

CLAIM HISTORY AND APPEAL PROCEEDINGS:

The Worker injured his left knee in a workplace accident on July 28, 1989. Surgeries were performed in 1989 and 1994, and the Worker was awarded a 12 percent permanent medical impairment ["PMI"] rating in 1995. The Worker is currently awaiting further knee surgery in the form of a total knee replacement.

The Worker also injured his lower back on June 7, 1990. The Board provided him with temporary total disability ["TTD"] benefits from June 8 to 18, 1990, and again from April 9 to August 5, 1991.

The Worker re-injured his back on January 19, 2001. Temporary earnings replacement benefits ["TERB"] were provided from January 25 to May 14, and May 19 to July 11, 2001.

A third back injury on April 28, 2003, resulted in a two-week time loss from work.

In May 2006, the Board awarded the Worker a five percent PMI rating for his 2001 back injury.

The Board also reviewed the Worker's claim and assessed his eligibility for benefits in relation to chronic pain in 2006.

In a decision dated March 22, 2006, a member of the Board's Transitional Services Team ["TST"] concluded that the Worker did not suffer from chronic pain, as that condition is defined in the *Workers' Compensation Act*, S.N.S. 1994-95, c.10, as amended [the "Act"]. As a result of that finding, the Worker was not entitled to benefits under the *Chronic Pain Regulations*. The Worker appealed to a hearing officer who, in a decision dated June 19, 2006, confirmed the TST's decision. The Worker appealed to this Tribunal.

This appeal proceeded by way of written submission. The Worker's representative filed written submissions on October 12, 2006. She argued that the definition of chronic pain contained in the *Chronic Pain Regulations* violated the Worker's equality rights under the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982 (U.K.)*, 1982, c. 11 [the "Charter"]. The Attorney General filed submissions on November 7, 2006.

On December 12, 2006, this Tribunal issued *Decision 2006-079-AD*, which addressed the issue of whether the definition of chronic pain contained in the *Chronic Pain Regulations* violated the Worker's equality rights under s. 15 of the *Charter*. The Tribunal found that there had been no *Charter* violation.

Participants to this appeal were provided with an opportunity to file additional submissions addressing *Decision 2006-079-AD*.

The Worker's representative filed submissions dated January 7, 2007. In correspondence dated January 26, 2007, the Attorney General indicated that it relied upon its November 7, 2006 submissions. Neither the Board nor the Employer actively participated in this appeal.

ISSUES AND OUTCOMES:

1. Does the definition of chronic pain contained in the *Chronic Pain Regulations* violate the Worker's equality rights?

No, workers with work-related, long term pain which does not meet the statutory definition of chronic pain are not treated any differently than workers whose conditions meet the definition of chronic pain. The *Chronic Pain Regulations* do not create a distinction based on a personal characteristic; rather, they eliminate such a distinction.

2. Is the Worker entitled to benefits under the *Chronic Pain Regulations*?

No, the Worker is not entitled to benefits under the *Chronic Pain Regulations*. He does not suffer from chronic pain, as that condition is defined in the *Act* and *Regulations*. His pain is explained by significant, objective findings, and there is insufficient evidence to establish that it has persisted beyond a normal recovery time or is disproportionate to his injury.

ANALYSIS:

The legislation applicable to this appeal is the *Act*. In weighing the evidence, I have considered s. 187 of the *Act* which provides that where there is doubt on an issue and the possibilities are evenly balanced, the issue shall be resolved in favour of the worker.

Chronic pain is defined in s. 10A of the *Act* as pain continuing beyond the normal recovery time for an injury, or pain that is disproportionate to the amount of pain usually associated with an injury. Conditions such as chronic pain syndrome, fibromyalgia, and myofascial pain syndrome are automatically considered to be chronic pain; however, this definition does not include pain that is supported by significant, objective findings at the site of the injury which indicate that the injury has not healed. In addition, in order to qualify for chronic pain benefits, it is necessary to show that the chronic pain is causally related to the workplace injury.

The Worker's representative argues that the definition of chronic pain contained in the *Chronic Pain Regulations* violates the Worker's equality rights under s. 15 of the *Charter*. Her October 12, 2006 submissions address this issue. The same argument was considered and rejected by this Tribunal in *Decision 2006-079-AD*.

I accept and adopt the reasoning of my colleague in *Decision 2006-079-AD*; accordingly, I find that the definition of chronic pain contained in the *Act* and the *Chronic Pain Regulations* applies in this case. Therefore, in order for the Worker to be entitled to chronic pain benefits, she must establish that her condition meets that definition of chronic pain.

Chronic pain is defined in s. 10A of the *Act* as pain that is:

- (a) continuing beyond the normal recovery time for the type of personal injury that precipitated, triggered or otherwise predated the pain; or
- (b) disproportionate to the type of personal injury that precipitated, triggered or otherwise predated the pain,

and includes chronic pain syndrome, fibromyalgia, myofascial pain syndrome, and all other like or related conditions, but does not include pain supported by significant, objective, physical findings at the site of the injury which indicate that the injury has not healed.

The Worker has been diagnosed with osteoarthritis in his left knee and lumbar spine. He also suffers from spinal stenosis, a narrowing of the spinal canal.

In her January 29, 2007 submissions, the Worker's representative argues that the phrase, "all other like or related conditions" in s. 10A must be interpreted as including conditions that are of the same underlying nature as fibromyalgia and myofascial pain syndrome.

The Worker's representative refers to generic evidence which characterizes osteoarthritis (and arthritis in general) as a musculoskeletal, inflammatory condition. She argues that fibromyalgia and myofascial pain syndrome are also classified as musculoskeletal, inflammatory conditions, and submits that "osteoarthritis is recognized by the medical community as a chronic pain condition (and) belongs to the "like" class that includes fibromyalgia and myofascial pain syndrome...". On that basis, she says that the Worker meets the statutory definition of chronic pain and is entitled to chronic pain benefits.

Similarly, she submits that spinal stenosis is also a condition recognized by the medical community as a chronic pain condition. In support of her position, she relies upon expert opinion evidence referred to by this Tribunal in *Decision 2006-079-AD*. In that decision, spinal stenosis was described as a "chronic painful condition".

I do not accept the Worker's representative's argument that osteoarthritis or spinal stenosis are "like or related conditions" to chronic pain syndrome, fibromyalgia, myofascial pain syndrome.

In order to establish entitlement to chronic pain benefits under the *Act* and *Regulations*, a

worker's pain must have continued beyond a normal recovery time or be disproportionate to the injury. The statutory definition of chronic pain includes chronic pain syndrome, fibromyalgia, myofascial pain and all other like or related conditions. However, specifically excluded from the definition of chronic pain is pain that is supported by significant, objective, physical findings at the site of the injury which indicate that the injury has not healed.

Osteoarthritis and spinal stenosis, like so many other chronically painful conditions, demonstrate significant, objective findings upon examination. Inflamed joints (arthritis) are visible by x-ray, CT and MRI. The same is true for spinal stenosis. Scar tissue and narrowing of the spinal canal are readily visible. These objective findings are one factor that separates and excludes these conditions from chronic pain syndrome, fibromyalgia, myofascial pain syndrome and other like conditions.

Chronic pain syndrome, fibromyalgia, and myofascial pain syndrome are complex disorders that are usually resistant to traditional pain treatment therapies. People with these conditions do not generally demonstrate objective findings upon examination. There is usually not an easily definable local cause for their pain. The lack of any apparent abnormalities makes treatment challenging. In these cases, it is usually determined that the pain is disproportionate to the original injury.

I interpret the phrase "and all other like or related conditions" in s. 10A of the *Act* as meaning conditions similar to chronic pain syndrome, fibromyalgia and myofascial pain syndrome, which do not exhibit significant, objective, physical findings at the site of the injury which indicate that the injury has not healed. These "similar" conditions would include complex disorders whose underlying causes are unclear, and which do not respond favourably to traditional pain treatment therapies. In such cases, the pain would be considered disproportionate to the original injury. Spinal stenosis, osteoarthritis and many other chronically painful conditions do not fall within this category.

There is a distinction between chronic pain (as that condition is defined in the *Act* and *Regulations*), and persistent pain that is explained by objective evidence. Although the latter may include chronically painful conditions (such as osteoarthritis and spinal stenosis), diagnostic testing together with history and clinical findings clearly reveal the source of the pain. In the Worker's case, his x-rays and CT scans demonstrate the existence of osteoarthritis in his knee and spinal stenosis in his lumbar spine. Although these conditions may cause him chronic and persistent pain, they do not constitute "chronic pain", as that term is defined in the *Act* and *Chronic Pain Regulations*.

At this point, I will review the Worker's medical evidence to determine whether the Board has correctly determined that the Worker does not suffer from chronic pain.

The Worker injured his left knee on July 28, 1989. Arthroscopic surgery performed on October 18, 1989, revealed a problem with the anterior cruciate ligament.

The Worker re-injured his knee in December 1993. Arthroscopic surgery on March 20, 1994, identified an obvious anterior cruciate ligament tear and extensive osteoarthritic changes. Surgery to repair the torn anterior cruciate ligament was carried out in July 1994.

A PMI assessment performed on October 12, 1995, identified decreased flexion and instability. The Worker was awarded a 12 percent PMI rating.

The Worker sought treatment for increased knee pain in 2004. An x-ray performed on June 28, 2004, revealed osteoarthritis in the Worker's left knee.

The Worker was referred to Dr. Dill, an orthopaedic surgeon. In a report dated July 19, 2004, Dr. Dill expressed the opinion that the Worker suffered from end-stage arthrosis of the left knee (identified on x-ray). He recommended that a total knee replacement be performed. The Worker is waiting for this procedure to be scheduled.

The Worker's first back injury occurred on June 7, 1990. An x-ray of his lumbar spine performed on June 18, 1991, revealed very slight lipping in the anterior superior margin at levels L3 to L5.

In a report dated August 19, 1991, Dr. K. Orell noted that x-rays demonstrated mechanical instability and anterior osteophytes in the Worker's lumbar spine. Doctor Orell diagnosed the Worker with mechanical back pain. He also recommended a weight reduction and exercise program. The Worker returned to work that month.

The Worker re-injured his back in 2001. An x-ray performed on January 19, 2001, revealed mild multi-level osteophytosis anteriorly, and osteoarthritis at the L5-S1 articular facets, especially on the left. The Worker was referred to a chiropractor, Dr. Dunn, who diagnosed him with lumbar radiculitis and sciatica.

The Worker was referred for a CT scan on June 14, 2001. It revealed a central disc prolapse at L2-3, mildly indenting the cord. Early osteoarthritis in the facet joints at L4-5 and L5-S1 was also present.

The Worker's most recent back injury occurred on April 28, 2003, and resulted in a two-week time loss from work.

The Worker stopped working approximately one year later, in June 1994. He has since attributed his inability to work to his back pain.

On January 19, 2006, a Board Medical Advisor expressed the opinion that the Worker's condition did not meet the definition of chronic pain contained in the *Act*.

With respect to the Worker's left knee injury, the Medical Advisor noted that the Worker suffered from severe osteoarthritis related to his anterior cruciate ligament injury and

required a total knee replacement. He stated that these findings constituted significant, objective findings which played a meaningful role in explaining the degree and nature of the Worker's pain.

Similarly, the Medical Advisor attributed the Worker's back pain to his poor physical condition, obesity, osteoarthritis and the central disc prolapse at the L2-3. He noted that the Worker had been diagnosed with mechanical back pain and expressed the opinion that the Worker's pain was not disproportionate to the type of pain usually associated with this type of injury. The Medical Advisor also recommended that the Worker be assessed for a PMI, given the 2001 CT scan results.

A PMI assessment was performed on May 5, 2006. The examining Board Medical Advisor recommended a PMI rating of five percent, based on the objective findings. He also confirmed the earlier opinion that the Worker's back pain was explained by objective findings and was not disproportionate to his injury.

Another CT scan was performed on May 6, 2006. It revealed degenerative lumbosacral spondylo-arthritis with canal stenosis, Grade I spondylolysis at the L4-5 level, and multi-level osteophyte bulges with protrusion at the L2-3 level.

In a report dated May 26, 2006, Dr. Collicutt, an orthopaedic surgeon, noted the existence of the L2-L3 disc bulge but felt that the Worker's "real disease" was the Grade I spondylolysis, degenerative disc disease and spinal stenosis at the L4-5 level. Doctor Collicutt also concluded that a laminectomy was not warranted.

Having considered the evidence in its entirety, I am unable to conclude that the Worker's condition meets the definition of chronic pain contained in the *Act*. The Worker has been assessed by numerous specialists who have attributed his symptoms to objective findings. He has not been diagnosed with chronic pain syndrome, fibromyalgia, myofascial pain syndrome or any like condition. His pain has not been characterized as disproportionate or having persisted beyond a normal recovery time.

The Worker was awarded a 12 percent PMI rating for his knee injury in 1995. The award was based on the existence of significant, objective findings which included extensive osteoarthritis and a near complete arthrosis. The Worker is now awaiting total knee replacement surgery. His treating specialists and the Board Medical Advisor have attributed his symptoms to these findings. There is no evidence that the Worker's pain is disproportionate to his injury or that it has persisted beyond a normal recovery time.

The Worker's first back injury occurred in 1990. He returned to work in 1991, and there is no indication that he experienced chronic pain in relation to that injury. The Worker re-injured his back in 2001, and was diagnosed with mechanical back pain. CT scans have revealed osteoarthritis in the Worker's facet joints, spondylolysis, spinal stenosis, and disc osteophyte protrusions. The Worker's symptoms have been attributed to these conditions.

He has been awarded a five percent PMI rating for his back. There is no evidence that his pain is disproportionate to his injury or that it has persisted beyond a normal recovery time.

Although the Worker suffers from persistent back and knee pain, his condition does not meet the definition of chronic pain contained in the *Act*. I find that his pain is the usual type of pain associated with his injuries. He has already been awarded compensation in recognition of these injuries.

CONCLUSION:

The appeal is denied. The Worker does not suffer from chronic pain, as that condition is defined in the *Act*. His pain is explained by significant, objective findings, and there is insufficient evidence to establish that it has persisted beyond a normal recovery time or is disproportionate to his injury. He is not entitled to benefits under the *Chronic Pain Regulations*.