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by a former Commissioner and Member of the Board

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Matter of VFG Provisions

Case # 40311021

Date of Accident: 2/21/03

District Office: Hauppauge

Employer: VFG Provision

Carrier: State Insurance Fund

Carrier ID No.: W204002

Carrier Case No.: 47982988-239

Date of Filing of Decision: 4/13/10

Claimant's Attorney: Grey & Grey

Panel: Robert E. Beloten

The Full Board, at its meeting held on March 16, 2010, considered the above captioned case for Mandatory Full Board Review of the Board Panel Memorandum of Decision filed on August 26, 2009.

ISSUE

The issue presented for Full Board Review is whether the claimant's husband (decedent) suffered a causally related death.

In a decision filed on March 31, 2009, the Workers' Compensation Law Judge (WCLJ), in pertinent part, established the case for a causally related death and made awards.

The majority of the Board Panel affirmed the WCLJ's decision, finding that, based upon the opinion of the claimant's consultant, Dr. Melvin Holden, the decedent died of an accidental mixed drug intoxication, with two of the drugs having previously been prescribed by the decedent's attending orthopedic surgeon, Dr. Ruangsak Chewaproug, for his right wrist injury (WCB Case # 20207212). Absent any evidence regarding whether the decedent took all of his medication immediately after it was prescribed, or any evidence that the decedent obtained another prescription from a different physician, the majority found that it must "assume" that the pain medications and muscle relaxers in the decedent's system at the time of his death were from his right wrist injury case, whereby his death was causally related.

The dissenting Board Panel member found that the majority of the medications in the decedent's system at the time of his death were never used to treat his prior right wrist injury; that the decedent had no known prescriptions for several of the pain medications found in his system, including the Oxycodone; that the level of Oxycodone (a narcotic) in the decedent's blood was twice the recommended therapeutic level; and that the last prescriptions written in the right wrist injury case were for 30 pills of Vicodin on November 6, 2002, and 30 pills of Flexeril on September 17, 2002, well prior to the decedent's demise on February 21, 2003. Given the decedent's history of drug addiction, psychiatric problems (which included

suicidal ideations), and cardiac problems; the credible opinion of Dr. Carl Friedman that the decedent intentionally took his own life; and fact that Dr. Holden was unaware of either the decedent's psychiatric or cardiac problems/hospitalizations, the dissenting Board Panel member found that the record did not support a finding of a causally related death.

In its application for Full Board Review, the carrier asserts that, as outlined in the dissenting Board Panel member's opinion, there is insufficient credible evidence of a nexus between the decedent's September 4, 2002, right wrist injury and his subsequent demise from mixed drug intoxication on February 21, 2003.

Upon review, the Full Board votes to adopt the following findings and conclusions.

FACTS

WCB Case # 20207212 - Right Wrist Injury

WCB case # 20207212 is established for a right wrist injury that occurred on September 4, 2002, when the decedent fell at work. The decedent went to the Brunswick Hospital emergency room on the day of the accident, but X-rays of his right wrist were negative. The decedent was noted to have hypertension and an aortic deficiency, and he was noted to currently be taking antibiotics, Prilosec, Prozac, and [unreadable]. The decedent was diagnosed with a sprain and a possible fracture of the [unreadable], was given a prescription for Ibuprofen, was given an excuse to stay out of work for three days, and was discharged.

On September 5, 2002, the decedent was diagnosed with a right wrist sprain, a tear of the fibrocartilage complex, a questionable fracture of the pisiform base, and ulnar nerve compression by Dr. Chewaproug. The decedent was placed in a cast, Vicodin was prescribed for his pain, and his physician recommended that he be kept out of work for approximately eight weeks (i.e., until October 30, 2002). At an examination on September 17, 2002, Dr. Chewaproug removed the cast, prescribed Flexeril, sent the decedent for a CAT scan, and referred him to a neurologist based upon some alleged numbness and tingling in his fingers.

A subsequent CT scan of the right wrist performed on September 19, 2002, revealed soft tissue swelling and possibly a small avulsion fragment or accessory ossification adjacent to the pisiform. On October 28, 2002, Dr. Chewaproug requested authorization for an MRI and physical therapy, prescribed additional Vicodin (30 pills), and indicated that the decedent would be unable to return to work for the next two weeks. On November 6, 2002, the physician continued to find the decedent unable to return to work, and prescribed additional Vicodin. This is the last medical report of any causally related treatment contained in the record.

The decedent subsequently died on February 21, 2003, approximately 15 weeks after his last causally related treatment. By proposed decision filed on March 13, 2003, which became final on April 16, 2003, both parties were directed to obtain posthumous schedule loss of use reports. The claimant subsequently submitted a 35% right hand schedule loss of use report, and raised the issue of causally related death. The carrier submitted a 15% right hand schedule loss of use report. The case was then continued to travel with the present case; however, no schedule loss of use award or award for lost time has ever been made.

WCB Case # 40311021 - Death Claim

By form C-62 filed on September 18, 2003, the claimant asserted that her husband had died on February 21, 2003, "as a consequence of WCB # 20207212." As a result, the Board indexed WCB Case # 40311021, and sent a Notice of Indexing to the carrier on Tuesday, November 25, 2003. In response, the

carrier filed a form C-7 on Monday, December 22, 2003, wherein it controverted the claim on various grounds, including causal relationship. It is noted that this form was timely filed, as the 25th day after the Notice of Indexing fell on Saturday, December 20, 2003, thereby giving the carrier until Monday, December 22, 2003, to file a timely C-7.

On January 20, 2004, the carrier submitted a consultant's report from Dr. Friedman. In this report, Dr. Friedman indicated that he had reviewed the autopsy report and the toxicology report. The autopsy report indicated that the decedent's death was due to a mixed drug intoxication, which involved Oxycodone, Olanzapine, Hydrocodone, Fluoxetine, Cyclobenzaprine, and Diazepam, and the presence of these drugs was confirmed by the toxicology report. The decedent had been brought to the emergency room in cardiac arrest, and resuscitation efforts were unsuccessful. The decedent had recently been discharged from St. Francis Hospital with a diagnosis of a cardiac blockage on February 18, 2003 (i.e., three days prior to his death). The decedent's known medications were listed as Clonazepam, Zyprexa, Fluoxetine, Vioxx, and Diazepam. Dr. Friedman reviewed the medical records from WCB Case # 20207212, and noted that the only medication listed was Vicodin, and that it had only been prescribed for eight [sic] weeks. Dr. Friedman concluded that the decedent had overdosed on opiates/sedatives (primarily Oxycodone and Diazepam), which caused respiratory suppression, and when combined with his cardiac condition, resulted in his death. However, Dr. Friedman was unable to determine whether the overdose was intentional or an accident, and he did not indicate whether there was any connection with WCB Case # 20207212.

The claimant subsequently failed to submit any medical evidence in support of her claim, including the autopsy report or the toxicology report. As a result, by decision filed on July 8, 2004, the case was designated for no further action.

The case remained closed for over two and a half years until the claimant filed a form RFA-1 on March 22, 2007. Attached to this document was the first piece of medical evidence submitted by the claimant. This evidence consisted of a one page letter, dated March 7, 2007, from Dr. Holden, an internist and Assistant Professor of Clinical Medicine at SUNY Stony Brook. In this letter, Dr. Holden indicated that he had reviewed the autopsy report, the records of Dr. Chewaproug, and the records of Long Island Medical Associates, Inc. (Dr. Shanon). According to Dr. Holden's information, the decedent's right wrist injury resulted in the prescribing of pain medications (Oxycodone and Hydrocodone) and muscle relaxers (Cyclobenzaprine and Diazepam) by Drs. Shanon and Chewaproug. As a result, Dr. Holden opined that the decedent's medications from his right wrist injury were a significant contributing factor in his demise via mixed drug intoxication.

On October 16, 2007, the Board received the Brunswick Hospital Emergency Room records from the decedent's prior treatment on July 26, 2002. On that day, the decedent arrived via ambulance, escorted by police, as he had allegedly been driving while intoxicated. The decedent admitted to having a drinking problem, and that he had consumed a half pint of vodka that day. The decedent refused treatment and was discharged.

Testimony was taken from the claimant widow via telephone on January 18, 2008. The claimant testified regarding her marriage to the decedent in February of 2000; the birth of their two children in February of 2001 and March of 2002; their separation in October of 2001 due to the decedent's alcohol problem; an Order of Protection obtained in October of 2001; and the decedent's hospitalization for psychiatric problems in May of 2003. At the conclusion of the testimony, the carrier was given an opportunity to obtain the decedent's psychiatric treatment records, and the carrier reserved its right to medical testimony.

On March 28, 2008, the Board received a myriad of medical records from the carrier. Although these records are mostly illegible, the decipherable portions indicate that the decedent sought regular treatment from March 22, 2000, to October 14, 2002, for multiple ailments, including sore throats, upper GI complaints, a right foot injury, a hand rash, vertigo, heart palpitations, anxiety, chest colds, aortic valve dysfunction, and depression. Among the decipherable medications prescribed/recommended in the various reports were Pepcid AC, Prilosec, Lipitor, Vicodin, Fironol, Inderol, Prozac, and Propranolol. The decedent sought emergency room treatment at the Brunswick Hospital on October 2, 2002, for chest pains, at which time he was noted to be taking Prozac, Prilosec, Zyprexa, and [unreadable]. In the report from October 14, 2002, the decedent was diagnosed as being bipolar/paranoid. An October 25, 2002, report regarding treatment for throat pain listed the following current medications: Prozac, Zyprexa, unspecified muscle relaxer (most likely Flexeril), Inderol, Hydroxyzine, Vioxx, Lipitor, Prilosec, Fluoxetine, Cyclobenzaprine, and Nitroquick. On October 28, 2002, Xanax was added to the list of current medications, when the decedent was seen for a "bad taste" in his mouth.

A January 6, 2003, report from Stony Brook University Hospital indicates that the decedent was seen for a psychiatric assessment due to depression, and that he had to be medicated with Haldol to control his agitation. The decedent was brought in by police after his mother reported him missing, following his threat to burn the house down after pouring gasoline around the house. The decedent's mother reported that he was acting "bizarre" (i.e., he was talking to the microwave), and that she had attempted to bring him to another hospital for evaluation that morning, but he ran away when she parked the car. The decedent indicated that he was experiencing auditory and visual hallucinations; admitted getting special messages from the television; indicated that he was always watching his back; admitted to having compulsive behaviors at home (where he lived with his mother); and indicated that he felt that something was growing in the back of his throat. Although the decedent denied having thoughts of suicide, he indicated that he felt hopeless/helpless at times, and that he was upset about the suicide of his brother-in-law (April of 2002). The decedent had previously been hospitalized in February of 2002, and again in April-May of 2002, for substance abuse and suicidal ideation. The decedent was noted to have been under the treatment of Dr. Darvey, a psychiatrist with Children & Family Services, since September of 2002. The decedent admitted to a history of substance abuse, including alcohol, marijuana, and cocaine/crack, the latter three of which he denied using after March of 2002. However, the toxicology report came back positive for cocaine. The decedent's current medications were listed as Zyprexa, Depakote, Prozac, Propranolol (for hypertension), and Lipitor. The decedent was diagnosed with psychosis and mood disorder, and was admitted for aggressive behavior and suicidal thoughts (i.e., the decedent admitted that he "constantly thinks of suicide" but has no plan). While hospitalized, the decedent was given Ativan for his anxiety and Klonopin (instead of the Valium he requested).

Of particular note in the hospital records is the fact that, on January 11, 2003, the decedent complained that he had fallen in the hospital bathroom on the wet floor, and had hurt his right wrist, with a pain level of 10 out of 10. Upon examination, the decedent's wrist had mild tenderness, mild edema, and mild range of motion deficits. Right wrist X-rays were ordered, and the decedent requested Tylenol III, but due to his substance abuse history and mild findings upon examination, only Motrin was given. The X-rays were negative for any fracture, and the decedent was subsequently discharged on January 13, 2006.

Medical records were also submitted for the decedent's hospitalization for cardiac problems from February 15, 2003, to February 18, 2003, at St. Francis Hospital. The decedent was diagnosed with progressive angina, was determined not to be a good candidate for angioplasty, and was recommended for open heart surgery. During his hospital stay, the decedent had been treated with Zocor (cholesterol), Plavix (blood thinner), Imdur (cardiac pumping), Prevacid (ulcers), Toprol (blood pressure), Depakote (anti-convulsant), Propranolol, Prilosec, and Zyprexa.

With respect to the medical records regarding the decedent's right wrist injury on September 4, 2002, the majority of the records submitted were already contained in WCB Case # 20207212. The only new reports consisted of a follow-up report for treatment by Dr. Shanon at Long Island Medical Associates on September 28, 2002, which noted numbness in the fingers, and listed the decedent's current medications as Prilosec, Prozac, and [unreadable]. In addition, bilateral upper extremity EMG/NCV studies performed on October 2, 2002, were normal.

On April 4, 2008, the Board received a supplemental report from the carrier's Dr. Friedman. In this report, the consultant reviewed numerous additional medical records; indicated that it was still "unclear" whether the decedent had taken his own life; opined that the decedent died of a drug overdose superimposed on substantial coronary artery disease; and concluded that the decedent's death was not related to his right wrist injury of September 4, 2002.

At the hearing held on June 12, 2008, the carrier was directed to obtain and produce the hospital records from Dr. Darvey and South Oaks Hospital (where the decedent had been treated for his psychiatric problems in 2002), and the parties were directed to produce memoranda on the issue of spousal abandonment.

At the hearing held on August 7, 2008, the depositions of Drs. Friedman, Holden, Chewaproug, Chaudary, Shanon, Kongara, and Darvey were directed, and the claimant was directed to submit a copy of the autopsy report. It is noted that no copy of the autopsy report was subsequently submitted, and that only the depositions of Drs. Holden, Shanon, Friedman, and Chewaproug were completed.

Dr. Holden, an internist who specializes in pulmonary disease, testified that he only performed a post-mortem records review at the request of the claimant's attorney. He only reviewed the autopsy report and some records from Drs. Chewaproug and Shanon. It was his opinion that the decedent died due to the medications in his system: Olanzapine (aka Zyprexa), a psychiatric drug; Oxycodone (aka Percocet), a pain medication; Hydrocodone (aka Vicodin), a pain medication; Fluoxetine (aka Prozac), an anti-depressant; Cyclobenzaprine (aka Flexeril), a muscle relaxer; and Diazepam (aka Valium), a sedative/muscle relaxer. He believed the death to be accidental because the decedent had multiple abrasions on his head, abdomen, and hands, which he believed were caused by a fall; most people who commit suicide lie down after taking an overdose. However, he acknowledged that no one witnessed the decedent fall (it was an assumption); that he did not review Dr. Friedman's report; that he was unaware of the decedent's hospitalization in January of 2003 for bipolar disorder; that he was unaware of the decedent's hospitalization for substance abuse and suicidal ideation in 2002; that cocaine use can cause addiction and psychosis; that he did not review the records of the decedent's hospitalization for heart problems immediately prior to his death; that he was unaware of the decedent being under active psychiatric and cardiac care at the time of his death.

Dr. Shanon, an internist/neurologist, testified that he had treated the decedent from March 22, 2000, through December 7, 2002. He saw the decedent on September 28, 2002 regarding his right wrist injury, but he never prescribed any medications for the decedent regarding that injury. He was aware that the decedent had a bipolar disorder, but he was not aware of the decedent's prior history of suicidal ideations. On October 25, 2002, the decedent was taking numerous medications, most of which were for his psychiatric problems, including Prozac, Zyprexa (muscle relaxer), Inderol (anti-anxiety/blood pressure), Hydroxyzine (anti-anxiety/allergies), Vioxx (anti-inflammatory/pain), Lipitor (high cholesterol), Prilosec (gastric esophageal reflux disease), Fluoxetine (anti-anxiety/depression), Cyclobenzaprine (muscle relaxer), and Nitroquick (angina). He was unaware of the decedent's cocaine use.

Dr. Friedman testified that the decedent's wrist injury from September 4, 2002, played no role in his death on February 21, 2003. Although the decedent had twice the recommended therapeutic level of Oxycodone in his system at the time of his death, given the decedent's history of drug addiction, it was possible that he had developed a tolerance for opiates that would not affect his blood pressure or respiration. The autopsy also showed that the decedent had severe coronary artery disease (caused by his cocaine abuse) in all arteries (which was even greater than what had been diagnosed at St. Francis hospital). In addition, the decedent had a history of psychosis with suicidal thoughts. Although he could not state that the decedent intentionally killed himself, the foregoing factors rendered his death unrelated to his prior wrist injury.

Dr. Chewaproug testified that he treated the decedent for his right wrist injury. At his first examination on September 5, 2002, he prescribed 30 pills of Vicodin, a pain medication that could be taken once every four hours. At his September 17, 2002, examination, he prescribed 30 pills of Flexeril, a muscle relaxer. At his last examination on November 6, 2002, he prescribed another 30 pills of Vicodin. All of the prescriptions were one-time, non-renewable prescriptions. He could not determine the source of the decedent's continuing problems, so he requested an MRI but provided no further treatment. Although the decedent did tell him about an alleged heart valve problem, he has never reviewed any other medical records regarding the decedent. The decedent did not tell him about his psychiatric condition/treatment. The decedent also did not tell him about any other medications that he was taking.

At the hearing held on March 26, 2009, the WCLJ found no spousal abandonment, determined the claimant to be the lawful spouse, found that the decedent had two dependent children, established the case for a causally related death, and made awards. These findings were subsequently memorialized in the decision filed on March 31, 2009, and the carrier filed a timely application for administrative review.

LEGAL ANALYSIS

There is a strong common law presumption against suicide, and Workers' Compensation Law (WCL) § 21(3) also presumes that, absent substantial evidence to the contrary, a claimant/decedent does not have a willful intent to harm himself/herself (see *Matter of Kislowski v Empire Boarding Stable*, 5 AD2d 734 [1957]; *Matter of Bruning v Sheffield Farms Co., Inc.*, 8 AD2d 241 [1959]). The Board has established cases for drug induced deaths where the drugs in question were prescribed for a causally related work injury or condition (see *Matter of Brick v R.B. Hamilton Trucking Co., Inc.*, 60 AD2d 735 [1977]).

In the present case, there is insufficient evidence to conclude that the decedent intentionally took his own life. Despite the decedent's history of psychiatric problems (bipolar disorder, psychosis, mood disorder), the decedent's personal problems (being separated from his wife, having a history of drug abuse, being diagnosed with a serious heart condition), and the decedent's recent psychiatric hospitalization (for hallucinations and suicidal ideations), there is no direct evidence that the decedent intended to cause his own death on February 21, 2003. The decedent left no suicide note, and there is no indication that he discussed his intentions with anyone prior to his death. In addition, Dr. Holden credibly testified that the death was accidental because the decedent had multiple abrasions on his head, abdomen, and hands, which he believed were caused by a fall, and that most people who commit suicide lie down after taking an overdose. Furthermore, Dr. Friedman did not opine that the decedent's death was a suicide. Rather, he indicated that he could not state whether it was an intentional drug overdose, only that whatever the cause, it was not related to the prior wrist injury sustained five months earlier. Therefore, the record supports a finding that the decedent's death was an accident.

However, the analysis does not end with the determination that the decedent's death was accidental, as there must still be some nexus with his prior compensable right wrist injury. Upon review of the medical

reports and testimony, the record supports the conclusion that the decedent's death on February 21, 2003, was not related to his earlier right wrist injury on September 4, 2002.

Neither the autopsy report nor the toxicology report were ever submitted into evidence. However, both Dr. Freidman and Dr. Holden stated in their reports that the autopsy and toxicology reports indicated that decedent's death was due to a mixed drug intoxication, which involved Oxycodone (aka Percocet), Olanzapine (aka Zyprexa), Hydrocodone (aka Vicodin), Fluoxetine (aka Prozac), Cyclobenzaprine (aka Flexeril), and Diazepam (aka Valium).

While Dr. Holden's report indicated that the decedent's September 4, 2002 right wrist injury resulted in the prescribing of pain medications (Oxycodone and Hydrocodone) and muscle relaxers (Cyclobenzaprine and Diazepam) by Drs. Shanon and Chewaproug, and that such medications had a role in the decedent's death, Dr. Shanon testified that he had never prescribed any medications for the decedent's right wrist injury. In addition, Dr. Chewaproug testified that he did not prescribe Oxycodone, and although Dr. Chewaproug did previously prescribe both Vicodin (Hydrocodone) and Flexeril (Cyclobenzaprine) for the decedent's right wrist injury, these prescriptions were issued on September 5, 2002 (Vicodin), September 17, 2002 (Flexeril), and November 6, 2002 (Vicodin), the prescriptions were not renewable, and the prescriptions were limited to 30 pills on each occasion.

Without the toxicology report, there is no evidence in the record of the level of each of the six drugs that contributed to decedent's death, including the two of the six drugs which were prescribed in relation to his wrist injury. Those two drugs, Vicodin (Hydrocodone) and Flexeril (Cyclobenzaprine), were prescribed between September 17, 2002 and November 6, 2002, several months before the decedent's fatal overdose on February 21, 2003. The decedent did not receive treatment for his compensable wrist condition after November 6, 2002, and there is no evidence in the record that his wrist condition was symptomatic at the time of his death. Given these facts, any connection between decedent's wrist injury and his fatal overdose on February 21, 2003, is too attenuated to find that the decedent's death was consequential to that injury. Therefore, this claim for death benefits is disallowed.

CONCLUSION

ACCORDINGLY, the WCLJ decision filed on March 31, 2009, is REVERSED to disallow the claim for a causally related death. No further action is planned by the Board at this time.