CASE NO. 5833 CRB-2-13-4 : COMPENSATION REVIEW BOARD

CLAIM NOS. 100003988, 100024554, 100025456, 100028595
100043408, 200015707, 200104780, 200120511
200122128, 200133917, 200134290 200143830

GEORGE BREY : WORKERS' COMPENSATION
CLAIMANT-APPELLANT COMMISSION

v. : APRIL 2, 2014

STATE OF CONNECTICUT/
DEPARTMENT OF CORRECTION
EMPLOYER
SELF-INSURED
RESPONDENT-APPELLEE

and

GALLAGHER BASSETT SERVICES, INC.
ADMINISTRATOR

APPEARANCES:

The claimant appeared without legal representation at oral argument. In the proceedings before the trial commissioner, the claimant was represented by Ralph A. Russo, Esq., Law Offices of Ralph Russo, Esq., 49 Welles Street, Suite 212, Glastonbury, CT 06033.

The respondent was represented by Richard R. Hine, Esq., Assistant Attorney General, Office of the Attorney General, 55 Elm Street, P.O. Box 120, Hartford, CT 06141-0120.

This Petition for Review from the March 27, 2013 Finding and Dismissal of the Commissioner acting for the Eighth District was heard on October 25, 2013 before a Compensation Review Board panel consisting of Commission Chairman John A. Mastropietro and Commissioners Charles F. Senich and Peter C. Mlynarczyk.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has petitioned for review from the March 27, 2013 Finding and Dismissal of the Commissioner acting for the Eighth 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 began working for the respondent employer as a Correction Officer in April 1982 and remained with the respondent employer in that capacity until March 2003. The claimant's duties included supervising and monitoring inmates, searching inmates and their cells, cell extractions, and other responsibilities typical of a Correction Officer. Over the course of his career, the claimant filed workers' compensation claims for more than thirty work-related injuries; the respondent stipulated that every claim is an accepted compensable injury.

Commencing in May 1982 and continuing through October 1998, the claimant brought a series of back claims arising from a number of work-related incidents; in 1986, the parties entered into a Voluntary Agreement for a seven and one-half percent permanent partial disability rating to the claimant's back. In 1994, the claimant underwent a lumbar discectomy, after which his permanency rating was increased to ten percent. At trial, the claimant testified that his permanency rating was thirty percent, and a Stipulation to Date, which was never signed by the respondent or approved by the Workers' Compensation Commission, was entered into the record stating that the claimant's permanency rating was thirty percent. The claimant underwent a

Respondents' Medical Examination with Myron Shafer, M.D., on April 7, 2009; Shafer opined that the claimant's permanent partial disability rating for his back was fifteen percent and ascribed to the claimant a light-duty work capacity with a ten-pound lifting restriction.

The claimant also made a number of claims for knee injuries arising from multiple work-related incidents. On September 3, 2004, the claimant was examined by Thomas Dugdale, M.D., in a Respondents' Medical Examination; noting that the claimant had advanced degenerative changes in his right knee, but not in his left knee, Dugdale opined that although the claimant needed a total right knee replacement he still possessed a sedentary work capacity. In 2008, the claimant underwent a total right knee replacement; on January 23, 2009, the claimant was examined by Courtland Lewis, M.D., who assigned to the claimant a thirty-seven percent permanent partial disability to the right knee and ascribed to the claimant a light-duty work capacity relative to the knee with a maximum-lift capacity of fifty pounds and a maximum-carry capacity of twenty-five pounds. However, Lewis deferred to Jonathan Kost, M.D., the claimant's pain management physician, on the issue of overall work capacity. Following the Respondents' Medical Examination with Myron Shafer, M.D., on April 7, 2009, Shafer opined that the claimant possessed a light-duty work capacity, concurred with the thirty-seven percent rating to the right knee, and, as noted previously herein, ascribed to the claimant a light-duty work capacity and a ten-pound lifting restriction.

Over the years, the claimant also filed claims for injuries to his cervical spine and neck, head, elbows, groin, buttocks, wrist, shoulder and finger. On July 1, 2009, the claimant underwent a Commissioner's Examination with Jerrold Kaplan, M.D. Kaplan

determined that in light of the claimant's array of injuries, ongoing pain management treatment, which included medical and periodic epidural steroid injections, was appropriate. Kaplan also suggested that the claimant participate in counseling sessions to address issues of depression and chronic pain. Because the claimant's most recent injury had occurred in 2002, Kaplan opined that the claimant had reached maximum medical improvement and suggested the claimant undergo a functional capacity examination in order to assess his work capacity and restrictions.

The claimant returned to Kaplan on December 20, 2010 for a follow-up examination specifically intended to assess the claimant's work capacity and restrictions. To that end, Kaplan reviewed the Function Capacity Evaluation conducted by Robb Wright on September 30, 2009 in which Wright had determined, *inter alia*, that the claimant's physical demand level was in the sedentary to medium range with restrictions for repetitive load and walking. Kaplan concluded that the claimant possessed a sedentary full-time work capacity with restrictions and a ten-pound lifting and carrying limitation. Kaplan also indicated that the claimant should avoid "stairs, ladders, walking up ramps, hazardous equipment, overhead work with the right arm, squatting, bending, or kneeling" and should only occasionally walk or stand. Claimant's Exhibit A [December 20, 2010 report of Jerrold Kaplan, p. 2.] In addition, Kaplan recommended a left knee brace. Finally, Kaplan stated that his recommendations were solely predicated on the claimant's physical status and recommended a "psychiatric IME," id., to resolve any questions relative to whether the claimant had a psychological impairment.

The claimant came under the care of Cynthia Wickless, Ph.D., a Licensed Clinical Psychologist, who opined in a report dated February 17, 2010 that the claimant suffered

from a pain disorder and major depression.[1] Wickless indicated that the claimant's depression was sufficiently severe that the claimant was unfit for employment. On April 21, 2010, at the request of the respondent, the claimant underwent a psychological examination with Andrew Meisler, Ph.D. In his report of May 4, 2010, Meisler, having reviewed some of the comments made by the claimant to various examiners as well as the claimant's deposition testimony of March 22, 2010 relative to the circumstances surrounding the claimant's pool membership and the activities performed by the claimant around the family home, concurred with Wickless that the claimant's primary diagnosis was a pain disorder. Meisler also opined that the claimant's disorder is the result of both medical and psychological issues but "a substantial portion of the claimant's pain is psychogenic in origin." Claimant's Exhibit A [May 4, 2010 report of Andrew Meisler, Ph.D., p. 6]. In addition, Meisler found that while the claimant's pain did play a role in his depression, other significant factors also contributed, such as "(1) the circumstances surrounding his employment battles, retirement, and trouble with the retirement board; (2) severe domestic and financial strain; (3) a 'victim mentality;' and (4) narcotic dependence." Id.

Meisler disagreed with Wickless' conclusion that the claimant was unemployable due to his depression, noting that the claimant's prior attempts to return to work in 2006 and 2008 were not successful because of reported back pain and narcotic use respectively. Meisler also indicated that the claimant did not report that his depression prevented him from performing various chores around the home. Finally, Meisler

[1] Although both Michael Dorval, CRC, ABVE-D and Andrew Meisler, Ph.D., reference this report, it does not appear to have been submitted into the record.

pointed out that the claimant's psychological treatment had only recently begun and the claimant had yet to avail himself of the interventions suggested by Wickless, such as aqua therapy, which the claimant had rejected.

The claimant also treated with Jonathan Kost, M.D., for pain management and was taking several medications. In a report dated February 12, 2009, Kost ascribed to the claimant a light-duty work capacity.[2]

In addition to the foregoing, the claimant submitted into evidence the report of November 7, 2011, the Addendum of February 6, 2012 and the deposition of January 31, 2012 of Michael Dorval, a vocational expert. Dorval opined that the claimant's optimal productivity was limited to two or three hours a day and that his physical limitations were beyond the scope of what most employers could reasonably accommodate. Dorval concluded that the claimant's psychological problems coupled with his physical limitations rendered the claimant incapable of gainful employment. Dorval noted that he believed the claimant wanted to work and he took this desire into consideration in reaching his conclusion that the claimant is not employable. While Dorval acknowledged that Kost, Shafer and Wright had all concluded that the claimant has a light-duty work capacity, Dorval indicated that in forming his opinion he predominantly relied upon Kaplan's opinion.

At trial, the claimant stated that since his retirement in 2003, he attempted to return to work at a car dealership but he was fired for walking with a limp. See October 25, 2012 Transcript, p. 18. The claimant provided no other evidence demonstrating that

[2] In his Finding and Award, the trial commissioner cited the date of this report as January 23, 2009. We deem this harmless scrivener's error. See D'Amico v. Dept. of Correction, 73 Conn. App. 718, 729 (2002), *cert. denied*, 262 Conn. 933 (2003).

he had sought any other employment.[3] At his deposition, the claimant also testified that he tried to go back to school after he retired, but that the Division of Workers' Rehabilitation denied the course of study he had selected because he was "too old" and not "retrainable." Claimant's Exhibit B, p. 26. The claimant did not make any other attempts to pursue retraining. Id., at 28.

The claimant testified that around the house, he mows the lawn, rakes leaves and removes snow with both a snow blower and a shovel. He also cooks, washes the dishes, and vacuums. The claimant denied being proficient in the use of a computer but testified that he had used a computer in order to prepare correspondence, such as Freedom of Information requests and whistleblower complaints, to a number of state agencies.

The trial commissioner denied the claim for temporary total disability benefits, having determined that although it was undisputed that the claimant had sustained multiple compensable work-related injuries, it was also undisputed that no medical doctor had pronounced the claimant totally disabled as a result of any of his accepted injuries or a combination of those injuries. The trier did not find Wickless' opinion credible or persuasive, choosing instead to place more credence in the opinion set forth by Meisler regarding the causation of the claimant's depression and his ability to work relative to his psychological condition. The trier also concluded that the claimant was not credible, noting that he believed the claimant's computer skills were not as deficient as the claimant had presented. Moreover, the trier was not persuaded that the claimant had any real interest in either returning to work or engaging in vocational training. In addition,

[3] The May 4, 2010 report of Andrew Meisler, Ph.D., indicates that the claimant, in addition to accepting a position at the car dealership in 2006, also was hired by the U.S. Postal Service in 2008 but was prevented from taking the position because of a positive drug test for opiates. See Claimant's Exhibit A [May 4, 2010 report of Andrew Meisler, Ph.D., p. 5.] The claimant did not testify to this at his deposition or at trial.

because the trier did not find the claimant's testimony credible concerning his physical and psychological restrictions, the trier rejected the opinion proffered by Dorval because he found the underlying facts upon which Dorval relied in reaching his conclusions were similarly not credible. The trier also found that Dorval's opinion was inconsistent with the other medical and psychological opinions in the record.

The claimant filed a timely Petition for Review and approximately five weeks later filed with the Eighth District Office of the Workers' Compensation Commission a document which he requested be considered a motion to correct, appeal, strike and dismiss, and vacate the finding of the trial commissioner.[4] While this document cannot technically be considered a brief, nevertheless, in keeping with the well-settled policy of accommodation afforded *pro se* litigants by Connecticut courts and this board, we will accept the claimant's motion in lieu of a brief. See Walter v. Bridgeport, 5092 CRB-4-06-5 (May 16, 2007).

In prosecuting his appeal, the claimant appears to dispute both the inferences drawn by the trier from the factual findings and several of the factual findings themselves. The claimant also contends that the trier disregarded pertinent aspects of the claim history in reaching his conclusions. Unfortunately, many of the issues presented in the claimant's motion are either outside the scope of the instant record and/or reflect a failure to fully appreciate the purpose of appellate litigation. However, the gravamen of the claimant's appeal appears to be the trial commissioner's failure to award temporary total disability benefits on the basis of the Osterlund doctrine, a theory of law which

[4] This document was resubmitted to the Workers' Compensation Commission approximately two months later along with additional correspondence detailing, *inter alia*, the claimant's efforts to obtain and/or review certain file documents as well as other records from the Workers' Compensation Commission and the Attorney General's office ostensibly related to his appeal.

provides an alternative route for the collection of temporary total disability benefits when a claimant is able to prove that despite having been ascribed a work capacity, he or she is essentially unemployable.[5]

Before proceeding to examine the merits of the appeal, 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). Moreover, "[a]s with any discretionary action of the trial court, appellate review requires every reasonable presumption in favor of the action, and the ultimate issue for us is whether the trial court could have reasonably concluded as it did." Burton v. Mottolese, 267 Conn. 1, 54 (2003). 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, at 540, *quoting* Del Vecchio v. Bowers, 296 U.S. 280, 287 (1935).

Turning our analysis to the matter at bar, we note at the outset that a claimant "is entitled to total disability benefits under General Statutes § 31-307 (a) only if he can prove that he has a 'total incapacity to work.'"[6] D'Amico v. Dept of Correction,

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[5] See Osterlund v. State, 135 Conn. 498 (1949).

[6] Section 31-307(a) C.G.S. states: "If any injury for which compensation is provided under the provisions of this chapter results in total incapacity to work, the injured employee shall be paid a weekly compensation equal to seventy-five per cent of his average weekly earnings as of the date of the injury, calculated pursuant to section 31-310, after such earnings have been reduced by any deduction for federal

73 Conn. App. 718, 724 (2002), *cert. denied*, 262 Conn. 933 (2003). The claimant "[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, 62 Conn. App. 440, 454 (2001). A claimant seeking temporary total disability benefits will generally proffer medical evidence in order to substantiate the claim. If, however, the medical evidence suggests that the claimant has a work capacity, a claimant can also establish eligibility for temporary total disability benefits via an Osterlund claim, which essentially shifts the focus from a claimant's physical condition to a claimant's employability. This 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.

As is the case with an award of temporary total disability benefits generally, the decision to award temporary total disability benefits pursuant to this doctrine is a factual determination that rests solely within the discretion of the trier. In order to assess a claimant's eligibility, 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

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or state taxes, or both, and for the federal Insurance Contributions Act made from such employee's total wages received during the period of calculation of the employee's average weekly wage pursuant to section 31-310…."

> combination with his pre-existing talents, deficiencies, education and intelligence levels, vocational background, age, and any other factors which might prove relevant…. A commissioner always 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.

Regardless of whether a claimant establishes unemployability:

> by demonstrating that she actively sought employment but could not secure any, or by demonstrating through a nonphysician vocational rehabilitation expert or medical testimony that she is unemployable, … as long as there is sufficient evidence before the commissioner that the [claimant] is unemployable, the [claimant] has met her burden.

Marandino v. Prometheus Pharmacy, 105 Conn. App. 669, 684-685 (2008).

As mentioned previously herein, the trial commissioner found that none of the medical doctors who examined or treated the claimant opined that he was totally disabled as a result of the injuries he sustained over the course of his career with the employer. We have reviewed the various medical reports cited by the trial commissioner and find no error on the part of the trier in his interpretation of these reports. In addition, although the trier recognized that a licensed clinical psychologist had concluded the claimant was unemployable due to the severity of the claimant's pain disorder and depression, the trier did not find this opinion credible, choosing instead to place more credence in the opinion of the respondent's psychological expert, who indicated that although the claimant suffered from a pain disorder and depression, the claimant's depression was not severe enough to render the claimant unemployable. It is of course well-settled that a trier is under no compunction to accept a medical opinion simply because it is proffered into

evidence. "It is the quintessential function of the finder of fact to reject or accept evidence and to believe or disbelieve any expert testimony…. The trier may accept or reject, in whole or in part, the testimony of an expert." (Internal citations omitted.) Tartaglino v. Dept. of Correction, 55 Conn. App. 190, 195 (1999), *cert. denied*, 251 Conn. 929 (1999).

The discretion to assign the appropriate evidentiary weight to medical reports also extends to the trier's assessment of vocational expert opinions. In the matter at bar, we note that the trier specifically did not find credible the vocational opinion submitted by Michael Dorval, wherein Dorval opined that the claimant's physical and psychological limitations rendered him incapable of gainful employment. Such a finding was well within the trier's discretion and provides no grounds for a claim of error.

In addition, we note that the trier stated that because he did not find the claimant's testimony fully credible relative to his physical and psychological limitations, he likewise discounted Dorval's opinion because the evidentiary basis for Dorval's opinion, i.e., "the claimant's narrative," was not fully credible. See Do v. Danaher Tool Group, 5029 CRB-6-05-12 (November 28, 2006). Consistent with this finding, the trier also indicated that he did not find credible the testimony of the claimant regarding his computer proficiency or his attempts to return to work or undertake vocational retraining. These findings relative to credibility clearly weakened the claim for temporary total disability benefits pursuant to Osterlund. Nevertheless, this board is simply not empowered to reverse a trier's conclusions relative to credibility.

> 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. (Citations omitted; internal quotation marks omitted.)

Briggs v. McWeeny, 260 Conn. 296, 327 (2002).

In light of the foregoing analysis, we do not find that the trier's denial of temporary total disability benefits in this matter constituted an abuse of his discretion such that a reversal of the decision would be warranted.

As stated previously herein, the claimant has raised a number of issues on appeal which go well beyond the instant record and, as such, are outside the scope of appellate review. However, we would like to address comments made by the claimant in his motion which seem to imply that the trial commissioner's impartiality in hearing this matter may have been affected because of some sort of social relationship existing between him and respondent's counsel. The claimant's comments appear to be predicated on a discussion between the trier and respondent's counsel which occurred prior to the commencement of the formal hearing concerning their respective work-out schedules at a local YMCA to which they both belong. In addition, the claimant suggested that the trier and respondent's counsel may have some sort of "off-work" connection arising from the fact that they have both been politically active in the same district. The tenor of the claimant's remarks would seem to indicate that the claimant believes the trier should perhaps have recused himself from presiding over this matter. We strenuously reject the implication.

Canon 3 (c) of the Code of Judicial Conduct states:

> A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (A) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;….

Given that the number of commissioners in the workers' compensation forum is statutorily limited to sixteen, "the recusal of trial commissioners has been disfavored except for circumstances under which a trial commissioner determined on his or her own that their impartiality was at issue." [7] Martinez-McCord v. State/Judicial Branch, 5647 CRB-7-11-4 (August 1, 2012). See also Saddlemire v. American Bridge Co, 94 Conn. 618 (1920). "Every effort should be made to avoid disqualification, so that the same Commissioner may conduct the subsequent hearing, or the hearing for a modification of the original award." Saddlemire, supra, at 627. Moreover, "the determination of whether a commissioner has heard prior evidence in a matter, and whether having heard such evidence may affect his or her ability to hear the case, is solely within the discretion of the trial commissioner…. Only the trial commissioner can know whether what he or she has heard will impact his or her ability to fairly preside over the formal hearing." Rogers v. C.N. Flagg Power, 3809 CRB-6-96-5 (June 23, 2000).

In light of the foregoing, it is clear that a trier's recusal should occur only when "the commissioner believes he or she is unable to render a fair and impartial decision…." Martinez-McCord, supra. It is equally clear that the instant claimant's purported

[7] Section 31-276(a) C.G.S. states, in pertinent part, that: [t]here shall be a Workers' Compensation Commission to administer the workers' compensation system. There shall be sixteen workers' compensation commissioners."

rationale for the trier's recusal in the instant matter is inconsistent with the generally accepted legal standard for disqualification. Neither an exchange of pleasantries between colleagues nor a speculative association based on prior political activity give rise to the logical inference that the trial commissioner and respondent's counsel enjoyed a social connection such that the trier's "impartiality might reasonably be questioned." Code of Judicial Conduct Canon 3 (c)(1)(A). Moreover, the record indicates that the claimant was represented by counsel at the proceedings below. If the claimant or his counsel had any concerns regarding the trier's impartiality, these concerns could have been raised at any point during the trial. A claimant is not entitled to wait until he receives an unfavorable finding and then raise allegations of impartiality after the fact. See Henderson v. Department of Motor Vehicles, 202 Conn. 453, 462 (1987). Given that the record reveals absolutely no evidence that the trier's decision to preside over the formal hearing was in any way improper, we decline to reverse the Finding and Dismissal which was issued as a result of that formal hearing.

Having reviewed the submissions of the claimant on appeal, we are left with the strong impression that the claimant is primarily engaged in an attempt to re-litigate the facts of this matter. "Essentially, the appellant seeks to have this board independently assess the evidence presented and substitute our presumably more favorable conclusions for those reached by the trial commissioner. This we will not do. This board does not engage in de novo proceedings and will not substitute our factual findings for those of the trial commissioner." Vonella v. Rainforest Café, 4788 CRB-6-04-2 (March 16, 2005).

There is no error; the March 27, 2013 Finding and Dismissal of the Commissioner acting for the Eighth District is accordingly affirmed.

Commissioners Charles F. Senich and Peter C. Mlynarczyk concur in this opinion.