United States Department of Labor
Employees' Compensation Appeals Board

TIMOTHY L. MANSELL, Appellant	)	
and	)	**Docket No. 03-2066**
	)	**Issued: February 22, 2005**
TENNESSEE VALLEY AUTHORITY, Muscle Shoals, AL, Employer	)	

Appearances:
Timothy L. Mansell, pro se
Jim C. Gordon, Jr., Esq., for the Director

Oral Argument February 3, 2005

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On August 15, 2003 appellant filed a timely appeal from the March 19, 2003 merit decision of the Office of Workers' Compensation Programs, which denied authorization for left hip surgery. He also filed a timely appeal from the Office's June 9, 2003 nonmerit decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review these denials. The Board has no jurisdiction to review new evidence submitted on appeal, as that evidence was not before the Office when it made its final decisions.

ISSUES

The issues are: (1) whether appellant's left hip condition is a consequence of his December 8, 1983 employment injury; (2) whether the Office properly denied authorization for left hip surgery; and (3) whether the Office properly denied appellant's request for reconsideration.

FACTUAL HISTORY

On December 8, 1983 appellant, then a 24-year-old structural iron worker, sustained an injury in the performance of duty when he struck his left knee while climbing a diesel truck. The Office accepted his claim for left knee contusion and post-traumatic chondromalacia patella. The Office later accepted these conditions bilaterally. Appellant received compensation for wage loss on the periodic rolls, underwent multiple surgeries on his left and right knees and received a schedule award for permanent impairment of the left lower extremity.

On August 5, 2002 Dr. James O'Brien, appellant's orthopedic surgeon, reported that appellant's left knee gave way "which has been a common occurrence and he injured his left hip three weeks ago." X-rays were normal, but Dr. O'Brien recommended a magnetic resonance imaging (MRI) scan. He stated: "This is directly related to his left knee problems as the left knee gave way causing an injury to his left hip."

On August 16, 2002 Dr. O'Brien reported that an MRI scan revealed avascular necrosis, left worse than right.[1] He stated that appellant would most likely require a total hip replacement because of the severity of his pain: "We will request authorization from [workers' compensation] for total hip replacement, the hip problem is due to the knee giving way and causing him to fall and due to both knees giving way." His office made the first request for authorization that day.

After an Office medical adviser reported that he did not believe a fall could cause bilateral avascular necrosis, the Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. Robert Sparks, III, an orthopedic surgeon, for a second opinion on whether appellant's current left hip condition was causally related to his December 6, 1983 work injury. The Office asked Dr. Sparks whether the proposed procedure was indicated for treatment of appellant's December 6, 1983 employment injury. The Office also asked: "The treating physician, Dr. O'Brien has indicated that [appellant's] left knee gave way causing him to fall on his left hip. The diagnosis provided is AVN, left greater than right. In your opinion is the diagnosed bilateral AVN, left greater than right causally related to the indicated fall?"

In a report dated October 14, 2002, Dr. Sparks related appellant's history of injury on December 6, 1983. He added: "His most severe problem at the present time is with his left hip. His hip started hurting two and a half months ago when his left knee popped out and buckled causing his left hip to pop." Dr. Sparks described appellant's complaints and his findings on physical examination. X-rays showed some mottled appearance to the left femoral head, which he noted was compatible with avascular necrosis. The right hip looked normal on plain x-rays.

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[1] The August 15, 2002 MRI scan report offered the following findings: "Evaluation of the right hip demonstrates signal abnormality involving the femoral head most consistent with [G]rade [1] AVN. Correlation of the patient's clinical history will be necessary. This examination demonstrates gross signal abnormality involving the left femoral head with extension to involve the left femoral neck and trochanteric region. There is a moderate left hip effusion. Differential diagnosis should include osteochondrosis (AVN), infection, or post-traumatic etiology. Diffuse marrow edema as demonstrated in this exam[ination] involving the hips is occasionally seen in patients with early reversible AVN." The impression was reported as follows: "1. Stage 1 AVN involving the right femoral head. 2. Diffuse pattern of edema involving the left femoral head, neck and trochanteric region with evidence of joint effusion. Findings are felt to most probably represent AVN."

Responding to Office questions, Dr. Sparks reported that residuals of the October 6, 1983 employment injury included degenerative arthritis of the left knee, a flexion contracture of the left knee and crepitus from within the left knee as the range of motion examination was carried out. As for the proposed surgery, he stated: "[Appellant] states that a left total hip replacement surgery is being contemplated. If that is true, I think the necessity for that surgery is totally unrelated to his knee injury of December 6, 1983." He explained that the fall did not cause the avascular necrosis:

> "I do not think his hip avascular necrosis is related in any way to an alleged fall. The avascular necrosis was discovered after the fall, but the fall did not cause the avascular necrosis. Avascular necrosis that is caused by a traumatic injury shows up months or years later, not shortly after the injury."

Although he observed that appellant might require a total hip replacement in the future, Dr. Sparks reported that in his opinion the need for that surgery was "in no way related to the December 6, 1983 work injury."

On November 18, 2002 Dr. O'Brien reported: "It is medically probable that [appellant's] AVN of both hips is due to his knee problems which has altered his gait." On December 12, 2002 he reported: "[Appellant] has AVN of both hips and is due to his knee problems, which have altered his gait. I feel that it is medically necessary that [he] have left Bi-Polar surgery as soon as possible." On December 18, 2002 a second Office medical adviser reported that there was no medical literature supporting that an altered gait from knee problems causes avascular necrosis of the femoral heads.

Dr. O'Brien referred appellant to Dr. E. Lyle Cain, an orthopedic surgeon, for consultation. On February 17, 2003 Dr. Cain related the following history: "[Appellant] states he has had multiple injuries in both knees and multiple arthroscopy, and had an injury on [July 20]02, when he fell from a two step height onto his buttock area, and complained of severe bilateral hip pain, left worse than right." Dr. Cain reported his findings and diagnosed left hip Stage 3 avascular necrosis, right hip Stage 1 avascular necrosis. He discussed the possible etiology:

> "I reviewed his extensive medical records from Dr. O'Brien's office, including long history of bilateral knee difficulties and multiple prescriptions for pain medications, as well as arthroscopies on both knees. He has had what appears to be four Medrol dose packs according to the medical records, which may have some relation to his avascular changes. However, this can certainly be related to his trauma to the hips because of the time course relationship to his onset of symptoms."

In a decision dated March 19, 2003, the Office denied authorization for appellant's total left hip replacement on the grounds that the weight of the medical evidence, as represented by the opinions of Dr. Sparks and the Office medical adviser, did not support that the proposed surgery was medically necessary in relation to the employment injury.

In a decision dated June 9, 2003, the Office denied appellant's request for a reconsideration of the merits of his case.

LEGAL PRECEDENT -- ISSUE 1

A claimant seeking benefits under the Federal Employees' Compensation Act[2] has the burden of proof to establish the essential elements of his claim by the weight of the evidence,[3] including that he sustained an injury in the performance of duty and that any specific condition or disability for work for which he claims compensation is causally related to that employment injury.[4]

It is an accepted principle of workers' compensation law that once 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 attributable to the employee's own intentional conduct.[5]

ANALYSIS -- ISSUE 1

Appellant thus has the burden of establishing by the weight of the evidence that his left hip condition is a consequence of his December 8, 1983 employment injury, with its resulting bilateral knee conditions and authorized surgeries and prescribed medication. He must establish that his employment injury caused or aggravated or otherwise contributed to the avascular necrosis in his left hip, either by way of a consequential fall from a two-step height in July 2002, by way of an altered gait or by way of the steroidal medication prescribed for his accepted knee conditions. This burden requires the submission of a rationalized medical opinion in support of appellant's contention.[6]

Appellant's attending and consulting orthopedic surgeons, Dr. O'Brien and Dr. Cain, submitted reports tending to support a connection between the December 8, 1983 employment injury and the avascular necrosis in his left hip. But these reports offered no real discussion of how the employment injury contributed to an altered gait or to a two-step fall in July 2002, or how an altered gait or fall or steroidal medication contributed to appellant's left hip condition. The Office undertook further development of the evidence by referring appellant to Dr. Sparks.

The problem in this case is that when the Office asked Dr. Sparks for a second opinion, it asked him the wrong questions. The Office asked whether the diagnosed bilateral avascular necrosis was causally related to the indicated fall, leaving undeveloped and unadjudicated the prior question of whether the reported fall from a two-step height in July 2002 occurred as

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[2] 5 U.S.C. §§ 8101-8193.

[3] *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

[4] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[5] *John R. Knox*, 42 ECAB 193 (1990).

[6] *Fred Magnotta*, 23 ECAB 125 at 126 (1972).

alleged, and if so, whether the fall was a natural consequence of his December 6, 1983 employment injury, with its resulting bilateral knee conditions and authorized surgeries. By focusing on whether to authorize the proposed surgery in the exercise of its discretion under section 8103 of the Act, the Office forgot a fundamental fact of injury question: whether the fall occurred as alleged and as a natural consequence of the accepted employment injury. It is only after this question is resolved in the affirmative that the causal relationship between the fall and avascular necrosis in the hips becomes relevant. If the fall did not occur as alleged, or if it was not a natural consequence of the accepted employment injury, the Office has no discretion to exercise under section 8103, as that section requires an injury arising out of the employment as a condition precedent.[7]

The Office is not a disinterested arbiter but rather performs the role of adjudicator on the one hand and gatherer of the relevant facts and protector of the compensation fund on the other, a role that imposes an obligation on the Office to see that its administrative processes are impartially and fairly conducted.[8] Although the claimant has the burden of establishing entitlement to compensation, the Office shares responsibility in the development of the evidence.[9] Once the Office starts to procure medical opinion, it must do a complete job.[10] The Office has the responsibility to obtain from its referral physician an evaluation that will resolve the issue involved in the case.[11]

The Board will set aside the Office's March 19, 2003 denial of authorization and remand the case for proper development of the evidence. The Office shall make a finding on whether the fall from a two-step height in July 2002 occurred as alleged. The Office shall prepare a statement of accepted facts that sets forth all the medical conditions accepted in this case, all the surgeries approved and any steroidal medications prescribed. The Office shall then provide its referral physician with an explanation of causal relationship, including precipitation, aggravation and acceleration, and request a well-reasoned medical opinion on whether appellant's employment-related knee conditions contributed to his fall, whether the fall contributed to his avascular necrosis, and whether the avascular necrosis was a result of the steroid treatment he received for his employment injury or was a result of his altered gait. After such further development of the evidence as may be necessary, the Office shall issue an appropriate final decision on the merits of appellant's claim.

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[7] *See* 5 U.S.C. § 8103(a) ("The United States shall furnish to an employee who is injured while in the performance of duty the services, appliances and supplies, prescribed or recommended by a qualified physician, that the Office considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of any monthly compensation.") To be entitled to reimbursement of medical expenses, the employee must establish that the expenditures were incurred for treatment of the effects of an employment-related injury. *John R. Benton*, 15 ECAB 48 (1963).

[8] *Thomas M. Lee*, 10 ECAB 175 (1958).

[9] *William J. Cantrell*, 34 ECAB 1233 (1983); *Gertrude E. Evans*, 26 ECAB 195 (1974).

[10] *William N. Saathoff*, 8 ECAB 769 (1956).

[11] *Mae Z. Hackett*, 34 ECAB 1421, 1426 (1983); *Richard W. Kinder*, 32 ECAB 863, 866 (1981) (noting that the report of the Office referral physician did not resolve the issue in the case).

CONCLUSION

This case is not in posture for decision on whether appellant's left hip condition is a consequence of his December 8, 1983 employment injury or on whether the Office properly denied authorization for left hip surgery. Further development of the evidence is required. Because the case is remanded for an appropriate final decision on the merits of appellant's claim, whether the Office properly denied appellant's request for reconsideration is moot.

ORDER

IT IS HEREBY ORDERED THAT the March 19, 2003 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: February 22, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member