

Monday, April 18, 2005

Fibromyalgia as a Diagnosis in Personal Injury Cases

By Daniel E. Cummins

Special to the Law Weekly

Over the past few years, there have been more and more claims being presented for post-traumatic fibromyalgia in personal injury matters. Fibromyalgia has been described as a chronic musculoskeletal disorder that causes widespread pain and tenderness in the muscles and soft tissue. It can be manifested as tender points, at various places in the body and can cause pain, sleep disturbance, fatigue, and a variety of other symptoms. These problems can be severe enough to disrupt a person's work and daily activities. Although there are a few medical providers who routinely diagnose patients with fibromyalgia, there are other medical providers who view it as a psychosomatic condition and still others who dismiss it outright as a cognizable diagnosis.

To date, there has been no consensus in the scientific community as to the cause of fibromyalgia and/or whether it can be a result of trauma. Yet the claim that a plaintiff or claimant had developed fibromyalgia as a result of a traumatic event routinely went unchallenged in prior cases.

A recent trend has developed in the form of challenges to such claims through the filing of motions in limine to preclude expert testimony on the causation issue followed by a motion for summary judgment seeking a dismissal of the claim for post-traumatic fibromyalgia. As summarized below, there have been varying decisions rendered by Pennsylvania trial courts on this open issue and, to date, no definitive decision from the appellate courts to put the controversy to rest.

It is well settled under Pennsylvania law that, among the duties of the trial court, is the performance of its function as a "gatekeeper" whenever science enters the courtroom and, particularly, when expert testimony relying upon novel scientific evidence is offered. See *Blum v. Merrell Dow Pharmaceuticals, Inc.*, 705 A.2d 1314, 1322 (Pa. Super 1997), *aff'd* 764 A.2d 1 (Pa. 2000). Under the law of the Commonwealth of Pennsylvania, a determination of the reliability and, therefore, admissibility of scientific evidence requires that the proponent establish that the evidence concerns a matter which "has achieved 'general acceptance' in the relevant scientific community." See *Riccio v. S & T Contractors*, 56 Pa. D. & C. 4th 86 (Pa. Com. Pl. 2001) *citing Blum*, 764 A.2d at 2.

With a motion in limine, a defendant may seek to preclude a plaintiff from introducing evidence in support of a claim that the subject accident and resulting trauma allegedly caused the plaintiff to develop fibromyalgia.

The rationale supporting such a motion would be that there is no general consensus in the relevant scientific community that fibromyalgia syndrome is causally related to trauma and, therefore, evidence of such an alleged relationship, in the form of expert medical testimony or otherwise, should be ruled in admissible.

Although there may be some uncertainty as to whether it is the medical expert's conclusion or methodology, or both, which must have achieved general scientific acceptance as a precondition to evidentiary admissibility, a majority of the Pennsylvania courts which have addressed the issue have found that, in this context of an expert attempting to testify as to a causal relationship between trauma and fibromyalgia, neither the methodology nor the conclusion offered by such an expert on causation has achieved the scientific consensus required before such testimony may be admissible. See *Riccio*, at 3. As the Commonwealth Court of Pennsylvania explained in the case of *McKenzie v. Western House Electric Corp.*, 674 A.2d 1167, 1172 (Pa. Cmwlth. 1996):

"In order for scientific testimony indicating that an event causes a particular result to be admitted, there must be a showing not that the studies establishing the causal relationship follow generally accepted methodologies, but that the existence of the causal relationship is generally accepted by the relevant medical community."

There are at least three Pennsylvania common pleas court decisions on the issue presented, all of which

have recently held that expert testimonial evidence of the existence of a causal relationship between a plaintiff's accident and his or her alleged fibromyalgia syndrome is not admissible under the applicable standard of review since a conclusion that trauma can cause fibromyalgia has not gained general acceptance in the relevant scientific community. See *Riccio*, 56 Pa. D. & C. 4th 86; See *Tibensky v. Krempele*, 50 Leh. L.J. 922 (2003). See also *Heilman v. Ford*, C.P. Northumberland Co., No. 1999-C-2169 (2002) (motion to preclude evidence of causation between trauma and plaintiff's fibromyalgia granted).

The *Riccio* decision, issued in 2001, provides a detailed and apparently exhaustive review of the scientific literature regarding the condition of fibromyalgia, which literature reveals that the scientific community has not been able to establish any causation between trauma and fibromyalgia on a medical or scientific basis.

In *Riccio*, the court summarized a 1996 document entitled, "The Fibromyalgia Syndrome: A Consensus Report on Fibromyalgia and Disability," which appeared in Volume 23 of *The Journal of Rheumatology*. Among the conclusions contained in that report was the following:

"It is possible that the causes [of fibromyalgia] might differ from individual to individual, or might be multiple. *But the answer to the causal question has not been determined by science.* Epidemiological studies that might be able to unravel causal issues in fibromyalgia that follows upon trauma or other events have not been performed." *Riccio*, at 5 [emphasis added].

Thus, as recently as at the time of the court's decision in *Riccio* in June of 2001, *Tibensky* in 2003, and *Heilman* in July of 2004, it has been held that there is no consensus in the scientific community to allow an expert to opine that trauma can cause fibromyalgia. On information and belief, there has been no change in this situation and, therefore, there has been no consensus reached by the scientific community up to the present sufficient to allow an expert to so opine on causation.

Significantly, the *Riccio* court also indicated that its decision precluding the introduction of expert testimony on the relationship between the trauma and fibromyalgia was consistent with decisions reached by courts in other jurisdictions, including *Black v. Food Lion, Inc.*, 171 F.3d 308, 309 (5th Cir. 1999). In the *Black* case, the Fifth Circuit Court of Appeals wrote, in pertinent part, as follows:

The underlying predicates of any cause-and-effect medical testimony are that medical science understands the physiological process by which a particular disease or syndrome develops and knows what factors caused the process to occur. Based on such predicate knowledge, it may then be possible to fasten legal liability for a person's disease or injury.

"In this case [involving a slip and fall that allegedly caused fibromyalgia to develop], neither [the treating physician] nor medical science knows the exact process that results in fibromyalgia or the factors that trigger the process. Absent these critical scientific predicates, for which there is no proof in the record, no scientifically reliable conclusion on the causation can be drawn. [The treating physician]'s use of a general methodology cannot vindicate a conclusion for which there is none-underlying medical support." *Black v. Food Lion*, 171 F.3d at 313.

The *Riccio* court emphasized that the *Daubert* standard of review applied in the *Black* case to preclude the evidence of alleged post-traumatic fibromyalgia was significantly less demanding than the *Frye* standard of review that applies in Pennsylvania cases. *Riccio*, at 12.

With this background, the *Riccio* court noted that the Fifth Circuit Court of Appeals in *Black* considered the admissibility of evidence of a causal connection between trauma and fibromyalgia and concluded, as follows:

"While the medical profession has made significant advances in the diagnosis and treatment of fibromyalgia, experts have recognized that the evidence that trauma actually causes fibromyalgia is "insufficient to establish causal relationships." [citing the Consensus Report noted above]. The [Consensus Report] states, 'Overall— data from the literature are insufficient to indicate whether causal relationship exist between trauma and [fibromyalgia]. The absence of evidence, however, does not mean that causality does not exist, rather that appropriate has not been performed. *Id.* at 535. At least one other commentator has also recognized the severe difficulties associated with identifying the cause of a given patient's fibromyalgia." See *Geoffrey Little John Medico-Legal Aspects of Fibrositis Syndrome* [citation omitted] ("[T]he is no scientific evidence to suggest that the injury itself results in the pathophysiology of [fibromyalgia] syndrome.") *Black v. Food Lion*, 171 F.3d at 312-313.

Accordingly, the *Black* court concluded that, even under the less restrictive federal standard of review, that evidence of scientific causality between trauma and fibromyalgia is inadmissible. *Id.*; See also *Wynacht v. Beckman Instruments, Inc.*, 113 F. Supp. 2d 1205 (E.D. Tn. 2000) (The court held as unreliable and, therefore, inadmissible, expert testimony of a causal relationship between a chemical spill at the defendant's laboratory and the Plaintiff's medical conditions including fibromyalgia); See also *Gross v. King David Bistro, Inc.*, 83 F. Supp. 2d 597 (D.Md. 2000) (Testimony of a causal relationship between infection from a food borne pathogen and fibromyalgia was held to be insufficiently reliable for admission into evidence under *Daubert* and F.R.C.P. 702 as the court found that the "empirical data is simply too nascent and tepid to support [the causal conclusion [and that] [t]he medical studies themselves acknowledge that the causes of fibromyalgia are unknown).

While the majority rule noted above holds that attempts to relate fibromyalgia to traumatic incidents should be rejected, at least two Pennsylvania common please court decisions have held otherwise in unpublished opinions. See *Hughes v. Fox-Eichelberger*, Cumberland CCP 99-3850-Civil Term (July 1, 2004)(unpublished opinion); see also *Michael v. Garman* (also known as) *Cappellini v. Garman*, Luzerne County CCP, 1269-Civil-1997 (February 7, 2005 Order of Court)(Trial court denies defendant's motion in limine on fibromyalgia evidence without opinion).

In *Hughes* the trial court rejected a motion in limine seeking to preclude expert evidence linking a plaintiff's alleged fibromyalgia condition to a traumatic incident. Without citing any of the numerous cases above that rejected such evidence of causation of fibromyalgia, the trial court in *Hughes* indicated that, while the condition of fibromyalgia was only recently discovered, it allegedly did not involve the use of any novel scientific methodology to reach a diagnosis for that condition. No supporting medical evidence or legal precedent in support of this conclusion was described in the opinion.

Thus, under the current trend of the law as set forth in the majority rule cited above, any evidence of an alleged causal relationship between trauma and the alleged onset of fibromyalgia would be inadmissible under the applicable standard of review unless and until the relevant scientific community can establish such causation through generally accepted methodologies and/or conclusions.

Accordingly, in cases where fibromyalgia is alleged, defense counsel may properly file a motion in limine to preclude any such evidence, including expert opinion evidence. Defense counsel should also, simultaneously or subsequently, follow with a motion for summary judgment seeking the dismissal of any fibromyalgia claims.

If this strategy is successful, the plaintiff's ongoing complaints of alleged chronic and non-specific pain would then be left without a supporting diagnosis and may consequently appear less credible in the eyes of a jury.

From the plaintiff's perspective, counsel may wish to avoid fibromyalgia terminology and instead present the symptoms under the general rubric of pain and suffering. Although the plaintiff or claimant may lose the benefit of presenting to a fact-finder or jury the ominously sounding diagnosis of fibromyalgia, he or she could still present evidence of the symptoms arising therefrom in perhaps another equally compelling manner.