CASE NO. 5846 CRB-2-13-5 : COMPENSATION REVIEW BOARD
CLAIM NO. 200135391

SYLVESTER PETTWAY
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: APRIL 17, 2014

ENVIRO EXPRESS, INC.
EMPLOYER

and

MEADOWBROOK INSURANCE GROUP
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by James T. Baldwin, Esq., Coles, Baldwin & Kaiser, LLC, 1261 Post Road, Fairfield, CT 06824.

The respondents were represented by Robert R. Dombrowski, Esq., Pavano & van der Werff, LLC, 360 Bloomfield Avenue, Suite 200, Windsor, CT 06095.

This Petition for Review from the May 2, 2013 Finding and Dismissal of the Commissioner acting for the Fourth District was heard November 22, 2013 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Peter C. Mlynarczyk and Ernie R. Walker.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has appealed from a Finding and Dismissal which determined that he was not entitled to benefits pursuant to § 31-308(a) C.G.S. The claimant argues that the trial commissioner erroneously attributed his lack of success in obtaining employment to a noncompensable ailment, and should have attributed this situation to his compensable injury. The claimant also argues the trial commissioner should have credited him with making a reasonable effort to find employment. We find that these are essentially factual issues and the trial commissioner could, after weighing the evidence on the record, conclude as he did in this matter. We affirm the Finding and Dismissal.

The trial commissioner reached the following factual findings which are relevant to our consideration. The claimant received a Finding and Orders dated December 7, 2011 based on a compensable June 16, 2001 truck accident. The trial commissioner in that Finding found the claimant's conversion disorder compensable as the bed of the truck he was operating had collapsed, causing injuries to his head, neck, and back. The Finding and Orders dismissed a claim to find the claimant's major depression compensable, and dismissed a claim for temporary total disability benefits as of January 1, 2009. The claimant now seeks temporary partial disability benefits for the period January 1, 2009 to May 2, 2012. A Form 36 was approved on May 2, 2012 placing the claimant at maximum medical improvement concerning the conversion disorder. The claimant did not submit job searches until October 2012.

The claimant began treating with Dr. Mark Waynik, a psychiatrist, on October 23, 2009. He was diagnosed with a conversion disorder and a level of depression likely

related to his current unemployment and financial stress rather than the 2001 injury. The treater has opined that the claimant was totally disabled because of his symptoms of depression, decreased energy, sadness, impaired concentration, irritability, decreased interest, and decreased enjoyment and further indicated the claimant is not looking for work and doesn't feel capable of working. The claimant testified at the formal hearing that his condition has remained pretty much the same since late 2008, with shut-down spells, weakness, numbness, and blurry vision. When his body shuts down, he is unable to seek help. He volunteers at a church soup kitchen, when his body allows, approximately once or twice a month, although not in recent months. He testified he could not look for work every week, but only when his condition allowed, nor could he work on a consistent basis. He tried to find clerical or dispatch work similar to what he performed during a seven-year period of accommodation at his former employer. He also testified that he did not feel able to drive for long distances, so he only looked for work in his immediate area. He also testified that a number of his job search forms were not filled out because his condition was bad during that period of time. He did not complete any job applications but only spoke to some people regarding possible employment.

Based on these subordinate facts the trial commissioner concluded that the claimant was not credible as to his testimony regarding making a serious effort to find work. The commissioner further found that the claimant's self-perceived work restrictions are related to his non-compensable depressive disorder. He further found that the claimant only submitted evidence of work searches, after his bid for temporary total disability for the same period, was denied. Therefore, he denied the claimant's bid for § 31-308(a) C.G.S. benefits, as the claimant had not met his burden of proof.

The claimant filed a number of post-judgment motions, including a Motion to Correct, a Motion to Amend Exhibits, a Motion for Reconsideration and has filed two Motions to Submit Additional Evidence. The trial commissioner denied the first three motions herein and the Motions for Additional Evidence are pending before the Compensation Review Board, as the claimant has pursued an appeal from the Finding and Dismissal.

Prior to considering the merits of the appeal we must consider the pending Motions for Additional Evidence. The claimant seeks to admit documentation concerning his treatment with various medical professionals for his conversion disorder. He also seeks to provide documentation as to various delays in the hearing process and documentation as to his work searches. In Baker v. Hug Excavating, Inc., 5443 CRB-7-09-3 (March 5, 2010), we considered a similar request and denied the claimant's motion. As the Appellate Court pointed out in Mankus v. Mankus, 107 Conn. App. 585 (2008) when a litigant seeks to present previously unconsidered evidence directly to this panel, pursuant to Admin. Reg. § 31-301-9, the moving party must establish good cause.

"Thus, in order to request the board to review additional evidence, the movant must include in the motion (1) the nature of the evidence, (2) the basis of the claim that the evidence is material and (3) the reason why it was not presented to the commissioner." Id., at 596.

We are not persuaded that this documentation could not have been added to the record prior to the conclusion of the formal hearing. We believe admission of this evidence at this juncture would be "... an effort to try the case in an inappropriate piecemeal fashion. Schreiber v. Town & Country Auto Service, 4239 CRB-3-00-5 (June

15, 2001)." Grant v. Siemens Westinghouse Power Co., 5292 CRB-4-07-11 (October 28, 2008). We therefore deny the Motions to Submit Additional Evidence.

We now go to the merits of the claimant's appeal. The claimant's argument is that the trial commissioner did not properly apply the "law of the case" as set forth in the 2011 Finding and Orders. As the claimant views this matter, as his conversion disorder was found to be a compensable ailment in the prior finding, the trial commissioner in this matter erred in his assessment of the claimant's credibility in performing work searches. Claimant's Brief, pp. 7-8. Therefore, the claimant believed that he met his burden of establishing entitlement to § 31-308(a) C.G.S. benefits.

On appeal, we generally extend deference to the decisions made by the trial commissioner. "As 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." Daniels v. Alander, 268 Conn. 320, 330 (2004). The Compensation Review Board cannot retry the facts of the case and may only overturn the findings of the trial commissioner if they are without evidentiary support, contrary to the law, or based on unreasonable or impermissible factual inferences. Kish v. Nursing & Home Care, Inc., 248 Conn. 379 (1999) and Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988).

This precedent has caused our tribunal to take a deferential approach to a trial commissioner's evaluation as to what ailment is responsible for a claimant's inability to perform work. "When the board reviews a commissioner's determination of causation, it may not substitute its own findings for those of the commissioner." Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440, 451 (2001), *quoting,* O'Reilly v.

General Dynamic Corp., 52 Conn. App. 813, 819 (1999). "A commissioner's conclusion regarding causation is conclusive, provided it is supported by competent evidence and is otherwise consistent with the law. Id., 451, *quoting* Funaioli v. New London, 61 Conn. App. 131, 136 (2000).

The trial commissioner cited the medical reports of Dr. Waynik as supporting his conclusions. See Findings, ¶¶ 6-8. We have reviewed Claimant's Exhibit B, Dr. Waynik's medical reports. We note that that they make continual reference to the claimant having a "Major Depressive Disorder" but contain no reference to the claimant's conversion disorder. Dr. Waynik was not deposed prior to the formal hearing, therefore the reports herein were submitted "as is." Berube v. Tim's Painting, 5068 CRB-3-06-3 (March 13, 2007). The trial commissioner is permitted to reach a permissible inference from this evidence that the claimant's present condition was due to the depressive condition found noncompensable in the 2011 Finding and Orders.

In Bennett v. Wal-Mart Stores, 4939 CRB-7-05-5 (May 15, 2006), we outlined the claimant's burden when seeking § 31-308(a) C.G.S. benefits.

> In Sellers v. Sellers Garage, 80 Conn. App. 15 (2003), the Appellate Court outlined the standard for awarding a full partial disability award, "[t]o receive full compensation for partial disability under § 31-308(a), a plaintiff must satisfy the following three-pronged test: (1) the physician attending an injured employee certifies that the employee is unable to perform his usual work but is able to perform other work, (2) the employee is ready and willing to perform other work in the same locality and (3) no other work is available . . . ." (Internal quotation marks omitted.) Mikula v. First National Supermarkets, Inc., 60 Conn. App. 592, 598, (2000), Sellers, supra, at 20-21.

In Bennett, we remanded the case because upon review we concluded that while the trial commissioner found the claimant was "able" to work; there were no findings or

inferences in the record that enabled this board to conclude the commissioner found the claimant was "willing" to work. "[F]or the claimant to collect benefits under § 31-308(a), she was required to show she was 'ready and willing' to perform work within her restrictions." Id. In the present matter the trial commissioner concluded the claimant had not made a credible effort to find work within his restrictions.[1] See Conclusions, c-e. Having reached that conclusion the trial commissioner could reasonably find the claimant had not satisfied the test delineated in Sellers, supra, for § 31-308(a) C.G.S. benefits.

We find the outcome herein consistent with other recent precedent concerning § 31-308(a) C.G.S. benefits. In Fountain v. Coca Cola Bottling Co., 5328 CRB-1-08-3 (February 18, 2009), the respondent appealed from an award of benefits to the claimant. We affirmed the trial commissioner's decision as he determined the claimant had presented "extensive documentation as to actually conducting a job search." Id. The claimant in Fountain was also found to be a credible witness and "[w]here the veracity of a witness' factual representations is at issue, the trier's credibility assessment is virtually inviolable on appeal." Canevari v. C.R. Gibson Co., 4231 CRB-7-00-5 (May 14, 2001) *citing* Berube, supra. On the other hand, in Gelinas v. P & M Mason Contractors, Inc., 5567 CRB-8-10-6 (June 7, 2011) the trial commissioner concluded that for the bulk of the period that the claimant sought benefits for "the claimant provided no credible or persuasive evidence that he was ready and willing to work within his restrictions prior to reaching MMI." Id. We affirmed the trial commissioner's decision to deny that element

[1] We note that cases such as McCarthy v. Hartford Hospital, 5079 CRB-1-06-3 (March 8, 2007), *aff'd*, 108 Conn. App. 370 (2008), *cert. denied*, 289 Conn. 910 (2008) do not make work searches mandatory prior to a commissioner awarding benefits for temporary partial disability. In the present matter, however, the trial commissioner could have reasonably concluded the claimant was able to seek employment but not making a reasonable effort to secure employment.

of the claim as "[i]t is the claimant's burden to prove eligibility for § 31-308(a) C.G.S. benefits." Id.

The trial commissioner concluded that the claimant failed in his burden of persuasion that he should receive § 31-308(a) C.G.S. benefits. Upon review of the record we find that the trial commissioner could have reasonably concluded the claimant had failed to meet this burden. We affirm the Finding and Dismissal.

Commissioners Peter C. Mlynarczyk and Ernie R. Walker concur in this opinion