

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DIANE A. KRUPA and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, West Roxbury, MA

*Docket No. 01-310; Submitted on the Record;
Issued January 23, 2002*

DECISION and ORDER

Before MICHAEL E. GROOM, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issue is whether appellant had any disability after January 11, 1995 causally related to her April 1, 1987 employment injury.

This case is before the Board for the third time.¹ Previously, the Board affirmed the termination of appellant's compensation and medical benefits effective January 11, 1995 but remanded the case for further development of the medical evidence on whether she had any continuing disability after January 11, 1995 causally related to her April 1, 1987 employment injury.² In 1991,³ the Board found that the Office of Workers' Compensation Programs had failed to meet its burden of proof in terminating appellant's compensation effective August 26, 1989. The facts and history of this case are set forth in the Board's previous decisions and are incorporated herein by reference.

By decision dated December 7, 1998, the Office denied appellant's claim for compensation on the grounds that the weight of the medical evidence failed to establish that she had any disability after January 11, 1995 causally related to her April 1, 1987 employment injury.

By letter dated October 1, 1999, appellant requested reconsideration and submitted additional evidence. She also argued that the Office referral physician, Dr. Robert S. Chernack,

¹ Docket No. 96-1195 (issued May 15, 1998).

² Appellant sustained a bulging disc at L4-5 on April 1, 1987 while helping a patient off an examining table.

³ Docket No. 91-881 (issued October 31, 1991).

had misquoted the findings in the April 5, 1993 report of Dr. James C. Wepsic⁴ and overlooked a 1995 magnetic resonance imaging (MRI) scan.⁵

By decision dated November 1, 1999, the Office denied modification of its December 7, 1998 decision.

The Board finds that appellant has failed to meet her burden of proof to establish that she had any residual disability or medical condition after January 11, 1995 causally related to her April 1, 1987 employment injury.

After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he or she had an employment-related disability which continued after termination of compensation benefits.⁶

The Board has reviewed the additional evidence submitted by appellant and notes that it is not of sufficient probative value to establish that appellant had residuals of her April 1, 1987 employment injury after January 11, 1995.

In a report dated January 27, 1995, Dr. Emilio J. Jacques, Jr., a general practitioner, stated that appellant had been experiencing low back pain radiating to the right and left lower extremities and associated with numbness since her April 1, 1987 employment injury. He noted that a January 18, 1995 MRI scan revealed degenerative joint disease and degenerative disc disease over the lumbar spine and disc protrusion at L4-5, especially to the left.⁷ Dr. Jacques diagnosed chronic low back pain syndrome secondary to degenerative joint disease and disc disease over the lumbar spine and a disc protrusion at L4-5. He stated his opinion that appellant's condition was causally related to her April 1, 1987 employment injury.

In a report dated March 10, 1995, Dr. Jacques provided findings on examination and diagnosed chronic low back pain syndrome secondary to L4-5 disc protrusion with positive lower extremity radiculopathy. He stated:

“In my opinion ... [appellant's] symptoms and complaints, objective and subjective findings are causally related to the industrial injury that she sustained on April 1, 1987. In my opinion, [appellant] is totally disabled ... she is going to continue spinal orthosis and conservative treatment. If her symptoms persist, she

⁴ Dr. Wepsic's April 5, 1993 report is of record at R 344-46.

⁵ Appellant also submitted evidence previously of record.

⁶ See *Gary R. Sieber*, 46 ECAB 215, 222 (1994); *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

⁷ An MRI scan dated January 18, 1995 indicated a moderate degree of disc protrusion at L4-5 and a diagnosis of degenerative disc disease, a mild disc protrusion at L3-4, not significantly changed since October 11, 1991 and a moderate degree of disc protrusion at L4-5.

may be a good candidate to have an operative procedure over the lumbar spine such as discectomy....”

In a report dated April 20, 1995, Dr. Harilaos T. Sakellarides, a Board-certified orthopedic surgeon, stated that appellant was seen on February 9 and 13, 1995 for pain in the mid-dorsal spine radiating to both interscapular areas and the lower ribs, pain in the left suprascapular area, pain in the lumbosacral spine radiating to the right gluteal area and right thigh, leg and toes. He provided findings on examination and diagnosed a problem with the L4-5 disc and recommended further diagnostic testing. Dr. Sakellarides indicated that appellant needed surgery for decompression of the involved disc space. He opined that the MRI scan taken in January 1995 showed a progression of the disc condition compared to the MRI scan performed in 1991. Dr. Sakellarides also opined that appellant was totally disabled and her condition was causally related to her April 1, 1987 employment injury.

However, the reports of Drs. Sakellarides and Jacques are not sufficiently well rationalized to establish that appellant’s condition after January 11, 1995 was causally related to her April 1, 1987 employment injury, rather than due to progression of the natural aging process.

In a report dated September 2, 1999, Dr. Eugenio Martinez, a Board-certified physiatrist, provided a history of appellant’s condition and findings on examination. He diagnosed chronic low back pain with many causes likely, chronic thoracic spinal pain, likely myofascial in cause, and associated deconditioning syndrome. Dr. Martinez stated:

“Diagnostically, lumbar spine x-rays performed in January 1999 are reviewed today. There is severe disc space narrowing at L5-S1 with associated reactive endplate changes and anterior spurring from the inferior aspect of L5 vertebral body and superior aspect of S1. There is no spondylolisthesis. The other disc spaces are well preserved. A lumbar spine MRI scan from 1995 is reviewed which also demonstrates disc desiccation at L3-4, L4-5 and L5-S1 with a central protrusion at L4-5 as well and marked disc space narrowing at L5-S1. There is no neural foraminal impingement. Compared to lumbar spine study from 1991, there appears to have been progression in terms of L5-S1 degeneration, but L4-5 appears relatively unchanged. Thoracic spine x-rays also done in January of this year are normal.”

* * *

“[Appellant] presents today for evaluation ... of persistent, severe low back pain associated with intermittent sciatica-type sessions involving either extremity. She also experiences significant thoracic spinal pain and none of her symptoms have really improved over time, by her report, with various treatments. There appears to be a significant degree of disc degeneration at L5-S1; however, there is no evidence of a clinically significant radiculopathy on my evaluation today nor is there evidence of neural foraminal impingement on her most recent MRI scan from 1995. Therefore, I do not believe that an MRI scan needs to be repeated at this time. Certainly, the degree of degeneration at L5-S1 appears to be advanced for her age. By her history and based on my clinical evaluation today, it is

certainly possible, in fact likely, that she sustained a back injury specifically involving the L5-S1 disc in 1987 which has caused advanced degeneration of that disc over time. Therefore, it would appear likely that her current symptoms and associated disc degeneration are causally related to the [April 1987 employment] injury.”

However, the Office has not accepted that appellant sustained an injury to the L5-S1 disc as a result of the April 1, 1987 employment injury. The Office accepted a bulging disc at L4-5 as a result of the 1987 employment injury but Dr. Martinez noted that recent x-rays indicated relatively little change in the L4-5 area since 1991. Furthermore, Dr. Martinez did not provide sufficient medical rationale for his opinion that appellant’s back condition after January 11, 1995, including the degeneration at L5-S1, was causally related to her 1987 employment injury.

In a report dated July 6, 1998, Dr. Robert S. Chernack, a Board-certified orthopedic surgeon and Office referral physician, provided a history of appellant’s condition, a review of the medical records and detailed findings on examination of the back and lower extremities. He stated that he found no objective findings of disability. Dr. Chernack stated:

“[Appellant] refused to perform almost all parts of the examination that had to do with any type of movement. She was able to walk on her toes, initially refused to walk on her heels and then later did walk on her heels a little. [Appellant] refused to bend forward. She refused to squat. There was dramatic inconsistency in range of motion, watching her get on and off the table, moving on the table, versus asking her to do it in the standing position. Even in the supine position, she complained of exquisite back pain to examination of just her feet or toes. [Appellant] was not able to dorsiflex the toes against the resistance of a finger, yet she was able to hold herself up to get into and out of a squatted position without any problem. The same was true for any motion of her foot or ankle, complaining of exquisite low back pain even though she was in the supine position. There was dramatic inconsistency on almost all parts of the examination.

“I can demonstrate no positive objective findings of disability on today’s examination. Although, [appellant] has a very long, chronic pain type syndrome with a dramatic overlay to her examination, as noted my evaluation today shows no positive orthopaedic findings or neurological defects. There is no atrophy to indicate longstanding problems. There is a marked amount of inconsistency on examination indicative of significant symptom magnification. Orthopaedically, I would place no restrictions on her at this time.”

In a supplemental report dated August 28, 1998, Dr. Chernack stated that appellant did not have any objective residuals after January 11, 1995 causally related to her April 1, 1987 employment injury.

The Office properly found that the thorough and well-rationalized reports of Dr. Chernack represented the weight of the medical opinion evidence and established that appellant had no disability after January 11, 1995 causally related to her April 1, 1987 employment injury.

Regarding appellant's argument that Dr. Chernack misquoted Dr. Wepsic's April 5, 1993 report, the record shows that Dr. Chernack quoted Dr. Wepsic as saying "MRI scan at that time [April 5, 1993] showed L3-4, L4-5 and L5-S1 degenerative changes" and Dr. Wepsic actually wrote, "[the] [M]RI scan shows significant degenerative changes at L3-4, L4-5 and L5-S1." Dr. Chernack left out the word "significant." However, appellant did not explain how the fact that Dr. Chernack left out this word is relevant to her claim. Therefore, this argument does not establish that she had any disability after January 11, 1995 causally related to her April 1, 1987 employment injury.

Regarding appellant's argument that Dr. Chernack overlooked a 1995 MRI scan, the record shows that he did not mention the 1995 MRI scan in his July 6, 1998 report. However, the fact that he did not mention this MRI scan does not mean that it was overlooked. The statement of accepted facts sent to Dr. Chernack mentions the 1995 MRI scan and the Office sent him copies of the medical records. Dr. Chernack refers in his report to the reports of Drs. Sakellarides and Jacques, both of whom refer to the 1995 MRI scan. Dr. Chernack performed a thorough examination and evaluation of appellant, obtained his own tests and provided a rationalized medical opinion explaining why appellant's condition after January 11, 1995 was not causally related to her April 1, 1987 employment injury. Neither Drs. Sakellarides nor Jacques provided a rationalized medical opinion in their reports.

The November 1, 1999 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
January 23, 2002

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member