

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

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**[REDACTED] Appellant**

**and**

**DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION  
MEDICAL CENTER, Albuquerque, NM, Employer**

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**Docket No. 04-572**

**Issued: July 15, 2004**

*Appearances:  
Record*

*Case Submitted on the*

*Gordon Reiselt, Esq., for the appellant*

*Office of Solicitor, for the Director*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Member

MICHAEL E. GROOM, Alternate Member

A. PETER KANJORSKI, Alternate Member

***JURISDICTION***

On December 24, 2003 appellant filed a timely appeal of the June 18 and October 15, 2003 decisions of the Office of Workers' Compensation Programs which denied her

claim of total disability commencing August 5, 2002. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

### ***ISSUE***

The issue is whether appellant was totally disabled commencing August 5, 2002 as a result of her accepted injury of April 25, 2002.

### ***FACTUAL HISTORY***

On April 29, 2002 appellant, then a 50-year-old nurse, filed a traumatic injury claim alleging that on April 25, 2002 she sustained a sprain/strain in her neck and lower back, while transporting patients. The employing establishment controverted the claim. Appellant returned to work in a light-duty capacity on April 26, 2002 answering telephones, taking messages, using the copy machine and performing other duties as assigned by her supervisor. In a duty status report dated May 7, 2002, Dr. Aaron B. Kaufman, a family practitioner, indicated that appellant could perform light duty with no pushing, lifting or bending. By letter dated June 26, 2002, the Office accepted her claim for cervical radiculopathy and cervical strain. Dr. Kaufman reiterated the same work restrictions in reports dated June 28, July 12 and 25, 2002.

In a July 18, 2002 medical report, Dr. Jonathan Burg, appellant's attending Board-certified physiatrist, stated:

“[Appellant] has a[n] MRI [magnetic resonance imaging] scan showing anterior subluxation of C4 on C5, likely due to the marked hypertrophy of the facet joints, with no dis[c] herniations or spinal stenosis. This certainly can explain much of her neck pain. She has been offered an anterior cervical dis[c]ectomy and fusion by Dr. [Claude] Gelinas, [a Board-certified orthopedic surgeon,] which I would certainly consider, once we get her depression under control.”

Dr. Burg indicated that appellant should continue to work with the same restrictions.

On July 31, 2002 appellant filed a claim for compensation for the period August 5 through 19, 2002. Claims for subsequent periods of total disability were later filed. Appellant submitted a July 31, 2002 attending physician's report by Dr. Burg, who indicated that she was totally disabled from July 29 through August 29, 2002 due to cervical radiculopathy caused by the April 25, 2002 lifting injury. In an August 27, 2002 report, Dr. Burg indicated that appellant was doing better with regard to her medical condition, although she still had some cervical diffuse tenderness in her upper back and neck. He indicated that she did not feel that she could go back to work, but he noted: “I think a lot of this has to do with the disgust with the level of care that is provided at the

Veteran's Hospital in the unit [appellant] was working in." In a September 10, 2002 medical report, Dr. Burg indicated that he was in accord with her decision to not return to work at the employing establishment for physical and psychological reasons.

In an August 26, 2002 duty status report, Dr. Kaufman indicated that appellant was totally disabled commencing July 29, 2002, due to her cervical herniated nucleus pulposus with radiculopathy. On August 26, 2002 Dr. Gelinis indicated that appellant sustained cervical radiculopathy and a lumbar sprain as a result of the April 25, 2002 work injury. He indicated that he first saw her on October 1, 2001 and she was totally disabled from October 1, 2001 through present and partially disabled from August 29 to October 29, 2002.

By letter dated October 2, 2002, appellant was referred by the Office, to Dr. William K. Jones, a Board-certified orthopedic surgeon, for a second opinion. In an October 31, 2002 report, he indicated that appellant had no orthopedic restrictions. Dr. Jones stated:

"[Appellant] states [that] she is taking almost 90 mg [milligrams] of morphine daily and has had 60 mg today. I do not detect any orthopedic abnormalities of her cervical spine or lumbar spine. X-rays of the cervical spine show normal alignment, dis[c] spaces and neural foramina, as well as a completely normal range of motion on the flexion and extension views. Since [appellant] is an extremely supple person, the flexion and extension views shows some slight subluxation anteriorly of C4 on C5. On the extension views, there is a minimal amount of anterior subluxation of C4 on C5; and on the straight lateral views of her cervical spine, the cervical lordotic curve is mostly straightened and a minimal anterior subluxation of C4 on C5 is evidence[d]. In my opinion, this anterior subluxation is an anatomical variant which is probably normal for [appellant] and is not a contributing factor to her subjective complaints of pain at this time."

Dr. Jones further indicated that he was not certain that an actual injury occurred on or about April 25, 2002. He opined that appellant's level of disability was primarily related to her subjective complaints. Finally, Dr. Jones noted that he would not place any limitations on her from an orthopedic standpoint.

In a November 25, 2002 report, Dr. Gelinis indicated that appellant has had neck problems for 17 years which were probably aggravated by her April 25, 2002 injury at work.

By decision dated November 26, 2002, the Office determined that there was no condition, disabling or otherwise, related to the April 25, 2002 incident and terminated all medical benefits.

On November 29, 2002 the Office received a November 21, 2002 report from Dr. Burg, who stated:

"[Appellant] had a[n] MRI on [November 11, 2002] because she had reported that she had significant increase in her neck pain following her work injury on April 25, 2002

while working at the [employing establishment], taking care of patients. She had not had an MRI [scan] following the injury, although we do have a preexisting MRI [scan] from [October 11, 2001], ordered by Dr. Claude Gelinas, a spine surgeon, here in Albuquerque. This new MRI [scan] is markedly different, with rather severe findings that certainly support [appellant's] complaints of significant neck pain and radiating pain even into her lower back, as well as pain into her head and arms with increased headache. She has a dis[c] herniation, paracentral and to the left, which is actually contacting the spinal cord. This is a very significant finding and one that will require surgical intervention. Unfortunately, [appellant] also has problems at C3-4 and C4-5. At C3-4 she has a small central dis[c] protrusion with narrowing at C3-4 due to facet hypertrophy. At C4-5, [appellant] has mild to moderate left foramina narrowing, due to facet arthritis with mild spondylolisthesis."

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"The truth is that [appellant] did not have this dis[c] herniation at C5-6. What she had on the previous MRI [scan] was simply a C4-5 and C3-4 problem. [Appellant] had this lifting injury, which is a well known cause of dis[c] herniations in either the neck or back. Therefore, we have documentation of essentially a normal C5-6 on MRI [scan] only six months prior to the work injury. Now, a positive MRI [scan] consistent with [appellant's] symptoms and consistent with the actual injury itself exists. I don't think you have any choice but to approve this claim, as well as her time loss, since the pain has been so severe from this dis[c] herniation, she has been unable to work all of this time. [Appellant] will require surgical intervention."

On February 13, 2003 appellant requested reconsideration. In support thereof, she submitted a medical report dated January 20, 2003 from Dr. Burg, who stated:

"With regard to [appellant], the case is quite simple. Dr. Jones, who as far as I know, is not currently in practice, only does [impartial medical examinations] for the Department of Labor, as well as other insurance companies. [He] did not have the benefit of [appellant's] MRI [scans] when he saw her. That is the only way I can explain his opinion, as if he did have the MRI [scans], then his opinion is worthless. Either way, it is actually worthless, as [Dr. Jones] did not have the newest MRI [scan]. He states that there are no positive findings, which is ridiculous. The case is very, very straightforward. [Appellant] injured her neck on [April 25, 2002] while lifting and transferring a patient. The MRI [scan] that she had six months prior to that injury ordered by Dr. Gelinas, showed minimal anterior subluxation of C4 on C5 with hypertrophy of the facet joint, but there was no dis[c] herniation, spinal canal stenosis, spinal cord compression or neuroforamina narrowing seen. [Appellant] had been having some degree of neck and back pain prior to the lifting incident of April 2002 and that was the reason why the MRI [scan] was taken. Following the lifting injury, however, the pain was not only greatly increased, but she started having radiating pain to a much more significant degree, consistent with dis[c] herniations. For this reason, I had another MRI [scan] done. Again, this is about seven months after the incident. Now, the MRI [scan] shows a paracentral dis[c] herniation at C5-6, which is contacting the spinal cord, but not

compressing it. There was also, at C3-4, a minimal central dis[c] protrusion causing moderate left foramina narrowing at C3-4 and at C4-5, there was mild to moderate left foramina narrowing due to facet arthritis and mild spondylosthesis. Obviously, this case is very straight forward, since we have two MRI [scans], one before the injury and one after the injury with no intercurrent trauma....”

Dr. Burg further noted that nothing had changed with regard to his opinion as to appellant’s ability to work and that he could not tell whether this condition was temporary or permanent.

By decision dated June 18, 2003, the Office found that the medical evidence now established that appellant had ongoing residuals from the April 5, 2002 work incident and was accordingly entitled to ongoing medical benefits. However, the Office noted that there was nothing in the contemporaneous medical evidence to establish that appellant was precluded from working modified work as of August 5, 2002.

On July 31, 2003 appellant requested reconsideration and submitted a July 22, 2003 report by Dr. Burg, who stated:

“As you know, it was my impression that Dr. Gelinis had taken [appellant] off work on July 29, 2002 and I agreed with that. As it turns out, he put her at light duty and I was unaware of that at the time, otherwise, I would have given her a no work status. But, because I was under the impression that Dr. Gelinis had done that I did not reiterate my stance.”

Dr. Burg continued to note that appellant was on massive dosages of narcotic medications. He noted that sitting for long periods of time and using the computer would exacerbate her discomfort. Dr. Burg concluded:

“I again reiterate that [appellant] ... was physically incapable of performing her light-duty position after July 26, 2002 based on the multiple dis[c] herniations which are causing significant neck and back pain, as well as radiculopathy, as well as because of the multiple medications she is on that affect her cognitive functioning which would make her very unsafe in a medical setting at any level. I would think that any patient who has a bad outcome because of her action on these sedating cognitively impairing medications would have reason to be quite disturbed by the fact that [appellant] was working in a position where precise medical communication was necessary.”

By decision dated October 15, 2003, the Office reviewed appellant’s claim on the merits but determined that the record did not indicate that she had a cervical condition that precluded her from working in the modified position at the time of the alleged recurrence on July 29, 2002 and denied reconsideration.

***LEGAL PRECEDENT***

A claimant seeking benefits under the Federal Employees' Compensation Act[1] has the burden of proof to establish the essential elements of her claim by the weight of the evidence,[2] including that she sustained an injury in the performance of duty and that any specific condition or disability for work for which she claims compensation is causally related to that employment injury.[3] The evidence generally required to establish causal relationship is rationalized medical opinion evidence. The claimant must submit a rationalized medical opinion that supports a causal connection between her claimed disability and the employment injury. The medical opinion must be based on a complete factual and medical background with an accurate history of the claimant's employment injury and must explain from a medical perspective how the claimed disability is related to the injury.[4] When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence, a recurrence of total disability and to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[5]

Section 8123 of the Act[6] provides that, if there is a disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician to resolve the conflict.[7]

### ***ANALYSIS***

The Office accepted that on April 25, 2002 appellant sustained a cervical radiculopathy and cervical strain in the performance of duty. She then returned to light-duty work. Appellant alleged that commencing August 5, 2002, she was totally disabled from this work due to her work-related injury. In support of her alleged disability, appellant submitted numerous medical reports from Dr. Burg. He noted on July 31, 2002 that she was totally disabled from July 29 through August 29, 2002 due to her cervical radiculopathy which was caused by the April 25, 2002 lifting injury. The Board notes that on August 26, 2002 Dr. Kaufman indicated that appellant was totally disabled commencing July 29, 2002 due to her cervical radiculopathy and lumbar sprain as a result of her April 25, 2002 injury. Dr. Jones, the physician to whom the Office referred appellant for a second opinion, disagreed and indicated in an October 2, 2002 report, that he would not place any limitations on appellant from an orthopedic standpoint. As Dr. Burg and Dr. Jones disagree as to whether appellant is totally disabled with regard to her accepted injury, the Office should have referred her to an impartial medical specialist to resolve the conflict in evidence.

***CONCLUSION***

The Board finds that this case is not in posture for decision. The Office must prepare a statement of accepted facts and refer appellant to an appropriate Board-certified physician to obtain a detailed, well-rationalized opinion regarding whether her accepted cervical condition resulted in any disability commencing August 5, 2002. Following this and any other development that the Office deems necessary for a proper adjudication of the case, the Office shall issue an appropriate decision.

***ORDER***

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated October 15 and June 18, 2003 are hereby vacated and this case is remanded for further consideration consistent with this opinion.

Issued: July 15, 2004

Washington, DC

Colleen Duffy Kiko

Member

Michael E. Groom

Alternate Member

A. Peter Kanjorski

Alternate Member

[1] 5 U.S.C. §§ 8101-8193.

[2] *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

[3] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[4] *John A. Ceresoli, Sr.*, 40 ECAB 305 (1988).

[5] *Mary G. Allen*, 50 ECAB 103 (1998); *Mary A. Howard*, 45 ECAB 646 (1994).

[6] 5 U.S.C. §§ 8101-8193 (1974); 5 U.S.C. § 8123(a).

[7] *Robert D. Reynolds*, 49 ECAB 561 (1998).