



duty due to repetitive activities at work. She stopped working with the employing establishment on September 29, 1998.<sup>1</sup> The Office accepted appellant's claim for bilateral carpal tunnel syndrome and placed her on the periodic rolls.

Appellant received treatment from Dr. Gregg Diamond, a Board-certified physiatrist, who requested that she attend a pain program. This request was authorized by the Office on March 21, 2001. Dr. Diamond referred appellant to Dr. Christopher J. Tucker, a Board-certified physiatrist, associated with the pain management program. In a March 20, 2001 report, Dr. Tucker indicated that he tried to schedule her for an evaluation on February 21, 2001 and that the appointment had been rescheduled on six occasions. He noted that appellant related that she was in the process of moving. In an April 3, 2001 report, Dr. Tucker noted her history of injury and treatment and diagnosed bilateral carpal tunnel syndrome and myofascial pain syndrome. He advised that appellant failed to respond to primary levels of care and determined that she had a pain disorder with medical and psychological features of mental stress. Dr. Tucker indicated that these included sleep disturbance, depression, suicidal ideation, chronic deficits of functioning, inhibition of physical function, excessive functional disability, open surgical option, occupational risk factors, extended period of disability, excellent job history, financial disincentives and uncertain vocational options and possible rehabilitation needs. He also referred appellant to a pain program and requested a repeat electromyogram (EMG) and thyroid tests.

In a June 5, 2001 report, Dr. Tucker advised that he was discharging her as she had never attended a single day of treatment at the pain program. He indicated that she displayed a "very strong pattern of noncompliance and secondary gain behaviors." Dr. Tucker also noted that appellant's pattern of noncompliance began immediately with her initial evaluation and that she failed to make the most of her appointments. Dr. Tucker indicated that the only findings "of any significant neuromuscular disorder were on the EMG of November 2, 1999, which showed slowing of the median and ulnar distal latencies." He advised that this was "consistent with median and ulnar nerve entrapments at the wrist and might also be an indication of peripheral neuropathy." Dr. Tucker explained that, despite being scheduled for a repeat EMG, appellant refused to proceed and demonstrated "an avoidant behavior throughout her evaluation process" with regard to the pain program. He explained that her efforts to avoid the program were suggestive of "serious financial secondary gain issues." Dr. Tucker also noted that she came to his office on several occasions, very well groomed and perfectly made up and opined that this would require the ability to perform fine motor tasks. He determined that she had reached maximum medical improvement and had shown a "very strong pattern of refusing treatment and diagnostics appropriate to her claimed injury." Dr. Tucker indicated that appellant was "capable of returning to full-duty full-time work effective immediately."<sup>2</sup>

On April 15, 2003 the Office issued a notice of proposed termination of compensation. The Office proposed to terminate appellant's compensation on the basis that the weight of the medical evidence, as represented by the report of Dr. Tucker established that she no longer had a

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<sup>1</sup> Appellant referred to a prior claim under No. 160280819; however, that claim is not before the Board and there are no details regarding that claim in the record.

<sup>2</sup> The Office subsequently closed appellant's vocational rehabilitation file.

work-related disability and that appellant was capable of performing her regular work without restrictions.

By decision dated May 15, 2003, the Office terminated appellant's compensation benefits effective that day.

In a June 26, 2003 report, Dr. Robert Ippolito, Board-certified in plastic surgery of the hand and a treating physician, diagnosed bilateral cubital tunnel syndrome, carpal tunnel syndrome and pronator syndrome. In a July 8, 2003 report, he requested an EMG and nerve conduction velocity studies (NCV).<sup>3</sup>

In a July 31, 2003 report, Dr. Erwin A. Cruz, a Board-certified neurologist and a treating physician, indicated that he performed NCV studies and EMG's which were "entirely normal." He also advised that he did not see any "evidence of entrapment neuropathy or any other problem, whatsoever."

By letter dated April 7, 2004, appellant, through her representative, requested reconsideration and submitted additional evidence and arguments. She alleged that she continued to be disabled and that the medical evidence suggested a conflict. In a November 2, 1999 diagnostic report, Dr. Diamond determined that appellant was totally incapacitated. A March 23, 2004 report from Dr. Kathy Toler, a Board-certified neurologist and treating physicians, stated that appellant's condition began on June 19, 1996 when she had mid and low-back pain after lifting a tray of mail.<sup>4</sup> Dr. Toler diagnosed post-traumatic cervical strain, which was asymptomatic, post-traumatic thoracic strain, bilateral cubital tunnel and bilateral carpal tunnel syndrome and post-traumatic lumbar radicular syndrome. She opined that appellant's complaints were directly related to the injury in 1996 and she was uncertain as to her ability to work without additional diagnostic testing.

By decision dated April 20, 2004, the Office denied modification of the May 15, 2003 decision. The Office determined that the medical evidence submitted by appellant failed to overcome the deficiencies of her claim.

On June 1, 2004 appellant requested that the Office disregard Dr. Cruz's reports and utilize those of Dr. Diamond.

By letter dated June 9, 2004, appellant's representative requested reconsideration and repeated previous arguments and submitted additional evidence.

In a June 23, 2003 report, Dr. Cruz indicated that the neuroelectrophysiologic findings were normal. He opined that he "did not find any evidence of bilateral carpal tunnel median entrapment neuropathy and/or ulnar neuropathy at the wrist or elbow." Also submitted was a

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<sup>3</sup> In a July 9, 2003 email correspondence, the Office noted that Dr. Ippolito was requesting referral for an EMG/NCV study and indicated that the tests were denied as the case had been closed since May 15, 2003).

<sup>4</sup> Any claim pertaining to a 1996 injury is not before the Board on the present appeal.

September 4, 1996 report from Dr. Diamond, who noted the history of a June 19, 1996 injury and findings on examination.

By decision dated September 2, 2004, the Office denied modification of the May 15, 2003 decision. The Office found that the evidence was insufficient to establish any disabling residuals following the Office's termination of compensation on May 15, 2003.

On October 21, 2004 appellant requested reconsideration. She enclosed a September 16, 2004 letter in which she alleged that the earlier report of Dr. Diamond dating back to 1996 should be utilized as opposed to the later reports. Appellant also questioned the validity of other medical reports and testing. The Office also received a copy of an August 11, 2000 and March 23, 2004 report from Dr. Toler and a page of a June 9, 2000 letter of medical necessity from Dr. Diamond that were previously of record.

On October 20, 2004 the Office received a copy of diagnostic test results from Dr. Mark E. Pretorius, a Board-certified neurologist, dated August 12, 1997, which showed that appellant had a normal EMG and NCV study of both upper extremities. The Office also received treatment notes dating from June 24 to 26, 1996 from Dr. K. James Wagner, a Board-certified orthopedic surgeon, which indicated that she was treated for facet syndrome of the thoracic spine and lumbar syndrome.

By decision dated November 30, 2004, the Office denied appellant's reconsideration request without reviewing the case on the merits. The Office determined that she did not raise any substantive legal questions, nor did she include relevant and pertinent new evidence and thus, appellant's request was insufficient to warrant a review of the prior decision.

### **LEGAL PRECEDENT -- ISSUE 1**

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.<sup>5</sup> Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.<sup>6</sup>

### **ANALYSIS -- ISSUE 1**

The Office based its decision to terminate appellant's compensation on the June 5, 2001 report of Dr. Tucker, a Board-certified physiatrist and one of her treating physicians. He had an opportunity to examine appellant and review her history. In his June 5, 2001 report, Dr. Tucker opined that she had shown a pattern of noncompliance, had missed most of her appointments and refused to attend the pain program to which she was also referred by Dr. Diamond, another treating physician. Dr. Tucker noted that the only findings of any significant muscular disorder were on EMG findings from 1999. He attempted to obtain current findings; however, appellant

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<sup>5</sup> *Curtis Hall*, 45 ECAB 316 (1994).

<sup>6</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989).

resisted efforts to obtain current results and he opined that she demonstrated “avoidant behavior.” Dr. Tucker opined that she sought to “delay any kind of treatment” offered which he felt represented “serious ... secondary gain issues.” He also observed that in addition to her efforts to avoid treatment, he also noticed that appellant was very well groomed and made up, which would require fine motor skills. He determined that she had reached maximum medical improvement and was capable of full time and regular-duty work. Dr. Tucker noted no basis on which to support any disability or need for continuing treatment due to the accepted injury.

The Board finds that the report of Dr. Tucker, appellant’s treating physician, constitutes the weight of medical evidence and establishes that residuals of her accepted injury had ceased. At the time the Office terminated benefits, the record contained no medical evidence objectively supporting continuing residuals or disability causally related to her accepted bilateral carpal tunnel syndrome. The Board concludes that the Office met its burden of proof in terminating appellant’s benefits.

### **LEGAL PRECEDENT -- ISSUE 2**

After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation shifts to appellant. In order to prevail, she must establish by the weight of the reliable, probative and substantial evidence that he had an employment-related disability, which continued after termination of compensation benefits.<sup>7</sup>

The medical evidence required to establish a causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician’s rationalized opinion on the issue of whether there is a causal relationship between the claimant’s diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by appellant.<sup>8</sup>

### **ANALYSIS -- ISSUE 2**

Subsequent to the Office’s May 15, 2003 decision, appellant submitted several reports. The relevant reports included several from Dr. Ippolito, her Board-certified plastic surgeon for the hands. He diagnosed bilateral cubital tunnel syndrome and requested additional studies. However, this was not accepted by the Office. The only accepted condition was bilateral carpal tunnel syndrome which related to the wrists; whereas bilateral cubital tunnel syndrome related to the elbows. This report is, therefore, of limited probative value.

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<sup>7</sup> *Talmadge Miller*, 47 ECAB 673, 679 (1996); *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

<sup>8</sup> *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

Appellant also submitted two reports dated June 23 and July 31, 2003 from Dr. Cruz, a Board-certified neurologist and her treating physician, who indicated that her EMG and NCV studies were normal. He further advised that he did not see any evidence of any problems.

Additionally, Dr. Toler, a Board-certified neurologist, diagnosed several conditions, including post-traumatic cervical strain, which was asymptomatic, post-traumatic thoracic strain, bilateral cubital tunnel and bilateral carpal tunnel syndrome and post-traumatic lumbar radicular syndrome. However, as noted above, the only accepted condition was bilateral carpal tunnel syndrome.<sup>9</sup> Dr. Toler indicated that these conditions were directly related to the injury in 1996, but was uncertain as to appellant's ability to work without additional diagnostic testing. However, she did not relate appellant's condition or disability to the accepted bilateral carpal tunnel syndrome arising from the August 18, 2000 occupational disease claim.<sup>10</sup> Furthermore, Dr. Toler did not attempt to distinguish Dr. Tucker's opinion or demonstrate knowledge of his opinion.<sup>11</sup>

Appellant also submitted additional reports and diagnostic imaging reports that do not mention work factors or otherwise address causal relationship. These reports merely reported findings and did not contain an opinion regarding the cause of the reported condition. Medical reports not containing rationale on causal relation are entitled to little probative value and are generally insufficient to meet an employee's burden of proof.<sup>12</sup>

Consequently, appellant has not established that her condition on and after May 15, 2003 was causally related to her accepted employment injury.

The Board notes that appellant contended that the medical evidence suggested a conflict. Section 8123 of the Federal Employees' Compensation Act<sup>13</sup> provides that where there is disagreement between the physician making the examination for the United States and the physician of the employee, the Office shall appoint a third physician who shall make an examination.<sup>14</sup> However, in this case, there is no conflict as contemplated by section 8123, as Dr. Tucker, the physician on whom the Office relied in terminating benefits, was one of appellant's physicians. He was not a physician to whom she was referred by the Office or the United States.

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<sup>9</sup> See *Jaja K. Asaramo*, 55 ECAB \_\_\_\_ (Docket No. 03-1327, issued January 5, 2004) (where an employee claims that a condition not accepted or approved by the Office was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury).

<sup>10</sup> As noted above, *supra* note 4, any matter pertaining to a 1996 injury is not presently before the Board. If appellant wishes to pursue any matter pertaining to that claim, she should contact the Office.

<sup>11</sup> See *Cowan Mullins*, 8 ECAB 155, 158 (1955) (where the Board held that a medical opinion based on an incomplete history was insufficient to establish causal relationship).

<sup>12</sup> *Lois E. Culver (Clair L. Culver)*, 53 ECAB 412 (2002).

<sup>13</sup> 5 U.S.C. § 8123.

<sup>14</sup> *Richard L. Rhodes*, 50 ECAB 259 (1999).

### **LEGAL PRECEDENT -- ISSUE 3**

Under section 8128(a) of the Act,<sup>15</sup> the Office 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 provides 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 [the Office] erroneously applied or interpreted a specific point of law; or

“(ii) Advances a relevant legal argument not previously considered by the Office; or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by the [the Office].”<sup>16</sup>

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 the Office without review of the merits of the claim.<sup>17</sup>

### **ANALYSIS -- ISSUE 3**

Appellant requested reconsideration on October 21, 2004 of the Office’s September 2, 2004 decision.

The underlying issue is medical in nature, whether appellant’s work-related injury and disability had resolved. However, she did not provide any relevant or pertinent new evidence to the issue of whether she continued to be disabled and unable to return to regular duty after May 15, 2003.

Although appellant alleged that Dr. Diamond’s 1996 report should be utilized as opposed to the later reports, this report is irrelevant to the issue of whether she continued to be disabled on or after May 15, 2003 as a result of her accepted employment injury. Regarding her allegations that reports of other physicians were not based on valid testing, appellant has not supported these allegations with any evidence.

Appellant also submitted copies of documents that were previously submitted. The submission of evidence which repeats or duplicates evidence that is already in the case record does not constitute a basis for reopening a case for merit review.<sup>18</sup> Further, she provided reports

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<sup>15</sup> 5 U.S.C. § 8128(a).

<sup>16</sup> 20 C.F.R. § 10.606(b).

<sup>17</sup> 20 C.F.R. § 10.608(b).

<sup>18</sup> *David J. McDonald*, 50 ECAB 185 (1998); *John Polito*, 50 ECAB 347 (1999); *Khambandith Vorapanya*, 50 ECAB 490 (1999).

that dated back to 1996 and, as noted above, they are not relevant to the issue of whether she continued to be disabled after May 15, 2003. Appellant did not provide any relevant and pertinent new evidence to establish that she was disabled or unable to work after her benefits were terminated on May 15, 2003 due to her accepted employment-related conditions.

Consequently, the evidence submitted by appellant on reconsideration does not satisfy the third criterion, noted above, for reopening a claim for merit review. Furthermore, she also has not shown that the Office erroneously applied or interpreted a specific point of law or advanced a relevant new argument not previously submitted. Therefore, the Office properly denied appellant's request for reconsideration.

### **CONCLUSION**

The Board finds that the Office met its burden of proof in terminating appellant's benefits effective May 15, 2003 and that she did not meet her burden of proof to establish that she had any injury-related condition or disability after May 15, 2003 causally related to the accepted employment injury. Further, the Board finds that the Office properly refused to reopen her case for further review of the merits of her claim under 5 U.S.C. § 8128(a)

### **ORDER**

**IT IS HEREBY ORDERED THAT** the November 30, September 2 and April 20, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 24, 2004  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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