CASE NO. 5877 CRB-4-13-8
CLAIM NO. 400081416 : COMPENSATION REVIEW BOARD

ANTONIO VITTI
CLAIMANT-APPELLEE : WORKERS' COMPENSATION COMMISSION

v.

: SEPTEMBER 16, 2014

CITY OF MILFORD
EMPLOYER
SELF INSURED
RESPONDENT-APPELLANT

and

PMA CUSTOMER SERVICE CENTER
ADMINISTRATOR

APPEARANCES: The claimant was represented by David J. Morrissey, Esq., Morrissey, Morrissey & Mooney, 203 Church Street, Naugatuck, CT 06770.

The respondent was represented by Scott Wilson Williams, Esq., Williams Moran, LLC, PO Box 550, Fairfield, CT 06824.

This Petition for Review[1] from the August 14, 2013 Finding and Award of the Commissioner acting for the Fourth District was heard June 20, 2014 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Stephen B. Delaney and Michelle D. Truglia.

---

[1] We note that a postponement and an extension of time were granted during the pendency of this appeal.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The respondent appeals from the August 14, 2013 Finding and Award of the Commissioner Acting for the Fourth District. In that Finding and Award the trial Commissioner awarded benefits pursuant to § 7-433c, Rev. 1992, Heart and Hypertension Act. It is the respondent's contention that the trial Commissioner erred in concluding that the respondent failed to rebut the presumption of compensability pursuant to § 7-433c(b)(2) and therefore erred in awarding benefits to the claimant pursuant to § 7-433c.

The pertinent facts in this matter are as follows. The claimant was employed as a police officer for the respondent municipality. The claimant was hired February 12, 1993, after passing a pre-employment physical. In the summer of 2010 while on vacation in Italy the claimant suffered a constellation of symptoms. The symptoms included; nausea, abdominal pain, and shortness of breath. The symptoms lasted several days and on August 17, 2010 the claimant consulted with Dr. Matthew Cohen. After examining the claimant and performing an abdominal ultrasound Dr. Cohen determined that the claimant did not have any significant gastrointestinal pathology. The claimant thereafter consulted with a cardiologist, Dr. John Chandler. Dr. Chandler performed an EKG and immediately transferred the claimant to St. Raphael's Hospital. Dr. Chandler suspected the claimant suffered from either coronary artery disease or cardiomyopathy.

Further testing was done at St. Raphael's Hospital and it was determined that the EKG results reviewed by Dr. Chandler were correct. It was also suspected that in addition to coronary artery disease or cardiomyopathy the claimant was suffering from myocarditis. Additional indications were that the claimant was experiencing progressive

heart failure. On August 23, 2010 the claimant was put on an intra-ortic balloon pump for cardiac support. On August 24, 2010, the claimant was transferred to Hartford Hospital where the claimant was diagnosed as suffering from cardiogenic shock and acute myocarditis. Additional testing indicated that the claimant required a heart transplant.

Dr. Detlef Wencker was the claimant's treating physician. On September 29, 2010 the claimant underwent a heart transplant. Dr. Wencker biopsied a portion of the claimant's native heart and determined that the claimant suffered from Giant Cell Myocarditis. In testimony before the trial commissioner, Dr. Wencker stated that Giant Cell Myocarditis is an extremely rare disease and fewer than 100 cases have been identified since 1907. See Findings, ¶ 9.

At the outset we note the parties agreed that the applicable law to be applied was § 7-433c (Rev. 1992) as it existed in 1992. In Findings, ¶ 1, and in an accompanying footnote of the August 14, 2013 Finding and Award the trial commissioner noted the following:

> After the record closed, a dispute arose about whether the 2010 version of CGS 7-433c -- which changes the rebuttable presumption -- should be the applicable statute. This commissioner at a June 12, 2013 pre-formal hearing declared -- and the parties agreed -- that the matter would be resolved by using the 1992 version as originally stipulated and pages 22-28 and 32 of the claimant's post-hearing legal memorandum dealing with the 2010 version would not be considered.

The statute, § 7-433c(a) (Rev. 1992) applied by the trial Commissioner, in pertinent part stated:

> Notwithstanding any provision of chapter 568 or any other general statute, charter, special act or ordinance to the contrary, in the event a uniformed member of a paid municipal fire department or a regular member of a paid municipal police department who

> successfully passed a physical examination on entry into such service, which examination failed to reveal any evidence of hypertension or heart disease, suffers either off duty or on duty any condition or impairment of health caused by hypertension or heart disease resulting in his death or his temporary or permanent, total or partial disability, he or his dependents, as the case may be, shall receive from his municipal employer compensation and medical care in the same amount and the same manner as that provided under chapter 568 if such death or disability was caused by a personal injury which arose out of and in the course of his employment. . . .
>
> (b)[A]ny regular member of a paid municipal police department who begins such employment on or after July 1, 1992, (1) shall not be eligible for benefits pursuant to this section until such member has completed two years of service from the date of employment and (2) shall not be eligible for benefits pursuant to this section after such member has completed two years of service if the municipal employer proves by a preponderance of evidence that the member's condition or impairment of health caused by hypertension or heart disease is not job-related.

The statute at issue was enacted in Public Act 92-81. That Act differed from previous versions of what is commonly referred to as the Heart and Hypertension Act. Previous versions of that Act provided a conclusive presumption of liability for certain municipal police and fire officers who suffered from heart disease or hypertension provided the police or fire officer could demonstrate they were part of the class to which the benefits applied. The statutory requirements were that the claimant had to have passed a pre-employment physical which failed to show evidence of heart disease or hypertension, and if the claimant satisfied these provisions he or she was then eligible for Chapter 568 benefits. Public Act 92-81 removed the conclusive presumption provision and added a rebuttable presumption. The rebuttable presumption permitted the municipal employer to demonstrate "by a preponderance of evidence that the . . . condition or impairment of health caused by hypertension or heart disease is not job related."

The respondent contends that the trier's conclusion that it failed to satisfy the rebuttable presumption is error. We agree that error exists. While both parties provide their own views as to how the rebuttable presumption language should be applied, we see a far more fundamental flaw in the findings of the trial commissioner. Our review of the factual findings reflects findings that are inconsistent with other findings and therefore the conclusion drawn by the trial commissioner is without legal support. Munson v. Munson, 98 Conn. App. 869 (2006); Gage v. Western Connecticut State University, 5470 CRB-7-09-06 (July 8, 2010). As an example of the inconsistencies to which we refer, the trier summarizes various points in the testimony provided by Dr. Wencker. In particular the trier states in Findings, ¶¶ 9h and 9r respectively:

> There is no consensus in the medical community that the disease should no longer be called idiopathic. . . .
>
> There is no basis in the literature or the details of the claimant's case to implicate his employment as a cause of the Giant Cell Myocarditis that he developed. Both the literature and his experience are sparse in that area. It is possible the claimant was subjected to some pathogen in the course of his employment, but there is just no way to know if something in his employment did or did not cause the disease.

In Conclusion, ¶ c, the trier declares, "I find Dr. Wencker more persuasive than Dr. Krauthamer [Respondent's Medical Expert] concerning Giant Cell Myocarditis."

When confronted with a Finding and Award where the findings are inconsistent with the conclusion a remand is in order. See e.g., Barichko v. State/Department of Transportation, 5813 CRB-4-12-12 (January 13, 2014). Generally our review on appeal accords great deference to the conclusions of a trial Commissioner drawn from the factual findings. Ordinarily the conclusions will not be disturbed unless they result from a misapplication of law, unreasonable or impermissible inferences or are without

evidence. See Fair v. People Savings Bank, 207 Conn. 535 (1988). The above reflects that the conclusion of the trial Commissioner is without legal support.

However, in addition to the error noted above, we are troubled by the trial Commissioner's application of the rebuttable presumption provision contained in § 7-433c(b) Rev. 1992. Although the parties may have agreed to apply the 1992 version of the statute, see Findings, ¶ 1, we think such a stipulation is analogous to conferring jurisdiction by agreement and cannot stand. Castro v. Viera, 207 Conn. 420 (1988). See also, Walsh v. Waldron & Sons, 112 Conn. 579, 584 (1931) *citing* Savings Bank of Danbury v. Downs, 74 Conn. 87 (1901). It has long been held that the date of injury controls the statute to be applied in a Heart and Hypertension claim. See e.g. Macsata v. City of Stamford, 5 Conn. Workers' Comp. Rev. Op. 144, 377 CRD-7-85 (July 22, 1988). Given that the date of injury in the instant matter was in 2010 we fail to understand the legal basis for the application of the 1992 version. As the claimant's entitlement to benefits was decided on the basis of the application of an incorrect statute it is incumbent upon this appellate tribunal to address the error. Further our courts have held such error to constitute plain error and worthy of review on appeal. Connecticut National Bank v. Giacomi, 242 Conn. 17, 39 (1997). Therefore, given the inconsistent factual findings and the error in law noted above, we believe due process compels that the matter be addressed consistent with the appropriate law, § 7-433c Rev. 2010.

We therefore vacate the August 14, 2013 Finding and Award of the Commissioner Acting for the Fourth District and direct further proceedings consistent with this opinion.

Commissioners Stephen B. Delaney and Michelle D. Truglia concur.