

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NOREEN A. GREUBEL and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, Philadelphia, PA

*Docket No. 03-203; Submitted on the Record;
Issued September 22, 2004*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant sustained a recurrence of total disability commencing May 2, 2000, causally related to her accepted employment injuries sustained on June 11, 1999; and (2) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation entitlement effective December 3, 2001, on the grounds that she had no further disability for work or injury residuals requiring further medical treatment causally related to her accepted low back strain or right knee contusion.

The Office accepted that, on June 11, 1999, appellant, then a 46-year-old tax examiner, sustained a low back strain and a right knee contusion when she fell on a concrete sidewalk after feeling dizzy on the way to lunch. Appellant stopped work following the incident and the Office paid compensation for wage loss.

Appellant was treated by Dr. Stuart A. Kauffman, an osteopathic Board-certified family practitioner, who provided regular reports supporting appellant's continued disability due to chronic low back pain, lumbar radiculopathy and herniated nucleus pulposus at L1-2, L2-3 and L5-S1.

The record support that appellant had a significant past history of trauma to her back and neck, initially injuring her lower back in 1991 due to a private industry on-the-job accident. Thereafter, she sustained an injury in 1992 and was involved in three motor vehicle accidents in 1992, 1993 and 1995. In 1997 appellant sustained another private industry on-the-job injury.

On April 3, 2000 appellant returned to limited-duty work, part time for four hours per day with activity restrictions. However, on May 2, 2000 Dr. Kauffman again opined that appellant was totally disabled and she filed a claim for a recurrence of disability on that date.

Dr. Kauffman treated appellant on May 2, 2000 noting that she complained of low back pain at a constant level "8" on a scale of 1 to 10. He noted that a palpatory examination revealed paravertebral spasms of the lumbar spine of moderate intensity with taut bands noted into the

paravertebral musculature. Dr. Kauffman noted that appellant had paresthesias and radicular symptoms in the right leg into the right ankle and trigger points in the right and left lumbar region at L2-3 and L4-5. He diagnosed herniated nucleus pulposus (HNP) L1-2, L2-3 and L5-S1, chronic low back pain and lumbar radiculopathy, and he indicated that appellant's trigger points were injected with marcaine. Dr. Kauffman also performed two facet blocks at L5-S1 and L2-3 and he advised appellant to stop working and seek pain management treatment for possible epidural injections.

By report dated July 7, 2000, Dr. Kauffman stated:

"In March 2000 I authorized [appellant] to return to work on a part-time basis for four hours a day with frequent breaks. She was able to perform her job with minimum to moderate pain for at least two weeks. However, [appellant] began to experience severe pain which was exacerbated by her return to work and demands of her job. I thence am stating that the workman's comp[ensation] carrier should be responsible for her compensation due to her inability to work, as her injury is an exacerbation of her original work-related [injury].

"The objective findings that helped to lead me to this conclusion are the following: palpatory exam[ination] reveals paravertebral spine of severe intensity, trigger points were noted in the left and right lumbar region at L1-2, negative Waddell[']s signs.

"Due to [appellant's] constant severe low back pain which radiates down her right leg and into her right foot and a numbness and heaviness in her legs, she is not able to work for any length of time at her required job. [Appellant] also states that she frequently experiences a loss of sensation in her leg when stepping on the gas and break pedal while driving.

"It is my conclusion that [appellant] is not able to return to work due to an exacerbation of her previous work-related injury which occurred on June 11, 1999."

The Office determined that a second opinion examination was required and it referred appellant, together with a statement of accepted facts, questions to be addressed and the relevant case record, to Dr. Richard J. Mandel, a Board-certified orthopedic surgeon.

By report dated August 16, 2000, Dr. Mandel reviewed appellant's factual and medical history, described his findings upon examination, and stated:

"My impression is of a fall at work that occurred in June 1999 resulting in an injury to the lower back. The injury was initially accepted as a lumbar strain and sprain. There is no evidence of ongoing strain and sprain at this time. There is evidence of right lumbar radiculopathy as manifested by the subjective findings of diminished sensation in the L5 and S1 dermatomes, positive straight leg raise and sitting root test on the right and positive contralateral straight leg raising test. There were no objective findings on today's examination, *e.g.*, atrophy or reflex loss. [Appellant] has a history of multiple prior injuries. The records that I have

reviewed indicate a previous MRI [magnetic resonance imaging] [scan] in 1995. The next MRI [scan] that is available post-dates the work accident of June 1999. In the interim, she injured her lower back on two occasions in motor vehicle accidents. I have not seen MRI [scans] following either of those accidents. If such studies were done, it would be vitally important to review them to determine whether the L5-S1 disc herniation was present following either of those accidents. There also is an apparent history of L5-S1 herniation in 1991, although a 1995 MRI [scan] did not confirm any significant herniation at that level at that time.

“In summary, [a] review of the available records leads me to conclude that [appellant] sustained a lumbar strain and sprain and that she may have sustained a herniated disc at L5-S1 as a result of the fall at work in June 1999. She is fully recovered from the strain and sprain. Review of prior MRI [scans] and medical records of treatment for the automobile accidents will help clarify whether the work injury resulted in a herniation at L5-S1 or whether the herniation was preexisting. She has reached maximum medical improvement from the herniation without surgery. Further modalities and physical therapy treatments are not indicated. [Appellant] is capable of work of a sedentary nature on a full[-]time basis. A physical capacities checklist has been completed in this regard. In my opinion, she has not been totally disabled but does have ongoing physical limitations related to the herniation.”

In a follow-up report dated November 5, 2000, Dr. Mandel indicated that he had reviewed December 1995 cervical and lumbar MRI scans and noted that there was no evidence of any L5-S1 disc herniation at that time. Dr. Mandel opined that review of the films did not provide significant new information as it was already established that appellant did not have an L5-S1 herniation in 1995 and indicated that a question remained as to whether appellant sustained the herniation at some time between December 1995 and her June 1999 work injury. He noted that two accidents occurred during this period of time and he was not able to review any imaging studies following these injuries.

Dr. Mandel noted that a Dr. Ruiz,¹ by report dated October 2, 1997, found a “dramatically positive straight leg raising test on the left at approximately 5 degrees and 15 degrees on the right” and diagnosed past HNP of the lumbar spine, rule out exacerbation or reherniation of the lumbar spine and rule out facet arthralgia. He further noted that Dr. Jeffrey A. Lindenbaum, an osteopathic Board-certified family practitioner, by report dated January 8, 1997, indicated back pain radiating into the left buttock following a motor vehicle accident on December 21, 1995 and that a 1991 MRI scan revealed a herniated disc at L5-S1 at that time.

Dr. Mandel stated:

“The clinical reports strongly suggest that the herniated disc at L5-S1 predated the 1999 work injury. It would still be helpful to review any imaging studies that may have been done between December 1995 and June 1999. If such studies

¹ Specialty undetermined.

were not done, then based upon the clinical it would be my opinion that the work-related injury consisted of a lumbar strain and sprain and right knee contusion. The lumbar herniation was preexisting and was not caused by nor affected by the work injury of 1999. [Appellant] is fully recovered from the lumbar strain and sprain and from the knee contusion.”

By decision dated August 27, 2001, the Office denied appellant’s claim for recurrence of disability commencing May 2, 2000. The Office found that she failed to submit rationalized medical evidence establishing a causal relationship between her condition on May 2, 2000 and her original low back strain and right knee contusion injuries.

Thereafter, on August 30, 2001 the Office issued a notice of proposed termination of compensation on the grounds that the weight of the medical evidence established that appellant no longer suffered from the effects of the accepted work injury. The Office found that Dr. Mandel’s report constituted the weight of the medical evidence and established that appellant had recovered from her lumbar strain and knee contusion.

By letter dated September 21, 2001, appellant’s representative objected to the proposed termination of compensation, arguing that the medical evidence established that appellant sustained an L5-S1 disc herniation as a result of the June 11, 1999 work injury. In support he submitted a September 4, 2001 follow-up report from Dr. Kauffman.

Also submitted was a September 21, 2001 report by Dr. Mikhail Freylikh, a Board-certified physiatrist, who indicated that he first saw appellant on June 16, 1999 with diagnoses of acute lower back sprain and strain and right knee contusion. He discussed nerve conduction velocity study (NCV) results and electromyographic study results and appellant’s course of treatment and diagnosed chronic lower back pain due to degenerative disc disease with chronic bilateral L5-S1 radiculopathy and status post right knee closed injury, symptomatically recovered. Dr. Freylikh opined that appellant’s prognosis for functional recovery was poor and that “with a reasonable degree of medical certainty ... the above injuries were sustained by [appellant] at the time of the fall from June 11, 1999.”

By decision dated December 3, 2001, the Office finalized its termination of appellant’s compensation effective that date.

Appellant disagreed with the December 3, 2001 decision and requested an oral hearing before an Office hearing representative. A hearing was held on May 14, 2002 at which appellant and Dr. Kauffman testified.

Dr. Kauffman presented appellant’s history of injury, complaints and course of treatment, discussed diagnostic testing results and correlated her subjective complaints with the objective testing results arriving at the diagnoses of exacerbation of preexisting lumbar disc disease with a new, more extensive L5-S1 disc herniation causing radiculopathy due to disc impingement on the thecal sac where the nerve root exits from the right side of the spine. Dr. Kauffman stated:

“Although [appellant] does have a history of previous lumbar pathology or problems with her back, including herniations in her low back, she had been working prior to the incident which occurred on June 11, 1999, her occupation as

am [employing establishment] employee, she had been able to work prior to her falling. And after the fall she had complained of intense pain, where she stated that she was unable to work. And based upon the findings on the MRI [scan], which were not present prior to the June 11, 1999 work-related injury, I can state within reasonable medical certainty that [appellant's] injury and her pain and complaints that are keeping her from gainful employment are a direct result of the June 11, 1999 work-related injury."

At the hearing it was noted that a fall as sustained by appellant was a somewhat unusual mechanism of injury for a herniated disc and when asked whether he felt the fall was sufficient to cause the disc problems found, Dr. Kauffman replied:

"[A] fall for somebody who's young and healthy like myself would probably just be a bruise. I'd feel sore for a couple of days. But unfortunately for [appellant] -- her back is so unstable from all of the previous injuries that she had, she is much more susceptible to injury. Those discs, she doesn't have much stability in her back, so a simple fall like that for somebody who is in their mid to late 30s like myself ... it wouldn't] be impossible, but yes, you know, I agree, its usually -- these injuries ... are lifting-type injuries but a fall, a simple fall for somebody who has such extensive back problems, not only in her low back but also in her neck, would definitely, could definitely cause an injury such as [appellant's]."

Dr. Kauffman indicated that there was a disc herniation following injury in 1991 and that following the 1999 injury there was a change in the size of the herniation as well as disc material impinging on the thecal sac, which was not seen prior to the 1999 MRI scan. He opined that appellant's prognosis was poor due to her chronic back pain and indicated that she was working four hours per day with difficulty.

Appellant testified that her work activities four hours per day exacerbated her symptoms and that she had to stop after about one month. Appellant stated that she had worked for four hours per day from January to August 2001, and then returned to work again at four hours per day on December 26, 2001. She stated that prior to her June 11, 1999 fall she was able to work full time without back problems.

By decision dated October 7, 2002, the hearing representative affirmed the August 27 and December 3, 2001 decisions but he remanded the case for further development regarding appellant's entitlement to compensation subsequent to the date of termination. The hearing representative found that the Office met its burden of proof to terminate compensation and medical benefits based upon the report of Dr. Mandel, as Dr. Kauffman diagnosed only unaccepted conditions and failed to identify any muscular back strain injury-related disability. The hearing representative further found that appellant had failed to establish that she sustained a recurrence of disability commencing May 2, 2000, causally related to her June 11, 1999 injuries, as she did not submit evidence which described a change in the nature and extent of her injury-related conditions. The medical evidence merely presented nonaccepted diagnoses.

The hearing representative found, however, that with regard to Dr. Kauffman's testimony, further development was necessary to establish whether appellant had sustained any

herniated discs or other conditions, causally related to her employment injury, or had injury-related disability, and it noted that Dr. Freylikh opined that appellant's work-related fall caused her diagnosed degenerative disc disease with chronic bilateral L5-S1 radiculopathy, which required further clarification and development. However, no such development was undertaken.

The Board finds that this case is not in posture for decision on the issue of whether appellant sustained a recurrence of disability on May 2, 2000, due to a conflict in medical opinion evidence.

To establish that she sustained a recurrence of disability after returning to limited-duty work, appellant had the burden to establish a recurrence of temporary total disability by the weight of reliable, probative and substantial evidence and to show that he cannot perform the light duty.² As part of her burden, she had to show a change in the nature and extent of the injury-related conditions or a change in the nature and extent of the light-duty requirements.³ Appellant presented Dr. Kauffman's reports in support of a change in the nature and extent of her injury-related low back strain condition.

Title 5 U.S.C. § 8123(a) states in pertinent part: "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."

No such appointment of a third physician was made in this case.

In this case, appellant submitted reports from her treating physician, Dr. Kauffman, which noted that appellant had returned to limited-duty work on April 3, 2000, but that on May 2, 2000 he opined that she was again totally disabled, because, in addition to her complaints of back pain, palpatory examination revealed paravertebral spasm in the lumbar spine of moderate intensity with taut bands noted into the paravertebral musculature. Dr. Kauffman noted appellant's complaints of paresthesias and radicular symptoms into the right leg, and he demonstrated trigger points in the right and left lumbar region at L2-3 and L4-5. He diagnosed herniated discs at L1-2, L2-3 and L5-S1, chronic low back pain and lumbar radiculopathy, and he performed facet blocks at L5-S1 and L2-3. In a July 7, 2000 report, Dr. Kauffman reported that, objectively, palpatory examination of appellant's spine revealed paravertebral spasms of severe intensity and trigger points in the left and right lumbar region at the L1-2 level. He opined that appellant had been able to perform her job for about two weeks with minimum to moderate pain, but that, thereafter, she began to experience severe pain which was exacerbated by her work. Dr. Kauffman opined that appellant's current symptomatology was an exacerbation of her original work injury, and opined that she was not able to return to work due to the exacerbation of her June 11, 1999 previous work-related injury.

In subsequent reports Dr. Kauffman stated, "within a reasonable medical certainty" that appellant's injury and pain complaints which were keeping her from employment beginning May 2, 2000 were as a direct result of the June 11, 1999 work injury. He noted that appellant's

² *Terry R. Hedman*, 38 ECA 222, 227 (1986).

³ *Id.*

prognosis was poor due to her chronic back pain and he indicated that she was working four hours per day with difficulty.

However, the Office second opinion specialist, Dr. Mandel reported that on August 16, 2000 he found no evidence of ongoing lumbar strain or sprain. He noted appellant's diminished sensation in the L5 and S1 dermatomes, her positive straight leg raising test, her positive sitting root test on the right, and a positive contralateral straight leg raising test, but he opined that there was no evidence of objective findings such as atrophy or reflex loss. Dr. Mandel noted appellant's history, indicated that she may have herniated the L5-S1 disc in her June 1999 fall at work, but opined that she was fully recovered from the strain and sprain at that time. He indicated that appellant had reached maximum medical improvement without surgery, such that further modalities and physical therapy treatments were not indicated, and that she could perform sedentary work on a full-time basis, and he completed a physical capacities checklist to that end.

After reviewing December 1995 cervical and lumbar MRI scans he opined that there was no evidence of any L5-S1 disc herniation at that time. Dr. Mandel noted that more recent imaging studies were not available for his review. He reviewed reports from other physicians and opined that these reports strongly suggested that the L5-S1 herniated disc predated appellant's 1999 work injury. Dr. Mandel noted that the work injury consisted of lumbar strain and right knee contusion, and that the lumbar herniation was preexisting and was not caused by nor affected by the 1999 work injury. He opined that appellant was totally recovered from both conditions at that time.

Because Dr. Kauffman opined that appellant had a worsening in the nature and extent of her injury-related condition which caused her to cease work on May 2, 2000, and identified objective symptoms, his reports support appellant's recurrence claim.

However, Dr. Mandel disagreed with Dr. Kauffman and his reports negate any causal relationship of work factors with appellant's herniated disc. He did not find any worsening in the nature and extent of appellant's accepted condition. On August 16, 2000 he found no evidence of ongoing lumbar strain or sprain, and no evidence of objective findings to substantiate a recurrence of disability on May 2, 2000, and he opined that she was fully recovered from the strain and sprain at that time. He indicated that appellant had reached maximum medical improvement without surgery, such that further modalities and physical therapy treatments were not indicated, and that she could perform sedentary work on a full-time basis, and he completed a physical capacities checklist to that end.

As Dr. Kauffman, who found objective evidence on May 2, 2000 of appellant's worsening condition, disagreed with Dr. Mandel, who found no objective evidence of disability or injury residuals requiring further medical treatment, on the issue of whether appellant experienced a change in the nature and extent of her injury-related conditions on May 2, 2000, there arises a conflict in the medical opinion evidence which requires referral to a third physician, as detailed in 5 U.S.C. § 8123(a), to resolve the conflict regarding whether or not appellant experienced a May 2, 2000 recurrence of disability.

The Office is therefore instructed to compile a statement of accepted facts, formulate specific questions to be addressed, and to refer appellant, together with the relevant case record,

to an appropriate medical specialist for a rationalized medical opinion to resolve the existing conflict in medical evidence.

The Board further finds that the Office improperly terminated appellant's compensation and medical benefits.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.⁴ After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁵ Further, the right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for wage loss.⁶ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition that require further medical treatment.⁷

In this case, the hearing representative found that the weight of the medical evidence was represented by the reports of Dr. Mandel, a second opinion specialist, who found that appellant had preexisting herniated discs and that her work-related injuries of June 11, 1999 had resolved.

However, the Board finds that there is an unresolved conflict in medical opinion evidence between Dr. Kauffman and Dr. Mandel as to whether appellant continued to have disability for work and/or injury residuals requiring further medical treatment, causally related to her accepted employment conditions.

In this case, Dr. Kauffman provided numerous reports supporting that appellant had continuing disability due to chronic low back pain, lumbar radiculopathy and herniated discs at L1-2, L2-3, and L5-S1, causally related to her original employment injuries of low back strain and right knee contusion. He opined that on May 2, 2000 appellant was again totally disabled due to these conditions. Dr. Kauffman noted that appellant's condition was exacerbated by her return to work, when she began to experience severe pain. He treated appellant that date noting that she complained of low back pain at a constant level "8" on a scale of 1 to 10. Dr. Kauffman noted that palpatory examination revealed paravertebral spasms of the lumbar spine of moderate intensity with taut bands noted into the paravertebral musculature, and paresthesias and radicular symptoms in the right leg into the right ankle, with trigger points in the right and left lumbar region at L2-3 and L4-5. He diagnosed HNP L1-2, L2-3 and L5-S1, chronic low back pain and lumbar radiculopathy. Dr. Kauffman advised that appellant was not able to return to work due to an exacerbation of her previous work-related injury which occurred on June 11, 1999.

⁴ *Harold S. McGough*, 36 ECAB 332 (1984).

⁵ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

⁶ *Marlene G. Owens*, 39 ECAB 1320 (1988).

⁷ *See Calvin S. Mays*, 39 ECAB 993 (1988); *Patricia Brazzell*, 38 ECAB 299 (1986); *Amy R. Rogers*, 32 ECAB 1429 (1981).

However, the Office also obtained a medical report from Dr. Mandel, who found that there was no evidence of ongoing strain or sprain at the time of his examination, no objective findings such as atrophy or reflex loss, and opined that appellant was fully recovered from her accepted lumbar strain/sprain injury and from the right knee contusion. He opined that no further treatment modalities were required and physical therapy was not indicated for her lumbar strain injury. Dr. Mandel opined that appellant had reached maximum medical improvement and did note the presence of herniated discs and suggested that they were preexisting, and he opined that she could perform sedentary-duty work on a full-time basis. He found ongoing physical limitations related to the herniations but no total disability. Thereafter, Dr. Mandel reviewed MRI scans and determined that appellant did not have an L5-S1 disc herniation in 1995, but that it developed some time between December 1995 and June 1999. He noted that a 1997 report found a dramatically positive straight leg raising test on the left at 5 degrees and on the right at 15 degrees, and diagnosed HNP, rule out exacerbation or reherniation of the lumbar spine, rule out facet arthralgia. Dr. Mandel opined that therefore the herniated disc at L5-S1 predated the 1999 work injury and was not affected by the 1999 injuries.

The Federal Employees' Compensation Act⁸ notes 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."

The conflict in this case is between Dr. Kauffman, who finds that appellant remains totally disabled and in need of medical treatment, and Dr. Mandel, who found that appellant has fully recovered and that no further treatment is necessary.

In this case the conflict between Dr. Mandel and Dr. Kauffman must be resolved before the Office can terminate wage-loss compensation or medical benefits. The Office, therefore, did not meet its burden of proof to terminate wage-loss compensation or medical benefits, and the December 3, 2001 decision must be reversed.

Moreover, the Board finds that the case requires further development regarding the unanswered questions posed by the hearing representative as to whether appellant had sustained any herniated discs or other conditions, causally related to her employment injury, whether appellant's employment caused or aggravated her herniated disc condition, and on whether she has post-termination disability due to these defects. The hearing representative had remanded the case for further development regarding appellant's entitlement to compensation subsequent to the date of termination, to establish whether appellant had sustained any herniated discs or other conditions, causally related to her employment injury or had injury-related disability, and to clarify Dr. Freylikh's opinion that appellant's work-related fall caused her diagnosed degenerative disc disease with chronic bilateral L5-S1 radiculopathy, which was not accomplished.

At the hearing Dr. Kauffman testified that, although appellant did have a preinjury history of back problems, the June 11, 1999 employment injury aggravated her preexisting degenerative disc disease problems and caused further disability, including radiculopathy due to the discs impinging on the thecal sac where the nerves exit the right side of the spine. He noted

⁸ 5 U.S.C. § 8123(a).

that following the 1999 employment injury there was a change in the size and extent of appellant's herniated disc injury with disc material impingement on the thecal sac. Dr. Kauffman indicated that with appellant's unstable back, such a fall as occurred on June 11, 1999 was quite sufficient to aggravate her preexisting back problems. Further, Dr. Freylikh had opined that appellant's nerve conduction studies and electromyogram (EMG) results were sufficient to suggest that radicular deficits were sustained by her at the time of her June 11, 1999 fall.

Proceedings under the Act are not adversary in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.⁹ In the instant case, although none of appellant's treating physicians' reports contain rationale sufficient to completely discharge appellant's burden of proving by the weight of reliable, substantial and probative evidence that she sustained herniated discs or an aggravation of degenerative disc disease, causally related to her June 11, 1999 injury, they constitute substantial, uncontradicted evidence in support of appellant's claim and raise an uncontroverted inference of causal relationship between her disabling disc disease complaints and her original traumatic incident, that is sufficient to require further development of the case record by the Office.¹⁰

Therefore, on this issue, the Office is directed to refer appellant, together with a statement of accepted facts, questions to be addressed and the relevant case record, to an impartial medical examiner to resolve the conflict between Drs. Mandel and Kauffman, and to answer the questions posed by the hearing representative regarding appellant's entitlement to wage-loss compensation and medical benefits subsequent to the date of termination.

⁹ *William J. Cantrell*, 34 ECAB 1223 (1983).

¹⁰ *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

The decision of the Office of Workers' Compensation Programs dated October 7, 2002 is hereby set aside and the December 3, 2001 decision is hereby reversed and the case is remanded for further development in accordance with this decision of the Board.

Dated, Washington, DC
September 22, 2004

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member