

injury. She stated that her initial claim was accepted for occupational asthma and aggravation of preexisting sarcoidosis and that she was limited to working in a dust-free environment. Appellant stated that she attempted to work at her new assignment in the Air Mail Center on March 7, 2003 and suffered a severe attack of asthma due to the dusty environment at the employing establishment. On the reverse of the form, she indicated that following her initial employment injury in 1978 she worked limited duty in the accounting payroll office and was returned to her regular-duty assignment on March 1, 2003. Appellant submitted a notification from the employing establishment dated February 21, 2003 that she was involuntarily reassigned to the Priority Mail Center. On February 24, 2003 the employing establishment provided appellant with a limited-duty assignment due to her August 1, 1978 employment injury beginning March 1, 2003.

Dr. Richard H. Simon, a Board-certified internist of professorial rank, completed a report on March 9, 2003 noting that appellant contacted his office on March 7, 2003 due to difficulty with her cough. He had examined appellant on February 21, 2003. Appellant reported that her cough was not preventing her from working when she was assigned to a relatively clean work environment. Her work assignment then changed and when she reported to work at her new assignment on March 7, 2003 she developed intractable coughing and left work. Dr. Simon noted that appellant's disability due to airway hyperreactivity was historically made worse by exposure to dusty environments. In a note dated March 21, 2003, Dr. Simon noted examining appellant on that date and reported her assessment that her new work environment had more dust than her prior work area. He noted that appellant felt her cough worsened after a few minutes exposure to the new environment and she was unable to continue her work. Dr. Simon stated that appellant reported that her symptoms did not return to baseline for the remainder of that date, but that her symptoms had currently returned to baseline. He stated, "My impression is that [appellant] continues to have problems due to past lung damage from her sarcoidosis (no evidence of progression) and her airway hyperreactivity. [Appellant] has consistently reported that one of the triggers that worsen her cough is being in dusty environments."

Appellant filed a second notice of recurrence of disability on March 31, 2003 alleging that on that date she sustained a recurrence of disability due to her August 1, 1978 employment injury. She stated that, following the acceptance of her August 1, 1978 claim, she was restricted from work or exposure to extremely dusty environments. Appellant alleged that her recurrence of disability was due to continuous exposure to an extremely dusty environment on March 31, 2003 which was detrimental to her pulmonary health.

On April 11, 2003 Dr. Simon noted that appellant reported to a new work site on March 31, 2003 and experienced a marked increase in her cough. Appellant had to leave the employing establishment due to her cough. Dr. Simon stated, "My impression is that [appellant] continues to be plagued with severe coughing. By her reports it is triggered with exposures to dust. Unfortunately, she has not been able to work at two different sites where she has been assigned because of the coughing."

In a letter dated June 25, 2003, the Office requested additional factual and medical evidence in support of appellant's claim for recurrence on March 7, 2003. The Office allowed 30 days for a response.

By decision dated October 3, 2003, the Office denied appellant's claim for a worsening of her preexisting respiratory conditions based on her exposure to dust on March 7, 2003.¹

Appellant requested an oral hearing on October 16, 2003. She testified at the oral hearing on June 30, 2004. At that time, in support of her claim, appellant submitted additional medical evidence including a report from Dr. Simon dated February 21, 2003 which diagnosed asthma and sarcoidosis. Dr. Simon stated, "Patient is able to work as long as she is assigned to work environment that is no more dusty than the current one. She will not be able to work if her assignment places her in a more dusty site." On October 10, 2003 Dr. Simon stated by appellant's history her cough was exacerbated by exposure to dust, cleaning solutions, fumes including vehicular exhaust and cigarette smoke. He reviewed a report of particulate levels submitted by the employing establishment and noted that other environmental triggers were still possible. In a note dated February 6, 2004, Dr. Simon stated that appellant alleged her asthma resulted in a cough when exposed to cold, fumes, perfume or dust. He opined that this was consistent with her condition. By decision dated October 26, 2004, the hearing representative noted that the Office had properly determined that appellant's March 10, 2003 claim for a recurrence was a claim for a new traumatic injury; Office claim number 092034867. She remanded the case to the Office to secure additional evidence from the employing establishment regarding appellant's specific work environment on March 7, 2003 as well as to secure a second opinion evaluation from a qualified physician on the issue of whether appellant's work environment on March 7, 2003 caused an aggravation of her underlying condition.

The Office referred appellant for a second opinion evaluation with Dr. Bruce M. Niebylski, a Board-certified internist, on April 14, 2005. In a report dated May 18, 2005, Dr. Niebylski noted that appellant had returned to work on April 22, 2004. He examined appellant and diagnosed preexisting sarcoidosis with fibrotic lung disease and asthma. Dr. Niebylski stated that appellant had experienced episodes of temporary aggravation due to exposure to dust.² He stated that the temporary aggravations would aggravate the symptoms, but not worsen the underlying diagnosed conditions. Dr. Niebylski concluded, "It is possible that a temporary aggravation occurred on March 7, 2003." He recommended that appellant continue to work in a dust free and fume free environment as a preventative measure as a permanent restriction based on her conditions of sarcoidosis and asthma. The Office requested a supplemental report on July 28, 2005. Dr. Niebylski responded on August 30, 2005 and opined

¹ In a letter dated March 26, 2003, appellant objected to the employing establishment's direction to report to the Priority Mail Center effective March 29, 2003. She stated that conditions at the Priority Mail Center posed an immediate threat to her present health condition and were not in compliance with her current and ongoing medical restrictions. Appellant submitted a narrative statement dated September 29, 2003 and alleged that the employing establishment failed to provide her with a job within her restrictions. She referenced claim number 0900465215. In a decision dated October 3, 2003, the Office accepted that appellant sustained a temporary aggravation of sarcoidosis and asthma, under claim numbers A9-440173 and A9-465215. The Board notes that, in the record currently before it, the Office has not issued a final decision addressing whether appellant sustained a recurrence of disability due to her August 1, 1978 employment injury based on a change in the nature and extent of her light-duty job requirements as a result of her assignments to the Air Mail Center and/or the Priority Mail Center which allegedly failed to comply with the restrictions of her 1978 employment injury for a low dust environment. As the record before the Board does not establish that the Office has issued a final decision on this issue, the Board may not consider this issue in this appeal. 20 C.F.R. § 501.2(c).

² Dr. Niebylski incorrectly noted that appellant's asthma was not an employment-related condition.

that appellant's diagnosed conditions of sarcoidosis and asthma were not worsened by her work environment on March 7, 2003. He further opined that appellant's diagnosed conditions were not aggravated by her work environment. Dr. Niebylski stated that the requirement of a dust-free environment was not unreasonable, but noted that appellant could also wear a breathing mask or air filter while at work.

The Office found a conflict of medical opinion evidence between Drs. Simon and Niebylski regarding the aggravation of appellant's underlying pulmonary conditions due to her work environment on March 7, 2003. It referred appellant, a statement of accepted facts and a list of specific questions, to Dr. Thomas J. Petz, a Board-certified internist, for an impartial medical examination. Dr. Petz completed a report on February 22, 2006 and performed a physical examination as well as review of the medical records. He diagnosed quiescent sarcoidosis, asthma and allergic rhinitis. Dr. Petz stated, "Asthmatics have more irritable airways and nonspecific irritants which would include dust ... may induce a transient exacerbation of asthma. Once the individual is removed from the irritant and uses an appropriate inhalation medication, one would anticipate subsidence of her symptomatology." Dr. Petz recommended that appellant avoid exposure to irritants within the working environment. The Office requested a supplemental report from Dr. Petz on March 7, 2006.

By decision dated March 7, 2006, the Office accepted appellant's claim for temporary aggravation of asthma. The Office stated that the actual period of the aggravation had not yet been determined and was under development.

Appellant filed a claim for compensation and requested wage-loss compensation from March 7, 2003 through April 22, 2004. She submitted additional medical evidence addressing her current medical conditions on March 28 and 31, May 30 and June 23, 2006.

Dr. Petz submitted a supplemental report on April 19, 2006 and opined that appellant had a temporary aggravation of her asthma attributed to dust irritants in her working environment on March 7, 2003. He opined that this temporary aggravation subsided within three days based on a review of the record.

On July 11, 2006 appellant submitted a report from Dr. Simon dated March 9, 2004 diagnosing sarcoidosis and hyperreactive airway disease or asthma. Dr. Simon noted that appellant had not worked since March 2003 and that she believed that her coughing was worsened by exposure to dust, fumes and extremes of cold weather. He noted that appellant's sensitivity to dust, fumes and cold weather had not been reduced by available treatment modalities. Dr. Simon, therefore, opined that appellant's condition was permanent, that her condition could not be considered as temporary and that no date could be assigned to when it would cease.

Appellant submitted statements from the employing establishment dated November 26, 2003 and February 4, 2004 stating that there was no work available within her work restrictions.

By decision dated September 14, 2006, the Office approved appellant's claim for wage-loss compensation from March 7 to 9, 2003³ and denied her claim for compensation from March 10, 2003 through April 22, 2004. The Office found that the reports of Dr. Petz were entitled to the weight of the medical opinion evidence and established that appellant sustained a temporary aggravation of her pulmonary condition which ceased within three days after the exposure.

Appellant requested reconsideration on December 13, 2006 and provided a narrative statement detailing the chronology of her claim. She also submitted additional medical evidence in support of her request. Dr. Simon examined appellant on June 23, 2006 and noted treatment due to a chronic draining skin lesion and a syncopal episode. In a note dated September 22, 2006, he examined appellant regarding an increased cough which developed due to a viral exposure. Dr. Simon examined appellant on December 15, 2006 and found her condition stable.

By decision dated January 22, 2007, the Office declined to reopen appellant's claim for consideration of the merits on the grounds that she failed to submit relevant, pertinent new evidence which warranted review of the merits.⁴

LEGAL PRECEDENT -- ISSUE 1

When employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for the periods of disability related to the aggravation. However, when the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased. This is true even though the employee is found medically disqualified to continue in such employment because of the effect which the employment factors might have on the underlying condition. Under such circumstances, her disqualification for continued employment is due to the underlying condition, without any contribution by the employment.⁵ The fact that the Office accepts appellant's claim for a specified period of disability does not shift the burden of proof to appellant to show that he or she is still disabled. The burden is on the Office to demonstrate an absence of employment-related disability during the period subsequent to the date when compensation is terminated or modified.⁶ The Office's burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

The Federal Employees' Compensation Act provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the

³ The Office noted that, as appellant had experienced only three compensable dates of wage loss under this claim, those days were withheld as waiting days and she had no period of compensable disability. See 5 U.S.C. § 8117.

⁴ Following the Office's January 22, 2007 decision, appellant submitted additional new evidence. As the Office did not consider this evidence in reaching a final decision, the Board may not review the evidence for the first time on appeal. See 20 C.F.R. § 501.2(c).

⁵ *Raymond W. Behrens*, 50 ECAB 221, 222 (1999).

⁶ *Id.*

⁷ *Id.*

employee, the Secretary shall appoint a third physician who shall make an examination.⁸ The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician of an Office medical adviser or consultant, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case.⁹ It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on proper factual and medical background must be given special weight.¹⁰

ANALYSIS -- ISSUE 1

Appellant's attending physician, Dr. Simon, a Board-certified internist of professorial rank, opined that she sustained an employment-related aggravation of her diagnosed condition of asthma due to employment exposures on March 7, 2003. The Office referred appellant for a second opinion evaluation with Dr. Niebylski, a Board-certified internist, who opined that appellant had no aggravation of her asthma due to her March 7, 2003 employment exposure. Due to this conflict of medical opinion evidence, the Office properly referred appellant to Dr. Petz, a Board-certified internist, for an impartial examination to determine whether appellant sustained an aggravation of her asthma due to her March 7, 2003 employment exposure.

In a report dated February 22, 2006 and in a supplemental report dated April 19, 2006, Dr. Petz reported his findings on examination and reviewed the medical history. He diagnosed asthma and sarcoidosis. Dr. Petz opined that dust may have induced a transient exacerbation of appellant's asthma which would subside with removal from the irritant. In the supplemental report dated April 19, 2006, he found that appellant had sustained a temporary aggravation of her asthma and opined that this aggravation ended within three days after the employment exposure after through review of the record. The Board finds that Dr. Petz' reports are based on a proper factual history and is sufficiently detailed and well reasoned to constitute the weight of the medical evidence and resolve the existing conflict of medical opinion evidence. Dr. Petz agreed with appellant's attending physician, Dr. Simon, that appellant sustained an aggravation of her asthma due to her employment exposure on March 7, 2003 and further agreed with Dr. Simon's assessment that this aggravation had returned to baseline within a few days following the exposure.

Appellant submitted an additional report from Dr. Simon dated March 9, 2004 diagnosing sarcoidosis and hyperreactive airway disease or asthma. Dr. Simon noted that appellant had not returned to work and opined that, since currently available medical treatments had not lessened appellant's sensitivity to dust and other irritants her condition was permanent, that her condition could not be considered as temporary and that no date could be assigned to when it would cease. This report is not sufficiently detailed and rationalized to constitute the weight of the medical

⁸ 5 U.S.C. §§ 8101-8193, 8123.

⁹ 20 C.F.R. § 10.321.

¹⁰ *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

opinion evidence. Dr. Simon does not opine that any or every exacerbation of appellant's cough resulted in a permanent aggravation of her asthma and did not address the central issue of when appellant's cough returned to baseline following the exposure on March 7, 2003. Further, as Dr. Simon was on one side of the conflict that Dr. Petz resolved, the additional report from Dr. Simon is insufficient to overcome the weight accorded Dr. Petz as the impartial medical examiner or to create a new conflict.¹¹

The weight of the medical opinion evidence as represented by the well-reasoned reports of Dr. Petz establish that appellant sustained a temporary aggravation of her underlying asthma, and that this temporary aggravation ceased within three days following her exposure on March 9, 2003. As appellant's employment-related aggravation of asthma was temporary and left no permanent residuals, she is not entitled to compensation for periods after the aggravation ceased on March 9, 2003. This is true even though all physicians of record found that appellant should not continue working in a dusty environment because of the effect which the dusty environment might have on the underlying asthma. Under these circumstances, her disqualification for continued employment is due to the underlying asthma, without any contribution by the employment.¹²

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,¹³ the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.¹⁴ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.¹⁵

ANALYSIS -- ISSUE 2

Appellant requested reconsideration on December 13, 2006 and submitted additional medical evidence. In order to require the Office to reopen her claim for consideration of the merits, the evidence must be relevant and pertinent to the issue for which the Office denied her claim, the lack of sufficient rationalized medical opinion to establish that the March 7, 2003 aggravation of her asthma was either permanent or extended beyond the excepted period of March 9, 2003. In support of her claim, appellant submitted reports from Dr. Simon dated June 23, September 22 and December 15, 2006. These reports addressed appellant's ongoing medical conditions at the time of the examinations and did not address any condition or disability

¹¹ *Jaja K Asaramo*, 55 ECAB 200, 205 (2004).

¹² *Behrens*, *supra* note 5.

¹³ 5 U.S.C. §§ 8101-8193, § 8128(a).

¹⁴ 20 C.F.R. § 10.606(b)(2).

¹⁵ 20 C.F.R. § 10.608(b).

resulting from the March 7, 2003 employment exposure. As Dr. Simon's reports did not address the issue for which the Office denied appellant's claim, these reports are not relevant and pertinent and are not sufficient to require the Office to reopen appellant's claim for consideration of the merits.

Appellant's request for reconsideration also included her narrative summation events. As the Office denied her claim for additional compensation based on the lack of supportive medical evidence, her statement is not relevant and pertinent and is not sufficient to require the Office to reopen her claim for consideration of the merits.

CONCLUSION

The Board finds that the weight of the medical evidence establishes that appellant sustained a temporary aggravation of her asthma on March 7, 2003 which ceased by March 9, 2003 and which does not entitle her to additional compensation benefits for disability.¹⁶ The Board further finds that appellant failed to submit relevant and pertinent new evidence requiring the Office to reopen her claim for consideration of the merits.

ORDER

IT IS HEREBY ORDERED THAT the January 22, 2007 and September 14, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 19, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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

¹⁶ See 5 U.S.C. § 8117.