United States Department of Labor
Employees' Compensation Appeals Board

LUCILLE CORE, Appellant	)	
and	)	**Docket No. 05-645**
	)	**Issued: July 8, 2005**
DEPARTMENT OF THE ARMY, WALTER REED ARMY MEDICAL CENTER, Washington, DC, Employer	)	

Appearances:
Lucille Core, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member

JURISDICTION

On January 19, 2005 appellant filed a timely appeal of the December 23, 2004 decision of the Office of Workers' Compensation Programs, which denied further merit review on the basis that her request for reconsideration was untimely filed and failed to demonstrate clear evidence of error. Because more than one year has elapsed between the last merit decision dated October 15, 2003 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2). Accordingly, the only decision properly before the Board is the December 23, 2004 decision denying appellant's request for reconsideration.

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On February 27, 2002 appellant, then a 42-year-old food service worker, sustained a traumatic back injury in the performance of duty. She stopped working on March 1, 2002 and returned to full-time, limited-duty work on March 6, 2002. The employing establishment terminated appellant effective April 12, 2002. The termination occurred during appellant's probationary period and the official notification of personnel action (Standard Form 50-B) indicated "No reason given" for the termination.[1] In a decision dated July 30, 2003, the Office accepted appellant's claim for acute lumbar strain.[2]

On August 26, 2003 appellant filed a claim for compensation (Form CA-7) for lost wages dating back to August 29, 2002. She submitted various treatment records from Dr. Montague Blundon, III, a Board-certified orthopedic surgeon, who first treated appellant on August 29, 2002. Dr. Blundon diagnosed acute lumbar strain secondary to a February 27, 2002 work injury. In an August 20, 2003 report, he indicated that appellant was partially disabled from August 29, 2002 to the present. Dr. Blundon further noted that appellant had a permanent restriction of no lifting over 25 pounds.

By a decision dated October 15, 2003, the Office denied appellant's claim for wage-loss compensation for the period August 29, 2002 to August 26, 2003. The Office noted that appellant was performing full-time, limited-duty work when she was terminated for cause on April 12, 2002. Additionally, the medical evidence did not demonstrate that appellant was totally disabled due to her February 27, 2002 employment injury.

The Office received an undated request for reconsideration from appellant on October 19, 2004. She submitted recent treatment records from Dr. Blundon dated September 22 and 28, October 20 and November 24, 2004. Appellant also submitted October 5, 2003 emergency room records from Suburban Hospital where she was treated for neck, back and left upper extremity pain and discomfort. The Office also received additional treatment records from an unidentified provider with the initials JEC, which covered the period June 9, 2003 to October 28, 2004. Appellant received treatment for a variety of conditions including a problem with her right third finger, a strain of intercostals muscle and arm and back complaints. Additionally, appellant submitted various documents that she perceived to be relevant to her April 12, 2002 termination and pending EEO complaint. This included, among other things, previously submitted statements from coworkers attesting to the quality of appellant's work, a

[1] In an April 12, 2002 memorandum, the employing establishment notified appellant that she would be terminated effective that same day because of tardiness/absenteeism and unprofessional conduct. The employing establishment indicated that appellant reported to work late and departed early on several occasions and she also exhibited unprofessional conduct on a number of occasions during her probationary period. Appellant filed an equal employment opportunity (EEO) complaint alleging that she was fired because of her temporary disability. She later amended her complaint to include a charge of sexual harassment against her former supervisor. As of July 20, 2004, the complaint was still pending before the U.S. Equal Employment Opportunity Commission (EEOC).

[2] The Office initially denied the claim in a decision dated June 3, 2002. An Office hearing representative affirmed the denial by decision dated March 11, 2003. On April 8, 2003 appellant requested reconsideration and in a decision dated July 30, 2003, the Office reviewed the claim on the merits and vacated the prior denial.

proposed settlement agreement signed by appellant in October 2002, which was later withdrawn and counseling records regarding appellant's performance standards.

In a decision dated December 23, 2004, the Office found that appellant's request was untimely filed and failed to demonstrate clear evidence of error on the part of the Office in denying wage-loss compensation for the period August 29, 2002 to August 26, 2003. Accordingly, the Office declined to review the merits of appellant's claim.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act 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 payment of compensation.[4] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).[5] One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision, for which review is sought.[6] In those instances when a request for reconsideration is not timely filed, the Office will undertake a limited review to determine whether the application presents "clear evidence of error" on the part of the Office in its "most recent merit decision."[7]

ANALYSIS

The one-year time limitation begins to toll the day the Office issued its October 15, 2003 decision, as this was the last merit decision in the case.[8] The Office received appellant's undated request for reconsideration on October 19, 2004. Because the request was received one year and four days after the October 15, 2003 merit decision, the Office found the request to be untimely.

[3] 5 U.S.C. § 8128(a); *see Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[4] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

[5] 20 C.F.R. § 10.607 (1999).

[6] 20 C.F.R. § 10.607(a) (1999).

[7] 20 C.F.R § 10.607(b) (1999). To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. *See Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise and explicit and it must be apparent on its face that the Office committed an error. *See Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. *Id.* Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. *See Jesus D. Sanchez*, 41 ECAB 964 (1990). 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 decision. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

[8] *See Veletta C. Coleman*, 48 ECAB 367, 369 (1997).

Section 10.607(a) provides that an application for reconsideration must be sent within one year of the date of the Office decision, for which review is sought.[9] The regulation further provides that if the request is "submitted by mail, the application will be deemed timely if postmarked … within the time period allowed."[10]

Appellant argued that her request was postmarked October 13, 2004 and therefore it was timely.[11] As previously stated, appellant's request was undated and the Office received the request on October 19, 2004. While appellant claimed to have mailed her request in a timely fashion, the record does not include a copy of the envelope in which appellant submitted her request for reconsideration.[12] The record also does not include any other evidence of mailing or receipt that would otherwise establish a timely filing. As the request was undated and the record is devoid of any additional information that would render appellant's request timely, the Office properly relied on the October 19, 2004 date of receipt.

Because the Office received appellant's request more than one year after the Office's October 15, 2003 merit decision, she must demonstrate "clear evidence of error" on the part of the Office in denying wage-loss compensation for the period August 29, 2002 to August 26, 2003. To establish clear evidence of error, appellant must submit evidence relevant to the issues that were decided by the Office.[13]

When appellant was relieved of her duties effective April 12, 2002 she had performed light-duty work in accordance with her then-current restrictions of no lifting over five pounds, limited walking and limited standing. Appellant claimed that she was terminated in part because of her physical disability. The employing establishment, however, indicated that it terminated appellant during her probationary period because of her tardiness, absenteeism and unprofessional conduct.

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition, which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[14] This term also means an inability to work when a light-duty assignment

[9] *See supra* note 6.

[10] *Id.*

[11] Appellant submitted additional evidence with her appeal regarding the October 13, 2004 date of mailing and the time of receipt of her request for consideration. As this evidence was not before the Office when it issued the December 23, 2004 decision, the Board is precluded from considering the evidence for the first time on appeal. 20 C.F.R. § 501.2(c).

[12] The Office's procedures require that an imaged copy of the envelope that enclosed the request for reconsideration should be in the case record. If there is no postmark, or it is not legible, other evidence such as a certified mail receipt, a certificate of service and affidavits may be used to establish the mailing date. In the absence of such evidence, the date of the letter itself should be used. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004).

[13] *See Dean D. Beets, supra* note 7.

[14] 20 C.F.R. § 10.5(x) (1999).

made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force) or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.[15]

The employing establishment effectively withdrew appellant's light-duty assignment when it terminated her on April 12, 2002. However, contrary to appellant's contention, there is insufficient evidence demonstrating that the termination was the result of her physical disability. The Office found that the employing establishment terminated appellant for cause. While several of her coworkers may have believed she was a "good worker," appellant has not provided sufficient information or argument on reconsideration demonstrating clear evidence of error on the part of the Office. Appellant's complaint was still pending before the EEOC as of July 20, 2004 and although the employing establishment may have been willing to entertain the prospect of a settlement in October 2002, this alone does not establish that appellant's accepted employment injury was the reason for her dismissal.

Appellant also resubmitted a copy of her performance standards counseling record, which indicated that on March 31, 2002 appellant's supervisor counseled her regarding her inability to perform all scheduled duties due to her restrictions. Although this discussion occurred less than two weeks prior to her April 12, 2002 termination, this document by itself does not establish that appellant was terminated because of her employment-related disability. She was also counseled on March 31, 2002 about continuing to return from breaks on time and about following all other agency policies. Her returning from breaks in a timely fashion was the subject of a prior counseling session that occurred on October 26, 2001. Consequently, appellant has not demonstrated clear evidence of error with respect to the Office's finding that she was terminated for cause, which was unrelated to her accepted employment injury.

The remaining question is whether appellant is unable to perform the light-duty position she held through April 12, 2002.[16] During the relevant timeframe of August 29, 2002 to August 26, 2003, Dr. Blundon was of the opinion that appellant could perform light-duty work. When he first examined her on August 29, 2002, Dr. Blundon imposed a 15-pound lifting restriction and advised that appellant should not sort silverware because the constant bending severely aggravated her lumbar spine. Approximately, one month later on September 26, 2002 the only restriction Dr. Blundon imposed was a 40-pound lifting limitation. However, on October 24, 2002 he modified appellant's lifting restriction to 25 pounds and on December 19, 2002 he once again reduced it to 15 pounds. On March 15, 2003 Dr. Blundon increased appellant's lifting restriction to 25 pounds and this sole limitation continued in effect through

[15] *Id.*

[16] When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that she can perform the light-duty position, the employee has the burden of establishing by the weight of the reliable, probative, and substantial evidence a recurrence of total disability and show that she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the employment-related condition or a change in the nature and extent of the light-duty job requirements. *Barry C. Peterson*, 52 ECAB 120, 125 (2000); *Terry R. Hedman*, 38 ECAB 222 (1986).

August 20, 2003 and beyond. Dr. Blundon advised that the 25-pound lifting limitation was a permanent restriction.

Because appellant's April 12, 2002 duties did not require her to lift in excess of 5 pounds, even Dr. Blundon's strictest limitation of 15 pounds lifting would not establish an inability to perform her light-duty work. Dr. Blundon recent treatment records covering September 22 to November 24, 2004, do not address appellant's physical capabilities during the relevant time frame of August 29, 2002 to August 26, 2003, and thus, are insufficient to demonstrate clear evidence of error. Furthermore, this evidence tends to reinforce the prior finding that appellant was not disabled from performing the light-duty position she held on April 12, 2002. In his most recent treatment records Dr. Blundon continued to find appellant capable of performing light-duty work and the only restriction he imposed was a 25-pound lifting limitation.

The October 5, 2003 emergency room treatment records from Suburban Hospital also do not address the relevant timeframe of August 29, 2002 to August 26, 2003. Additionally, the treatment appellant received for neck, back and left upper extremity discomfort and pain appears to be unrelated to her February 27, 2002 employment injury. The treatment records from an unidentified provider with the initials JEC, while covering a portion of the claimed period of disability, also pertain to medical conditions unrelated to appellant's accepted February 27, 2002 employment injury. Thus, the medical documentation appellant submitted on reconsideration failed to demonstrate clear evidence of error on the part of the Office in finding that appellant was not totally disabled due to her February 27, 2002 employment injury and therefore not entitled to wage-loss compensation for the period August 29, 2002 to August 26, 2003.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the December 23, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 8, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member