

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

Kevin Durkin,
Employee/Claimant,

OJCC Case No. 19-032349MAM

vs.

Accident date: 9/11/2019

Hillsborough County Aviation
Authority/Florida Municipal Insurance
Trust,
Employer/Carrier/Service Agent.

Judge: Mark A. Massey

_____ /

COMPENSATION ORDER

This cause came before the undersigned Judge of Compensation Claims for a final merits hearing on 07/29/20. Claimant was present at the hearing along with his attorney Kristine Callagy, Esquire. Alan D. Kalinoski, Esquire was present on behalf of E/C. The hearing was conducted via Zoom videoconference due to the current pandemic and to minimize travel.

The petition for benefits which is at issue was filed 12/20/19. Mediation was held on 03/16/20. Pre-trial stipulation was filed 04/17/20 (amended 04/20/20). The final hearing was originally set for 06/17/20 but continued to 07/29/20 due to circumstances beyond the control of the parties and to allow completion of discovery.

Jurisdiction was reserved on the petition filed 05/20/20 as it has not been mediated and is therefore not procedurally ripe for adjudication.

Prior to or at the hearing, claimant withdrew the claims for temporary total disability, temporary partial disability, associated penalties and interest, and compensability of arterial and cardiovascular hypertension.

Claimant seeks a determination of compensability of his heart disease and authorization of treatment for same. E/C have denied compensability and denied the claim in its entirety. For the reasons outlined below, I find in favor of claimant.

Claims (as narrowed at hearing)

1. Compensability of heart disease (coronary artery disease) pursuant to section 112.18(1), Florida Statutes.
2. Authorization of medical care and treatment with cardiologist for heart disease. Claimant is currently not under the care of an authorized treating physician.
3. Costs and attorney's fees.

Defenses (as narrowed at hearing)

1. No compensable accident or occupational disease resulting in an injury arising out of and in the course of employment as required by 440.02, Florida Statutes.
2. The claimant failed to provide timely notice of this claim to the employer as required by 440.185, Florida Statutes.
3. The claimant does not meet the criteria to give rise to application of the presumption pursuant to 112.18(1), Florida Statutes.
4. The claimant had pre-existing heart disease and/or hypertension since 1985 which predated his employment.
5. No referral to a cardiologist was attached to the petition for benefits as required by 440.192, Florida Statutes.
6. If the presumption were applicable, the E/C will produce sufficient evidence to rebut the presumption.
7. No costs or attorney's fees are owed.

Judge's Exhibits

1. Petition for benefits filed 12/20/19 (D-1)
2. Response to petition filed 01/02/20 (D-6)

3. Pre-Trial Stipulation (D-16)
4. Amended Pre-Trial Stipulation (D-17)
5. Claimant's Trial Memorandum, for argument only (D-42)
6. E/C's Trial Memorandum, for argument only (D-48)
7. Claimant's Motion in Limine to Exclude the Opinion of Dr. Nocero (D-32)
8. Final Evidentiary Order Denying Claimant's Motion in Limine (D-41)

Claimant's Exhibits

1. Deposition of Dr. Borzak with attachments (D-39)
2. Deposition of adjuster (D-43)
3. Pre-Employment Physical Exam (D-45)
4. Payroll records (D-44)
5. Deposition of Dr. Usha Agarwal with attachments (D-46) (accepted for fact and historical purposes only and not for any medical opinions expressed)
6. Deposition of Dr. Sudhir Agarwal with attachments (D-49) (for fact and historical purposes only and not for any medical opinions expressed)

Employer/Carrier's Exhibits

1. Deposition of Dr. Nocero with attachments (D-33-35) (claimant maintains and does not waive *Daubert* objection which was the subject of the Motion in Limine)

Findings of Material Fact

Claimant began working as a law enforcement officer with the Hillsborough County Aviation Authority in January 2011. He underwent a pre-employment physical that revealed evidence of hypertension but did not reveal evidence of heart disease. Claimant admits he has a long-standing history of hypertension controlled by medication.

In 2012 claimant suffered a heart attack and received two stents. He has treated regularly with a cardiologist and primary care physician since then. In September 2019, claimant's cardiologist discovered another blockage which required placement of a stent in a different location on 09/11/19. Claimant returned to work the following day.

Overview of the Medical Evidence

Dr. Usha Agarwall

Dr. Usha Agarwall's deposition was admitted into evidence for fact and historical purposes only. She is claimant's primary care physician who treats claimant in conjunction with his cardiologist Dr. Sudhir Agarwall. She has treated the claimant since 2013. Her records indicate that claimant takes blood pressure medication and cholesterol medication regularly. She obtains bloodwork and labs on the claimant regularly.

Dr. Sudhir Agarwall

Dr. Sudhir Agarwall's deposition was admitted into evidence for fact and historical purposes only. He is claimant's cardiologist. He placed the stent in claimant in 2012 and has provided follow-up treatment regularly since then. He prescribes the blood pressure medication and the cholesterol medication. Following the 2012 stent he placed claimant on aspirin and Plavix. In 2013 he ordered a stress test and echocardiogram for clearance for cervical spine surgery. In 2015 he ordered another stress test and another echocardiogram. In July 2015 he performed a heart catheterization which did not result in any new or different recommendations.

On 08/29/19 claimant had another stress test. Based on the results of that, Dr. Sudhir Agarwall recommended catheterization, which he performed on 09/11/19, and which revealed stenosis, resulting in placement of a stent. The doctor testified that the stent placed in 2019 was in a different location than the one placed in 2012. Claimant has been stable since then and has gone back to his regular medication regimen.

Dr. Steven Borzak

Dr. Borzak is claimant's independent medical examiner who performed a records review IME on or about 05/20/20. He is a board certified cardiologist. Dr. Borzak acknowledged that the pre-employment physical did not reveal evidence of heart disease, as confirmed by a negative stress test. (Borzak deposition, p. 12). Dr. Borzak noted the history of well-controlled hypertension and well controlled cholesterol. (p. 12-13) He noted the history of the prior stent in 2012, and that the 2019 stent was placed in a different location. (p. 13) He confirmed that the 2019 stress test revealed evidence of coronary artery disease, and that this is considered heart disease. (p. 13) He testified, consistent with his report, that claimant was disabled and unable to work while undergoing the 2019 stent placement. (p. 13)

Dr. Borzak provided a detailed explanation of the purpose of the stent procedure and what it is designed to accomplish. (p. 14) Specifically, it is designed to address the narrowing, or blockage, found in the artery, and open it up to increase blood flow. (p. 14)

Dr. Borzak was asked what risk factors claimant has, if any, for the development of heart disease. In response, he noted that claimant has a history of hypertension and hypercholesterolemia, but noted that those were mitigated by the fact that they were treated and

appeared to be well controlled. (p. 14-15) He did not believe that age was a significant risk factor for this claimant. Ultimately, Dr. Borzak concluded by stating that “So therefore, because the risk factors are not particularly strong, I would conclude that his coronary artery disease is – is of unknown cause.” (p. 15)

Dr. Borzak went on to explain that hypertension medication reduces and controls blood pressure, and by doing so reduces the effect of hypertension on the heart and blood vessels. (p. 15) He also noted that claimant had lost about 30 pounds in 2016, which would help mitigate some of the other risk factors like hypertension and cholesterol. (p. 17) He did note that claimant has a family history of heart problems, but considers this a secondary risk factor which is basically subsumed within or considered part of the other risk factors. (p. 17-18)

When asked if there is any objective medical test that can be performed that would tell us what the cause of claimant’s heart disease is, Dr. Borzak simply replied, “No.” (p. 18) When asked what the purpose is of identifying risk factors, Dr. Borzak stated it is important to help predict who might be at higher risk for having events, and to develop strategies to reduce that risk. (p. 18) In this regard, Dr. Borzak discounted the theory that this claimant’s risk factors were what caused his heart disease. He noted that risk factors such as hypertension and high cholesterol are “not dichotomous variables, but rather they’re continuous. What I mean by that is that there’s a dose response like most things in biology. The higher the cholesterol, the more strongly it contributes to the development of atherosclerosis and coronary disease. So in someone whose cholesterol is well controlled, means that it would be less – less of a potent cause, so to speak. So when we consider risk factors, in my opinion, it’s important to consider the duration and severity of the risk factors and not just their presence or absence.” (p. 18-19)

Dr. Michael Nocero

Dr. Nocero is E/C's independent medical examiner. He is board certified in internal medicine and cardiovascular diseases. He evaluated the claimant on or about 05/20/20 and reviewed claimant's medical records. Dr. Nocero agreed that claimant had coronary artery disease. He was of the opinion that claimant had risk factors of "high cholesterol, obesity, high blood pressure, and a very strong family history of coronary artery disease with his mother and father both dying of coronary artery disease and a brother having a myocardial infarction at age 47, which is considered premature coronary artery disease." (Dr. Nocero deposition, p. 16) When asked his opinion on the significance of those risk factors as it applies to claimant's development of heart disease, Dr. Nocero answered, "It's my opinion that all of those risk factors acted in concert to cause plaque in his coronary arteries that eventually substantially obstructed blood flow in his coronary arteries and necessitated the stenting that was done in 2012 and again in 2019." (p. 17) He further noted that at the time of the 2012 stents, claimant was age 54 which placed him in the category of premature coronary artery disease. (p. 17)

When asked if he has an opinion as to the most likely cause of this claimant's heart disease, Dr. Nocero answered, "Once again, with coronary artery disease, it's a combination of risk factors that all play off each other in concert in leading to plaque forming in the opening of the coronary artery, and it's that situation clinically that leads to critical stenosis in those coronary arteries and need for either medication or in this claimant's situation angioplasty." (p. 17). Dr. Nocero placed particular emphasis on claimant's family history. (p. 18-19) Dr. Nocero also offered a summary explanation, or theory, as to how elevated cholesterol in particular contributes to the development of plaque which eventually obstructs the arteries. (p. 19-20)

Application of the Presumption

Section 112.18(1)(a), Fla. Stat. provides in pertinent part that “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, correctional officer, or correctional probation officer . . . 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 must 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.”

Pursuant to the statute and case law, the claimant must establish four elements in order for the presumption to be applicable: (1) the claimant is a member of a protected class (firefighter, law enforcement officer, or correctional officer); (2) the claimant suffers from a covered condition (hypertension, heart disease, or tuberculosis); (3) the claimant underwent a pre-employment physical that failed to reveal evidence of such condition; and (4) the condition resulted in a disability.

Protected Class

There is no dispute that claimant was hired as, and was working as, a law enforcement officer, and therefore is a member of the protected class. I find this element of the presumption has been met.

Covered Condition

There is no dispute that claimant suffers from “heart disease” as that term is used in section 112.18(1). Both IME doctors agree that claimant has coronary artery disease, which is a form of heart disease. This element of the presumption has been met.

Pre-Employment Physical

There is no dispute that claimant underwent a pre-employment physical, and the report of same is in evidence. The claimed condition here is heart disease. The pre-employment physical did not reveal evidence of heart disease. Therefore, this element of the presumption has been met. Any argument to the contrary is rejected. The fact that the physical revealed a self-reported history of hypertension is irrelevant. Both IME physicians concur that the pre-employment physical did not reveal evidence of heart disease. I find that this element is condition-specific based on the plain language of the statute.

Disability

The evidence is unrefuted that claimant was disabled while undergoing the stenting procedure. This element of the presumption has been met.

Has the presumption been rebutted?

Once the claimant establishes all the necessary elements of the presumption, the burden shifts to the employer to overcome the presumption by presenting sufficient evidence which convinces the JCC that the disease was caused by some non-work related factor. If claimant

relies solely on the presumption and does not present additional medical evidence to support a finding of causation, the employer's burden may be satisfied by competent evidence. However, if claimant presents medical evidence in support of causation in addition to the presumption, the employer must satisfy its burden by clear and convincing evidence. Caldwell v Division of Retirement, 372 So. 2d 438 (Fla. 1979); Punsky v Clay County Sheriff's Office, 18 So. 3d 577 (Fla. 1st DCA 2009).

Here, I find that claimant has established all necessary elements of the presumption, and by doing so has shifted the burden to the employer to establish a non-occupational cause of his heart disease. I further find that because claimant has not presented medical evidence in support of causation, claimant must rely solely on the presumption. Dr. Borzak's opinion that the cause is "unknown" is not competent evidence of an occupational cause. LeBlanc v City of West Palm Beach, 72 so. 3d 181 (Fla. 1st DCA 2011) (medical opinion that cause is unknown held to be insufficient to carry employer's burden of proving non-occupational cause; conversely, a medical opinion that cause is unknown cannot support a finding of occupational causation). Therefore, the employer's burden here is to produce competent evidence which convinces the trier of fact that the cause is non-occupational.

As the court further explained in Punsky, "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. (citation omitted) 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.

(citation omitted) It is the evidence of non-industrial causation that may be found to rebut the presumption, not the mere existence of risk factors.”

The question, then, is whether Dr. Nocero’s testimony is competent and sufficiently persuasive evidence of non-occupational causation. Dr. Nocero identified several risk factors which he opined “acted in concert” or “play[ed] off each other in concert” to cause plaque to form, and that plaque in turn is what caused the blockage in the artery. The risk factors he deemed to be most important were elevated cholesterol and family history, and he gave a summary explanation for how cholesterol *can* contribute to the development of plaque, which *can* in turn lead to blockage. (Dr. Nocero deposition, p. 19-20). I emphasize the word “can” because this part of Dr. Nocero’s testimony appears to be more of an academic theory than proof of what actually happened in this specific case. Further, while Dr. Nocero considered what happened in 2019 to be a progression of what happened in 2012, this appears to overlook the fact that the more recent blockage was in an entirely different location and different artery than the earlier blockage.

I further find that Dr. Nocero’s reliance on the plaque theory, and on the risk factors he identified and found significant, are undermined by a review of Dr. Sudhir Agarwall’s records and Dr. Borzak’s testimony. Dr. Sudhir Agarwall’s records describe a severe 70% stenosis (Dr. Agarwall deposition, p. 33, and page 232 of the PDF). Although Dr. Agarwall’s medical opinions are not admissible, I find that this diagnosis is admissible, per Office Depot v Sweikata, 737 So. 2d 1189 (Fla. 1st DCA 1999). Dr. Borzak described this as “a high grade narrowing, which means that one of the blood vessels that supplies blood to the heart muscle had a constriction, which limits blood flow and could very well explain the angina that the man was

experiencing. So the stent procedure is designed to reduce the narrowing by opening it up with a wound catheter and then scaffolding that result with a metal tube called the stent. It's treated with medication to prevent scar tissue formation inside. That's the standard treatment for asymptomatic coronary disease." (Dr. Borzak deposition, p. 14) What is notably missing in both Dr. Agarwall's records and Dr. Borzak's testimony is any mention of plaque being the cause of the narrowing. So once again Dr. Nocero's opinion as to plaque being the cause appears to be more of a theory than anything else, and a theory largely unsupported by known facts.

In addition, Dr. Nocero's heavy reliance on the risk factors of cholesterol and family history is countered by Dr. Borzak's opinion that the family history in itself would not be considered a significant risk factor in this claimant, and that the cholesterol has been well controlled for many years, which makes it much less of a risk factor than if it was uncontrolled. I find Dr. Borzak's explanation for why those factors have been significantly mitigated as risk factors to be logical, credible and persuasive. To the extent that the testimony of Dr. Nocero and Dr. Borzak differ as to the relative significance of those risk factors in this case, I accept the opinions of Dr. Borzak and give less weight to the opinions of Dr. Nocero. Therefore, I am not persuaded that Dr. Nocero's opinions go beyond the mere identification of risk factors, to the point of being actual causative factors. In this respect, I find Dr. Nocero's opinions to be speculative and hypothetical at best.

Conclusion

In summary, I find that claimant has established entitlement to the 112.18(1) presumption, and that the employer has not carried its burden of proving a non-occupational cause of claimant's heart disease to rebut the presumption based on the record before me.

WHEREFORE it is hereby ORDERED AND ADJUDGED:

1. The claim for compensability of claimant's heart disease is granted.
2. The claim for authorization of a cardiologist for treatment of heart disease is granted.
3. The claim for costs and attorney's fees is granted. Jurisdiction is reserved as to amount if the parties cannot agree.

DONE AND SERVED this 4th day of August, 2020, in Tampa, Hillsborough County, Florida.



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