

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
PENSACOLA DISTRICT OFFICE

Thomas Lee,)	
Employee/Claimant,)	
)	
vs.)	
)	OJCC Case No. 08-017788NSW
Escambia County Sheriff's Department/Preferred)	
Governmental Claims Solutions,)	Accident date: 9/1/2007
Employer/ Carrier/Servicing Agent.)	
_____)	

FINAL COMPENSATION ORDER

THIS CAUSE came on to be heard via Video Tele-Conference in Pensacola, Escambia County, Florida on 11-18-08 upon Claimant's claim for compensability of hypertension and heart disease pursuant to the heart/lung bill; authorization of a cardiologist; penalties, interest, costs and attorney's fees. The Petition for Benefits was filed 07-07-08. Mediation was conducted on 09-15-08, seventy (70) days after the petition was filed. The parties' pretrial compliance questionnaire was filed 09-24-08. The final hearing occurred one hundred thirty-four (134) days after the petition was filed and this Order was entered sixteen (16) days thereafter. Steven Pyle, Esq. was present in Daytona Beach on behalf of the Claimant. George Helm, III, Esq. was present in Daytona Beach on behalf of the Employer/Carrier (hereafter "E/C").

Submitted into evidence at the Final Hearing were the following documents, each accepted, identified and placed into evidence without objection except where noted, as Judge's Exhibits, Joint Exhibits, Claimant's Exhibits, or E/C Exhibits, as follows:

JUDGE'S EXHIBITS MARKED FOR THE RECORD:

- #1. The parties' Pre-Trial Stipulation filed 09-24-08.
- #2. E/C's Supplemental Pre-Trial Stipulation filed 10-16-08.
- #3. Claimant's Objection to E/C Exhibit List filed 10-22-08.
- #4. E/C notice of withdrawal of Dr. Videau as IME filed 10-28-08.
- #5. Petition for Benefits filed 07-07-08.
- #6. E/C Response to Petition for Benefits filed 08-07-08.
- #7. Claimant's Notice of Disclosure of Dr. Thomas Payne as IME filed 09-19-08.

JOINT EXHIBITS:

- #1. Deposition of Cathy Meeks taken 11-10-08.
- #2. Deposition of Mona Yancey taken 11-07-08.

CLAIMANT'S EXHIBITS:

- #1. Deposition of Dr. Thomas Paine taken 10-30-08.

E/C's EXHIBITS:

- #1. Deposition of Dr. Cesar Yepes taken 10-09-08.
- #2. Medical records of Dr. Jay Varenholt (for factual purposes only).
- #3. Surgeon General's Report of Smoking (proffered).

OBJECTIONS:

Claimant objected to the following proffered exhibit by E/C:

- a. E/C Ex.#3 - Surgeon General Report on Smoking as the same violates Claimant's due process rights as he is unable to cross-exam any of the witnesses regarding their opinions and conclusions and as such experts are not authorized treating physicians, IME's or EMA's their opinions are inadmissible. E/C contends the report is evidence of a pathological and epidemiological link between smoking and heart disease. Accepting E/C's contention, the report contains medical opinions of experts who are not authorized providers, IME's or EMA's and is therefore inadmissible pursuant to Ch. 440.13(5)(e), F.S. Claimant's objection is sustained.

In making the determinations set forth below, I have attempted to distill the salient facts together with the findings and conclusions necessary to resolve this claim. I have not attempted to painstakingly summarize the substance of the parties' arguments, nor the support given to my conclusions by the various documents submitted and accepted into evidence; nor have I attempted to state nonessential facts. Because I have not done so does not mean that I have failed to consider all of the evidence. In making my findings of fact and conclusions of law in this claim, I have carefully considered and weighed all evidence submitted to me. I have considered arguments of counsel for the respective parties, and analyzed statutory and decisional law of Florida.

Based upon the parties' stipulations and the evidence and testimony presented, I find:

1. The Judge of Compensation Claims has jurisdiction of the parties and the subject matter of this claim.
2. The parties' stipulations and agreements, set forth in the pretrial compliance questionnaire are accepted, adopted and made an order of the Office of the Judge of Compensation Claims. The parties have further stipulated Claimant passed a pre-employment physical 08-22-86 with no evidence of heart disease or hypertension, is a member of a protected class and was disabled on 09-05-07 (rather than 09-01-07 as alleged in the Petition) due to heart disease. E/C concedes if Claimant's heart disease is found to be compensable, such will require the E/C provide care and treatment for Claimant's hypertension. The parties further stipulate Claimant's AWW/CR is \$980.65/653.80 not including fringe benefits.
3. Any and all issues raised by way of the Petitions for Benefits ("PFB"), but which issues were not dismissed or tried at the hearing, are presumed resolved, or in the alternative, deemed abandoned by the Claimant and, therefore, are Denied and Dismissed with prejudice. See, Scotty's Hardware v. Northcutt, 883 So.2d 859 (Fla. 1st DCA 2004).
4. Claimant has worked for the employer as a detention officer or corrections officer since 08-22-86. His job entails providing care, custody and control of prisoners and during his career he has worked in court security, as a transport officer and most recently in dispatch. He has been required to search suspects brought in for booking and remove weapons from such individuals. According to Claimant, some of these individuals are drunk, unruly and angry. He also described having been involved in violent encounters, at least one of which resulted in a shooting death. Claimant testified he smoked for 20 years, stopping on 09-23-07 and was on cholesterol medication prior to September 2007.
5. Claimant testified he reported his heart condition to Ms. Yancey in September 2007 after Dr. Kinselmann, his family physician, scheduled him to see a cardiologist, Dr. Paine, with whom he has been treating under his private health insurance for his heart condition and hypertension. He was off work from 09-05-07 until 02-01-08 following a heart catheterization on 09-05-07 and triple by-pass surgery 09-24-07. He again missed four (4) days of work beginning 10-17-08 following a second catheterization. According to Claimant, he initially requested Ms. Yancey not report his condition as a workers' compensation claim as he did not wish to change physicians, but on 10-11-07 did request his condition be considered work related. When he was off work in 2007, he was initially paid by his employer utilizing sick leave benefits. When the carrier began paying these benefits the employer advised him he was required to repay his sick leave.
6. Mona Yancey has been employed by the Escambia County Sheriff's Office since 1984 and since December 2005 as administrative assistant in risk management handling all workers' compensation claims. Her file indicates Claimant was hired 08-30-06 as, and remains, a detention officer. Ms. Yancey testified Claimant had bypass surgery 09-24-07. Approximately one (1) week prior to such surgery, Claimant came to her office to turn in paperwork regarding leave. At that time, Ms. Yancey asked him to complete paper work regarding a workers' compensation

claim, but he refused stating he did not wish to file under workers' compensation as he desired to continue with his own physicians. Ms. Yancey gave him the notice of job injury, asked him to think about it and get back to her if he changed his mind. Thereafter on 10-11-07 he returned the first report of injury and she submitted the same to PGCS also on 10-11-07. Ms. Yancey testified Claimant was paid his full salary via sick leave benefits from 09-05-07 until he returned to work 02-04-08.

7. Cathy Meeks is employed by the carrier as adjuster in this matter. Ms. Meek's testified the first benefit payment was dated 11-07-07 and mailed to Claimant 11-08-07 for TTD benefits from 09-05-07 to 11-06-07 plus penalties and interest. Claimant was also sent a letter on 11-08-08 advising the E/C was invoking the 120 day pay and investigate provision of the workers' compensation act. Additional indemnity payments were made thereafter from 11-07-07 until 02-25-08. On 03-06-08, the carrier served its Notice of Denial (DWC-12) of the claim in its entirety. Since that time, the E/C made payment on 08-19-08 to Northwest Florida Heart Group, on 09-23-08 to West Florida Regional Medical and on 10-30-08 to Cardiology Consultants (medical records). There was no evidence introduced nor even argument made these medical payments were on Claimant's behalf or whether such were for IME physicians retained by the E/C.

8. Dr. Jay Varenholt was apparently Claimant's family physician and his records reveal a gradual increase in Claimant's blood pressure from 09-09-97 until he was diagnosed with hypertension on 02-24-00 and prescribed medication. At that time, Claimant advised the doctor his father and uncle had early onset heart disease and that his father had a heart attack at 39. It was noted at the subsequent visit on 03-09-00 Claimant's cholesterol was over 400 and his triglycerides were around 3,600 and that aggressive action was needed. On 04-06-00, his triglycerides were 4,230 and the doctor prescribed Tricor. By 05-18-00 the doctor noted Claimant's blood pressure was well managed and his triglycerides were down to 667. The 03-29-01 visit indicated essentially normal blood pressure and the last record of 04-24-01 indicates Claimant's insurance was changing and he could no longer return to Dr. Varenholt.

9. Dr. Thomas Paine is board certified in internal medicine and cardiology and was Claimant's IME in this matter. He initially saw Claimant 08-23-07 with a four month history of chest discomfort. Claimant was noted to have a history of hypertension, abnormal cholesterol and triglycerides, family history of heart disease and being a smoker. A heart catheterization was performed 09-05-07 indicating extensive three vessel coronary disease followed by triple coronary bypass surgery on 09-24-07 by Dr. Bailey. According to Dr. Paine, Claimant was disabled from 09-05-07 until eight (8) weeks after his bypass surgery. A second catheterization was performed 10-07-08 following an abnormal stress test. It was Dr. Paine's opinion Claimant is not yet at MMI.

10. Dr. Paine testified Claimant advised him of stress he experiences due to his work. According to Dr. Paine, he believes stress plays a role in coronary disease and is one of the many risk factors present in this case. He cannot say Claimant's job stress did or did not contribute to his heart disease, as with all the other risk factors, stress was merely one of the many risk factors present in this instance. According to Dr. Paine, there are individuals with all of

the risk factors who never develop heart disease. “[O]ur understanding of the pathogenesis of the disease is incomplete...there’s no definitive answer to why we get coronary disease. Although... the more risk factors you have, the more likely you are to have the disease... We think that coronary disease is more likely if patients have high blood pressure, diabetes, high cholesterol, they smoke, and they have a strong family history... I don’t think that there is a particular cause, there are associations but not causes.”

11. Dr. Paine is of the opinion that diabetes, which Claimant does not have, is the strongest risk factor. Another major risk factor is family history and Claimant’s father and the aunts and uncles on his father’s side have sustained myocardial infarctions. He testified an individual as a smoker, is at higher risk to have heart disease than someone who does not smoke. However, Dr. Paine testified he does not smoke, but does have heart disease as well. With regards to risk factors, Dr. Paine agreed the presence of risk factors makes it more likely that someone may have or develop heart disease and “if you have a population that doesn’t smoke, that is not diabetic, is not hypertensive, does not have dyslipidemia, and everyone in their family lives to be 100 years old, they’re a lot less likely to have coronary disease.”

12. E/C argues Dr. Paine testified that as a result of Claimant’s risk factors, there is a 90% chance he would develop heart disease and only a 10% chance he would not. I find this was not what Dr. Paine testified to. Rather, what Dr. Paine was saying was if someone in his waiting room complaining of symptoms of heart disease and who had risk factors similar to Claimant, 90% of the time such individual would have heart disease. Such statement is not, as the E/C suggests, the same as stating someone with Claimant’s risk factors will develop heart disease 90% of the time. What the doctor was addressing was the diagnosis, not the cause as the E/C suggests. In fact, Dr. Paine testified he does not know what causes heart disease and the more risk factors an individual has, the greater the risk such individual may develop heart disease. He was clear that he had no opinion as to what caused Claimant’s heart disease and believed it would be extremely difficult for any physician to state what risk factors caused Claimant or anyone else, to develop heart disease.

13. Dr. Cesar Yepes is board certified in internal medicine and practices in cardiology. He was the E/C’s IME and examined Claimant 09-04-08 diagnosing coronary artery disease, coronary bypass surgery, a history of hypertriglyceridemia, hypertension, smoking and a family history of heart disease.

14. Dr. Yepes identified five (5) basic risk factors for developing heart disease; hypertension, dyslipidemia, smoking, family history and diabetes and while Claimant does not have diabetes, he does have four (4) of the five (5) risk factors. He also stated that the greater the number of risk factors an individual has, the greater the likelihood he or she will develop heart disease.

15. Addressing these risk factors, Dr. Yepes testified the most significant are diabetes and smoking, and while Claimant does not have diabetes, his smoking alone “would be sufficient... to have the heart disease that he presents

with last year.” While Dr. Yepes testified “[c]ause is one thing and risk factors (are) another thing” and that an individual with all the risk factors may never develop heart disease, he was of the opinion the cause of Claimant’s heart disease, within a “high likelihood of probability”, was his severe dyslipidemia and heavy smoking. Specifically, he opined that 50% to 60% of the direct cause of Claimant’s heart disease was the combination of his hypertriglyceridemia and smoking while hypertension was 20%. Regarding stress, Dr. Yepes testified while the same may have contributed to his high blood pressure, considering his hypertriglyceridemia and smoking, even had Claimant not worked in a stressful environment “he will get what he has.”

16. Ch. 112.18, F.S. provides as follows:

(1) Any condition or impairment of health of any Florida state, municipal, county, port authority, special tax district, or fire control district firefighter or any law enforcement officer or correctional officer as defined in s. 943.10(1), (2), or (3) caused by tuberculosis, heart disease, or hypertension resulting in total or partial disability or death shall be presumed to have been accidental and to have been suffered in the line of duty unless the contrary be shown by competent evidence. However, any such firefighter or law enforcement officer shall have successfully passed a physical examination upon entering into any such service as a firefighter or law enforcement officer, which examination failed to reveal any evidence of any such condition.

The Supreme Court in Caldwell v. Division of Retirement, 372 So.2d 438, 441 (Fla. 1979) held this presumption relieves firemen and police of the necessity of proving causation of the disease and “cast on the employer the burden of persuading the trier of fact that the disease was caused by a non-occupational related agent.”

17. To be entitled to such presumption, a claimant must prove each of the four (4) elements: (1) he/she is a member of the protected class; (2) he/she passed a pre-employment physical indicating the disease was not then present; (3) he/she has since such time been diagnosed with the disease; and (4) the disease has resulted in disability. The parties have stipulated that each of these four (4) elements has been satisfied in this instance. As a result, the burden of proof shifts to the E/C to offer evidence sufficient to rebut the presumption Claimant’s heart disease is work related. In order to satisfy such burden, the E/C must present evidence sufficient to persuade “the trier of fact that the disease was caused by a non-occupationally related agent”, Caldwell, 372 So.2d at 441; “evidence that convinces a JCC that the disease was caused by some non-work related factor”, Saldana v. Miami-Dade County, 978 So.2d 823 (Fla. 1st DCA 2008); or “evidence that the disease was caused by a specific non-work-related event or exposure,” Butler v. City of Jacksonville, 980 So.2d 1250 (Fla 1st DCA 2008). Whether the evidence necessary to rebut the presumption must be clear and convincing or merely competent and substantial, “simply submitting evidence creating a conflict... (does)... not rebut the presumption,” Jones v. Dept. of Health and Rehabilitative Services, 552 So.2d 926, 928 (Fla. 1st DCA 1989). “The presumption would be meaningless if the only evidence necessary to overcome it is evidence that there has been no specific occupationally related event that caused the disease.” Caldwell, 372 So.2d at 441.

18. It is the E/C contention there are two (2) separate standards for rebutting the presumption which arises under Ch. 112.18(1). First, if a claimant relies solely upon the presumption and presents no evidence his work contributed in any way to his heart disease, the E/C may rebut the presumption by presenting competent substantial evidence. Second, if a claimant presents some evidence his work contributed to his heart disease, the E/C must present clear and convincing evidence to rebut the presumption. The E/C in the instant matter contends Claimant has presented no objective medical evidence of any work related cause for his heart disease and therefore E/C is thus only required to present competent substantial evidence to rebut the presumption and that it has done so in this instance.

19. I find Dr. Paine and Dr. Yepes are in agreement Claimant has numerous risk factors which the medical community considers as contributing factors in the development of heart disease. Both physicians agree an individual may however, have heart disease with none of the various risk factors, or may have all such risk factors yet never develop heart disease. Both were also of the opinion an individual with numerous risk factors is more likely to develop heart disease than an individual with no risk factors. However, while Dr. Paine testified there is no medical means of measuring the extent to which any risk factor may have caused or contributed to Claimant developing heart disease, Dr. Yepes testified two (2) of Claimant's risk factors, smoking and hypertriglyceridemia, were 50% to 60% the direct cause of his heart disease. As I accept both physicians' statements there is a distinction between risk factors and cause, I find it difficult to accept Dr. Yepes' opinion that two (2) specific risk factors are in fact the cause of Claimant's heart disease. Rather, I find he has made a leap of faith based upon personal opinion, not medical science to which he himself testified, i.e. "[c]ause is one thing and risk factors (are) another thing." Despite this, I accept the basic premise of both physicians testimony that the totality of Claimant's risk factors is the likely cause of his having developed heart disease.

20. In enacting the heart/lung statute, the legislature must have been aware of the medical community's opinion, as expressed by Drs. Paine and Yepes, that risk factors similar to those in the instant matter, are considered substantial factors in the development of heart disease. Despite such or perhaps in response thereto, the legislature made a determination that appropriate public policy was to provide corrections officers, such as Claimant, with a presumption his heart disease was the result of his work activities.

21. I do not find it necessary to determine whether the burden on the E/C, in rebutting such presumption, is to present evidence which is merely competent and substantial or evidence which is clear and convincing. Clearly the lesser burden is one of competent and substantial evidence, and in this instance, I find the E/C has failed to present sufficient competent substantial evidence to rebut the presumption. While the E/C may not be required to offer evidence of some other specific non-occupational hazard, see, Lentini v. City of West Palm Beach, 980 So.2d 1232 (Fla 1st DCA 2008) and Saldana, certainly something more than a litany of known risk factors is necessary to convince the JCC the disease was caused by some non-work related agent or factor. In Lentini, claimant had a congenital heart defect which medical testimony established caused his condition, not his work. In City of Temple Terrace v. Bailey,

481 So.2d 49 (Fla. 1st DCA 1995), normal progression of claimant's congenital heart condition was determined to be the cause, not work. In Saldana, claimant had a pre-disposition to hypertension; its onset occurred before his employment; he failed to obtain treatment; the development of his hypertensive heart disease resulted from such untreated hypertension; and the JCC determined none of these factors had anything to do with his work duties. The evidence in these three (3) cases is the type which has convinced and persuaded JCC's that the disease at issue, whether hypertension or heart disease, arose from non-work related events and circumstances and is thus sufficient evidence to rebut the presumption. Unlike the three (3) cases cited above, here there is no evidence of a congenital problem or that Claimant failed to care and treat a known medical condition thereby causing or greatly contributing to the development heart disease. More specifically, unlike Saldana, the medical records of Dr. Varenholt reveal that once Claimant was diagnosed with hypertension and high triglycerides, he received and took medications and changed his diet. As a result, his pressure has been controlled and his triglyceride level has decreased. As the only evidence presented in the instant matter was the existence of risk factors which I find without more, to be insufficient in convincing this JCC Claimant's heart disease was the result of some non-work activity, factor, event or exposure sufficient to rebut the statutory presumption.

22. To find, as the E/C suggest, that presenting evidence of risk factors alone is sufficient to overcome the presumption would render the statutory presumption meaningless to the vast majority of police officers. If the E/C were correct, the only officers likely to benefit from the presumption would be those young enough that they have not yet developed high blood pressure, diabetes, high cholesterol, weight gain, or stress from years of service in a hazardous, anxious, dangerous and difficult job which the legislature singled out in enacting Ch. 112.18(1), F.S.

23. While the E/C has conceded Claimant is entitled to the presumption with regards to his heart disease, the E/C did not concede the presumption applicable to his hypertension as there is no evidence of disability due to such condition. See, Miller v. City of Delray Beach Police Dept., 920 So.2d 768 (Fla. 1st DCA 2006). As no evidence has been presented of any disability at any time as a result of Claimant's hypertension, the presumption does not apply. However, as his hypertension may at some time in the future result in disablement, the same should be denied without prejudice. However, the E/C concedes if Claimant's heart disease is compensable, and it is, then the E/C would be required to provide care and treatment for Claimant's hypertension as such is a hindrance to necessary care and treatment of the compensable heart condition. As a result, Claimant's claim for compensability of his hypertension should be granted.

24. As the E/C has failed to present even competent substantial evidence to rebut the presumption, discussion of the 120 day rule is unnecessary. However, Ch. 440.20(4), F.S. requires the E/C "admit or deny compensability within 120 days after the initial provision of compensation. . . . A carrier that fails to deny compensability within 120 days after the initial... payment of compensation waives the right to deny compensability, unless the carrier can establish material facts relevant to the issue of compensability that it could not have discovered through reasonable investigation within the 120-day period." At the earliest, the initial provision of compensation was 11-07-07 the date of the first

indemnity check. As the E/C denied the claim in its entirety on 03-06-08, exactly 120 days thereafter, such denial was timely. As a result, the 120 day rule is not applicable.

It is,

ORDERED AND ADJUDGED that:

1. Claimant's claim for compensability of his heart disease is **GRANTED**. Claimant is entitled to attorney's fees and taxable costs for the prosecution of such benefit, and they are **GRANTED**. Jurisdiction is reserved for determination of the appropriate amount of such fees and costs.
2. Having determined Claimant's heart disease compensable, Claimant's claim for compensability of his hypertension is **GRANTED**. Claimant is entitled to attorney's fees and taxable costs for the prosecution of such benefit, and they are **GRANTED**. Jurisdiction is reserved for determination of the appropriate amount of such fees and costs.
3. Claimant's claim for authorization of a cardiologist is **GRANTED**. Claimant is entitled to attorney's fees and taxable costs for the prosecution of such benefit, and they are **GRANTED**. Jurisdiction is reserved for determination of the appropriate amount of such fees and costs.

DONE AND ELECTRONICALLY MAILED this 4th day of December, 2008, in Pensacola, Escambia County, Florida.



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