

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HELEN C. PEARSON and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, Covington, KY

*Docket No. 97-1831; Submitted on the Record;
Issued October 8, 1999*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant met her burden of proof establishing that she sustained a recurrence of disability, from April 1, 1996 through June 19, 1996, due to the December 16, 1994 employment injury; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing.

On December 29, 1994 appellant, then a 61-year-old clerk, filed a claim for a traumatic injury alleging that on December 16, 1994 she fell at work and fractured her left femur bone. The Office accepted appellant's claim for a Pauwels fractured and transcervical hip. Appellant underwent surgery of close reduction fracture of the left hip with compression hip nailing with lock screw on December 17, 1994. She stopped working on December 17, 1994 and returned to part-time work on May 15, 1995 and full-time work on June 12, 1995. Appellant continued to experience problems with her hip and by March 28, 1996, appellant's treating physician, Dr. Robert M. Runge, a Board-certified orthopedic surgeon, diagnosed aseptic neurosis of the left femoral head, a condition which the Office accepted. Dr. Runge requested and the Office authorized left hip replacement surgery.

On April 1, 1996 while the date for surgery was pending, appellant hurt her left hip at home and went to the emergency room at St. Luke Hospital that day. The emergency room report dated April 1, 1996 stated that appellant was walking across the carpet floor when she tripped and fell. The report described a physical examination of appellant, left hip and femur x-rays which revealed previous femoral neck fracture with rod and plate in place and stated that appellant had a left hip contusion.

In a report dated April 2, 1996, Dr. Runge stated that in December 1994 appellant sustained a vertical shear fracture transcervical of the left hip which was nailed. He stated that this shear fracture united but appellant developed aseptic necrosis of the femoral head, which particularly occurred in a high percentage of vertical shear fractures and that was how it was related to the December 16, 1994 employment injury. Dr. Runge stated that appellant's bone

scan showed lack of circulation to the head of the femur and that a bipolar hemiarthroplasty was considered to be the surgery of choice in replacing the dead femoral head.

On April 12, 1996 appellant filed a claim for a recurrence of disability, Form CA-2a, commencing April 1, 1996 causally related to the December 16, 1994 employment injury. Appellant stated that the recurrence of disability occurred because the lack of circulation of blood in her hip made it weak and constantly painful and there was no other cause or reason for the fall other than her hip giving out. She stated that since April 1, 1996 appellant had to use a walker and pain medication "constantly." Appellant stopped working as of April 1, 1996.

By letter dated May 30, 1996, the Office requested additional information from appellant including medical evidence which established that the total disability beginning April 1, 1996 was due to the December 16, 1994 employment injury and not the April 1, 1996 incident.

In a report of a phone call with the Office on June 5, 1996, the Office stated that appellant said that on April 1, 1996 her left hip "just gave out and caused her to fall to her carpeted floor." She said that she was not sure what she told people at the hospital on April 1, 1996 because she was in excruciating pain and was frightened. The Office stated that appellant said that due to the state she was in she might have told the emergency room people that she tripped but she emphasized that she did not trip. In a letter to the Office dated June 6, 1996, appellant reiterated that she did not trip on April 1, 1996 as the room where she fell was carpeted. She reiterated that when she was taken to the hospital by her grandson on April 1, 1996, she was in great pain and was frightened. She said that she did not recall what she said, "all [she] wanted was relief." Appellant said that on April 1, 1996 when she went to take a step on her left leg, it just went down and she landed on her leg and hip. She stated that she had been in pain for months before the fall due to the loss of blood circulation in the left hip.

In a note dated May 14, 1996, the Office stated that if in fact appellant tripped, the employing establishment controverted the claim on the grounds that a new, nonwork-related injury occurred.

On June 20, 1996 Dr. Runge performed a hemiarthroplasty with bipolar cemented stem prosthesis on appellant.

In a report dated July 11, 1996, Dr. Runge stated that he nailed appellant's hip on December 17, 1994 and she developed avascular necrosis of the femoral head. He stated that this was proved by a technetium bone scan before appellant had the episode on April 1, 1994. Dr. Runge stated that avascular necrosis of the femoral head was secondary to the vertical shear fracture of the neck of the femur and not the new injury. He stated:

"Avascular necrosis can come on early or late from a hip nailing and to me, I consider it part of the same injury and the natural sequence of events in a certain percentage of neck fractures of the hip. Avascular necrosis is known to follow neck fractures in a certain percentage of cases."

In an attending physician's report dated July 12, 1996, Dr. Runge checked the "yes" box that appellant's left hip condition was causally related to the December 15, 1994 employment injury.

By decision dated August 2, 1996, the Office denied the claim, stating that appellant failed to establish that the recurrence of disability from April 1 through June 19, 1996, the day before appellant underwent the authorized surgery of hemiarthroplasty, was causally related to the December 16, 1994 employment injury.

By letter dated December 15, 1996, appellant requested a written review of the record by an Office hearing representative and submitted a medical report from Dr. Runge dated September 18, 1996.

By decision dated January 27, 1997, the Office's Branch of Hearings and Review denied appellant's request for a hearing, stating that appellant's request for a review of the written record was postmarked December 16, 1996, more than 30 days after the Office issued the August 2, 1996 decision and that, therefore, appellant's request was untimely. The Branch informed appellant that she could request reconsideration by the Office and submit additional evidence.

The Board finds that appellant failed to establish that she sustained a recurrence of disability from April 1, 1996 through June 19, 1996 causally related to the December 16, 1994 employment injury.

Appellant has the burden of establishing by reliable, probative and substantial evidence that the recurrence of a disabling condition for which she seeks compensation was causally related to her employment injury.¹ This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.²

In the present case, there is some inconsistency as to what happened on April 1, 1996 as the St. Luke Hospital emergency room report dated April 1, 1996 reported that appellant tripped but appellant subsequently denied that she tripped. Rather, in her June 5, 1996 telephone conversation with the Office and in her June 6, 1996 letter, appellant emphasized that she did not trip but her left leg gave way causing her to fall on her left hip and whatever she told the hospital personnel on April 1 was said in fear and in great pain. Nonetheless, appellant did not submit any medical evidence to document that her disability from April 1, 1996 through the time of her authorized surgery on June 20, 1996 was due to the December 16, 1994 employment injury. In his April 2, 1996 report, Dr. Runge explained that appellant's aseptic necrosis was causally related to the December 16, 1994 employment injury but did not address the impact of the April 1, 1996 incident on appellant's condition. In his July 11, 1996 report, Dr. Runge stated that the avascular necrosis was secondary to the vertical shear fracture of the femur neck and not

¹ *Dominic M. DeScala*, 37 ECAB 369 (1986).

² *Louise G. Malloy*, 45 ECAB 613, 617 (1994).

the new injury but again, he did not address the effect of the April 1, 1996 incident on appellant. He also did not address the significance of the April 1, 1996 incident in his July 12, 1996 attending physician's report in which he checked the "yes" box indicating that appellant's hip condition was work related. Although the Office informed appellant of the medical evidence she must submit to establish her claim, appellant did not submit the requisite medical evidence. She, therefore, failed to establish that the recurrence of disability from April 1, 1996 through June 19, 1996 was causally related to the December 16, 1994 employment injury.

The Board finds that the Office properly denied appellant's request for a hearing.

Section 8124(b)(1) of the Federal Employees' Compensation Act provides that "a claimant ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."³ Section 10.131 of the Office's federal regulations implementing this section of the Act, provides that a claimant shall be afforded the choice of an oral hearing or a review of the written record by a representative of the Secretary.⁴ Thus, a claimant has a choice of requesting an oral hearing or a review of the written record pursuant to section 8124(b)(1) of the Act and its implementing regulation.

Section 10.131(a) of the Office's regulations⁵ provides in pertinent part that "a claimant is not entitled to an oral hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request...."

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.⁶ Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act, which provided the right to a hearing,⁷ when the request is made after the 30-day period for requesting a hearing,⁸ and when the request is for a second hearing on the same issue.⁹

In the present case, appellant's December 15, 1996 hearing request, which was postmarked December 16, 1996, was made more than 30 days after the issuance of the Office's August 2, 1996 decision and therefore, the Office was correct in stating that appellant was not

³ 5 U.S.C. § 8124(b)(1).

⁴ 20 C.F.R. § 10.131.

⁵ 20 C.F.R. § 10.131(a).

⁶ *Henry Moreno*, 39 ECAB 475, 482 (1988).

⁷ *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

⁸ *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

⁹ *Frederick Richardson*, 45 ECAB 454, 466 (1994); *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

entitled to a hearing in that decision. The Office exercised its discretionary powers in denying appellant's request for a hearing and in so doing, did not act improperly.

The decisions of the Office of Workers' Compensation Programs dated January 27, 1997 and August 2, 1996 are hereby affirmed.

Dated, Washington, D.C.
October 8, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member