

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANN MARIE MORTENSON and U.S. POSTAL SERVICE,
POST OFFICE, Charlotte, NC

*Docket No. 02-1131; Submitted on the Record;
Issued May 21, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant sustained a recurrence of disability in May 2001 due to her July 5, 1996 employment injury.

On August 31, 1996 appellant, then a 34-year-old mailhandler, filed a claim alleging that she sustained a herniated nucleus pulposus (HNP) at C5-6 when she was moving a desk at work on July 5, 1996. Appellant stopped work on August 2, 1996 and she underwent a discectomy at C5-6 on August 13, 1996. She later returned to her regular work at the employing establishment.

By decision dated December 3, 1996, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that she did not submit sufficient evidence to establish that she sustained an injury in the performance of duty on July 5, 1996. By decision dated and finalized January 22, 1998, an Office hearing representative set aside the Office's December 3, 1996 decision and remanded the case to the Office for further evidentiary development, to be followed by a *de novo* decision regarding whether appellant sustained an employment-related injury on July 5, 1996.¹ By decision dated June 9, 1998, the Office found that appellant sustained an HNP at C5-6 in the performance of duty on July 5, 1996 which had resolved by March 9, 1998. The Office also retroactively authorized the discectomy at C5-6 which had been performed in August 1996.²

¹ On remand the Office referred appellant to Dr. Louis Pikula, Jr., a Board-certified neurosurgeon, for further evaluation of the cause of her cervical condition and any related disability.

² In its decision, the Office stated, "Your claim is accepted for: cervical HNP C5-6; resolved as of March 9, 1998; cervical discectomy of August 1996 accepted. The Office indicated that Dr. Pikula's opinion served as the basis for its determinations that appellant sustained a July 5, 1996 employment injury and that the injury had resolved by March 9, 1998. The Office attached an explanation of appellant's appeal rights with the decision.

In June 2001 appellant alleged that she sustained a recurrence of disability in May 2001 due to her July 5, 1996 employment injury.³ She claimed that she had residuals of bone fragments which remained from the August 1996 surgery. By decision dated July 20, 2001, the Office effectively denied appellant's claim for recurrence of disability. The Office stated, "[Y]our case was denied on June 9, 1998 for the reason that you were found to have no continuing disability related to your July 5, 1996 cervical injury and subsequent surgery. As a denied claim cannot recur, no further action will be taken concerning your claim for recurrence."⁴

On January 11, 2002 appellant requested reconsideration of her claim. By decision dated February 8, 2002, the Office denied her request for merit review on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

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

An individual who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury.⁵ This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical rationale.⁶

In the present case, the Office accepted that appellant sustained an HNP at C5-6 in the performance of duty on July 5, 1996 which had resolved by March 9, 1998; the Office also retroactively authorized a discectomy at C5-6 which had been performed in August 1996. Appellant alleged that she sustained a recurrence of disability in May 2001 due to her July 5, 1996 employment injury. By decision dated July 20, 2001, the Office denied appellant's claim for recurrence of disability.⁷

The Board finds that, in its July 20, 2001 decision, the Office based its denial of appellant's recurrence of disability claim on a faulty premise. The Office incorrectly suggested that it had not accepted that appellant sustained an injury in the performance of duty on July 5, 1996 and that there could be no recurrence of disability in connection with a denied claim. However, the record clearly shows that appellant's claim was accepted for the condition of an HNP at C5-6 and for the discectomy which was performed at that level. The fact that the Office

³ She did not, however, stop work at that time.

⁴ The Office suggested that its July 20, 2001 document constituted an informational letter. The Board finds, however, that the content and context of this document establishes that it constitutes a final decision in which the Office effectively denied appellant's claim that she sustained a recurrence of disability in May 2001 due to her July 5, 1996 employment injury.

⁵ *Charles H. Tomaszewski*, 39 ECAB 461, 467 (1988); *Dominic M. DeScala*, 37 ECAB 369, 372 (1986).

⁶ *Mary S. Brock*, 40 ECAB 461, 471-72 (1989); *Nicolea Brusco*, 33 ECAB 1138, 1140 (1982).

⁷ As noted above, the July 20, 2001 document constituted a final decision of the Office rather than an informational letter.

improperly interpreted the relevant facts of the present case prevented it from properly evaluating appellant's claim for recurrence of disability in accordance with the above-described standards.

For these reasons, the Board finds that the July 20, 2001 decision of the Office should be set aside. The case should be remanded to the Office and, after any further development it deems necessary, the Office should issue a merit decision, applying the proper facts and law, regarding appellant's claim that she sustained a recurrence of disability in May 2001 due to her July 5, 1996 employment injury.⁸

The July 20, 2001 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, DC
May 21, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

⁸ Given the Board's disposition of the merit issue of the present case and its determination regarding the deficiencies of the Office's July 20, 2001 decision, the Office's nonmerit decision of February 8, 2002 is rendered moot. It should be noted that the Office improperly determined in its February 8, 2002 decision that appellant filed an untimely reconsideration request on January 11, 2002 because it failed to acknowledge its July 20, 2001 merit decision; *see* 5 U.S.C. § 8128(a); 20 C.F.R. § 10.607(a).