

He stopped work on June 20, 1997 and returned to light-duty work on March 12, 1998. Appellant again stopped work on June 26, 1998 as the light-duty position required repetitive bending in excess of his medical restrictions. He received wage-loss compensation on the daily and periodic rolls. For work absences from October 8 to December 28, 1997 and May 5 to December 28, 1998, appellant received a total of \$12,489.59 in wage-loss compensation.

In a statement of earnings and employment (Form EN1032), signed on December 28, 1998, appellant answered “no” to the inquiries regarding whether he had any employment earnings or performed volunteer work during the previous 15 months. Under Part D of the form, entitled “other Federal Benefits or Payments,” appellant stated that, from 1990 to 1998, he earned \$488.00 every two weeks from “work gov.”

An August 20, 1999 investigative memorandum showed that in each quarter from October 1997 to March 1999, appellant had actual earnings from working in the private sector at a coin laundry. Investigative agents obtained copies of his payroll checks and work schedules from the coin laundry. In an August 18, 1999 interview with investigative agents, appellant admitted purposely omitting his private-sector employment on the Form EN1032.

On February 14, 2000 appellant entered into a plea agreement in the U.S. District Court for the Eastern District of Virginia. He plead guilty under 18 U.S.C. § 1920 to one count of making a false statement to obtain federal employee’s compensation not exceeding \$1,000.00. The court later ordered restitution in the amount of \$12,489.59 to be repaid at \$208.00 a month.

By decision dated March 13, 2000, the Office terminated appellant’s compensation benefits effective February 14, 2000, on the grounds that he plead guilty to compensation fraud in federal court under 18 U.S.C. § 1920. It found that, under 5 U.S.C. § 8148(a), “any individual who is convicted of fraud related to the application for or receipt of benefits under the [Federal Employees’ Compensation Act] forfeit[ed] their right to any entitlement under the [Act] for any injury occurring on or before the date of such conviction.

In a letter postmarked April 26, 2000, appellant requested an oral hearing. The Office denied this request in a June 7, 2000 decision as it was untimely filed and because the issue involved could be addressed equally well by submitting relevant evidence on reconsideration.

In an August 31, 2000 file memorandum and a September 6, 2000 letter to the U.S. Attorney’s office for the Eastern District of Virginia, the Office stated that, after further consideration, it determined that appellant did not forfeit his entitlement to compensation. The Office noted that, in the December 28, 1998 Form EN1032, he reported his private-sector employment but did so under the wrong item number. It also noted that his private-sector employment ceased prior to the June 16, 1997 injury. The Office determined that appellant did not fail to disclose his earnings and made no false statement. It noted that he was under no

obligation to report his earnings at the laundromat, as dissimilar private-sector employment would be excluded from wage-earning capacity and average annual earnings determinations.¹

In a September 11, 2000 file memorandum, the Office stated that it had contacted the U.S. Attorney's office and that appellant's federal fraud conviction was about to be vacated.

By decision dated December 26, 2000, the Office found that appellant forfeited his wage-loss compensation for the period October 28, 1997 to December 28, 1998 as he failed to disclose his actual earnings for that period on the December 28, 1998 Form EN1032. The Office found that appellant failed to disclose his actual earnings at the private-sector laundromat for the period January 25, 1997 through February 27, 2000, encompassing the period October 28, 1997 to December 28, 1998. It further found that the federal restitution agreement constituted a global settlement of the forfeited amount, fully satisfying the debt. Therefore, the Office would not pursue recovery of the forfeited compensation.

In a May 6, 2005 letter, appellant requested reconsideration of the March 13, 2000 decision and of the Office's forfeiture decision of December 26, 2000. He asserted that the Office erred by terminating his benefits under 5 U.S.C. § 8148 as he "did not plead guilty in an open court." Appellant submitted additional evidence.

A U.S. Attorney's office docket of appellant's criminal case shows that the court accepted his guilty plea on February 14, 2000 and judgment was entered on May 18, 2000. Appellant's May 24, 2001 motion for a new trial was denied on July 11, 2001. On December 19, 2003 the court granted his motion for early termination of probation.

In an August 7, 2003 letter, appellant alleged that the Office's investigative agents tricked him into saying that he intentionally failed to disclose his earnings. He contended that he did not intend to deceive the Office.

In an April 2, 2004 letter, the Office advised appellant that in October 2000 the U.S. Attorney's office "advised that the decision regarding fraud could not be reversed as there was no evidence sufficient to overcome the decision."

Appellant also submitted a July 20, 2000 letter of removal due to misconduct, medical reports and billing records. He provided correspondence between the Office and his elected representatives and copies of checks and correspondence regarding restitution payments.

By decision dated April 10, 2006, the Office denied reconsideration on the grounds that his request was untimely filed and did not present clear evidence of error. It found that

¹ The Board notes that the Office's August 31, 2000 file memorandum and September 6, 2000 letter contain several errors. The December 28, 1998 Form EN1032 notes only appellant's federal employment, not his private-sector employment. Also, his employment at the laundromat continued from before the June 16, 1997 injury through March 1999. The Office confused appellant's obligation to report all earnings and employment with how the Office would consider such employment in a wage-earning capacity or annual earnings calculation. The Board finds, however, that under the circumstances of the case these errors are harmless and nondispositive.

appellant's plea agreement in open court was sufficient cause to terminate his compensation benefits.

LEGAL PRECEDENT

Section 8128(a) of the Act² does not entitle a claimant to a review of an Office decision as a matter of right.³ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁴ The Office, through regulation, has imposed limitations on the exercise of its discretionary authority. One such limitation is that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁵ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁶

In those cases where requests for reconsideration are not timely filed, the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulation.⁷ Office regulation states that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in the Office's regulation, if the claimant's request for reconsideration shows "clear evidence of error" on the part of the Office.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁹ The evidence must be positive, precise and explicit and must be manifest on its face that it committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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

² 5 U.S.C. § 8128(a).

³ *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

⁴ *Thankamma Mathews*, *supra* at note 3; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

⁵ 20 C.F.R. §§ 10.607; 10.608(b). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁶ 5 U.S.C. § 10.607(b); *Thankamma Mathews*, *supra* note 3 at 769; *Jesus D. Sanchez*, *supra* note 4 at 967.

⁷ *Thankamma Mathews*, *supra* note 3 at 770.

⁸ 20 C.F.R. § 10.607(b).

⁹ *Thankamma Mathews*, *supra* note 3 at 770.

¹⁰ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹¹ *Jesus D. Sanchez*, *supra* note 4 at 968.

¹² *Leona N. Travis*, *supra* note 10.

whether the new evidence demonstrates clear error on the part of it.¹³ 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's decision.¹⁴ The Board must make an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that it abused its discretion in denying merit review in the face of such evidence.¹⁵

ANALYSIS

The Office properly determined that appellant failed to file a timely application for review. It issued its most recent merit decision in this case on December 26, 2000. Appellant's May 6, 2005 requesting reconsideration was untimely filed as it was submitted more than one year after the last merit decision.¹⁶ The issue is whether his May 6, 2005 request for reconsideration demonstrated clear evidence of error in the Office's March 13 and December 26, 2000 decisions.

Appellant's August 7, 2003 letter asserted that the Office tricked him into saying that he intentionally failed to disclose his earnings. His May 6, 2005 letter contended that the Office erred in terminating his compensation benefits as he had not been convicted of compensation fraud in open court. The Board finds that these letters do not raise a substantial question as to whether the Office's March 13 and December 26, 2000 decisions were in error or *prima facie* shift the weight of the evidence in appellant's favor. Therefore, they are insufficient to establish clear evidence of error.

The federal criminal docket record does not indicate that the February 14, 2000 guilty plea or May 18, 2000 judgment were ever reversed, vacated or set aside. The Office's April 2, 2004 letter explains that the U.S. Attorney's office did not reverse the fraud conviction as there was "no evidence sufficient to overcome the decision." These documents do not establish any error in the Office's March 13 and December 26, 2000 decisions.

Appellant also submitted a letter of removal, medical reports correspondence his elected representatives and documents regarding restitution payments. The documents do not contain precise, direct, explicit evidence that appellant timely reported his private-sector employment to the Office as required. Thus, they do not raise a substantial question as to the correctness of the Office's March 13 and December 26, 2000 decisions.

Appellant has not established that the Office improperly denied his request for further review of the merits of his claim, because his reconsideration request did not show that the

¹³ *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁴ *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

¹⁵ *Gregory Griffin*, *supra* note 5.

¹⁶ *Veletta C. Coleman*, 48 ECAB 367 (1997); *Larry L. Lilton*, 44 ECAB 243 (1992).

Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or constitute relevant and pertinent new evidence not previously considered by the Office.

Accordingly, the Board finds that the arguments and evidence submitted by appellant in support of his May 6, 2005 request for reconsideration do not *prima facie* shift the weight of the evidence in his favor or raise a substantial question as to the correctness of the Office's March 13 and December 26, 2000 decisions and are thus, insufficient to demonstrate clear evidence of error.

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely and failed to show clear evidence of error in the Office's March 13 and December 26, 2000 decisions. Therefore, the April 10, 2006 decision of the Office denying his May 6, 2005 request for reconsideration was proper under the law and the facts of this case.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 10, 2006 is affirmed.

Issued: November 27, 2006
Washington, DC

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

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

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