

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KAREN F. LOWERY and DEPARTMENT OF AGRICULTURE,
AMS TOBACCO PROGRAM, Mockville, NC

*Docket No. 03-1901; Submitted on the Record;
Issued October 23, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for review of the merits of her case under 5 U.S.C. § 8128.

On January 21, 1999 appellant, then a 45-year-old agricultural commodity grader, filed a notice of traumatic injury alleging that she was hurt in the performance of duty on that date when she reached into a van to get her purse and the van started rolling down an incline, pulling her alongside of it. The Office accepted the claim for a back strain, right shoulder strain and a left knee strain. Appellant stopped work on January 21, 1999 and received compensation for total disability. In a decision dated July 30, 2001, the Office terminated appellant's compensation, finding that she was no longer disabled and had no continuing residuals due to her work-related injury. On August 27, 2001 appellant requested reconsideration, alleging that she suffered from an abdominal hernia as a consequence of the January 21, 1999 work injury. Appellant submitted medical reports to support her contention.¹ In a decision dated February 13, 2002, the Office denied modification of its prior decision terminating appellant's compensation. The Office also specifically determined that the medical evidence was insufficient to establish a causal relationship between appellant's diagnosed abdominal hernia and the work incident of January 21, 1999.²

On February 13, 2003 appellant filed a second request for reconsideration and submitted exhibits identified A-U, which included the following: a personal statement dated February 11, 2003; appellant's statement dated February 11, 2003; an employing establishment letter dated January 18, 2002; a February 19, 2002 letter; a copy of the notice of traumatic injury dated

¹ Appellant submitted an August 21, 2001 report from Dr. Franklin Tolbert, a family practitioner, who stated that appellant had developed an abdominal wall hernia, which Dr. Tolbert felt was directly related to the January 21, 1999 work injury.

² The Office noted that Dr. Tolbert did not address why appellant's hernia was not caused by her nonwork-related surgery for removal of a tumor in 2000.

January 21, 1999; handwritten notes of telephone conversations with Earl Benton, Billy King and Faye Lewis dated March 23 and 24, 1999; a request for documents; physician letters dated July 23, August 21, 30 and November 1, 2001, January 18 and February 17, 2002; documentation pertaining to appellant's 1995 work injury; duty status reports dated August 29 and 30, 2001; a memorandum by Dr. Anthony DeFranzo dated July 18, 2001; a memorandum from the Office medical adviser dated December 10, 2001; chart notes dated March 4, 2002; an Office letter dated July 26, 2000; chart notes dated April 8, 1999; the Office letter dated July 26, 2000; an April 15, 2002 letter from the rehabilitation counselor; a performance appraisal dated January 21, 1999; a work review document; a September 11, 2002 letter from appellant to the employing establishment; a June 5, 1997 Office memorandum; and a January 13, 2000 Office letter.

In a decision dated April 28, 2003, the Office denied appellant's request for reconsideration on the grounds that the evidence attached to the request was repetitive or irrelevant to the issue of termination of compensation. Consequently, the Office concluded that appellant was not entitled to have his case reviewed on the merits of the claim.

The Board finds that the case is not in posture for a decision.³

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁴ The new Office regulations were made effective January 4, 1999⁵ and further address this discretionary authority. Section 10.606(b) of the Office regulations provides that an application for reconsideration must be in writing, set forth arguments and contain evidence that: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.⁶ When an application for reconsideration is timely filed⁷ but does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.⁸

The Board notes that the majority of the exhibits submitted by appellant in support of her reconsideration request were copies of documents and medical evidence that was previously of record. Appellant, however, also submitted a February 17, 2002 report from Dr. Tolbert, which directly addresses the issue of consequential injury. In its decision, the Office primarily found Dr. Tolbert's opinion as to the etiology of appellant's hernia to be no reasoned since he did not

³ Appellant filed a claim for an emotional condition but the Office has not issued a final decision with regard to that claim for compensation.

⁴ 5 U.S.C. § 8128.

⁵ 63 Fed. Reg. 227 (1998).

⁶ 20 C.F.R. § 10.606(b)(2) (1999).

⁷ An application for reconsideration must be sent within one year of the date of the Office decision, for which review is sought. *See* 20 C.F.R. § 10.607(a) (1999).

⁸ 20 C.F.R. § 10.608(b) (1999).

explain why appellant's hernia was not due to her nonwork-related surgery in 2000. In his February 17, 2002 report, Dr. Tolbert noted that appellant's hernia was discovered prior to her scheduled surgery during the preoperative examination and was felt to be due to her work injury of June 6, 2002. Because Dr. Tolbert indicates that appellant's hernia preexisted her tumor surgery, the Office must reconsider the probative value of the physician's opinion that appellant's hernia is due to her accepted work injury. Moreover, appellant submitted chart notes from Dr. Michael E. King, a Board-certified orthopedic surgeon, dated March 4, 2002, indicating that his opinion that appellant suffered from continuing residuals due to the accepted work injury. Dr. King stated that appellant is in need of surgery for her right shoulder and possibly the left knee. Because the new evidence submitted by appellant on reconsideration are relevant to the issues of whether appellant has any continuing residuals or disability due to her accepted work injury and whether she is entitled to compensation based on disability due to a consequential injury, the Board finds that appellant satisfied the requirements of section 10.606(b)(3) of the regulations and is, therefore, entitled to a merit review of her case in accordance with section 8128.

The decision of the Office of Workers' Compensation Programs dated April 28, 2003 is hereby vacated and the case is remanded for consideration consistent with this opinion.

Dated, Washington, DC
October 23, 2003

Alec J. Koromilas
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member