

The Office accepted that appellant sustained lumbar strain, a right hip strain and a herniated nucleus pulposis at L5-S1 due to a July 16, 1997 traumatic injury, assigned file number xxxxxx025. On December 17, 1997 it doubled file numbers xxxxxx402 and xxxxxx025.

By decisions dated January 9 and December 8, 1998, the Office found that the medical evidence was insufficient to establish that appellant sustained the claimed condition of avascular necrosis of the hips due to the August 20, 1993 work incident. It noted that he first sought medical treatment for his 1993 injury in February 1995. By decision dated April 17, 2001, the Board set aside the December 8, 1998 decision after finding that the record contained a conflict in medical opinion regarding whether appellant sustained avascular necrosis of the hips on August 20, 1993 in the performance of duty.¹ The Board remanded the case for the Office to refer him for an impartial medical examination to determine whether his avascular necrosis and resulting hip replacements were casually related to the August 20, 1993 employment incident.

By decision dated October 12, 2000, the Office terminated appellant's compensation in file number xxxxxx025 after finding that he was no longer disabled due to his July 16, 1997 employment injury.² By decision dated June 19, 2002, it determined that the medical evidence was insufficient to establish that his July 16, 1997 employment injury caused a loosening of his hip prosthesis. On December 17, 2002 following a preliminary review, a hearing representative set aside the June 19, 2002 decision. He found that the Office properly determined that the July 16, 1997 work injury did not aggravate appellant's hip condition and properly terminated his compensation as he had no disability due to his July 16, 1997 employment injury. The hearing representative determined, however, that the Office failed to follow the Board's instructions to resolve the conflict in opinion regarding whether his 1993 work injury caused or aggravated his hip condition. He further found that the Office should separate file numbers xxxxxx025 and xxxxxx402. The hearing representative instructed the Office to obtain an additional opinion from the physician who performed an impartial medical examination in file number xxxxxx025.

In a decision dated May 30, 2003, the Office denied appellant's claim that he sustained avascular necrosis due to the August 20, 1993 employment incident. Appellant requested an oral hearing, which was held on March 4, 2004. By decision dated May 18, 2004, the hearing representative vacated the May 30, 2003 decision. She found that the file numbers xxxxxx402 and xxxxxx025 should be recombined. The hearing representative further determined that the Office should not have used a referee physician from another case to resolve the conflict in medical opinion found by the Board regarding whether appellant's avascular necrosis was

¹ Docket No. 99-1572 (issued April 17, 2001).

² By decision dated March 23, 1999, the Office terminated appellant's compensation after finding that he was no longer disabled due to his low back and right hip strain in file number xxxxxx025. On December 15, 1999 a hearing representative set aside the March 23, 1999 decision and remanded the case for resolution of a conflict in medical opinion regarding whether he had residuals of his July 16, 1997 injury and whether he had a herniated disc causally related to the July 16, 1997 work injury.

causally related to the August 1993 employment incident.³ She instructed the Office to refer him for another impartial medical examination.

On June 12, 2006 the Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Leslie A. Konkin, a Board-certified orthopedic surgeon, for an impartial medical examination. In a report dated July 28, 2006, Dr. Konkin discussed appellant's current complaints and reviewed the medical reports of record. He noted that a March 20, 1995 magnetic resonance imaging (MRI) scan study showed no evidence of a fracture line.⁴ Dr. Konkin diagnosed idiopathic avascular necrosis of the bilateral hips. He found that it was not reasonable "to draw a causal relationship between [appellant's] hip condition and a work[-]related accident which did not require medical attention for 18 months." Dr. Konkin explained that appellant fell on his buttocks and that hip fractures occurred either from twisting injuries or "direct lateral compression of the hip joint." He noted that appellant initially described the incident to his supervisor as a minor buttocks pain and did not tell his attending physician of his hip pain until February 1995. Dr. Konkin indicated that if he had fractured his femur on August 20, 1993 he would be unable to walk. He stated:

"Avascular necrosis of the hip is a multifactorial condition. It can develop with trauma, but the trauma needs to be of a significant magnitude such as a dislocation of the hip or a fracture of the femoral neck. Obviously, neither of these occurred following [appellant's] fall on his buttocks. With a fracture of the hip, there is interruption of the circulation to the femoral head. In a dislocation of the hip, there is also interruption of the circulation to the femoral head, resulting in a significant incidence of avascular necrosis. Forces applied to [appellant's] body in the August, 1993 incident were applied to the pelvis and not to the hip joints.

"The avascular necrosis was categorically not caused by the traumatic incident of August 20, 1993, nor was it aggravated by the incident of 1993. [Appellant's] hips did not sustain sufficient trauma to either cause or aggravate preexisting avascular necrosis on August 20, 1993. There are numerous systemic causes for avascular necrosis and these include administration of corticosteroids, decompression sickness, sickle cell anemia and alcohol usage. [Appellant] denied alcohol usage in my interview. There is documentation in Dr. Miller's consultation of his participation in an alcohol awareness program. This would certainly suggest that at some point in time [he] used significant alcoholic beverages, which would be a far more plausible explanation for his avascular necrosis than a fall on his buttocks."

³ The hearing representative further instructed the Office to accept that appellant sustained a loosening of his right hip prosthesis under file number xxxxxx025.

⁴ A radiologist interpreted the March 20, 1995 MRI scan study hip as showing "[b]ilateral avascular necrosis, both femoral head with superimposed marrow edema and joint effusion of the right hip possibly representing either further infarction or nondisplaced fracture superimposed. I do not see evidence of fracture line and nondisplaced fracture would be most likely. More likely this is related to infarct."

Dr. Konkin stated:

“If [appellant] had suffered a fracture of the right hip as alleged by Dr. [Robert] Caton, he would have been unable to bear weight on the right hip and would have sought emergency attention on the day of injury. He certainly would have complained to Dr. Caton sooner than 18 months after the alleged incident. In my opinion, this individual’s avascular necrosis is either idiopathic in causation or related to prior alcohol consumption and bears no relationship whatsoever to the incident of August 20, 1993.”

By decision dated August 11, 2008, the Office denied appellant’s claim that he sustained bilateral avascular necrosis of the hips causally related to his August 20, 1993 employment injury. On September 2, 2008 appellant requested an oral hearing. At the hearing, held on March 24, 2009, he related that he believed that the employing establishment and the Office were denying his claim because of his whistleblowing activity. Appellant asserted that Dr. Konkin was selected by the Office to deny his claim and that Dr. Konkin was biased against him and told him that he was paid money to deny claims. He related that two MRI scan studies showed that he had a cracked femoral head. Appellant submitted a January 29, 1998 report from his attending physician diagnosing a femoral fracture at the time of his August 20, 1993 fall and resulting in avascular necrosis.

By decision dated August 14, 2009, the hearing representative affirmed the August 11, 2008 decision. She found that the opinion of the impartial medical examiner was well rationalized and represented the weight of the medical evidence.

On appeal, appellant asserts that it took the Office 13 years to adjudicate his claim because it needed to find a physician to support the denial. He maintained that Dr. Konkin ignored MRI scan studies showed that he had a cracked femoral head in August 1993. Appellant asserted that the Office was not independent but aligned with the employing establishment.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees’ Compensation Act⁵ has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an “employee of the United States” within the meaning of the Act, that the claim was filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged; and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.⁶ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁷

⁵ 5 U.S.C. §§ 8101-8193.

⁶ *Tracey P. Spillane*, 54 ECAB 608 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁷ *See Ellen L. Noble*, 55 ECAB 530 (2004).

Section 8123(a) provides that, if there is 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 an examination.⁸ The implementing regulations states 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.⁹

When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁰

ANALYSIS

Appellant alleged that he sustained bilateral avascular necrosis of the hips as a result of falling onto his buttocks on August 20, 1993. On prior appeal, the Board determined that the record contained a conflict in medical opinion regarding whether his bilateral avascular necrosis of the hips was due to the August 20, 1993 work incident.

The Office referred appellant to Dr. Konkin for an impartial medical examination. When a case is referred to an impartial medical examiner for the purpose of resolving a conflict, the opinion of such specialist, is sufficiently well rationalized and based on a prior factual and medical background, must be given special weight.¹¹ The Board finds that the opinion of Dr. Konkin is well rationalized and based on a proper factual and medical history. In a report dated July 28, 2006, Dr. Konkin accurately summarized the relevant medical evidence, provided detailed findings on examination and reached conclusions about appellant's condition which comported with his findings.¹² He reviewed the results of diagnostic studies, including the March 20, 1995 MRI scan study, which he noted showed no evidence of a fracture line. Dr. Konkin diagnosed idiopathic avascular necrosis of the hips which he found unrelated to the August 20, 1993 fall. He provided rationale for his opinion by explaining that, with an injury severe enough to cause avascular necrosis, appellant would not have waited 18 months to seek medical treatment. Dr. Konkin also explained that a fall on the buttocks would not typically result in a hip fracture. He noted that if appellant had fractured his hip on August 20, 1993 he would have been unable to walk. Dr. Konkin asserted that many factors could cause bilateral hip avascular necrosis, including alcohol abuse. He concluded that appellant's avascular necrosis "is either idiopathic in causation or related to prior alcohol consumption and bears no relationship

⁸ 5 U.S.C. § 8123(a).

⁹ 20 C.F.R. § 10.321.

¹⁰ *R.C.*, 58 ECAB 238 (2006); *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

¹¹ *J.M.*, 58 ECAB 478 (2007); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

¹² *Manuel Gill*, 52 ECAB 282 (2001).

whatsoever to the incident of August 20, 1993.” As Dr. Konkin’s report is detailed, well rationalized and based on a proper factual background, his opinion is entitled to the special weight accorded an impartial medical examiner.¹³

On appeal, appellant argues that the Office selected a physician to deny his claim. He maintained that Dr. Konkin was biased against him. Appellant, however, did not submit any evidence in support of his contention. The Board has held that unsubstantiated allegations of bias are not sufficient to diminish the probative value of an impartial medical examiner’s report.¹⁴

Appellant further asserted that Dr. Konkin ignored MRI scan studies showing that he cracked his femoral head in August 1993. Dr. Konkin, however, reviewed the medical reports of record and explained that appellant would have been unable to walk if he fractured his hip in August 1993. He also maintained that appellant would not have waited 18 months to seek medical treatment with a fractured hip. Dr. Konkin’s opinion is well rationalized and thus constitutes the weight of the medical evidence.¹⁵

CONCLUSION

The Board finds that appellant has not established that he sustained bilateral avascular necrosis of the hips causally related to an August 20, 1993 employment incident.

¹³ See *supra* note 11.

¹⁴ *Geraldine Foster*, 54 ECAB 435 (2003).

¹⁵ See *Jaja K. Asaramo*, 55 ECAB 200 (2004).

ORDER

IT IS HEREBY ORDERED THAT the August 14, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 4, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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