

CASE NO. 5945 CRB-7-14-7
CLAIM NO. 700138861

: COMPENSATION REVIEW BOARD

GERALD O'BRIEN
CLAIMANT-APPELLANT

: WORKERS' COMPENSATION
COMMISSION

v.

: SEPTEMBER 11, 2015

CITY OF STAMFORD
FIRE DEPARTMENT
EMPLOYER

and

PMA INSURANCE
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Daniel A. Benjamin, Esq., Benjamin & Gold, PC, 350 Bedford Street, Stamford, CT 06901.

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

This Petition for Review¹ from the June 9, 2014 Finding and Award/Denial Statement of Facts of the Commissioner acting for the Seventh District was heard May 29, 2015 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Randy L. Cohen and Stephen M. Morelli.

¹ We note that postponements were granted during the pendency of this appeal.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has appealed from a Finding and Award/Denial dated June 9, 2014 (“Finding”) which granted the claimant benefits under § 7-433c C.G.S.² for hypertension and denied his claim for benefits under this statute for arrhythmia. The claimant has appealed the denial of benefits for arrhythmia, arguing that the trial commissioner failed to apply the proper legal standards and did not credit uncontroverted medical evidence supportive of a finding of compensability. We have reviewed the trial commissioner’s Finding and we believe that a clarification of the trial commissioner’s Finding concerning the claimant’s arrhythmia is in order. Consistent with the precedent in Hubbard v. University of Connecticut Health Center, 5705 CRB-6-11-12 (November 30, 2012) and Bazelais v. Honey Hill Care

² This statute reads as follows:

“Sec. 7-433c. Benefits for policemen or firemen disabled or dead as a result of hypertension or heart disease. (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.”

Center, 5011 CRB-7-05-10 (October 25, 2006), we remand this matter to the commissioner.

The following facts are pertinent to our consideration of this appeal. The claimant has been employed by the respondent as a firefighter since 1979. On February 17, 2005 the claimant filed a Form 30C alleging he had compensable hypertension. During the course of his claim for § 7-433c C.G.S. benefits for hypertension the claimant asserted in a Form 30C filed on January 23, 2012 that he also had sustained a compensable injury as a result of his arrhythmia. The respondents filed a Form 43 contesting the timeliness of the claim, asserting that there had been numerous prior incidents of the claimant sustaining premature ventricular contractions (PVC's) based on EKG's in the record. The commissioner noted the claimant's primary care physician, Dr. Tao-Nan Chi, had EKG's which indicated the presence of a systolic murmur as early as March 25, 2009. At that examination the claimant was told not to worry about the murmur. A February 10, 2010 examination revealed PVC's; which are premature beats of the heart. Dr. Chi deemed this arrhythmia benign, since the premature beat was between two normal beats of the claimant's heart. A December 20, 2010 examination by Dr. Chi revealed PVC's and the claimant was directed to have a stress test performed. This stress test occurred on January 11, 2011 and was normal.

Dr. Chi examined the claimant again on December 27, 2011. This was the first time the physician noted regular PVC's were occurring while listening to the claimant's chest with his stethoscope. Dr. Chi directed the claimant to follow up with a cardiologist. On January 30, 2012 the claimant was examined by Dr. Charles Augenbraun for chest

pain and for the findings of PVC's at Dr. Chi's recent examination. The January 30, 2012 EKG by Dr. Augenbraun showed the presence of an arrhythmia.

The trial commissioner summarized the testimony of the two physicians as follows. She noted Dr. Augenbraun testified that an arrhythmia can be the result of organic heart disease, structural heart disease, or it can occur in the absence of detectable organic heart disease, "Where we then assume that the abnormality is purely relate to the electrical system of the heart." Findings, ¶ 39. Dr. Chi testified that he believed the claimant's PVC's were insignificant, requiring no medical treatment and did not impair the functioning of the heart.

Based on these facts the trial commissioner concluded the claimant filed a timely claim for benefits for his arrhythmia. She found both the reports and opinions of Dr. Chi and Dr. Augenbraun to be credible and persuasive that the arrhythmia was not present until the December 20, 2010 exam and that was confirmed by an EKG performed by Dr. Augenbraun on January 18, 2011. She found Dr. Chi's opinion to be credible and persuasive that the claimant's PVC's are insignificant and have not impaired the functioning of the claimant's heart. She finally found that while the arrhythmia claim was timely, the claimant had failed to submit any evidence that the arrhythmia was caused by hypertension or heart disease as required by § 7-433c C.G.S.

The claimant filed a Motion to Correct seeking four corrections. The first correction was a typographical error and was granted. The other three corrections were denied. The second correction sought a finding that the claimant's PVC's were an abnormality of the heart, based on Dr. Augenbraun's deposition testimony. The commissioner denied this correction without explanation. The commissioner denied the

third correction as well, which sought a conclusion that the claimant's arrhythmia was a compensable heart disease consistent with the legal standards promulgated under Salmeri v. State/Dept. of Public Safety, 4066 CRB-5-99-6 (August 9, 2000), *aff'd*, 70 Conn. App. 321 (2002), *cert. denied*, 261 Conn. 919 (2002). The fourth correction, which sought an order that the claim for arrhythmia was accepted, was also denied. The claimant has brought this appeal, focusing on an assertion that the commissioner's denial of these three corrections was reversible error.

We note the standard of deference we are obliged to apply to a trial commissioner's findings and legal conclusions is well-settled. "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). "This presumption, however, can be challenged by the argument that the trial commissioner did not properly apply the law or has reached a finding of fact inconsistent with the evidence presented at the formal hearing." Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007). In addition, "[w]e have held that, where the findings of a trial commissioner appear to be inherently inconsistent amongst themselves, or with the trier's conclusions, the correct approach is to remand the matter for clarification." Ortiz v. Highland Sanitation, 4439 CRB-4-01-9 (November 12, 2002).

The claimant's appeal focuses heavily on Dr. Augenbraun's testimony. As they view the record his opinions as a cardiologist should have been given far more weight than that of Dr. Chi, who was a primary care physician. They regard Dr. Augenbraun's testimony as clearly describing the claimant's arrhythmia as a "heart disease" as the term was applied in Salmeri, supra. They further draw attention to the fact that unlike Dr. Chi, Dr. Augenbraun found the claimant sustained a permanent impairment to his heart as a result of this arrhythmia, assigning an 8% to 9% permanent partial disability rating herein. See Claimant's Exhibit N. The claimant further notes that the trial commissioner found Dr. Augenbraun a credible and persuasive witness on the issue of when the claimant's arrhythmia required the filing of a § 7-433c C.G.S. claim. Therefore, since Dr. Augenbraun's testimony was uncontroverted, they cite Vallier v. Cushman & Wakefield, 5822 CRB-1-13-2 (February 21, 2014) as grounds to reverse the Finding and to direct the trial commissioner to grant the Motion to Correct.

The respondents offer arguments supportive of sustaining the trial commissioner's Finding. They argue it was the prerogative of the trial commissioner to determine which of the physicians who examined the claimant provided the most reliable testimony or documentary evidence. Tartaglino v. Dept. of Correction, 55 Conn. App. 190, 195 (1999), *cert. denied*, 251 Conn. 929 (1999). As respondents view this precedent, the trial commissioner was under no obligation to credit Dr. Augenbraun's opinion as to the claimant's arrhythmia. They point out that Salmeri, supra, was based on the application of a different statute, § 5-145a C.G.S., and therefore is not binding in this case. They further cite Brooks v. West Hartford, 4907 CRB-6-05-1 (January 24, 2006) for the proposition that a trial commissioner may reasonably determine an injury to a claimant's

heart need not constitute “heart disease” within the meaning of § 7-433c C.G.S. They believe that the trial commissioner’s determination that the arrhythmia was not caused by heart disease or hypertension to be a reasonable conclusion based on the record.

We commence our discussion by reviewing the precedent relied upon by the respondents. We do not find Brooks, supra, of much precedential value in this dispute. In Brooks the cardiac issues which led to the death of the decedent were clearly the sequelae of his sarcoidosis, an inflammatory ailment similar to cancer which was not specific or isolated to the heart. The trial commissioner did not consider these circumstances as due to “heart disease” and this tribunal affirmed that factual finding. The decedent in Brooks was not diagnosed with any other sign of coronary disease. The reasoning in Brooks that a non-coronary disease merely manifested itself in the heart is not supported by the record present in this case. The respondents point to no diagnosis of any non-cardiac ailment which the claimant was suffering from which would explain the presence of his arrhythmia. We do not extend the reasoning in Brooks that a non-coronary disease can be the cause of cardiac distress to cases where no other agent for the claimant’s condition can be identified.

On the other hand, we do believe that while Salmeri, supra, relied on the state’s “hazardous duty” statute for its employees, this case does have persuasive value as related to 7-433c C.G.S. cases. The manner in which § 5-145a C.G.S. describes eligibility for benefits is as follows;

Any condition of impairment of health caused by hypertension or heart disease resulting in total or partial disability or death to..... (lists enumerated eligible positions)... shall be presumed to have been suffered in the performance of his duty and shall be compensable in accordance with the provisions of chapter 568,....

(Emphasis added.)

The eligibility language for benefits under the municipal heart and hypertension law is quite similar. This language reads 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. . . .

(Emphasis added.)

Therefore we conclude the eligibility standards under § 5-145a C.G.S. and § 7-433c C.G.S. are essentially the same. As a result, the Salmeri precedent that a claimant needs to only prove he or she sustained a condition or impairment of health due to heart disease is applicable herein. See Salmeri, supra, 337-338, where the close alignment of these statutes is discussed at some length. However, in order to apply this legal standard, we must review the record to see if the claimant presented probative evidence that, were it to be credited by the trial commissioner, would sustain an award under that standard.

Dr. Augenbraun was deposed on February 12, 2013. The transcript of this deposition was admitted as Claimant's Exhibit R. The witness made this statement at his deposition which is relevant to our inquiry.

Q: “Is a PVC an abnormality of the physiological functioning of the heart?

A: Yes.”

Id., p. 22.

The witness further discussed at length the distinctions between arrhythmia and organic heart disease. Id., pp. 24-25. This colloquy included a discussion as to the cause of PVC’s potentially being an abnormality to the electrical system of the heart. Id., pp. 24-25. Dr. Augenbraun confirmed the claimant had no other organic heart disease. Id., p. 25. Nonetheless, Dr. Augenbraun confirmed that he had opined the claimant had an 8 to 9% permanent partial disability to his heart as a result of his arrhythmia. Id., pp. 28-29.

In light of this record, we believe clarification of the basis for the trial commissioner’s Conclusion ¶ I, is warranted. The record reflects that the claimant submitted medical evidence from which the commissioner could find that his arrhythmia was due to an abnormality of the functioning of his heart. The totality of Dr. Augenbraun’s testimony can be read to indicate that the claimant had sustained a form of heart disease, as cases such as Salmeri have defined this term. The trial commissioner appears to find Dr. Augenbraun’s opinions persuasive but yet she stated the claimant did not produce evidence supportive of finding the arrhythmia was caused by heart disease.

The respondents argue that Dr. Chi’s opinions were found to be credible and persuasive by the trial commissioner and as he found the claimant’s PVC’s were insignificant, and did not impair the functioning of his heart, the trial commissioner could reasonably deny the claim. We are not persuaded this argument mandates that we affirm the trial commissioner, since the standard for approving a § 7-433c C.G.S. claim requires

the presence of heart disease while employed as a police officer or fire fighter, but not necessarily disability from this ailment. We look to our recent decision in Staurovsky v. Milford - Police Department, 5906 CRB-4-14-1 (January 30, 2015), *appeal pending*, AC 37670. In Staurovsky the claimant did not sustain disability from a heart ailment until after he retired, but presented probative evidence he had heart disease while he was still employed as a police officer. We affirmed the award based on the following rationale, citing Ciarlelli v. Hamden, 299 Conn. 265 (2010);

Therefore, the Appellate Court and the Supreme Court in the past decade have interpreted § 7-433c C.G.S. in a fashion where the presence of “any condition or impairment of health caused by hypertension or heart disease”, *id.*, 298, created the triggering point to file a claim for benefits while the claimant must await “his death or his temporary or permanent, total or partial disability”, *id.*, fn2, resulting from that injury so as to collect benefits.

Staurovsky, *supra*.

Since the claimant could have a viable § 7-433c C.G.S. claim at this time, and yet still not establish any current eligibility for medical treatment, permanency benefits or temporary total or temporary partial disability benefits; we cannot find Dr. Chi’s opinion that the claimant’s arrhythmia was “insignificant” conclusively determined this dispute. The trial commissioner would need to determine she was not persuaded the claimant’s arrhythmia was due to heart disease. This is difficult to infer from the underlying facts and conclusions in the Finding as in Conclusion, ¶ G the trial commissioner found both Dr. Chi and Dr. Augenbraun credible and persuasive witnesses on the issue of the claimant’s timeliness. Nonetheless, the trial commissioner reached no determination on the reliability of Dr. Augenbraun’s opinions on other issues, and since we believe he did present probative evidence, we believe the commissioner must affirmatively rule on those issues.

We note that recently when we believed a trial commissioner had applied an incorrect legal standard in a § 7-433c C.G.S. case we ordered a remand. See Vitti v. Milford, 5877 CRB-4-13-8 (September 16, 2014). We note the similarity to the Bazelais case where we ordered a remand when a trial commissioner found two witnesses who offered inconsistent opinions both credible and persuasive, and sought a clarification on remand. As we pointed out in Hubbard, supra, a remand is appropriate when we find that evidence credited by the trial commissioner is ambiguous and may not support the ultimate conclusion;

Nevertheless, precisely because of the ambiguity of the evidence at hand, we are unable to sustain the trier's dismissal of the claim for temporary total disability benefits. We therefore remand this matter to the trial commissioner for additional proceedings relative to the issue of whether the claimant currently has an entitlement to temporary total disability benefits. "No case under this Act should be finally determined when the ... court is of the opinion that, through inadvertence, or otherwise, the facts have not been sufficiently found to render a just judgment." Cormican v. McMahan, 102 Conn. 234, 238 (1925).

Id.

Therefore, we remand this matter to the trial commissioner for additional findings clarifying whether the claimant has established a viable § 7-433c C.G.S. claim for arrhythmia based on the appropriate standards for such claims after due consideration as to the reliability of Dr. Augenbraun's opinions.³

Commissioners Randy L. Cohen and Stephen M. Morelli concur in this opinion.

³ The claimant sought this tribunal to overturn the trial commissioner's determination and find the arrhythmia claim compensable based on the precedent in Vallier v. Cushman & Wakefield, 5822 CRB-1-13-2 (February 21, 2014). Vallier is factually distinguishable and does not support that result. In Vallier the trial commissioner found a medical witness credible and persuasive on the issue of the claimant's medical treatment, and then reached an order as to medical treatment inconsistent with the witness's opinion. We directed the trial commissioner to correct the Finding so as to incorporate the witness's opinion as to the claimant's medical treatment. In the present case the trial commissioner reached no finding as to the credibility or persuasiveness of Dr. Augenbraun's opinion on the issue of whether the claimant's arrhythmia was heart disease. As we are not the finder of fact, we cannot direct that a correction be granted concerning that issue.