

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BETTY J. ACKER and ACTION, WINGS LEARNING CENTER,
Logan, OH

*Docket No. 00-1668; Submitted on the Record;
Issued April 13, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issue is whether appellant's disability commencing on January 1, 1993 is causally related to the March 5, 1992 employment injury.

The Office of Workers' Compensation Programs accepted appellant's claim for a low back strain and appellant was paid temporary total disability benefits to January 1, 1993. Subsequently, appellant sought continuation of her disability benefits.

A magnetic resonance imaging (MRI) scan dated April 6, 1992 stated that a small focal disc protrusion was suspected at L4-5 on the left side.

An MRI scan dated September 6, 1997 stated that appellant had multilevel disc degeneration with mild central and left lateral stenosis at L4-5 and small left paracentral disc hernia at T12-L1.

In a report dated August 19, 1993, appellant's treating physician, Dr. Robert J. Neff, a Board-certified family practitioner, diagnosed degenerative L3-4 and L4-5 disc disease, bilateral sciatica, severe lower back and bilateral lower extremity pain "worsened with activity" and checked the "yes" box that it was due to the March 5, 1992 employment injury.

By decision dated November 4, 1997, the Office denied appellant's claim, stating that the medical evidence was insufficient to establish that appellant's back condition was caused by the 1992 injury.

Appellant requested an oral hearing, which was held on July 8, 1998. She also submitted additional medical evidence. In a report dated March 11, 1998, appellant's treating physician, Dr. Charles E. Lowrey, an orthopedic surgeon with a specialty in occupational medicine, considered appellant's history of injury, performed a physical examination and reviewed the 1992 and 1997 MRI scans. He noted that the September 1997 MRI scan showed multilevel degenerative joint disease but no high-level herniation or nerve root impingement. When

compared to the 1997 MRI scan, the 1992 MRI scan showed a left-sided L4-5 herniation with slight nerve root impingement which apparently had “improved in the interim.” He diagnosed lumbosacral sprain with aggravation of preexisting degenerative joint disease.

In his report dated July 20, 1998, Dr. Lowrey opined that the March 5, 1992 employment injury represented a lumbosacral sprain with aggravation of the preexisting degenerative disc disease. He stated: “This could indeed continue to cause symptoms including sciatica-type symptoms up to the present time.”

In a report dated July 21, 1998, Dr. Neff noted that the 1992 MRI scan showed a protrusion of the L4-5 disc with impingement of the dura associated with the nerve root and that a 1993 electromyogram (EMG) and nerve conduction study showed bilateral L5-S1 paraspinal neuropathy. He stated that appellant had had chronic lumbosacral pain with intermittent bilateral sciatica ever since her March 5, 1992 employment injury.

By decision dated September 4, 1998, the Office hearing representative found that Drs. Neff’s and Lowrey’s reports supported a finding that appellant’s current condition arose from the March 5, 1992 incident but lacked sufficient medical rationale to establish the requisite causal connection. He remanded the case for appellant to be evaluated by a referral physician.

In a report dated November 13, 1998, Dr. Bernard Nolan, a Board-certified orthopedic surgeon and referral physician, considered appellant’s history of injury, performed a physical examination and opined that the MRI scans did not reveal a disc herniation. He found that “there were no objective signs of any abnormality in her lumbar spine,” that her range of motion and neurologic examination were normal and the stocking distribution of hypoesthesia in her left lower extremity did not fit any anatomic pattern. Dr. Nolan concluded that appellant had no residuals due to her March 5, 1992 employment injury and could work full-time with a lifting restriction.

By decision dated January 14, 1999, the Office denied appellant’s claim, stating that the medical evidence was insufficient to establish that her current back condition and disability were related to her March 5, 1992 employment injury.

Appellant again requested an oral hearing, held on July 19, 1999, and submitted additional medical evidence.

In a report dated June 2, 1999, Dr. Neff reviewed the MRI scans and a 1997 EMG which showed evidence of L5 radiculopathy on the right and questionably on the left. He opined that appellant’s activities of lifting heavy boxes caused not only a lumbar strain but also the L4-5 disc protrusion revealed on the 1992 MRI scan. Dr. Neff added that appellant had preexisting osteoarthritis of the thoracic and lumbar spine, which was aggravated by the March 5, 1992 employment injury. He stated that, prior to the March 5, 1992 employment injury, appellant did not have severe low back pain, but following the injury her symptoms were frequently severe and included pain radiating down both thighs, constituting sciatica which is often associated with an L4-5 disc herniation.

Dr. Neff stated that, even though the 1997 MRI scan did not show a disc herniation at L4-5, the degenerative changes were “most severe” at the L4-5 level and “in the interval from the

prior scan[,] facet hypertrophy had progressed and resulted in *mild spinal stenosis* [sic].” He concluded that appellant developed a disc herniation as a result of her March 5, 1992 employment injury, which evolved over several years to become a lumbar spinal stenosis, most prominently at the L4-5 level and worst on the left side. Dr. Neff added that the bilateral sciatica was related to the lumbar spinal stenosis and that he believed Dr. Nolan had minimized the findings from the MRI scans and the EMG.

By decision dated January 5, 2000, the Office hearing representative affirmed the Office’s January 14, 1999 decision.

The Board finds that the case is not in posture for decision.

Appellant has the burden to show her entitlement to continued benefits. To establish that her disability is work related, appellant must submit rationalized medical opinion evidence, based on a complete factual and medical background of the employee, which shows a causal relationship between the conditions for which compensation is claimed and the implicated employment factors or incidents.¹

In this case, a conflict in the medical evidence exists between the opinion of appellant’s treating physician, Dr. Neff, that appellant had residuals from her March 5, 1992 employment injury and the opinion of the referral physician, Dr. Nolan, that appellant recovered from her March 1992 employment injury. Dr. Neff opined that appellant’s current back condition and sciatica constituted an aggravation of her preexisting degenerative disease. In finding that the MRI scans showed no disc herniation and there were no objective signs of a medical problem, Dr. Nolan disregarded the significance, if any, of the 1997 MRI scan showing degenerative disc disease. He also did not consider the 1997 and 1993 EMG results showing neuropathy and radiculopathy.

Section 8123(a) of the Federal Employees’ Compensation Act 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.² The case, therefore, requires remand for an impartial medical specialist to resolve the conflict between Drs. Neff’s and Nolan’s opinions.

On remand, the Office should refer the case record with a statement of accepted facts to an appropriate medical specialist pursuant to section 8123(a) of the Act. Following this and such further development as the Office deems necessary, it shall issue a *de novo* decision.

¹ *June A. Mesarick*, 41 ECAB 898, 908 (1990); see *Walter D. Morehead*, 31 ECAB 188, 194 (1979).

² 5 U.S.C. § 8123(a); *Esther Velasquez*, 45 ECAB 249, 252-53 (1993).

The January 5, 2000 decision of the Office of Workers' Compensation Programs is vacated and the case remanded for further action consistent with this opinion.

Dated, Washington, DC
April 13, 2001

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member