

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KIM SUNG and DEPARTMENT OF THE NAVY,
PUGET SOUND NAVAL SHIPYARD, Bremerton, WA

*Docket No. 98-1569; Submitted on the Record;
Issued November 17, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was insufficient to warrant merit review of the claim.

In the present case, appellant filed a claim alleging that he sustained injuries to his right wrist, left shoulder and left elbow causally related to factors of his federal employment. By decision dated November 4, 1996, the Office denied appellant's claim on the grounds that it could not be established that appellant had actually experienced the employment factors alleged.

In a letter dated April 1, 1997, appellant requested reconsideration of his claim. By decision dated June 19, 1997, the Office determined that the evidence was insufficient to warrant reopening the claim for merit review.¹

The Board's jurisdiction is limited to final decisions of the Office issued within one year of the filing of the appeal.² Since appellant filed his appeal on April 17, 1998, the only decision over which the Board has jurisdiction on this appeal is the June 19, 1997 decision denying his request for reconsideration.

The Board has reviewed the record and finds that the Office improperly denied merit review in this case.

¹ A nonmerit review is a limited review to determine if the evidence is sufficient under 20 C.F.R. § 10.138(b)(1) to reopen the case for merit review, and the only right of appeal is to the Board. A merit review is a determination, pursuant to the discretionary authority granted by 5 U.S.C. § 8128(a), of whether the evidence is sufficient to modify the prior decision, and appeal rights include a one-year period to request reconsideration or appeal to the Board; *see* 20 C.F.R. § 10.138; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.7.8 (June 1997).

² 20 C.F.R. § 501.3(d).

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,³ the Office's regulations provides that a claimant may obtain review of the merits of the claim by (1) showing that the Office erroneously applied or interpreted a point of law, or (2) advancing a point of law or fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office.⁴ Section 10.138(b)(2) states that any application for review that does not meet at least one of the requirements listed in section 10.138(b)(1) will be denied by the Office without review of the merits of the claim.⁵

In the June 19, 1997 Office decision, the Office noted that appellant had submitted an October 11, 1996 statement with his request for reconsideration. This statement is a response to a supervisor's statement regarding the work duties that appellant alleges contributed to his injuries. It is clearly relevant to appellant's claim, since the Office based the denial of his claim on the supervisor's statement with respect to appellant's actual work duties. The Office found that the October 11, 1996 statement was previously reviewed by the Office prior to the November 4, 1996 decision, and therefore did not constitute new evidence. The record, however, does not support this determination. The November 4, 1996 decision does not refer to an October 11, 1996 statement from appellant; it indicates that appellant had submitted a statement (dated September 10, 1996) regarding the implicated work duties, and noted there had been an October 3, 1996 response from appellant's supervisor that contradicted some of appellant's allegations. The record contains a copy of the October 11, 1996 statement that is date stamped as received by the Office on November 21, 1996. There is no indication in the record that the October 11, 1996 statement was received or reviewed by the Office prior to the November 4, 1996 decision. Accordingly, the Board finds that the October 11, 1996 statement constitutes evidence not previously considered by the Office.

Since the record contains relevant evidence not previously considered by the Office, it should have reopened the claim for a review of the merits under section 10.138(b). The case will be remanded to the Office for an appropriate merit decision.

³ 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.")

⁴ 20 C.F.R. § 10.138(b)(1).

⁵ 20 C.F.R. § 10.138(b)(2); *see also* *Norman W. Hanson*, 45 ECAB 430 (1994).

The decision of the Office of Workers' Compensation Programs dated June 19, 1997 is set aside and the case remanded for action consistent with this decision of the Board.

Dated, Washington, D.C.
November 17, 1999

Michael J. Walsh
Chairman

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member