Rochelle, Steven

TREATMENT

Proper and necessary medical and surgical services (RCW 51.36.010)

Spinal column stimulator

Notwithstanding the Health Technology Clinical Committee preclusion for authorizing spinal cord stimulator treatment, the Department remains obligated to repair or replace a spinal cord stimulator it had previously authorized. **….*In re Steven Rochelle,* BIIA Dec., 15 24143 (2017)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: STEVEN G. ROCHELLE	**)**	**DOCKET NO. 15 24143**
	)	
CLAIM NO. P-042409	**)**	**DECISION AND ORDER**

In October 1995, Steven G. Rochelle suffered an industrial injury to his low back. He underwent two failed surgeries and in June 2000 the Department closed the claim with a Category 4 permanent partial disability award for low back impairments. As part of a pilot project, the claim was reopened in 2006, and the Department authorized the implantation of a spinal cord stimulator. The claim was closed in 2007 with no additional award for permanent impairment. Mr. Rochelle's spinal cord stimulator, which had been providing him with relief, began to fail and in May 2015 Mr. Rochelle applied to reopen the claim, seeking repair or replacement of the spinal cord stimulator. The Department denied the application and did not repair or replace the device. Our industrial appeals judge determined that a change in the law prevented him from directing the Department to repair or replace a spinal cord stimulator, but found that Mr. Rochelle's condition caused by the industrial injury had objectively worsened and directed the Department to reopen Mr. Rochelle's claim. The Department argues that the medical evidence does not establish reopening the claim. Mr. Rochelle argues that the Department should be directed to repair or replace the spinal cord stimulator. We disagree with our industrial appeals judge that we cannot direct the Department to repair or replace the spinal cord stimulator or its battery, and we agree with the Department that the medical evidence before us does not establish that Mr. Rochelle's condition proximately caused by the industrial injury objectively worsened during the relevant period. The Department order is **REVERSED** and **REMANDED** to deny the application to reopen and to repair or replace the spinal cord stimulator.

DISCUSSION

Spinal Cord Stimulator

The evidence presented by the parties almost exclusively concerns the need to repair or replace Mr. Rochelle's spinal cord stimulator or its battery. The failing effectiveness of the spinal cord stimulator prompted Mr. Rochelle to file an application to reopen his claim. Mr. Rochelle suffers from two failed back surgeries as a result of the industrial injury, and his spinal cord stimulator was implanted in 2006 under this claim for treatment of the condition proximately caused by the industrial injury, with the approval of the Department as part of a pilot project and study. The device appears to have greatly increased Mr. Rochelle's functioning and allowed him to return to work. In 2013 or 2014, Mr. Rochelle noticed that he could no longer recharge the spinal cord stimulator, and his pain

and loss of function began to worsen, resulting in a decline in his condition and level of functioning. Therefore, he applied to reopen the claim to have the spinal cord stimulator repaired or replaced.

On October 22, 2010, the Health Technology Clinical Committee, which governs coverage determinations by the Department of Labor and Industries and was established under the aegis of the Health Care Authority, issued a determination declaring spinal cord stimulators to be a non-covered benefit. That determination precludes coverage of spinal cord stimulators by the Department, and precludes consideration of whether, in an individual case, a spinal cord stimulator is medically necessary, or proper and necessary treatment.[1] In *Joy v. Department of Labor & Indus.,* the court determined that the Department and this Board are precluded from authorizing any form of treatment that has been determined by the Health Technology Clinical Committee to be a non-covered benefit.[2] However, the court declined to determine whether the application in the case of Ms. Joy, or the prohibition of such treatment in general, could operate retroactively.[3]

We conclude that the Department remains obligated to repair or, if necessary, replace Mr. Rochelle's spinal cord stimulator or the unit's battery. Once Mr. Rochelle received his spinal cord stimulator as treatment through the Department's clinical study, he obtained a vested right to the repair or replacement of the device as a piece of durable medical equipment, pursuant to WAC 296-20-1102. At the time the Department provided him treatment in the form of the spinal cord stimulator, it also vested in him the right to the repair and replacement of the device. To now apply the Health Technology Clinical Committee determination that the device is not a covered treatment is clearly a retrospective application of that determination to Mr. Rochelle's circumstances. The WAC vested Mr. Rochelle with the right to have the Department bear the cost of maintaining the device it had previously approved. Generally, a statute will not apply retrospectively on a vested right, absent clear language to the contrary.[4] The denial of coverage for spinal cord stimulators should be applied prospectively only. In our view, the denial applies to authorization of implanting a spinal cord stimulator after the determination became effective but does not apply to maintenance, repair or replacement of a device previously authorized and implanted.

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[1] *See,* RCW 70.14.120(3).
[2] *Joy v. Department of Labor and Indus.*, 170 Wn. App. 614 (2012); *In re Ladonia Skinner*, BIIA Dec., 14 10594 (2015).
[3] *Joy* at 629-630.
[4] *Bodine v. Department of Labor & Indus.,* 29 Wn.2d 879 (1948).

Objective Evidence of Worsening

We agree with the Department that the medical evidence in the record before us is not sufficient to establish that Mr. Rochelle's condition worsened during the relevant period. To establish worsening within the meaning of RCW 51.32.160, a worker must prove through medical testimony[5] that a proximate causal relationship exists between his industrial injury and the subsequent disability.[6] Such medical testimony simply is not in the evidence before us.

Mr. Rochelle testified that his symptoms worsened with increased leg pain and wetting the bed at night. He stated that he did complain to his doctor (who did not testify) of the increased leg pain and bed-wetting.[7] The fact that his physician filed an application to reopen the claim was sufficient for our judge to infer that the physician had the opinion that these conditions were proximately caused by the industrial injury, and had worsened between the terminal dates. We agree with the Department that such an inference is conjecture; we do not know whether that physician, or any other medical expert for that matter, would testify that the conditions Mr. Rochelle complains of were proximately caused by the industrial injury. Even if we accept that the nocturnal bed wetting and increased leg pain did develop between the terminal dates, there is no medical opinion the industrial injury more-likely-than-not proximately caused the conditions.

Although Mr. Rochelle has not established that the claim should be reopened based on a comparison of objective findings, we do not consider this a barrier to directing the Department to repair or replace the spinal cord stimulator. The Department's responsibility to repair or replace the device as required by WAC 296-20-1102 is not dependent on reopening the claim. The WAC clearly requires that device be repaired or replaced upon documentation and substantiation by the attending doctor. The record reflects that the attending physician presented such documentation with the application to reopen. The Department responded by issuing an order denying the application and thereby denying the requested repair or replacement of the device. Accordingly, we direct the Department to repair or replace the spinal cord stimulator as requested.

DECISION

In Docket No. 15 24143, the claimant, Steven G. Rochelle, filed a protest with the Department of Labor and Industries on September 11, 2015. The Department forwarded it to this Board as an

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[5] *Johnson v. Department of Labor & Indus.*, 114 Wn.2d 479 (1990).
[6] *Cyr v. Department of Labor & Indus.,* 47 Wn.2d 92 (1955).
[7] We do not read the Department's petition, as the claimant asserts, to contain an untimely objection to the physician's chart note that was read into the record by Dr. Gilmore.

appeal. Mr. Rochelle appeals a Department order dated August 4, 2015. In this order, the Department affirmed the provisions of a prior order in which it denied an application to reopen the claim for aggravation of condition. This order is correct and is affirmed.

FINDINGS OF FACT

1. On January 7, 2016, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.

2. Steven G. Rochelle sustained an industrial injury on October 23, 1995, when he jumped down from a bridge abutment to the ground and injured his low back, herniating at least one disc.

3 In 2006 the Department authorized treatment in the form of an implant of a spinal cord stimulator.

4. On October 22, 2010, the Washington Health Care Authority adopted a Health Technology Assessment Finding (HTA) on spinal cord stimulators that prohibits the Department of Labor and Industries from authorizing the use of a spinal cord stimulator as treatment for an industrial injury.

5. In May 2015 Steven Rochelle filed an application to reopen his claim in order to have his spinal cord stimulator repaired or replaced.

6. The spinal cord stimulator needs maintenance and replacement of its battery as substantiated by Mr. Rochelle's attending physician.

7. Steven Rochelle's back condition proximately caused by the industrial injury did not objectively worsen between January 28, 2011, and August 4, 2015.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in this appeal.

2. The October 22, 2010 Health Technology Assessment Finding on spinal cord stimulators adopted under RCW 70.14 and WAC 182-55 does not operate retrospectively to preclude the Department from authorizing a maintenance and repair of spinal cord stimulator previously provided under this claim as treatment for the October 13, 1995 industrial injury.

3. Under WAC 296-20-1102, the Department is obligated to repair or replace the spinal cord stimulator without the need to reopen the claim for aggravation of condition.

4. Between January 28, 2011, and August 4, 2015, the conditions proximately caused by the industrial injury did not worsen within the meaning of RCW 51.32.160.

5. The August 4, 2015 order is reversed and this matter is remanded to the Department to deny the application to reopen the claim and grant Mr. Rochelle's request to repair or replace his spinal cord stimulator.

Dated: March 15, 2017.

BOARD OF INDUSTRIAL INSURANCE APPEALS

LINDA L. WILLIAMS, Chairperson

FRANK E. FENNERTY, JR., Member

JACK S. ENG, Member

Addendum to Decision and Order
In re Steven G. Rochelle
Docket No. 15 24143
Claim No. P-042409

Appearances

Claimant, Steven G. Rochelle, by Putnam Lieb Potvin, per Dustin J. Dailey

Employer, Department of Transportation, None

Department of Labor and Industries, by The Office of the Attorney General, per Shawn W. Gordon

Petition for Review

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The Department and the claimant filed timely Petitions for Review of a Proposed Decision and Order issued on November 4, 2016, in which the industrial appeals judge reversed and remanded the Department order dated August 4, 2015.

Evidentiary Rulings

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.