfeited his right to compensation for the period April 30, 1999 to April 9, 2002 due to his conviction for fraud in obtaining compensation benefits under 18 U.S.C. § 1920.¹⁹

The Board further finds that appellant failed to demonstrate clear evidence of error. On reconsideration appellant contended that his medical condition had further declined since his last appeal. He claimed that he dealt with pain and suffering due to his original August 1, 1967 work injury and that he was unable to work. Appellant asserted that his SSA benefits were less as he had been unable to contribute into the system. He further asserted that he was innocent and that

¹³ *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (February 2016) (the term clear evidence of error is intended to represent a difficult standard).

¹⁴ *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁵ *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁶ *J.S.*, Docket No. 10-0385 (issued September 15, 2010); *B.W.*, Docket No. 10-0323 (issued September 2, 2010).

¹⁷ 20 C.F.R. § 10.607(a); *see Alberta Dukes*, 56 ECAB 247 (2005).

¹⁸ Federal (FECA) Procedure Manual, *supra* note 11, Chapter 2.1602.4 (October 2011); *see Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁹ 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

he was not working in the business with which he was affiliated while receiving compensation benefits. Rather, appellant maintained that he was overseeing people who were helping him move and vacate the business property due to a land dispute. He contended that he did not draw any income from any work. Appellant also contended that he did not knowingly or willfully commit fraud.

In its November 5, 2007 decision, the Board affirmed an OWCP hearing representative's January 23, 2007 decision, which found that appellant forfeited his right to compensation for the period April 30, 1999 to April 9, 2002 because he was convicted of fraud in obtaining FECA compensation benefits under 18 U.S.C. § 1920, which 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. Absent further merit review of this issue by OWCP pursuant to section 8128 of FECA, this issue is *res judicata*.²⁰

The term clear evidence of error is intended to represent a difficult standard, and the argument appellant provided on reconsideration is not the type of positive, precise, and explicit evidence which manifested on its face that OWCP committed an error.²¹ Appellant's arguments pertaining to his continuing employment-related residuals and disability and resultant financial difficulties, the nature of his business, and his innocence have been previously addressed and considered by OWCP and the Board in prior decisions²² and do not shift the weight of the evidence in his favor. Thus, the arguments submitted are of insufficient probative value to shift the weight in favor of appellant and raise a substantial question as to the correctness of the January 23, 2007 OWCP decision.

On appeal appellant contends that a mistake was made regarding his fraud conviction because he did not know that he was obligated to inform OWCP that he was moving and that he received no pay. He contended that he continued to have residuals of his employment injury and he was unable to support himself with his SSA benefits. As discussed, appellant's contentions have been previously addressed and considered by OWCP and the Board in prior decisions²³ 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 August 14, 2017 request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

²⁰ Absent further merit review of the issue by OWCP, the issue is *res judicata* and is not subject to further review. See *H.G.*, Docket No. 16-1191 (issued November 25, 2016).

²¹ *Leon D. Faidley, Jr.*, *supra* note 12.

²² See *J.F.*, Docket No. 18-0250 (issued July 6, 2018); see also *A.M.*, Docket No. 10-0526 (issued November 8, 2010) (appellant did not sufficiently explain how largely duplicative evidence raised a substantial question as to the correctness of OWCP's decision).

²³ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the September 5, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 9, 2018
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board