

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

Carol L. Seligman,
Employee/Claimant,

OJCC Case No. 99-009136WWA

vs.

Accident date: 4/14/1999

IMC Healthcare, Inc./TIG Premier
Insurance Company, and Zenith Insurance
Company,
Employer/Carrier/Servicing Agent.

Judge: Wilbur W. Anderson

**FINAL EVIDENTIARY ORDER GRANTING EMPLOYER/CARRIER'S MOTION
TO COMPEL IME**

1. For a party to be entitled to an IME, section 440.13(5)(a), Florida Statutes (1998), says there must be a dispute concerning overutilization, medical benefits, compensability, or disability. In this case, Claimant argues the Employer/Carrier is not entitled to an IME because the response to the petition for benefits did not deny the benefit requested, but said only that the E/C was investigating its medical necessity. On the facts of this case, I find there is a current dispute concerning medical benefits and therefore grant the motion to compel.

2. Claimant sustained compensable injuries in an industrial accident on April 14, 1999. Sixteen years later, in July of 2015, Claimant's authorized treating physician scheduled the trial insertion of a pain pump. No evidence was presented as to what the E/C did in response to the doctor's actions, but on August 11, 2015, Claimant filed a petition for benefits seeking authorization of the procedure. Nine days later, on August 20, 2015, the E/C filed a response to the PFB, saying it was investigating the medical necessity of the pain pump and had scheduled an IME. The E/C did not expressly deny the requested benefit.

3. Claimant now objects to the E/C's motion to compel Claimant to attend the IME because the E/C has not expressly denied authorization of the pain pump trial. The E/C responds by saying the filing of the PFB is itself sufficient evidence of the statutorily required dispute. Both sides have a point.

4. A legitimate argument can be made that the filing of a PFB seeking a benefit under Chapter 440 evidences a dispute because the purpose of filing the PFB is to invoke the statutory dispute resolution process. The PFB in this case also included the certification required by section 440.192(4), Florida Statutes (2015), "that the claimant, or attorney if the claimant is represented by counsel, has made a good faith effort to resolve the *dispute* and that the claimant or attorney was unable to resolve the *dispute* with the carrier." (emphasis added).

5. On the other hand, case law interpreting the dispute requirement states the E/C must deny the benefit claimed. See *Lehoullier v. Gevity/Fire Equip. Servs.*, 43 So. 3d 834, 836 (Fla. 1st DCA 2010) ("To create a dispute concerning medical benefits, an E/C is required to deny a claimant's request for medical benefits."). So if, for example, the E/C had filed a response to the PFB saying it had authorized the pain pump trial, it would be clear that a dispute no longer existed and the E/C would not be entitled to an IME. And if the E/C had filed a response to the PFB expressly denying authorization for the pain pump trial, it would be equally clear that a dispute continued to exist. The E/C's noncommittal response that it is investigating the claim is somewhere in between.

6. To resolve this issue, I look to the case law that says if an E/C does not file a notice of denial within 14 days of receipt of the PFB, it has constructively denied the claim. Russell Corp. v. Brooks, 698 So. 2d 1334, 1335 (Fla. 1st DCA 1997). Accordingly, because the E/C's response to the PFB did not say the requested medical benefit would be authorized, it was

tantamount to a denial and confirmed the continued existence of a dispute entitling the E/C to an IME.*

7. It is not necessary for me to determine whether the mere filing of a PFB entitles an E/C to an IME prior to the expiration of the 14-day response period provided in section 440.192(8), Florida Statutes (2015).

The motion to compel is GRANTED.

DONE AND ELECTRONICALLY TRANSMITTED VIA EMAIL TO THE ATTORNEYS AND CARRIER LISTED BELOW this 11th day of September, 2015, in Daytona Beach, Volusia County, Florida.



Wilbur W. Anderson
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*Because the date of accident is April 14, 1999, Claimant may also be entitled to an IME at the E/C's expense. Southern Bakeries v. Cooper, 659 So. 2d 339 (Fla. 1st DCA 1995).