

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
Administrative Hearings Division



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In the Matter of,)	
)	
CARROLL FARRELL, SR.,)	
)	
Claimant,)	
)	
v.)	AHD No. 02-482B
)	OWC No. 574667
CG ENTERPRISES, INC.,)	
)	
and)	
)	
LIBERTY MUTUAL INSURANCE GROUP,)	
)	
Employer/Carrier.)	

Appearances

FRANK R. KEARNEY, ESQUIRE
For the Claimant

CHRISTOPHER R. COSTABILE, ESQUIRE
For the Employer/Carrier

Before:

MELISSA LIN KLEMENS
ADMINISTRATIVE LAW JUDGE

COMPENSATION ORDER

STATEMENT OF THE CASE

This proceeding arises out of a claim for workers' compensation benefits filed pursuant to the provisions of the District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.* (hereinafter "Act").

After timely notice, a full evidentiary hearing was held on November 2, 2006 before Melissa

Lin Klemens, Administrative Law Judge. Carroll Farrell, Sr. (hereinafter "Claimant") appeared in person and by counsel. CG Enterprises, Inc. and Liberty Mutual Insurance Group (hereinafter collectively "Employer") appeared by counsel. Claimant testified on his own behalf. Employer called no witnesses. Claimant Exhibit (hereinafter "CE") Nos. 1 - 4 and Employer Exhibit (hereinafter "EE") Nos. 1 - 2 described in the Hearing Transcript (hereinafter "HT") were admitted into evidence.

The record closed on November 17, 2006, upon receipt of the HT.

BACKGROUND

Claimant worked for Employer in heavy construction until August 27, 2001 when he sustained a back injury on the job. Claimant has undergone numerous surgical procedures in an attempt to alleviate his back and leg symptoms; however, Claimant continues to experience chronic pain. Two (2) of his doctors have recommended a spinal cord stimulator. At the same time, they do not believe Claimant is capable of returning to any work.

Employer disputes the reasonableness and necessity of a spinal cord stimulator. Employer also argues that if authorization for a spinal cord stimulator is ordered, it is premature to consider Claimant's eligibility for permanent total disability benefits.

CLAIM FOR RELIEF

Claimant seeks an award under the Act of authorization for medical treatment and permanent total disability benefits from September 26, 2006 to the present and continuing.

ISSUES

1. Whether a spinal cord stimulator is reasonable and necessary; and
2. The nature and extent of Claimant's disability, if any.

FINDINGS OF FACT

The parties have stipulated, and I accordingly so find jurisdiction over this case vests in the

District of Columbia; an employer/employee relationship exists; Claimant sustained an accidental injury on August 27, 2001 which arose out of and in the course of employment; Claimant provided timely notice of his injury; the claim was filed timely; and Claimant's average weekly wage is Eight Hundred Seventy Dollars and Ninety-six Cents (\$870.96).

Claimant, a forty-five-year-old man, dropped out of high school to help support his family after the death of his father. He never returned to any formal education and is unable to read, write, or perform simple arithmetic. Instead, at age sixteen (16), he began working in heavy construction and has done so ever since.

On August 27, 2001, Claimant was working heavy construction for Employer. On that date, he lost control of a bundle of steel weighing approximately twenty thousand (20,000) pounds and injured his back. For at least the past two (2) years, Claimant has been treating with Dr. Randy Davis and Dr. William Tham for his injuries.

As a result of his work-related accident, in addition to physical therapy and numerous injections, Claimant has undergone multiple back surgeries including a lumbar laminectomy¹ and lumbar fusion in January 2005; a hemilaminectomy² at L5-S1, nerve decompression, and discectomy³ on February 1, 2002; and a L4-L5 and L5-S1 interbody fusion

¹A laminectomy is the "excision of the posterior arch of a vertebra." DORLAND'S MEDICAL DICTIONARY, 29th Ed. (2000) (hereinafter "DORLAND'S"), p. 960.

²Removal of one side of the vertebral lamina is a hemilaminectomy. DORLAND'S at p.800.

³A discectomy is the removal of an intervertebral disk. DORLAND'S at p.525.

with pedicle screw fixation and foraminotomy⁴ on December 3, 2002. Nonetheless, I find he continues to experience persistent pain in his back and legs and has been diagnosed with failed back syndrome. Consequently, I find both of his treating physicians, Dr. Davis and Dr. Tham, have recommended a spinal cord stimulator for pain management. I find Claimant has elected to forego additional surgery and desires to follow his treating physicians' recommendation for a spinal cord stimulator.

I find Claimant has reached maximum medical improvement as of September 28, 2006. I also find Claimant's treating physicians have certified that Claimant is permanently unable to work as a result of his injuries.

DISCUSSION

The undersigned has reviewed and has considered the totality of the evidence as well as the argument presented by the parties on the issues presented for resolution. To the extent an argument is consistent with the findings of fact, analysis, and conclusions of law contained herein, it is accepted; to the extent an argument is inconsistent therewith, it specifically is rejected.

Claimant has requested authorization for a spinal cord stimulator. Despite several back surgeries, Claimant continues to experience persistent, debilitating pain in his back and legs.

Dr. Davis has been treating Claimant for at least two (2) years. Throughout that period of time,

⁴A foraminotomy is an operation to remove the roof of intervertebral foramina to relieve nerve root compression. DORLAND'S at p.698.

he has been recommending placement of a spinal cord stimulator. (CE1). As recently as April 2006, Dr. Davis suggested considering

a spinal cord stimulator which Dr. Daly could implant as a temporary electrode to see if it provides him any relief. The advantage of that is that it's a lot less surgery with less risk than a revision laminectomy which has more risk of spinal fluid leak, infection, bleeding and making the legs weaker. (CE1).

In addition, Claimant has been treating with Dr. Tham for at least two (2) years. Dr. Tham also has recommended a spinal cord stimulator because Claimant has reach maximum medical improvement and as of September 28, 2006 has not considered a fourth surgery. (CE2).

On the other hand, Employer has submitted the May 9, 2006 Functional Capacity Evaluation (hereinafter "FCE") Report of Dr. S. R. Parthasarathy. (EE1). The self-proclaimed purpose of the FCE "is a Physician supervised detailed assessment of an individual's current physical capabilities, with an emphasis on identifying and documenting objective physical findings that may or may not explain one's demonstrated physical limitations."⁵ (EE1). The only reference therein regarding the recommendation for a spinal cord stimulator is "Mr. Farrell indicated he is considering Spinal Cord Stimulation for pain control. Unfortunately the scientific literature has not

⁵At the hearing the undersigned pointed out that EE1 was missing page 1. While the record was not held open specifically for receipt of that page, a copy was received via facsimile on November 3, 2006, and in the interest of completeness, that page has been incorporated into EE1.

demonstrated this to be an efficacious treatment for Failed Back Syndrome in an industrial setting, and I believe it is unlikely he will have significant symptom or functional enhancement as a result.” (EE1).

The Court of Appeals has noted that the Act specifically provides a method to contest the reasonableness of medical treatment; a utilization review is the preferred and most reasonable method of determining such issues. *See, Sibley Memorial Hospital v. DOES*, 711 A.2d 105, (D.C. 1998). In the case *sub judice*, Employer has not exercised this statutory provision; therefore, consideration of the reasonableness and necessity of medical treatment recommended for Claimant must be considered based on the evidence presented herein, but Employer offers very little by way of opposition to the reasonableness and necessity of a spinal cord stimulator.

Dr. Parthasarathy’s general opinion regarding the efficacy of a spinal cord stimulator as treatment for failed back syndrome must be weighed against the opinions of two (2) doctors who each have been treating Claimant for more than two (2) years, not merely performing an FCE over the course of one (1) day. Given the preference and deference normally to be accorded the opinions of treating physicians under the Act, *Short v. DOES*, 723 A.2d 845 (D.C. 1998); *Stewart v. DOES*, 606 A.2d 1350 (D.C. 1992), on this issue, I reject the opinion of Dr. Parthasarathy and accept the opinions of Drs. Davis and Tham. As a result, I find and conclude a spinal cord stimulator is reasonable and necessary and is to be authorized by Employer.

Employer also argues that Dr. Clifford T. Solomon has raised some questions about placement of a spinal cord stimulator; however,

Dr. Solomon’s position on that issue in May 2005 was “There was some talk about having a stimulator. To my way of thinking, this would be an absolute last resort. I would not recommend a stimulator for pain at this point. I would like to wait another two months to see if this will settle down on its own.” (CE4). More than two (2) months have passed, and based upon the evidence in the record, Claimant no longer is being treated by Dr. Solomon. Instead, Claimant’s treating physicians have issued opinions more proximate in time and based on active treatment of Claimant. I do not find it necessary to specifically reject Dr. Solomon’s outdated opinion because even he opined that “[s]ometimes in these types of cases a temporary stimulator is placed to see if it gives relief. If it does give relief then they convert to a permanent stimulator.” (CE4). In other words, Dr. Solomon did not rule out the possibility that a spinal cord stimulator may provide Claimant with some relief from his symptoms. Rather, he wanted to wait, but Claimant has not seen improvement in the more than one (1) year since Dr. Solomon expressed his position.

Although Employer hereby is ordered to authorize a spinal cord stimulator, it does not follow that such a disposition makes it premature to determine the nature and extent of Claimant’s disability, specifically whether he is permanently totally disabled, because a spinal cord stimulator has been recommended as palliative care; it is not intended to “attempt to fix any problems,” (CE1) *e.g.* improve Claimant’s physical condition. Rather, it is hoped that it will alleviate some of his pain.

Claimant was injured in 2001 when he lost control of a twenty thousand (20,000) pound bundle of steel. (HT p.28-29). Since that time, Claimant has undergone approximately eighteen (18) injections, physical therapy, a

lumbar laminectomy, lumbar fusion, a left L5-S1 hemilaminectomy, nerve decompression, a diskectomy, an interbody fusion with pedicle screw fixation and foraminotomy, and hardware removal and refusion. (EE1) None of this treatment has provided relief, and Claimant has been diagnosed with failed back syndrome. As a result, he has been presented with two (2) options for further treatment 1. the spinal cord stimulator discussed *infra* and 2. "one last attempt at revision complete laminectomy of 4 with revision foramenotomies at 4-5 and 1 both sides, but more attention to the LT along with likely autologous bone graft and implantation of an EBI bone growth stimulator." (CE1). However, in April 2006, Dr. Davis opined there is no chance that surgery will relieve all of Claimant's symptoms; in fact, he thought there is a 10% chance Claimant could emerge from surgery even worse. (CE1). Thereafter, in September 2006, Dr. Tham asserted that with no plans for further surgery, Claimant had reached maximum medical improvement. (CE2).

In order to prove entitlement to permanent partial disability benefits, a claimant must present substantial credible evidence that (1) his condition has reached maximum medical improvement, and (2) he is unable to return to either his usual or any other employment as a result of his injury. *See, Logan v. DOES*, 805 A.2d 237, 241 (D.C. 2002). I am persuaded by Dr. Tham's and Dr. Davis' medical opinions that Claimant not only has reached maximum medical improvement but that he is "permanently disabled and will not be able to work."⁶ (CE2, CE1) Despite conservative,

invasive, and surgical treatment, Claimant's disability has continued since 2001, and per Drs. Tham and Davis, it is of indefinite duration. (CE2, CE1). As such, Claimant's disability is permanent. *Smith v. DOES*, 548 A.2d 95, 98 (D.C. 1988) ("A disability is permanent if it 'has continued for a lengthy period, and it appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period.") (Citations omitted.)

Then, a "claimant suffers from total disability if his injury prevents him from engaging in the only type of gainful employment for which he is qualified." *Washington Post v. DOES*, 675 A.2d 37, 41 (D.C. 1996). In determining the degree of disability, physical condition alone is not enough. One also must consider the claimant's age, industrial history, and the availability of other work. *Logan, supra*.

Claimant did not complete the tenth (10th) grade because his father died, and Claimant had to work on the family farm for survival. He never completed his high school education and did not obtain a General Education Diploma, also known as a "GED." Instead, at age sixteen (16), he went into heavy construction; that is the only work he has known since that time. (HT p.25-26). Thus, Claimant now is a forty-five year old who cannot read, write, or perform simple arithmetic. (HT p.26). With his current disability overlaid upon these factors, not only is Claimant unable to perform his usual job, Employer has not established the availability of other jobs which Claimant could perform. *Logan, supra*, at 242-243. ("[T]he burden is on the employer to prove that work for which the claimant was qualified [when considering his age, background, physical capabilities, mental

⁶I accept Dr. Tham's and Dr. Davis's opinions to express that in his medical expertise Claimant is not capable of performing any work at this time; I do not accept his opinion to express any legal conclusions which

are for the undersigned to ascertain.

ORDER

It is ORDERED Claimant's claim for relief be and hereby is GRANTED.



MELISSA LIN KLEMENS
ADMINISTRATIVE LAW JUDGE

December 27, 2006

Date

JOHNNY CHARLES V. UNLIMITED SERVICES, INC.
CRB NO. 07-28

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of March 2007, a copy of the foregoing **Decision and Order** was mailed Certified mail to the following:

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