

FACTUAL HISTORY

On September 30, 2008 appellant, then a 56-year-old nurse, filed a recurrence of disability alleging that she sustained severe low back pain on July 31, 2008 after she was assigned to two work areas for approximately one week. She specified that she had been on restricted duty in a single area due to an accepted April 26, 2006 back injury² and the increased volume of work, namely inserting intravenous catheters, taking vital signs, managing patient charts and pushing wheelchairs, caused her to bend more frequently. Appellant's supervisor explained that a second work area was assigned due to a nursing staff shortage. She stopped work on August 1, 2008 and returned on August 6, 2008. The Office developed this as a claim for a new occupational disease.

An August 4, 2008 note from Dr. Luis R. Pagan, a Board-certified neurological surgeon, related that appellant had "a recent exacerbation of back pain that started a week ago." On physical examination, Dr. Pagan observed a negative straight leg raise and normal gait and posture. Neurological examination findings were also normal. In an August 6, 2008 attending physician's report, Dr. Pagan diagnosed disc dislocation and listed April 26, 2006 as the date of injury. He also noted that appellant reached maximum medical improvement and advised that she be placed on light duty in an August 11, 2008 work capacity evaluation.

The employing establishment notified appellant in a September 16, 2008 memorandum that she remained on restricted duty due to her "on-the-job injury." The employing establishment pointed out that she reached maximum medical improvement and that she would be provided work within her restrictions.

On December 18, 2008 the Office informed appellant that it was adjudicating the matter as a new occupational disease claim as she implicated new employment factors. It gave her 30 days to submit a physician's reasoned opinion explaining how her July 2008 work activities caused or aggravated a back condition. The Office did not receive a response.

By decision dated February 3, 2009, the Office denied appellant's claim, finding the medical evidence insufficient to demonstrate that a back condition resulted from the described employment factors.

In a January 12, 2010 e-mail correspondence with her attorney, appellant stated that she was first informed by Dr. Pagan sometime in late 2009 that the Office closed her original claim. She disputed the action, asserting that she was permanently disabled and needed prescription medication. Appellant retired effective January 1, 2010.

In a January 25, 2010 report, Dr. Pagan noted that he initially attended to appellant on July 24, 2006, when she complained of back, left hip and left leg pain on April 26, 2006 while lifting a patient at work. Appellant denied any preexisting back and leg pain before this incident. A magnetic resonance imaging (MRI) scan at the time revealed L4-L5 facet hypertrophy and

² Claim number xxxxxx201. This claim is not before the Board on the present appeal.

L5-S1 left disc herniation. Appellant continued to present back discomfort and recently underwent left knee arthroscopy. Dr. Pagan concluded:

“[Appellant] denies prior history of back pain and leg pain before her April 26, 2006 injury. I therefore conclude that there is causal relationship between her work injury and her symptomatology and need for treatment. This opinion is within reasonable medical certainty and/or probability. As a consequence of her injury, [appellant] is left with a permanent disability, for which she may only work in a light-duty capacity. These opinions are only for her lumbar spine.”

Appellant’s counsel requested reconsideration on January 31, 2010 and argued that the February 3, 2009 decision should be vacated based on Dr. Pagan’s January 25, 2010 report.

By decision dated June 9, 2010, the Office denied appellant’s request on the grounds that it did not receive new and relevant evidence warranting a merit review.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Act,³ the Office’s regulations provide that the evidence or argument submitted by a claimant must either: (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.⁴ Where the request for reconsideration fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁵

ANALYSIS

Appellant’s counsel requested reconsideration and argued that newly-submitted evidence, namely Dr. Pagan’s January 25, 2010 report, warranted further merit review and ultimately reversal. In this report, Dr. Pagan found that appellant’s employment caused her lumbar spine symptoms and need for treatment.

The Board finds that Dr. Pagan’s January 25, 2010 report constituted relevant and pertinent new evidence not previously considered by the Office as it addressed the issue underlying the Office’s February 3, 2009 denial, whether appellant’s employment caused or aggravated her low back condition.⁶ Although appellant had submitted previous reports from Dr. Pagan, the earlier reports did not specifically address causal relationship. Therefore, the Office was obligated to conduct a merit review of the claim when appellant submitted

³ 5 U.S.C. § 8128(a).

⁴ *E.K.*, Docket No. 09-1827 (issued April 21, 2010). *See* 20 C.F.R. § 10.606(b)(2).

⁵ *L.D.*, 59 ECAB 648 (2008). *See* 20 C.F.R. § 10.608(b).

⁶ *See Mary Lou Barragy*, 46 ECAB 781 (1995) (submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case).

Dr. Pagan's January 25, 2010 report in support of her reconsideration request. The requirements for reopening a claim for merit review do not include the requirement that a claimant submit all evidence which may be necessary to discharge her burden of proof.⁷ If the Office should determine that the new evidence submitted lacks probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.⁸ The case shall be remanded to the Office to conduct a merit review of the entire record. After such further development as is deemed necessary, the Office shall issue an appropriate merit decision.

CONCLUSION

The Board finds that the Office improperly refused to reopen appellant's claim for further review of the merits pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the June 9, 2010 decision of the Office of Workers' Compensation Programs is set aside and remanded for a review of the merits.

Issued: May 10, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

⁷ See *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

⁸ See *Dennis J. Lasanen*, 41 ECAB 933 (1990).