

[her] left foot,” with three immobile toes that caused her to limp, leading to chronic lumbar pain. She acknowledged her ability to perform her light-duty job.²

FACTUAL HISTORY

The Office accepted that on February 4, 2004 appellant, then a 42-year-old distribution clerk, sustained a severe contusion and sprain of her left foot when a metal mail basket fell on it.

Following emergency room treatment, appellant was examined on February 4, 2004 by Dr. Bonnie Simmons, an attending osteopath, who opined that appellant could return to work on February 5, 2005 with her ankle elevated.³ Appellant was then followed by Dr. Mark Gelfand, an attending Board-certified surgeon. In February 9 and 13, 2004 reports, Dr. Gelfand provided a history of injury and diagnosed a contusion and sprain of the left foot. He held appellant off work through February 14, 2004 and released her to work on February 15, 2004. In periodic reports through March 2004, Dr. Gelfand held appellant off work due to the left foot injury. He released appellant to sedentary, restricted duty on April 19, 2004.⁴ After being found fit for duty by an employing establishment physician, appellant returned to full-time limited-duty work on April 20, 2004.

On June 6, 2004 appellant filed a claim for a recurrence of disability for the periods May 2 and 5, 12 to 16, 2004 and June 1 to 5, 2004. She contended that the left foot injury caused her to limp, thereby, producing lumbar pain. Appellant submitted a May 20, 2004 letter from Dr. Gelfand noting that appellant had left foot trauma and “low back pain” with periodic work absences from May 2 to 20, 2004. Dr. Gelfand then held her off work.

In a June 15, 2004 report, Dr. Vladimir Gertsik, an attending podiatrist, noted the February 4, 2004 injury and referred appellant to a neurologist to “evaluate numb toes [left] foot and [low back pain].” Appellant was then followed by Dr. Marina Neystat, a Board-certified neurologist and internist. In a June 21, 2004 report, Dr. Neystat provided a history of injury and treatment, noting appellant’s symptoms of numbness in the toes on the left foot. On examination, she observed “discoloration of the skin over the dorsum of the left foot” and “mild dysesthesias present over the lateral aspect.” On July 1, 2004 Dr. Neystat obtained electromyography and nerve conduction velocity tests of the lower extremities showed a delayed “H reflex” on the left. Based on these studies, on July 29, 2004, Dr. Neystat diagnosed lumbar radiculopathy and a complex regional pain syndrome. She explained in an August 12, 2004 letter that limping due to severe left foot pain caused “moderate to severe lower back pain.” In September 2, 2004 reports, Dr. Neystat observed left foot tenderness and a reduced range of motion in the toes of the left foot. She held appellant off work from September 2 to 6, 2004.

² Appellant submitted additional evidence accompanying her request for appeal. The Board cannot consider new evidence for the first time on appeal that was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c).

³ February 7, 2004 x-rays of the left foot showed no evidence of fracture. A March 2, 2004 magnetic resonance imaging scan of the left foot was normal.

⁴ Appellant participated in physical therapy in March and April 2004.

In an October 19, 2004 report, Dr. Gelfand diagnosed a severe sprain and contusion of the left foot with tendinitis. He discharged appellant from treatment as of October 12, 2004 and released appellant to return to light sedentary duty on October 13, 2004.

On October 14 and 19, 2004 appellant filed claims for a recurrence of disability from June 15 to October 18, 2004. She asserted that limping due to the left foot injury increased her lumbar pain.

In a November 19, 2004 letter, the Office advised appellant of the medical and factual information needed to establish her claimed recurrences of disability. The Office noted that appellant was on light duty at the time of the alleged recurrences of disability. Therefore, she was to demonstrate a change in the requirements of her light-duty position or a worsening of her accepted condition such that she could no longer perform the job. The Office also advised appellant to submit a rationalized report from her attending physician supporting a causal relationship between the accepted injury and the claimed periods of disability.

Appellant responded by December 5, 2004 letter, asserting that she had already submitted all relevant documentation to the Office. She did not submit additional medical evidence.⁵

By decision dated January 12, 2005, the Office denied appellant's claim for a recurrence of disability commencing June 15, 2004. The Office found that appellant did not submit evidence establishing a change in the nature and extent of her limited-duty job or a worsening of the accepted left foot condition. The Office also denied appellant's claim for low back pain on the grounds that the medical evidence was insufficient to establish a causal relationship "to either the limited[-]duty job or the original injury of February 4, 2004."

In January 6, 2006 letters, appellant requested reconsideration. She asserted that the accepted left foot injury produced a permanent limp that caused lumbar pain. Appellant submitted additional evidence.

In a January 10, 2005 report, Dr. Neystat noted appellant's complaints of continued left foot pain with a limited range of motion of the toes. She also noted low back pain. On examination, Dr. Neystat found left foot tenderness and "dyesthesias on the lateral aspect of the left foot." She diagnosed left foot trauma and left lumbar radiculopathy versus regional complex pain syndrome.

In a May 24, 2005 letter, Dr. Gelfand noted that appellant still had left foot pain and "numbness in the second, third and fourth toes of the left foot." He stated that, after appellant finished a course of pain medication, she began to complain about severe back pain. The neurologist diagnosed appellant with complex regional pain syndrome of the left foot and left lumbar radiculopathy. Dr. Gelfand opined that appellant's "back pain was caused by the injury to her foot, affecting her back with her constant limping." He released appellant to sedentary duty.

⁵ Appellant submitted numerous letters regarding her dissatisfaction with how union representatives and employing establishment officials handled her claim.

In a January 5, 2006 letter, Dr. Gelfand again noted appellant's left foot pain with numbness in the second, third and fourth toes. He also noted that appellant was waiting "for authorization for more physical therapy" for her back pain.⁶ Dr. Gelfand released appellant to work "with the restriction that she has back support all the time," including "an adequate back chair."⁷

Appellant also submitted physical therapy notes dated from March 2004 to January 2005. These notes were not signed or reviewed by a physician.

By decision dated January 18, 2006, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant a merit review.⁸ The Office found that the medical evidence submitted on reconsideration was irrelevant as it failed to address the underlying issue of causal relationship. The Office noted Dr. Gelfand's May 24, 2005 statement that appellant's lumbar pain was caused by limping. However, the Office found that as Dr. Gelfand "failed to provide a diagnosis of a medical condition resulting from the effects of the limping ... his opinion [was] of limited probative value" and insufficient to "warrant reopening of the claim for merit review."⁹

LEGAL PRECEDENT

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.¹⁰ Section 10.608(b) provides that, when an application for review of the merits of a claim does not meet at least one of the three

⁶ At oral argument, held October 3, 2006, appellant contended that the Office refused to authorize her requests for continuing physical therapy. The Director's representative asserted that the Office issued a "short form closure" in error and noted that appellant could resubmit her requests for physical therapy and medical treatment related only to the accepted left foot injury. The Board notes that the issue of whether the Office wrongfully denied her requests for medical treatment is not before the Board on the present appeal.

⁷ On January 9, 2006 appellant filed a claim for recurrence of disability commencing May 2, 2004. She also asserted that she sustained "lower back pain" due to "limping caused by the original injury." As there is no final decision of record regarding this claim, it is not before the Board on the present appeal.

⁸ Following issuance of the Office's January 18, 2006 decision, appellant submitted additional evidence. The Board may not consider evidence for the first time on appeal that was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c).

⁹ The Board notes that the Office's January 18, 2006 decision contains language addressing whether appellant established that she sustained a consequential lumbar injury. At oral argument, held on October 3, 2006, the Director's representative asserted that this language did not constitute a final decision on the consequential injury issue.

¹⁰ 20 C.F.R. § 10.606(b)(2).

requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.¹¹

When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.¹²

ANALYSIS

The Office accepted that appellant sustained a severe sprain and contusion of her left foot on February 4, 2004. Appellant then claimed a recurrence of disability for intermittent periods on and after June 15, 2004 due to a worsening of the accepted condition. The Office denied appellant's claim for recurrence of disability in a January 12, 2005 decision on the grounds that the medical evidence was insufficient to establish a worsening of the accepted condition.

In January 6, 2006 letters, appellant requested reconsideration. In support of her request, she submitted a January 10, 2005 report from Dr. Neystat, an attending Board-certified internist and neurologist and May 24 and January 5, 2006 letters from Dr. Gelfand, an attending Board-certified surgeon.

In a January 10, 2005 report, Dr. Neystat addressed appellant's left foot and lumbar pain and limited motion of the toes. She diagnosed left foot trauma and left lumbar radiculopathy versus a regional complex pain syndrome. This report is repetitive of Dr. Neystat's July 29 and August 12, 2004 reports, in which she observed left foot and lumbar pain and offered the same diagnosis of lumbar radiculopathy and a complex regional pain syndrome. Evidence or argument which is duplicative or cumulative in nature is insufficient to warrant reopening a claim for merit review.¹³ Thus, Dr. Neystat's January 10, 2005 report, is insufficient to warrant reviewing the claim on the merits.

In a May 24, 2005 letter, Dr. Gelfand noted appellant's ongoing left foot pain with numbness in the second, third and fourth toes. He opined that appellant's lumbar pain was caused by limping due to the left foot injury. In a January 5, 2006 letter, Dr. Gelfand reiterated his previous findings and noted work restrictions. His remarks regarding appellant's left foot pain are repetitive of his October 19, 2004 report. Also, Dr. Neystat observed numbness in the toes of appellant's left foot in her June 21, 2004 report. Dr. Gelfand's opinion regarding the relationship between limping and appellant's lumbar pain was offered by Dr. Neystat on

¹¹ 20 C.F.R. § 10.608(b).

¹² *Annette Louise*, 54 ECAB 783 (2003).

¹³ *Denis M. Dupor*, 51 ECAB 482 (2000).

August 12, 2004.¹⁴ Thus, Dr. Gelfand's May 24 and January 5, 2006 letters are duplicative of reports previously of record and considered by the Office. They are, therefore, insufficient to warrant a review of the claim on the merits.¹⁵

Appellant also submitted physical therapy notes. As these notes were not signed or reviewed by a physician, they are not medical evidence for the purposes of this case.¹⁶ Therefore, they are irrelevant to the crucial medical issue in the claim. Evidence which is irrelevant to the claim is insufficient to warrant a merit review of the case.¹⁷

Appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument or constitute relevant and pertinent new evidence not previously considered by the Office. She is not entitled to a review of the merits of her claim. Therefore, the Office properly denied her request for reconsideration.

CONCLUSION

The Board finds that the Office properly denied a merit review of appellant's claim pursuant to her January 6, 2006 request for reconsideration, as she failed to submit relevant and pertinent evidence addressing the critical issue of whether her condition on and after June 15, 2004 was causally related to the accepted February 4, 2004 left foot injury.

¹⁴ The Board notes that neither Dr. Gelfand nor Dr. Neystat explained how or why the accepted February 4, 2004 left foot injury would cause numbness in the toes or cause appellant to limp. Moreover, neither physician explained the pathophysiology of how limping would cause lumbar pain, such as how an altered gait would adversely affect alignment of the lumbar discs or paraspinal musculature. Also, neither physician opined that appellant was disabled due to the accepted left foot injury for any period on or after June 15, 2004.

¹⁵ See *supra* note 13.

¹⁶ *Thomas L. Agee*, 56 ECAB ____ (Docket No. 05-335, issued April 19, 2005); *Richard F. Williams*, 55 ECAB ____ (Docket No. 03-1176, issued February 23, 2004); *Merton J. Sills*, 39 ECAB 572 (1988).

¹⁷ *Mark H. Dever*, 53 ECAB 710 (2002).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 18, 2006 is affirmed.

Issued: October 31, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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