Pickering v. Brattleboro Mem. Hospital (Feb. 20, 1996)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRIES

Gloria Pickering	*)*	*File #: G-19788*
	)	
	)	*By: Barbara H. Alsop*
v.	*)*	*Hearing Officer*
	)	
	)	*For: Mary S. Hooper*
Brattleboro Memorial Hospital	*)*	*Commissioner*
	)	
	)	*Opinion #: 12-96WC*

Hearing held at Montpelier, Vermont, on November 28, 1995.
Record closed on December 12, 1995.

APPEARANCES

Thomas W. Costello, Esq., for the claimant
Keith J. Kasper, Esq., for the defendant

ISSUE

Whether the claimant has reached an end medical result from her work related
injury.

THE CLAIM

1. Temporary partial disability compensation pursuant to 21 V.S.A. §646 from June 10, 1995, and ongoing.

2. Medical and hospital benefits pursuant to 21 V.S.A. §640.

STIPULATIONS

1. Claimant suffered an injury arising out of and in the course of her employment on April 1, 1994.

2. At the time of the injury, Claimant was an employee within the meaning of the Vermont Workers' Compensation Act (hereinafter "Act").

3. At the time of the injury, Brattleboro Memorial Hospital was Claimant's employer within the meaning of the Act.

4. At the time of the injury, Nation's Care was the workers' compensation insurance carrier for the employer.

5. On April 15, 1994, Claimant began a period of temporary total disability.

6. At the time Claimant became totally disabled, her average weekly wage was $438.00, resulting in a compensation rate of $292.00.

7. At the time of the injury and the time of Claimant's disability, she had no dependents.

8. Claimant's current compensation rate is $293.75.

9. Claimant returned to part-time work on August 8, 1994, which continues to the date of hearing.

10. On June 2, 1995, Defendant filed a Form 27 effective June 10, 1995, alleging that Claimant had reached a medical end result on the basis of Dr. Wing's independent medical evaluation, with 38% permanent partial impairment to the upper extremity.

11. On June 2, 1995, Defendant filed a Form 27 effective July 2, 1995, discontinuing coverage of the massage therapy and Dr. Carr's current treatment upon the conclusion of one month of physical therapy as recommended by Dr. Wing's independent medical evaluation.

12. Defendant has advanced voluntary permanency benefits on the basis of Dr. Wing's independent medical evaluation for a total of 54.5 weeks effective June 2, 1995.

13. Claimant contests that she is at medical end result and the termination of treatment prescribed by Dr. Carr pursuant to the Form 27 filed on June 2, 1994 [sic].

14. The parties stipulate to the admission of a joint medical record, attached Joint Exhibit 1.

15. The parties stipulate to admission of the curriculum vitae for both testifying doctors attached as Claimant's Exhibit 1 and Defendant's Exhibit A.

EXHIBITS

1. *Joint Exhibit 1* — *Medical records notebook*
2. *Claimant's Exhibit I* — *Curriculum Vitae of Rex G. Carr, M.D.*
3. *Defendant's Exhibit A* — *Curriculum Vitae of Daniel C. Wing, M.D.*

FINDINGS OF FACT

1. Stipulations 1 through 7 and 9 through 15 are accepted as true. Stipulation 8 is rejected, as the claimant's compensation rate as of the date of the hearing was $296.98. The exhibits listed above are admitted into evidence. Judicial notice is taken of all forms filed with the Department in this matter. Notice is also taken of a number of pages from the book Myofascial Pain and Dysfunction, The Trigger Point Manual, by Janet G. Travell, M.D., and David G. Simons, M.D., a book acknowledged by both expert witnesses as a major treatise in the field of myofascial pain syndrome.

2. Gloria Pickering graduated from high school in Maine. Thereafter she worked for the state welfare office as a transcriptionist. She moved to the Brattleboro/Springfield area of Vermont, and began to work for the Brattleboro Memorial Hospital in 1979. While working for the hospital, she received training in medical terminology and she also took computer courses.
The bulk of her work was as a medical transcriptionist, a job she clearly enjoyed greatly.

3. Beginning in 1990, the claimant began to experience problems with her upper extremities. Initially, the problem was numbness in her little fingers, but over time, the numbness spread to other fingers and her thumbs.
By 1993, the pain had progressed to her shoulders, and the numbness had invaded her arms. She stopped working in April of 1994, complaining of a real feeling of cold in her hands and arms, and extreme numbness of the right arm.

4. The claimant was referred by her employer to Dr. A. Douglas Lilly, an orthopedic surgeon, who followed her for several months. At her first visit to him in April, Dr. Lilly found that she was suffering from symptoms consistent with bilateral bursitis, along with an ulnar neuritis and mild bilateral carpal tunnel syndrome. Because the claimant was scheduled for a vacation the following week, Dr. Lilly recommended that she not type for the remainder of the week and that she try it out again after her week's vacation.

5. After her vacation, the claimant attempted to return to her work, and was unable to tolerate any typing. After her next visit with Dr. Lilly, he began to believe that her problem might be a thoracic outlet syndrome, a diagnosis that is in all likelihood correct. Dr. Lilly recommended a course of physical therapy, and a referral ultimately to a neurologist, Dr. Lawrence R. Jenkyn. Dr. Jenkyn ruled out any serious nerve entrapment and identified the claimant's problem as a chronic myofascial pain syndrome secondary to overuse of both upper extremities. As a result of the consultation with Dr. Jenkyn, the claimant was placed on a prescription of Amitriptyline, which seemed to help. The claimant continued in physical therapy, which was devoted in large measure to myofascial release techniques.

6. Dr. Lilly believed that the claimant was suffering from depression, at least in part due to her inability to do the job she loved. He recommended that she be referred to a psychiatrist for assistance in dealing with her depression. She did see a psychiatrist, a Dr. Abney whose records were not included in the joint medical exhibit.

7. After a period of time, the claimant was referred to Dr. Robert D. Leffert, an orthopedic surgeon in Boston. Dr. Leffert opined that she did indeed suffer from thoracic outlet syndrome, and that conservative treatment in the form of physical exercise and a weight loss program would be appropriate. He stated that her prognosis was guarded because of the duration and extent of her symptoms. He believed that some of her difficulties could be resolved by correcting her postural defects, and that myofascial release was not a recommended treatment for her condition. This latter opinion distressed the claimant as she believed that the releases were of substantial benefit to her.

8. On August 8, 1994, the claimant returned to work at the Hospital. She has had a few different positions, but is now working three days a week for two hours each day, performing clerical tasks that are within her capabilities. The Hospital has endeavored to assist the claimant in finding appropriate work, and has been supportive of her efforts at rehabilitation. The claimant indicated that she is able to tolerate the work quite well, and would like to extend her hours, but that Dr. Carr advises against it.

9. The claimant testified that she was not satisfied with the care she was receiving, and that she therefore consulted with Dr. Rex G. Carr, a physiatrist, in hopes of improving her condition. His initial office notes indicate that the claimant was depressed, with some remorse and self-blame for her failure to seek medical attention earlier in the course of her symptoms. She was sleeping poorly, although she was able to work part-time

in the hospital gift shop, and received some emotional benefit from the work.
Dr. Carr indicated to the claimant at the initial office visit that he believed that his treatment would last approximately one year.

10. The claimant continued to see Dr. Carr, who tried a number of different medications in an effort to obtain restful sleep for the claimant. She had a number of side effects to some of the medications, so that there was a period
of time in which she was clearly not improving. With nearly daily visits to a hot tub, the claimant was reporting to the doctor that she was occasionally nearly pain free. She also during this period of time commenced a program of
minimal home exercises.

11. In April of 1995, the claimant was seen by Dr. Daniel C. Wing at the request of the employer. Dr. Wing indicated that at that time he thought that she had reached a plateau in her recovery, because of her statements made to him about her perception of the lack of any gains in her condition. He also noted at that time that the claimant's range of motion in her affected areas was within normal limits and that she was sleeping within a normal range, that is, at least seven hours a night.

12. The claimant continued to treat with Dr. Carr after the appointment with Dr. Wing. Her treatment at that time consisted of massage treatments, hot tub therapy, and a number of medications, including vitamin B-12 shots and a
chromium picolinate supplement. Dr. Carr viewed his role in the claimant's treatment as one of monitoring the appropriateness of her medications and the
progress made in her home exercise program. Dr. Carr has declined to approve
extended work hours for the claimant and now opines that his treatment of the
claimant should continue for one and a half to two more years.

13. On June 10. 1995, payments of temporary partial disability benefits were
terminated based on the acceptance by the Department of a Form 27, Notice of
Intention to Discontinue Payments, filed by the insurer and based on the opinion of Dr. Wing. On July 2, 1995, medical benefits to the claimant were discontinued based on the filing of a second From 27. The claimant has continued to receive treatments, paying for the services herself, and reports continued improvements.

14. The claimant has testified that, since she saw Dr. Wing, she has noted improvement in most of her symptoms, which have lessened in intensity, as well as an improvement in her range of motion in her arms, and significant improvement emotionally. She rarely experiences the sensation of an electric shock in her arms, one of her more painful symptoms. There is also a decrease in the coldness, numbness, swelling and tingling that has occurred since her April visit with Dr. Wing.

15. Both Dr. Carr and Dr. Wing testified at the hearing, and the bulk of the testimony involved disagreements between the doctors on the nature of the claimant's problem, and the significance of the improvement that she appears to have experienced since Dr. Wing saw her in April.

16. Dr. Carr testified that he is board certified in physical medicine and rehabilitation, and that was at one time affiliated with Dartmouth-Hitchcock Medical Center. He is now in private practice. He is interested in the fields of fibromyalgia and myofascial pain, and attends courses and conferences concerning those fields. He attended the Third World Conference on Fibromyalgia and Myofascial Pain that was held in San Antonio in the summer of 1995. He also attended a number of workshops while he was there. Although his curriculum vitae indicates that he has given a number of presentations to Arthritis Foundation groups over the last few years, he has not attended any conferences other than the one cited above. Nor has he personally published any research or review papers in the field.

17. Dr. Carr referred to one of the accepted treatises on myofascial pain as the definitive authoritative text. This is Myofascial Pain and Dysfunction, the Trigger Point Manual, by Travell and Simons, published in 1989. He defines, based on this book, the condition of myofascial pain as being one in which there is persistent and perpetuated muscle spasm, usually caused by trauma. It is a condition worsened by usage of the affected muscle group. The diagnosis is made by the finding of an active trigger point which, when palpated, reproduces the symptoms of which the patient complains. In the claimant, Dr. Carr found one active trigger point in the pectoralis minor, as well as latent trigger points in the upper forearm, trapezius and scapular area.

18. According to Dr. Carr, latent trigger points do not cause the symptoms complained of, but only a slight stiffness. The goal of treatment is to reduce active trigger points to latency, and ultimately to make them permanently latent. The method of achieving this goal is to strengthen the muscle. However, overuse of the muscle will trigger additional spasm, and

hence the procedure is to deal with the perpetuating factors for the spasm, reduce them, and then begin a gradual strengthening program. Dr. Carr identified that the claimant's strongest perpetuating factor was the lack of restorative sleep. This opinion was later confirmed by Dr. Wing.

19. Dr. Wing testified to a different mechanism for the myofascial pain syndrome from which the claimant was suffering. He indicated that, while the early model for the syndrome was as Dr. Carr stated, recent studies have established that the syndrome is caused by a neurological dysfunction, specifically a problem in the transmission of messages from the brain. It manifests as a muscle spasm because of the neurological error. As a result, anything that relaxes the muscle will result in a reduction of the pain, but that is only symptomatic relief. The healing that is necessary occurs in the nerves, which can take as long as a year to heal. Hence, when there is improvement noted, it is impossible to say what caused the improvement, because the amelioration may be due to treatment that occurred as long as a year previously.

20. Dr. Wing testified that the goal of treatment for myofascial pain is to improve the patient's functional capacity. This frequently is accomplished by behavioral modification, as the patient's habits may be responsible for the failure to heal. Dr. Wing has noted, as have other caregivers, that the claimant's posture is an example of the principle. Dr. Wing has further indicated that it is essential for the claimant to be actively involved in her own treatment. Thus, passive treatments are contraindicated, as the goal is to allow the claimant to achieve a capacity for self-management. Treatments should focus on allowing the patient to make changes in his or her own life, and to improve their functional capacity by learning what they can and cannot do.

21. In any event, Dr. Wing testified that there is no evidence in this case that the claimant's improvement was caused by medical treatment. Specifically, it is his opinion that at least two of the substances prescribed for the claimant by Dr. Carr, B-12 injections and chromium picolinate, have no justification in the scientific literature for treatment of myofascial pain. B-12, according to Dr. Wing, is the most notorious placebo response medicine in history. Chromium picolinate is not FDA approved, and there is no standardization as to its use.

22. The issue of the chromium picolinate created an interesting and informative aside in the hearing. Dr. Carr mentioned in his direct testimony

that some form of chromium had been implicated as a carcinogen, but that he had not researched the issue yet. He indicated that he had not told the claimant this before the hearing. When Dr. Wing testified, he stated that chromium picolinate was not the substance linked with cancer, which may have served to relieve the claimant of any misapprehension caused by Dr. Carr's disclosure.

23. Dr. Wing testified that the treatment after the termination of medical benefits by Dr. Lewis Sussman, that is, the teaching of biofeedback techniques, was medically supportable, but that none of the other non-medicinal treatment could be correlated with the improvements experienced by the claimant. Massage therapy is passive and nonspecific, and has a placebo effect, and can be justified only when linked to a functional outcome, which was not the case here. There is no evidence to support the premise that a hot tub is any better than a bath. The purpose of this therapy is to relax the affected muscles after exercise to deal with any rebound from the exercise, and under these circumstances, it is counterproductive to relax in a hot tub and then have to drive home. In fact, in this particular case, Dr. Wing opined that a bath at home might be a better treatment.

24. With regard to the claimant's improvement after Dr. Wing's evaluation in April, Dr. Wing testified that it was not clear whether the improvement was functional or subjective. Subjective improvements without commensurate functional improvements would not justify a change in his opinion. However, the report of improvement would be enough to justify reexamining the claimant. It appeared to Dr. Wing from the material that he had been given to review that the claimant's improvement was as a result of better pacing, that is, because of her restructuring of her activity, rather than an improvement of her capacity, and hence he did not change his opinion at the hearing that the claimant had reached an end medical result in April of 1995.

25. Finally, with regard to the necessity for ongoing treatment, specifically that recommended by Dr. Carr, Dr. Wing testified that the treatment would not be necessary at the level recommended by Dr. Carr, even if the claimant were improving. Dr. Wing testified that those medications that are deemed appropriate could be monitored by a primary care physician, and that the exercise program, to the extent that it even needed monitoring, could be monitored over the telephone.

26. I find that Dr. Wing is more credible than Dr. Carr in this case. Specifically, I find that Dr. Carr, in spite of his attendance at the Third World Conference on Fibromyalgia and Myofascial Pain, has not stayed current in the literature of myofascial pain. In particular, his continued reliance on a book six years old in a developing field is questionable at best. Dr. Wing's testimony about current theories involving myofascial pain, including the neurological basis for the pain, is more credible. I find Dr. Carr's failure to research immediately the issue of the carcinogenic effects of a supplement he was prescribing to a patient troubling, particularly where, as here, he first notifies the patient of the potential problem in testimony at a hearing. Dr. Wing, who does not prescribe the supplement and questions its efficacy, nonetheless knew of the allegation and knew that the supplement in question was not implicated.

27. Dr. Carr's credibility is also impugned by his reluctance to allow the claimant to work. The claimant has been working since she began to treat with Dr. Carr. She has reached a point where she is handling her minimal level of employment well, and wishes to extend her hours of work. The claimant testified that Dr. Carr declined to approve any extension of her hours and in fact indicated that she should not be working at all. This is in direct contradiction to Dr. Wing's assertion that the claimant should be allowed to self-manage, to set her own limits, and it defies common sense. If the claimant is working without negative repercussions, why would it be appropriate for her to stop?

28. I find that the claimant's treatment by Dr. Sussman is compensable, and that all other medical and ancillary treatment, including massage therapy and hot tub therapy, received since the termination of medical benefits is not compensable. I find that the claimant's improvement has not been established to be the result of any of the treatment that she has received since July 2, 1995. There is no basis on the record for finding that it is more probable that the claimant's ongoing treatments by and at the direction of Dr. Carr are in fact responsible for either palliative or curative changes in the claimant's condition.

CONCLUSIONS OF LAW

1. In workers compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. Goodwin v. Fairbanks, Morse Co., 123 Vt. 161 (1963). The claimant must establish by

sufficient credible evidence the character and extent of the injury as well as the causal connection between the injury and the employment. Egbert v. The Book Press, 144 Vt. 367 (1984).

2. Where the causal connection between an accident and an injury is obscure, and a lay-person would have no well grounded opinion as to causation, expert medical testimony is necessary. Lapan v. Berno's Inc., 137 Vt. 393 (1979). There must be created in the mind of the trier of fact something more than a possibility, suspicion or surmise that the incidents complained of were the cause of the injury and the inference from the facts proved must be the more probable hypothesis. Burton v. Holden & Martin Lumber Co., 112 Vt. 17 (1941).

3. The substantial medical dispute in this case eventually devolves into a credibility issue. When the testimony of a physician is mandated in order for the claimant to prevail, as it is in this case, the determination of credibility of the medical witnesses is dispositive of the case. As I have found that Dr. Wing is more credible than Dr. Carr, the claimant cannot prevail.

4. Because Dr. Wing has established that a further examination of the claimant may be appropriate to determine the nature of the claimant's claimed improvement, the insurer is ordered to have such an examination performed. Moreover, to the extent that the claimant's medications and exercise program need to be monitored, monitoring consistent with Dr. Wing's opinion will be compensable.

ORDER

THEREFORE, based on the foregoing findings of fact and conclusions of LAW, it is ORDERED:

1. EBI, or in the event of its default Brattleboro Memorial Hospital, shall provide medical benefits consistent with this opinion for the monitoring of the claimant's medications and exercise program and shall pay for Dr. Sussman's treatment; and

2. The claims for additional temporary compensation and benefits are DENIED.

DATED at Montpelier, Vermont, this 20th day of February 1996.

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Mary S. Hooper
Commissioner