STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF JUDGES OF COMPENSATION CLAIMS
FORT LAUDERDALE DISTRICT OFFICE

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OJCC No: 14-025646DAL
D/A: 11/24/2012
JUDGE: Daniel A. Lewis

FINAL COMPENSATION ORDER

AFTER DUE NOTICE to the parties, a Final Merits Hearing was conducted before the undersigned Judge of Compensation Claims (JCC) on September 2, 2015 in Lauderdale Lakes, Broward County, Florida. The petition for benefits which came on for adjudication was filed on November 4, 2014. The parties stipulated as follows:

A. The undersigned has jurisdiction of the parties and of the subject matter.

B. Notice of hearing was timely afforded to the proper parties.

C. Venue lies in Broward County, Florida.

D. The claimant's accident of November 24, 2012 and hypertensive condition were initially accepted by the employer/carrier pursuant to the pay and investigate provision of section 440.20(4), Fla. Stat. The employer/carrier subsequently denied the compensability of the claimant's accident and hypertension.

E. There was an employer – employee relationship on the claimed date of accident.

F. Notice of the accident/injury was timely given.

G. The claimant's average weekly wage is not at issue. The claimant stipulates to the average weekly wage as calculated by the employer in the amount of $1275.52.

H. The date of the claimant's attainment of maximum medical improvement (MMI) was not an issue for this Final Hearing.

I. There was no agreement by the parties to handle the payment of the claimed outstanding medical bills administratively.

J. Claim was made for:

1. A determination of the compensability of the claimant's disabling arterial and cardiovascular hypertension and/or heart disease pursuant to section 112.18, Fla. Stat.

2. Authorization of care and treatment with a cardiologist for arterial and cardiovascular hypertension.

3. Reimbursement of the medical bills of the Cleveland Clinic in the amount of $6216.40 for dates of service November 24, 2012 and November 25, 2012.

4. Also claimed were attorney's fees and costs.

K. The employer/carrier asserted as defenses that:

1. The entire claim is denied.

2. The claimant's employment is not the major contributing cause of his condition or need for medical care and treatment with a cardiologist.

3. The employer/carrier objects to the claimant's listing arterial and cardiovascular hypertension and/or heart disease interchangeably.

4. Section 112.18 and 440.09, Fla. Stat., defenses.

5. No documentation to support the bills for dates of service November 24, 2012 and November 25, 2012 in the amount of $6216.40 are causally related to the claimant's employment.

6. The employer/carrier also asserted a general denial to the claim for attorney's fees and costs.

After careful consideration and review of the testimony, documentary evidence and argument presented, the following are my findings of ultimate facts and conclusions of law:

1. This claimant is a 48 year old man, date of birth November 24, 1966, who began his employment as a deputy sheriff with the Broward Sheriff's Office (BSO) in July, 2006. The claimant was and is employed with the BSO as a road patrol deputy, handling matters of domestic violence, burglaries in progress, traffic enforcement and civil disobedience.

2. Deputy Gonzalez testified that on November 24, 2012, he was working the 2:00 p.m. to 10:00 p.m. shift. He was assigned to a road patrol unit. According to the claimant, he began to feel ill and felt flushed. He testified he experienced a feeling of pressure in his head and eyes along with a severe headache. Deputy Gonzalez spoke with his supervisor, who told him to go to a nearby fire station. At the fire station, the claimant's blood pressure was taken and an EKG was administered. Deputy Gonzalez was immediately sent to the Cleveland Clinic, where he was admitted.

3. Deputy Gonzalez testified that before being hired for the BSO in 2006, he had never been diagnosed with high blood pressure or hypertension or told that he had heart disease. In December, 2010, prior to the date of the November 24, 2012 incident herein, the claimant was advised that he had high blood pressure, and he began treatment for that condition. Deputy Gonzalez testified that he took his blood pressure medication as prescribed.

4. The claimant seeks a determination of the compensability of his hypertension under section 112.18, Fla. Stat., the "Heart and Lung Bill." That statute creates a rebuttable presumption of occupational causation for disabling heart disease suffered by correctional officers and law enforcement officers (among others) who meet certain prerequisites. Walters vs. State of Florida – DOC, 100 So. 3d 1173 (Fla. 1st DCA 2012). In the absence of stipulated facts, the statute requires proof that the claimant was employed as a law enforcement officer, fireman or other covered employee, that he suffered from a condition or impairment caused by tuberculosis, heart disease or hypertension which resulted in disability or death, and that he passed a physical examination upon entering into service as a law enforcement officer or other covered position, which failed to reveal any evidence of the disabling disease. Walters vs. State of Florida – DOC, 100 So. 3d at 1175. The claimant relies solely on the presumption to establish occupational causation.

5. Here, there is no dispute that the claimant is a law enforcement officer, a member of a covered or protected class. There is also no dispute that the claimant underwent a pre-employment physical upon entering into service with the BSO which failed to reveal any evidence of hypertension or heart disease. However, there is a dispute as to whether the claimant's hypertension is a covered condition and whether the hypertension resulted in disability. The employer/carrier also asserts that the presumption of occupational causation has been rebutted by the medical evidence. *See* Miami-Dade County vs. Mitchell, 159 So. 3d 172 (Fla. 1st DCA 2015). The employer/carrier further argues that the "reverse presumption" contained in section 112.18(1)(b), Fla. Stat., applies.[1]

[1] The employer/carrier also argued, at this hearing and in its Trial Memorandum, that the claimant suffered a similar episode of hypertensive headaches in December, 2010, that a prior claim for that incident had been filed by the claimant and voluntarily dismissed, and that the statute of limitations has run on that claim. Therefore, according to the employer/carrier, the "presumption" is that the December, 2010 event is

6. Case law instructs us that the presumption in section 112.18, Fla. Stat., applies only to arterial or cardiovascular hypertension. Bivens vs. City of Lakeland, 993 So. 2d 1100 (Fla. 1st DCA 2008), Williams vs. City of Orlando, 89 So. 3d 302 (Fla. 1st DCA 2012). In this regard, the claimant presented the testimony of his independent medical examiner, Dr. Borzak. Dr. Borzak is board certified in internal medicine with a subspecialty in cardiovascular disease, and is well qualified in his field.

7. Dr. Borzak testified the claimant was diagnosed with high blood pressure in December, 2010. Since then, the claimant has been on blood pressure medication. Dr. Borzak diagnosed the claimant with essential or primary hypertension, which means the cause cannot be determined. Dr. Borzak explained that secondary hypertension is where the cause can be identified. According to Dr. Borzak, essential hypertension is also known as arterial or cardiovascular hypertension.

8. The employer/carrier presented the testimony of cardiologist Dr. Perloff, who was initially authorized to treat. Dr. Perloff is also board certified and has excellent qualifications. Dr. Perloff saw the claimant on seven occasions, dating from December 3, 2012 to February 5, 2014. Dr. Perloff also diagnosed hypertension. However, Dr. Perloff expressed his concern as to whether the claimant is truly hypertensive or whether his hypertension is testosterone induced; that is, secondary hypertension.

9. It should be noted here that the claimant has been treated with testosterone since 2008 for complaints of impotency and erectile dysfunction. This treatment has been managed by the claimant's treating urologist, Dr. Simon. Deputy Gonzalez testified that he initially was

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unrelated to the claimant's employment, and the medical condition now claimed stems from the same condition. I note that the compensability of the December, 2010 incident was never adjudicated, nor did the employer/carrier here raise the expiration of the statute of limitations as an affirmative defense to the instant claim for compensability of the November 24, 2012 accident. Consequently, I reject this argument.

prescribed Androgel, which is applied topically. In 2010, the claimant began taking testosterone injections. The injections were initially administered by Dr. Simon; later, Dr. Simon allowed the claimant to self administer the shots. The claimant testified that his wife works for a cardiologist as a nurse and administers his testosterone injections.

10. Significantly, Dr. Perloff did not testify that the claimant's hypertensive condition, even if testosterone induced, was not arterial or cardiovascular hypertension. Dr. Perloff merely testified that if the claimant's testosterone use is causing his hypertension, then it would be considered secondary hypertension. According to Dr. Perloff, a diagnosis of essential or primary hypertension is premature until all possible secondary causes, including the claimant's use of testosterone, have been excluded. However, Dr. Perloff testified the claimant is unwilling to stop the testosterone treatment which, as stated, was prescribed by his treating urologist for diagnosed medical conditions.

11. I choose to accept the medical testimony and opinions of Dr. Borzak over those of Dr. Perloff in this regard. Case law tells us that the JCC may accept the medical opinion testimony of one physician over that of another, so long as it does not appear that the JCC ignored or overlooked contrary testimony. Chavarria vs. Selugal Clothing, Inc., 840 So. 2d 1071 (Fla. 1st DCA 2003), White vs. Bass Pro Outdoor World LP, 16 So. 3d 992 (Fla. 1st DCA 2009). I find that the claimant's hypertensive condition is one of the conditions covered by the presumption of section 112.18(1), Fla. Stat.

12. The final statutory prerequisite for application of the presumption is that the hypertension resulted in total or partial disability. Case law instructs us that disability results where a claimant is medically restricted from working so as to avoid potential further injury or death due to his tuberculosis, heart disease or hypertension. Rocha vs. City of Tampa, 100 So. 3d

138 (Fla. 1st DCA 2012). Disability occurs when the employee becomes actually incapacitated, partially or totally, from performing his employment. Carney vs. Sarasota County Sheriff's Office, 26 So. 3d 683 (Fla. 1st DCA 2009).

13. Here, the claimant experienced a hypertensive episode while on road patrol duty. He was sent from the fire station to the Cleveland Clinic hospital and was admitted for treatment and testing. The medical records reflect the claimant was diagnosed with hypertensive headache and the reason for admission was due to an abnormal CT scan of the brain. Deputy Gonzalez testified the physicians at the Cleveland Clinic were concerned he may have suffered a stroke. While in the hospital, the claimant was incapable of performing his duties as a policeman and, therefore, did not have the actual capacity to earn his wages as a policeman, regardless of whether or not he was actually paid his wages. City of Mary Esther vs. McArtor, 902 So. 2d 942 (Fla. 1st DCA 2005), Martz vs. Volusia County Fire Services, 30 So. 3d 635 (Fla. 1st DCA 2010).

14. The medical records of the Cleveland Clinic further reflect that the claimant was advised upon discharge to resume pre-hospital activity, except for lifting heavy weights or climbing ladders. The claimant was also instructed to refrain from sexual activity until a subsequent MRI was completed. Dr. Borzak testified it would be ill-advised for police officers to perform their duties if their blood pressure is markedly elevated.

15. Based on the foregoing, I find that the claimant's hypertension resulted in disability. I find the claimant has met the statutory prerequisites for application of the presumption. A claimant's burden of proving major contributing cause by medical evidence is fully met where the presumption applies. Fuller vs. Okaloosa Correctional Institution, 22 So. 3d 803 (Fla. 1st DCA 2009).

16. The employer/carrier next asserts that the presumption has been rebutted. Under the case law, the presumption is itself sufficient to support an ultimate finding of industrial causation unless overcome by evidence of sufficient weight to satisfy the trier of fact that the tuberculosis, heart disease or hypertension had a non-industrial cause. It is the evidence of non-industrial causation that may be found to rebut the presumption, not the mere existence of risk factors or conditions. Punsky vs. Clay County Sheriff's Office, 18 So. 3d 577 (Fla. 1st DCA 2009), Fuller vs. Okaloosa Correctional Institution, 22 So. 3d at 806.

17. In addition, the employer, in rebutting the presumption, must disprove occupational causation by medical evidence. Fuller vs. Okaloosa Correctional Institution, 22 So. 3d at 806, Miami-Dade County vs. Mitchell, 159 So. 3d 172 (Fla. 1st DCA 2015). Here, the employer/carrier must demonstrate, by medical testimony established within a reasonable degree of medical certainty, that the claimant's hypertension was caused by some non-work related factor. Fuller vs. Okaloosa Correctional Institution, 22 So. 3d at 806, Lentini vs. City of West Palm Beach, 980 So. 2d 1232 (Fla. 1st DCA 2008). Where the claimant presents some medical evidence of occupational causation; for example, that his job as a police officer contributed to his hypertension, the employer can only rebut the presumption with clear and convincing evidence of a specific non-work related cause. However, if the claimant relies exclusively upon the statutory presumption and presents no corroborating or supporting medical evidence of occupational causation, all that is needed to rebut the presumption is competent and substantial evidence. Punsky vs. Clay County Sheriffs Office, 18 So. 3d 577 (Fla. 1st DCA 2009, Lentini vs. City of West Palm Beach, 980 So. 2d 1232 (Fla. 1st DCA 2008), Thomas Vecchio and Kellie Hastings (as amended by Alan Kalinoski and Tonya Oliver), The 2015 Florida Bar Workers' Compensation Forum course book, "*Government Employees and Presumptions*," p. 218 (2015).

18. I find that here, in order to rebut the presumption, the employer/carrier must show by competent medical evidence that the claimant's hypertension was caused by some non-work related factor. In this regard, I again turn to the medical opinion testimony of Dr. Borzak and Dr. Perloff.

19. Dr. Borzak testified that the role of testosterone is controversial in terms of its relationship to blood pressure. According to Dr. Borzak, while there is medical literature that the use of testosterone raises blood pressure, here, the claimant was taking testosterone for a documented testosterone deficiency and a clinical diagnosis of hypogonadism. Dr. Borzak testified that in such cases, studies reveal testosterone may raise or it may act to lower blood pressure. Dr. Borzak concluded that testosterone may be a risk factor for hypertension but it was not clearly a cause. According to Dr. Borzak, the use of testosterone cannot be identified as the cause of the claimant's hypertension although it possibly could have contributed to it.

20. Dr. Perloff testified that the use of testosterone in higher doses can cause polycythemia, or an elevation in red blood cell count, and the claimant has evidence of that. Dr. Perloff testified he reviewed the records from the claimant's urologist, and expressed his opinion that the claimant did not have hypogonadism, or diminished testosterone production.[2] According to Dr. Perloff, the medical literature supports that people who use testosterone in large doses are at an increased risk for cardiovascular problems, including strokes and hypertension.

21. However, Dr. Perloff admitted he was unaware of how much testosterone the claimant was actually taking. Dr. Perloff also admitted that the medical records contained no indication that the claimant was not compliant with taking the medication as prescribed by his urologist. Deputy Gonzalez testified that he administered the testosterone injections in accordance with the directions of his treating urologist.

[2] As pointed out by the claimant, Dr. Perloff is not a urologist or an endocrinologist.

22. Significantly, Dr. Perloff did not opine that the use of testosterone caused the claimant's hypertension. Contrary to the employer/carrier's assertions, Dr. Perloff did not testify that the major contributing cause of the claimant's hypertension or need for treatment for same was due to testosterone use. Instead, Dr. Perloff testified that, in his opinion, the claimant's testosterone usage exacerbated his hypertension and aggravated his underlying hypertension. Dr. Perloff also admitted there was no objective medical evidence to establish the claimant's testosterone use in fact increased his blood pressure and that it would be mere speculation on his part to state that discontinuing the testosterone would reduce the claimant's blood pressure. Dr. Perloff further testified that a person could be on testosterone therapy without it affecting their blood pressure.

23. I find that here, the medical evidence does not support that the claimant's hypertension was caused by some non-work related factor. LeBlanc vs. City of West Palm Beach, 72 So. 3d 181 (Fla. 1st DCA 2011) (citing Fuller and holding that to rebut the presumption, the employer/carrier is required to affirmatively demonstrate non-work related cause). I accept the medical opinions of Dr. Borzak that, while the use of testosterone may be a risk factor, it was not a cause of the claimant's hypertension.

24. The employer/carrier next asserts that the "reverse presumption" contained in section 112.18(1)(b), Fla. Stat., applies. That section provides, in pertinent part, that a law enforcement officer suffering from tuberculosis, heart disease or hypertension is presumed not to have incurred such disease in the line of duty if the law enforcement officer "Departed in a material fashion from the prescribed course of treatment of his or her personal physician and the departure is demonstrated to have resulted in a significant aggravation of the tuberculosis, heart disease or hypertension resulting in disability or increasing the disability or need for medical

treatment." The employer/carrier relies on the testimony of Dr. Perloff that the claimant's refusal to stop taking testosterone or to see an endocrinologist was a material departure from Dr. Perloff's medical recommendation, resulting in a significant aggravation of his underlying hypertension. I reject this assertion.

25. Here, the claimant's medical conditions of impotence and erectile dysfunction are managed by his treating urologist, Dr. Simon. There was no medical testimony presented that the claimant departed in a material fashion from Dr. Simon's prescribed course of treatment for those medical conditions. Dr. Perloff did not treat the claimant for those conditions. In addition, the claimant testified he has been compliant with Dr. Simon's course of treatment or care, and his dosage of testosterone is limited by prescription. The claimant testified he has been taking and administering his medication as prescribed Dr. Simon. While Dr. Simon's treatment may be placing the claimant at risk for the possible development of other conditions, I find that such does not constitute a material departure from the prescribed course of treatment as contemplated by section 112.18(1)(b), Fla. Stat.

26. Based on the foregoing, the claimant's claim for a determination of the compensability of his hypertension pursuant to section 112.18, Fla. Stat., shall be, and the same is hereby, granted. The claimant also seeks authorization of care and treatment with a cardiologist for the hypertension. Since I find this care to be reasonable and causally related to the claimant's compensable hypertensive condition, this claim shall also be granted. Copeland Steel Erectors vs. Miles, 483 So. 2d 107 (Fla. 1st DCA 1986), Selecta Forms vs. Martinez, 768 So. 2d 1272 (Fla. 1st DCA 2000).

27. The claimant next seeks payment or reimbursement for the medical bills of the Cleveland Clinic for dates of service November 24, 2012 and November 25, 2012. Dr. Borzak

testified that the care rendered at the Cleveland Clinic was reasonable and appropriate for the treatment of the claimant's uncontrolled hypertension. However, the medical bills themselves were not admitted into evidence, and the parties did not stipulate to handle their payment administratively.

28. Case law instructs us that an order directing payment of medical bills is improper unless the medical bills are placed in evidence or there is clear and unequivocal testimony as to the amount of the bills. Thomas vs. Yoder Brothers, 882 So. 2d 442 (Fla. 1st DCA 2004), Town & Country Farms vs. Peck, 611 So. 2d 63 (Fla. 1st DCA 1992), Metropolitan Dade County vs. Moss, 568 So. 2d 492 (Fla. 1st DCA 1990). A plaintiff may himself testify as to the amount of his medical bills. Irwin vs. Blake, 589 So. 2d 973 (Fla. 4th DCA 1991).

29. Here, the claimant testified he received two bills from the Cleveland Clinic for dates of service November 24, 2012 and November 25, 2012. The claimant testified as to the treatment which he received at that hospital, which included a CT scan of the brain for evaluation of a possible stroke. The claimant testified the bills were in the amounts of $4419.40 and $1517, respectively, for the two dates of service. According to the claimant, these bills remain outstanding and have not been paid by his group health insurance.

30. I find the claimant's testimony, coupled with the testimony of Dr. Borzak, establishes that the treatment rendered at the Cleveland clinic was reasonable, medically necessary and causally related to the claimant's hypertensive condition. I find the bills to properly be the responsibility of the employer/carrier to pay. The claim for payment of the medical bills of the Cleveland Clinic in the total amount of $5936.40 for dates of service November 24, 2012 and November 25, 2012 is hereby granted.

31. Since the employer/carrier denied that an injury by accident occurred for which compensation benefits are payable, and the claimant has prevailed on the issue of compensability, I find that the claimant is entitled to recover his attorney's fees and taxable costs from the employer/carrier pursuant to section 440.34(3), Fla. Stat. Jurisdiction is reserved to determine the amount of the fee and costs due.

DONE AND ORDERED at Lauderdale Lakes, Broward County, Florida this 11th day of September, 2015.

Honorable Daniel A. Lewis
Judge of Compensation Claims

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Final Compensation Order was furnished this 11th day of September, 2015 by electronic transmission to the parties' counsel of record and by U.S. mail to the parties.

Secretary to Judge of Compensation Claims