U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SUSAN FLEMING and U.S. POSTAL SERVICE,
POST OFFICE, Seattle, WA

Docket No. 02-1887; Submitted on the Record;
Issued February 3, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective November 4, 2000.

On October 15, 1998 appellant, then a 45-year-old letter carrier, filed a notice of occupational disease and claim for compensation alleging that she developed right foot inflammation, which she attributed to driving her postal vehicle. Appellant stopped work on September 29, 1998. She alleged that her injury occurred on or prior to April 1, 1998. The Office accepted the claim for sesamoiditis and right foot strain. Appellant began receiving compensation on the periodic rolls effective September 29, 1998. She has not worked since that date.

Appellant's treating physician, Dr. Richard Atwater, a Board-certified orthopedic surgeon, found appellant capable of performing the most restrictive work where she would not be required to drive or work on her feet all day. Dr. Atwater opined that appellant had residuals of her accepted work injury.

In order to ascertain appellant's work capacity and the extent of her continuing residuals due to her work-related foot condition, the Office referred appellant for a second opinion evaluation with Dr. Allan Wilson, a Board-certified orthopedic surgeon. Dr. Wilson diagnosed forefoot pain of unknown etiology. He was unable to confirm the diagnosis of sesamoiditis.

The Office determined that a conflict existed in the medical evidence between Drs. Atwater and Wilson regarding appellant's continuing disability for work and whether or not she had any residuals due to the accepted work injury. The Office referred appellant for an impartial medical evaluation with Dr. Lance Brigham, a Board-certified orthopedic surgeon, on November 22, 1999. Dr. Brigham stated in his report that, although appellant's original foot problem may have been sesamoiditis, the condition had resolved and she was left with a "systemic disease problem, which is causing bilateral foot pain." He noted that he did not have a definitive diagnosis but thought that appellant had a collagen vascular type of problem associated

with fibromyalgia. He found that appellant's foot condition at the time of his examination was not work related. Dr. Brigham stated that "This sesamoiditis is a limited disease process that does heal with rest and conservative care and rarely needs surgical removal. At best, this may have been a problem originally, but at this time is not her major injury or problem."

On February 22, 2000 the Office issued a notice of proposed termination of compensation. Appellant was advised that the weight of the medical evidence established that she was no longer disabled and had no continuing residuals of her accepted work injury. She was given 30 days to submit additional evidence if she disagreed with the proposed action.

Appellant submitted a February 25, 2000 report from Dr. John Nimlos, a Board-certified family practitioner. Dr. Nimlos concurred with Dr. Atwater that the diagnosis of sesamoiditis had been adequately established. He disagreed with Dr. Brigham's opinion that appellant's continuing foot symptoms had anything to do with fibromyalgia and maintained that she continued to suffer residuals of work-related sesamoiditis.

In a decision dated October 26, 2000, the Office terminated appellant's compensation and medical benefits effective November 4, 2000.

On October 31, 2000 appellant requested a hearing, which was on April 25, 2001.

At the hearing, appellant's attorney submitted a referral letter dated June 10, 1997 on another federal workers' compensation claim filed by appellant under file number 14-0306973. The letter directed appellant to undergo a second opinion examination with Dr. Charles Peterson. Appellant's attorney pointed out that Dr. Peterson is an orthopedic surgeon, who works in the same medical firm, Seattle Orthopedic and Fracture Clinic, as Dr. Brigham. He argued that this association should disqualify Dr. Brigham as the impartial medical specialist.

In a decision dated July 10, 2001, an Office hearing representative affirmed the Office's October 26, 2000 decision.

The Board finds that the Office did not meet its burden of proof to terminate compensation because Dr. Brigham may not act as the referee medical examiner.

Section 8123(a) of the Federal Employees' Compensation Act provides in part as follows: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[1]

The physician selected by the Office to serve as the referee medical examiner should be one wholly free to make a completely independent evaluation and judgment. To help achieve this, the Office has developed specific procedures for the selection of referee medical examiners

[1] 5 U.S.C. § 8128(a).

designed to provide adequate safeguards against *any possible appearance* that the selected physician's opinion was biased or prejudiced.[2]

On August 30, 1985 the Office issued Act Bulletin No. 85-52, which addressed the exclusion of agency-connected physicians from the rotation of referee medical examiners for certain cases.[3] As part of the action taken by the Office to assure the impartiality of the designated specialist under section 8123(a), the Office adopted the following procedure:

> "The letter to the physician referring a claimant for impartial examination should include the following paragraph: 'Because this examination is being requested in accordance with a statutory provision for resolving a conflict in medical opinion, it is important that the physician have *no previous connection* with the claimant and no regular association with the claimant's employing agency. *If you, or a member of your professional firm, have previously attended this patient*, or regularly performed fitness-for-duty examinations for the patient's employer ... please call [the Office] so that other arrangements can be made for the impartial examination.'" (Emphasis added.)

The Board has disqualified a physician from serving as a referee medical examiner when the record demonstrated that such physician was in association or otherwise affiliated with a physician whose medical opinion was used to create a conflict with the claimant's attending physician, or when the physician has otherwise reviewed the case record and provided an opinion on the claim. The Board has held that the Office must assure that the person designated as the referee medical examiner has no prior association or affiliation with any other physician who has examined the claimant or provided an opinion on the claim. To hold otherwise would undermine the impartiality sought under section 8123(a).[4]

There is no evidence of record substantiating that Dr. Brigham was previously connected with appellant's case. As the Office hearing representative noted in his July 10, 2001 decision, although Dr. Brigham is associated with Dr. Peterson, who examined appellant at that the request of the Office for a prior claim, there is no indication that the condition for which Dr. Peterson saw appellant has any bearing on her current right foot condition. There is also no indication that Dr. Brigham saw appellant prior to his November 22, 1999 examination. Nonetheless, Dr. Brigham's association or affiliation with a physician who has previously examined appellant and acted as a referral physician for the Office, undermines the appearance of impartiality sought under section 8123(a).[5]

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[2] *Daniel A. Davis*, 39 ECAB 151 (1987).

[3] Federal (FECA) Bulletin No. 85-52 (issued August 30, 1985).

[4] *Daniel A. Davis, supra* note 2.

[5] *See George W. Coast*, 36 ECAB 600 (1985) (holding that although there was no direct evidence of record substantiating that the physician was previously connected with the claimant's case the selection of a physician involved with fitness-for-duty examinations on behalf of the employing establishment undermined the appearance of impartiality).

The July 10, 2001 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, DC
February 3, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member