

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

G.G., Appellant)	
)	
and)	Docket No. 18-1074
)	Issued: January 7, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Monsey, NY, Employer)	
)	

Appearances:
Capp Taylor, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On May 1, 2018 appellant, through counsel, filed a timely appeal from a March 12, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The most recent merit decision was a Board decision dated January 9, 2015, which became final 30 days after issuance, and is not subject to further review.² As there was no merit decision by OWCP within 180 days of the filing of this appeal, pursuant to the Federal Employees' Compensation Act³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 20 C.F.R. § 501.6(d); *see J.P.*, Docket No. 17-0053 (issued May 23, 2017); *R.M.*, Docket No. 14-1213 (issued October 15, 2014).

³ 5 U.S.C. § 8101 *et seq.*

(FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.

ISSUE

The issue is whether OWCP properly determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances outlined in the prior Board decision is incorporated herein by reference. The relevant facts are as follows.

On May 11, 1998 appellant, then a 46-year-old mail processor, filed an occupational disease claim (Form CA-2) alleging that her mood disorder and sleep deprivation occurred as a result of her work shift hours commencing at 1:00 a.m. OWCP accepted the claim for sleep disturbances and mood disorder, secondary to sleep deprivation. On August 4, 1999 it issued a wage-earning capacity determination, finding that appellant's actual earnings at the employing establishment since March 20, 1999 represented her wage-earning capacity. Appellant continued to receive compensation based on wage-earning capacity.

OWCP sent appellant EN1032 forms that requested information, regarding employment activity. On March 31, 2014 it received a March 24, 2014 report from the employing establishment's Office of Inspector General (OIG) regarding appellant's involvement in internet sales. According to the report, appellant was engaged in selling items on eBay with a registered PayPal account and eBay profile. The report includes a document listing eBay sales to appellant's account, indicating that, during the period December 23, 2011 to April 23, 2012, she sold 71 items on eBay.

By decision dated April 11, 2014, OWCP found that appellant had forfeited her compensation from December 13, 2010 to March 11, 2013. It found that she had earnings that were knowingly omitted from the EN1032 forms signed on March 13, 2012 and March 11, 2013.

In a preliminary determination dated April 11, 2014, OWCP found that an overpayment of compensation in the amount of \$4,950.68 was created. It indicated that this was the compensation paid from the current claim during the period December 13, 2010 to March 11, 2013. OWCP also preliminarily determined that appellant was at fault in the creation of the overpayment because she made an incorrect statement as to a material fact that she knew or should have known was incorrect. By decision dated May 14, 2014, it finalized its determination of a \$4,950.68 overpayment of compensation. OWCP found that appellant was required to report her business activity regarding her eBay account, even if it were for a friend. In addition, it denied waiver of recovery of the overpayment, finding that she was at fault in creating the overpayment.

⁴ Docket No. 14-1847 (issued January 9, 2015); *petition for reconsideration denied*, Docket No. 14-1847 (issued November 13, 2015).

Appellant appealed to the Board. By decision dated January 9, 2015, the Board affirmed OWCP's April 11 and May 14, 2014 decisions.⁵ The Board found that appellant forfeited her compensation from December 13, 2010 to March 11, 2013 as she should have reported the earnings from eBay sales that were sent to her PayPal account and then transferred to her bank account. The Board found that her omission of such earnings was "knowingly" made, as she failed to report such activity on EN1032 forms dated March 13, 2012 and March 11, 2013 in light of the fact that multiple sales transactions had gone into her accounts. The Board further found that an overpayment of compensation in the amount of \$4,950.68 was created and that waiver of recovery of the overpayment was properly denied as appellant was with fault in the creation of the overpayment. The Board noted that she had made an incorrect statement regarding a material fact that she knew or should have known was incorrect in answering "no" to the question as to self-employment or involvement in a business enterprise. Appellant should have known that her statement that she had no self-employment or involvement in a business enterprise was incorrect as multiple sales transactions from eBay sales had gone into her accounts despite the fact she alleged that the selling enterprise belonged to a friend who was using her eBay and PayPal accounts.

On January 29, 2015 appellant requested reconsideration.⁶ By decision dated May 5, 2015, OWCP denied her reconsideration request without a review of the merits.

In a January 13, 2017 letter, received by OWCP on January 17, 2017, appellant requested reconsideration. She noted that OWCP found that she had "earnings" due to sales of items on eBay and knowingly failure to report employment or earnings. Appellant contended that OWCP had failed to utilize the common definition of the term "earnings." Citing to the American Heritage Dictionary and Webster's New World Dictionary, she noted that there were two definitions for "earnings." The first definition indicated wages or salary gained in return for one's labor and service. The second definition pertained to business profit. Appellant cited to the dissenting opinion in the Board's prior decision in support of her contention that listing items on eBay should not constitute gainful self-employment.⁷ She argued that OWCP never explained how the eBay sales would rise to the level of self-employment. OWCP also never determined what, if any profit or short/long-term capital gains were attributed to the items sold. Thus, appellant concluded that there was no business profit. She additionally argued that OWCP improperly shifted the burden of proof. Appellant argued that she was not "gainfully employed" from December 13, 2011 to April 23, 2012 and had no actual earnings from the eBay sales. Rather, she was just a conduit, using her eBay and PayPal accounts to help her friend. Appellant contended that such activity was not compensable on the market and that there was no evidence refuting her friend's statement that he was responsible for all the business activities in regard to selling the items. Additionally, OWCP failed to further investigate and had summarily concluded that she had earnings. Appellant also argued against OWCP's finding that she knowingly violated the reporting requirement of two

⁵*Id.*

⁶ Appellant argued that she was not the one selling the goods on eBay. Rather her friend sold the goods as supported by his notarized affidavit. Thus, appellant had no business activity for the period in question and no earnings or employment to report on the EN1032 form. She alleged that the claims examiner did not adequately consider all of the facts.

⁷ *Supra* note 4.

EN1032 forms. She contended that the language and examples found on the EN1032 forms would not put the average claimant on notice that the use of an eBay account by a third person or by a claimant would constitute business activity. Appellant attested that she was not self-employed or involved in a business enterprise, did not actively participate in eBay sales, and truthfully completed the EN1032 forms. Thus, she argued that she did not knowingly fail to report earnings and thus was not subject to the forfeiture provisions of 5 U.S.C. § 81016(b).

By decision dated March 12, 2018, OWCP determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error. It found that she had submitted similar argument regarding earnings and that her friend had used her accounts to sell his own items. OWCP noted that the Board has already determined that her failure to report this business activity constituted a knowing omission of earnings, which resulted in her forfeiture to compensation. Thus, it concluded that appellant had not presented evidence to establish clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁸ Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's integrated Federal Employees' Compensation System.⁹ The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.¹⁰

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 demonstrates clear evidence of error, OWCP will reopen the case for merit review.¹¹ To demonstrate clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP,¹² is positive, precise, and explicit, and is manifest on its face that OWCP committed an error.¹³ 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

⁸ 20 C.F.R. § 10.607(a).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

¹⁰ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

¹¹ *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); *supra* note 9 at Chapter 2.1602.5 (February 2016) (the term clear evidence of error is intended to represent a difficult standard).

¹² *See A.F.*, Docket No. 18-0645 (issued October 26, 2018); *Dean D. Beets*, 43 ECAB 1153 (1992).

¹³ *See A.F.*, *supra* note 12; *Leona N. Travis*, 43 ECAB 227 (1991).

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.¹⁴

ANALYSIS

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed. OWCP's regulations¹⁵ and procedures¹⁶ establish a one-year time limit for requesting reconsideration, which begins on the date of the last merit decision issued in the case. The most recent merit decision was the Board's January 9, 2015 decision. Appellant had one year from the date of that decision to timely request reconsideration. As her reconsideration request was received on January 17, 2017 more than one year after the January 9, 2015 merit decision, they were untimely filed.

The Board further finds that appellant failed to demonstrate clear evidence of error on the part of OWCP in its decision regarding forfeiture of compensation. Appellant again contended that she had no "earnings" from sales of items on her eBay account as the sales belonged to her friend. She also contended that did she did not knowingly fail to report such earnings. Appellant did not sufficiently explain how largely duplicative evidence or argument raised a substantial question as to the correctness of OWCP's decision.¹⁷ In her reconsideration request, she also argued general concepts of earnings and business activity. Appellant also contended that OWCP erroneously shifted the burden of proof to her. However, these arguments do not manifest on their face that OWCP committed an error.¹⁸ The Board finds that these arguments lack validity and fail to demonstrate clear evidence of error.¹⁹ Thus, the Board finds that these arguments are of insufficient probative value to shift the weight of the evidence in favor of appellant and raise a substantial question as to the correctness of OWCP's decision.²⁰

Thus, the Board finds that OWCP properly denied appellant's untimely request for reconsideration.²¹

¹⁴ *J.S.*, Docket No. 10-0385 (issued September 15, 2010); *B.W.*, Docket No. 10-0323 (issued September 2, 2010).

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

¹⁶ *Supra* note 9 at Chapter 2.1602.4 (February 2016); see *A.F.*, *supra* note 12; *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁷ See *J.F.*, Docket No. 18-0250 (issued July 6, 2018); see also *A.M.*, Docket No. 10-0526 (issued November 8, 2010).

¹⁸ See *S.M.*, Docket No. 17-0385 (issued June 26, 2018).

¹⁹ *D.B.*, Docket No. 16-1405 (issued January 9, 2017).

²⁰ See *supra* note 14.

²¹ *Nancy Marciano*, 50 ECAB 110 (1998).

On appeal counsel contends that appellant has demonstrated clear evidence of error. He argues that the dissenting opinion in *G.G.*, reflects the proper analysis that should have been used in this case. However, the Board lacks jurisdiction to review the merits of this case.

For these reasons, the evidence submitted by appellant does not raise a substantial question concerning the correctness of OWCP's April 11, 2014 decision and OWCP properly determined that appellant did not demonstrate clear evidence of error in that decision.

CONCLUSION

OWCP properly determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the March 12, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 7, 2019
Washington, DC

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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