

**United States Department of Labor
Employees' Compensation Appeals Board**

L.C., Appellant)

and)

DEPARTMENT OF THE NAVY, NAVAL)
FACILITY ENGINEERING COMMAND --)
STATIONS & BASES, Norfolk, VA, Employer)

**Docket No. 08-875
Issued: April 2, 2009**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 4, 2008 appellant filed a timely appeal from merit decisions of the Office of Workers' Compensation Programs dated May 22, 2007 and January 2, 2008 which denied a left hip arthritis condition as being related to a December 20, 1989 employment injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that his left hip arthritis condition and subsequent surgery was causally related to his December 20, 1989 employment injury.

FACTUAL HISTORY

On December 20, 1989 appellant, then a 53-year-old boiler plant operator and tool machine operator, sustained a burn to the inside of his left ankle. The Office accepted the claim for burn with ulceration of the left leg and permanent aggravation of venous insufficiency. The claim was subsequently accepted for other related complications of appellant's peripheral

vascular disease which predisposed him to ulceration including: aggravation of varicose veins; coagulation defects; peripheral vascular disease; and arthritis of the left lower leg. Appellant was totally disabled from December 20, 1989 to May 4, 1991. From May 5 to 24, 1991 appellant worked as a fork lift operator. He subsequently worked as a security guard in a hospital from May 31, 1991 to March 19, 1992, at which time he had a recurrence of total disability. The record indicates that appellant received compensation based on his loss of wage-earning capacity since 1992.¹

In a May 7, 2007 letter, appellant's congressional representative requested that the Office approve medical treatment for a possible total hip arthroplasty. The April 20, 2007 medical report of Dr. David J. German, a Board-certified orthopedic surgeon, recommended that appellant undergo a total left hip arthroplasty. Dr. German noted that the surgery would benefit appellant, if successful, but there were potential risks due to his medical history. He recommended that appellant follow up with a specialist at the Cleveland Clinic.

By decision dated May 22, 2007, the Office denied appellant's request, finding that his left hip condition was not causally related to his December 20, 1989 work injury. It noted that there was no recent diagnostic testing of the left hip and that plain films of appellant's hip in October 1995 showed degenerative changes.

On June 27, 2007 appellant underwent a left total hip replacement, which was performed by Dr. Michael Joyce, a Board-certified orthopedic surgeon.

On August 13 and September 3, 2007 appellant requested reconsideration of the May 22, 2007 decision. He advised that 11 years prior, he had a very sore and painful vascular ulcer that was open for a long period of time. Appellant stated that the ulcer made it painful to walk and affected his whole body, including his hip and legs.

In October 3 and 10, 2006 medical reports, Dr. Steven E. Barnes, an osteopath, noted that appellant had marked degenerative arthritis of the hip and that follow-up with an orthopedic specialist was needed. On August 13, 2007 he noted that it was a significant possibility that appellant's long-standing problem with ambulation on his toes of the left leg, where he had the venous stasis ulcers in the early 1990's, caused problems with the left hip leading to the hip replacement. In an August 16, 2007 report, Dr. Barnes advised appellant had long-standing disability due to the venous insufficiency and subsequent ulceration of the left leg. Since 1994, appellant had difficulty with the ulcer. Dr. Barnes opined that the problems appellant had with ambulation were due to the venous stasis changes and the leg ulcer which precipitated an early start of arthritis of the left hip, which required the replacement.

In a May 22, 2007 report, Dr. Joyce advised that he treated appellant for consideration of total hip replacement/peripheral venous vascular stasis problems. He noted appellant's medical

¹ Prior to the December 20, 1989 injury, appellant had an ulcer on the lateral aspect of the left foot which responded to a femoropopliteal bypass was performed in July 1988. He also had a preexisting deep vein thrombosis with chronic venous insufficiency and stasis. Following the bypass, appellant's ulcers of the left leg stabilized until the job-related burn incident of December 20, 1989. His employment with the employing establishment was terminated March 30, 1990.

history, including a femoral popliteal artery bypass left leg in 1987, vein stripping of the left leg in 1990, and many years of skin breakdown problems because of his chronic venous stasis and vasculitis of atrophie blanche. Dr. Joyce advised that appellant had severe osteoarthritis of his left hip. He noted that appellant could be significantly benefited both by relief of pain and motion by undergoing a left total hip replacement.

In an August 9, 2007 report, Dr. Joyce reiterated that appellant had known osteoarthritis of both hips with the left hip much more severe than the right. Appellant sustained a burn injury to his left lower extremity in 1989 with subsequent venous stasis disease and vein stripping of the left lower extremity. Dr. Joyce noted that appellant favored the left leg and that he had draining wounds for a number of months. Appellant also had a thrombosis of his left lower leg and required surgery on his left thigh concerning the saphenous vein. Dr. Joyce stated that appellant's prolonged history of left leg problems, which included almost a five-year sequence of wound-healing problems of the left lower extremity, added to the exacerbation of his osteoarthritis of his left hip as it occurred in conjunction with his ongoing left hip arthritis, which made the left hip osteoarthritis much worse than the right hip.

On December 12, 2007 the Office requested an Office medical adviser to review a statement of accepted facts and the medical evidence as to whether appellant's left hip arthritis was caused, aggravated, accelerated or precipitated by the accepted conditions of burn with ulceration of the left leg and permanent aggravation of venous insufficiency.

In a December 13, 2007 report, the Office medical adviser opined that there was no connection between appellant's left hip arthritis or the need for total hip replacement and the chronic aggravation of his venous insufficiency from the burn. He did not see how Dr. Barnes could believe a difficulty in ambulation from the venous insufficiency in the lower extremity precipitated osteoarthritis in the left hip. The Office medical adviser explained that, if appellant put less weight on the left lower extremity due to the vascular problems and the ulcerations, there would be less stress placed on the left hip and less likely to cause degenerative arthritis.

By decision dated January 2, 2008, the Office denied modification of its previous decision.

LEGAL PRECEDENT

It is an accepted principle of workers' compensation law that when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause which is attributable to the employee's own intentional conduct.² If a subsequent injury is the direct and natural result of a compensable primary injury, it is compensable.³ Where an injury is sustained as a consequence of an impairment residual to an

² *Carlos A. Marrero*, 50 ECAB 117, 120 (1998); 1 A. Larson, *The Law of Workers' Compensation* § 10.01 (2002).

³ *Debra L. Dillworth*, 57 ECAB 516, 519 (2006).

employment injury, the new or second injury is deemed, because of the chain of causation, to arise out of and in the course of employment.⁴

The Federal Employees' Compensation Act provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make the examination.⁵ The implementing regulations state that if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.⁶

ANALYSIS

The Office accepted appellant's December 20, 1989 employment injuries for a burn with ulceration of the left leg, permanent aggravation of venous insufficiency, and other complications from peripheral vascular disease which predisposed him to ulceration including: aggravation of varicose veins; coagulation defects; peripheral vascular disease; and arthritis of the left lower leg. Appellant attributed his left hip degenerative arthritis and need for a total left hip replacement to the December 20, 1989 employment injury. The medical evidence is in conflict on this issue. Dr. Barnes, an attending osteopath, noted appellant had long-standing disability due to venous insufficiency and subsequent ulceration of the left lower extremity. He opined that the ambulation problems appellant had were to the venous stasis changes and leg ulcer have precipitated an early onset of arthritis to the left hip, which required surgery. Dr. Joyce, a Board-certified orthopedic surgeon, noted appellant's prolonged history of left leg problems, which included a five-year sequence of wound-healing problems of the left lower extremity and added to the exacerbation of his osteoarthritis of his left hip. An Office medical adviser opined that there was no connection between appellant's left hip arthritis or the need for surgery and the chronic aggravation of appellant's venous insufficiency from the burn. The Board finds that there is a conflict in the medical evidence as to whether appellant's accepted injury caused or aggravated the osteoarthritis of his left hip which necessitated surgery. The case will be remanded to the Office for referral of appellant to an impartial medical specialist. After such development as the Office deems necessary, an appropriate decision should be issued.

⁴ *Kathy A. Kelley*, 55 ECAB 206 (2004).

⁵ 5 U.S.C. § 8123.

⁶ 20 C.F.R. § 10.321(b).

CONCLUSION

The Board finds that the case is not in posture for decision due to an unresolved conflict in medical opinion.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 2, 2008 and May 22, 2007 are set aside and the case remanded for further action consistent with this decision of the Board.

Issued: April 2, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board