

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

Tracy Boucher)	State File No. P-17719
)	
)	By: Margaret A. Mangan
)	Hearing Officer
v.)	
)	For: R. Tasha Wallis
)	Commissioner
Bennington College)	
)	Opinion No. 14-02WC

Hearing held in Montpelier, Vermont on February 25, 2002
Record Closed on March 8, 2002

APPEARANCES:

Sam Mason, Esq. for the claimant
Glenn S. Morgan, Esq. for the defendant

ISSUES:

1. Is the claimant at medical end result or does she have a work capacity and therefore not entitled to temporary total disability benefits?
2. Are the proposed radio frequency rhizolysis treatments reasonable and necessary?

EXHIBIT:

Joint Exhibit I: Medical Records

FINDINGS OF FACT:

1. At the time of the injury at issue here, claimant was an “employee” and Bennington College her “employer” as those terms are defined in the Workers’ Compensation Act (Act) and Rules. Claimant worked as a food purchaser and receiver in a job that required a medium-heavy work capacity.
2. Claimant suffered a work-related injury on February 21, 2000 when she was returning to the van she was using for a delivery. She slipped on a snow bank, and then arrested a fall by grabbing onto the van door. The defendant’s acceptance of this claim is reflected in the Form 21 agreement for Temporary Total Disability Compensation signed by the parties in May 2000 and approved by this Department.

3. On March 13, 2000 the claimant saw Dr. Gregory King at Mt. Anthony Primary Care who diagnosed cervical disc syndrome and instructed her to remain out of work for three days. On March 16th he noted that her condition had worsened. Dr. King then referred the claimant to Dr. Alec Kloman, a neurologist, who recommended a combination of muscle relaxants and physiotherapy and suggested she remain out of work until further notice.
4. Claimant had several sessions of physical therapy that included ambulation on a treadmill, aqua jogging, biking. She missed several appointments without canceling beforehand. Her last appointment was on June 28, 2000.
5. Mary Daley, R.N., a medical case manager with Intracorp and assigned to the claimant by the insurance carrier, suggested claimant see Dr. Johansson. Claimant's first visit with him was on July 27, 2000. Dr. Johansson is a physician working with patients in the area of physical medicine and rehabilitation, including pain management.
6. Claimant was enrolled in a treatment program at Green Mountain Physical and Occupational Medicine, which she completed on August 25, 2000, a week ahead of schedule. Claimant, not the treatment team, chose that early completion date, with the "stated reasons...that she believed she had learned the fundamental principles and skills during the two weeks she was in the program; and, for personal and vocational reasons, she appeared to feel pressured to leave early and return to her home base." Medical Records.
7. Claimant attended 6 out of the 10 scheduled physical therapy appointments at Green Mountain Physical Therapy and Occupational Medicine.
8. On September 24, 2000 Dr. Johansson examined the claimant, finding that the claimant had a normal neurological evaluation with no evidence of active radiculopathy in the upper or lower extremities. However, she still had tightness around her shoulder and diffuse myofascial pain trigger points. He diagnosed myofascial pain syndrome and recommended a membership at a rehabilitation facility primarily for hydrotherapy.
9. Dr. Johansson placed claimant at end medical result with a permanency rating of 5%. The insurance carrier paid benefits based on that rating.
10. On September 27, 2000 Dr. Johansson released the claimant to return to work. He also recommended myofascial release work once a week for four to six weeks. Claimant was capable of work at that time.

11. On October 31, 2000 she was assessed with a sedentary to light work capacity as reflected in the Final Behavioral Medicine and Pain Experience Evaluation.
12. Claimant returned to Dr. Johansson to report that the massage therapy and hydrotherapy made her symptoms worse.
13. Dr. Johansson evaluated the claimant again on November 30, 2000. The examination that day revealed myofascial tightening and pain, although she had no obvious motor loss, no sensory loss and no significant reflex changes. However, because of the cervicothoracic pain, he ordered CT and MRI scans. In his note for that visit, Dr. Johansson noted, "At this point, nothing has worked."
14. Both the CT and MRI scans were negative. Claimant's pain complaints continued.
15. Claimant has attended college since her injury. In May 2001 she earned a Bachelor of Science degree with three minors.
16. Dr. Edward Apicella is a physician at the Albany Center for Pain Management in Bennington. At a visit on April 27, 2001 Dr. Apicella opined that that the claimant was suffering from posterior joint syndrome in both the cervical and lumbar areas of her spine and that she had not yet reached medical end result. Dr. Apicella opined that one can have this syndrome even when CT and MRI scans are negative, although Dr. Johansson disagrees. Dr. Apicella recommended facet joint injections for diagnostic purposes and radiofrequency rhizolysis if the pain returned. The injections were done in July 2001. Claimant's pain continued.
17. In a letter dated October 5, 2001, Dr. Dranginis noted that claimant "still suffers...from extreme limitation of range of motion in her back and continues to be unable to work. We feel strongly that patient is not yet at a medical endpoint but should be markedly improved and able to return to the work force after, but not until, she completes the scheduled series of radio frequency rhizolysis later this year."
18. The recommended rhizolysis, intended to reduce her pain, was scheduled in November 2001 then again in December, but was cancelled due to the carrier's denial, supported by Dr. Johansson's opinion that it was not reasonable or necessary.
19. Dr. Johansson opined that the recommended rhizolysis "does not make sense anatomically" because on examination the claimant never had significant joint restrictions, which is what a facet syndrome is. However, she had facet restrictions and problems in her thoracic region which Dr. Johansson's team diagnosed as myofascial pain syndrome.

20. Claimant's primary care physician released her back to work when they learned that the rhizolysis had been denied.
21. Beginning on October 24, 2002, the claimant began working for "Cigarettes Cheaper," a job she left after two months because she had been required to work seventy hours in one week. She had no physical difficulty doing the work, but was concerned that she had little help and hours that were too long.
22. In a letter of December 2001 Dr. Dranginis explained that the radio frequency treatments "are intended to provide permanent relief."

Work History

23. Claimant had been in the Navy where she received some training. She has also had experience with inventory, ordering and storekeeping.
24. Recently claimant began a new job as a residential counselor with increasing hours expected to soon be at thirty hours a week.

Attorney Fees and Costs

25. Claimant submitted evidence that her attorney expended 36.75 hours on this case and incurred \$162.95 in costs to obtain medical records.

DISCUSSION AND CONCLUSIONS OF LAW:

1. In response to a request from the claimant, the hearing officer ordered an expedited hearing. The evidence is limited to written medical reports and testimony of the claimant.
2. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks*, 123 Vt. 161 (1963). The claimant must establish by sufficient credible evidence the character and extent of the injury and disability as well as the causal connection between the injury and the employment. *Egbert v. Book Press*, 144 Vt. 367 (1984).
3. 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).

Radiofrequency treatments

4. Dr. Dranginis has treated this claimant over time for a number of different problems and knows this claimant well. Doctors Apicella and Johansson both have expertise in the areas of pain management. Dr. Johansson reviewed all the medical records. The explanations underlying the opinions are in direct conflict on the issue of the reasonableness of the rhizolysis. Given the complex and individual nature of pain, the treating physicians have an advantage in this case on the proposed treatment. Dr. Dranginis observed the claimant over time, knew her condition prior to the injury and is in the best position to evaluate her likely response to the rhizolysis. Accordingly, I accept the joint opinion of Doctors Apicella and Dranginis that the radio frequency rhizolysis is reasonable and necessary for this claimant.
5. The analysis of medical end result produces a different result however because the determination must be more objective and because the medical records, including detailed physical therapy notes, support Dr. Johansson's opinion that the claimant has reached a substantial plateau. Medical end result "means 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 21.2100, Workers' Compensation Rules. As the Vermont Supreme Court made clear in *Coburn v. Frank Dodge*, 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. 165 Vt 529 (1996). Although treatment for the claimant's pain complaints may provide symptomatic relief, the evidence does not prove that it will improve her underlying condition. In fact, the evidence strongly supports the finding that she had reached a plateau. Yet claimant points to the opinions from Doctors Dranginis and Apicella that she had not yet reached medical end result. Those medical determinations undoubtedly were based on the continuation of the claimant's symptoms. For a legal determination, "the proper test ...is whether the treatment contemplated at the time it was given was reasonably expected to bring about significant medical improvement." *Id* at 533; Workers Compensation Rule 2.1200.
6. Finally, even if the claimant had not reached medical end result, the carrier would have been justified in terminating her temporary total benefits. She had been released for work and was more than capable of working as her education and experience amply illustrate. "Under Vermont workers' compensation law, a claimant is entitled to temporary disability compensation upon reaching medical end result or successfully returning to work." See *Orvis v. Hutchins*, 123 Vt. 18, 24, 179 A.2d 470, 474 (1962) (temporary disability ends when maximum earning power has been restored or recovery process has ended)." *Coburn*, 165 Vt. at 532.

7. Dr. Johansson released the claimant to work on September 27, 2000. Claimant knew that she was to look for work, but did not. Not until October 24, 2001 did she begin a job where she worked for two months, with overtime. She was physically able to do the work, but left because of the long hours. Claimant attended college. She had more than physically demanding work in her experience. Claimant was capable of working, despite her protestations to the contrary.
8. In sum, the claimant is entitled to payment for the proposed radio frequency rhizolysis treatments, but she is not entitled to further temporary total disability benefits.
9. Under 21 V.S.A. § 678(a) a prevailing claimant is entitled to reasonable attorney fees as a matter of discretion and necessary costs as a matter of law. Because the claimant has prevailed on a portion of this claim, she is awarded fees based on 10 hours at \$70.00 per hour and costs of \$162.95, which were necessary for the successful aspect of this claim.

ORDER:

Based on the Foregoing Findings of Fact and Conclusions of Law:

1. Defendant is ORDERED to cover
 - a. The prescribed radio frequency rhizolysis treatments for the claimant;
 - b. Attorney fees of \$700.00 and costs of \$162.95.
2. Claimant's claim for additional temporary disability benefits is DENIED.

Dated at Montpelier, Vermont this 2nd day of April 2002.

R. Tasha Wallis
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.