

The End of Fibromyalgia? A View from the Defense

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The term fibromyalgia was coined by the American Rheumatology Association in 1990. However, there have been many changes in the criteria since that time. Currently, Dr. Frederick Wolfe, the chair of the American Rheumatological Committee, has stated that he no longer thinks of fibromyalgia as a disease, but only as a "clinical term" (Wolfe 1997, pp. 1247-49). The following are some reasons a defense may use to question the validity of a fibromyalgia diagnosis:

1. The cat is out of the bag. The American Rheumatology Association's criteria of 11 out of 18 tender points has been published so that everyone can see where the tender points are and what symptoms one must have in order to have a "positive examination."
2. Fibromyalgia relies on self-reporting. The diagnosis is based on the applicant's self-reporting of symptoms. In other words, "I touch, you hurt." Applicants may tend to be very self-serving during the examination.
3. Fibromyalgia cannot occur as a result of trauma. The recommendation of the 1996 revision of the American Rheumatology Association excluded "reactive" and "posttraumatic fibromyalgia" as a cause of fibromyalgia (Wolfe 1996, p. 537). Based on the association's criteria, this would appear to exclude car accidents, falls and other traumatic incidents as acceptable causes of fibromyalgia.
4. Fibromyalgia treatment should not continue forever. Assuming that a judge would decide that there is a diagnosis of fibromyalgia, treatment should not go on forever and should be limited to item two of the 1996 Vancouver consensus report. This section states: "Therapies should not be continuous or indefinite. The goal of therapy is to make the patient independent." Accordingly, there should not be long periods of temporary disability or extensive future medical treatments for fibromyalgia patients.
5. Fibromyalgia is not disabling. Dr. Frederick Wolfe makes a clear statement that "people with fibromyalgia should not be considered disabled" (Wolfe 1997). Accordingly, people with fibromyalgia can work. In the 1996 case of *Yeager v. Reliance Standard Life Insurance Company* (88 F 3rd 376 [6th circuit]), the plaintiff with fibromyalgia was found by the doctor to be capable of performing 95% of his work functions and was not disabled (p. 382). The *Yeager* case is not a worker's compensation case, but is well-reasoned.
6. Fibromyalgia is resistant to treatment, and it is unknown exactly what the best treatment is. The treatment for fibromyalgia is unclear. Thus, applicants might not be able to address all issues in order to prove their case or to establish a need for continuing medical treatment for fibromyalgia.
7. Fibromyalgia has three elements. Experts often forget to describe all three elements in their diagnosis. The three elements are: (1) Pain in eleven out of 18 tender points; (2) widespread pain in three of four quadrants; and (3) pain for a minimum of three months. It is difficult to see how a doctor on one examination could diagnose widespread pain for three months. Further, when tender points "wax and wane," it is hard to know whether the tender points are waxing or waning on the date of the patient's examination. The skills of the examiner in applying pressure to the tender points often differ as well.
8. Fibromyalgia has a sleeping component. Often, the practitioner does not explore the sleeping conditions of the applicant. A practitioner may note that the applicant drinks six cups of

coffee a day, then wonder why the applicant stays awake.

9. New case law may make fibromyalgia more difficult to prove. A major development from the United States Supreme Court may make it difficult for applicants with controversial conditions such as fibromyalgia to recover. The most recent U.S. Supreme Court case on the issue of expert testimony was *Kumho Tire Co. v. Carmichael* (March 23, 1999; 119 5 ct. 1167 [199]).

A man was injured when one of the company's tires failed. The plaintiff, Patrick Carmichael, had as an expert Dennis Carlson, a mechanical engineer, who testified that the failure could have been caused by a design or manufacturing defect, which he could neither specify nor identify. *Kumho* moved to exclude the evidence of this expert. As a result of this case, the court held that the trial judge is now the gatekeeper and determines the reliability and admissibility of expert evidence. The judge must make sure that the expert's opinions are based on "scientific principles."

The bottom line from the *Kumho* case is that "intellectual rigor" must be used in evaluating expert testimony. The defense may argue that *Kumho* means the following factors should be cited in evaluating expert testimony (*Kumho* referred to a previously decided 1993 case, *Daubert v. Merrill Dow, Inc.*). The four factors are:

1. whether the expert's methodology can be tested;
2. whether it has been subjected to peer review and publications;
3. its potential rate of error; and
4. whether it has gained general acceptance in the relevant scientific community.

In conclusion, with all of the conflicts going on in the scientific community over whether fibromyalgia exists, it might appear that fibromyalgia cannot pass the rigors of the *Kumho* case. Furthermore, broader issues are created for the acupuncture community in reviewing *Kumho* and applying it to acupuncture in general. Much of acupuncture methodology has not been tested in peer review articles. Since *Kumho* is so new, we can only wait and see how this case will ultimately be applied in acupuncture cases.

As a defense attorney, the following might be a good recommended checklist for fibromyalgia cases:

1. Contend that the applicant does not have fibromyalgia and may have something else.
2. Contend that fibromyalgia was not caused, aggravated or exacerbated by work. If work did "light up fibromyalgia," for how long? Causation is difficult to establish due to Dr. Wolfe's denouncing the criteria, the differences among professionals on the tender points checked, and the conflicts on what causes or aggravates fibromyalgia.
3. Contend that if the applicant does have fibromyalgia, it was a pre-existing condition and request apportionment.
4. Look to see if histories and current activity levels are accurate.

References

- Wolfe F. Vancouver Fibromyalgia Consensus Group. The fibromyalgia syndrome: a consensus report on fibromyalgia and disability. *Journal of Rheumatology* 1996;23:534-9.
- Wolfe F. The fibromyalgia problem. *Journal of Rheumatology* 1997;27(7):1247-49.

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