

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

Fabian Moodie)	Opinion No. 51-03WC
)	
v.)	By: Margaret A. Mangan
)	Hearing Officer
Vermont Department of Corrections)	For: Michael S. Bertrand
)	Commissioner
)	
)	State File No. K-07233

Hearing held in Montpelier on July 9, 2003
Record closed on July 21, 2003

APPEARANCES:

Christopher O. Reis, Esq., for the Claimant
Keith J. Kasper, Esq., for the Defendant

ISSUES:

1. When did the claimant reach medical end result?
2. Is the claimant barred from seeking another opinion on the extent of his permanent partial impairment to his spine? If not, to what permanency benefits to his spine is he entitled?
3. To what extent, if any, can defendant assert a credit or offset for prior payments, overpayments or advances of permanency benefits due to claimant's work-related injury?

EXHIBITS:

Joint Exhibit I:	Medical Records
Claimant's Exhibit 1:	July 3, 2003 letter to Attorney Reis from Mark H. Fleischer, M.D.
Defendant's Exhibit A:	Correspondence and notes of conversation with claimant, November 20, 22, 2002.
Defendant's Exhibit B:	IME letter from David Casey dated Feb. 3, 2000

CLAIM:

Claimant seeks an award of 8% whole person for the bladder and 18% whole person for the additional spinal impairment and, if successful, attorney fees and costs of litigation.

STIPULATION OF FACTS:

1. On January 17, 1996, claimant was an employee and defendant his employer within the meaning of the Vermont Workers' Compensation Act ("Act").
2. On January 17, 1996, claimant suffered a personal injury to his back arising out of and in the course of his employment with defendant.
3. On January 17, 1996, claimant's average weekly wage was \$588.83.
4. On February 23, 2000, a Form 27 was approved by this department on the basis that claimant had reached a medical end result for his injury.
5. At the time of the filing of the Form 27, claimant's compensation rate was \$473.88.
6. The parties agree that claimant has at least an 8% whole person impairment rating for bladder dysfunction and a 10% whole person impairment for the spine.
7. Defendant asserts that claimant has been overpaid for the spinal impairment in the amount of \$3,082.98.
8. Claimant has not yet received any permanency benefits for the bladder dysfunction.

FINDINGS OF FACT:

1. The stipulated facts are accepted as true and the exhibits are admitted into evidence.
2. It is undisputed that claimant suffered a work related injury to his back while working for the Department of Corrections on January 17, 1996 when he slipped on the ice in a dock area. He continued to work until August of that year. He had surgery in December, 1996 for a herniated disc.
3. The carrier paid the claimant permanent partial disability payments based on a medical end result determination and 10% permanent partial disability rating assessed by several physicians in 1998 and 1999.

4. Because claimant's pain persisted, he had a spinal fusion in July of 1999.
5. Victor Gennaro, D.O., an orthopedic surgeon, examined the claimant for the defense and reviewed his medical records in January of 2000. At that time, Dr. Gennaro determined that claimant had reached medical end result and, based on the 4th edition of the AMA Guides, that he had a DRE III, 10% permanent partial impairment rating. He testified that claimant's symptoms had reached a plateau and were unlikely to change. At that time, claimant had reported to Dr. Gennaro that he was taking OxyContin 40 mg twice a day.
6. In February 2000, Dr. Chard, who provided an opinion at the claimant's request, assessed permanency at 15% by combining a DRE III for the low back and DRE II for the cervicothoracic area.
7. The insurer in this case terminated temporary total disability benefits to the claimant on February 23, 2000 pursuant to a Form 27, with medical end result as the basis. The form was approved based on opinions by Doctors Chard and Gennaro, both of whom determined that claimant had reached medical end result for his work related injury.
8. The insurer paid the claimant additional permanency intended to be for the extra 5% but due to a clerical error overpaid the claimant by \$3,082.98.
9. Claimant testified that in early 2002 he was found to be "100% unemployable" as a result of an Army related service disability. Despite this determination, claimant testified that he was in great shape prior to his 1996 work-related injury.
10. Claimant continues to receive treatment for pain. At the time of the hearing, he was taking twelve 80 mg OxyContin pills per day, prescribed by Dr. Mark Fleischer in Rochester, New York since November 2001. He drives to Dr. Fleischer's office for the prescriptions. Claimant failed to tell defense counsel about his treatment with Dr. Fleischer at his deposition, although he was asked about such treatment, and with the exception of one letter, no records from Dr. Fleischer have been produced. At the deposition, he testified that a physician at the Veteran's Administration Hospital prescribed his pain medication.
11. Claimant never sought payment for the OxyContin as treatment for his work-related injury.
12. Claimant opined that the treatment from Dr. Fleischer has improved his condition, specifically that he has been able to increase the distance he can walk and does floor exercises.
13. Claimant has been diagnosed with Gulf War Syndrome, although he denies that he has the syndrome.

14. In a letter dated July 8, 2003 from Mark H. Fleischer, M.D. to claimant's counsel, Dr. Fleischer wrote that claimant had been a patient of his since November 2001 and had diagnoses of failed back surgery and Gulf War Syndrome. He opined that claimant's pain had not been well managed when he first saw him, but that he has improved with treatment. He concluded that claimant had not reached medical end result until November of 2002. No other records from Dr. Fleischer have been offered in this case. In fact, until the eve of the hearing, no one involved in this case, with the exception of the claimant, knew anything about Dr. Fleischer's treatment.
15. Dr. Gennaro, who reviewed the entire medical record, testified that new information has not altered his opinion that claimant had reached medical end result in January 2000. All records support the conclusion that claimant's condition has not improved since January of 2000, claimant's protestations to the contrary notwithstanding.
16. Dr. Gennaro opined that claimant's bladder condition is not related to his work related injury, but even if it were, the medical end result date of February 2000 would not change. In fact, the medical evidence does not document any improvement in claimant's bladder condition since February of 2000.
17. Claimant suggests that a nerve was severed during spinal surgery, leading to the bladder condition he now has.
18. In April of 2003 claimant received another permanency rating, this time from Christopher Brigham, M.D. who, based on the 5th edition of the Guides, determined that claimant has a total permanent partial disability rating of 31% to 34% whole person. The total combines a rating for a DRE Lumbar Category V at 25% to 28% and a bladder impairment rating of 8%.

CONCLUSIONS OF LAW:

1. A disabled injured worker is entitled to temporary disability benefits until he has successfully returned to work or has reached medical end result. *Coburn v. Frank Dodge & Sons*, 165 Vt. 529, 532 (1996).

2. 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. WC Rule 2.1200. “The fact that some treatment such as drug or physical 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 Vt. at 533. (citations omitted). “[A] claimant may reach medical end result, relieving the employer of temporary disability benefits, but still require medical care associated with the injury for which the employer retains responsibility.” *Pacher v. Fairdale Farms*, 166 Vt. 626, 629 (1997); *Coburn*, 165 Vt. at 532. The necessity of treatment such as physical therapy or medications is not inconsistent with finding medical end result. *Pacher*, 166 Vt. 626.
3. The opinion expressed in Dr. Fleischer’s July 8, 2003 letter may well be based on a thorough understanding of the claimant’s condition and review of relevant medical records, but that is not possible to ascertain since his file has not been produced and the basis underlying his opinion never elicited. Therefore, the well-founded opinions of Dr. Gennaro and Dr. Chard based on a medical end result in 2000 are accepted as valid, thereby justifying the termination of temporary disability benefits at that time.
4. Also, because medical end result had been reached in 2000, the *AMA Guides* edition governing the spinal rating in this case was the 4th edition. The 5th edition, used by Dr. Brigham, did not govern until 2001. Consequently, Dr. Brigham’s rating for the spinal impairment cannot be accepted. It is, therefore, not necessary to address the issue whether claimant was barred from seeking another rating.
5. Based on the 4th edition of the *Guides*, the parties agree that claimant was overpaid \$3,082.98. Defendant is therefore entitled to a credit for that overpayment against any future benefits due. 21 V.S.A. § 651.

ORDER:

Based on the Foregoing Findings of Fact and Conclusion of Law, the claimant's claim for additional temporary total disability benefits are DENIED.

Defendant's claim for an offset for overpayment is GRANTED.

Dated at Montpelier, Vermont this 8th day of December 2003.

Michael S. Bertrand
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.