

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

Jonathan Ira Kahn,
Employee/Claimant,

OJCC Case No. 15-008009ERA

vs.

Accident date: 3/24/2015

City of Miami Springs/Florida
League of Cities/ Workers'
Compensation Claims Department,
Employer/Carrier/Servicing
Agent.

Judge: Edward Almeyda

/

FINAL COMPENSATION ORDER

This matter came before me, the undersigned Judge of Compensation Claims, for a duly notice final hearing held on 3/28/2016. The Claimant was represented by Kristine Callagy and the Employer/Carrier (E/C) by Damian Albert.

The adjudicated PFB's are dated 4/10/2015 and 7/23/2015.

CLAIMS/DEFENSES:

Claims:

1. TTD based on correct compensation rate.
2. TPD based on correct compensation rate.
3. Determination of correct AWW.
4. Medical authorization by a board certified cardiologist for hypertension or heart disease.
5. Compensability of disabling hypertension and/or heart disease pursuant to F.S. 112.18(1) and Collective Bargaining Agreement.

6. Payment of income impairment benefits from 7/15/2015.
7. Penalties, Interests, Costs and Attorney's fees.

Defenses:

1. TTD not due as claim not compensable and never exceeded waiting period.
2. No medical or vocational evidence to support claim for TPD.
3. AWW is correct per 13 week statement.
4. Medical treatment not necessary as claim is not compensable.
5. Claim not compensable as claimant does not meet element necessary to invoke presumption of F.S. 112.18(1). Claimants blood pressure reading on 3/24/2015 was not disabling. Claimant's pre-employment physical revealed evidence of hypertension.
6. Income impairment benefits not due as claim is not compensable.
7. Penalties, Interest, costs and attorney's fees not due.

DOCUMENTARY EVIDENCE:

Claimant:

1. Dr. Pianko's report (33)
2. Pre-employment physical (57)
3. Dr. Pianko's deposition (60)
4. Dr. Pianko's records (61-64)
5. Adjuster's deposition (81)
6. Records from Davie Urgent Care (83) (Fact purposes only).

Employer/Carrier:

- a. Dr. Vadillo's deposition (86)
- b. Dr. Perloff's deposition (87)
- c. Response to PFB (90)
- d. Notice of denial (92)
- e. Records from Dr. Vadillo (100)

Judge's exhibits:

- J.1 Claimant's trial memo (94)
- J.2 E/C's trial memo (93)
- J.3 Pretrial (78)
- J.4 Pretrial amendment (80)

Live testimony:
Claimant.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

1. This is a “heart lung” matter brought pursuant to F.S. 112.18(1) due to hypertension on a police officer of Miami Springs. In considering the presumption contemplated by this statute, the E/C stated that there was no dispute over fact that the Claimant was a member of a protected class (police officer), and that the medical condition was a protected one (hypertension).

2. The scope of this dispute is over the other two necessary factors to invoke the presumption, lack of evidence of at the pre-employment physical of a protected condition, and lack of any disability resulting from the hypertension.

3. Florida Statute 112.18(1) specifically reads as follow:

(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.

4. CLAIMANT: Mr. Kahn testified live before me, and I found him to be very credible, with a straight forward candor, demeanor, and comportment, as expected of a retired police captain.

5. He started working for the Employer in 1979, and ultimately retired in 2015 as a captain. At the time of his hire he underwent a physical examination, following which no recommendations were made for any follow up treatment.

6. His duties included that of a patrol officer and investigator. He later was promoted to sergeant, ultimately reaching the rank of acting captain. As an acting captain he still had to do patrol duty, almost on a daily basis.

7. Prior to 3/24/2015 he had been diagnosed with high blood pressure in 2012 and since that time was taking medication for this condition. On this date, during the afternoon he developed a headache and felt flushed. Upon terminating his shift, on the way home, he went to an urgent care clinic, Baptist Urgent Care, where he was examined and released after a few hours. Upon discharge he was referred to another doctor for treatment to the high blood pressure. Ultimately, the follow up physician doubled his dosage, and now is under control.

8. Following this emergency visit on 3/24/2015, a Tuesday, he was out of work the rest of the work week (Wednesday to Friday), returning to duties on 4/1/2015. He had been given discharge instructions by the Clinic, which he gave to his supervisor on that date.

9. Mr. Kahn had previously filed a claim for this elevated blood pressure in 2012, which claim was denied.

10. PRE-EMPLOYMENT PHYSICAL: the date of this examination is 4/20/1979. With reference to the specific condition covered by this dispute it reads as follows:

Height: 6 ft. — in. Weight: 182 lbs. Frame: Lt. Med. Heavy Normal Abnormal
Heart: Enlargement; arrhythmia; murmurs
Blood Pressure: Systolic 140 Diastolic 75
EKG results normal

11. There is no indication that the blood pressure reading was abnormal, and in fact the box “normal” had been checked off. The EKG results were within normal limits. There is no further indication in this form as to the methodology for the blood pressure test, the number of reading, or the circumstances at the time of this recorded reading.

12. LEONARD PIANKO: He is a board certified cardiologist, who also serves as an EMA, who testified as the Claimant’s IME. He examined the Claimant on 7/15/2015.

13. Upon examining the Claimant and reviewing records he concluded that while the Claimant had hypertension, his condition was stable on blood pressure medication. He concluded that the Claimant was at maximum medical

improvement as of the date of his examination, and assigned 10 percent impairment. The rating was based upon the Florida 1996 guide with regards to hypertension, cardiovascular disease, at page 120. He concluded that the Claimant fit within Class I, which rates this disease up to 14%.

14. While he did not know the specific criteria for 1979, as every year there is a different recommendation, he testified that the systolic reading should be around 90-92, and the diastolic around 140-145. He went on to state: "But I would not call it hypertension because we have one reading, it was not repeated, there was a 20 year period—more than 20 year period—almost 30- year period from 1979 to 2012 that there was no evidence of hypertension." (Dr. Pianko at pp. 10-11).

15. This reading at the time of the pre-employment physical was further explained by him as follows:

"there are a lot of things that can cause what we call pseudo hypertension, among them is white coat syndrome among other things, blood pressure not being taken properly, anxiety, stress, etcetera with regard to this. So I would not call him as having hypertension based on one reading of 140/78 back in 1979, when he didn't not develop real hypertension until the year 2012." (Pianko at page 11).

16. To diagnose hypertension more than one reading is necessary. He concluded that a single reading in 1979 is not evidence of hypertension. Later, in this deposition, without any objection, he read the Davie Urgent Care Center report which took the claimant from work for three days. He concluded that it was reasonable for him to be out of work for that amount of time. (Pianko p.16).

17. On cross examination he again explained why more than one reading is necessary, and that in his experience often times the second or third reading is lower. This is significant because it tells that the first reading was either incorrect or just a temporary one.

18. With reference to the decision by the walk in clinic to take the claimant out of work, he could not state whether it was correct, or not, because he did not have enough information.

19. Continuing in the cross examination concerning the pre-employment reading, he testified that: “in the real world, specially going back to 1979, the difference between 135 and 140 is a semantic one.” He went on to explain that it was because there was only one reading. (Pianko p. 29).

20. Later he testified that this pre-employment single reading was not evidence of the condition of hypertension, because: “Many times people have a high blood pressure and then you repeat it and you check it again and you wait a little time and you’re patient and it comes back normal.” (Pianko p. 32).

21. At the conclusion of the deposition Dr. Pianko explained why this single reading of blood pressure was not evidence of hypertension because it was not reproduced, and the difference between 135 and 140 is very negligible. The diastolic pressure was normal, and subsequent readings every two years didn't reveal hypertension.

22. SHERYL POOLE: She is the adjuster in this case. She obtained an average weekly wage statement from the Employer, and this amounts to \$1,855.08.

23. DR. ALBERTO VADILLO: He is a cardiologist and the treating physician in this case. He evaluated the Claimant on 4/16/2015 for hypertension. On the first visit, as well as the second one the blood pressure readings were normal. A hypothetical question was posed where the E/C mentioned that the Claimant had two blood pressure readings on the date of the accident. The first one was 175/100 and the second one 152/90. Based upon that information, Dr. Vadillo testified that he would not have restricted the Claimant's work activities on that day.

24. He indicated that in order to make a diagnosis of hypertension a series of elevated blood pressure readings are needed. He went on to explain that just because the blood pressure is elevated above the normal range doesn't make a person hypertensive. The best way is to let the patient rest for about 30 to 45

minutes and retake the blood pressure. Multiple readings are needed to support a diagnosis.

25. When asked whether an individual reading could be evidence of hypertension, he responded that it could be, if there are elevated readings on several occasions. (Vadillo p. 15). When specifically asked whether the reading shown in the pre-employment physical was considered evidence of hypertension, he responded that he imagined that several readings were done. If that was the case, then yes, it would be evidence of hypertension.

26. At the time of the pre-employment physical, Dr. Vadillo was in medical school, and he stated that 120/70 was the standard considered normal.

DR. DAVID PERLOFF: He is a cardiologist and the E/C's IME who examined the Claimant on 8/13/2015. He was furnished a package of records (presumably by the E/C) to review prior to this examination, which records included those from Baptist Urgent Care at Davie. He relied on these records in arriving at his opinions.

27. The history he obtained is that five or six years prior to the examination the Claimant was diagnosed with hypertension, and placed on medication.

28. In explaining the elevated pressure reading in the Baptist Urgent Care at Davie record, he set forth that usually a person in a situation with such a facility can have an elevated reading. The proper way is to calm the person down, and

then re-take the reading. In the Claimant's case on examination by Dr. Perloff, the first elevated reading came down, and Dr. Perloff attributed this anxiety or another stimulus.

29. As to the three day disability from this walk in clinic in Davie, Dr. Perloff stated that he would not find any benefit to that decision, and that he would not have done it. It was not consistent with the practicing guidelines in evidence based medicine. The blood pressure reading at the time of this physician's examination was 140/78, not a basis to impose work restrictions.

30. Dr. Perloff described the proper method for the taking of blood pressure. This method includes the following:

1. Feet both at the floor.
2. Sitting upright.
3. A properly calibrated sphygmomanometer.
4. Patient calm and relaxed not smoked within 30 minutes.
5. No need to use the bathroom.

31. In order to make the diagnosis of hypertension, you need multiple readings over a period of time consistently.

32. Dr. Perloff did not feel the Claimant met the test required to invoke the presumption of the "heart lung bill." He testified that the pre-employment physical showed evidence of hypertension. He did not believe that the reading on the date of this claimed accident met the disability criteria.

33. The current hypertension falls under category I, as he does not have end organ damage. The impairment of the Claimant is six percent, because of the prior reason and the fact that the blood pressure is controlled with medication. He was at maximum medical improvement at least as of the date of this examination.

ANALYSIS

34. With the E/C conceding that the Claimant is a member of a protected class, and that the claimed condition is a protected condition, the remaining issues for determination are whether the Claimant had evidence of hypertension at the time of the pre-employment physical, and whether the hypertension caused a disability.

35. Each of those elements is separately considered to determine whether the presumption applies.

36. EVIDENCE OF HYPERTENSION AT THE TIME OF THE PRE-EMPLOYMENT PHYSICAL. The E/C strenuously argues that the shown reading of 140/78 is evidence of hypertension. In so doing, they are only focusing on one aspect of this physical examination report, the reading, and totally disregarding the conclusion of the physician that it was “normal.”

37. In addition, all three cardiologists concur as to the proper method for obtaining an accurate blood pressure reading. The E/C’s own IME, Dr. Perloff set

forth a five prong test for this procedure, and the evidence does not include any indication that the pre-employment medical examiner carried out his procedure.

38. *Evidence* is defined as “something that tends to prove or disprove the existence of an alleged fact.” (*Black’s Law Dictionary, Seventh Edition*). The question then is: does a single reading of blood pressure, without proof that it was done correctly, serve to prove the existence of hypertension?

39. In short, the answer in this factual scenario is NO. The conclusion of this pre-employment examiner that the blood pressure is normal is more probative than the listed reading. The Claimant in this case has overcome the E/C challenge to this factor to establish the presumption.

40. **DISABILITY:** Interestingly, while the E/C challenged the admissibility of the Davie clinic records, which as a sole document was partially sustained, they separately admitted into evidence the content of the records in the testimony of Dr. Perloff to the extent that there was a recommendation of three days of disability.

41. The Claimant on 3/24/2015 was told by a physician not to work for three days due to the elevated blood pressure, and he complied with this. Dr. Pianko concurred with this recommendation, and the E/C’s witnesses did not. The significant factor is that the E/C’s witnesses were not then treating this Claimant as a patient, with the appurtenant duties and responsibilities of such a treating physician. It is very convenient to hind sight such a recommendation in a vacuum,

such as was done here, but this does not obviate the established fact that the Claimant was out of work for three days following medical advice due to the claimed condition.

42. In this respect, the contrary opinions of Drs. Perloff and Vadillo to that of Dr. Pianko, who concluded that there was justification to take the Claimant from work for three days, are rejected.

43. The Claimant has, thus, proved the fourth element of this presumption, disability.

44. ESTABLISHMENT OF THE PRESUMPTION UNDER F.S. 112.18(1). The Claimant having met the four prongs necessary to establish this presumption, is presumed to have a compensable hypertensive disease/condition. The E/C has not presented any evidence which would overcome this presumption.

45. While Dr. Perloff testified as to some probable factors which aggravate high blood pressure, such as smoking or stress, this testimony is not sufficient to overcome the presumption, as it was speculative and not directed with any form of medical certainty to the specific factors of this case.

46. The Claimant's hypertension is compensable.

47. ENTITLEMENT TO TEMPORARY DISABILITY: While the Claimant has proved that he was disabled for three days, he is still not entitled to payment of

any temporary disability as said three days is below the one week waiting period provided by the statute. This claim is denied.

48. DATE OF MMI AND IMPAIRMENT BENEFITS: the attainment of maximum medical improvement was at the time of Dr. Pianko's examination. In so doing his opinion is accepted. There is in reality no contrary opinion, just differences as to the date predicated upon the date of the respective examinations. Following Dr. Pianko's examination there is not evidence that further remedial treatment was furnished to the Claimant.

49. Dr. Pianko and Dr. Perloff both opined that the hypertension caused an impairment falling under class I, and ranged their rating from six to ten percent. In view of the fact that the Claimant is now stable to the extent that his blood pressure is within normal range with medication, I find the lower rating of six percent is more reasonable, and so award.

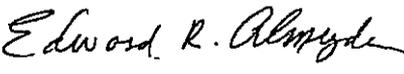
50. ATTORNEY'S FEES AND COSTS: Jurisdiction is reserved until such time as a proper motion for these benefits is filed.

WHEREFORE, IT IS ORDERED AND ADJUDGED THAT:

1. The Claimant's hypertension is compensable.
2. The Employer/ Carrier shall provide suitable medical treatment for the hypertension by a cardiologist.
3. The claim for temporary indemnity is denied.

4. The E/C shall pay the claimant income impairment benefits predicated upon a six percent rating.

DONE AND ORDERED this 4th day of April, 2016, in Miami, Dade County, Florida.

S 

Edward Almeyda
Judge of Compensation Claims
Division of Administrative Hearings

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