



## **FACTUAL HISTORY**

On May 8, 2001 appellant, then a 52-year-old limited-duty clerk, filed a traumatic injury claim alleging that on May 7, 2001 she experienced severe pain in her neck, shoulders and arms and numbness in the left hand in the performance of duty. The Office accepted the claim for an aggravation of a cervical herniated disc at C2-3 and placed her on the periodic rolls effective August 2, 2001.<sup>2</sup>

In a report dated August 17, 2001, Dr. James T. Galyon, a Board-certified orthopedic surgeon and appellant's attending physician, diagnosed a herniated disc at C2-3 with no anticipated improvement. He found that it was "not reasonable" to expect her to perform her limited-duty work. On September 17, 2001 Dr. Galyon noted that appellant had a "C2-3 cervical herniated disc with nerve root impingement and has been declined surgery by her various neurosurgeons. I do not believe she will be able to continue the work that she has previously performed. I have discharged her as of September 12, 2001."

A March 18, 2002 MRI scan study of the cervical spine showed a "C2 central soft disc herniation with some superior migration of fragment." A cervical MRI scan study obtained on December 30, 2002 showed a central herniated disc at C2, degenerative disc disease, spondylosis and bulging of the annulus fibrosus at C4-5 and C5-6.

On January 5, 2004 the Office referred appellant to Dr. Robert R. Jones, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated January 15, 2004, Dr. Jones diagnosed post herniated nucleus pulposus (HNP) at C2 without cord compression and bilateral carpal tunnel syndrome.<sup>3</sup> He opined that appellant had no objective findings to support her complaints of pain except for the herniated disc which was not "putting any pressure on the nerve roots or on the spinal cord." In an accompanying work restriction evaluation dated January 26, 2004, Dr. Jones found that appellant could perform her usual employment.

The Office requested that Dr. Galyon review Dr. Jones' report and advise whether he concurred with his findings. On March 23, 2004 the Office issued a notice of proposed termination of compensation on the grounds that the weight of the medical evidence established that she had no further employment-related disability.

In a report dated April 5, 2004, Dr. Galyon diagnosed cervical disc disease. He opined:

"I believe that [appellant] is no longer able to perform repetitious work, sedentary work, or lifting work because of the cervical disc disease. She has been seen by several neurosurgeons, all of whom feel that this is an inoperable lesion because of its location; therefore, I think that she is permanently disabled from work."

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<sup>2</sup> A magnetic resonance imaging (MRI) scan study of the cervical spine, obtained on May 19, 2001, revealed a large central disc herniation at C2-3 with impingement.

<sup>3</sup> Appellant has an accepted claim for carpal tunnel syndrome under file number 062087863.

By decision dated April 29, 2004, the Office finalized its termination of appellant's compensation effective that date. The Office did not terminate medical benefits. On May 5, 2004 the Office vacated the April 29, 2004 decision after finding that it did not review all of the medical evidence submitted prior to its termination decision. In a decision dated May 6, 2004, the Office again terminated appellant's entitlement to compensation after reviewing the medical evidence and finding that she had no further disability due to her May 7, 2001 employment injury.

On May 9, 2004 appellant requested an oral hearing. She submitted a May 14, 2004 cervical MRI scan study which revealed a C2-3 "[l]arge central disc extrusion with disc contacting [the] anterior cord." A hearing was held on December 14, 2003. In a decision dated April 8, 2005, an Office hearing representative set aside the termination of compensation after finding a conflict between Dr. Jones and Dr. Galyon on the issue of whether appellant had any further disability due to her employment injury.<sup>4</sup>

By letter dated May 27, 2005, the Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Wayne T. Lamar, a Board-certified orthopedic surgeon, for an impartial medical examination.<sup>5</sup> In a report dated June 22, 2005, Dr. Lamar reviewed the history of injury and the diagnostic studies. He noted that appellant worked limited duty at the time of her May 7, 2001 employment injury and discussed her work restrictions. Dr. Lamar listed detailed findings on examination. He diagnosed an aggravation of a preexisting HNP at C2-3 and a history of cervical radiculopathy. Dr. Lamar found sensory loss in the palmar aspect of the index, long and ring finger and mild weakness of the left hand. On examination, he found limited range of motion of the cervical spine, a positive foramen compression test with radicular pain into the left arm, spondylosis by x-ray and cervical MRI scan studies showing "evidence of C2-3 disc protrusion HNP defacing the cervical cord." Dr. Lamar asserted that appellant's employment injury appeared to have caused a permanent aggravation as her symptoms were worse than before the injury. He also indicated that he "thought the problem was temporary." Dr. Lamar concluded that appellant could resume work with the restrictions imposed prior to the May 7, 2001 employment injury.<sup>6</sup>

By letter dated July 14, 2005, the Office requested additional information from Dr. Lamar, including clarification of whether the employment-related aggravation was temporary or permanent and whether she had further residuals of her work injury.

In a supplemental report dated August 1, 2005, Dr. Lamar again diagnosed spondylosis at C2-3, C4-5, C5-6, and a HNP defacing the cervical cord. He listed the objective findings upon which he based his opinion and reiterated that appellant's work injury on May 7, 2001

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<sup>4</sup> The hearing representative indicated that she was setting aside the April 29, 2004 decision; however, it is apparent that she meant to set aside the May 6, 2004 termination decision as the April 29, 2004 decision was previously set aside by the Office.

<sup>5</sup> Appellant filed a claim for a schedule award. In its May 27, 2005 letter, the Office requested that Dr. Lamar also address the extent of her permanent impairment.

<sup>6</sup> Dr. Lamar also provided an opinion on the extent of appellant's permanent impairment.

permanently aggravated her current spinal condition. Dr. Lamar opined that her subjective complaints did not outweigh the objective findings.<sup>7</sup>

By decision dated August 24, 2005, the Office terminated appellant's compensation effective that date after finding that the opinion of Dr. Lamar represented the weight of the evidence and established that she had no further employment-related disability.

In a report dated August 18, 2005, Dr. Galyon noted that appellant had a herniated C2-3 disc which could not be repaired surgically. He opined that she was disabled from employment. Dr. Lamar further indicated that appellant was experiencing difficulty swallowing, possible due to her cervical disc injury.

On September 10, 2005 appellant requested an oral hearing, which was held on July 26, 2006.<sup>8</sup> She submitted an August 2, 2006 report from Dr. Galyon, who recommended disability retirement. In a letter dated August 25, 2006, appellant's attorney contended that Dr. Lamar's opinion was not well explained as he provided no rationale for his finding that she could return to work.

By decision dated September 21, 2006, the hearing representative affirmed the August 24, 2005 decision.

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

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.<sup>9</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>10</sup>

Section 8123(a) provides that, 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.<sup>11</sup> The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with

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<sup>7</sup> Dr. Lamar declined to further clarify his opinion regarding the extent of any permanent impairment and suggested a referral to a neurosurgeon.

<sup>8</sup> In a decision dated October 19, 2005, the Office granted appellant a schedule award for a four percent permanent impairment of the left upper extremity.

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

<sup>10</sup> *Gewin C. Hawkins*, 52 ECAB 242 (2001).

<sup>11</sup> 5 U.S.C. § 8123(a).

the case.<sup>12</sup> In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>13</sup>

### ANALYSIS

The Office accepted that appellant sustained an aggravation of a herniated cervical disc at C2-3 due to a May 7, 2001 employment injury. Appellant stopped work and did not return. Her attending physician, Dr. Galyon, opined that she was permanently disabled due to her May 7, 2001 employment injury. Dr. Jones, an Office referral physician, found that she had no further work-related disability. The Office properly referred appellant to Dr. Lamar to resolve the conflict in opinion between Dr. Galyon and Dr. Jones.

In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>14</sup> The Board finds, however, that Dr. Lamar's opinion that appellant could resume her limited-duty employment is not sufficiently well reasoned to be entitled to special weight.

In a report dated June 22, 2005, Dr. Lamar reviewed the medical evidence, including the results of diagnostic studies. He further discussed appellant's work duties at the time of her May 7, 2001 employment injury. Dr. Lamar diagnosed an aggravation of a preexisting HNP at C2-3 and a history of cervical radiculopathy. He listed the objective findings on examination as limited range of motion of the cervical spine, a positive foramen compression test with radicular pain into the left arm and cervical MRI scan studies showing "evidence of [a] C2-3 disc protrusion HNP defacing the cervical cord." Dr. Lamar opined that appellant's employment injury permanently aggravated her cervical condition. He found that she could work in her date-of-injury limited-duty position. In a supplemental report dated August 1, 2005, Dr. Lamar diagnosed a HNP defacing the cervical cord and spondylosis at C2-3, C4-5 and C5-6. He opined that appellant's employment injury permanently aggravated her spinal condition. Dr. Lamar found that appellant's subjective complaints were supported by the objective findings on examination and the results of diagnostic studies. He did not, however, provide any rationale for his determination that she was able to resume her limited-duty employment. Dr. Lamar concluded that she could resume her date-of-injury employment but provided no analysis to show how he reached such a determination. While his statement regarding the extent of appellant's disability was clear and unequivocal, he failed to offer any medical reasoning in support of his conclusions.<sup>15</sup> The certainty with which Dr. Lamar expressed his opinion cannot

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<sup>12</sup> 20 C.F.R. § 10.321.

<sup>13</sup> *David W. Pickett*, 54 ECAB 272 (2002); *Barry Neutuch*, 54 ECAB 313 (2003).

<sup>14</sup> *See David W. Pickett*, *supra* note 13.

<sup>15</sup> *See Elaine Sneed*, 56 ECAB \_\_\_\_ (Docket No. 04-2039, issued March 7, 2005).

overcome the lack of medical rationale.<sup>16</sup> As he did not sufficiently explain his finding that appellant could return to her date-of-injury position, his opinion is insufficient to constitute the weight of the evidence on this issue and the record contains an unresolved conflict in medical opinion on the extent of disability. The Board consequently finds that the Office did not meet its burden of proof to terminate her compensation benefits.

**CONCLUSION**

The Board finds that the Office improperly terminated appellant's compensation effective August 24, 2005 on the grounds that she had no further disability due to her May 7, 2001 employment injury.<sup>17</sup>

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 21, 2006 is reversed. The case record is returned to the Office.

Issued: September 25, 2007  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>16</sup> See *Willa M. Frazier*, 55 ECAB 379 (2004).

<sup>17</sup> In view of the Board's disposition of the termination, the issue of whether appellant has established continuing employment-related disability is moot.