

**STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY**

)	State File No. D-21227
Brigitte Moulton)	
)	By: Margaret A. Mangan
v.)	Hearing Officer
)	
Ethan Allen, Inc.)	For: Steve Janson
)	Commissioner
)	
)	Opinion No. 09-99WC

Hearing Held in Montpelier on November 24, 1998
Record Closed on December 15, 1998

APPEARANCES:

Gary D. McQuesten, Esq. for Claimant
Keith Aten, Esq. for Defendant

ISSUE:

When did claimant's work-related medical condition reach a medical end result?

EXHIBITS:

Joint Exhibit I: Medical Records

Claimant's Exhibit 1: Transcript of deposition of Denise Niemira, M.D., taken July 23, 1998

STIPULATION:

1. Claimant suffered a work-related injury while an employee of the defendant on April 30, 1991.
2. The claimant has received medical treatment, evaluations, diagnostic testing and physical therapy as reflected in the medical records, Joint Exhibit I.
3. On September 26, 1996, defendant filed a Form 27 giving notice of its intention to discontinue temporary total benefits and to begin permanency benefits.
4. Claimant contends that she was not at medical end point in September 1996 and is entitled to additional temporary total disability benefits.

FINDINGS OF FACT:

1. Official notice is taken of all forms filed with the Department. The exhibits are admitted into evidence and the stipulated facts are accepted as true.

2. Claimant began working in the sanding chair department at Ethan Allen in 1971 when she was eighteen years old. In late April 1991, she suffered a work-related injury to her right hand, arm, shoulder and neck. The medical records note that, at the time of her injury, she was doing carving work which necessitated repetitive, rapid movements of a twisting nature. Claimant is right hand dominant.
3. Claimant continues to have an essentially undiagnosed pain condition as a result of that injury. However, the many physicians who have evaluated and treated her since the injury have offered diagnoses that include: cervical radiculopathy, carpal tunnel syndrome, double crunch syndrome, reflex sympathetic dystrophy, biceps tendinitis, thoracic outlet syndrome, depression, low back disability, mild facial syndrome, fibromyalgia and fibromyocitis exacerbated by a sleep disorder and new carpal tunnel syndrome on the left.
4. Claimant's symptoms of discomfort have improved, but have not abated since the injury. She is convinced that she is unable to be employed on a full-time basis as a result.
5. From August of 1991 through September of 1998, claimant has been evaluated and treated at the Dartmouth Hitchcock Medical Center (DHMC) by Dr. Rose, Dr. Stommel, Dr. Ball, Dr. Phillips and Dr. Savoy. Their notes reflect the administration of stellate ganglion blocks for her pain in 1993, as well as a September 1996 determination that she had essentially shown no improvement over the "past five years." Dr. Rose suggested that she be treated at a place closer to her home to assure that she could keep appointments. In 1998 Dr. Savoy conducted a thorough history and physical examination which are described below.
6. From June of 1992 to February of 1998, claimant treated with her chiropractor, Dr. Alice Soucy who complained that claimant's care had been fragmented and recommended that she have a rehabilitation program that would be consistent and continuous.
7. In April 1994 Dr. Bruce Foerster, an orthopedic surgeon in St. Albans, evaluated claimant. He noted that her symptoms were diffuse and involved her whole body. He diagnosed chronic pain syndrome, stated that she was ready to return to light duty work, and opined that surgery would not be appropriate.
8. From 1992 to 1994 claimant was treated at the Neuromuscular Pain Relief Center. Records submitted as part of Joint Exhibit I reflect 24 treatment sessions in 1992 and nine in 1994. In a note dated October 8, 1994 is that Adson's for thoracic outlet syndrome and Allen's tests were negative, although earlier they had been positive. That note also stated that claimant's range of motion had improved.
9. Dr. Denise Niemira, claimant's primary care provider, has treated her at least since 1994 when she recommended an integrated pain management program. At several visits Dr. Niemira examined claimant's range of motion and muscle tension. In September of 1994, she noted that claimant's range of motion was increasing. Two years later, in September 1996, she noted claimant's comment that she was on a merry go round, with a swollen arm, painful range of motion, feelings of depression, and concern that her back pain would pose an obstacle to vocational rehabilitation.
10. In letters and notes written in 1998, Dr. Niemira expressed her concern that claimant's "residual difficulties" would make it difficult for her to hold a full-time job or even a part-time job with any degree of lifting. She opined that "chiropractic and physical therapy will improve her both symptomatic and functionally."
11. At her deposition, Dr. Niemira testified that claimant has not reached a medical end result, that she continues to have limited range of motion, weak hand grasp, and inability to reach her shoulder to 90 degrees. She conceded that claimant would have some good days and some bad days in a pattern that could continue for years.
12. Dr. Harold Rosenzweig performed several evaluations of claimant for the defendant. In October of 1994, he determined that she had not yet reached a medical end result. In March of 1995, he noticed improvement in her functioning, believed that it had leveled off, concluded that she had reached a medical

end result, and assigned a permanency rating. He later retracted that opinion when it became clear to him that she continued to improve functionally. In April of 1996, he again examined claimant, noting that she had no discoloration or swelling in her right, dominant hand whose grip was half that of her left. Rotating her head was painful. Tilting her head resulted in pain to her arm and hand. He also noted that abduction of her arm had worsened from when claimant had seen Dr. Niemira two months earlier.

13. After the April 1996 visit, Dr. Rosenzweig opined that, if radiculopathy could be ruled out, and no surgical correctable problem identified, or other definitive modality agreed upon, then claimant would be deemed to be at a medical end result. He assigned a 14% upper extremity or 8% whole person permanency rating.
14. In May of 1996, claimant saw Dr. Penar at Fletcher Allen Health Care, who recommended that claimant have an EMG.
15. On May 1, 1996 the employer mailed a Form 27 with a stated intent to discontinue temporary benefits on May 6, based on an April 25, 1996 letter from Dr. Rosenzweig. In that letter, the doctor qualified his conclusion by stating that claimant would be at a medical end result if radiculopathy, a surgically correctable lesion, or other definitive modality could be ruled out. The Department rejected that Form 27.
16. In August 1996 claimant had the EMG which followed recommendations of Dr. Rosenzweig and Dr. Penar. The test showed residual effects of carpal tunnel syndrome for which she had undergone surgery a few years earlier. However, that EMG showed no sign of thoracic outlet syndrome or cervical radiculopathy.
17. On September 26, 1996 the employer mailed another Form 27 with notice of intention to discontinue benefits on October 3, 1996. The Department accepted that second form and the carrier began payments toward permanency.
18. In 1997 claimant had a few physical therapy sessions in Connecticut with Kristine Roy, who noted that although she had seen claimant only twice, she noticed marked subjective and objective changes. Ms. Roy, therefore, concluded that claimant had not reached maximum medical improvement.
19. In August 1998 claimant had an MRI of her spine at DHMC which was compared to a September 1992 study. The 1998 findings represented a progression in severity since 1992, with an osteophyte disc complex at the C4-5, C5-6 and C6-7 levels with resultant mild to moderate stenosis at the different cervical levels.
20. On September 21, 1998 Dr. John Savoy saw claimant in the out-patient department at the DHMC. On examination, he noted moderate limitation in her cervical spine, pain in the cervical regions, normal motor examination, and exquisite tenderness around the bicipital tendon. He saw no surgical indications in the MRI done the month before. Dr. Savoy diagnosed chronic cervical and right upper extremity myofascial syndrome, with an associated right upper bicipital tendonitis. He pronounced claimant a “prime candidate for evaluation by our new Anesthesia Pain Management Center.” In a follow up letter, he explained his feeling that “there is no other form of therapy which would be of value to her.”

CONCLUSIONS OF LAW:

1. The claimant in workers' compensation cases has the initial burden of proving her injury and disability, and of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984); *Goodwin v. Fairbanks, Morse, Co.*, 123 Vt. 161 (1962). She must establish by sufficient credible evidence the character and extent of her injury as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984).
2. Once a claim has been accepted by a carrier or employer, the burden of proof is on that party to establish the propriety of terminating temporary benefits. *Cormier v. Capital Candy Co.*, Opinion No. 60-96WC (Oct. 25, 1996); *Merrill v. University of Vermont*, 133 Vt. 101 (1974).

3. Under Vermont's workers' compensation law, a claimant is entitled to temporary disability compensation until reaching medical end result or successfully returning to work. *Coburn v. Frank Dodge & Sons*, 165 Vt. 529, 532 (1996). "Unless the claimant has successfully returned to work, temporary disability compensation shall not be terminated until a Notice of Intention to Discontinue Payments (Form 27), adequately supported by the evidence, is received by both the commissioner and the claimant." Rule 18 (a)(1), *Vermont Workers' Compensation and Occupational Disease Rules* ("Rule"). Therefore, an employer seeking to terminate temporary benefits on the basis that claimant has reached a medical end result must provide adequate, written documentation to support the Form 27. *Id.*, Rule 18 (a)(2).
4. Medical end result is "the point at which a person has reached a substantial plateau in the medical recovery process, such that significant further improvement is not expected, regardless of treatment." Rule 2(h); *Pacher v. Fairdale Farms*, 166 Vt. 626 (1997). Whether significant further improvement can be expected is necessarily a medical determination. *Green v. Easton Hockey, USA*, Opinion No. 06-98WC (Feb. 6, 1998). "The fact that some treatment, such as physical or drug therapy, continues to be necessary does not preclude a finding of medical end result if the underlying condition causing the disability has become stable and if further treatment will not improve that condition." *Coburn*, 165 at 533; 4 *Larson's Workers' Compensation Law* § 57.12(c).
5. Claimant does not argue that she has radiculopathy or a surgically correctable lesion. However, she contends that she has not yet reached a medical end result because more can be done for her. Her strongest evidence on this subject are the 1998 MRI and Dr. Savoy's recent evaluation. The MRI revealed the presence of osteophytes, but no surgical indications. Dr. Savoy noted moderate limitation in her cervical spine, pain in the cervical regions, normal motor examination, and exquisite tenderness around the bicipital tendon. He recommended a pain management evaluation.
6. "The persistence of pain may not of itself prevent a finding that the healing period is over, even if the intensity of the pain fluctuates from time to time, provided that the underlying condition is stable." *Larson's* § 57.12(c) at 10-46. In *Green*, 06-98WC, the Department held that claimant had not yet reached maximum medical improvement when her physician testified that a sympathectomy was likely to diminish her pain to the point where she could return to work. Because the underlying condition had not stabilized and further improvement was expected from the sympathectomy, the Department held that she had not reached a plateau in her recovery process.
7. This case lacks the "correctable" problem found in *Green*. Claimant's underlying condition is difficult to define, given the myriad medical diagnoses offered. But the two constants are limits in her range of motion and pain, which even by the testimony of her treating physician, Dr. Neimira, are likely to persist for an undetermined amount of time, potentially years, although she can expect good days and bad days. Dr. Savoy determined that claimant is a prime candidate for his pain clinic. But neither he nor any of the other physicians who commented on this claimant's condition have convincingly shown that the clinic is "reasonably expected to bring about significant medical improvement." Rule 2(h). The fact that the pain clinic will provide treatment related to her work injury does not preclude the finding the record in this case supports, that claimant has reached a medical end result. The employer, therefore, has met its burden of showing that temporary total disability benefits were properly terminated in September 1996.

ORDER:

Based on the foregoing Findings of Fact and Conclusions of Law, claimant's request for temporary total disability benefits after the September 1996 finding of medical end result is DENIED.

Dated at Montpelier, Vermont, this 16th day of February, 1999.

Steve Janson
Commissioner

