

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

James J. Rushing,)	
Employee/Claimant,)	
)	
vs.)	
)	OJCC Case No. 06-025674JEM
Sumter Correctional Institution,)	
Employer,)	Accident date: 1/6/2006
and)	
)	
Division of Risk Management,)	
Carrier/Servicing Agent.)	
)	
Steven P. Pyle, Esq., Attorney for the)	
Claimant)	
Benjamin Williams, Esq., Attorney for the)	
Employer/Carrier)	

ORDER ADDRESSING THE MERITS OF A PETITION FOR BENEFITS FILED 8/15/07

After due notice to the parties, a hearing on this claim was held in Tampa, Hillsborough County, Florida. The Parties were represented by Counsel as indicated hereinabove.

Claim was made for the following:

1. Authorization and payment of prescription medication prescribed by claimant's authorized treating physician, Dr. Mathias.
2. Payment of impairment benefits (IBs) for a 45% permanent partial impairment (PPI) per the opinion of Dr. Mathias as stated in his report dated 3/6/07.

3. A reasonable attorney fee for the attorney for the Claimant.
4. Interest and penalties on all past due payments of compensation.
5. The cost of these proceedings.

The claim was defended on the following grounds:*

1. Claimant suffers from a pre-existing condition.
2. The claimant's employment is not the major contributing cause (MCC) of the condition(s).
3. The employer/carrier denies liability to the claimant for the payment of penalties, interest, costs, or attorney's fees.

*The employer/carrier withdrew their defense that medications for which claimant was seeking reimbursement were not prescribed by an authorized physician.

The parties entered into the following stipulations:

1. The Judge of Compensation Claims has jurisdiction of the parties and the subject matter of this claim.
2. Venue properly lies in Hillsborough County, Florida.
3. Notice of hearing and notice of injury were properly given as required by the Workers' Compensation Law.
4. On 1/6/06, the Claimant was employed by the Employer herein.
5. No disability compensation benefits have been furnished to the Employee by the

Employer/Carrier.

6. The Claimant reached maximum medical improvement on 3/6/07.
7. Medical reports were agreed to be admissible into evidence.

At the trial of this cause, the following documents were admitted into evidence:

Judge's Exhibits:

1. Petition for benefits filed 8/15/07.
2. Mediation Agreement [Mediation Conference Report] of 11/21/07.
3. Uniform Statewide Pretrial Stipulations and Order entered 11/26/07.
4. Claimant's Trial Memorandum.
5. Employer/Carrier's Trial memorandum.

Claimant's Exhibits:

1. Transcript of the deposition testimony of Dr. Patrick Mathias taken 4/25/08.
2. State of Florida Claims Abstract.

Employer/Carrier Exhibits:

1. Medical records of Arjumand F. Hasmi, M.D.
2. Medical records of Yawer M. Nensey, M.D.
3. Medical Records of Thomas Edwards, D.O.

4. Department of Corrections Employment Records.

After due consideration of this matter and after having the opportunity to review the documentary matters and having had the opportunity to observe the candor and demeanor of the witnesses who did appear and give live testimony before me, and having endeavored to resolve all conflicts of fact in the evidence presented herein, I do make the following findings of fact:

1. I have jurisdiction of the facts and the subject matter of this claim.

2. The stipulations as entered into by and between the parties are hereby adopted as findings of fact and incorporated herein by reference.

3. The claimant is a 61-year-old male. He has worked as a correctional officer since 1993. From 1993 until 2000 he was employed by the Sumter County Sheriff's Office. In July 2000 the claimant was hired by the State of Florida Department of Corrections. While the claimant has not sustained a specific injury by accident as defined in section 440.02 F.S. he does allege an injury by occupational disease under the provisions of section 440.151 F.S. In support of his claim for benefits under the workers' compensation laws of the State of Florida claimant relies solely upon the presumption afforded to correctional officers as found in section 122.18 F.S., which must be read in conjunction with section 943.13 F.S.

4. The claimant currently suffers the effects of permanent atrial fibrillation, for which he had a pacemaker surgically implanted in 1997, coronary artery disease, coronary artery disease, hypertension, and diabetes. It is clear from the medical records submitted that the claimant does suffer

from both hypertension and heart disease.

5. Section 943.13 states "In order to be eligible for the presumption set forth in s. 112.18 while employed with an employing agency, a ... correctional officer ... must have successfully passed the physical examination required by this subsection upon entering service as a ... correctional officer ... with the employing agency, which examination must have failed to reveal any evidence of ... heart disease or hypertension. A ... correctional officer ... may not use a physical examination from a former employing agency for purposes of claiming the presumption set forth in s. 112.18 against the current employing agency."

6. The medical evidence presented establishes that at the time the claimant was employed by the State of Florida Department of Corrections his physical examination revealed that he had both heart disease and hypertension.

7. "Hypertension is sustained elevation of resting systolic BP [equal to or greater than 140 mm Hg], diastolic BP [equal to or greater than 90 mm Hg], or both." The Merk Manual, 18th Edition, page 604. The claimant's blood pressure at the time of his employment physical was 140 over 100. The records also reflect that as early as 1993 the claimant was being treated for elevated blood pressure with readings of 148 over 102. He was prescribed Procardia XL 30 mg to be taken daily. Procardia is a drug manufactured by Pfizer and, according to their web site, is indicated for the treatment of hypertension. As noted by Dr. Mathias it was not clear to him that the claimant was had hypertension because the claimant was taking medication for the condition and if he had hypertension it was well controlled. It is also noted that in 1995 the claimant underwent an

echocardiogram that was suggestive of coronary artery disease, a disease for which there is no known cause.

8. It would seem that claimant's claim of compensability should be denied as it is clear that the conditions for which he is seeking benefits under the Act pre-existed his employment with the State of Florida Department of Corrections.

9. Claimant argues that the employer/carrier are estopped from denying compensability of his occupational disease as they agreed in a 11/22/06 mediation agreement to authorize a cardiologist to treat claimant, pay his out of pocket medical expenses, and pay the claimant indemnity benefits for certain closed periods of disability. Further, claimant argues that the employer/carrier failed to initiate the pay and investigate procedures of sec. 440.192(8) F.S. The employer/carrier gloss over this argument. The employer/carrier argue that they only agreed to "pick-up" the claim as compensable when it was established that the claimant had coronary artery disease, a condition they learned was pre-existing two months after accepting the condition as compensable. The employer/carrier argues that they have the right at any point to challenge a previous conclusion that the employment was the major contributing cause of the condition for which benefits are sought. Counsel for the claimant responded by stating that major contributing cause does not apply in a presumption case. Section 440.09 (1) is clear and speaks both to injury by specific accident and occupational disease. Not only must the employment be the major contributing cause of the occupational disease but causation must be established by clear and convincing evidence. It is found that the burden of establishing a causal relation between the occupational exposure and the resulting

occupational disease, in the case of a correctional officer, is relieved by the presumption. It is also found that the need to establish that the occupational disease is and remains the major contributing cause of the correctional officer's occupational disease is similarly relieved by the presumption. However, when the presumption is relied upon the burden then shifts to the employer/carrier to establish that the condition pre-existed the correctional officer's entry into service with the employing agency. As noted above the employer/carrier did meet that burden, however, they failed to issue a 'pay and investigate' letter. The employer/carrier did not make any statement in the mediation agreement to the effect that they were only accepting the claimant's coronary artery disease as compensable. The employer/carrier failed to "... establish material facts relevant to the issue of compensability that could not have been discovered through reasonable investigation within the 120-day period...." Sec. 440.192(8) F.S. The very employment records placed in evidence include the pre-employment medical examination report and records that clearly put the employer/carrier on notice of the claimant's pre-existing hypertension and heart disease. There is simply no reasonable basis upon which the employer/carrier should be relieved of the burden established by statute and by their own agreement with the claimant.

10. Returning to the specific claims, claimant seeks payment of impairment benefits for a 45% permanent partial impairment. Claimant relies upon Dr. Mathias, a cardiologist authorized by the employer/carrier to treat the claimant. Dr. Mathias was of the opinion that claimant was at a point of maximum medical improvement. Dr. Mathias stated his opinion that the claimant had a 22% permanent partial impairment for his coronary artery disease and 5% impairment for his essential

hypertension. The combined value for those two impairments equals 26% pursuant to the Florida Impairment Rating Guide Combined Value Chart. Claimant's suggestion that the impairment for the claimant's atrial fibrillation/cardiac arrhythmia should also be included is rejected. The medical experts agreed that this condition not only pre-existed the claimant's employment with the Department of Corrections but also that it was simply not related to his employment and was not known to have a psychosocial factor. It is found the claimant's total impairment, therefore, for his compensable occupational disease is 26%.

11. It is found that the claimant is entitled to continuing treatment by his authorized cardiologist, Dr. Mathias, including the provision of medications to control his hypertension and coronary artery disease, and diabetes. It is found that it is necessary for the claimant to be treated for his diabetes for, as Dr. Mathias testified, "medication to control diabetes is integral to the management of coronary artery disease".

12. I find that Counsel for the Claimant has performed a valuable service and is entitled to a reasonable fee at the expense of the employer/carrier pursuant to sec. 440.34(3)(b) F.S. Jurisdiction is reserved to determine the quantum of the fee in a subsequent proceeding.

IT IS, THEREFORE, ORDERED that the Employer/Carrier do:

1. Authorize and pay for prescription medications prescribed by claimant's authorized cardiologist, Dr. Mathias to treat the claimant's coronary artery disease, hypertension, and diabetes.
2. Pay to the claimant impairment benefits for a 26% permanent partial impairment.

3. Pay to counsel for the claimant a reasonable attorney fee.
4. Pay the reasonable taxable costs of these proceedings.
5. Jurisdiction is reserved to determine the quantum of attorney's fees and costs in the event the parties cannot so agree.

The parties are herewith notified that the court file relating to the instant claim will be destroyed six (6) months from the date this order becomes final, if not appealed, or six (6) months after the date of mandate or other order of final disposition if appeal is taken

A party desirous of retaining any portion of the closed file must so notify this office not less than 30 days prior to the destruction date.

DONE AND ORDERED in chambers in Tampa, Hillsborough County, Florida.



Joseph Murphy

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THIS IS TO CERTIFY that the foregoing Merit Order was entered and that a copy was sent by U.S. Mail this 7th day of June 2008 to each of the following:

James J. Rushing

OJCC Case No. 06-025674JEM
Order Addressing the Merits of
A Petition for Benefits Filed 8/15/07

4990 Southwest 123rd Road
Webster, Florida 33597

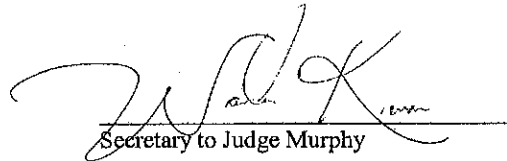
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Secretary to Judge Murphy