

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

Michael L Burroughs,
Employee/Claimant,

vs.

OJCC Case No. 20-000653TSS, 20-
000655TSS

Florida Highway Patrol/Division of Risk
Management,
Employer/Carrier/Servicing Agent.

Accident dates: 12/18/2019, 12/20/2019

Judge: Timothy S. Stanton

FINAL COMPENSATION ORDER

THIS CAUSE came on for a final hearing before the undersigned Judge of Compensation Claims on July 23, 2020. Kristine Callagy, Esquire, appeared for Claimant. Laura Buck, Esquire, appeared for the employer/carrier (E/C). I entered an order on June 11, 2020 consolidating both cases under OJCC# 20-000653. The petitions for benefits (PFB) e-filed on January 10, 2020, (both cases) were the subject of this final hearing. The PFBs filed on June 10, 2020 (both cases) are unmediated and are not ripe for adjudication; therefore, I reserve jurisdiction for those PFBs. The appendix lists all witnesses, exhibits, documents, and objections.

Claims (for this final hearing):

OJCC: 20-000653:

1 Payment of temporary partial disability (TPD) starting from December 18, 2019 to present and continuing at the correct compensation rate. Claimant withdrew this claim at the final hearing.

2. Payment of temporary total disability (TTD) starting from December 18, 2019 to present and continuing at the correct compensation rate. Claimant withdrew his claim for TTD benefits for the time period of February 17, 2020 through July 23, 2020. The remaining outstanding time period for TTD benefits is December 18, 2019 through February 16, 2020.
3. Authorization of medical care and treatment of a cardiologist and/or appropriate physician for Claimant's work-related cardiac injury.
4. Compensability of disabling arterial and cardiovascular hypertension and/or heart disease pursuant to section 112.18(1), Florida Statutes.
5. Penalties, interest, costs and attorney fees.

OJCC: 20-000655:

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5. Penalties, interest, costs and attorney fees.

Defenses for both OJCC 20-000653 and OJCC20-000655:

1. No TTD/TPD due.
2. No medical evidence to support TTD status.
3. No medical evidence to support TPD status.
4. Average weekly wage/compensation rate (AWW/CR) per the thirteen-week wage statement.
5. Claimant has not met the criteria to qualify for a presumption under section 112.18, Florida Statutes.
6. The E/C rebutted presumption in section 112.18.
7. Work performed is not the major contributing cause of Claimant's condition.
8. Claimant's condition did not arise out of employment.
9. Claimant's condition is personal in nature and pre-existed the alleged incident.
10. No causal connection between Claimant's condition and work performed.
11. Request for cardiologist is not reasonable or medically necessary, and/or not related to any compensable event, due to Claimant's personal, pre-existing condition.
12. No costs or attorney fees due.
13. No penalties or interest due.

Findings of Fact and Conclusions of Law:

I have carefully considered and weighed all the evidence presented to me in making my findings of fact and conclusions of law. Although I will not recite in explicit detail the testimony, and I may not refer to each piece of documentary evidence, I have considered all of

the testimony and evidence and I have attempted to resolve all the conflicts in the testimony and evidence. Based upon the foregoing and the applicable law, I make the following findings:

1. The undersigned has jurisdiction over the parties and the subject matter.
2. The stipulations agreed to by the parties in the Uniform Pretrial Stipulations (2) filed on April 21, 2020 are accepted and adopted.
3. Claimant testified that the Florida Highway Patrol hired him as a trooper in 1985. Over the years, he has received multiple promotions and he has been a captain since 2008. He oversees approximately 25 employees and is responsible for law enforcement in three counties.
4. In 2017, Claimant was diagnosed with an enlarged aorta, and he came under the care of Dr. Klodell, cardiologist. After monitoring and providing follow-up care for Claimant's enlarged aorta, Dr. Klodell determined in December 2019 that Claimant developed an aortic aneurysm that required surgery. On December 18, 2019, Dr. Klodell performed heart surgery on Claimant to remove the aneurysm and place grafting material in the aorta. While still in the hospital following the surgery, Claimant experienced complications and required additional surgery on December 20, 2019. Following his surgeries, Claimant had a successful recovery.
5. Dr. Chernobelsky, board certified cardiologist, is Claimant's independent medical examiner (IME). He testified that Claimant was diagnosed with an ascending aortic aneurysm, which required surgery. He testified that Claimant underwent heart surgery on December 18, 2019 to repair the aortic aneurysm, and following the surgery, Claimant suffered complications that required additional surgery on December 20, 2019. Following the December 20, 2019 surgery, Claimant also was diagnosed with cardiomyopathy and coronary artery disease, which Dr. Chernobelsky testified was likely related to the December 18, 2019 aortic aneurysm surgery.

6. In regard to Claimant's aortic aneurysm, Dr. Chernobelsky testified that the aortic aneurysm is cardiovascular disease and it is "within what we call heart disease." Dr. Chernobelsky explained that the aorta is the main artery of the heart and it contains the aortic valve, which is part of the heart. He testified that the aortic valve is contained within the aortic root. He further testified that the cardiovascular system is not "split between the heart and the aorta."

7. Dr. Chernobelsky testified that in Claimant's case, his aortic aneurysm was located immediately after the aortic valve and the surgery required that the surgeon disconnect Claimant's coronary arteries (which are part of the heart) from his aorta, and he sewed a Dacron graft on the aorta to the heart.

8. Dr. Chernobelsky further testified that following the surgery, Claimant was TTD from December 18, 2019 through February 16, 2020.

9. Dr. Nocero, board certified cardiologist, is the E/C's IME. He testified that Claimant's diagnosis was an aortic aneurysm, which required surgery. In explaining Claimant's surgery, Dr. Nocero testified that the surgery is one of the most difficult operations as Claimant was connected to a heart-lung machine, and that Claimant's heart was stopped in cold cardiac arrest, as it is impossible to remove the aneurysmal tissue and place the grafting material with a functioning heart. During the surgery, the surgeon removed Claimant's two coronary arteries (which is part of the heart according to Dr. Nocero) from the aorta and then later reattached them to the aorta with the graft material. Surgery also included removal of the aortic root, and the surgeon inspected the aortic valve (also part of the heart according to Dr. Nocero), which is located in the aorta, and it was found thickened but it did not require replacement.

10. In discussing whether Claimant's aortic aneurysm is "heart disease," he testified that it was not. When asked if the aortic aneurysm was a cardiovascular problem, he testified that he considered it "a vascular problem not part of the heart which is the cardio part." He testified that, "I'd be more specific in limiting it to vascular."

11. Dr. Nocero testified that following Claimant's December 18, 2019 aortic aneurysm surgery, Claimant suffered from complications and he required additional surgery on December 20, 2019. Dr. Nocero stated that Claimant was diagnosed with cardiomyopathy and coronary artery disease while in the hospital recovering from the two surgeries. He related the cardiomyopathy and coronary artery disease to the December 18, 2019 aortic aneurysm surgery.

12. Dr. Nocero testified that after the December 18, 2019 surgery, Claimant was TTD from December 18, 2019 through February 16, 2020.

Presumption:

13. Section 112.18, Florida Statutes, referred to as the "Heart/Lung Bill," may provide a claimant with a presumption of compensability for certain covered medical conditions.

Section 112.18 states:

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 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 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.

14. Accordingly, a claimant must show four elements for the presumption to apply: 1) the claimant is a member of the protected class; 2) the claimant developed a covered condition;

3) the claimant underwent a pre-employment physical that failed to reveal evidence of a covered condition; and 4) that the covered condition resulted in disability or death.

OJCC: 20-000653:

15. Concerning the December 18, 2019 date of injury for Claimant's aortic aneurysm, the parties stipulated that Claimant met three of the four elements required for a section 112.18 presumption: Claimant is a member of the protected class as a police officer, he successfully passed a pre-employment physical, and he suffered a disability on December 18, 2019. The parties disagreed that his condition of an aortic aneurysm is a covered condition.

16. Section 112.18, Florida Statutes, lists three covered conditions: hypertension, heart disease, and tuberculosis. Claimant argued that his aortic aneurysm is included in the covered condition of "heart disease," while the E/C disagreed. In determining whether an aortic aneurysm is heart disease¹, I look to City of Venice v. Van Dyke, 46 So.3d 115, (Fla. 1st DCA 2010), which addressed the aorta, aortic disease, and the presumption.

17. In City of Venice v. Van Dyke, 46 So.3d 115, (Fla. 1st DCA 2010), the claimant, as a result of his aortic condition, underwent replacement of the ascending aorta, reattachment of the coronary arteries, heart catheterization, and reimplantation of the aortic valve. In denying the compensability, the E/C argued that the aorta was not part of the heart; therefore, aortic disease was not "heart disease." Id. In affirming the JCC's finding of compensability, the court noted that if a statute does not define a word or term, the courts must apply the plain and ordinary meaning of the word or term. However, the court also noted that, "When necessary, the plain and ordinary meaning of words can be ascertained by reference to a dictionary." Id. at 116.

¹ The statutes do not contain a definition of heart disease, nor identify any specific conditions.

18. In Van Dyke, the court noted that Florida statutes do not define the term “heart disease.” Therefore, the court referenced Dorland’s Illustrated Medical Dictionary (29th ed.), and it adopted Dorland’s definition of “heart disease,” and held that “any organic, mechanical, or functioning abnormality of the heart, its structures, or the coronary arteries” is “heart disease.” Id. As referenced and adopted by the court, the definition of “heart disease” includes three physical elements for heart disease: (1) the heart, (2) its structures, and (3) the coronary arteries.

19. After adopting Dorland’s definition of heart disease, the court again referenced Dorland’s, and held that, “*The ascending aorta is one of the structures of the heart.*” (emphasis added). Id. Therefore, the court held that an aorta is included within the definition of “heart disease.” Id. The court further held, in adopting Dorland’s definition of “heart disease,” that, “*it is clear that Claimant’s aortic disease is a condition which can reasonably be classified as heart disease . . .*” (emphasis added). Id. In rejecting the E/C’s argument that aortic disease is not a covered condition, the court held that “Moreover, because the E/C does not present a cognizable legal basis for reversal, other than anecdotally arguing the positional, and prepositional, relationship of Claimant’s condition to his actual heart, we affirm . . . Claimant’s . . . aortic disease is compensable.” Id.

20. Here, as in Van Dyke, Claimant’s condition concerns the aorta.

21. Dr. Chernobelsky testified that an ascending aorta is the main artery of the heart and it is a continuation of the left ventricular of the heart. He further testified that the aorta contains the aortic valve, and the aortic valve is part of the heart. He testified that the aortic valve is located within the aortic root. Dr. Nocero also agreed that the aortic valve is part of the heart and it is located within the aorta.

22. Dr. Chernobelsky explained that while an aortic aneurysm is a cardiovascular condition, it is also, “within what we call heart disease.” He further testified that the cardiovascular system is not “split between the heart and the aorta.” I accept Dr. Chernobelsky’s opinions and testimony.

23. I recognize that Dr. Nocero disagreed with aspects of Dr. Chernobelsky’s testimony and opinions; however, after reviewing both of the doctors’ testimony and opinions, I accept Dr. Chernobelsky’s opinions over those of Dr. Nocero where the opinions differ concerning the aortic aneurysm, as I find his opinions are the more logical and well-reasoned opinions.

24. Therefore, as Van Dyke held that heart disease is “any organic, mechanical, or functioning abnormality of the heart, its structures, or the coronary arteries,” that an aorta is a “structure of the heart,” and that aortic disease is “a condition which can reasonably be classified as heart disease . . .,” I find that Claimant’s aortic aneurysm is work-related and compensable². Furthermore, I find that Claimant’s aortic aneurysm is work-related and compensable based upon Dr. Chernobelsky’s opinion that an aortic aneurysm is a cardiovascular condition that is “within what we call heart disease,” along with his other opinions.

25. I find that Claimant has met his burden of proof for the presumption, and his aortic aneurysm is work related and compensable unless the E/C provides sufficient evidence to rebut the presumption. However, I find the E/C failed to provide the evidence or argument³

² The E/C’s argument that since the 1996 Florida Impairment Guide does not contain a specific rating for an aortic condition, it is not heart disease. However, Dr. Chernobelsky testified that, in his opinion, it was an oversight in the guide, and Dr. Nocero testified that the Guide was outdated. While I considered the non-inclusion of an aortic rating in the Guide, I find that it is not dispositive in determining whether or not Claimant’s aortic disease is “heart disease.”

³ The E/C did not argue it rebutted the presumption.

sufficient to rebut the presumption. Therefore, as noted, I find that Claimant's aortic aneurysm is work related and compensable.

OJCC: 20-000655:

26. The parties stipulated that Claimant met the presumption⁴ of section 112.18 for heart disease for Claimant's coronary artery disease and cardiomyopathy. However, the E/C argued that it successfully rebutted the presumption.

27. The E/C argued that Claimant's coronary artery disease and cardiomyopathy was caused by complications from the December 18, 2019 surgery for his aortic aneurysm; therefore, since the aortic aneurysm was non-compensable so was the coronary artery disease and cardiomyopathy.

28. In regard to the cause of Claimant's coronary artery disease and cardiomyopathy, Dr. Nocero testified, within a reasonable degree of medical certainty, that Claimant's coronary artery disease and cardiomyopathy were caused by Claimant's aortic aneurysm surgery. Dr. Nocero testified that the aortic aneurysm surgery caused an occlusion of Claimant's left coronary artery that resulted in Claimant's coronary artery disease and cardiomyopathy. Dr. Chernobelsky also testified that it was likely Claimant's aortic aneurysm surgery caused his coronary artery disease and cardiomyopathy. Therefore, I accept Dr. Nocero and Dr. Chernobelsky's opinions, and I find that Claimant's aortic aneurysm surgery caused his coronary artery disease and cardiomyopathy.

29. However, as I previously found that Claimant's aortic aneurysm was a compensable work accident, I find that the E/C did not rebut the presumption with an unrelated

⁴ Claimant relies strictly upon the presumption.

cause. Therefore, I find that Claimant's coronary artery disease and cardiomyopathy are work related and compensable.

Cardiologist:

30. As I found Claimant's aortic aneurysm, coronary artery disease and cardiomyopathy compensable, I find that he is entitled to authorization of a cardiologist for treatment of those conditions.

TTD/TPD:

31. Dr. Chernobelsky and Dr. Nocero both testified that Claimant was TTD from December 18, 2019 through February 16, 2020. Therefore, I find that Claimant is entitled to TTD benefits from December 18, 2020 through February 16, 2020.

WHEREFORE it is ORDERED AND ADJUDGED:

1. The claim for compensability of Claimant's aortic aneurysm, coronary artery disease and cardiomyopathy is granted. Claimant's aortic aneurysm, coronary artery disease and cardiomyopathy are work-related and compensable.

2. The claims for authorization of medical care and treatment of a cardiologist, and/or appropriate physician for Claimant's work-related cardiac injury are granted for both dates of injury. The E/C shall authorize a cardiologist for treatment of Claimant's aortic aneurysm, coronary artery disease and cardiomyopathy. One cardiologist may provide care for both dates of accident.

3. The claims for TTD benefits for December 18, 2019 through February 16, 2020, and December 20, 2019 through February 16, 2020, are granted. However, the claim for TTD benefits for the December 18, 2019 date of accident also overlaps the TTD claim for the

December 20, 2019 date of injury. The average weekly wage for both dates of injury is the same. Therefore, while I award Claimant TTD for both dates of accident, the E/C shall pay Claimant TTD benefits from December 18, 2019 through February 16, 2020 for only the date of accident of December 18, 2019, with penalties and interest.

4. The claim for attorney fees and costs is granted. I reserve jurisdiction to determine amount of the attorney fees and costs if the parties are unable to agree.

DONE AND SERVED this 6th day of August, 2020, in Gainesville, Alachua County, Florida.



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APPENDIX

Judge Exhibits:

1. PFB filed on January 10, 2020. (DN 1) 20-000653.
2. Response to PFB filed on January 31, 2020. (DN 7) 20-000653.
3. Pretrial stipulation filed on April 21, 2020. (DN 15) 20-000653.
4. Claimant supplemental pretrial stipulation filed on April 24, 2020. (DN 16).
5. Order consolidating cases filed on June 11, 2020. (DN 23) 20-000653.
6. PFB filed on January 10, 2020. (DN 1) 20-000655.
7. Response to PFB filed on February 19, 2020. (DN 8) 20-000655.
8. Pretrial stipulation filed on April 21, 2020. (DN 16).
9. Claimant supplemental pretrial stipulation filed April 24, 2020. (DN 17) 20-000655.

Consolidated Exhibits filed in 20-000653:

10. Claimant's trial memorandum, argument only, filed on July 20, 2020. (DN 32).
11. The E/C's trial memorandum, argument only, filed on July 21, 2020. (DN 53).

Joint Exhibits:

None.

Claimant Exhibits – filed under consolidated case 20-000653:

1. Linda Strickland's deposition filed on July 20, 2020. (DN 31).
2. Dr.Chernobelsky's deposition filed on July 20, 2020. (DN 33).
3. Dr.Chernobelsky's exhibit 1, 2, 3 and 4 filed on July 21, 2020. (DN 32-52, 54-65).
4. Preemployment physical filed on July 20, 2020. (DN 30).
5. Payroll records filed on July 20, 2020. (DN 69).

E/C Exhibits:

1. Michael Burroughs' deposition filed on July 21, 2020. (DN 73).
2. Dr. Nocero's deposition filed on July 21, 2020. (DN 74). Claimant placed a Daubert objection on page 41 of the deposition concerning any causation opinion, based upon pure opinion testimony and not based upon medical or scientific data. At the final hearing, Claimant raised his Daubert objection. Section 90.702, Florida Evidence Code, codified the Daubert standard: (1) The testimony is based upon sufficient facts or data, (2) The testimony is the product of reliable principles and methods; and (3) The witness has applied the principles and methods reliably to the facts of the case. See also Booker v. Sumter County Sheriff's Office, 166 So.3d 189 (Fla. 1st DCA 2015).

Excluding a medical doctor's professional opinion involving medical experts, however, is rarely appropriate. Dickenson v Cardiac & Thoracic Surgery of E. Tenn. P.C., 388 F. 3d 976 (6th Cir. 2004). The purpose of the Daubert admissibility analysis is to protect juries from being swayed by technical evidence that is highly questionable. In a bench trial (such as a workers' compensation final hearing) it is acceptable to admit evidence of

borderline admissibility and give it the weight it deserves. SmithKline Beecham Corp. v Apotex Corp., 247 F. Supp 2d 1011 (N.D. Ill. 2003).

Here, I find Dr. Nocero is a qualified expert, as he is board certified and well-experienced in cardiology. I find that he reviewed significant medical records and also performed a physical examination of Claimant. He also discussed an article that he referenced during the deposition. While the E/C objected to Dr. Nocero's opinions, I find the causation opinions admissible. While the principles and methodology references may have been somewhat limited, I find that goes more to the weight of the evidence and testimony. I also note that Dr. Chernobelsky's (Claimant's IME) opinions concerning causation of Claimant's cardiomyopathy and coronary artery disease essentially the same as Dr. Nocero.

3. Dr. Nocero's exhibits 1, 2, 3, and 4 filed on July 21, 2020. (DN 75-100).

Live witnesses:

Michael Burroughs.