APPENDIX TABLE OF CONTENTS

OPINION AND ORDERS

APPENDIX TABLE OF CONTENTS (Cont.)

CONSTITUTIONAL, STATUTORY, AND JUDICIAL RULES

OTHER DOCUMENTS

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT (MAY 4, 2020)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MICHAEL B. BROWN,

Petitioner,

v.

U.S. DEPARTMENT OF LABOR,

Respondent.

No. 19-13120
Non-Argument Calendar

Agency No. 2015-SOX-00018

Petition for Review of a
Decision of the Department of Labor

Before: WILSON, GRANT, and LUCK, Circuit Judges.

PER CURIAM:

Michael Brown seeks review of the U.S. Department of Labor Administrative Review Board's decision affirming an Administrative Law Judge's denial of his motion to set aside the final judgment on his retaliation claim in favor of his former employer, Synovus Financial Corporation, under the Sarbanes-Oxley Act, 18 U.S.C. § 1514A. We deny his petition.

Factual Background and Procedural History

The underlying proceedings concerned an employment dispute. Brown argued that his former employer, Synovus, retaliated against him for whistleblowing, in violation of the Sarbanes-Oxley Act. Synovus moved for summary judgment, which the ALJ granted. In making his decision, the ALJ relied in part on Brown's deposition testimony that he was "terminated before he could report the fraud." Three months after the ALJ's decision, Brown appealed to the board. The board affirmed because Brown did not appeal the ALJ's decision within the required fourteen days. *See* 29 C.F.R. § 1980.110(a) (Mar. 2015). Brown then filed a petition in this court. We denied Brown's petition because, we emphasized, Brown did not file a direct appeal with the board by the fourteen-day deadline and, instead, attempted to file a Federal Rule of Civil Procedure 60(d)(3) motion, arguing that "the ALJ intentionally omitted and misrepresented facts in favor of Synovus." *See Brown v. Sec'y of Labor*, 739 F. App'x 978, 979 (11th Cir. 2018) ("*Brown I*") (unpublished). "The Board construed [that] motion as a petition for review and stated that it was untimely." *Id.* Agreeing with that decision, we concluded that the "Board did not err in construing [Brown's] motion to set aside the ALJ's order as a petition for review instead of a Rule 60(d)(3) motion," and "the Board did not err in denying [Brown's] motion as untimely." *Id.* at 980.

Shortly after, Brown filed what he termed to be a "Rule 60(d)(1)(3) Motion, Brief, and Independent Action . . . to set Aside the Order Due to Fraud on the Court" with the U.S. Department of Labor's Office of Administrative Law Judges. In his motion,

he contended that the previous ALJ misrepresented the facts and misapplied the law. A new ALJ denied Brown's motion. Because Brown "focus[ed] on the notion of 'fraud upon the court,'" the new ALJ construed Brown's motion as one that fell exclusively under rule 60(d)(3). The new ALJ found that, to set aside a judgment under rule 60(d)(3), the alleged fraud had to have been based on information that was discoverable only after the previous ALJ's decision. But Brown's motion, the new ALJ continued, was based on information known to him at the time of the previous ALJ's decision. The new ALJ also determined that even if the previous ALJ improperly found facts and misapplied the law, his actions did not rise to the level of fraud required for relief under rule 60(d)(3). Brown's motion, the new ALJ said, was "an attempt to re-argue his case, and not a demonstration of any type of fraud." The new ALJ concluded that Brown forfeited his right to challenge the previous ALJ's factual findings and legal conclusions when Brown failed to timely file a petition for review. For all these reasons, the new ALJ denied Brown's rule 60(d)(3) motion.

Brown appealed to the board, and the board "adopt[ed]" the new ALJ's decision, concluding that Brown "failed to allege proper grounds of fraud on the court" and merely attempted to "relitigate his [previous] case in the form of a motion for relief." Brown now seeks review of the board's decision.

Standard of Review

Our review of the board's decision is governed by the Administrative Procedure Act. *Stone & Webster Const., Inc. v. U.S., Dep't of Labor*, 684 F.3d 1127, 1132

(11th Cir. 2012). "We conduct *de novo* review of the [board]'s legal conclusions, but we test the [board]'s factual findings for substantial evidence." *Id.* "The substantial evidence standard limits the reviewing court from deciding the facts anew, making credibility determinations, or re-weighing the evidence." *Id.* at 1133 (internal quotation marks omitted).

Discussion

Brown contends that the board erred in not setting aside the summary judgment in favor of his former employer because: (1) the board relied on collateral estoppel to reject his fraud arguments; (2) he was entitled to relief under rule 60(b)(4); (3) the board did not address his claim under rule 60(d)(1); and (4) the first ALJ committed fraud on the court, in violation of rule 60(d)(3), by altering Brown's deposition testimony to create the impression that Brown failed to meet the whistleblowing requirements of Sarbanes-Oxley.

1. Collateral Estoppel.

The board did not base its decision, or even mention, collateral estoppel, so we won't review the board's order under the collateral estoppel doctrine. *See Fla. Dep't of Labor & Emp't Sec'y v. U.S. Dep't of Labor*, 893 F.2d 1319, 1321–22 (11th Cir. 1990) ("[A] reviewing court, in dealing with a determination or judgment which an agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." (internal quotation marks omitted)).

2. Rule 60(b)(4).

We will not consider Brown's rule 60(b)(4) argument because he raised it for the first time on appeal. *See Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004) ("This Court has repeatedly held that an issue not raised in the district court and raised for the first time in an appeal will not be considered by this court." (internal quotation marks omitted)).

3. Rule 60(d)(1).

The board properly construed Brown's motion as having been made under rule 60(d)(3) rather than rule 60(d)(1) because his sole argument—fraud on the court—was a rule 60(d)(3) argument. *See United States v. Jordan,* 915 F.2d 622, 624–25 (11th Cir. 1990) ("Federal courts have long recognized that they have an obligation to look behind the label of a motion filed by a pro se inmate and determine whether the motion is, in effect, cognizable under a different remedial statutory framework.").

4. Rule 60(d)(3).

Rule 60(d)(3) gives a court the power to "set aside a judgment for fraud on the court." *See* Fed. R. Civ. P. 60(d)(3). Fraud on the court is "only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases." *Travelers Indem. Co. v. Gore*, 761 F.2d 1549, 1551 (11th Cir. 1985). "Where relief from a judgment is sought for fraud on the court, the fraud must be

established by clear and convincing evidence." *Booker v. Dugger*, 825 F.2d 281, 283 (11th Cir. 1987).

Brown's rule 60(d)(3) argument fails for three reasons. First, the only evidence to support Brown's allegation of judicial misconduct was his own conclusory allegations. But conclusory allegations are insufficient to support a finding of fraud. *See Booker*, 825 F.2d at 283–84 ("Conclusory averments of the existence of fraud made on information and belief and unaccompanied by a statement of clear and convincing probative facts which support such belief do not serve to raise the issue of the existence of fraud." (internal quotation marks and alterations omitted)). Second, even assuming the ALJ misconstrued Brown's deposition testimony, this error would not amount to fraud. At most, the ALJ made a factual error, which is not fraud under rule 60(d)(3). *See First Nat'l Life Ins. Co. v. Cal. Pac. Life Ins. Co.*, 876 F.2d 877, 883 (11th Cir. 1989) (noting that a "careless . . . factual error" did not "amount[] to fraud"). And third, Brown had to show that the alleged fraud could not have been discovered by due diligence. *See Aldana v. Del Monte Fresh Produce N.A., Inc.*, 741 F.3d 1349, 1359 (11th Cir. 2014); *see also Travelers*, 761 F.2d at 1552 ("[F]or fraud to lay a foundation for an independent action, it must be such that it was not in issue in the former action nor could it have been put in issue by the reasonable diligence of the opposing party."). That is not the case here. Brown knew of the alleged fraud at the time of the ALJ's decision. He knew what was in the ALJ's order and what was in his deposition.

Conclusion

Because Brown presents no grounds to set aside the underlying judgment in favor of his former employer, the board did not err in affirming the ALJ's denial of Brown's rule 60(d)(3) motion.

PETITION DENIED.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT (JULY 11, 2018)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MICHAEL B. BROWN,

Petitioner,

v.

SECRETARY OF LABOR,

Respondent.

No. 17-13151
Non-Argument Calendar

Agency No. 2017-037

Petition for Review of a
Decision of the Department of Labor

Before: Ed CARNES, Chief Judge,
HULL, and Julie CARNES, Circuit Judges.

PER CURIAM:

Michael B. Brown, proceeding *pro se*, appeals the Administrative Review Board's order dismissing as untimely his petition for review of the administrative law judge's denial of his Sarbanes-Oxley whistleblower complaint. He also appeals the Board's order denying his motion for reconsideration.

Brown worked as an audit manager at Synovus Financial Corporation from November 2007 to January 2014, when he was fired. In July 2014 he filed a counseled whistleblower complaint with the Occupational Safety and Health Administration alleging that Synovus retaliated against him after he complained about potential Sarbanes-Oxley violations. After an investigation, OSHA dismissed his complaint in April 2015, finding that there was no reasonable cause to believe that Synovus violated the Sarbanes-Oxley Act when it fired him. Brown objected to that finding and requested a hearing before an ALJ. Brown also retained a new attorney to represent him before the ALJ. Synovus then moved for summary judgment, which the ALJ granted on Friday, December 16, 2016.

Brown had 14 days to appeal the ALJ's decision to the Administrative Review Board, which means that he had to file his petition for review by Friday, December 30, 2016. *See* 29 C.F.R. § 1980.110(a) (Mar. 2015). He did not file an appeal by that deadline. Instead, on April 6, 2017—over three months after the deadline—he filed a *pro se* "Motion and Brief to Set Aside the Order Due to Fraud on the Court" under Federal Rule of Civil Procedure 60(d)(3),[1] alleging that the ALJ intentionally omitted and misrepresented facts in favor of Synovus. The Board construed the motion as a petition for review and stated that it was untimely. But because the 14-day appeal deadline is not jurisdictional and is subject to equitable tolling, the Board ordered Brown to show cause as to why his petition should not be dismissed as untimely.

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[1] Rule 60(d)(3) allows a court to "set aside a judgment for fraud on the Court."

Brown responded to the show cause order by arguing that equitable tolling should apply because his attorney was ineffective. He stated that after receiving the ALJ's order on December 19, 2016, he immediately called his attorney to discuss an appeal. He spoke with and visited his attorney over the next several days and stated that he believed that his attorney had filed his appeal by the December 30 deadline. But on January 14, 2017, he learned that his attorney had failed to file a timely appeal with the Board. Brown attached a sworn affidavit from his attorney confirming those allegations. Synovus argued in response that the Board had repeatedly rejected ineffective assistance as a ground for equitable tolling.

On May 17, 2017, the Board issued an order denying Brown's petition on the ground that attorney error does not permit equitable tolling. It also noted that even though Brown learned on January 14, 2017, that his attorney had not filed an appeal, Brown did not file an appeal within 14 days from that date; instead, Brown waited over three months to file his motion. Brown filed a *pro se* motion for reconsideration requesting that the Board entertain an independent action to reconsider its decision and to set aside the ALJ's order for fraud on the court. The Board denied that motion on the ground that it did not address any of the Board's grounds for granting a motion for reconsideration. This is his appeal.

We review the Board's "decision pursuant to the standard of review outlined in the Administrative Procedure Act." *DeKalb County v. U.S. Dep't of Labor*, 812 F.3d 1015, 1020 (11th Cir. 2016) (quotation marks omitted). We review *de novo* the Board's legal conclusions and its "factual findings are reversed

only if unsupported by substantial evidence on the record as a whole." *Id.* (quotation marks omitted). Brown contends that the Board erred in construing his motion to set aside the ALJ's decision as a petition for review, instead of a motion under Rule 60(d)(3), and that it erred in dismissing his motion as untimely. He also contends that the Board erred in denying his motion for reconsideration. Brown's contentions fail.

The Board did not err in construing his motion to set aside the ALJ's order as a petition for review instead of a Rule 60(d)(3) motion. The Board liberally construes *pro se* filings, *Svendsen v. Air Methods, Inc.*, ARB Case No. 03-074, 2004 WL 1923132, at *1 n.2 (Aug. 26, 2004), and there is no authority for Brown's argument that the Board is required to follow the Federal Rules of Civil Procedure, *see Henrich v. Ecolab, Inc.*, ARB Case No. 05-030, 2007 WL 7143174, at *5 (May 30, 2007) ("Adopting the entire Federal Rules of Civil Procedure would prevent the Board from exercising the greater authority it possesses as the decision-maker for the Department of Labor.").

The Board also did not err in denying Brown's petition as untimely. The ALJ issued its decision on December 16, 2017, which gave Brown until December 30, 2017 to file his appeal with the Board. 29 C.F.R. § 1980.110(a). But, as Brown admits, he did not timely file an appeal, and his argument that attorney error warrants equitable tolling is a non-starter. *See, e.g., Higgins v. Glen Raven Mills, Inc.*, ARB Case No. 05-143, at *9 & n.60 (Sept. 29, 2006) ("In considering whether attorney error constitutes an extraordinary factor for tolling purposes, the Board has consistently held that it does not because ultimately, clients

are accountable for the acts and omissions of their attorneys.") (quotation marks and alterations omitted) (collecting cases). And, as the Board noted, even if equitable tolling did apply, once Brown learned on January 14, 2017, that his attorney did not file his appeal, he had another 14 days to file that appeal. *See id.; see also* 29 C.F.R. § 1980.110(a). But instead of doing that, he waited over three months until April 6, 2017, to file his motion with the Board. As a result, the Board did not err in denying his motion as untimely.[2]

Finally, the Board did not err in denying Brown's motion for reconsideration, which did not address any of the Board's grounds for reconsideration and was simply an attempt to relitigate his petition. *See Kirk v. Rooney Trucking Inc.*, ARB No. 14-035, at *2 (Mar. 24, 2016) (denying motion for reconsideration where party failed to address the Board's grounds for reconsideration, which include material differences in fact or law from what was presented to the Board and which the movant could not have known through reasonable diligence; new material facts or a change in law arising after the Board's decision; or failure to consider material facts presented to the Board before its decision).

PETITION DENIED.

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[2] Brown also argues the merits of the original whistleblower complaint that he filed, but because the Board dismissed his petition on procedural grounds, we do not address the merits of his complaint. *See Fla. Dep't of Labor & Emp't Sec'y v. U.S. Dep't of Labor*, 893 F.2d 1319, 1321 (11th Cir. 1990) ("As a general rule in administrative law cases, a reviewing court may not affirm an agency decision on grounds not addressed by the agency, but, rather, will remand for the agency to address the issue in the first instance.").

FINAL DECISION AND ORDER OF THE ADMINISTRATIVE REVIEW BOARD (JUNE 19, 2019)

U.S. DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD
200 CONSTITUTION AVENUE, N.W
WASHINGTON, D.C. 20210

In the Matter of:
MICHAEL B. BROWN,

Complainant,

v.

SYNOVUS FINANCIAL CORP.,

Respondent.

ARB Case No. 2019-0007

ALJ Case No. 2015-SOX-018

Before: William T. BARTO, Chief Administrative Appeals Judge and James A. HAYNES and Daniel T. GRESH, Administrative Appeals Judges.

This case arises under the whistleblower provision of the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C. § 1514A (2010) and its implementing regulations at 29 C.F.R. Part 1980 (2015). Brown brought his original complaint (Brown I) against Synovus Financial Corporation in 2014. The Occupational Safety and Health Administration (OSHA) dismissed the com-

plaint. Brown objected and requested a hearing. The Administrative Law Judge (ALJ) subsequently assigned to the case granted Synovus's motion for summary decision on December 16, 2016 and provided Brown notice of his right to timely appeal the ALJ's decision. The SOX's whistleblower provision gives parties fourteen days to appeal an ALJ's decision. 29 C.F.R. 1980.110(a). On April 6, 2017, over three months after the ALJ's decision, Brown filed a motion with the Administrative Review Board (ARB or Board) to set aside the ALJ's decision for alleged "fraud on the Court." The ARB treated Brown's motion as a petition for review and denied it as untimely filed. *Brown v. Synovus Financial Corp.*, ARB No.17-037, ALJ No. 2015-SOX-018 (ARB May 17, 2017). After the ARB denied Brown's subsequent motion for reconsideration, Brown appealed the ARB's final decision to the United States Court of Appeals for the 11th Circuit, which affirmed the ARB's decision. *Brown v. Sec'y of Labor*, No. 17-13151, 739 Fed. Appx. 978 (11th Cir., July 11, 2018)(unpub.). The court also denied Brown's subsequent motion for reconsideration.

Following the court's denial, Brown filed a motion with the ALJ for relief under Fed. R. Civ. P. 60(d), again asserting fraud on the court (*Brown II*). On October 30, 2018, the ALJ denied his motion, concluding specifically that Brown alleged no new information or discovery of fraud but rather moved for relief based on facts and content already known to him in December 2016 when the matter was before the ALJ the first time. The ALJ found that Brown's motion for relief was an attempt to reargue

his case which the ARB and the court of appeals had already denied.

Brown has now petitioned the ARB for review of the ALJ's decision.[1] Upon review of the ALJ's Order, we conclude that the ALJ's Order is well-reasoned and based on the undisputed facts and the applicable law. The ALJ properly concluded that the motion failed to allege proper grounds of fraud on the court. The ALJ correctly concluded that Brown seeks to relitigate his case in the form of a motion for relief. Accordingly, we adopt and attach the ALJ's Order Denying Motion to Relieve Party from Judgment, Order, or Proceeding to Set Aside the Order due to Fraud on the Court. Brown's Motion at issue is thereby DENIED.

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[1] The ARB has jurisdiction to review the ALJ's decision under Secretary's Order No. 01-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13,072 (Apr. 3, 2019) and 29 C.F.R. Part 1980.110. The ARB reviews the ALJ's factual determinations for substantial evidence and conclusions of law de novo. *Dietz v. Cypress Semiconductor Corp.*, ARB No. 15-017, ALJ No. 2014-SOX-002, slip op. at 6 (ARB Mar. 30, 2016); *see* 29 C.F.R. 1980.110(b).

ORDER DENYING MOTION TO RELIEVE PARTY FROM JUDGMENT, ORDER, OR PROCEEDING TO SET ASIDE THE ORDER DUE TO FRAUD ON THE COURT (OCTOBER 30, 2018)

U.S. DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD
200 CONSTITUTION AVENUE, N.W
WASHINGTON, D.C. 20210

In the Matter of:
MICHAEL B. BROWN,

Complainant,

v.

SYNOVUS FINANCIAL CORP.,

Respondent.

Case No. 2015-SOX-018

Before: Paul C. JOHNSON. Jr.,
District Chief Administrative Law Judge.

This matter was docketed in the Office of Administrative Law Judges on May 22, 2015, and assigned to Administrative Law Judge Alan L. Bergstrom, On December 16, 2016, Judge Bergstrom granted a motion for summary decision filed by Respondent Synovus Financial Corp.

On October 10, 2018, Complainant Michael B. Brown filed a motion entitled "Complainant Michael B. Brown's Rule 60(d)(3) Motion, Brie and Independent Action to Relieve a Party from a Judgment, Order, or Proceeding to Set Aside the Order Due to Fraud on the Court." Respondent Synovus Financial Corporation filed a timely response. For the reasons set forth below, Mr. Brown's motion will be denied.[1]

Background

Complainant filed a complaint under the employee-protection provisions of the *Sarbanes*-Oxley Act on July 3, 2014. He alleged that Synovus retaliated against him by reassigning him, placing him on a performance improvement program, and ultimately terminating him, after he raised concerns about the company's disregard of his audits and its blocking him from reporting his concerns to management. After the required investigation, OSHA determined that there was no reasonable cause to believe that Synovus violated Mr. Brown's rights under SOX. Mr. Brown objected to that determination and requested a hearing, and the matter was forwarded to the Office of Administrative Law Judges, where it was assigned to ALJ Alan L. Bergstrom.

On December 16, 2016, Judge Bergstrom issued a Decision and Order granting Synovus' motion for summary decision and dismissing the complaint. That Decision and Order informed Mr. Brown of his

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[1] Mr. Brown has also filed a complaint of judicial misconduct against Judge Bergstrom. That matter has been referred to the Chief Administrative Law Judge, and will not be addressed in this Order.

appeal rights, and instructed him that any appeal to the Administrative Review Board must be filed within 14 days of the date of Judge Bergstrom's decision. Complainant did not appeal to the An within 14 days. On April 6, 2017—79 days after Judge Bergstrom's Decision and Order—Mr. Brown filed a Motion and Brief to Set Aside the Order Due to Fraud Upon the Court. The ARB construed that motion as a petition for review of Judge Bergstrom's decision, and ultimately denied the petition as untimely. Complainant appealed the ARB's decision to the U.S. Court of Appeals for the 11th Circuit that Court affirmed the ARB's dismissal of his appeal on July 11, 2018. By order dated September 10, 2018, the Court of Appeals denied Mr. Brown's motion for reconsideration of its decision affirming the ARB. Mr. Brown thereafter filed the motion that is before me now.

Discussion

Mr. Brown brings his motion under Rule 60(d)(3)[2] of the Federal Rules of Civil Procedure. That rule provides that it "does not limit a court's power to . . . set aside a judgment for fraud on the court." He argues that Judge Bergstrom misrepresented and misconstrued the facts, and misapplied the-law, in granting summary decision to Synovus.

The proper procedure to challenge a ruling of an administrative law judge in a SOX proceeding is to petition the ARB for a review of that ruling. As Judge

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2 Complainants styles it as a motion under Rule 60(d)(3), but there is no such rule. Given his focus on the notion o ["fraud upon the court," I conclude that the motion is brought under Rule 60(d)(3).

Bergstrom advised Mr. Brown in the December 2016 Decision and Order:

> To appeal, you must file a Petition for Review ('Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision.

This Mr. Brown did not do. He filed nothing with the ARB for several months, and when he did, it was not a petition for review. The .ARB nevertheless chose to construe it as a petition for review, and denied it as untimely, noting that not only did Mr. Brown fail to file it within 14 days of the Decision and Order, he failed to file it within 14 days of becoming aware that his previous attorney had not filed it either. By falling to file a timely petition for review, Mr. Brown forfeited his right to have Judge Bergstrom's Decision and Order examined for factual and legal correctness. Having chosen to sit on his rights, he cannot now re-litigate his case.

Mr. Brown points out that there is no time limit for bringing a Rule 60(d)(3). motion; and that is true.[3] Rad be discovered for the first time, almost three years after the Decision and Order, that there had been fraud, he might be able to bring such a motion. But in this case, Mr. brown bases his entire argument on evidence that was known to him before December of 2016, and on statements and analysis by Judge Bergstrom that became known to him in that month. This is clearly an attempt to re-argue

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[3] I assume for the sake of this Order that Rule 60(d)(3) is applicable to administrative hearings in the Department al Labor, although that is far from clear.

his case, and not a demonstration of any type of fraud, and it is precisely the type of argument that should have been made on appeal to the ARB.

Finally, I note that Mr. Brown has not alleged any fraud *on* the ALJ, but has alleged fraud *by* the ALJ. The case law he cites, as well as that cited by Respondent, establishes the proposition that Rule 60(d)(3) is implicated when there. has been egregious misconduct by *a* party in the case, not by the court itself. For example, the Eleventh Circuit has held that "only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute a fraud on the court." *Gupta v. Walt Disney World Co.,* 482 F. App'x 458, 459 (11th Cir. 2012); *Rozier v. Ford Motor Co.,* 573 F.2d 1332, 1338 (5th Cir. 1978). Even assuming that Judge Bergstrom improperly found the facts and misapplied the law, his actions (a) are not fraudulent, (b) even if deemed fraudulent, do not rise to the level of fraud required for Rule 60(d)(3) relief, and (c) clearly are not a fraud *on* the court.

ORDER

For the foregoing reasons, IT IS ORDERED that Complainant Michael B. Brown's Rule 60(d)(3) motion is DENIED.

SO ORDERED.

/s/ Paul C. Johnson. Jr
District Chief Administrative Law Judge

ORDER OF THE ADMINISTRATIVE REVIEW BOARD (JULY 27, 2017)

U.S. DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD
200 CONSTITUTION AVENUE, N.W
WASHINGTON, D.C. 20210

In the Matter of:
MICHAEL B. BROWN,

Complainant,

v.

SYNOVUS FINANCIAL CORP.,

Respondent.

ARB Case No. 17-037

ALJ Case No. 2015-SOX-018

Before: Paul M. IGASAKI, Chief Administrative Appeals Judge and Leonard J. HOWIE III, Administrative Appeals Judge.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

On May 17, 2017, the Administrative Review Board issued a Final Decision and Order Dismissing Untimely Appeal in this case arising under the employee protection provisions of the Sarbanes-Oxley

Act of 2002 (SOX).[1] Initially, the Board rejected Complainant Michael B. Brown's Motion and Brief to Set Aside the Order Due to Fraud on the Court concluding that:

> The Secretary of Labor has delegated to the Board the limited responsibility to act for the Secretary and issue final agency decisions in review or upon appeal of final decisions of Department of Labor Administrative Law Judges (and the Wage and Hour Administrator and his or her authorized representative). To invoke the Board's authority to review a decision of an ALJ under the SOX's employee protection provisions, the party must file a petition for review within 14 days of the date of the ALJ's decision. Complainant has not filed a petition for review of an Administrative Law Judge's decision in this case. Instead he has filed a Motion and Brief to Set Aside the Order Due to Fraud on the Court. Brown has not cited to any authority that would permit the Board to consider such a motion. However, given Brown's pro se status, the Board will consider the Motion to constitute a petition for review of the ALJ's decision.[2]

Considering Brown's Motion as a Petition for Review, the Board ultimately concluded that because the "petition" was not filed within the applicable limitations

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[1] 18 U.S.C.A. § 1514A (Thomson West Supp. 2016). SOX's implementing regulations are found at 29 C.F.R. Part 1980 (2016).

[2] *Brown v. Synovus Financial Corp.*, ARB No. 17-037, ALJ No. 2015-SOX-018, slip op. at 2, (ARB May 17, 2017).

period (14 days) of the date on which Brown learned that his attorney had failed to file a petition, after telling Brown he would do so, it was not timely.[3]

On June 19, 2017, Brown filed "Complainant Michael B. Brown's Motion for the Board to Entertain an Independent Action to Reconsider its May 17, 2017 Final Decision and Order and Relieve the Complainant from the Decision and Order and Motion for the Board to Entertain an Independent Action to Set Aside the Court Order Due to Fraud on the Court." The Board has authority to reconsider its SOX decisions upon a timely motion for reconsideration.[4] We have previously identified four non-exclusive grounds for reconsidering a final decision and order. The grounds for reconsideration include, but are not limited to, whether the movant has demonstrated:

> (i) material differences in fact or law from that presented to [the Board] of which the moving party could not have known through reasonable diligence, (ii) new material facts

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[3] *Id.* at 2-3. *Accord Hillis v. Knochel Bros., Inc.*, ARB Nos. 03-136, 04-081, 04-148; ALJ No. 2002-STA-050, slip op. at 8-9 (ARB Reissued Mar. 31, 2006) (*citing Socop-Gonzales v. INS*, 272 F.3d 1176, 1195 (9th Cir. 2001) (90-day limitations period began to run on the date Socop first learned that there was a problem with his attempt to adjust his immigration status, *i.e.* from the date of the action that gave rise to his entitlement to equitable tolling)). In this case the date that gave rise to Brown's entitlement to equitable tolling was the date on which he learned that his attorney had not filed the petition for review as he said he would *i.e.*, January 14, 2017.

[4] Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012).

> that occurred after the [Board's] decision, (iii) a change in the law after the [Board's] decision, and (iv) failure to consider material facts presented to the [Board] before its decision.[5]

Brown's motion does not address any of the Board's well-established grounds for granting reconsideration nor does it proffer any additional grounds that would justify such reconsideration.

In essence, Brown re-argues the merits of his contention that the Boards should consider his motion alleging fraud on the court and his argument that special circumstances exist to justify his failure to timely file his petition for review. Accordingly, because Brown has failed to demonstrate any of the four grounds the Board has recognized as sufficient to justify reconsideration, nor any other sufficient ground, we DENY his motion for reconsideration.

SO ORDERED.

/s/ Paul M. Igasaki
Chief Administrative Appeals Judge

/s/ Leonard J. Howie III
Administrative Appeals Judge

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5 *Kirk v. Rooney Trucking*, ARB No. 14-035, ALJ No. 2013-STA-042, slip op. at 2 (ARB Mar. 24, 2016); *OFCCP v. Fla. Hosp. of Orlando*, ARB No.11-011, ALJ No. 2009-OFC-002, slip op. at 4, n.4 (ARB July 22, 2013) (Order Granting Motion for Reconsideration and Vacating Final Decision and Order Issued Oct. 19, 2012) (citation omitted).

FINAL DECISION AND ORDER OF THE ADMINISTRATIVE REVIEW BOARD DISMISSING UNTIMELY APPEAL (MAY 17, 2017)

U.S. DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD
200 CONSTITUTION AVENUE, N.W
WASHINGTON, D.C. 20210

In the Matter of:
MICHAEL B. BROWN,

Complainant,

v.

SYNOVUS FINANCIAL CORP.,

Respondent.

ARB Case No. 17-037

ALJ Case No. 2015-SOX-018

Before: Paul M. IGASAKI, Chief Administrative Appeals Judge and Leonard J. HOWIE III, Administrative Appeals Judge.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

On December 16, 2017, a Department of Labor Administrative Law Judge issued a Decision and Order—Granting Respondent's Motion for Summary Decision and Order Dismissing Complaint (D. & O.)

in this case arising under the employee protection provisions of the of the Sarbanes-Oxley Act of 2002 (SOX).[1] On April 6, 2017, Complainant Michael B. Brown filed, with the Administrative Review Board, a Motion and Brief to Set Aside the Order Due to Fraud on the Court.

The Secretary of Labor has delegated to the Board the limited responsibility to act for the Secretary and issue final agency decisions in review or upon appeal of final decisions of Department of Labor Administrative Law Judges (and the Wage and Hour Administrator and his or her authorized representative).[2] To invoke the Board's authority to review a decision of an ALJ under the SOX's employee protection provisions, the party must file a petition for review within 14 days of the date of the ALJ's decision.[3] Complainant has not filed a petition for review of an Administrative Law Judge's decision in this case. Instead he has filed a Motion and Brief to Set Aside the Order Due to Fraud on the Court. Brown has not cited to any authority that would permit the Board to consider such a motion. However, given Brown's pro se status, the Board will consider the Motion to constitute a petition for review of the ALJ's decision.

But, as such, Complainant filed his petition more than 14 days after the ALJ issued his D. & O. Never-

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[1] 18 U.S.C.A. § 1514A (Thomson West Supp. 2016). SOX's implementing regulations are found at 29 C.F.R. Part 1980 (2016).

[2] Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012).

[3] D. & O. at 29. *See also* 29 C.F.R. § 1980.110(a) (2016).

theless, the period for filing a petition for review with the ARB is not jurisdictional and therefore is subject to equitable modification.[4] In determining whether the Board should toll a statute of limitations, we have recognized four principal situations in which equitable modification may apply: (1) when the defendant has actively misled the plaintiff regarding the cause of action; (2) when the plaintiff has in some extraordinary way been prevented from filing his action; (3) when the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum, and (4) where the defendant's own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights.[5] But the Board has not found these situations to be exclusive, and an inability to satisfy one is not necessarily fatal to Brown's claim.[6]

Brown bears the burden of justifying the application of equitable tolling principles.[7] Accordingly, we ordered him to show cause why the Board should not dismiss his petition because he failed to timely file it. In response, Brown replies that ineffective assistance of counsel constituted an extraordinary way in which he was prevented from timely filing his petition. In

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[4] *Accord Hillis v. Knochel Bros.*, ARB Nos. 03-136, 04-081, 04-148; ALJ No. 2002-STA-050, slip op. at 3 (ARB Oct. 19, 2004); *Overall v. Tennessee Valley Auth.*, ARB No. 98-011, ALJ No. 1997-ERA-053, slip op. at 40-43 (ARB Apr. 30. 2001).

[5] *Selig v. Aurora Flight Sciences*, ARB No.10-072, ALJ No. 2010-AIR-010, slip op. at 3 (ARB Jan. 28, 2011).

[6] *Id.* at 4.

[7] *Accord Wilson v. Sec'y, Dep't of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995) (complaining party in Title VII case bears burden of establishing entitlement to equitable tolling).

support of this basis for equitable tolling, Brown avers that he was in contact with his counsel on several occasions after the ALJ issued his decision and that on the day the petition for review was due to be filed at the Board, his counsel assured him that it would be filed. Brown's contention is supported by a Declaration from his counsel, Marcus G. Keegan, stating that Keegan indicated to Brown on December 30, 2016, that he would file the petition, but that he failed to do so.[8]

The Board has consistently held that equitable tolling is generally not appropriate when a complainant is represented by counsel because counsel is "presumptively aware of whatever legal recourse may be available to [his or her] client."[9] Thus, attorney error does not constitute an extraordinary factor because "[u]ltimately, clients are accountable for the acts and omissions of their attorneys."[10] We do note that this appears to be particularly egregious conduct by the attorney in this case. He admitted that he told Brown on the day that the petition was due that he would file it and then failed to do so. But even if we made an exception for this extraordinarily serious breach of an attorney's obligation to his client, Brown still could not prevail on his claim for equitable tolling.

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[8] Declaration of Marcus G. Keegan, Exhibit B to Complainant's Response to the Order to Show Cause.

[9] *Sysko v. PPL Corp.*, ARB No. 06-138, ALJ No. 2006-ERA-023, slip op. at 5 (ARB May 27, 2008)(quoting *Mitchell v. EG&G*, No. 1987-ERA-022, slip op. at 8 (Sec'y July 22, 1993)).

[10] *Higgins v. Glen Raven Mills, Inc.*, ARB No 05-143, ALJ No. 2005-SDW-007, slip op. at 9 (ARB Sept. 29, 2006).

Brown admitted that he learned on January 14, 2017, that his attorney had failed to file the petition for review. Even if the period for filing had been tolled during the period Brown was unaware that Keegan had failed to file the petition as he said he would, once Brown was put on notice of this fact, the limitations period began to run anew. Nevertheless, Brown failed to file a petition for review within 14 days of the date that Keegan informed him that his attorney had not filed the petition. Brown states that he continued to attempt to work with Keegan after January 14th to "get as much information as he could from counsel" and that he filed a grievance with the State Bar of Georgia. But Brown has failed to establish any sufficient grounds for his failure to file a petition for review or to request additional time in which to do so, by January 28, 2017.

Accordingly, as Brown has failed to file a timely petition for review or to demonstrate sufficient grounds to entitle him to equitable tolling, his petition is DENIED as untimely and this case is closed.

SO ORDERED.

/s/ Paul M. Igasaki
Chief Administrative Appeals Judge

/s/ Leonard J. Howie III
Administrative Appeals Judge