

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEBORAH S. STEIN and DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION, Sacramento, CA

*Docket No. 03-576; Submitted on the Record;
Issued June 23, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's June 12, 2002 request for reconsideration on the merits under 5 U.S.C. § 8128(a).

On November 15, 1999 appellant, then a 34-year-old air traffic controller filed a notice of traumatic injury claim alleging that she sustained an injury on November 14, 1999 as a result of a lightning strike while performing her federal duties. Appellant asserted that, at the moment the lightning strike occurred, she felt a painful jolt and crackling in her right ear which radiated down her esophagus. Appellant stated that, within one hour, she experienced many symptoms on the right side of her body including headaches, dizziness, tingling and chest pain. A witness statement from William Silaghi provided at the end of the report stated: "There was a flash of lightning over the control tower. The STVS radio panel blinked at the LC-W position where [appellant] was working. She complained of receiving an electrical jolt in her ear that traveled down her throat." Appellant stopped work on November 15, 1999. The Office accepted the claim for electric shock, vertigo and headaches as work related and paid wage-loss compensation from December 30, 1999 through January 15, 2000.

In a decision dated February 1, 2000, the Office rescinded the prior acceptance of the claim on the basis that fact of injury had actually not been established. The Office determined that the claim be rejected following an investigation instituted by the employing establishment, which substantiated that the incident of a lightning strike and resulting shock had not likely occurred as alleged. An employing establishment representative informed the Office that the electrical and telecommunications lines, which support the tower where appellant worked on November 14, 1999, were located underground and were in good working order; thus lightning could not have caused any major shock injury to an employee within the tower. The representative indicated that the audio tape recording of appellant's November 14, 1999 work shift was reviewed for indication of electrical disturbance or suspected lightning that might have caused static; however, there was no indication of a disturbance, static or change to the quality of the controller's voice detected. It was further noted that a visual inspection of the STVS and position equipment was performed, along with the lightning protection system on the exterior of

the lower shaft; however, no evidence was found of damage from lightning or evidence that a lightning strike had occurred. The Office determined that, based on this additional factual evidence submitted by the employing establishment, appellant's claim was accepted in error.

On February 12, 2000 appellant requested an oral hearing, which was held on March 13, 2001. By decision dated June 13, 2001, an Office hearing representative affirmed the prior decision, finding that, based on the factual evidence of record, acceptance of appellant's claim was properly rescinded.

On June 12, 2002 appellant through counsel requested reconsideration and argued that appellant had suffered from seizures and blackouts as a result of her lightning injury. Appellant's counsel submitted evidence in support of the claim including diagnostic and narrative medical reports. Appellant submitted electroencephalogram (EEG) studies performed March 27 and August 14, 2001, which showed conflicting findings and an unremarkable magnetic resonance imaging scan of appellant's brain conducted October 4, 2001. Appellant also submitted a narrative report from Dr. Robert Burgerman, a neurologist, from the Sacramento Epilepsy Center in Sacramento, California dated August 14, 2001 and a June 6, 2002 amended report from Dr. Mary Ann Cooper, a physician and professor at the University of Illinois. Dr. Burgerman reviewed the August 14, 2001 EEG in his report, discussed appellant's complaints, the facts related by appellant regarding the alleged electric shock sustained November 14, 1999 and diagnosed nonepileptic seizures (possibly psychogenic seizures) versus the possibility of frontal lobe complex partial seizures. Dr. Cooper in her report indicated that she was an expert with lightning injuries and their sequelae for over 20 years. She indicated that, upon review of the case, appellant's statements were consistent with the complaints normally given by someone who has been injured by lightning. Dr. Cooper opined that, upon review of the medical record, lightning was the direct and proximate cause of appellant's complaints and deficits and further that appellant was totally disabled.

In a decision dated September 23, 2002, the Office denied appellant's request for review on the grounds that the evidence submitted was irrelevant and immaterial to the issue and insufficient to warrant merit review.¹

The Board finds that the Office improperly denied appellant's request for further merit review.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,² the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not

¹ The Board does not have jurisdiction to review evidence submitted by appellant subsequent to the Office's September 23, 2002 decision. The Board cannot review this evidence on appeal, as the Board's jurisdiction is limited to reviewing the evidence and arguments that were before the Office at the time of its final decision; *see Lloyd E. Griffin, Jr.*, 46 ECAB 979 (1995); *Carroll R. Davis*, 46 ECAB 361 (1994). Appellant may submit such evidence to the Office along with a request for reconsideration.

² 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

previously considered by the Office.³ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must also file his application for review within one year of the date of that decision.⁴ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.⁵

In this case, the Office initially accepted that appellant suffered an injury on November 14, 1999 as a result of lightning jolting through her headset at work; however, later rescinded acceptance of the claim following review of information submitted by the employing establishment. Appellant disagreed with this Office decision, requested reconsideration on June 12, 2002 and submitted additional evidence. Accompanying the request, appellant's counsel provided medical reports from Drs. Burgerman and Cooper, which discussed the history of the injury as related by appellant, her complaints of seizures and blackouts, diagnostic findings and the opinion that appellant's conditions were directly caused by the alleged lightning injury.

The Board finds that Dr. Cooper's report is relevant as to whether appellant sustained injuries due to the reported lightning strike. Dr. Cooper, who is an expert in lightning injuries, related appellant's injuries to the lightning strike reported by appellant. The report is new and meets the criteria for a merit review by the Office. On remand of the case, the Office shall conduct a merit review of the evidence submitted on reconsideration and issue an appropriate decision in the case.

³ 20 C.F.R. §§ 10.606(b)(2).

⁴ 20 C.F.R. § 10.607(a).

⁵ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

The decision of the Office of Workers' Compensation Programs dated September 23, 2002 is hereby set aside and the case is remanded for further development consistent with this decision.

Dated, Washington, DC
June 23, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member