White v. Grand Union (07/29/03)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Brian White	)	State File No. L-19050
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Crawford & Co., Insurer	)	
for Grand Union	)	For: Michael S. Bertrand
	)	Commissioner
	)	
	)	Opinion No. 33-03WC

Hearing held in Montpelier on January 15 and January 16, 2003
Record closed on February 18, 2003

APPEARANCES:

Ronald A. Fox, Esq., for the Claimant
Marion T.Ferguson, Esq. and Glenn S. Morgan, Esq., for the Defendant

ISSUES:

1. Is the Claimant permanently totally disabled due to his December 5, 1997 work-related injury? If so, to what benefits is he entitled?

2. Can the compensation rate for the Claimant exceed his average weekly wage based on July 1 cost of living adjustments?

3. Is the Claimant entitled to attorney fees and costs?

EXHIBITS:

Joint Exhibit I:	Medical records: 2 volumes
Joint Exhibit II:	VR records
Joint Exhibit III:	2 indices for medical records
Joint Exhibit IV:	VR index

Claimant's Exhibit 1:	Curriculum vitae of James Rathmell, M.D.
Claimant's Exhibit 2:	Photograph
Defendant's Exhibit A:	Curriculum vitae of Dr. Johansson
Defendant's Exhibit B:	Curriculum vitae of Dr. Rosen
Defendant's Exhibit C:	Curriculum vitae of Dr. Tanenbaum

CLAIM:

1. Permanent total disability benefits pursuant to 21 V.S.A. § 644 with annual adjustments pursuant to 21 V.S.A. § 650 (d).

2. Attorney fees and costs pursuant to 21 V.S.A. § 678(a).

3. Interest on past due payments pursuant to 21 V.S.A. § 664.

FINDINGS OF FACT:

1. On July 20, 1990 Claimant began working for Grand Union. From that time, he was an employee and Grand Union an employer as those terms are defined in the Workers' Compensation Act.

2. In the course of his employment on December 5, 1997, Claimant injured his left ankle when he fell over a pallet as he was unloading a trailer. He was in significant pain and was taken to the emergency department at the Northwest Regional Hospital for treatment. A cast was applied and he was given pain medication for what was initially diagnosed as a severe sprain.

3. Claimant followed up with Dr. Groening who referred him to Dr. Beattie. The physicians agreed on a course or treatment that included physical therapy and pain medication for what was then left ankle and foot pain.

4. When Claimant reported pain radiating up his leg following an injection into the ankle, Dr. Beattie began to suspect reflex sympathetic dystrophy (RSD) and referred him the to Dr. Smail at the Fletcher Allen Health Care (FAHC) pain clinic.

5. In response to a nerve block by Dr. Smail, Claimant reported worsening pain. Some of the additional sympathetic nerve blocks resulted in some relief, others in none at all.

6. The employer accepted this claim and paid Claimant temporary total and medical benefits. The period of temporary total disability began on December 5, 1997, as reflected in a Form 21.

7. At the time of his injury, Claimant's average weekly wage was $827.14, with a compensation rate of $551.43.

8. Eventually Dr. Rathmell took over Claimant's care. Yet, nine months after the accident, Claimant continued to complain of pain. He became depressed. Dr. Rathmell recommended continued physical therapy and consideration of a spinal cord stimulator.

9. A trial spinal cord stimulator reduced Claimant's perception of pain by 30%. A permanent stimulator reduced what Claimant perceived as sensitivity pain, but not the burning aspect of his pain. At the time of the implant, Claimant perceived pain in his entire leg.

10. For several weeks Claimant participated in a work hardening program four hours per day five days per week, but stopped after consultation with Dr. Rathmell because he could not handle the level of activity. Claimant felt he was unable to continue physical therapy or work hardening as it was too difficult for him, even when it was reduced to two hours a day, three days a week.

11. Dr. Rathmell recommended that the Claimant return to work at Grand Union on a light duty basis, but a job within those restrictions was not available.

12. Claimant's attempt at returning to a work hardening program did not succeed because he felt he could not bear weight on his foot for more than five minutes.

13. About 15 months after his injury, Claimant noticed that pain was no longer limited to his left leg. He had pain in the right as well. At that time, his daily activities involved reading a newspaper, watching television and taking his children to the bus stop at the corner, a short distance from his house.

14. Over time, Claimant noticed that the pain in his legs migrated to his groin then to his arms, hands, abdomen, low back and chest.

15. Claimant talked with family members about his pain, learned about reflex sympathetic dystrophy (RSD), researched the subject on the Internet, was a frequent visitor to the website of RSD Hope, an on-line support group, and traveled to several seminars in Maine coordinated by RSD Hope.

16. Claimant treats with Dr. Rathmell for primary care, Dr. Naylor, a psychiatrist who manages his medications; Dr. Penar, a neurosurgeon; and Dr. Klemchuk, a therapist. Claimant began seeing Dr. Naylor and Dr. Klemchuk because he was shutting himself out from the world and lashing out at his family, in what he describes as anger from his chronic pain.

17. In November of 1999 Claimant was hospitalized after a suicidal gesture he attributes to depression from his chronic pain. Claimant never sought psychological support and treatment prior to his work related injury.

18. Claimant has had two spinal cord stimulators, with the second a dual lead stimulator intended to give him relief in both legs. However, the leads were removed because Claimant developed back pain after they had been inserted. He hopes to have another SCS in the future.

19. Dr. Rathmell's colleague, Dr. Smail, diagnosed Claimant with Complex Regional Pain Syndrome (CRPS) on April 17, 1998. Later that month, Claimant presented to Dr. Rathmell with allodynia and temperature asymmetry. On May 1, 1998 Dr. Rathmell diagnosed CRPS Type I.

20. Claimant continued to complain of pain, despite sympathetic blocks, psychological intervention and various medications. At one point, he was admitted to a hospital for continuous administration of pain medication and aggressive physical therapy, but the pain persisted.

21. At the time of the hearing, Claimant was taking medications for pain control, depression, mood swings, sleep and muscle spasms.

22. Claimant reports that: showering is difficult because water touching his skin is painful; socks are painful because they compress his skin; hands are too painful to allow touching a keyboard; sitting beyond 15 minutes is the limit of his capacity; walking beyond 150 feet is too difficult, so he uses a wheelchair or a cane; and sleep patterns have been disrupted by pain.

23. Since his injury, Claimant has gained weight, feels fatigued, and describes constant pain and stress. He doesn't wear socks.

24. Claimant had voice-activated software for his computer, but does not use it.

25. Claimant and his wife feel that he is incapable of caring for their children.

26. Claimant has traveled by car to Maine and has made other car trips for family vacations. He found a reunion in June 1998 enjoyable when he was able to "take control."

27. When he traveled with his 3 and 4 year old children as long as 5 years ago, he was able to watch over them in the swimming pool.

28. Claimant is able to play ball with his children, help them with their homework and play electronic games.

29. Claimant has not explored sedentary work possibilities or some kind of work at home because he thought it would be too stressful.

30. During a full day hearing, Claimant was focused and able to follow the testimony. His demeanor was not that of a person in pain, although this is not to say that he is a malingerer.

31. Claimant has not looked for light, part-time or home based employment because he believes the stress of work would increase his pain.

Medical Opinions

32. James Rathmell, M.D. is a board certified anesthesiologist with an additional certificate in pain management. He has researched, written and published in the area of pain medicine.

33. What used to be known as RSD is now called Complex Regional Pain Syndrome Type I (CRPS). It entails a history of trauma, which can be minor, ongoing chronic pain, some derangement of the sympathetic nervous system, and a response to a blockade of the sympathetic nervous system in terms of pain relief.

34. In advanced stages, those with CRPS may have thinning of skin, hair loss, pitting of nail beds and loss of bone density.

35. Subjective signs of CRPS include allodynia, which is pain in response to even the lightest touch.

36. Dr. Rathmell employs a psychologist in his pain clinic because those living with chronic pain often have depression and anxiety.

37. Dr. Rathmell believes the prognosis for this Claimant is guarded. Based on his knowledge of the Claimant and past functional capacity evaluations, he opined that Claimant is not likely to improve and that he does not have the ability to engage in even sedentary activity.

38. Dr. Rathmell does not have a physiologic explanation for how Claimant's pain migrated from one extremity to another, but is familiar with the literature that describes such a phenomenon.

39. Dr. Rathmell sent Claimant to the Cleveland Clinic where he saw Dr. Michael Stanton-Hicks who suggested that a 4 lead SCS might be necessary in the future. Dr. Rathmell has never implanted 4 leads in one patient, but agreed such a procedure might be appropriate for this Claimant.

40. Although he agrees that Claimant's presentation is extraordinary, Dr. Rathmell opined to a reasonable degree of medical certainty that Claimant has CRPS that is causally related to his December 1997 ankle strain.

41. John Johansson, D.O., is a board certified family physician with a practice in non-surgical orthopedics. He examined the Claimant on March 5, 1998 for the Defendant and reviewed some medical records. He has not seen the Claimant since nor has he examined medical records since that time.

42. When he examined the Claimant he saw no signs of CRPS Type I. He diagnosed an ankle sprain, and secondary tendonitis. He determined that Claimant had a light duty work capacity.

43. The Defendant also had the Claimant evaluated by James Rosen, Ph.D. who described Claimant as having the full range of normal emotions during the interview. Dr. Rosen noted that Claimant had a normal range of passive activities in his life, including watching television and being with his children. He presented as well adjusted and without exaggeration. Dr. Rosen's diagnosis is an adjustment disorder with depressed mood that does not disable him from working.

44. Dr. Rosen described a profile this Claimant fits where one has difficulty recognizing the difference between pain that is a reflexive response to physical stimulation versus pain responses that are learned and under some self-control.

45. Although Dr. Rosen does not challenge the causal connection between Claimant's psychopathology and his work-related injury, he opined that on a psychological basis, Claimant has the ability to work. He wrote:

> Although Mr. White says he has lost confidence in his ability to work, he did not describe any psychological or mental health issue that in and of itself would interfere with useful work. He is capable of coping with stress, he gets along with people and forms good relationships, he engages in functional behavior, he does not have abnormal personality traits, and he does not have a cognitive impairment. His bouts of depression are not incapacitating. On a psychological basis, separating mental health from his RSD and physical symptoms, he has a capacity for work

46. Daniel Tanenbaum M.D. was called by the Defendant to provide his opinion of this case, based on a review of the Claimant's medical records. When he initially evaluated this case, on August 30, 2000, Dr. Tanenbaum agreed that there was a causal connection between the RSD and the Claimant's ankle injury. He also determined that Claimant was at medical end result at that time.

47. Dr. Tanenbaum explained that when CRPS is aggressively treated at the outset, one would expect to maintain level of functioning and see improvement in strength. This Claimant's presentation is not typical for those with CRPS. Based on the records, including a functional capacity evaluation, Dr. Tanenbaum concluded that Claimant has a light to moderate work capacity.

48. At the hearing, Claimant presented in a wheelchair, at times with his hands clenched. Yet when he testified, he was animated and used fluid hand movements.

49. Claimant has submitted a copy of his fee agreement with his attorney as well as evidence of 215.5 hours worked on this case and costs incurred totaling $1591.05.

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*, 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).

2. 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 form the facts proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941).

3. Although a layperson is competent to testify regarding his experience as pain, see *Merrill v. UVM*, 133 Vt. 101, 105 (1974), the weight to be given that testimony is dependent on credibility.

4. Simply because something comes into existence after a fact, the temporal relationship standing alone does not justify a conclusion that it came into existence because of the fact. *Norse v. Melsur Corp.*, 143 Vt. 241, 244 (1983).

5. To prove permanent total disability in this case, and in all those predating the 1999 amendment to 21 V.S.A. § 644 (effective July 1, 2000), the Claimant must prove that he is totally disabled for gainful employment. That determination must be based on physical impairment rather than individual factors like age or experience. See *Fleury v. Kessel/Duff Construction Co*., 148 Vt. 415, 419 (1987). The standard is further articulated in § 645(a), which specifies that one must have "no reasonable prospect of finding regular employment." "Regular employment means work that is not casual and sporadic. Gainful employment means that the hiring is not charitable and the person earns wages." *Kreuzer v. Ben & Jerry's Homemade & Royal and Sun Insurance*, Opinion No. 15-03WC (March 21, 2003); see also *In the Matter of Tee v. Albertson's* 939 P.2nd. 668 (Or. 1997) (discusses Oregon statute defining a "gainful" occupation as paying wages equal to or greater than state mandated hourly minimum wage).

6. Reaching the necessary conclusions in this case requires an evaluation of the expert opinions. When such opinions conflict, this Department has traditionally examined the following criteria: 1) the length of time the physician has provided care to the claimant; 2) the physician's qualifications, including the degree of professional training and experience; 3) the objective support for the opinion; and 4) the comprehensiveness of the respective examinations, including whether the expert had all relevant records. *Miller v. Cornwall Orchards*, Op. No. WC 20-97 (Aug. 4, 1997); *Gardner v. Grand Union* Op. No. 24-97WC (Aug. 22, 1997).

7. The presumption in favor of the treating doctor justifies accepting Dr. Rathmell's diagnosis of complex regional pain syndrome. However, the presumption is lost on the disability aspect of this case because of the inherent unreliability of the Claimant who has convinced himself of his total disability and who presents to physicians accordingly. Nevertheless, Dr. Rathmell has the advantage of expertise in the management of pain. Doctors Johansson, Tanenbaum and Rosen have the advantage of objectivity and distance, crucial elements in this case because of its subjective nature, although Dr. Tanenbaum did not examine the Claimant and Dr. Johansson's examination was several years old. Dr. Rathmell for the Claimant and Dr. Rosen for the defense, have had the most thorough review of the records in this case.

8. Although Rathmell's expertise in the area of pain gives him an advantage in the treatment of pain, the advantage does not carry to the issues of causation and disability because the opinion is based on the subjective reporting of the Claimant. The vague "objective" criteria claimed by the Claimant, such as decreased strength, can be explained by disuse, not an inability to use an extremity. In fact there is no physiologic reason why the Claimant cannot work. The sole basis for the claim is his subjective report that he cannot. That report stands in contrast to a man engaged in a full day hearing, a man traveling by car to Maine for meetings, traveling with his family on vacations, surfing the internet on the subject of RSD.

9. At the time he evaluated the Claimant, Dr. Johansson determined that Claimant had a light to moderate work capacity. Based on his review of the medical records, Dr. Tanenbaum opined that from a physical perspective, Claimant had a work capacity. Dr. Rosen opined that Claimant's psychological problems were not sufficient to interfere with his ability to work. Claimant testified that he felt unable to continue the work hardening program even when it was pared down to two hours a day, three days a week, although he also testified that he was able to spend an equivalent amount of time or more in productive activity at home, such as researching RSD, starting a support group, bible studies and working with his children.

10. On balance the evidence fails to support Claimant's claim that he is permanently totally disabled. It is therefore not necessary to address the other issues presented.

ORDER:

Based on the forgoing Findings of Fact and Conclusions of Law, this claim for permanent total disability is DENIED.

Dated at Montpelier, Vermont this 29th day of July 2003.

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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.