

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
FT. MYERS DISTRICT OFFICE

Darrel Grabner,
Employee/Claimant,

OJCC Case No. 15-001373WWA

vs.

Accident date: 8/8/2014

Office of the Inspector General /Division of
Risk Management,
Employer/Carrier/Servicing Agent.

Judge: Wilbur W. Anderson

COMPENSATION ORDER

Because the Employer/Carrier failed to rebut the presumption arising under section 112.18(1)(a), Florida Statutes, I conclude Claimant's coronary artery disease is compensable.

PROCEDURAL BACKGROUND

This case, venued in the Ft. Myers district, was assigned to the undersigned on May 25, 2016, following Judge Kathy Sturgis's retirement. The final hearing was conducted by video teleconference on June 14, 2016. Jason L. Fox appeared for Claimant. Jonathan L. Cooley appeared for the E/C.

CLAIMS

PFB Division filing date: 1/21/2015

1. Payment of TTD/TPD, as appropriate from 8/8/2014 to the present and continuing at the correct rate. *Claimant's counsel conceded at the final hearing that his client is not entitled to these benefits at this time.*
2. Authorization and payment for evaluation and treatment with a board certified cardiologist and board certified primary care physician to treat the cardiovascular conditions.
3. Compensability of the claimant's hypertension, coronary artery disease, heart attack and stents pursuant to Florida Statue §112.18. *The claim for compensability of hypertension was not*

pursued. The claims for compensability of the heart attack and stents flows from the coronary artery disease claim.

4. A \$2000.00 advance and PICA to be paid by the E/C/SA pursuant to §440.32 and §440.34, Florida Statutes. *Claimant's counsel did not pursue this claim.*

PFB Division filing date: 11/2/2015 *At the final hearing, the parties agreed this PFB had not been pretried and that I should reserve jurisdiction to determine these claims at a later date.*

1. Payment of impairment benefits from May 13, 2015 to present and continuing based upon the ratings assigned by the independent medical examiners to be paid at the correct compensation rate based upon the wage statement.

2. Penalties, interest, costs and attorney fees.

DEFENSES

The Employer/Carrier disputes the presumption of §112.18, Florida Statutes applies. If the §112.18, Florida Statutes, presumption applies, the Employer/Carrier will rebut the presumption. The Claimant's employment is not the cause or the major contributing cause of the Claimant's medical condition or disability, if any disability exists. The Claimant's condition is personal in nature and not related to employment. As such, temporary indemnity benefits are not due and owing. The Claimant has not sustained an ongoing loss of earnings. Medical treatment is not due and owing. The Claimant is not entitled to an advance. Penalties, interest, costs and attorney's fees are not due and owing.

1. Temporary benefits are not due and owing based on the above. The Claimant has not sustained an ongoing loss of earning.

2. Based on the above, medical treatment is not due and owing.

3. Compensability is denied.

4. Advance is not due and owing.

5. Penalties, interest, costs and attorney's fees is not due and owing.
6. An adjustment to the average weekly wage is not appropriately before the court as it is not the subject of a petition for benefits that has been mediated or pre-tried.

EXHIBITS

JCC Exhibits

1. Pretrial stipulation filed 6/29/15 (27)*
2. Claimant's amendment to the pretrial stipulation filed 7/13/15 (31)
3. Employer/Carrier's amendment to the pretrial stipulation filed 7/13/15 (32)

Claimant Exhibits

1. Memorandum of law filed 1/22/16 (argument only) (64)
2. Supplement to the memorandum of law filed 6/10/16 (86)
3. Medical report by Dr. Patrick Mathias filed 1/20/16 (55)
4. Deposition of Dr. Patrick Mathias taken on 10/8/15, filed 1/20/16 (54)
5. Exhibits to Dr. Patrick Mathias's deposition filed 1/25/16 (66)
6. Pre-employment physical report dated 1/31/06, filed 1/25/16 (67)

E/C Exhibits

1. Memorandum of law filed 1/21/16 (argument only) (59)
2. Memorandum of law filed 6/10/16 (argument only) (88)
3. Deposition of Dr. Michael Nocero Jr., taken on 7/15/15, filed 1/21/16 (60)
4. Exhibits to Dr. Michael Nocero's deposition filed 6/10/16 (91)
5. Deposition of Dr. David Perloff taken on 5/17/16, filed 6/13/16 (93)

Joint Exhibits

1. Petition for benefits filed 1/21/15 (1)

* Numbers in parentheses refer to the OJCC docket number.

2. Response to petition for benefits filed 1/28/15 (4)
3. Petition for benefits filed 11/2/15 (42)
4. Response to petition for benefits filed 12/7/15 (45)
5. Order appointing expert medical advisor entered on 2/5/16 (68)
6. No conflict of interest declaration signed by Dr. David Perloff on 2/16/16 (70)
7. Expert medical advisor's report by Dr. David Perloff dated 3/1/16, filed 3/11/16 (77)
8. Deposition of Darrel Grabner taken on April 22, 2015, filed 6/10/16 (92)

LIVE WITNESSES

Claimant

Darrel Grabner

Employer/Carrier

None

FINDINGS OF FACT

1. The stipulations of the parties are accepted and adopted.
2. Claimant has worked as a senior law enforcement inspector (a sworn law enforcement officer) for Florida's Office of Inspector General since 2006. A pre-employment physical revealed no evidence of heart disease. On August 8, 2014, he was hospitalized. Diagnostic procedures showed a totally occluded right coronary artery. Two stents were placed in the artery. He was placed on a no-work status for five business days. He then returned to work.
3. Dr. Patrick Mathias, Claimant's IME cardiologist, opined that the cause Claimant's coronary artery disease is unknown. Although he identified several risk factors associated with the development of coronary artery disease, he testified those risk factors are not considered the cause of coronary artery disease, and that an actual cause cannot be determined.

4. Dr. Michael Nocero, the E/C's IME cardiologist, also testified that a risk factor for coronary artery disease is not a cause, but qualified that statement by testifying that medical science is "starting to march closer and closer to an actual cause and effect." He also testified that Claimant's constellation of risk factors is the major contributing cause of his coronary artery disease.

5. To resolve the apparent medical dispute over causation, Judge Sturgis entered an order on February 5, 2016, appointing Dr. David Perloff, also a cardiologist, as an EMA. In his report, Dr. Perloff concluded he could not determine the actual cause of Claimant's coronary artery disease. In deposition, however, he agreed with defense counsel that various risk factors (hyperlipidemia, rheumatoid arthritis, hypertension, and diabetes) "came together" to "result" in Claimant's coronary artery disease. But he also agreed with Claimant's counsel that risk factors are not causes and that there is no objective test to determine the cause of coronary artery disease. He testified further that he could not rule out the possibility that Claimant's work as a law enforcement officer could be a five percent risk factor.

CONCLUSIONS OF LAW

1. The initial question is whether Claimant's coronary artery disease is presumed compensable under section 112.18(1)(a), Florida Statutes (2016). To be entitled to the presumption, Claimant must prove (1) he is a member of a protected class, (2) he suffers from one of the conditions within the scope of the presumption, (3) a pre-employment physical did not show evidence of the condition, and (4) the condition resulted in disability or death. The E/C concedes that Claimant, as a law enforcement officer, is a member of a protected class, that coronary artery disease is a condition within the scope of the presumption, and that the condition resulted in disability. Although the E/C does not concede this, based on the medical evidence, including the pre-employment physical itself, I also conclude the pre-employment physical did

not show evidence of coronary artery disease. Consequently, I find the presumption of compensability applies.

2. The presumption is dispositive unless rebutted by medical evidence proving the disease was caused by a specific, non-work-related event or exposure, i.e., some non-work-related factor, or by proof of a specific combination of wholly non-industrial causes. Walters v. State, DOC /Div. of Risk Mgmt., 100 So. 3d 1173, 1174 (Fla. 1st DCA 2012). If, in addition to relying on the presumption, Claimant presents medical evidence of compensability, the E/C bears the burden of presenting clear and convincing evidence to the contrary. Indian River County v. Bellamy, 137 So. 3d 1058 (Fla. 1st DCA 2014); Punsky v. Clay County Sheriff's Office, 18 So. 3d 577 (Fla. 1st DCA 2009) (en banc). If Claimant relies solely on the presumption, the E/C may rebut the presumption by persuading the trier of fact to accept competent evidence to the contrary. Id.

3. Claimant contends the clear and convincing standard applies to rebutting the presumption of compensability because Dr. Perloff's opinions provide some additional medical evidence of occupational causation. I reject this contention because Dr. Perloff only said he could not rule out the possibility that Claimant's work as a law enforcement officer could be a five percent risk factor. This is not evidence of causation. I therefore conclude the E/C's burden is to persuade me to accept competent evidence that Claimant's coronary artery disease was caused by a specific, non-work-related event or exposure, i.e., some non-work-related factor, or by proof of a specific combination of wholly non-industrial causes. Having carefully considered the medical evidence, I am not persuaded.

4. Although at one point in his deposition Dr. Perloff agreed with the E/C's counsel that Claimant's hyperlipidemia, rheumatoid arthritis, hypertension, and diabetes came together to create coronary artery disease, he also agreed with Claimant's counsel that risk factors are not

causes. And in his report Dr. Perloff was clear that he could not determine the actual cause of Claimant's coronary artery disease. Thus, Dr. Perloff's opinion as to causation was equivocal. As such, I have not afforded it the presumption of correctness provided in section 440.13(9)(c), Florida Statutes (2016). Instead, I have used the opinion as a source of assistance and a metric to measure the credibility and weight of the other evidence. See Fitzgerald v. Osceola County School Board, 974 So. 2d 1161, 1164 (Fla. 1st DCA 2008).

5. The one thing Dr. Perloff, Dr. Nocero, and Dr. Mathias agreed on at various points in their respective deposition testimony is that risk factors are not the same as a cause of coronary artery disease. I am unable to square that testimony with Dr. Nocero's statement that Claimant's constellation of risk factors is the major contributing cause of his coronary artery disease. I am also unable to reconcile Dr. Perloff's agreement with the E/C's counsel statement in deposition that various risk factors (hyperlipidemia, rheumatoid arthritis, hypertension, and diabetes) "came together" to "result" in Claimant's coronary artery disease with his opinion that risk factors are not causes. Faced with these contradictions, I conclude the E/C has not carried its burden of proving by competent evidence that a specific combination of wholly non-industrial conditions actually caused Claimant's coronary artery disease.

It is therefore,

ORDERED AND ADJUDGED:

1. Claimant's coronary artery disease is compensable. The E/C is responsible for all medically necessary treatment for that condition.
2. The claim for compensability of hypertension is deemed abandoned.
3. The claim for payment of TTD/TPD benefits is denied.
4. The claim for penalties and interest is denied.
5. Jurisdiction is reserved as to attorney's fees and costs.

6. Jurisdiction is reserved to determine the claims in the petition for benefits filed on November 2, 2015.

DONE AND ELECTRONICALLY TRANSMITTED VIA EMAIL TO THE ATTORNEYS AND CARRIER LISTED BELOW this 14th day of July, 2016, in Daytona Beach, Volusia County, Florida.



Wilbur W. Anderson
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