CASE NO. 3150 CRB-1-95-8

JOHN HODGDON III CLAIMANT-APPELLANT	:	COMPENSATION REVIEW BOARD
v.		
UTC/PRATT & WHITNEY EMPLOYER	:	WORKERS' COMPENSATION COMMISSION
and		
LIBERTY MUTUAL INSURANCE CO. INSURER RESPONDENTS-APPELLEES	:	MAY 2, 1997
and		
CIGNA INSURER RESPONDENTS-APPELLEES		
and		
SECOND INJURY FUND RESPONDENT-APPELLEE		

APPEARANCES:

The claimant was represented by Timothy F. Mills, Esq., 21 Oak St., Suite 207, Hartford, CT 06106.

The respondent employer and Liberty Mutual Insurance Co. were represented by Debra Dee, Esq., Law Offices of Nancy S. Rosenbaum, 655 Winding Brook Drive, Glastonbury, CT 06033.

The respondent employer and CIGNA were represented by Margaret E. Corrigan, Esq., Pomeranz, Drayton & Stabnick, 95 Glastonbury Blvd., Glastonbury, CT 06033.

The Second Injury Fund was not represented at oral argument. Notice sent to Ernie Walker, Esq., Assistant Attorney General, 55 Elm St., P. O. Box 120, Hartford, CT 06141-0120.

This Petition for Review from the August 8, 1995 Finding and Award of the Commissioner acting for the First District was heard October 11, 1996 before a Compensation Review Board panel consisting of Commissioners George A. Waldron, Robin L. Wilson and Amado J. Vargas.

OPINION

GEORGE A. WALDRON, COMMISSIONER. The claimant has petitioned for review from the August 8, 1995 Finding and Award of the Commissioner acting for the First District. The claimant argues that the commissioner erred by addressing the claimant's eligibility for total disability and § 31-308a benefits after limiting the formal hearings to the issue of causation, and by finding a maximum medical improvement date that was unsupported by the evidence. We affirm the trial commissioner's decision.

In the Finding and Award, the commissioner listed the issues to be decided as the compensability of the claimant's alleged lung injury and the extent of disability. He found that the claimant, a welder at Pratt & Whitney, was exposed to chemical fumes at work, sustaining an occupational injury. He then cited the testimony of Drs. Hashmi, Beckett, Godar and Conway in his decision, concluding that the claimant was totally disabled through only March 31, 1988, at which point he reached maximum medical improvement with a 25 percent permanent partial disability of his lungs. The commissioner stated that the claimant was not totally disabled beyond that date, and since he had not looked for work or made any other effort to rejoin the work force, no discretionary benefits would be awarded. The claimant appealed that decision.

The claimant argues on appeal that the only issue presented at the formal hearings was the threshold issue of compensability. He contends that the commissioner precluded

him from introducing either additional testimony regarding compensability or any evidence unrelated to causation at the June 6, 1994 formal hearing. As the commissioner reached conclusions as to these issues in his Finding and Award, the claimant argues that the commissioner deprived him of his due process right to present evidence in support of his eligibility for continuing disability benefits.

The hearing notice for the June 6, 1994 formal hearing indeed states the only issue to be compensability. However, notice of the first formal hearing in this case, which was held on June 26, 1991, stated that the issues there were both compensability and benefits. At that time, the claimant was represented by different counsel. A review of the transcripts shows that most of that hearing was spent taking the testimony of the claimant. During that time, claimant's counsel introduced numerous medical reports as exhibits. The claimant also said that he had not worked since 1987 because of his medical condition; Transcript, part 2, p. 6; and confirmed that he had not looked for work since leaving Pratt & Whitney. Id., 44. He testified that he believed that the respondents were responsible for his lung problem, and should take care of him for the rest of his life. Id., 45. The commissioner would later note that testimony in the 1995 Finding and Award.

Claimant's counsel stated at the conclusion of the 1991 hearing that he had the necessary medical evidence regarding disability, and would enter it into evidence at that time. Id., 57. The parties then specified the additional evidence they would need. The respondents intended to introduce the deposition of Dr. Hashmi and the testimony of Dr. Godar, while claimant's counsel stated that he would need no additional live testimony,

and only intended to introduce some medical reports from Dr. Beckett. Id., 61. The commissioner ordered that the parties proceed accordingly.

At the next formal hearing, on June 6, 1994, the claimant was represented by new counsel, and the proceedings were held before a different commissioner. Claimant's counsel sought to introduce further medical testimony, but the respondents objected based on the agreement at the last formal hearing that the record would remain open only for medical reports and the depositions of Drs. Hashmi and Godar. Transcript, p. 9. After reviewing the transcript of the 1991 formal hearing, the commissioner stated that the limitations agreed to in those proceedings applied despite the subsequent change of counsel. Id., 16-17. After allowing in the previously discussed depositions, a report by Dr. Beckett, and some office notes of Dr. Ettinger, the original treating physician in this case, the commissioner closed the record "on causation" subject to two exceptions, and a commissioner's exam by Dr. Conway. Id., 24, 37, 41.

Although the notice and transcript of the 1994 formal hearing indicate that the record was only being held open for evidence regarding causation, this did not mean that the issue of the claimant's disability should have been omitted from the award. The commissioner did not err in refusing to admit new evidence regarding the extent of that disability, because the agreement made by prior counsel at the 1991 formal hearing was still operative, and the commissioner did not have to exercise his discretion under § 31-298 to allow further evidence. See Pinto v. General Signal Corp., 2277 CRB-5-95-1 (decided Jan. 22, 1997) (the decision of replacement counsel to try a case differently does not provide grounds for him to reopen a formal hearing after the record is closed). There was already evidence on the subject of disability in the record, and it was proper for the

commissioner to consider it and make a decision on that issue. Fassett v. F. Castellucci & Sons, 15 Conn. Workers' Comp. Rev. Op. 83, 84, 2150 CRB-3-94-9 (Dec. 7, 1995) (a party is not entitled to present his case in a piecemeal fashion). In fact, the claimant proposed specific amounts of temporary total and partial disability compensation, along with supporting findings, in his November 18, 1994 Proposed Findings for the trial commissioner. Thus, we conclude that the claimant indeed had sufficient opportunity to introduce evidence regarding the extent of his disability, and find no due process violation here. [1]

The other issue that the claimant raises as error is the commissioner's finding that he reached maximum medical improvement as of March 31, 1988. This issue, of course, relates to the extent of the claimant's disability, and is a factual determination to be made by the trial commissioner based on the evidence. Webb v. Pfizer, Inc., 14 Conn. Workers' Comp. Rev. Op. 69, 70-71, 1859 CRB-5-93-9 (May 12, 1995); Deleon v. Dunkin Donuts, 10 Conn. Workers' Comp. Rev. Op. 39, 1113 CRD-3-90-9 (Jan. 23, 1992). As long as there is evidence in the record to support that finding, we cannot disturb it on appeal, for it is the commissioner who has the authority to weigh the credibility of the evidence. Webb, supra; Jusiewicz v. Reliance Automotive, 3140 CRB-6-95-8 (decided Jan. 24, 1997).

[1] The claimant has filed a Motion to Submit Additional Evidence in conjunction with this issue, seeking to introduce a report of a vocational rehabilitation specialist that would rebut the commissioner's finding that the claimant was not motivated to return to work. As we have already ruled that the commissioner properly ruled the record closed on the extent of the claimant's disability, we must evaluate this motion under the standards set forth in Admin. Reg. § 31-301-9. So viewed, this motion cannot be granted. The claimant's prior counsel could have introduced the reports of a vocational rehabilitation counselor in order to provide evidence that the claimant had looked for work, but did not seek to do so. Instead, the claimant first sought vocational counseling (judging from the attached document) in August 1991, after the record had been closed. The claimant has not alleged any reason why this could not have been done beforehand, and we thus find insufficient grounds to consider the vocational counselor's report as additional evidence.

The commissioner states in his findings that his conclusion regarding the dates of claimant's total disability is based on the claimant's testimony, Dr. Hashmi's testimony, and the report of Dr. Beckett. That report is dated March 31, 1988, and states that the claimant has a 25 percent permanent partial impairment of both lungs that precludes him from returning to work as a welder. (Claimant's Exhibit 30). As the respondents point out, subsequent medical opinions cited by the commissioner do not evince a worsening of the claimant's condition with respect to the degree of his permanent partial impairment. The commissioner was not required to rely on Dr. Hashmi's March 20, 1989 statement that the claimant had not yet reached maximum medical improvement because he continued to deteriorate. (Claimant's Exhibit 28, p. 30). See Nasinka v. Ansonia Copper & Brass, 13 Conn. Workers' Comp. Rev. Op. 332, 335-36, 1592 CRB-5-92-12 (April 27, 1995) (commissioner may accept parts of expert testimony and reject other parts). We find no error as to the date of maximum medical improvement in the award.

The trial commissioner's decision is affirmed.

Commissioners Robin L. Wilson and Amado J. Vargas concur.