United States Department of Labor
Employees' Compensation Appeals Board

M.G., Appellant	)	
and	)	**Docket No. 14-106**
	)	**Issued: April 17, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Bloomfield Hills, MI, Employer	)	

Appearances:
Paul H. Kullen, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 21, 2013 appellant, through counsel, filed a timely appeal from the June 3, 2013 decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration. As the last merit decision was issued on April 17, 2012 more than 180 days from the filing of this appeal, the Board does not have jurisdiction over the merits of the claim, pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits under 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.[2] In a May 19, 2009 decision, the Board affirmed the April 1 and September 3, 2008 OWCP decisions, which found that the medical evidence was not sufficient to establish that her lumbar condition was related to her employment duties as a distribution clerk. In an April 17, 2012 decision, the Board affirmed an April 26, 2011 OWCP decision, which found that appellant did not meet her burden of proof to establish that her low back condition was due to her federal employment.[3] The facts and history as set forth in the prior decision are incorporated by reference.

On March 19, 2013 appellant's attorney requested reconsideration. He submitted a June 25, 2010 report from Dr. Krasnick that was not previously considered. Dr. Krasnick noted that he saw appellant on March 8, 2010 for intractable back and leg pain. Appellant had grade 2 spondylolisthesis at the L5-S1 level, which caused foraminal narrowing and might require surgery. She did not have back pain until 1998, at which time she was working at the employing establishment as a distribution clerk. Prior to 1998, appellant had no back or leg pain or any treatment for back or leg pain or similar problems. Dr. Krasnick explained that appellant had worked since she was a teenager and never had any problems with her lumbar spine or legs. He advised that her job required prolonged standing, as well as bending, lifting and twisting. Dr. Krasnick noted that appellant was required to bend, lift and move or push up to 80-pound bags of mail or other mail-related items. He explained that in 1998, after heavy lifting and repetitive bending, she developed progressive back pain in both legs, in the thighs and occasionally into the feet. Dr. Krasnick indicated that appellant had x-rays and magnetic resonance imaging (MRI) scans dating to 2002. X-rays at the time revealed a grade 2 spondylolisthesis at L5 on SI with associated pars interarticularis defect on the right, possibly on the left. Dr. Krasnick reviewed MRI scan testing and noted a progression of her spondylolisthesis at the L5-Sl level. He explained that the MRI scans performed in 2002 and 2006 revealed slightly greater than a grade 1 spondylolisthesis, whereas the MRI scans in 2008 revealed a grade 2 spondylolisthesis. There was also an increase in facet joint arthritic changes and foraminal narrowing. Dr. Krasnick opined that all of these factors were consistent with the progression of pain and symptomatology. He advised that, as a result, appellant had further discogenic changes at the L5-S1 level contributing to worsening low back pain and restrictions of motion.

Dr. Krasnick advised that spondylolysis was frequently a problem that developed during adolescence or preadolescence and might be associated with some spondylolisthesis; however, it was frequently asymptomatic until there was an inciting event. He stated that this was a common scenario seen in his practice and noted that the injury was seen in people with underlying spondylolysis and some degree of spondylolisthesis. Dr. Krasnick explained that

[2] Docket No. 11-1886 (issued April 17, 2012) and Docket No. 08-2474 (issued May 19, 2009).

[3] This decision noted that appellant provided a March 8, 2010 report from Dr. Robert A. Krasnick, a Board-certified physiatrist, who noted appellant's history of injury and treatment. Dr. Krasnick noted findings and diagnosed chronic back and intermittent leg pain secondary to grade 2 spondylolisthesis; underlying pars defect, spondylolysis and intermittent leg pain secondary to foraminal stenosis and radiculitis. He opined that the work at the employing establishment "certainly aggravated and likely accelerated this condition to the point that she was unable to work."

they developed symptomatology as a result of excess stress on the spine, particularly bending, lifting and twisting, which triggered instability at the spine due to increased stress and "micro if not macro injury to the discs and facet joints and leading to a cascade of further changes that occur over a number of years." He opined that, "[w]ithin reasonable medical certainty, bending, lifting and twisting during the course of work caused injury to the L5-S 1 disc, causing pain and further instability in 1998. This condition continued to progress during the course of her work in spite of treatment and ultimately being placed on work restrictions." Dr. Krasnick advised that an aggressive rehabilitation with spinal stabilization exercises would have been effective but this was not provided to appellant. He opined that, "because of the injury to the disc and the underlying nature of [appellant's] problem, it is more likely than not that the L5-S1 level was permanently and irreversibly damaged." Dr. Krasnick explained that her condition progressed on imaging from 2002 to 2008. He opined that "a workplace injury would not only have caused precipitation of symptoms, but acceleration of her underlying disease. This is consistent with her history of having no back or leg pain prior to 1998 and progressive symptomatology since that time."

In a June 3, 2013 decision, OWCP denied appellant's request for reconsideration finding that the evidence submitted was insufficient to warrant further merit review. While Dr. Krasnick provided some reasoning in support of her claim, he did not address a 2002 nonwork injury, when a car hood fell on her neck or that she had not worked at the employing establishment since September 11, 2008. OWCP also found Dr. Krasnick's report to be cumulative.

LEGAL PRECEDENT

Under section 8128(a) of FECA,[4] OWCP may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provide that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

> "(i) Shows that OWCP erroneously applied or interpreted a specific point of law; or
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> "(ii) Advances a relevant legal argument not previously considered by OWCP; or
>
> "(iii) Constitutes relevant and pertinent new evidence not previously considered by OWCP."[5]

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.[6]

[4] 5 U.S.C. § 8128(a).

[5] 20 C.F.R. § 10.606(b).

[6] *Id*. at § 10.608(b).

ANALYSIS

In support of the March 19, 2013 request for reconsideration, appellant's attorney submitted Dr. Krasnick's June 25, 2010 report. This report had not previously been submitted or considered by OWCP.

The Board finds that Dr. Krasnick's June 25, 2010 report constitutes relevant and pertinent new evidence not previously considered by OWCP. This report supported causal relationship of appellant's claimed condition to her employment, the underlying point at issue. Although the record also contains a previous March 8, 2010 report from Dr. Krasnick which provides some support for causal relationship, the June 25, 2010 report provides a level of reasoning on causal relationship not provided in the March 8, 2010 report.[7] Thus, the June 25, 2010 report is not merely cumulative of the March 8, 2010 report as indicated by OWCP. Furthermore, OWCP found that the June 25, 2010 report from Dr. Krasnick deficient because it did not address a 2002 nonwork injury or that appellant had not worked for the employing establishment since September 11, 2008. However, the Board notes that to reopen a claim for merit review does not require a claimant to submit all evidence which may be necessary to discharge her burden of proof.[8] The evidence only needs to be relevant and not previously considered. If OWCP 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.[9] On remand it shall conduct a merit review of the record. After such further development as is deemed necessary, OWCP shall issue an appropriate merit decision.

On appeal, appellant's counsel asserts that Dr. Krasnick's opinion is sufficient to establish appellant's claim. As noted, however, the Board does not have jurisdiction over the merits of the claim.

CONCLUSION

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

[7] Dr. Krasnick's March 8, 2010 report noted diagnoses and addressed causal relationship by finding that appellant's work "certainly aggravated and likely accelerated this condition to the point that she was unable to work." The June 25, 2010 report noted the progression of appellant's condition and explained why specific employment factors such as bending, lifting and twisting triggered her spinal instability and led to a precipitation or acceleration of her underlying spine disease. This level of discussion of causal relationship in the June 25, 2010 report is not present in the March 8, 2010 report.

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

[9] *See Dennis J. Lasanen*, 41 ECAB 933 (1990).

ORDER

IT IS HEREBY ORDERED THAT the June 3, 2013 decision of the Office of Workers' Compensation Programs is set aside and remanded.

Issued: April 17, 2014
Washington, DC

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

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

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