

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

James Chirco,
Employee/Claimant,

OJCC Case No. 15-008455WWA

vs.

Accident date: 3/21/2015

Daytona Beach Police Department/City of
Daytona Beach- Risk Management,
Employer/Carrier/Service Agent.

Judge: Wilbur W. Anderson

COMPENSATION ORDER

The Employer/Carrier in this heart/lung presumption case failed to prove by competent evidence that the major contributing cause or causes of Claimant's disabling heart disease are non-industrial. I therefore apply the presumption in section 112.18(1)(a), Florida Statutes (2014), and determine Claimant's disabling heart disease is compensable.

PROCEDURAL BACKGROUND

A final hearing in this case was conducted on January 11, 2016, on a petition for benefits filed on April 16, 2015. Mediation occurred on July 31, 2015, and the final hearing was initially scheduled to occur on October 2, 2015. The subsequent appointment of an EMA, however, required several continuances based on joint motions of the parties. Paolo Longo, Jr., represented Claimant. Gregory McDole represented the E/C.

CLAIMS AND DEFENSES

The claims and defenses set forth below are taken from the pretrial stipulation. At the beginning of the final hearing, however, the parties agreed that, in the event I determine the claim is compensable, I should reserve jurisdiction to determine all remaining issues to give the parties an opportunity to resolve those issues administratively.

CLAIMS

1. Temporary Total Disability: payment of TTD benefits from 3/21/15 to the present and continuing at the correct rate
2. Temporary Partial Disability: payment of TPD benefits from 3/21/15 to the present and continuing at the correct rate
3. Medical Authorization: authorization for care and treatment with a cardiologist
4. Compensability: compensability of disabling arterial and cardiovascular hypertension and/or heart disease which resulted in the placement of 3 stents pursuant to Section 112.18(1), Florida Statutes
5. Penalties and Interest: Penalties and Interests pursuant to Section 440.20(6)-(8), Florida Statutes, or as otherwise provided by law
6. Attorney Fees: Attorney fees pursuant to Section 440.34, Florida Statutes or as otherwise provided by law
7. Medical Authorization: authorization for cardiac rehab pursuant to Dr. Quadrat – please see attached

DEFENSES

1. Section 112.18(1) presumption rebutted by competent evidence (Dr. Quadrat report 4/9/15)
2. MCC of Claimant's heart disease is a combination of non work related factors (Dr. Quadrat report 4/9/15)
3. Claimant's heart disease is not a compensable occupational disease under Section 440.15, Florida Statutes
4. Claimant is not responsible for payment for unauthorized treatment provided before 4/8/15 or after 4/16/15 for failure of providers to file reports as required by Section 440.13(4), Florida Statutes

5. Claimant returned to full duty with no restrictions on 4/30/15
6. E/C is not responsible for Claimant's attorney's fee or costs for a non-compensable accident

EXHIBITS

JCC Exhibits

1. Petition for benefits filed 4/16/15 (1)¹
2. Response to petition for benefits filed 4/28/15 (5)
3. Pretrial stipulation filed 8/5/15 (17)
4. Order granting claimant's motion to amend pretrial stipulation entered 12/28/15 (42)
5. EMA report uploaded to the docket 11/4/15 (33)

Claimant Exhibits

1. Memorandum of law filed 1/7/16 (argument only) (51)

E/C Exhibits

1. Memorandum of law filed 1/7/16 (argument only) (50)
2. Proposed exhibits filed 1/6/16 (47)
3. Deposition of James Chirco taken 6/3/15, filed 1/4/16 (46)

Joint Exhibits

1. Joint motion for appointment of EMA filed 8/4/15 (14)
2. Deposition of Dr. David Perloff with attachments, taken 12/15/2015, filed 1/4/16 (43, 44, 45)

WITNESSES

Claimant

1. James Chirco

¹ Numbers in parentheses refer to the OJCC docket number.

Employer/Carrier

None

DAUBERT OBJECTION

1. Claimant filed an unopposed motion on December 16, 2015, seeking permission to amend the pretrial stipulation to raise a Daubert objection to Dr. Perloff's opinion testimony. I granted the motion to amend the pretrial stipulation, but instructed the parties that I would not rule on the objection itself until after the final hearing. In ruling on this objection, I have engaged in the analysis set forth in Booker v. Sumter County Sheriff's Office, 166 So. 3d 189 (Fla. 1st DCA 2015), beginning with determining the timeliness and facial sufficiency of the objection.

2. I find Claimant's counsel's very brief and general objection raised on page 37 of Dr. Perloff's deposition was timely because Dr. Perloff's EMA report received by the parties prior to Dr. Perloff's deposition did not include enough detail to suggest a Daubert objection would be in order. I nevertheless find the objection facially insufficient. In totality, the objection was "I just wanted to place an objection based on 90.702 of the Florida Statutes and Daubert versus Merrell Pharmaceuticals regarding the methodology and lack of facts in evidence regarding Dr. Perloff's testimony on causation." Because I find this objection facially insufficient under Booker, it is unnecessary to engage in further analysis of this issue. The objection is overruled.

FINDINGS OF FACT

1. The stipulations of the parties are accepted and adopted.
2. Claimant is a police officer for the City of Daytona Beach. On March 21, 2015, while off duty doing yard work at home, he suffered a myocardial infarction and cardiac arrest. He was hospitalized and stents were inserted in the proximal circumflex artery and, later, in the right coronary artery. He has since returned to work.

3. The E/C initially provided medical treatment under the 120-day pay and investigate provisions of section 440.20(4) Florida Statutes (2014), authorizing Dr. Otaker Quadrat, a cardiologist, to evaluate and treat Claimant. Dr. Quadrat saw Claimant on April 9, 2015. In his report of that date, he opined that the major contributing cause of Claimant's coronary artery disease includes smoking, a family history of heart disease, high cholesterol, and obesity. He further opined that Claimant's work as a police officer was not a contributing cause of his coronary artery disease. Based on Dr. Quadrat's report, the E/C denied the claim in its entirety on April 16, 2015.

4. Claimant obtained an IME opinion from Dr. Steven Borzak, a cardiologist, who opined that the cause of Claimant's myocardial infarction is unknown. Based on the conflicting opinions of Dr. Quadrat and Dr. Borzak, the parties jointly moved for appointment of an EMA pursuant to section 440.13(9)(c), Florida Statutes (2014). I granted the motion and appointed Dr. David Perloff, also a cardiologist, as the EMA.

5. In his report and subsequent deposition testimony, Dr. Perloff could not state that the major contributing cause of Claimant's myocardial infarction and coronary artery disease was any particular risk factor or combination of risk factors.

CONCLUSIONS OF LAW

1. The parties agree Claimant is entitled to the presumption contained in section 112.18(1)(a), Florida Statutes (2014). I therefore start from the premise that Claimant's heart condition is compensable unless the E/C proves it is not. 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).

2. 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. Dr. Quadrat, the cardiologist previously authorized by the E/C under the 120-day pay and investigate provisions of section 440.20(4) Florida Statutes (2014), opined the major contributing cause of Claimant's coronary artery disease includes smoking, a family history of heart disease, high cholesterol, and obesity. He further opined that Claimant's work as a police officer was not a contributing cause of his coronary artery disease.² However, Dr. Perloff, the EMA appointed in this matter at the joint request of the parties, did not state that the major contributing cause of Claimant's disabling heart disease was any particular risk factor or combination of risk factors.

4. Claimant contends the clear and convincing standard applies to rebutting the presumption of compensability because Dr. Borzak's and Dr. Perloff's opinions provide some additional medical evidence of occupational causation. I reject this contention because Dr. Borzak opined that the cause of Claimant's myocardial infarction is unknown and Dr. Perloff's opinion was equivocal. I therefore conclude the E/C may rebut the presumption by persuading

² Neither Dr. Quadrat nor Dr. Borzak was deposed, so their opinions are gleaned strictly from their medical reports.

me to accept competent evidence to the contrary.³

5. I have carefully considered the E/C's argument that Dr. Perloff's testimony in its totality amounts to an opinion that the major contributing cause or causes of Claimant's heart condition are not work-related. I reject this contention and find Dr. Perloff's opinion to be that the cause of Claimant's disabling heart condition is unknown. For example, Dr. Perloff testified:

[I]f you take an individual patient, I can't tell you what actually caused his coronary disease. All I can tell you is from a statistical standpoint what is most likely to have been the cause, okay?

He also stated:

And the problem is I can't actually tell you what [Claimant's heart disease] is due to because – I can tell you that, in my medical opinion, it is much more likely than not to be related to a combination of his cholesterol, family history, and smoking than it is related to his job, but I can't tell you that was definitely due to that. What I can tell you is it's more likely than not to be related to that but that's the best I can do.

Claimant's counsel later asked Dr. Perloff:

And then so, when we're talking about these risk factors, right, so if we've got our little pot of chili with all our risk factors inside, right, how does one separate, right – from a medical standpoint, how do you go into that chili and separate what you may consider occupational versus what you may consider non-occupational? I mean, what is the methodology by which one does that?

Dr. Perloff replied:

My friend, there is no way to do that. That's the thing is that it is just a pot of chili, you know. ... It's like I cannot – there's no medical data that will really allow me to tease out with an individual patient and say what it is that caused that person's heart disease.

³ In applying the competent evidence standard, I have not overlooked the fact that, by statute, the opinion of the EMA is presumed correct absent clear and convincing evidence to the contrary. § 440.13(9)(c), Fla. Stat. (2014). When the EMA's opinion on the disputed issue of major contributing cause is equivocal, however, case law holds that this nearly conclusive presumption of correctness does not apply. Instead, the JCC should use the EMA's opinions as a source of assistance and a metric to measure the credibility and weight of the other evidence. Fitzgerald v. Osceola County School Board, 974 So. 2d 1161, 1164 (Fla. 1st DCA 2008).

After testifying that he could not say what caused Claimant's heart attack, Dr. Perloff was then asked the following questions:

Q. Okay. And with these risk factors that, you know, we talked about earlier, family history, cholesterol and smoking, can you objectively put a number on each of those risk factors to get us to 51 or higher percentage cause of heart attack?

A. No.

Q. Because there's no objective test to do that, correct?

A. There's no way to do that.

Q. Okay. All right.

A. And it would be, again, an intellectually dishonest exercise to try to assign a number.

Although later in his deposition Dr. Perloff reiterated that Claimant's heart disease was most likely related to the combination of family history, low LDL cholesterol, and smoking, he never recanted his earlier testimony quoted above.

6. Thus, on one side of the evidentiary ledger is (1) a presumption of occupational causation under section 112.18(1)(a), Florida Statutes, (2) Claimant's conclusory IME opinion (not elaborated upon by deposition testimony) that the cause of Claimant's heart condition is unknown, and (3) the EMA's report and extensive deposition testimony which I construe to say, albeit equivocally, that it is not possible to say any particular risk factor or combination of risk factors is the major contributing cause of Claimant's disabling heart condition. On the other side of the evidentiary ledger is the conclusory opinion of the previously authorized treating cardiologist (also not elaborated upon by deposition testimony) that Claimant's work as a police officer is not a contributing cause of his coronary artery disease.

7. Because the presumption of compensability unquestionably applies, and because Dr. Perloff's opinion on causation is equivocal, my task is to determine whether the E/C has

presented competent evidence that convinces me Claimant's heart condition is not work-related. Having carefully considered the totality of the evidence, and using Dr. Perloff's testimony as a metric to measure the other medical evidence, I conclude the major contributing cause or causes of Claimant's disabling heart disease are unknown. The E/C has therefore failed to rebut the presumption of compensability in section 112.18(1)(a), Florida Statutes (2014), and Claimant's disabling heart disease is compensable by operation of law. See LeBlanc v. City of West Palm Beach, 73 So. 3d 181 (Fla. 1st DCA 2011); Fuller v. Okaloosa Corr. Inst., 22 So. 3d 803, 806 (Fla. 1st DCA 2009) (stating, to rebut 112.18 presumption, E/C required to affirmatively demonstrate non-work-related cause, not prove that there is no known cause).

It is therefore,

ORDERED AND ADJUDGED:

1. Claimant's heart disease is compensable.
2. Jurisdiction is reserved to adjudicate all remaining issues if the parties are unable to resolve them administratively.

DONE AND ELECTRONICALLY TRANSMITTED VIA EMAIL TO THE ATTORNEYS AND CARRIER LISTED BELOW this 22nd day of January, 2016, in Daytona Beach, Volusia County, Florida.



Wilbur W. Anderson
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