

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of WILLIAM BOND and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, Brooklyn, NY

*Docket No. 98-706; Submitted on the Record;  
Issued January 3, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
DAVID S. GERSON

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

The Board has duly reviewed the case record in the present appeal and finds that the Office abused its discretion in denying appellant's request for review of the merits of his claim.

The Office accepted that appellant, a warehouse worker, sustained a disc herniation at L3-4 on February 16, 1994 while lifting a box. He underwent surgery for this condition and did not work after March 13, 1996 due to his employment-related condition. In 1996 appellant was diagnosed with avascular necrosis. In a July 12, 1996 decision, the Office found that appellant's avascular necrosis was not causally related to his accepted employment injury. In a July 8, 1997 letter, appellant's attorney requested reconsideration.<sup>1</sup> Evidence accompanying the request included May 13 and June 9, 1997 supplemental attending physician's reports (Forms CA-20a) from Dr. Leonard Langman, a neurologist, in which he checked a box "yes" to indicate that appellant's condition was due to the injury for which compensation was claimed. Among the conditions that Dr. Langman noted appellant as having were avascular necrosis of the right hip. In an October 9, 1997 decision, the Office denied appellant's request for a merit review of his claim, finding that the evidence submitted was immaterial and insufficient to warrant review of the prior decision.

The only decision before the Board on appeal is the October 9, 1997 Office decision which denied appellant's request for a merit review of his claim. Since more than one year has elapsed between the issuance of the July 12, 1996 merit decision and December 30, 1997, the

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<sup>1</sup> The attorney also requested that, in addition to avascular necrosis, appellant's claim be expanded to accept other conditions not previously accepted by the Office. The Office has not issued a final decision regarding the other conditions implicated by appellant's attorney. Therefore, the causal relationship of these conditions, if any, to appellant's accepted employment injury is not before the Board at this time; *see* 20 C.F.R. § 501.2(c).

date appellant filed his appeal with the Board, the Board lacks jurisdiction to review July 12, 1996 decision.

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

The Board finds that appellant submitted relevant and pertinent evidence not previously considered by the Office when he submitted Dr. Langman’s May 13 and June 9, 1997 supplemental attending physician’s reports. These reports were not previously of record and are relevant because they support causal relationship between appellant’s employment injury and his avascular necrosis. Dr. Langman had not submitted any prior similar reports which were considered by the Office in reaching a decision on appellant’s claim. Consequently, Dr. Langman’s May 13 and June 9, 1997 reports are relevant and pertinent evidence not previously considered by the Office and are sufficient to require the Office to conduct a merit review of the case.

The Office, in its October 9, 1997 decision denying a merit review, noted weighing the medical evidence in light of the evidence submitted by appellant and found that the weight of the medical evidence rested with a report of an Office referral physician upon whom the Office relied in its July 12, 1996 merit decision. However, the Board has held that the requirement for reopening a claim for merit review does not include the requirement that a claimant must submit all evidence which may be necessary to discharge his or her burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.<sup>4</sup> As noted above, appellant has submitted relevant and pertinent evidence not previously considered by the Office.

In view of the foregoing, the case shall be remanded to the Office to review the entire case record, including Dr. Langman’s May 13 and June 9, 1997 reports. After such further development as is deemed necessary, the Office shall issue an appropriate merit decision regarding the avascular necrosis aspect of appellant’s claim.

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<sup>2</sup> 20 C.F.R. § 10.138(b)(1).

<sup>3</sup> 20 C.F.R. § 10.138(b)(2).

<sup>4</sup> See *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

The October 9, 1997 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision.

Dated, Washington, D.C.  
January 3, 2000

Michael J. Walsh  
Chairman

George E. Rivers  
Member

David S. Gerson  
Member