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

Howard Smith,
Employee/Claimant,

vs.

Jacksonville Sheriff's Office/City of Jacksonville Risk Management,
Employer/Carrier/Servicing Agent.

/

OJCC Case No. 15-008767RJH

Accident date: 11/18/2014

Judge: Ralph J. Humphries

FINAL COMPENSATION ORDER

This Cause came on for a merits' hearing before the undersigned Judge of Compensation Claims on **August 10, 2016** in Jacksonville, Duval County, Florida. The subject matter of this hearing was a petition for benefits filed on April 21, 2015. A mediation conference on the petition was held on September 10, 2015. The claimant, **Howard Smith**, was present and represented by John Rahaim, Esquire. The employer/carrier, **Jacksonville Sheriff's Office/City of Jacksonville Risk Management Division**, hereinafter referred to as the "Employer" or as the "E/C" was represented by Gregory Lower, Esquire. Live testimony was received from the claimant. Additional testimony was received by way of depositions.

The following stipulations have been reached between the parties:

1. The court has jurisdiction of the parties;
2. Venue properly lies in Duval County, Florida;
3. The date of accident is alleged to be November 18, 2014;
4. There was an employer/employee relationship at the time of the accident;
5. Workers' compensation insurance coverage was in effect on the date of accident;
6. Timely notice of the accident, injury, or occupational disease was given by the claimant on the date of accident or was not at issue;
7. Timely notice of the final hearing has been given;

The substantive claims for determination at the current merits' hearing are the

following:

1. Compensability of claimant's heart disease;
2. Compensability of claimant's hypertension; and
3. Penalties, interest, costs, and attorney's fees.

The defenses raised by the E/C were the following:

1. No accident, injury or occupational disease arising out of and in course and scope of employment; and
2. Claimant not entitled to presumption of heart/hypertensive and compensability pursuant to §112.18(1);
3. If claimant meets presumption, E/C rebuts presumption with non-occupational causes of heart disease/hypertension;
4. E/C is entitled to the reverse presumption pursuant to §112.18(1)(b)1; and
5. Penalties, interest, costs, and attorney's fees are not due or owing.

The following documents were admitted into evidence at the current hearing:

Judge's Exhibits:

1. Petition for Benefits filed with DOAH on April 21, 2015;
2. Response to Petition for Benefits, filed with DOAH on April 28, 2015;
3. Pretrial Questionnaire completed by the parties and filed with DOAH on September 2, 2015;
4. Employer/carrier's Motion to Appoint Expert Medical Advisor filed with DOAH on November 23, 2015;
5. Order Granting Employer/Carriers Motion to Appoint EMA filed with DOAH on December 16, 2015;
6. Letter to Dr. Pianko filed with DOAH on December 16, 2015;
7. Dr. Pianko's EMA report filed with DOAH on January 25, 2016;
8. Claimant's Motion to Amend Pretrial Stipulation filed with DOAH on February 4, 2016;
9. Order Granting Motion to Amend Pretrial Stipulation filed with DOAH on
10. Claimant's Prehearing Statement admitted for purposes of argument only and not as evidence, filed with DOAH on August 9, 2016;

11. Employer/Carrier's Trial Memorandum admitted for purposes of argument only and not as evidence, filed with DOAH on August 8, 2016.

Claimant's Exhibit:

1. Deposition of Dr. Mathias filed at docket #59 with attachments.
2. November 18, 2014 Memorial Hospital record filed at docket #62 (filed post-hearing with the agreement of the parties).
3. Memorial Hospital records from November 2014 filed at docket #64 (filed post-hearing with the agreement of the parties).
4. Memorial Hospital records from December 2014 filed at docket #65 (filed post-hearing with the agreement of the parties).
5. Memorial Hospital records from January 2015 filed at docket #66 (filed post-hearing with the agreement of the parties).

Employer's Exhibits:

1. Deposition of Dr. Dietzius filed at docket #29 with attachments.
2. Transthoracic Echocardiogram dated November 18, 2014 filed at docket #63 (filed post-hearing with the agreement of the parties).

In my determination herein I have attempted to distill all the testimony and salient facts together with the findings and conclusions necessary to the resolution of this matter. I have not necessarily attempted to summarize the substance of the claimant's testimony or the testimony of any live or deposition witness, nor have I attempted to state nonessential facts.

Because I have not done so should not be construed that I have failed to consider all of the evidence.

Based upon the evidence, I make the following findings of fact and conclusions of law:

1. I have jurisdiction of the parties and the subject matter.
2. The stipulations of the parties are accepted and adopted by me as findings of fact.

3. The evidence closed in this matter on August 10, 2016 after which closing arguments were made by the parties.
4. The first determination I must make in this case is whether the claimant has established his hypertension is a compensable condition. The employer/carrier stipulated the claimant is a covered employee for purposes of the statutory presumption under §112.18(1), Florida Statutes. It was also agreed there was no evidence of hypertension or heart disease on his pre-employment physical and that hypertension is a covered condition. Resultantly, the parties agreed the determinative question to be answered is whether, on November 18, 2014, the claimant was disabled as a result of his hypertension.
5. The case of *Bivens v. City of Lakeland, 993 So.2d 1100 (Fla. 1st DCA 2008)* is instructional. In that case, the Court wrote: "The presumption is only applicable when a claimant's "tuberculosis, heart disease, or hypertension result[s] in total or partial disability or death." *See City of Port Orange v. Sedacca,* 953 So.2d 727, 729-730 (Fla. 1st DCA 2007) (stating "neither compensation nor benefits are available until the employee suffers disablement or death").
6. For the reasons set forth hereinafter, I find he was not disabled on November 18, 2014. The claimant has failed to establish by competent evidence that his hypertension resulted in total or partial disability on that date.
7. I have considered the EMA report of Dr. Pianko as well as his deposition. I have also considered the testimony of Dr. Mathias. The EMA report is not dispositive since it does not specifically address the date of accident although it does make reference to other dates upon which the claimant was temporarily disabled. Furthermore, his report does not provide any definitive opinion. Dr. Pianko references blood pressure readings of 171/102, 154/91 and 183/109 and finds the claimant was temporarily disabled as a result of those blood pressure levels but, again, there is no allegation of an accident on the dates for which those readings were given.
8. According to the medical records presented, the claimant had a blood pressure reading of 163/104 (It could be argued this number is 163/164 but that is illogical and I conclude the diastolic number is 104) at 9:35 AM on November 18, 2014. There was also a reading of 163/104 at 9:40 AM that same date. Both readings appear to have been recorded by the same person. It is not clear whether this reflects separate readings or

separate recordings of identical blood pressure readings. These represent the only blood pressure readings on November 18, 2014 which would appear to arguably meet Dr. Pianko's admittedly arbitrary scale of disability. There are multiple blood pressure readings that same date that clearly do not meet his definition of disability including a reading of 149/87 at the time of a transthoracic echocardiogram performed that date. In reading the testimony of Dr. Pianko, I conclude it was critical to his opinion that hypertension is disabling if the diastolic number is recorded at more than 100 and "repeated a couple of times." He expounded on his answer by stating that if the diastolic range is 105-110, he would send that individual to the emergency room for purposes of intravenous medication. Up to 100 on the diastolic level would not be disabling. As it relates specifically to the claimant, however, Dr. Pianko opined a lower standard for disability given the nature of his work. He testified, at page 15 of his deposition, as follows: "so you know, diastolic of you know, more than 90, 92, I probably would place him, you know, on light duty or a desk job and not keeping out of work, but you know, I probably would advise him until his pressure is better, not to do the heavy stuff that he was doing." At page 17, he testified he "probably would put him on light duty between you know, the 92 and 100 and probably take him out of work for a day or 2 if it's more than 100, but many physicians wouldn't." Regardless of those opinions, however, Dr. Pianko would defer to the physician treating the person at that time. At no time during the course of his deposition, or in his report, did Dr. Pianko state that it was his opinion with reasonable medical certainty the claimant was disabled as a result of hypertension on November 18, 2014. Given the totality of his testimony, the testimony of Dr. Pianko does not establish the claimant sustained any disability associated with his hypertension on November 18, 2014. Conversely, Dr. Pianko does not reach any conclusions to the contrary.

9. Resultantly, I have considered the testimony of Dr. Mathias on this issue. Dr. Dietzius did not express an opinion on this question although he confirmed that none of the physicians treating the claimant on November 18, 2014 placed the claimant in a total or partial disability status.
10. As argued by the claimant, Dr. Mathias addressed the issue of disability at page 12-13 of his deposition. Dr. Mathias testified as follows: "This gentleman would not be able to return to work owing to the fact that he had these blockages and owing to the fact that his blood pressure was elevated which compounded the situation. It made the situation

much worse." I reject the argument this establishes disability associated with the claimant's hypertension. It is clear from the testimony, and I so find, the claimant was disabled from his heart disease and he was worse because he concurrently had hypertension. There is no testimony to establish the hypertension, standing alone, was a disabling disease process.

11. Given the evidence and testimony as it relates to disability associated with hypertension, I find the claimant has failed to establish he was disabled on November 18, 2014 as a result of hypertension.

12. Turning to the question of whether the claimant's heart disease is compensable, Section 112.18(1), Florida Statutes creates a rebuttable presumption of compensability for heart disease suffered by law enforcement officers who satisfy the statute's prerequisites. *See Carney v. Sarasota County Sheriff's Office & OPTA Comp, 26 So. 3d 683 (Fla. 1st DCA 2009).* To satisfy the statutory prerequisites, the officer must have passed a pre-employment physical examination prior to entering into such service, which failed to reveal any evidence of heart disease. See *§112.18(1), Fla. Stat.; Miami -Dade County v. Davis, 26 So. 3d 13 (Fla. 1st DCA 2009).* Establishment of the presumption relieves a claimant "from the necessity of proving an occupational causation." *Bivens v. City of Lakeland, 993 So. 2d 1100, 1102 (Fla. 14 DCA 2008) (quoting Caldwell v. Div. of Ret., Fla. Dep't of Admin., 372 So. 2d 438, 441 (Fla. 1979)).*

13. The presumption is dispositive unless rebutted by medical evidence that the claimant's heart disease was caused by a specific, non-work related event, factor, or exposure. *Walters v. State, DOC, Div. of Risk Mgmt., 100 So. 3d 1173, 1174- 1175 (Fla. lst DCA 2012).* The presumption can also be rebutted by proof of a specific "combination of wholly non-industrial causes." See Fuller v. Okaloosa Corr. Inst., 22 So. 3d 803, 806 (Fla. lst DCA 2009); If the employer's medical testimony shows several non-work related factors or conditions are the cause of heart disease, and such evidence is accepted and credited by the trier of fact, such testimony could be found sufficient as competent, substantial evidence to rebut the presumption and establish non-industrial causation. See *Johns v. City of Sanford, 96 So. 3d 949 (Fla. lst DCA 2012).* Where, as here, claimant offers no evidence of occupational causation and relies solely on the presumption, the E/C must produce competent, substantial evidence establishing the disease was caused by some non-work-related factor. See id.; *Lentini v. City of W. Palm Beach, 980 So. 2d 1232 (Fla. lst DCA 2008).* Finally, and significantly, in *Punsky v. Clay*

County Sheriff's Office, 18 So.3d 577 (Fla. 1st DCA 2009), the Court wrote: "In summary, there is a clear path for the application of the section 112.18(1) presumption. The presumption does not vanish upon presentation of contrary evidence. Instead, it remains with the claimant who establishes his or her entitlement to the presumption and 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, n**ot the mere existence of risk factors or conditions**." (Emphasis added)

14. Here, claimant is relying solely on the presumption. Consequently, the E/C must present competent, substantial evidence establishing, within a reasonable degree of medical certainty that claimant's coronary artery disease was caused by a specific non-work related event, condition, or a combination of causes. When considering the evidence in its entirety, the E/C has established only that claimant has risk factors for developing coronary artery disease. I reject Dr. Pianko's opinion, as well as that of Dr. Dietzius, that claimant's coronary artery disease was caused by his risk factors. Dr. Pianko testified there was no objective test to determine which risk factors are directly related to claimant's heart disease, and doctors essentially perform a statistical analysis to opine as to cause. He agrees any percentage used is arbitrary. Dr. Pianko's opinion is insufficient to persuade me that one or more of claimant's risk factors actually caused his coronary artery disease. In rejecting his testimony, I considered such opinions as expressed at page 20: "…with regard to hypertension, that's not clear-cut what the etiology is and usually we don't know. With regard to coronary artery disease, we also don't know, but we have some long-term epidemiological studies like the Framingham study and several other studies that we base on. And obviously, the more risk factors someone has, the greater the likelihood of developing heart disease, but again, in any one individual, you can't say for sure." He also testified how being a police officer is a "high risk very stressful job" and is therefore also a risk factor. He agreed there is no test to determine which individual will develop and which individual will not develop heart disease despite the risk factors. Based on Dr. Pianko's opinion, not everyone with claimant's risk factors develops coronary artery disease. Indeed, his testimony was that less than 25% of those individuals with similar risk factors as the claimant actually developed heart disease. When asked which of the identified risk factors would trigger

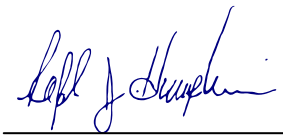
the development of coronary artery disease, whether police work or one of the other factors, Dr. Pianko testified: “The answer is we don’t know.” It is clear, and I so find, the existence of risk factors alone does not automatically equate with development of the disease. When considering the foregoing, I find the E/C did not rebut the presumption that claimant's coronary artery disease had an occupational cause.

15. Based upon the testimony and opinions of Dr. Pianko, I find the E/C has failed to establish the claimant has materially departed from a prescribed course of treatment thus causing or aggravating his heart disease. Dr. Pianko described the claimant as compliant in his treatment. I accept that testimony and reject any testimony to the contrary.
16. I find that the claimant’s attorney has performed a valuable service and is entitled to an award of a reasonable attorney’s fee and taxable costs against the employer for securing compensability of claimant’s heart disease.
17. Any and all issues raised by way of the petition for benefits, but which issues were not dismissed or tried at the hearing, or which were ripe, due and owing but not raised at the hearing, are presumed resolved, or in the alternative, deemed abandoned by the claimant, and therefore, are denied and dismissed with prejudice.

Wherefore, It Is CONSIDERED, ORDERED, and ADJUDGED as follows:

1. The claim for compensability of claimant’s heart disease is hereby granted.
2. The claim for compensability of claimant’s hypertension is hereby denied.
3. The E/C shall pay a reasonable attorney’s fee and taxable costs to the claimant’s attorney for securing the benefits being awarded by this Compensation Order. Jurisdiction is hereby reserved to determine the amount thereof if the parties are unable to amicably resolve this issue.

DONE AND ORDERED this 8th day of September, 2016, in Jacksonville, Duval County, Florida.



Ralph J. Humphries
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