

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of KENNETH P. BOEGER and DEPARTMENT OF THE NAVY,  
MILITARY SEALIFT COMMAND-PACIFIC, Oakland, CA

*Docket No. 99-913; Submitted on the Record;  
Issued May 4, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for a merit review under 20 C.F.R. § 10.138.

On December 1, 1988 appellant, a 37-year-old able seaman, sustained a cervical strain and scalp contusion while in the performance of duty. The Office subsequently expanded appellant's claim to include the condition of somatoform pain disorder. Appellant ceased working on December 7, 1988 and he returned to his prior duties on June 8, 1989. Approximately one month after returning to work, appellant resigned. He subsequently obtained employment as a truck driver, but after 13 months of employment he again ceased working due to a recurrence of disability beginning November 6, 1990. The Office accepted appellant's claimed recurrence of disability and placed him on the periodic compensation rolls. The Office subsequently referred appellant for vocational rehabilitation.

In a decision dated September 28, 1994, the Office determined that the selected position of order taker with earnings of \$210.40 per week fairly and reasonably represented appellant's wage-earning capacity. Accordingly, the Office reduced appellant's wage-loss compensation. By decision dated October 2, 1997, an Office hearing representative affirmed the September 28, 1994 decision.

On October 1, 1998 appellant requested reconsideration. By decision dated October 21, 1998, the Office denied appellant's request on the basis that the evidence submitted on reconsideration was of a cumulative nature.

The Board finds that the Office abused its discretion in refusing to reopen appellant's case for a merit review under 20 C.F.R. § 10.138.

Section 10.138(b)(1) of Title 20 of the Code of Federal 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 a fact not

previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.<sup>1</sup> Section 10.138(b)(2) provides that, when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.138(b)(1), the Office will deny the application for review without reaching the merits of the claim.<sup>2</sup>

With respect to the third requirement, submitting relevant and pertinent evidence not previously considered, the Board finds that appellant has satisfied this requirement. In its October 21, 1998 decision, the Office neglected to consider recent reports from appellant's neurologist, Dr. Mark O. Herring. Specifically, the Office did not address Dr. Herring's July 6, 1998 report wherein he concluded that appellant was permanently and totally disabled by his chronic pain complaints and psychological factors. This newly submitted report is both relevant and pertinent to the issue on reconsideration.

The Board's jurisdiction over a case is limited to reviewing that evidence which was before the Office at the time of its final decision.<sup>3</sup> Inasmuch as the Board's decisions are final as to the subject matter appealed, it is crucial that all relevant evidence that was properly submitted to the Office prior to the time of issuance of its final decision be addressed by the Office.<sup>4</sup> Accordingly, the case is remanded to the Office to fully consider the evidence that was properly submitted prior to the issuance of its October 21, 1998 decision denying reconsideration.<sup>5</sup>

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<sup>1</sup> 20 C.F.R. § 10.138(b)(1).

<sup>2</sup> 20 C.F.R. § 10.138(b)(2).

<sup>3</sup> 20 C.F.R. § 501.2(c).

<sup>4</sup> 20 C.F.R. § 501.6(c); *see William A. Couch*, 41 ECAB 548, 553 (1990).

<sup>5</sup> While the Office neglected to consider Dr. Herring's July 6, 1998 report on reconsideration, in an earlier letter dated July 22, 1998, the Office granted Dr. Herring's request for authorization for acupuncture treatments and referral for psychiatric evaluation as set forth in his July 6, 1998 report. Thus, the Office has already made a determination as to the relevance of Dr. Herring's July 6, 1998 report. Moreover, as the Office has authorized further psychiatric evaluation, it seems only prudent that the Office await the results of this examination before reviewing appellant's claim on the merits.

The October 21, 1998 decision of the Office of Workers' Compensation Programs is hereby set aside and the case is remanded for further consideration consistent with this opinion.

Dated, Washington, DC  
May 4, 2001

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Willie T.C. Thomas  
Member