WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOSEPH HERNANDEZ, ***Applicant***

vs.

PLEASANT VALLEY STATE PRISON / CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILATION, LEGALLY UNINSURED, ADJUSTED BY STATE COMPENSATION INSURANCE FUND, ***Defendants***

Adjudication Number: ADJ11604315
Fresno District Office

OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Report and Opinion on Decision which we adopt and incorporate in part, we will deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 20, 2023

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

JOSEPH HERNANDEZ
ADAMS, FERRONE & FERRONE
STATE COMPENSATION INSURANCE FUND, LEGAL

LN/pm

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *mc*

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I INTRODUCTION

Date of Injury:	07/01/2000 through 10/15/2018
Age on date of injury:	45
Occupation:	Corrections Officer
Body part injured:	Heart
Identity of petitioner:	Defendant
Timeliness:	The petition is timely filed.
Verification:	The petition is verified.
Date of the Award:	December 29, 2022

The contentions of Petitioner are: (1) that by the Findings and Order the WCJ acted in excess of his powers; (2) The evidence does not justify the Findings of Fact; (3) The Findings of Fact do not support the Order, Decision or Award.

II FACTS

The applicant filed a claim for a cumulative trauma injury to his heart from July 01, 2000, through October 15, 2018. The case was originally set for trial on February 22, 2022, and an F&A issued April 29, 2022, finding for Defendant.

Applicant filed a Petition for Reconsideration on May 19, 2022, from which the trial court rescinded the F&A and reset the matter for Status Conferences. And, on October 25, 2022, the matter was again set for Trial, without any new evidence.

On December 29, 2022, the court again issued an F&A. however, on this occasion the finding was in favor of the Applicant. Thereafter, Defendant filed a Petition for Reconsideration.

III DISCUSSION

The question of the Reconsideration and the difference of opinion in the second/current findings and award, boil down to this statement from the 20-some pages of reconsideration:

"PQME Patel did not opine that Applicant had pre-existing hypertension by wizardy, [sic] but relied upon his evaluation with Applicant. The basis for PQME Patel's opinion that the hypertension pre-existed employment was the evaluation with Applicant on March 13, 2019. The entire record reveals that

Applicant's heart trouble is non-industrial from a pre-existing disease." (Petition for Reconsideration; 12:8-12.)

This is the problem which is not addressed by the Defendant, and was also overlooked by the trial judge in the first trial. QME Dr. Patel relies upon a verbal answer to a question posed by himself to the applicant regarding his medical history. Specifically, that the applicant admits to being diagnosed with 'hypertension' 18 years earlier [estimated to be in 2000] in a (supposed) 02/18/2018 Kaiser record. In going through the medical file, this appears to be the result of Dr. Patel doing calculations in his head. But, the *truth of the matter* is never questioned.

What the truth is, is that there is NO RECORD FROM FEBRUARY 10, 2018 in the Kaiser records. It appears to be a figment of everyone's imagination, due to the QME repeating the history with such strength that everyone believes it is real. The report simply does not exist and, could not be found by applicant's attorney, defense attorney, the QME, or the Judge. All have evidently looked for it. But still, this medical record of the applicant admitting to being diagnosed with hypertension is the basis, or at least one of the basis, for the QME's opinion of pre-employment / pre-existing hypertension.

In fact, it is not until the second QME deposition that counsel gets the QME to accept the fact that the report Dr. Patel is relying on so strongly does not exist; that the QME finally breaks with his prior opinion and states that IF the applicant was not diagnosed with hypertension until AFTER he was employed by CDCR, then the presumption was not rebutted and would hold find an industrial injury. Nevertheless, he defers the question of the presumption to the trier of fact. (Exhibit 1; pages 7-21.) The court likewise believes the second deposition of the QME has proved its worth in the discovery process, as the medical evidence has been put under a bright light.

It is well accepted that Workers' Compensation is medically driven. And when a medical fact is only evidenced by a single report, as opposed to the employee's recollection, the medical report will be given great weight over memory. Without the report, the memory becomes only a "side note." In the instant case, this memory is not afforded great weight as it appears to be a recollection of a statement given to another doctor, the record of which cannot be found in the evidence. Therefore, the providence of this statement is in question/doubt. The court finds the statement to be not credible for the purpose defense chooses. (*Twentieth Century-Fix Film Corp. v. Workers' Comp. Appeals Bd. (Conway)* (1983) 141 Cal.App.3d. 778.)

The QME's reliance on the content of the statement is [unpersuasive]. It apparently goes from a comment applicant gives during a medical history about an earlier oral history to a completely different doctor, but the authenticity is never verified. It eventually follows the adage: If you tell a story long enough,

it will become the truth. There is no honest reason to believe the story is true, other than people want it to be true. *(Conway) Id.*

IV RECOMMENDATION

It is recommended the Petition for Reconsideration be denied.
DATED: 1/30/2023

Jeffry B. Diamond
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

OPINION ON DECISION

At the time of the first trial, the applicant's attorney filed a petition for reconsideration. Upon reading that petition, the court vacated the F&R and ordered the matter back to the trial court. Questions were asked and information was sought. The bottom line is that the court believes the applicant's attorney was correct in the assessment of the facts as presented in the reconsideration.

The court has essentially duplicated the applicant's argument in the following paragraphs and adopts same – for the most part verbatim – as the argument is well presented and the court sees nothing wrong with setting forth that argument. The petition can be viewed in whole in EAMS, as it was filed on 05/19/2022. The argument and analysis are as follows:

The heart trouble presumption is triggered when there is either a development or manifestation of heart trouble during a period of employment. (Lab. Code § 3212.) The presumption is extended following termination of service for a period of three calendar months for each full year of requisite service…" (Lab. Code § 3212.)

The presumption is triggered when the heart trouble develops or manifests within the allotted time. Here, Mr. Hernandez's heart trouble did both. His heart trouble manifested in the form of left ventricular hypertrophy with the extension based on years of service because the heart trouble revealed itself as existing on April 30, 2021. Since he retired October 15, 2018, with eighteen full years of service, Mr. Hernandez had until April 15th, 2023, to trigger the resumption. He manifested heart trouble well within the allotted time. Moreover, the QME testified that the heart trouble developed during his employment. The QME state that the hypertension caused the heart due to the additional exertion on the heart. Assuming the medical records indicated hypertension began in 2000 (more on that below), the QME's testimony that hypertrophy is a "very, very slow process" developing from hypertension after "four or five years" demonstrates that the heart trouble developed during the period of his employment – around 2004 or 2005. (Joint AA, p.13:24-14:6.) Even before the echocardiogram that revealed heart trouble, the QME state that if the applicant had left ventricular hypertrophy that it would have developed during the period of employment. (*Id*.)

Thus, Applicant [established] the heart trouble presumption because Mr. Hernandez's heart troubled developed and manifested within the time allowed by the [statute].

Once the Applicant [establishes] the presumption, the burden of proof is imposed on the employer to rebut it using [substantial medical] evidence. (Lab. Code § 3212l See also Reeves v. Worker's Comp. Appeals Bd, (Reeves) 80 Cal. App. 4th 22, 30; *Zipton v. Worker's Comp. Appeals Bd*. (1990) 218 Cal. App. 3d 980, 988, fn. 4.) Without substantial medical evidence to support the employer's

rebuttal, the presumption will apply. (Id.). [When] the applicant is a correctional officer, an employer can rebut the heart trouble [presumption] in two ways: (1) a preexisting disease unrelated to the employment is the sole cause of the heart trouble, or (2) a [contemporaneous] nonwork-related event was the sole cause of the heart trouble. (*Parish v. Worker's Comp. Appeals Bd*. (1989) 210 Cal. App 3d 92 98; *Jackson v Workers' Comp. Appeals Bd*., (2005) 133 Cal App. 4th 965,972.)

Rebutting the presumption is NOT the same standard as showing [nonindustrial] causation. When the medical evidence does not exist or fails to affirmatively show causation on a non-[presumptive] case, the Applicant is unable to meet its AOE/COE burden. The QME here discusses multi-factors that are associated with hypertension: stress, obesity, genetics, diet and exercise. The QME includes several cites to articles that discuss risk factors associated with hypertension. Applicant agrees – the medical evidence and literature [provided] by the QME unequivocally fails to show an industrial injury in a non presumptive case. However, for that very same reason, Defendant cannot rebut the presumption.

The opinions of the QME cannot rebut the presumption because the presumption is a burden-shifting one. The medical opinions of the QME do not state to a reasonable degree of medical probability what caused Applicant's hypertension and heart trouble. Instead, the QME opines on risk factors that are present in the Applicant's medical history, and the QME apportions to those risks factors.

Mr. Hernandez did not have LVH prior to employment. The QME disagrees with this finding. Before the echocardiogram in April 2021, the QME reported, "there is no mention of cardiac diagnosis or diagnoses referable to the heart throughout the review of medical records." (Joint BB, p. 6:242.) In his supplemental report he repeated, " there are no indications of heart trouble at this time." (Joint CC, p. 4:159.) In his deposition, the QME stated again, "how can you say that [he developed left ventricular hypertrophy] without any proof, though? I don't have an echocardiogram" (Joint AA, p. 16) A review of the medical records demonstrates that these statements are correct. (*Id*. at p. 12-14.) Mr. Hernandez did not have hypertension prior to his [employment] with Defendant. The QME opined, "pre-existing conditions are exempt from the presumption for heart trouble for correctional officers" and provided 0% impairment based on pre-[existing] hypertension. (Joint FF, p. 3:104.) However, neither Defendant nor QME, can point to a single medical record to prove Applicant had pre-existing hypertension before he began his [employment] with Defendant.

Instead, the basis for such opinion is unsupported [inference] and guesswork. Mr. Hernandez began working at Pleasant Valley July 2000. QME admitted, "I don't have any evidence of what [happened] in July 2000."

(Applicant's 1, p. 14:23-15:1.) In fact, the earliest medical record the QME reviewed is from 2016. Moreover, the first medical record to mention hypertension is 11-14-2018.

The QME opined Applicant had pre-existing hypertension using [no evidence]: *A review of the medical records from Kaiser 2/10/2018 [demonstrates] a history taken from the patient where the patient… stated the he had been diagnosed with hypertension '18 years ago.' This equates to slightly more than a year prior to procuring employment for the Pleasant Valley State Prison [In July 2000].* (Joint BB, p. 6:243-247.)

First, 18 years from 2018 is the year Applicant started with Defendant, not one year prior as the QME calculated. Secondly, and perhaps even more alarming, there is no Kaiser record dated February 10, 2018. (Joint BB, p. 12-14.) Yet this is basis of the QME's opinion.

Secondly, even if Applicant did have hypertension pre-employment, this is not enough to rebut the presumption. California [Labor] Code section 3212.2 requires a finding of "heart trouble", which case law has well established that hypertension alone is NOT "heart trouble" within the meaning of presumption. (See *Muznik v. Workers' Comp. Appeals Bd*., (1975) 51 Cal. App. 3d 622; See also *Thompson v. State of California, (2017)* Cal. Wrk Comp. P.D. LEXUS 105 [distinguishing hypertension from "heart trouble"]. A finding that Applicant's Heart Trouble is rebutted because his hypertension predated employment creates precedent that hypertension is "heart trouble" and completely disregards case law on this issue.

Even if the Heart Trouble Presumption is rebutted, there still remains an issue of industrial causation due to Applicant's weight gain from his industrial knee surgery. Applicant contends that the obesity is at least partially work- related. The QME stated as such in his second deposition. When asked whether his industrial knee injury played a factor in his [obesity], the QME stated, well the injury caused the 60 pounds weight gain, yes." When asked if the obesity got worse due to industrial connection, the QME once again confirmed, "You can say that." (Applicant's 1. Pp. 20:21-21:1.) Thus, the level of obesity is at least partially contributed to a work-related event. Defendant failed to meet its burden to provide sufficient evidence that obesity is a sole contemporaneous non-work related event that caused heart trouble.

Defendant did not meet its heavy burden to rebut Labor Code Section 3212.2. There is [] no evidence that demonstrates that a pre-existing [disease] is the cause of heart trouble. Instead, Defendant relied on the QME's mere opinion. The QME's opinion that the hypertension occurred prior to employment, however, is supported only by an absence of evidence and an incorrectly dated medical record. The February 10, 2018 medical report is non-existent, yet is the basis for the decision. This is not substantial medical evidence. There is no proof

of a pre-existing [disease] as there are no medical records prior to 2016 regarding obesity or hypertension. Moreover, the correctly dated medical record demonstrates that the QME should have reached the opposite conclusion – the hypertension began *after employment.* It is remarkable that a doctor would flippantly provide a supposed medical opinion based on a mere [estimation] of when [hypertension] was diagnosed. Applicant relies on the medical evidence that the QME [incorrectly] interpreted. The [medical] evidence does not clearly demonstrate that the presumption has been rebutted – it [demonstrates] that it applies.

DATE: 12/28/2022

Jeffry B. Diamond
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE