

**United States Department of Labor
Employees' Compensation Appeals Board**

DENISE M. TAYLOR, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Omaha, NE, Employer**

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**Docket No. 04-1580
Issued: February 4, 2005**

Appearances:
Denise M. Taylor, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On June 1, 2004 appellant filed a timely appeal from an April 8, 2004 nonmerit decision of the Office of Workers' Compensation Programs, denying her request for a review of the merits of her claim. The record also contains an Office decision dated February 5, 2004, which affirmed its June 9, 2003 decision, terminating appellant's compensation effective June 14, 2003 on the grounds that she no longer had any disability causally related to her November 25, 1988 employment injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the nonmerit and merit decisions.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation effective June 14, 2003, on the grounds that she no longer had any disability causally related to her November 25, 1988 employment injury; and (2) whether the Office properly refused to reopen appellant's claim for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On November 25, 1988 appellant, then a 34-year-old part-time flexible letter carrier, filed a traumatic injury claim alleging on that date she was bitten by a dog on her left calf while delivering mail. The Office initially accepted appellant's claim for left calf laceration and subsequently expanded the acceptance of her claim to include phlebitis and cellulitis in the left leg. Thereafter, appellant worked intermittently.

On June 18, 1991 appellant underwent surgery on her left calf to remove foreign body. On December 22, 1992 she underwent exploration of the calf with excision of scar and fat tissue. Appellant returned to work on August 11, 2000 as a modified distribution clerk based on the physical restrictions set forth by Dr. Jenae Limoges, her treating Board-certified internist.¹ She worked intermittently and stopped work on February 22, 2001. She filed a claim alleging that she sustained a recurrence of disability on that date and received appropriate wage-loss compensation.

The Office received a May 19, 2002 medical report from Dr. Nosrat A. Massih, an internist, in which he recommended that appellant quit her job because any position she took required her to either stand or sit in an upright position. In a letter dated July 11, 2002, the employing establishment advised Dr. Massih that a limited-duty position was available to appellant. The employing establishment described the duties of this position, as well as, the physical requirements which allowed appellant to sit or stand as necessary for her comfort and to elevate her leg if necessary. The employing establishment further advised Dr. Massih that the position was sedentary in nature and it did not require any squatting, climbing, kneeling, walking or lifting more than the weight of a letter.

By letter dated August 28, 2002, the Office referred appellant along with a statement of accepted facts, medical records and a list of specific questions regarding her left leg condition, disability and medical treatment to Dr. Paul N. Gobbo, a Board-certified internist, for a second opinion medical examination. Dr. Gobbo submitted a September 26, 2002 report providing a history of appellant's November 25, 1988 employment injury and medical treatment. He further provided his findings on physical examination and diagnosed chronic recurrent left calf pain status post trauma and infections with an element of postphlebotic syndrome. Dr. Gobbo wondered about the element of complex regional pain syndrome or reflex sympathetic dystrophy and noted that appellant chronically abused tobacco and she was overweight. Dr. Gobbo opined that based on appellant's history and his examination, it was not possible for her to continue her current job even though it involved sitting. He stated that even sitting for short periods brought on excruciating pain and discomfort in her left lower extremity. In addition, he stated that any other type of activity would tend to exacerbate this, especially standing and walking.

Dr. Gobbo also submitted an October 2, 2002 work capacity evaluation indicating that appellant had chronic left calf pain due to chronic postphlebotic syndrome with recurrent

¹ Dr. Limoges indicated in a July 1, 1999 work capacity evaluation that appellant could not sit, walk or stand no more than 30 minutes at a time without interruption. On September 11, 2000 appellant filed a claim alleging that she sustained a recurrence of disability on September 2, 2000 which was accepted by the Office on December 5, 2000.

thrombophlebitis and possible complex regional pain syndrome. He stated that appellant was unable to work and noted her physical limitations.

In an October 10, 2002 report, Dr. Gobbo reiterated the history of appellant's November 1988 employment injury and his September 26, 2002 findings. He stated that it appeared appellant had recurrent pain in her left calf related to chronic recurrent phlebitis. He suspected that she may also have some element of complex regional pain syndrome as a result of the initial dog bite, infection and phlebitis. Dr. Gobbo opined that appellant would not be able to return to her full duties as they involved prolonged periods of sitting and standing, none of which she could perform or tolerate at that time. He further opined that due to the chronic nature of her condition and lack of a cure, he expected her condition to be a lifelong problem, which would only be exacerbated by any type of employment.

The employing establishment submitted a February 26, 2003 investigative memorandum reporting that appellant spent several hours at a time at gambling casinos in September and October 2002 together with exhibits to the Office.

By letter dated March 10, 2003, the Office referred appellant along with medical records, a statement of accepted facts and a list of questions regarding her left leg condition, disability and medical treatment to Dr. Laurence A. Zacharia, a Board-certified internist, for a second opinion medical examination. Dr. Zacharia submitted a narrative report dated April 30, 2003, providing that ever since appellant was bitten by a dog on November 25, 1988 she suffered from recurrent pain in her left calf. He further provided a history of her medical treatment and his findings on physical and objective examination. Dr. Zacharia reviewed medical records and the employing establishment's investigative videotape. He diagnosed chronic inflammatory phlebitis. Dr. Zacharia stated that the videotape revealed that appellant was fully functional with no difficulty walking, sitting, climbing stairs and walking down stairs for as much as four hours. He further stated that while he believed that she could perform modified full-duty work, she had chronic inflammatory phlebitis and would need continuous oversight and treatment for this condition. He noted that the modified restrictions first introduced by Dr. Limoges on July 1, 1999 were still appropriate. Dr. Zacharia further noted that the medical evidence suggested that appellant's condition and restrictions were permanent. He stated that no further limitations were necessary and no underlying condition had been found to contribute or cause the chronic venous insufficiency or the recurrent superficial inflammatory thrombophlebitis.

In a May 5, 2003 letter, the Office issued a notice of proposed termination of appellant's compensation based on Dr. Zacharia's April 30, 2003 medical report. The Office provided 30 days in which appellant could respond to this notice.

In a May 31, 2003 response letter, appellant disagreed with the Office's proposed action. She noted discrepancies in the Office's factual presentation in its May 5, 2003 notice of proposed termination and questioned whether she actually appeared on videotapes from the casinos. Appellant alleged that she was harassed by the Office and employing establishment. She further alleged that contrary to the Office's finding, Dr. Massih was more qualified than Dr. Zacharia to render an opinion about her medical condition. Appellant stated that when she was not having an acute exacerbation, she was able to perform various activities.

By decision dated June 9, 2003, the Office finalized its proposed termination of appellant's compensation effective June 14, 2003. The Office found that appellant's arguments failed to address the issue involving her ability to return to work. The Office further found that she failed to submit any medical evidence establishing that she was unable to return to work and accorded greater weight to Dr. Zacharia's April 30, 2003 report.

On July 8, 2003 appellant requested an oral hearing before an Office hearing representative. She submitted treatment notes dated November 16, 2003 from Mary Sindelar, a registered nurse, regarding treatment she received in a hospital emergency room on that date for bilateral leg pain.

After the November 25, 2003 oral hearing, appellant, through her congressional representative, submitted Dr. Limoges' July 23, 2003 letter. In this letter, Dr. Limoges provided a history of the treatment appellant received from her and other physicians. Dr. Limoges stated that she attempted to work with the employing establishment to tailor a position for appellant that would allow her to avoid prolonged periods of sitting or standing in an attempt to decrease the swelling and subsequently decrease her recurrences but, no guarantee for work with these restrictions was provided. She opined that appellant had an underlying chronic problem, which led to recurrences. Dr. Limoges noted that it was unknown whether this was recurrent streptococcal cellulitis or an undiagnosed atypical mycobacterial infection. She further noted appellant's medication and opined that it appeared that while appellant may be relatively functional in between recurrent bouts of infection, these problems would continue to occur indefinitely and she did not see appellant returning to a truly functional status at any time in the future. Dr. Limoges expressed her fear that if appellant's condition remained undiagnosed and her symptoms were not controlled, the repeated bouts of inflammation would continue to worsen the underlying vascular and/or lymphatic abnormalities, which could eventually lead to complete loss of function of the leg or loss of the limb itself.

The Office received treatment notes dated November 16, 2003 from Dr. Thomas H. Webb, a vascular surgeon, which revealed no evidence of acute deep venous thrombosis involving the right lower extremity. The Office also received emergency room treatment notes of the same date from a physician whose signature is illegible revealed that appellant experienced leg pain. An unsigned pathology report revealed hematology and coagulation test results. Ms. Sindelar's November 16, 2003 discharge instructions and treatment notes indicated that appellant had bilateral leg pain and blood test results. A November 26, 2003 preliminary report from a registered nurse whose signature is illegible revealed no evidence of deep venous thrombosis based on a venous examination.

By decision dated February 5, 2004, the Office hearing representative affirmed the Office's June 9, 2003 decision. The Office hearing representative found the medical evidence of record sufficient to establish that appellant was physically capable of returning to her modified position, which she performed until February 2001.

Appellant requested reconsideration in a March 1, 2004 letter. She submitted a September 30, 2003 statement from an employing establishment supervisor, Pham Minhtr, who stated that her performance was less than fully successful and that her medical records established that she could not be accommodated in any position. Appellant also submitted a

September 17, 2003 statement from another employing establishment supervisor, Anamarie Piernicky, who stated that her medicals established that even with accommodations, there was no job she could perform. A September 8, 2003 letter from Dr. Limoges provided the employing establishment with appellant's medical history. Dr. Limoges noted that she attempted to work with the employing establishment in finding work for appellant. She diagnosed recurrent streptococcal cellulites and thrombophlebitis due to underlying venous and/or lymphatics secondary to trauma or undiagnosed chronic atypical mycobacterial infection secondary to foreign body/dirt/environmental contamination. Dr. Limoges stated that the condition may be worsening slightly as evidenced by increased chronic edema of the leg. She concluded that at that time, all the evidence suggested appellant would never have full or even partial recovery and it remained to be seen if there would ever be any remission on chronic prophylactic antibiotics. A November 17, 2003 medical report of Dr. Kurt V. Gold, a Board-certified physiatrist, provided a history of appellant's November 25, 1988 employment injury, medical treatment, social and family background. He also provided his findings on physical examination. Dr. Gold diagnosed dog bites while working, which was complicated by the question of whether appellant had deep venous thrombosis versus chronic thrombophlebitis. He also diagnosed myofascial pain syndrome at or subjacent to lateral gastrocnemius head on the left that was likely secondary to the above, bilateral lymphedema, overuse syndrome involving both legs, the development of patellofemoral syndrome in the right leg from overuse, situational depression with postinjury weight gain of 60 plus pounds, impaired sleep, gait and function secondary to above, nicotine dependency and vascular compromise involving the left leg which was showing signs of limb neglect. Dr. Gold stated that appellant had reached maximum medical improvement and she had a 30 percent permanent impairment of the left leg and a 10 percent permanent impairment of the right leg causally related to her November 25, 1988 employment injury based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*). He recommended that appellant stop smoking and seek additional medical treatment.

Through her congressional representative, appellant submitted Dr. Limoges' February 17, 2004 addendum report revealing that upon reviewing the tapes, which showed appellant at a casino, her medical opinion regarding appellant's condition, the chronicity, the low probability of recovery, her disability during flare-ups of thrombophlebitis and cellulitis remained unchanged. She explained that appellant was unable to work during flare-ups due to severe pain and swelling she experienced which worsened by movement, weight bearing or prolonged sitting or standing. She further explained that during an acute bout of thrombophlebitis and/or cellulitis, appellant needed to elevate her leg above heart level to help the swelling and venous and lymphatic drainage. Dr. Limoges noted that this required a supine position which would be prohibitive in the workplace.

In an April 8, 2004 decision, the Office denied appellant's request for a merit review of her claim on the grounds that the evidence submitted was cumulative and repetitious in nature.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to her employment, the Office may not terminate compensation without

establishing that the disability had ceased or that it was no longer related to the employment.² The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.³ If the Office, however, meets its burden of proof and properly terminates compensation, the burden for reinstating compensation benefits properly shifts to appellant.⁴

ANALYSIS -- ISSUE 1

In terminating appellant's compensation, the Office relied on Dr. Zacharia's April 30, 2003 medical report. In this report, Dr. Zacharia provided an accurate factual and medical background. He conducted a thorough medical examination and a detailed review of appellant's medical records. Dr. Zacharia's diagnosed chronic inflammatory phlebitis. He noted that the employing establishment's investigative videotape revealed that appellant was fully functional with no difficulty walking, sitting, climbing stairs and walking down stairs for as much as four hours. He opined that appellant could perform modified full-duty work based on Dr. Limoges' July 1, 1999 restrictions and noted that she would need continuous oversight and treatment for her chronic inflammatory phlebitis. Dr. Zacharia concluded that no further limitations were necessary and no underlying condition had been found to contribute or cause the chronic venous insufficiency or the recurrent superficial inflammatory thrombophlebitis.

The Board finds that Dr. Zacharia's opinion is entitled to greater weight in finding that appellant no longer has any disability due to her November 25, 1988 employment injury as it is sufficiently rationalized and based on a proper factual and medical background.

After the Office's June 9, 2003 decision terminating her compensation, appellant submitted additional medical evidence. Given that the Board has found that the Office properly relied on the opinion of Dr. Zacharia in terminating appellant's compensation effective June 14, 2003, the burden shifts to appellant to establish that she is entitled to compensation after that date.

Appellant submitted treatment notes and discharge instructions from Ms. Sindelar, a registered nurse and a report from another registered nurse whose signature is illegible regarding her leg condition. This evidence, however, does not constitute probative medical evidence in establishing appellant's disability for work because a registered nurse is not considered a "physician" under the Federal Employees' Compensation Act.⁵

Dr. Limoges' July 23, 2003 opinion that while appellant was functional in between recurrent bouts of infection, these problems would continue to occur indefinitely and she would be unable to return to a functional status at any time in the future is insufficient to establish appellant's burden inasmuch as Dr. Limoges failed to provide a specific diagnosis for the

² *Jason C. Armstrong*, 40 ECAB 907 (1989).

³ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁴ *See Virginia Davis-Banks*, 44 ECAB 389 (1993); *Joseph M. Campbell*, 34 ECAB 1389 (1983).

⁵ 5 U.S.C. § 8101(2); *see Sheila A. Johnson*, 46 ECAB 323 (1994).

underlying chronic medical condition that she believed caused appellant's recurrences and she failed to address whether appellant's disability for work was caused by her November 25, 1988 employment injury.

The November 16, 2003 emergency room treatment notes from a physician whose signature is illegible and Dr. Webb's treatment notes which indicated that appellant had leg pain and no evidence of acute deep venous thrombosis in the right leg did not address whether appellant's leg pain was caused by the November 25, 1988 employment injury and whether she was disabled due to this accepted employment injury.

The unsigned pathology report revealing appellant's hematology and coagulation test results is of no probative value as it was not signed by a physician and does not address the issue of whether appellant's disability was caused by her November 25, 1988 employment injury.⁶

The Board finds that the evidence submitted by appellant after the Office's June 9, 2003 decision did not provide a rationalized medical opinion establishing that her disability for work was causally related to her accepted employment injury and, thus, it is insufficient to create a conflict with Dr. Zacharia's opinion. Accordingly, as appellant has not submitted additional probative medical opinion evidence establishing that she had continuing disability causally related to her accepted November 25, 1988 employment injury, she has not met her burden of proof.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128 of the Act,⁷ the Office's regulations provide that 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.⁸ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁹ 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 of the merits.

ANALYSIS -- ISSUE 2

In this case, the Office terminated appellant's compensation on the grounds that she was no longer disabled due to her November 25, 1988 employment injury. Appellant disagreed with

⁶ See *Merton J. Sills*, 39 ECAB 572 (1988); *Jennifer L. Sharp*, 48 ECAB 209 (1996); *Thomas R. Horsfall*, 48 ECAB 180 (1996); see *Merton J. Sills*, 39 ECAB 572 (1988).

⁷ 5 U.S.C. §§ 8101-8193. 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 her own motion or on application." 5 U.S.C. § 8128(a).

⁸ 20 C.F.R. § 10.606(b)(1)-(2).

⁹ *Id.* at § 10.607(a).

this Office decision and requested reconsideration by letter dated March 1, 2004. In support of her request, appellant submitted statements from Mr. Minhtr and Ms. Piernicky, which indicated that she was unable to work based on her medicals. Whether appellant continued to be disabled for work as a result of her employment-related laceration, phlebitis and cellulitis of her left leg or continued to require medical treatment for her conditions, is a medical question reserved for qualified physicians.¹⁰ Although Mr. Minhtr and Ms. Piernicky may believe that appellant is unable to work, as lay people their opinion carries no evidentiary weight on such issue.

Appellant also submitted Dr. Limoges' September 8, 2003 letter in which she diagnosed recurrent streptococcal cellulites and thrombophlebitis due to underlying venous and/or lymphatics secondary to trauma or undiagnosed chronic atypical mycobacterial infection secondary to foreign body/dirt/environmental contamination and noted that her condition was worsening. Although Dr. Limoges' opined that appellant would never have full or even partial recovery and that it remained to be seen if there would ever be any remission as a result of taking chronic prophylactic antibiotics, she did not address whether appellant's condition was caused by her November 25, 1988 employment injury. The Board notes that Dr. Limoges was uncertain about the cause of appellant's diagnosed conditions.

In finding that appellant had a 30 percent permanent impairment of her left leg and a 10 percent permanent impairment of her right leg due to her accepted employment injury based on the A.M.A., *Guides*, Dr. Gold did not address whether appellant's impairment prevented her from working in the modified position at the employing establishment.

Dr. Limoges' February 17, 2004 addendum report revealed that her medical opinion regarding appellant's condition, the chronicity, the low probability of recovery, her disability during thrombophlebitis and cellulitis flare-ups remained unchanged after reviewing the employing establishment's investigative videotapes. She explained that appellant was unable to work during flare-ups due to severe pain and swelling, which worsened by movement, weight bearing or prolonged sitting or standing. She further explained that during an acute bout of thrombophlebitis and/or cellulitis, appellant needed to elevate her leg above heart level to help the swelling and venous and lymphatic drainage. This required a supine position which would be prohibitive in the workplace. Dr. Limoges' report is repetitious of her previous reports already considered by the Office. The Board has held that the submission of evidence or argument which repeats or duplicates that already in the case record does not constitute a basis for reopening a case.¹¹

Appellant has not shown that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office. Further, she failed to submit relevant new and pertinent evidence not previously considered by the Office. As appellant did not meet any of the necessary regulatory requirements, the Board finds that she was not entitled to a merit review.¹²

¹⁰ See *Ausberto Guzman*, 25 ECAB 362 (1974).

¹¹ *Edward W. Malaniak*, 51 ECAB 279 (2000).

¹² See *James E. Norris*, 52 ECAB 93 (2000).

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation effective June 14, 2003 on the grounds that she no longer had any disability causally related to her November 25, 1988 employment injury. The Board further finds that the Office properly refused to reopen appellant's claim for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the April 8 and February 5, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 4, 2005
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member