CASE NO. 5894 CRB-7-13-11 : COMPENSATION REVIEW BOARD
CLAIM NO. 700146827

DAVID KOHN, SR. : WORKERS' COMPENSATION
CLAIMANT-APPELLEE COMMISSION

v. : MARCH 11, 2015

TOWN OF WILTON
EMPLOYER
SELF-INSURED
RESPONDENT-APPELLANT
and

CONNECTICUT INTERLOCAL RISK
MANAGEMENT AGENCY
ADMINISTRATOR

APPEARANCES:

The claimant was represented by John M. Walsh, Jr., Esq., Licari, Walsh & Sklaver, LLC, 105 Court Street, New Haven, CT 06511.

The respondent was represented by Scott Wilson Williams, Williams Moran LLC, P.O. Box 550, Fairfield, CT 06430.

This Petition for Review from the October 15, 2013 Finding and Award by the Commissioner acting for the Seventh District was heard on October 24, 2014 before a Compensation Review Board panel consisting of Commission Chairman John A. Mastropietro and Commissioners Stephen B. Delaney and Nancy E. Salerno.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The respondent has petitioned for review from the October 15, 2013 Finding and Award by the Commissioner acting for the Seventh District. We find no error and accordingly affirm the decision of the trial commissioner.[1]

The trial commissioner, having taken administrative notice of all legal documents on file with the Workers' Compensation Commission, made the following factual findings which are pertinent to our review of this matter. The claimant was hired as a firefighter by the Town of Wilton Fire Department in 1976 and moved up through the ranks to Inspector, Deputy Fire Marshall and Fire Marshall. The claimant acknowledged that he underwent a pre-employment physical for the respondent in 1976 but denies that he was told at the time that he had heart disease, hypertension or high blood pressure. He registered a one-time blood pressure reading of 120/90. Subsequent to the physical, the examining doctor authored a letter stating that the claimant was qualified for the position of fireman with the Town of Wilton, and the respondent hired the claimant as a firefighter.

The claimant testified that between 1976 and 2007, he was periodically required to take physical fitness tests for the respondent. He stated that he was never told he had heart disease, hypertension or high blood pressure after any of these tests. The claimant's treating physician, Steven Glazer, M.D., performed a number of tests on the claimant

[1] We note that several motions for extension of time and one motion for continuance were granted during the pendency of this appeal.

during the period between August 22, 2002 and December 6, 2004; Glazer testified that he would not have classified any of the test results as heart disease or a heart "abnormality." Respondent's Exhibit 1, p. 50. Glazer also testified that although his office note of February 27, 2006 set forth a number of assessments, including hypertension, he did not think that the claimant required medication for treatment of hypertension. He was "equivocal" as to whether he had told the claimant he had hypertension, despite the fact that the word "hypertension" appears in the office note. Findings, ¶ 7.

On July 24, 2007, the claimant was on a treadmill, participating in a department exercise program, when he felt a slight pain and tightness in his chest which subsided when he stopped exercising. At trial, the claimant testified that in the months leading up to the event of July 24, 2007, he had experienced a few episodes of the same type as the one which occurred that day. The claimant testified that because he already had an appointment scheduled for the next day with this family physician, he decided he would bring up the incident at that time. On July 25, 2007, the claimant's family physician,Varshapriya Iyer, M.D., of Wilton Medical Associates, after examining the claimant, referred him to Charles Augenbraun, M.D., at Cardiology Associates of Fairfield County. Augenbraun scheduled the claimant for an angiogram on August 6, 2007 which revealed significant blockages. The blockages were remediated with the placement of stents, and the claimant was able to return to work with no restrictions as he was Fire Marshall at the time, which is a lighter-duty job.

The claimant testified that prior to the angiogram of August 6, 2007, none of his treating physicians from Wilton Cardiology Associates ever told him that he had heart disease or hypertension. After the angiogram, the claimant was prescribed Lisinopril and Plavix for his heart condition. Steven Glazer, M.D., testified that it was his protocol to discuss with the claimant his test results and evaluations; however, the record contains no clear statement by Glazer that he conveyed a specific diagnosis of heart disease or hypertension to the claimant. Moreover, at his deposition, Glazer indicated that he did not know if he would have called his findings heart disease in discussions with the claimant. He testified that he would have emphasized that his findings were minor.

Martin Krauthamer, M.D., conducted a medical records review of the claimant's chart and opined that the claimant's blood pressure reading of 120/90 in his pre-employment physical constituted evidence of hypertension. Krauthamer also noted that the claimant's medical records from Wilton Medical Associates contain elevated blood pressure readings in 1978, 1979, 1981, 1984, 1988, 1989, 1991, 1993, 1994, 2000, 2001 and 2006. In addition, Krauthamer found that the records from Norwalk Hospital also contain elevated blood pressure readings in 1993 and 1994. Krauthamer testified that the report of Alfred Bennett, M.D., of June 19, 1978, stating that the claimant "had a normal physical examination," Claimant's Exhibit C, was not necessarily inconsistent with Krauthamer's opinion that the claimant's pre-employment physical examination revealed evidence of hypertension.

Based on the foregoing, the trial commissioner concluded that the "isolated reading of 120/90," Conclusion, ¶ B, which occurred at the claimant's pre-employment physical examination did not constitute evidence of hypertension. The trial commissioner stated that "[w]ithout a more detailed report from the examining physician on May 14, 1976, the undersigned is constrained from interpreting the report as constituting 'any evidence of hypertension,' despite Dr. Krauthamer's testimony to the contrary." Id. The trier remarked that "[o]ne slightly high reading could just as easily have been caused by anxiety (white coat syndrome), [or] illness (cold or sore throat)." Id. The trier also found that "it is logical to infer that the examining physician did not believe the claimant had 'any evidence of hypertension' as he made no recommendation for further medical consultation relative to hypertension and ultimately, he concluded that the claimant was fit for duty." Id. The trial commissioner determined that "[b]ased upon the totality of the demonstrative and testimonial evidence, it is reasonable to conclude that prior to the claimant's August 6, 2007 angiogram and prescriptions for Plavix and Lisinopril, no medical professional rendered a formal diagnosis to the claimant of heart disease, hypertension or high blood pressure." Conclusion, ¶ C. As such, although the claimant never filed a notice of claim ("Form 30C"), the claim was timely given that a hearing was held within one year of the angiogram of August 6, 2007 and the issuance of the prescriptions for Plavix and Lisinopril. The trier also found that "timely notice to the respondent is evident from the fact that the respondent filed a Form 43 denying the claim

on September 7, 2007, one month after the claimant's August 6, 2007 angiogram." Conclusion, ¶ F.

The respondent filed a Motion for Extension of Time to File Motion to Correct, which the trial commissioner deemed untimely and denied, and this appeal followed. On appeal, the respondent contends that the trial commissioner utilized an incorrect legal standard in her assessment of whether the claimant's elevated blood pressure at the pre-employment physical constituted evidence of high blood pressure. The respondent avers that the trier's determination that the claimant's single elevated blood pressure reading could not constitute evidence of high blood pressure contravenes precedent. The respondent further argues that the trier's "adoption" of the additional requirement of a more detailed report from the examining physician is not found in either the statute or the controlling case law. In addition, the respondent claims as error the trier's inference that the claimant's physician "did not believe the claimant had 'any evidence of hypertension,'" Conclusion, ¶ B, because he did not recommend additional medical consultation relative to hypertension; the respondent contends that "[t]o focus upon what the physician was thinking applies yet another incorrect legal standard and provides additional support for reversal." Appellant's Brief, p. 10. Finally, the respondent maintains that the trial commissioner erroneously "engaged in speculation and conjecture as to other potential reasons for the Claimant's high blood pressure reading, thereby rendering her conclusions the product of inferences unreasonably drawn from the facts." Id., 11.

The standard of deference we are obliged to apply to a trial commissioner's findings and legal conclusions is well-settled.

> … the role of this board on appeal is not to substitute its own findings for those of the trier of fact. Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440, 451 (2001). The trial commissioner's role as factfinder encompasses the authority to determine the credibility of the evidence, including the testimony of witnesses and the documents introduced into the record as exhibits. Burse v. American International Airways, Inc., 262 Conn. 31, 37 (2002); Tartaglino v. Dept. of Correction, 55 Conn. App. 190, 195 (1999), *cert. denied*, 251 Conn. 929 (1999). If there is evidence in the record to support the factual findings of the trial commissioner, the findings will be upheld on appeal. Duddy v. Filene's (May Department Stores Co.), 4484 CRB-7-02-1 (October 23, 2002); Phaiah v. Danielson Curtain (C.C. Industries), 4409 CRB-2-01-6 (June 7, 2002). This board may disturb only those findings that are found without evidence, and may also intervene where material facts that are admitted and undisputed have been omitted from the findings. Burse, supra; Duddy, supra. We will also overturn a trier's legal conclusions when they result from an incorrect application of the law to the subordinate facts, or where they are the product of an inference illegally or unreasonably drawn from the facts. Burse, supra; Pallotto v. Blakeslee Prestress, Inc., 3651 CRB-3-97-7 (July 17, 1998).

McMahon v. Emsar, Inc., 5049 CRB-4-06-1 (January 16, 2007).

In Horkheimer v. Stratford, 4 Conn. Workers' Comp. Rev. Op. 139, 163 CRD-4-82 (December 31, 1987), this board stated that,

> [i]n order for [a] Claimant "to come within the group for which the protection provided in § 7-433c is intended, certain requirements must be met: (1) the Claimant must be a uniformed member of a paid municipal fire department or a regular member of a paid municipal police department; (2) whose pre-employment physical examination revealed no evidence of hypertension or heart disease; (3) who suffers a condition or impairment of health caused by hypertension or heart disease; (4) resulting in death or temporary

> or permanent total or partial disability; and (5) economic loss resulting therefrom.[2]

Id., at 141, *citing* Stachelczyk v. Norwalk, 1 Conn. Workers' Comp. Rev. Op. 51, 52, 19-CRD-7-80 (August 20, 1981).

This board has repeatedly held that "[w]hether or not an examination result contains evidence of hypertension is a factual question, as there is no legal 'bright line' blood pressure reading for hypertension." Fuessenich v. State/Dept. of Public Safety/State Police, 4416 CRB-1-01-7 (June 21, 2002), *citing* Cefaratti v. Wethersfield, 4179 CRB-6-00-1 (February 27, 2001). Moreover,

> once the results of the claimant's pre-employment physical have been offered into evidence, the trial commissioner is not bound to construe any "borderline" blood pressure readings as hypertensive, as if the respondents were statutorily granted "the benefit of the doubt…." Instead, the parties essentially stand on equal footing in trying to persuade the commissioner that evidence of hypertension

[2] Section 7-433c(a) C.G.S. (Rev. to 2007) states, in pertinent part: "(a) 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 and was suffered in the line of duty and within the scope of his employment, and from the municipal or state retirement system under which he is covered, he or his dependents, as the case may be, shall receive the same retirement or survivor benefits which would be paid under said system if such death or disability was caused by a personal injury which arose out of and in the course of his employment, and was suffered in the line of duty and within the scope of his employment. If successful passage of such a physical examination was, at the time of his employment, required as a condition for such employment, no proof or record of such examination shall be required as evidence in the maintenance of a claim under this section or under such municipal or state retirement systems. The benefits provided by this section shall be in lieu of any other benefits which such policeman or fireman or his dependents may be entitled to receive from his municipal employer under the provisions of chapter 568 or the municipal or state retirement system under which he is covered, except as provided by this section, as a result of 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. As used in this section, the term "municipal employer" shall have the same meaning and shall be defined as said term is defined in section 7-467."

> was or was not present at the time of the physical examination, based on the data and medical opinions before him. (Citation omitted.)

Cefaratti, supra.

Turning to the matter at bar, it is undisputed that the Town of Wilton Physical Examination Form completed by Alfred Bennett, M.D., on May 14, 1976 reports a blood pressure reading of 120/90 in the claimant's right arm. Claimant's Exhibit C. It is equally undisputed that the doctor's report affixed to this form dated June 19, 1976 states that the claimant "had a normal physical examination" and it was Bennett's "medical opinion that Mr. Kohn is qualified for the job of fireman for the town of Wilton." Id. It is the respondent's position that the trier, by applying an "incorrect legal standard," erred in failing to conclude that the elevated blood pressure reading demonstrated during the examination constituted "evidence of hypertension" as contemplated by § 7-433c C.G.S. However, we note at the outset that in Hyatt v. Milford, 4127 CRB-3-99-9 (November 7, 2000), this board "stated that there is no per se legal hypertension line based on one blood pressure reading … [although] a single high blood pressure reading *may* constitute evidence of hypertension." (Citation omitted; emphasis in the original.) Id. In addition, it is well-settled that "[a] claimant who is close to the borderline and who is not diagnosed with hypertension by his doctor is someone whom the commissioner must evaluate under all of the circumstances of his case." Leary v. Stamford, 3280 CRB-7-96-3 (September 17, 1997). As such, it is our view that the instant trier's conclusions in this matter arise not, as the respondent alleges, from the utilization of an

"improper standard" but, rather, from a proper assessment of the entire evidentiary record.

For instance, at trial, the claimant testified that at the time he underwent the pre-employment physical, he was not told that he had heart disease, hypertension or high blood pressure; nor was he instructed to make lifestyle changes. March 12, 2013 Transcript, p. 6. Moreover, although he was required to undergo regular "fitness for duty" evaluations during the period from 1976 to 2007, he was never told he had heart disease, hypertension or high blood pressure. Id. It was well within the trier's prerogative to rely on the claimant's testimony in reaching her conclusions, given that "we are of the opinion that a trier may look at parol or external evidence to help ascertain whether ambiguous information contained within the four corners of a pre-employment physical, such as a borderline blood pressure reading, constitutes evidence of hypertension under the circumstances." Pribesh v. Bridgeport, 4842 CRB-4-04-8 (August 12, 2005).

We note that the record contains no testimony from any of the physicians who treated the claimant prior to August 22, 2002, when the claimant began treating with Steven Glazer, M.D. However, as noted previously herein, Martin Krauthamer, M.D., performed a records review for the respondent and testified at trial. Krauthamer reported that current JNC-7 Guidelines classify blood pressure readings in excess of 139/89 as hypertensive, and opined that the claimant's elevated diastolic reading on May 14, 1976 constituted "evidence of hypertension." May 21, 2013 Transcript, p. 14. However,

Krauthamer also testified that a doctor's decision to give someone "a passing grade on the physical … would be dependent upon the doctor who was doing the exam and his overall assessment. The blood pressure would be one factor in that consideration." Id., 15.

Krauthamer indicated that beginning back in 1978, "there were 14 blood pressures over the period of time that were clearly abnormal and hypertensive."[3] Id., 12. However, when canvassed by the trier as to whether the JNC standards in 1976 would have classified a reading of 139/89 as high blood pressure, the doctor replied that he didn't know. Id., 16. The parties reviewed a copy of the JNC Guidelines for 1980 which happened to be on file at the Commission office; these Guidelines, which identify high blood pressure based on diastolic pressure readings only, classified mild blood pressure as a diastolic reading between 90 and 104, moderate blood pressure as a diastolic reading between 105-114, and severe blood pressure as a diastolic reading in excess of 115. Id., 23. Neither these Guidelines nor the JNC Guidelines in effect for 1976 were submitted into evidence. [4]

Krauthamer testified that under current criteria, although he would consider a reading of 120/90 "evidence of hypertension," id., 18, he "would not make a diagnosis of

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[3] In his report, Martin Krauthamer, M.D., identified fourteen "abnormal" blood pressure readings in the records of Wilton Medical Associates from May 22, 1978 through May 23, 2006 and five in the records of Norwalk Hospital from February 7, 1993 through November 23, 1994. Respondent's Exhibit 3.

[4] We find this evidentiary gap troubling, in light of our observation in Fuessenich v. State/Dept. of Public Safety/State Police, 4416 CRB-1-01-7 (June 21, 2001) that "[t]he doctor who performed the claimant's physical using the standards in place at that time did not find evidence of hypertension, as he did not mention it in his ultimate findings. We do not believe that it is proper for a respondent to apply modern ideals for blood pressure readings and cholesterol levels in analyzing a doctor's decision to clear a claimant for police duty 22 years ago." Id.

hypertension on one reading of almost any value in a low level range like this." Id. Krauthamer also indicated that current JNC Guidelines require that a diagnosis of high blood pressure be predicated on two elevated blood pressure readings taken "[a] period of time apart" although the Guidelines do not specify what that period of time should be. Id., 19. It is of course well-settled that, in assessing the findings of a pre-employment physical, "[t]he phrase 'any evidence of hypertension' in § 7-433c is not identical to 'a diagnosis of hypertension.'" Anzidei v. Cheshire, 3782 CRB-8-98-3 (April 23, 1999). Nevertheless, when queried as to whether the claimant's physicians at either Wilton Medical Associates or Norwalk Hospital informed the claimant he either had high blood pressure or hypertension, Krauthamer replied that he did not know. Id., 21.

Moreover, the doctor agreed that in addition to the high blood pressure readings identified in his report, "there very well may have been other blood pressure readings that were not … showing evidence of hypertension or not at a hypertensive level" in the claimant's medical records. Id., 20. Finally, under cross-examination, Krauthamer testified that blood pressure readings can be affected by factors such as "[w]hite coat hypertension," id., 27, illness, id., 30, and how nervous or anxious the patient is at the time the blood pressure is taken. Id., 27. The doctor conceded that other factors may have affected the claimant's blood pressure reading taken on May 17, 1976 given that the medical records under review did not demonstrate another allegedly elevated reading until May of 1978. Id., 28-29.

Having reviewed the foregoing, we find no basis for reversing the trier's conclusions in this matter. Contrary to the respondent's assertion, the trier did not seek to establish a new legal standard under which one blood pressure reading is per se insufficient to establish that a pre-employment physical contained evidence of hypertension; rather, she found that the elevated blood pressure reading at the pre-employment physical was insufficient under the facts of the instant matter. Likewise, the trier's acknowledgment that the instant evidentiary record lacked any additional information from Alfred Bennett, M.D., the physician who performed the pre-employment physical, strikes us as far more a recognition of the limitations of the evidentiary record before her rather than the creation of a new "requirement" in evaluating pre-employment physicals.

Moreover, in light of the precept stated in Leary, supra, which calls for an examination of the totality of the circumstances surrounding "[a] claimant who is close to the borderline and who is not diagnosed with hypertension by his doctor," id., the trier was well within her authority to rely on the claimant's testimony relative to whether Bennett had informed the claimant that the physical had revealed evidence of hypertension. The trier was also entitled to draw reasonable inferences from the fact that Bennett neither diagnosed hypertension nor informed the claimant that he was suffering from hypertension as well as the fact that Bennett's report of June 19, 1976 states that the claimant "had a normal physical examination." Claimant's Exhibit C. "Second-guessing a report that gave the plaintiff a clean bill of health, on which he may have justifiably

relied, would effectively deprive him of the benefit conferred by the legislature…." Gillette v. Monroe, 56 Conn. App. 235, 243 (1999), *cert. denied*, 252 Conn. 932 (2000).

Similarly, we reject the respondent's claim that the trier engaged in unwarranted "speculation" in reciting the different variables which can affect blood pressure readings; this line of inquiry was introduced at trial during a cross-examination of the respondent's expert and it was well within the trier's discretion to take this testimony into account in formulating her findings. Ultimately, "[t]he determination of whether a physical examination revealed any evidence of hypertension or heart disease is a factual issue committed to the trier's sound discretion." Hyatt, supra. Thus, "[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).

There is no error; the October 15, 2013 Finding and Award by the Commissioner acting for the Seventh District is accordingly affirmed.

Commissioners Stephen B. Delaney and Nancy E. Salerno concur in this opinion.