Russell Luce v. Town of Stowe (December 11, 2013)

STATE OF VERMONT
DEPARTMENT OF LABOR

Russell Luce

v.

Town of Stowe

Opinion No. 27-13WC

By: Phyllis Phillips, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File No. CC-63488

OPINION AND ORDER

Hearing held in Montpelier, Vermont on September 11, 2013
Record closed on October 15, 2013

APPEARANCES:

William Skiff, Esq., for Claimant
Keith Kasper, Esq., for Defendant

ISSUE PRESENTED:

Does implantation of a spinal cord stimulator constitute reasonable medical treatment for Claimant's June 15, 2011 compensable work injury?

EXHIBITS:

Joint Exhibit I:	Medical records
Joint Exhibit II:	Stipulation
Claimant's Exhibit 1:	Deposition of Gilbert Fanciullo, M.D., August 19, 2013
Defendant's Exhibit A:	*Curriculum vitae,* Nancy Binter, M.D.

CLAIM:

Medical benefits pursuant to 21 V.S.A. §640(a)
Costs and attorney fees pursuant to 21 V.S.A. §678

FINDINGS OF FACT:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was his employer as those terms are defined in Vermont's Workers' Compensation Act.

2. Judicial notice is taken of all relevant forms and correspondence contained in the Department's file relating to this claim.

3. Claimant worked for Defendant's highway department as a village caretaker. His job duties were varied, and included such tasks as plowing, changing signs, painting lines, filling potholes and moving park benches. Many of these tasks required heavy lifting.

4. Claimant has a prior medical history of low back pain dating back at least to 2007. In April of that year he underwent a left L4-5 discectomy performed by Dr. Abdu, an orthopedic surgeon. Following surgery, Claimant experienced immediate relief of his symptoms and was able to return to work with no restrictions.

5. Claimant also has undergone treatment for various psychological conditions, including anxiety. In 2011 he was diagnosed with bipolar disorder; for a time he was prescribed Lithium, but at the advice of his treating mental health providers he has since discontinued that medication.

Claimant's 2011 Work Injury and Subsequent Medical Course

6. On June 5, 2011 Claimant was in the process of changing a grader blade at work when he experienced a sharp pain in his right sacroiliac joint. Defendant accepted this injury as compensable and began paying benefits accordingly.

7. Initially Claimant treated conservatively for his injury, with chiropractic, injections and physical therapy. While at physical therapy on October 4, 2011 he fell backwards from an apparatus and landed on the floor with full force. Following this incident, he experienced pain radiating from his lower back into his left buttock and down his left leg to his ankle.

8. The left-sided symptoms Claimant experienced following the October 2011 incident came to be more problematic than those he had been experiencing since his initial injury. An October 2011 MRI study revealed a left-sided disc herniation at L4-5, with compression on the left L-4 nerve root. When his symptoms failed to abate with epidural steroid injections, Claimant consulted again with Dr. Abdu. Ultimately, Dr. Abdu recommended a revision disc excision at the left L4-5 level, the same location as Claimant's successful 2007 surgery.

9. Claimant underwent Dr. Abdu's recommended surgery in March 2012. Unfortunately, he did not experience any relief of symptoms thereafter; to the contrary, he reported worsening pain, which he described as severe and excruciating, in the same distribution as pre-operatively. He could not stand erect, and could neither sit nor lie down comfortably. Because he could not bear any pressure on his left heel, his gait was markedly antalgic; he ambulated either with a crutch or by hopping on his right foot with his left leg flexed. Narcotic pain medications were ineffective, even at increased dosages.

10. Dr. Abdu could not identify a specific cause for Claimant's ongoing symptoms. A post-surgical MRI in April 2012 did not show any remaining compressive disc pathology, either to Dr. Abdu's eye or upon further review by a neuroradiologist. For that reason, Dr. Abdu asserted that he had "no further surgical options to suggest." Instead, he recommended that Claimant consider either an alternative pain medication regimen or further injections. Barring those options, he suggested that Claimant consider a referral for a possible spinal cord stimulator.

Claimant's Spinal Cord Stimulator Treatment

11. In October 2012 Claimant underwent an evaluation with Dr. Fanciullo to determine if he was an appropriate candidate for a spinal cord stimulator. Dr. Fanciullo is a board certified specialist in anesthesiology and pain medicine. Currently he is the director of the Pain Medicine Center at Dartmouth Hitchcock Medical Center. In his clinical practice, Dr. Fanciullo has performed 200 to 300 spinal cord stimulator implants.

12. A spinal cord stimulator is a palliative treatment – it mediates the pain generated by dysfunction in the spine, but does not alter or correct the underlying condition in any respect. For that reason, generally a patient will not be considered an appropriate spinal cord stimulator candidate for so long as surgical treatment options aimed at addressing specific spinal pathology yet exist.

13. In Claimant's case, Dr. Fanciullo concluded that a spinal cord stimulator had become a reasonable treatment option. In doing so, he largely relied on Dr. Abdu's analysis. Dr. Fanciullo receives regular referrals for possible spinal cord stimulator implantations from Dr. Abdu, whom he credibly described as "an internationally known spine surgeon." Dr. Abdu having found no evidence of any structural lesion capable of surgical repair on Claimant's post-surgical MRI study, Dr. Fanciullo accepted his conclusion that surgical options had been exhausted.

14. Notwithstanding Dr. Fanciullo's determination that a spinal cord stimulator was a reasonable treatment option, Claimant still had to undergo a psychological evaluation, as is required of all prospective candidates for the device. The purpose of the evaluation is threefold: (1) to determine whether any psychological or social barriers exist that would hinder a patient's ability to benefit from the device; (2) to assess whether the patient is properly informed as to the device's potential risks and benefits; and (3) to assess whether any psychological interventions should be recommended.

15. With these criteria in mind, the evaluator determined that Claimant was an appropriate candidate for permanent implantation. He was well-informed as to both the benefits and limitations of a spinal cord stimulator. There was no evidence that his pain was of a psychological origin, and notwithstanding his diagnosis of bipolar disorder, he did not exhibit any current psychological or social barriers to treatment. From a psychological perspective, there were no contraindications. I find this analysis credible.

16. The next step in the approval process was for Claimant's case to be presented to the analgesic implantation committee. Recognizing the risk that a treating physician might become too invested in a patient's care to evaluate objectively whether he or she is likely to benefit from a stimulator, the purpose of the committee's review is to ensure that each candidate is appropriately screened. The committee is comprised of an assortment of physicians, psychologists, medical residents and/or nurses. It has at times rejected spinal cord stimulator candidates, though the evidence does not show how frequently this occurs.

17. The implantation committee determined that Claimant was an appropriate candidate for permanent implantation, albeit with some reservations related to his bipolar disorder and psychological presentation. Patients who suffer from major psychiatric illnesses are less likely to have a positive response to any medical intervention, including a spinal cord stimulator; their illness might be exacerbated or they may react unpredictably in other respects. After due consideration in Claimant's case, both the committee and Dr. Fanciullo concluded that his psychiatric condition would not interfere with his ability to benefit from the device.

18. The final step in the process of determining whether Claimant was an appropriate spinal cord stimulator candidate involved a one-week trial period with a temporary device. Claimant underwent this trial in December 2012, following which he reported a 60 percent reduction in his left leg pain. He was pleased with this result, and was eager to proceed with a permanent implantation.

19. Having completed the necessary steps in the approval process, in January 2013 Claimant's spinal cord stimulator was permanently implanted. As with the temporary device, following the procedure Claimant reported that the radiating pain down his left leg was at least 60 percent improved.

20. At the formal hearing, some eight months after permanent implantation, Claimant reported that he continues to derive meaningful pain relief from his spinal cord stimulator. Whereas before he could not tolerate any weight on his left heel, he is able to do so now; as a result, he can walk better and is more mobile. Although he still requires narcotic pain medications, his dosage level has stabilized. Objectively his function remains severely restricted – he still cannot sit or stand for extended periods without pain, and he is still incapable of working. Overall, however, the severity of his pain has decreased and become more manageable, and as a result, Claimant testified, "the quality of my life has increased." I find this testimony persuasive.

Expert Medical Opinions

21. According to Dr. Fanciullo, the benchmark for evaluating the efficacy of a spinal cord stimulator is if the patient derives at least 50 percent pain reduction; according to that criterion, in his opinion Claimant has had a positive outcome. In his deposition testimony, he acknowledged that a patient's report of reduced pain is inherently subjective. Researchers in his field have tried for decades to establish objective benchmarks against which to evaluate the effectiveness of spinal cord stimulator treatment. However, where the "end point" is pain reduction, objective criteria such as successful return to work or increased range of motion simply fall short. For that reason, Dr. Fanciullo's goal for Claimant was to try to relieve his pain and improve his function, not to get him back to work. I find this analysis credible.

22. Defendant's medical expert, Dr. Binter, strongly disagreed with Dr. Fanciullo's analysis. Dr. Binter is a board certified neurosurgeon. Over the course of her clinical career, she has performed more than 4,000 spine surgeries, both elective and trauma-related. At Defendant's request, Dr. Binter conducted an independent medical evaluation in September 2012. She also reviewed Claimant's medical records and deposition testimony.

23. Dr. Binter cited two objections to the use of a spinal cord stimulator in Claimant's case – one specific to his clinical presentation, the other more generally against the treatment itself. As to the first, upon review of Claimant's post-surgical MRI, and contrary to both Dr. Abdu's and the consulting neuroradiologist's readings, Dr. Binter noted what she believed to be evidence of a residual or recurrent L4-5 disc herniation that might account for at least some of his ongoing complaints. Considering that Claimant's radicular symptoms had failed to improve at all following Dr. Abdu's March 2012 surgery at that same level, Dr. Binter questioned whether something had been missed.

24. Dr. Binter recommended that Claimant undergo further work-up, including neurological consult, electrodiagnostic studies and "strong consideration" of lumbar fusion surgery, as a more appropriate treatment approach than a spinal cord stimulator. By addressing the specific pathology in Claimant's spine, in her opinion fusion surgery offered the possibility of far greater functional improvement, whereas a stimulator offered only transitory palliative pain relief. That Claimant's treating physicians were refusing to consider this approach was, in her words, "unconscionable."

25. I accept as valid Dr. Binter's concern, based on her review of Claimant's medical records and clinical presentation, that his ongoing symptoms might have been due to a structural lesion still capable of surgical correction. However, both Dr. Abdu and his consulting neuroradiologist concluded otherwise, and consequently I remain unconvinced as well. As Dr. Fanciullo credibly testified, the probability of a successful outcome from surgery decreases with every subsequent procedure. Claimant already has undergone two lumbar spine surgeries; in Dr. Fanciullo's opinion, it is unlikely that a third surgery would prove helpful to him. The risks posed by spinal fusion surgery are significant, and with those in mind Claimant clearly asserted his reluctance to undergo a third surgery. Last, unlike a spinal cord stimulator implant, a fusion surgery cannot be undone if ultimately it proves to be unsuccessful. For these reasons, I do not share Dr. Binter's outrage at the decision by Claimant's treating physicians not to pursue the approach she suggested.

26. Dr. Binter's second objection to the use of a spinal cord stimulator as treatment for Claimant's condition challenged its efficacy from a broader perspective. She decried the lack of high quality medical research studies documenting improvement among spinal cord stimulator patients by such objective measures as increased range of motion or decreased reliance on narcotic pain medications. In addition, according to her review of the medical literature the device has not proven effective at providing pain relief beyond the first two years after implantation.

27. As noted above, Finding of Fact No. 21 *supra*, Dr. Fanciullo credibly testified as to the difficulty of establishing objective benchmarks by which to measure treatment success where the ultimate goal is pain reduction, an inherently subjective criterion. Beyond that, he acknowledged in his deposition testimony that the efficacy of a spinal cord stimulator likely fades with time in some patients. However, he cited to a researcher in the field who has published papers documenting that 50 percent of his patients continue to use the device to their benefit after 20 years.

28. None of the research studies to which either Dr. Fanciullo or Dr. Binter referred was offered into evidence, and therefore it is impossible to evaluate the credibility of their conclusions in this regard. Considering their testimony, it is apparent only that the long-term efficacy of spinal cord stimulators remains somewhat undetermined.

29. Based on her analysis, Dr. Binter concluded that treatment with a spinal cord stimulator in Claimant's case was neither reasonable nor necessary. She stopped short of accusing either Dr. Abdu or Dr. Fanciullo of having deviated from the standard of care by recommending that approach, but stated unequivocally that it would not have been her choice.

30. For his part, Dr. Fanciullo conceded that a spinal cord stimulator has "serious inadequacies." It will not totally alleviate Claimant's pain, and will not assure sufficiently improved function to allow him to return to work. However, considering the available alternatives, in his opinion it is Claimant's best treatment option.

CONCLUSIONS OF LAW:

1. Vermont's workers' compensation statute obligates an employer to pay only for those medical treatments that are determined to be both "reasonable" and causally related to the compensable injury. 21 V.S.A. §640(a); *MacAskill v. Kelly Services,* Opinion No. 04-09WC (January 30, 2009). The Commissioner has discretion to determine what constitutes "reasonable" medical treatment given the particular circumstances of each case. *Id.* A treatment can be unreasonable either because it is not medically necessary or because it is not related to the compensable injury. *Baraw v. F.R. Lafayette, Inc.*, Opinion No. 01-10WC (January 20, 2010).

2. The disputed issue in this case is whether the implantation of a spinal cord stimulator constitutes reasonable medical treatment for Claimant's work-related injury. The parties presented conflicting expert medical opinions on this question. In such circumstances, the commissioner traditionally uses a five-part test to determine which expert's opinion is the most persuasive: (1) the nature of treatment and the length of time there has been a patient-provider relationship; (2) whether the expert examined all pertinent records; (3) the clarity, thoroughness and objective support underlying the opinion; (4) the comprehensiveness of the evaluation; and (5) the qualifications of the experts, including training and experience. *Geiger v. Hawk Mountain Inn*, Opinion No. 37-03WC (September 17, 2003).

3. Considering these factors here, I conclude that Dr. Fanciullo's opinion is the most credible. As compared with Dr. Binter, Dr. Fanciullo has considerable first-hand experience with spinal cord stimulator patients. His status as Claimant's treating physician lends further credibility to his analysis. In addition, the process he used to identify Claimant as an appropriate candidate for the device, which included not only the standard psychological evaluation but also peer review by an implantation committee, was comprehensive.

4. I acknowledge Dr. Binter's strongly held disagreement with Dr. Abdu, another treating physician, as to whether Claimant's condition might still be amenable to surgical correction, such that treatment with a spinal cord stimulator was premature. Whether the April 2012 MRI study does or does not reveal a surgically correctable lesion is beyond my ability to discern. What I can discern is that having already undergone two spine surgeries, and upon the advice of an internationally regarded treating surgeon, Claimant opted against a riskier, more invasive procedure in favor of a safer, less invasive one. Based on the credible opinions of Drs. Abdu and Fanciullo, I conclude that this was a reasonable choice for him to make. *See*, 1 Lex K. Larson, *Larson's Workers' Compensation* §10.10[6] (Matthew Bender, Rev. Ed.) (discussing reasonableness of refusal to undergo surgery as basis for terminating workers' compensation benefits).

5. The determination whether a treatment is reasonable must be based primarily on evidence establishing the likelihood that it will improve the patient's condition, either by relieving symptoms and/or by maintaining or increasing functional abilities. *Quinn v. Emery Worldwide*, Opinion No. 29-00WC (September 11, 2000). An injured worker's subjective preferences cannot render a medically unreasonable treatment reasonable. *See, Britton v. Laidlaw Transit*, Opinion No. 47-03WC (December 3, 2003). As is the case with many aspects of medical decision-making, however, there can be more than one right answer, and thus more than one reasonable treatment option for any given condition. *Cahill v. Benchmark Assisted Living*, Opinion No. 13-12WC (April 27, 2013); *Lackey v. Brattleboro Retreat*, Opinion No. 15-10WC (April 21, 2010). And although the workers' compensation statute mandates that employers pay only for "reasonable" medical treatment, it does not in any way require that injured workers thereby forfeit the right to direct their own medical care. *Id.*

6. Here, I conclude from the more credible evidence that the spinal cord stimulator has in fact led to improvement in Claimant's condition. His mobility has increased, and his reliance on narcotic medications has stabilized. Pain that before was unrelenting is now manageable. As a result, the quality of his life has improved. Defendant's assertion to the contrary notwithstanding, that these gains have failed to result in an improved work capacity does not disqualify them from consideration.

7. I conclude that for Claimant to treat the symptoms referable to his work-related injury with a spinal cord stimulator was a medically reasonable option for him to pursue. Whether another patient, on the advice of another treating physician, might weight the potential risks and benefits differently does not render his treatment choice any less reasonable.

8. As Claimant has prevailed on his claim for benefits, he is entitled to an award of costs and attorney fees. In accordance with 21 V.S.A. §678(e), Claimant shall have 30 days from the date of this opinion within which to submit his itemized claim.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Defendant is hereby **ORDERED** to pay:

1. Medical benefits covering all reasonable medical services and supplies associated with Claimant's spinal cord stimulator treatment, in accordance with 21 V.S.A. §640; and

2. Costs and attorney fees in amounts to be determined, in accordance with 21 V.S.A. §678.

DATED at Montpelier, Vermont this 11th day of December 2013.

_____
Anne M. Noonan
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.