CASE NO. 5797 CRB-5-12-11 : COMPENSATION REVIEW BOARD
CLAIM NO. 500003236

JUSTIN P. BUNKER : WORKERS' COMPENSATION
CLAIMANT-APPELLEE COMMISSION

v. : NOVEMBER 8, 2013

BOZZUTO'S, INC.
EMPLOYER

and

TRAVELERS INSURANCE COMPANY
INSURER
RESPONDENTS-APPELLANTS

APPEARANCES:

The claimant was represented by Edward T. Dodd, Jr., Esq., The Dodd Law Firm, L.L.C., Ten Corporate Center, 1781 Highland Avenue, Suite 105, Cheshire, CT 06410.

The respondents were represented by Diane D. Duhamel, Esq., McGann, Bartlett & Brown, L.L.C., 111 Founders Plaza, Suite 1201, East Hartford, CT 06108.

This Petition for Review from the November 1, 2012 Finding and Award of the Commissioner acting for the Fifth District was heard on May 31, 2013 before a Compensation Review Board panel consisting of Commission Chairman John A. Mastropietro and Commissioners Peter C. Mlynarczyk and Daniel E. Dilzer.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The respondents have petitioned for review from the November 1, 2012 Finding and Award of the Commissioner acting for the Fifth District. We find no error and accordingly affirm the decision of the trial commissioner.

The trial commissioner made the following factual findings which are pertinent to our review. The claimant was employed by the respondent employer as a tractor-trailer truck driver from 1986 through 2006. On October 3, 1989, the claimant fell from the back of his truck and sustained an injury to his right foot/ankle. He underwent surgery to repair a fracture of the right fibula and was released to full duty as a truck driver on February 5, 1990. On December 21, 1990, the claimant attained maximum medical improvement and was awarded a twenty-percent permanent partial disability of the right foot. The claimant did not seek additional medical treatment again for this injury until September 2010.

On August 23, 2001, the claimant was recalled to active military duty. He underwent a complete physical and, upon passing, was sent to Bosnia where he worked as a heavy vehicle wheel mechanic. The claimant returned to the United States in March 2002 but remained on active duty with the Connecticut National Guard. The claimant also resumed full-duty employment with the respondent employer, but worked only when the National Guard did not need his services. He continued to work as a heavy vehicle wheel mechanic for the National Guard and as a truck driver for the respondent.

In January 2004, the army requested that the claimant undergo an evaluation at Walter Reed Hospital for the injuries he sustained in Bosnia. The claimant was treated

for a lower back injury, bilateral knee injuries, hypertension, sleep apnea, hearing loss, and post-traumatic stress disorder. He was discharged from Walter Reed on September 17, 2004 and was deemed 100% disabled by the Veterans Administration. The claimant began receiving a monthly pension from them in 2004. The claimant testified that he separated from the National Guard in September 2004 because he had completed his term of enlistment.

In April 2006, the claimant was terminated from his employment with the respondent employer. At that time, the claimant was undergoing treatment at the Veterans Administration for injuries to his knees sustained while on active duty, and the VA had recommended the claimant use a cane. However, because the Department of Transportation prohibits commercial vehicle drivers from using any type of assistive device, the claimant had to stop driving tractor-trailer trucks. The claimant testified that he was not physically capable of performing the duties of a truck driver in 2006 but the respondent employer told him he could return to work there when he could drive again.

On October 9, 2007, the Social Security Administration determined the claimant had been disabled since April 26, 2006 but had a sedentary work capacity. The claimant's disability was predicated on the following injuries: degenerative joint disease of the knees; meniscus tear; right shoulder problems; disk herniation at L4-5; irritable bowel syndrome; bilateral hearing loss; migraine headaches; hypertension, post-traumatic stress disorder and depression; and obstructive sleep apnea. As of March 11, 2011, the claimant was receiving $1908 per month in Social Security disability payments.

On October 9, 2008, the Veterans Administration issued correspondence indicating that the claimant qualified for vocational rehabilitation and compensated work

programs under which veterans deemed unemployable can maintain employment as part of their therapy. The claimant testified that he has looked for work since the Veterans Administration determined he was unemployable but no one would hire him. The claimant testified that he did not advise either the Veterans Administration or the Social Security Administration that he considered himself capable of working since 2006. On September 24, 2010, the Department of Veterans Affairs again issued correspondence to the claimant stating: "Are you being paid at the 100 percent rate because you are unemployable due to your service-connected disabilities: Yes." Claimant's Exhibit A. The claimant testified that the purpose of the letter was to ensure that he did not lose his service pension "if" he looked for work. April 17, 2012 Transcript, p. 40.

The claimant testified that he had "sporadic" issues with his right ankle but it did not prevent him from working between 1990 and 2006. Claimant's Exhibit D, p. 27. In September 2010, the claimant consulted with Leigh Brezenoff, M.D., regarding his right ankle and underwent an MRI of the right foot on October 7, 2010. The MRI findings were primarily degenerative, and the doctor recommended conservative treatment. He administered an ankle injection and referred the claimant to physical therapy, which the claimant underwent in 2010 and 2011. Due to the claimant's continuing symptoms of pain and swelling, on November 24, 2010, Brezenoff fitted the claimant with an ankle brace and advised the claimant to remain out of work pending completion of physical therapy. On January 25, 2011, Brezenoff indicated in correspondence to the claimant's attorney that the claimant's work-related injury of October 3, 1989 was a substantial factor in the claimant's current need for medical treatment and the injury had resulted in osteoarthritis which was limiting his ability to work.

On April 18, 2011, the claimant underwent a Respondents' Medical Examination with Raymond Sullivan, M.D. Sullivan diagnosed the claimant with arthritis in the right ankle, small tibial and talar anterior spurs, right ankle impingement, and symptomatic distal fibular avulsion fracture fragment, all of which rendered the ankle functionally unstable. Sullivan recommended additional conservative treatment but indicated that he would consider the claimant a surgical candidate if conservative measures failed.[1] Sullivan related the claimant's need for medical treatment to the injury of October 3, 1989 and, although he did not find the claimant totally disabled, did place restrictions on the claimant's ability to work.

On July 14, 2011, the claimant again consulted with Brezenoff, who noted that although the claimant was achieving an increased range of motion with physical therapy, his pain was not diminishing. Brezenoff recommended proceeding with the surgery recommended by Sullivan. On July 25, 2011, Brezenoff fitted the claimant with a new right ankle brace which prevented the claimant from wearing a work shoe/boot and continued to keep the claimant out of work. On August 16, 2011, the claimant underwent a Commissioner's Examination with Enzo Sella, M.D. Sella concurred with the other doctors' recommendation for ankle surgery and agreed that the claimant's need for surgery was related to the injury of October 3, 1989. Sella did not comment on the claimant's work capacity.

On December 30, 2011, the claimant underwent the recommended surgery on his right ankle with Brezenoff and then followed up with Brezenoff on February 28, 2012

[1] Sullivan opined that the claimant would benefit from "ankle arthroscopic debridement and open excision of his fibular nonunion fragment with lateral ankle ligament reconstruction." Claimant's Exhibit G, p. 3.

and on March 29, 2012.[2] The doctor indicated that the claimant was to remain out of work until further notice and was to be re-evaluated on April 24, 2012.

Based on the totality of the evidence presented, the trial commissioner found credible and persuasive the opinion of the claimant's treating physician indicating that the work-related injury of October 3, 1989 was a substantial factor in the claimant's need for medical treatment and the claimant has been totally disabled since November 23, 2010.[3] The trial commissioner also found credible the claimant's testimony that he has been willing to work and has looked for work for a number of years but has been unable to find anything. In addition, the trial commissioner determined that neither the claimant's receipt of Veterans Administration benefits nor Social Security disability benefits affected his eligibility for total disability benefits pursuant to the Workers' Compensation Act. The trier therefore concluded the claimant was eligible for ongoing total disability benefits commencing on November 23, 2010 with the exception of the time period during which the claimant had delayed his surgery for personal reasons.

The respondents have appealed this decision, contending that the trier erred in concluding that the claimant was eligible for temporary total disability benefits because the evidence presented did not demonstrate that the claimant's work-related injury of October 3, 1989 resulted in the claimant's incapacity to work on November 23, 2010. Rather, it is the appellants' contention that the instant record clearly indicates that the

[2] The respondents authorized the claimant's surgery for September 2011 but the claimant delayed scheduling his surgery until December 2011 because of personal reasons.

[3] The trial commissioner's Finding and Award erroneously indicated that the claimant's physician was Enzo Sella, M.D. We deem this harmless error. See D'Amico v. Dept. of Correction, 73 Conn. App. 718, 729 (2002), *cert. denied*, 262 Conn. 933 (2003).

claimant's "earning capacity had been destroyed for years before the need for treatment on the right ankle ever became an issue." Appellants' Brief, p. 10.

We begin with a recitation of the well-settled standard of review we are obliged to apply to a trial commissioner's findings and legal conclusions. "The trial commissioner's factual findings and conclusions must stand unless they are without evidence, contrary to law or based on unreasonable or impermissible factual inferences." Russo v. Hartford, 4769 CRB-1-04-1 (December 15, 2004), *citing* Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988). Thus, "[i]t is … immaterial that the facts permit the drawing of diverse inferences. The [commissioner] alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court." Fair, supra, 540 (1988), *quoting* Del Vecchio v. Bowers, 296 U.S. 280, 287 (1935).

The respondents did not file a Motion to Correct; as a result, "we must accept the validity of the facts found by the trial commissioner and this board is limited to reviewing how the commissioner applied the law." Corcoran v. Amgraph Packaging, Inc., 4819 CRB-2-04-6, 4948 CRB-2-05-5 (July 26, 2006). Turning to the merits of the appeal, we note at the outset that this matter presents us with a rather unusual set of factual circumstances in that, relative to the time period prior to the claimant's medical treatment with Brezenoff in 2010, it is the respondents who are attributing total disability to the claimant while the claimant is asserting a work capacity. Nevertheless, for the purposes of our analysis we still must be guided by the language of § 31-307 C.G.S., which states, in pertinent part, that "[i]f any injury for which compensation is provided under the provisions of this chapter results in total incapacity to work, there shall be paid to the

injured employee a weekly compensation equal to sixty-six and two-thirds per cent of his average weekly earnings at the time of the injury…." Section 31-307 C.G.S. (Rev. to 1989). A claimant seeking temporary total disability benefits is generally expected to proffer medical evidence substantiating that claim. Thus, "[t]he plaintiff [bears] the burden of proving an incapacity to work, and 'total incapacity becomes a matter of continuing proof for the period claimed.'" Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440, 454 (2001), *quoting* Cummings v. Twin Tool Mfg. Co., 40 Conn. App. 36, 42 (1996).

In the matter at bar, the respondents' claims of error relative to the trier's award of temporary total disability benefits appear to rest on two fundamental contentions. The first is that the record indicates that the claimant's service-connected injuries, rather than the work-related injury of October 3, 1989, were the cause of the claimant's inability to work prior to 2010. The second is that in light of the claimant's unavailing attempts to find work for at least four years, the trier should have reasonably inferred that the claimant was totally disabled under the Osterlund doctrine.

With regard to the respondents' first contention regarding the effect of the claimant's service-connected injuries on his ability to work, the record reflects that at some point following his separation from the military in September 2004, the claimant was adjudicated permanently and totally disabled by the Department of Veterans Affairs. See Claimant's Exhibit A. On October 9, 2007, the claimant also received a "fully favorable" disability decision from the Social Security Administration; although the administrative law judge determined that the claimant had a sedentary work capacity, the judge also found that "[c]onsidering the claimant's age, education, work experience, and

residual functional capacity, there are no jobs that exist in significant numbers in the national economy that the claimant can perform…." Claimant's Exhibit D, See Respondents' Exhibit 1, p. 6. The claimant did not dispute the submission of either of these assessments into evidence.

However, it is well-settled that a finding of total disability in another adjudicative forum is not generally dispositive of a total disability claim presented to the Workers' Compensation Commission. In fact, we are reasonably confident that were total disability benefits to be awarded a claimant solely on the basis of a Social Security disability decision, such an award would be vigorously contested and ultimately reversed. In Bidoae v. Hartford Golf Club, 91 Conn. App. 470 (2005), our Supreme Court specifically stated that we "conclude that a finding by the Social Security Administration that the plaintiff is disabled for purposes of social security disability benefits does not preempt a workers' compensation commission from making its own independent determination concerning ability to work." Id., at 480. See also Zizic v. Sikorsky Aircraft Division, 3732 CRB-4-97-11 (July 7, 1999).

Our Supreme Court made a similar observation in Birnie v. Electric Boat Corporation, 288 Conn. 392 (2008) in the context of reversing a trial commissioner's application of collateral estoppel in the workers' compensation forum relative to a claim for § 31-306 C.G.S. benefits brought by a claimant who had been awarded widow's benefits pursuant to the federal Longshore and Harbor Workers' Compensation Act. The trial commissioner had concluded that the respondent "was collaterally estopped from relitigating the issue of causation because that issue was actually litigated and necessarily

determined in a previous Longshore Act proceeding." Id., at 395. The court disagreed, remarking:

> [a]lthough we can discern from the administrative law judge's decision that he concluded that *some* causal connection is required under the contributing factor standard, that decision provides no indication of the scope of the standard actually applied…. Because we cannot adequately compare the scope of the contributing factor standard as applied, and the substantial factor standard as required under the state act, we are unable to determine whether the application of the collateral estoppel doctrine is proper in this case.

Id., at 414. (Emphasis in the original.)

Turning to the matter at bar, we note that the trier found that:

> [t]he language of C.G.S. Section §31-307 does not include any exceptions or exclusions for eligibility for temporary total disability benefits as long as the claimant is totally disabled as a result of a compensable injury. Accordingly, I find that the claimant's receipt of Veteran's Administration benefits and/or Social Security disability benefits do not affect his claim for total disability benefits under Workers' Compensation.

Conclusion, ¶ L.

The respondents aver that because "[t]he issue is whether a claimant has suffered some loss of earning capacity as a direct result of his work-related injury," Laliberte v. United Security, Inc., 261 Conn. 181, 189 (2002), the trier erroneously applied the statutory provisions of § 31-307 C.G.S. in making this finding. However, in light of the position reflected in the foregoing excerpts of precedential case law on this issue, we do not find that the trial commissioner was compelled to adopt the findings of either the Veterans Administration or the Social Security Administration relative to her assessment of the claimant's work capacity and eligibility for total disability benefits in the workers' compensation forum. We recognize that the unique circumstances of the instant matter might have lent themselves to the strong temptation to rely upon these other assessments.

Nevertheless, we find no error in the trial commissioner's refusal to find the prior assessments dispositive of the issue of the claimant's work capacity.[4]

As mentioned previously herein, the respondents also assert that the trier could have reasonably inferred, based upon the evidence presented, that the claimant had a viable Osterlund claim in light of his futile long-term effort to find employment following his termination from the respondent employer. The Osterlund doctrine evolved out of the following observation articulated by our Supreme Court in Osterlund v. State, 135 Conn. 498 (1949):

> A finding that an employee is able to work at some gainful occupation within his reasonable capacities is not in all cases conclusive that he is not totally incapacitated. If, though he can do such work, his physical condition due to his injury is such that he cannot in the exercise of reasonable diligence find an employer who will employ him, he is just as much totally incapacitated as though he could not work at all.

Id., at 506-507.

The practical effect of this doctrine is that when a trier is called upon to decide whether a particular claimant has demonstrated temporary total disability under an Osterlund claim, it is expected that a trier will look beyond the medical evidence and examine other factors which may affect the claimant's employability.

> Whether a claimant is realistically employable requires an analysis of the effects of the compensable injury upon the claimant, in combination with his preexisting talents, deficiencies, education and intelligence levels, vocational background, age, and any other factors which might prove relevant…. A commissioner always

[4] This is particularly so given that in Riley v. Sun Life and Health Ins. Co., 657 F.3d 739 (8th Cir. 2011), the court observed that the disability benefits the claimant was entitled to receive from the Veterans Administration were "not from an 'insurance' program, but instead are considered obligatory compensation for injuries to service men and women during military duty," id., at 742, and "the amount of benefits depends upon the extent of the veteran's injury." Id., at 743. The court stated that "38 U.S.C. § 5107 provides that the Secretary of Veterans Affairs must consider all lay and medical information, and when the evidence is in equipoise, 'the Secretary shall give the benefit of the doubt to the claimant.'" Id., *quoting* 38 U.S.C. § 5107(b).

> must examine the impact of the compensable injury upon the particular claimant before him.

Bode v. Connecticut Mason Contractors, The Learning Corridor, 130 Conn. App. 672, 681 (2011), *cert. denied*, 302 Conn. 942 (2011), *quoting* R. Carter et al., 19 Connecticut Practice Series: Workers' Compensation Law (2008 Ed.) § 8:40, p. 301.

In the matter at bar, the respondents point out that the trier found "the claimant had looked for work after having been treated for his service connected injuries and had not been able to find someone to hire him." Appellants' Brief, p. 12. The respondents assert that the trier should have concluded that "[t]hose service connected injuries were the cause of the claimant's inability to work prior to 2010 [and] … the injury for which compensation is provided did not cause the total incapacity to work." Id. In essence, the respondents argue that the claimant's inability to secure employment leads inescapably to the conclusion that the claimant was unemployable. However, despite the unique circumstances presented in this matter, we are unwilling to permit the Osterland doctrine to be asserted as a defense to a claim. In addition, in light of the difficulties experienced by even relatively able-bodied individuals in attempting to find employment during the time period in question (2006 through 2010), we find that the trier's refusal to reach the conclusion sought by the respondents did not constitute error.[5]

Moreover, the claimant presented job searches for the period of June 6, 2011 through October 14, 2011 as a testament to his good-faith efforts to secure employment and testified that after being terminated from Bozzuto's, he submitted "many" on-line applications and pursued word-of-mouth leads from other drivers. April 17, 2012

[5] We note that record contains a report dated April 18, 2011 arising from a Respondents' Medical Examination performed by Raymond J. Sullivan, M.D., wherein Sullivan concurred with the claimant's treating physician, Leigh Brezenoff, M.D., that the claimant's symptoms were directly related to the work-related injury and were "in no way related to any other injuries to his knees or back." Claimant's Exhibit G., p. 2. Sullivan also opined that the claimant was not totally disabled.

Transcript, p. 23. In addition, he testified that even after receiving the favorable Social Security disability decision in 2007, he "never stopped" looking for work until he began having issues with his ankle and developed difficulties standing.[6] Id., at 24. The claimant also testified that he was able to handle such household chores as laundry, grocery shopping, dusting, [and] vacuuming," Claimant's Exhibit D, p. 37, as well as taking care of the lawn work and gardening. Id. The claimant stated, "I continued a normal life with the inconvenience of the ankle. I mean, it didn't prevent me from doing anything until I went to see Dr. Brezenoff. That's when I was having problems." April 17, 2012 Transcript, p. 47. The trial commissioner specifically found the claimant's evidence credible relative to both his willingness and capacity to secure new employment, and it is not our purview to reverse such discretionary findings on review.

> Credibility must be assessed . . . not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude . . . . An appellate court must defer to the trier of fact's assessment of credibility because [i]t is the [fact finder] . . . [who has] an opportunity to observe the demeanor of the witnesses and the parties; thus [the fact finder] is best able to judge the credibility of the witnesses and to draw necessary inferences therefrom . . . . As a practical matter, it is inappropriate to assess credibility without having watched a witness testify, because demeanor, conduct and other factors are not fully reflected in the cold, printed record.

Burton v. Mottolese, 267 Conn. 1, 40 (2003).

Finally, the respondents maintain that the claimant "produced no evidence at the formal hearing that the destruction of his earning capacity was due to his work injury." Appellants' Brief, p. 14. However, our review of the record indicates that the claimant

[6] The claimant testified that it was his understanding that he was allowed to earn up to $14,000.00 per year and still retain his Social Security and Veterans Administration benefits. April 17, 2012 Transcript, pp. 24-25.

provided an office note from Brezenoff dated November 24, 2010 indicating that the claimant was to remain out of work until his next office visit on January 6, 2011. Claimant's Exhibit F. On January 6, 2011, Brezenoff kept the claimant out of work pending additional physical therapy. Id. On January 25, 2011, Brezenoff provided correspondence to the claimant's attorney indicating that the work-related injury of October 3, 1989 was "a substantial factor with regard to [the] current treatment *and his disability from work* in that the injury caused the development of the osteoarthritis that is now limiting his ability to work." (Emphasis added). Id. On July 14, 2011, Brezenoff indicated that the claimant would be kept out of work pending surgery. Id. On December 30, 2011, the claimant underwent surgery, see Claimant's Exhibit I, and Brezenoff indicated that he was keeping the claimant out of work as of February 28, 2012 and March 29, 2012. Claimant's Exhibit F. Another follow-up was evidently scheduled for April 24, 2012 for which we have no report. Finally, both the Social Security disability decision of October 9, 2007 and Sullivan's Respondents' Medical Examination of April 18, 2011 attribute to the claimant a sedentary work capacity.

Having reviewed in its entirety the evidence upon which the trial commissioner relied in reaching her conclusions in this matter, we find that the record provides ample support for the trier's determination that the claimant was eligible for temporary total disability benefits as a result of his work-related injury of October 3, 1989. As mentioned previously herein, we recognize that this claim presents an unusual set of factual circumstances, and the parties have propounded arguments that seem antithetical to the usual legal arguments propounded by parties in a workers' compensation claim. Moreover, the trier, in reaching her findings, was called upon to weigh evidentiary

submissions in a manner that at first blush appears to be at variance with the general manner in which such submissions are assessed. The respondents are essentially arguing that the trier's conclusion that the claimant was totally disabled as a result of injuries incurred when the claimant was in the course of his employment with the respondent employer was an abuse of discretion. Quite frankly, had the trier assigned to the evidence the weight urged by the respondents, we would still be obligated to accord "every reasonable presumption in favor of the [trier's] action." Burton v. Mottolese, 267 Conn. 1, 54 (2003). Be that as it may, the trier did not reach the conclusion championed by the respondents, and our review on appeal fails to show any error on the part of the trial commissioner which would warrant reversal.

The November 1, 2012 Finding and Award of the Commissioner acting for the Fifth District is hereby affirmed.

Commissioners Peter C. Mlynarczyk and Daniel E. Dilzer concur in this opinion.