

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

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**SUSAN FLEMING, Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Seattle, WA, Employer**

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**Docket No. 05-664  
Issued: November 3, 2005**

*Appearances:*

*John E. Goodwin, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
WILLIE T.C. THOMAS, Alternate Judge

**JURISDICTION**

On January 24, 2005 appellant, through his attorney, filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated October 14, 2004, finding that she had no continuing disability causally related to her accepted employment injuries. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation benefits effective February 3, 2004; and (2) whether appellant has established any continuing employment-related residuals or disability after February 3, 2004.

**FACTUAL HISTORY**

This case has previously been before the Board. By decision dated February 3, 2003,<sup>1</sup> the Board found that the Office had failed to meet its burden of proof to terminate the compensation

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<sup>1</sup> Docket No. 01-1887 (issued February 3, 2003).

benefits of appellant, a letter carrier, effective November 4, 2000, due to her accepted conditions of sesamoiditis and right foot strain. The Board noted that the impartial medical specialist, Dr. Lance Brigham, a Board-certified orthopedic surgeon, selected to resolve the conflict of medical opinion evidence, between appellant's attending physician, Dr. Richard Atwater, a Board-certified orthopedic surgeon and the Office referral physician, Dr. Allan Wilson, a Board-certified orthopedic surgeon, lacked the necessary appearance of impartiality as he was associated or affiliated with a physician who had previously examined appellant or acted as a referral physician for the Office. The Board reversed the Office's July 10, 2001 decision.

The Office referred appellant for an impartial medical examination with Dr. Dean Ricketts, a Board-certified orthopedic surgeon, on June 23, 2003.

In a report dated June 18, 2003, Dr. John E. Nimlos, a Board-certified family practitioner, examined appellant and found that she was very tender at the medial sesamoid area on the right and somewhat tender at the medial metatarsophalangeal joint for the great toe. He found no crepitation, redness, heat or induration and that appellant's feet were normal in skin color texture, temperature and circulation. Dr. Nimlos diagnosed right foot sesamoiditis and stated that appellant could not return to her date-of-injury position.

Dr. Ricketts submitted a report dated July 25, 2003, reviewing the statement of accepted facts and providing a history of injury and medical history including findings on x-ray. On physical examination he found that appellant's gait and station were essentially normal with a very slight tendency to elevate the right great toe. Appellant demonstrated full active range of motion of the toes with a slight loss of plantar flexion of the metacarpophalangeal joints bilaterally. Dr. Ricketts stated:

“Examination of the right foot reveals mild tenderness about the origin of the plantar fascia and os calcis, which continues mild in intensity through the mid portion of the arch. Palpation about the metatarsal heads reveals trace tenderness about the tibial sesamoid and marked tenderness about the fibular sesamoid. This tenderness continues under all the metatarsal heads diminishing in intensity as one proceeds laterally....”

Dr. Ricketts diagnosed sesamoiditis versus sesamoid bursitis on the right foot, by history, which though industrially related had resolved. He stated that appellant had no objective findings and that originally appellant's maximum tenderness was at the tibial sesamoid of the right foot and that current maximum tenderness was at the fibular sesamoid. Dr. Ricketts noted that appellant had diffuse tenderness throughout her forefoot and that the diagnosis of sesamoiditis was based on localized tenderness in response to provocative examination. He found that appellant had no work-related diagnoses that were currently disabling and that she did not require further treatment.

On August 1, 2003 Dr. Nimlos noted that appellant had been examined by Dr. Ricketts. He found some excess calcium at the metatarsophalangeal joint at the medial aspect of the first toe. Dr. Nimlos diagnosed sesamoiditis with other trunk and hip symptoms through altered gait.

By letter dated September 15, 2003, the Office proposed to terminate appellant's compensation benefits based on Dr. Ricketts' report.

Dr. Nimlos completed a report on October 13, 2003 and reviewed Dr. Ricketts' report. He noted that appellant had consistent tenderness at the areas of the sesamoid bones and that both the medial and lateral sesamoid bones had been involved since appellant's initial examinations. Dr. Nimlos disagreed with Dr. Ricketts conclusion that there were no objective findings in support of appellant's continuing condition, noting that x-rays showed irregular mottling of the medial sesamoid consistent with chronic inflammation. He also argued that appellant demonstrated the localized tenderness necessary to diagnose sesamoiditis and concluded that she continued to experience this condition.

By decision dated February 3, 2004, the Office terminated appellant's compensation benefits that date based on Dr. Ricketts' report. Appellant requested an oral hearing on February 17, 2004. On February 27, 2004 appellant requested a subpoena for Dr. Ricketts listing the questions she wished to pose regarding his report. The hearing representative denied the request for subpoena on May 11, 2004. Appellant's attorney argued that he did not receive notification of the oral hearing within 30 days, that the hearing representative improperly denied the requested subpoena and that report of the previous impartial medical specialist should be excluded.<sup>2</sup> Appellant testified at the oral hearing on June 22, 2004 that Dr. Ricketts greeted her as "the infamous [appellant]." She stated that she did not feel that she received a fair examination from Dr. Ricketts. Appellant noted that Dr. Ricketts did not list all of her medical reports in his report.

Following the oral hearing, appellant's attorney provided a written objection to the failure of the Office to provide him with 30 days notice prior to the date of the oral hearing.<sup>3</sup> He also provided additional medical evidence from Dr. Nimlos. On September 20, 2003 Dr. Nimlos completed a form report repeating his findings and conclusions regarding appellant's history of injury, her findings on physical examination and x-rays, diagnosis and disability rating. In a note dated November 12, 2003, Dr. Nimlos found greater tenderness at the lateral sesamoid than the medial sesamoid. He also noted some crepitation. Dr. Nimlos diagnosed right foot sesamoiditis and possible Morton neuroma.

In a note dated June 4, 2004, Dr. Nimlos described appellant's nonwork-related left ankle injury and continued to diagnose right foot sesamoiditis.

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<sup>2</sup> The Board has limited the categories of impartial reports, which should be excluded to those reports from physicians who perform fitness-for-duty examinations for the employing establishment, from physicians that the Office previously requested an impartial report and failed to seek clarification and from physician's reports which the Office obtain through telephone contact or from physicians to whom the Office improperly utilized leading questions. As Dr. Brigham does not fall within these categories, the Office was not required to exclude Dr. Brigham's report from the record. *Beverly Grimes*, 54 ECAB \_\_\_ (Docket No. 03-42, issued April 18, 2003).

<sup>3</sup> The Board notes that the hearing representative refused to address this issue at the oral hearing or in his final decision. This issue is not properly before the Board. 20 C.F.R. § 501.2(c).

By decision dated October 14, 2004, the hearing representative affirmed the Office's termination decision and disagreed with appellant's procedural arguments.<sup>4</sup>

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

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>5</sup> The Office may not terminate compensation without establishing that disability ceased or that it was no longer related to the employment.<sup>6</sup> The Office's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>7</sup> The right to medical benefits for an accepted condition is not limited to the period of entitlement of disability. To terminate authorization for medical treatment, the Office must establish that a claimant no longer has residuals of an employment-related condition, which require further medical treatment.<sup>8</sup>

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.<sup>9</sup>

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

In this case, the Office referred appellant to Dr. Ricketts, a Board-certified orthopedic surgeon, to resolve the existing conflict of medical opinion evidence regarding whether appellant continued to experience disability and medical residuals of her accepted condition of sesamoiditis of the right foot. Dr. Ricketts reviewed the medical record including normal x-rays from 1998 and 1999 as well as x-rays in 1998 showing some irregular mottling of the medial bone consistent with chronic inflammation and concluded that appellant had no objective findings supporting a diagnosis of sesamoiditis. He found that appellant demonstrated diffuse tenderness throughout her forefoot on physical examination and stated that the diagnosis of sesamoiditis was based instead on localized tenderness. Dr. Ricketts concluded that appellant

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<sup>4</sup> Appellant indicated that she wished Dr. Ricketts to testify regarding the extent of the medical record he reviewed, whether he referred to appellant as "infamous" and whether Dr. Nimlos' October 13, 2003 report would have affected his opinion. The hearing representative denied this request on May 11, 2004 merely stating that he was unable to issue a subpoena based on the information provided. In the October 14, 2004 decision, the hearing representative found that Dr. Ricketts' report was thorough, unbiased and did not require additional clarification through the subpoena process. The Board finds that this was not an abuse of discretion as appellant failed to provide any evidence that the requested testimony from Dr. Ricketts would have provided any additional medical evidence relevant to the issue at hand. See C.F.R. § 10.617(c), (g).

<sup>5</sup> *Jorge E. Stotmayor*, 52 ECAB 105, 106 (2000).

<sup>6</sup> *Mary A. Lowe*, 52 ECAB 223, 224 (2001).

<sup>7</sup> *Gewin C. Hawkins*, 52 ECAB 242, 243 (2001).

<sup>8</sup> *Mary A. Lowe*, *supra*, note 6.

<sup>9</sup> *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

had no continuing work-related diagnosis, that she was not currently disabled and that she did not require further treatment.

The Board finds that Dr. Ricketts' July 25, 2003 report is entitled to special weight as it was based on a proper factual background, included medical reasoning in support of his conclusions that appellant did not have a continuing employment-related condition or disability. Dr. Ricketts noted that appellant lacked the necessary objective and subjective findings to support a continuing diagnosis of sesamoiditis, he extensively reviewed the medical reports of record and despite appellant's allegation that he referred to her as "infamous" the record does not support any bias in reviewing her claim.

Appellant's physician, Dr. Nimlos, a Board-certified family practitioner, reviewed Dr. Ricketts report on October 13, 2003 and disagreed with his interpretation of the findings on physical examination and x-ray. Dr. Nimlos stated that the x-rays showing irregular mottling were consistent with sesamoiditis and that appellant did demonstrate the localized tenderness necessary to diagnose sesamoiditis. He concluded that appellant remained disabled and continued to experience medical residuals of her accepted employment-related condition. While Dr. Nimlos disagreed with Dr. Ricketts conclusions, his report is not sufficient to either overcome the weight of Dr. Ricketts' report or to create a new conflict with it. Dr. Nimlos' assessment of the evidence varies from Dr. Ricketts but he did not introduce new findings or medical reasoning overcoming that provided by Dr. Ricketts. Therefore, the Board finds that the Office met its burden of proof to terminate appellant's compensation benefits.

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

As the Office met its burden of proof to terminate appellant's compensation benefits, the burden shifted to appellant to establish that she had disability causally related to her accepted employment injury.<sup>10</sup> To establish a causal relationship between the condition, as well as any disability claimed and the employment injury, the employee must submit rationalized medical opinion evidence, based on a complete factual background, supporting such a causal relationship. 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 the claimant. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.<sup>11</sup>

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<sup>10</sup> *George Servetas*, 43 ECAB 424, 430 (1992).

<sup>11</sup> *James Mack*, 43 ECAB 321 (1991).

## **ANALYSIS -- ISSUE 2**

Following the Office's February 3, 2004 decision, appellant submitted additional medical evidence from Dr. Nimlos dated September 20 and November 12, 2003 and June 4, 2004. Dr. Nimlos repeated his earlier findings adding the finding of some crepitation and expanding his diagnoses to right foot sesamoiditis and possible Morton neuroma. He also described appellant's nonwork-related left ankle injury. These reports and notes do not provide the necessary rationalized opinion on the issue of whether there is a causal relationship between the appellant's diagnosed condition and her employment. Without the necessary objective medical findings, medical opinion evidence and medical reasoning, these reports are not sufficient to establish appellant's continuing disability or medical residuals as a result of her accepted condition of sesamoiditis.

## **CONCLUSION**

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective February 4, 2004 and that appellant failed to establish any continuing disability or medical residuals on or after that date.

## **ORDER**

**IT IS HEREBY ORDERED THAT** the October 14, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 3, 2005  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge  
Employees' Compensation Appeals Board