

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D21-785

CITY OF MIAMI BEACH POLICE
DEPARTMENT and CORVEL
CORPORATION,

Appellants,

v.

RICHARD WEISSMAN,

Appellee.

On appeal from an order of the Office of the Judges of
Compensation Claims.
Edward R. Almeyda, Judge.

Date of Accident: April 25, 2019.

November 23, 2021

PER CURIAM.

AFFIRMED.

ROBERTS, RAY, and MAKAR, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Luis F. Estrada of Law Offices of Luis Estrada, LLC, Miami, for Appellants.

Kimberly A. Hill of Law Offices of Anidjar & Levine, P.A., Fort Lauderdale, for Appellee.

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

Richard Weissman,
Employee/Claimant,

OJCC Case No. 19-023272WJH

vs.

Accident date: 4/25/2019

City of Miami Beach Police
Department/Corvel Corporation,
Employer/Carrier/Servicing Agent.

Judge: Edward R. Almeyda

_____ /

FINAL COMPENSATION ORDER

This matter came before me for a final hearing on 2/22/2021 via Zoom. The Claimant was represented by Audrie Castro, Esquire, and the E/C by Luis Estrada, Esquire.

The adjudicated PFBs is dated 6/4/2020. A PFB dated 11/12/2020 was at the time of the hearing dismissed without prejudice. The E/C agreed not seek costs, and further not to raise res judicata, if it should be refiled.

CLAIMS/DEFENSES: (summary from pretrial)

Claims:

1. Authorize a cardiologist to treat hypertension.
2. Compensability of arterial and cardiovascular hypertension.
3. Payment of IIB of 10%. (withdrawn)
4. PICA

Defenses:

1. Named conditions are no properly identified.
2. Hypertension is personal condition, not work related.
3. Claimant does not meet requirements of F.S. 112.18.
4. Hypertension due to non-work-related conditions, which include obesity and failure to have routine medical evaluations.
5. Claimant materially departed from course of treatment for hypertension.
6. Claimant materially departed from course of treatment by failing to lose weight.
7. Claimant should be estopped from denying he departed from treatment as his medical records are missing.

8. Impairment is zero.
9. Fees and costs are denied.
10. E/C requests prevailing party costs.

Judge's exhibits for identification:

1. Pretrial (85 & 25)
2. Amendment to pretrial (93)
3. Claimant's supplemental memo (92)
4. E/C response to motion in limine (91)
5. E/C trial memo.
6. Claimant's motion in limine (88)

DOCUMENTARY EVIDENCE/WITNESSES:

Claimant:

1. PFB (13 & 14)
2. Dr. Chernobelsky's depositions (84, 68, 64, 63, 62)
3. Kathy Reid's deposition (59)
4. Samantha Hester's deposition (60)
5. Pre-employment physical (76)
6. Blood pressure logs (89) (Proffer only)
7. Composite of Guidelines, medical records, etc. (97) (Proffer only)
8. E-mail (94) (Proffer only).

Employer/Carrier:

- a. Claimant's deposition (70)
- b. Dr. Nocero's deposition (72)

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

1. This case involves the "heart-lung" provision. It is the Claimant's position that he, a police officer is a member of a protected class. He developed hypertension, and it is compensable pursuant to F.S. 112.18 is at issue.

2. DR. CHERNOBELSKY: this cardiologist was twice deposed. In his primary deposition he conducted a record Claimant's IME on 11/10/2020. At that time, he reviewed extensive reports identified in pages nine and ten of that deposition.

3. The record medical history is that the Claimant was diagnosed with hypertension in April, 2019 with pressure of 210/110. He was placed on medication. Ultimately, he came under

the care of Dr. Rosado. The current diagnosis is essential hypertension. This is a cardiovascular disorder that doesn't have a specific correctable cause. In this case, the cause of the hypertension is unknown. It is a chronic permanent condition which will require treatment.

4. The pre-employment physical did not reveal any evidence of heart disease. The Claimant is a first responder.

5. On the date the hypertension was discovered the Claimant was taken off work for 72 hours. The cause of that disability was the hypertension. The Doctor was unable to identify any non-work-related causes for the hypertension, and does not agree with the E/C's position that obesity is the cause. In this case of essential hypertension there is no medical test that can identify its cause.

6. The Doctor could not find any evidence of noncompliance by the Claimant, after the date of accident or dating back to 2012. The Doctor did not place the Claimant at MMI, as he was not the treating doctor, but agreed with Dr. Rosado that it was on 5/29/2019, when the blood pressure was under control. The impairment is ten percent, based on the Florida Guidelines.

7. The Claimant's obesity neither caused the hypertension nor the impairment. It did not change the treatment protocol. None of the medical records reveal a diagnosis of hypertension before 2019, or prior to the pre-employment physical.

8. A hospital admission on 10/25/2005 did not indicate hypertension, as pain (here from a knee injury) can elevate blood pressure. The B/P then was 152/92. A visit to a doctor on 8/10/2005 had a B/P reading of 130/85, which was not evidence of hypertension. The urinalysis indicated "trace protein." This is not evidence of hypertension nor would contribute to the disability as it is a minor abnormality, wrong organ system, and its cause has a very long differential analysis. The Claimant has no evidence of organ damage due to hypertension.

9. Records from 2012 do not reveal hypertension or referral to a cardiologist.

10. In his second deposition he testified that he could not testify to a reasonable certainty that the Claimant's obesity was the cause of the gentleman's hypertension. The obesity did not cause the Claimant's disability. He also reaffirmed his ten percent rating and date of MMI, the rating based on the fact that the Claimant takes three separate hypertensive medications.

11. The records attached to the deposition show that December 1990 the Claimant was examined by Dr. Snetman on behalf of the pension board. The urine was clear with no traces of blood. The B/P was 110/70. His weight was 232 pounds.

12. A record attached to the deposition dated 8/10/2005 has a B/P reading of 130/85. A record from PHC dated 6/8/12 has a B/P reading of 140/90. The urinalysis showed trace protein.

13. A discharge summary dated 6/15/2012 from Dr. Chapnik states: "*I discussed with him the hematuria. Patient is told to see his family physician after surgery to get this fully worked up.*"

14. DR. NOCERO: he is the E/C's cardiologist IME. He based his opinion on records review. The record from PHC for 6/8/2012 (pre-op evaluation) showed a B/P of 140/90. The Claimant is six feet six inches tall and weighs 265 pounds, which is a BMI of 30.6. he would consider that obese. The blood pressure reading was high and abnormal. There was a trace of blood in the urinalysis. The Claimant was recommended to seek a full work-up with a family physician for the abnormal urinalysis.

15. These are abnormal results which in his opinion would require further evaluation. The trace blood could be related to bladder cancer or hypertension.

16. While there is a relationship between obesity and hypertension, as to hematuria he said "it could be." He opined that this recommended evaluation would have covered

hypertension. This failure would have been a material departure from a prescribed course of treatment.

17. The failure to lose weight would have significantly increased the need for treatment and disability as it relates to hypertension. Here, the chronic obesity contributed to the hypertension.

18. He further opined that the Claimant had no impairment as he was properly medicated, which reduced quickly the blood pressure, and the Claimant was asymptomatic. Dr. Nocero does not agree with the premise police work has a relationship with hypertension. He did not feel that the Claimant's work had any relationship with hypertension, and considered in that opinion the fact that the Claimant was retiring, therefore, not on active duty.

19. The Claimant was a one pack daily smoker, and that affects blood pressure.

20. Dr. Nocero was shown the pre-employment physical. While it did not refer the Claimant to a cardiologist, also did not have a blood pressure reading. The Claimant, however, was cleared for employment. The report of this physical did not show any taking of medication by the Claimant.

21. The Doctor did not agree with an impairment but agreed to the MMI date of 5/29/2019. He admitted that the blood in the urine's cause was never determined. Dr. Nocero did not review the Claimant's B/P logs from home readings furnished Dr. Rosado. Regarding smoking, the records, according to Dr. Nocero, are ambiguous. These showed smoking two cigars daily in one record, and ten cigarettes daily in the other. He could not tell if this smoking was current or of a prior smoking history.

22. The diagnosis is of essential hypertension, which is of one without a known cause. He had previously assigned three risk factors for the hypertension of the Claimant, however,

admitted that there is no actual formula for the effect of these risk factors on the Claimant. Lack of treatment would create an organ damage, which has not occurred in this case. There is no evidence non-compliance with the hypertension control regime prescribed to the Claimant.

23. CLAIMANT: he testified via Zoom and his deposition is also in evidence. He injured himself in 2005 and had the knee operated by Dr. Desimone. He followed up with him and had not treated for the knee in years. On 4/25/2019 he went to Dr. Neytman who found his blood pressure very high. He did not have a PCP prior to that. He consulted with his father, a physician, if he had an issue.

24. Prior to April 2019, he had never been told he had elevated blood pressure. Dr. Neytman told him that he should adjust his diet in a way to lose weight. He was also taken off work by Dr. Neytman for 72 hours.

25. At the time of his pre-employment physical he had no issues with hypertension, and he was hired. He has never been told to enter into an actual weight loss program.

26. CATHERINE REID: she is the adjuster whose deposition is in evidence. Of significance is the pre-employment physical which indicate he meets the standards as of 2/21/89.

27. MS. HESTER: She is in the Employer's payroll department. According to the records the Claimant used ISC, injury service connect leave on 4/26/2019. He apparently was off duty the next two days.

ANALYSIS

28. DAUBERT OBJECTIONS: The first item is to dispose of the Claimant's challenge of Dr. Nocero's opinion due to DAUBERT, and its statutory counterpart. This is the testimony of a cardiologist who is board certified, involving issues within his expertise. His opinions were all within his area of expertise as a cardiologist, and as such meet the DAUBERT test.

29. Because of this, I deny the motion in limine to strike his opinion. Any deficiencies in the data which was provided to him go to the weight of his testimony.

30. For the same reason as with Dr. Nocero's testimony, I find that the opinion of Dr. Chernobelsky's is admissible.

31. PRESUMPTION. The next issue is over the establishment of the presumption provided in F.S. 112.18. Its elements are discussed below.

32. That the Claimant is a member of the protected class (i.e. firefighter, police officer or correctional officer). Here, there is no dispute as to the Claimant's employment as a police officer.

33. That the Claimant developed a protected condition (i.e. hypertension, heart disease, or tuberculosis). Again, there is not much of a dispute as to the fact that the Claimant developed essential hypertension as diagnosed in April, 2019 with a B/P of 210/110. This second prong is met.

34. That the Claimant underwent a pre-employment physical that failed to reveal evidence of the claimed protected condition(s). The pre-employment physical exam in evidence does not reveal any evidence of elevated blood pressure or cardiac condition. The Claimant was cleared for employment as a police officer. I find that this third prong is met.

35. That the protected condition resulted in, temporary, partial, or permanent disability or death (temporary or permanent incapacitation from performing his duties as a law enforcement officer/correctional officer). The E/C is contesting the existence of a temporary disability as well as a permanent incapacity.

36. The documentary evidence of a non-work note from Dr. Neytman dated 4/25/29 which reads in part: *"I recommend for him to be off duty for 72 hours and be seen by a cardiologist."* In support of this, the Claimant testified that he, indeed, was off work three days, one on sick leave and the other two because he was not on duty. I accept this testimony.

37. Dr. Chernobelsky agreed with this no work recommendation given the extent of the

elevation in the Claimant's blood pressure. Contrary is the opinion of the E/C IME, Dr. Nocero, which overlooks the extent of the hypertensive emergency on 4/19/2019, and Dr. Neytman's conclusion on 4/25/2019. I, thus, reject any conclusion from Dr. Nocero about this three-day disability.

38. Next is the degree of permanent impairment. I note all the testimony supports a date of MMI on 5/29/2019. In evaluating the testimony of Dr. Nocero vs. Dr. Chernobelsky I note that from the onset he does not agree with the premise of F.S. 112.18 – that police work causes hypertension. This lack of belief permeated the entire scope of his testimony.

39. The records from both Dr. Neytman and Dr. Rosado show diastolic reading repeatedly in excess of 90 mm Hg, which Dr. Nocero ignored. He also either ignored the Florida Impairment Guide and its application to this case. In that guide the test for impairment is set forth, and contemplates organ damage, blood pressure readings, and the taking of medication.

41. Dr. Nocero opined that the Claimant did not meet the test for a permanent impairment. In doing so, Dr. Nocero ignores the fact that the Claimant is taking three different medication to control his hypertension (Amlodipine 5mg, Hydrochlorothiazide 25 mg, and Bystolic 10 mg), this alone warrants a rating greater than 0%. Therefore, his opinion on impairment should also be inadmissible for his failure to abide by the 1996 Guidelines and the medical and factual evidence.

41. In contrast, Dr. Chernobelsky explained in detail why Captain Weissman fell under Class I with a 10% PIR for his hypertension, using the 1996 Florida Impairment Guides. Dr. Chernobelsky stated as follows, in page 30 of his deposition:

"I used 1996 Florida Uniform Permanent 13 Impairment Rating schedule because Mr. Weissman has documented hypertension but does not have what we consider to be a target organ damage. I assigned him within class one category of permanent impairment rating, which gives a range from zero to 14 percent. Since initial elevation of his blood pressure was severe and required urgent treatment and the fact that he needs three

medications to control his blood pressure, I chose a rating of ten percent which is a little bit lower than the median allowed within the class.”

42. I find Dr. Chernobelsky’s opinion to be in comport with the Florida Guide and more logical and reasonable than the contrary opinion of Dr. Nocero. In view of this I find that an impairment rating of ten percent is appropriate.

43. In view of the above analysis, I conclude that the Claimant successfully established the elements for the presumption to apply.

44. DEFENSES. The E/C is defending on several bases, including the so-called reverse presumption found in F.S. Section 112.18(1)(b)(1) of Florida Statutes. This prescribes in pertinent part that:

“For any workers’ compensation claim filed under this section and chapter 440 occurring on or after July 1, 2010, a law enforcement officer, correctional officer, or correctional probation officer as defined in s. 943.10(1), (2), or (3) suffering from tuberculosis, heart disease, or hypertension is presumed not to have incurred such disease in the line of duty as provided in this section if the law enforcement officer, correctional officer, or correctional probation officer: a. Departed in a material fashion from the prescribed course of treatment of his or her personal physician and the departure is demonstrated to have resulted in a significant aggravation of the tuberculosis, heart disease, or hypertension resulting in disability or increasing the disability or need for medical treatment...”

45. Furthermore, the legislature in §112.18(1)(b)(2) clarified what it intended by “prescribed course of treatment.” Specifically stating that “prescribed course of treatment” means prescribed medical courses of action and prescribed medicines for the specific disease or diseases claimed and as documented in the prescribing physician’s medical records. (Emphasis by the undersigned).

46. SPOILATION DEFENSE: this is predicated upon an impermissible assumption that medical records existed prior to 2019, and the Claimant withheld the same. The Claimant’s accepted clear testimony is that he did not receive medical treatment from 2012 to 2019. His

father was a physician (now deceased) and he would take care of minor conditions such as a cold. There is no evidence that any records were kept by him. The E/C, except for making this impermissible assumption, has no evidence to support its basis. This defense is denied.

47. FAILURE TO RECEIVE TREATMENT: it is noted that the statute requires treatment for the disease claimed. Again, the E/C is making an assumption that said treatment was ever recommended or prescribed. The E/C makes reference to the fact that in 2012, during the pre-operative examination, the tests showed blood in the urine. Also, in this exam his B/P was 140/80. They add these facts together to conclude that had the Claimant sought medical help, his blood pressure would have been treated.

48. This conclusion fails for two reasons. The first is that there is no evidence that this B/P reading was considered elevated by Dr. Chapnik. Dr. Chernobelsky testified, which testimony I accept, that under the circumstance of pain in the knee such reading would be justified and not abnormal.

49. Second, the E/C suggested in its argument that the recommendation for further evaluation encompassed the blood pressure. This is not so, as clearly in the record Dr. Chapnik recommended a further evaluation for the hematuria. This is a kidney issue, involving a separate organ, as described by Dr. Chernobelsky.

50. The requirement of F.S. 112.18(1)(b)(2) that the treatment be for the claimed condition is not borne by the doctors note, nor the balance of the testimony. Any assumption that had the Claimant seen a kidney doctor his blood pressure would have been treated is an impermissible assumption, not borne by the evidence.

51. HYPERTENSION NOT CAUSED BY THE EMPLOYMENT: this argument is predicated on the fact that the Claimant is overweight and a smoker. No witness testified that the

primary causes of the hypertension were either of those conditions. Rather, the testimony is that they are risk-factors to be considered.

52. Dr. Chernobelsky testified that he had some overweight patients with normal blood pressure, and some normal weight with high blood pressure. The same with the smoking which the Claimant described. This is a risk-factor, which as Dr. Chernobelsky described, it is the lung cancer that will kill you.

53. It is the evidence of non-industrial causation that may be found to rebut the presumption, not the mere existence of risk factors or conditions. *Punsky v. Clay Cty. Sheriff's Office*, 18 So.3d 577 (Fla. 1st DCA 2009). The mere presence of risk factors does not satisfy the E/C's rebuttal threshold despite what it asserted in the case at hand.

54. Here, both Dr. Chernobelsky and Dr. Nocero opined that the Claimant was diagnosed with essential hypertension. (Dep. of Dr. Chernobelsky pg. 14:2-15:10). Dr. Chernobelsky further opined in his IME "I agree with Dr. Nocero's assessment that Mr. Weissman's diagnosis is "primary hypertension the etiology of which is unknown." (Dep. of Dr. Chernobelsky pg. 14:2- 15:10; see also Dep. of Dr. Nocero pg. 57:22-59:16).

55. This clear testimony from both IMEs indicate that the Claimants condition has an unknown origin. Nothing in the evidence proves otherwise.

56. In *Caldwell v. Division of Retirement, Florida Division of Administration*, 372 So.2d 438 (Fla. 1979) the Court was faced with conflicting medical evidence. There was evidence that the Claimant's heart disease was caused by arterial sclerosis unrelated to his employment, and there was evidence that the recent employment stress or employment stress over a period of time caused the heart disease in whole or in part.

57. The Court stated that in such circumstances, the presumption could only be overcome by clear and convincing evidence, and that, in the absence of cogent proof to the contrary; the policy in favor of job relatedness must be given effect. In that regard, it was further noted: *“That statutory presumption is an expression of a strong public policy which does not vanish when the opposing party submits evidence. Where the evidence is conflicting, the quantum of proof is balanced, and the presumption should prevail.”*

58. In conclusion, I find that the Claimant’s hypertension is compensable and that he has an impairment of ten percent. The medical treatment for this condition is the E/C’s responsibility.

59. The Claimant, having prevailed, is entitled to Carrier paid fees and costs, for which jurisdiction is reserved.

WHEREFORE IT IS ORDERED AND ADJUDGED:

1. The Claimant’s hypertension is a compensable condition.
2. The E/C shall furnish medical treatment by a cardiologist for the hypertension.
3. The E/C shall pay the Claimant ten percent impairment together with penalties and interest.
4. Jurisdiction is reserved on issues of fees and cost

DONE AND SERVED this 25th day of February, 2021, in Miami, Dade County, Florida.



Edward Almeyda
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