

CASE NO. 5994 CRB-2-15-3
CLAIM NO. 200004771

: COMPENSATION REVIEW BOARD

JULIE DRAYTON
CLAIMANT-APPELLANT

: WORKERS' COMPENSATION
COMMISSION

v.

: APRIL 7, 2016

ELECTRIC BOAT CORPORATION
EMPLOYER
SELF-INSURED
RESPONDENT-APPELLEE

and

TRAVELERS PROPERTY & CASUALTY
INSURER
RESPONDENT-APPELLEE

APPEARANCES:

The claimant was represented by Peter W. Rotella, Esq., Rotella & Fabricant, LLC, 199 Broad Street, New London, CT 06320.

The respondent Travelers Property & Casualty was represented by Lucas D. Strunk, Esq., Strunk Dodge Aiken Zovas, LLC, 100 Corporate Place, Suite 300, Rocky Hill, CT 06067.

The parties agreed to waive oral argument and have the appeal decided based on the record before the Board.

Notice to the respondent Electric Boat Corporation as a self-insured employer was sent to Peter D. Quay, Esq., Law Office of Peter D. Quay, LLC, PO Box 70, Taftville, CT 06380.

This Petition for Review¹ from the February 19, 2015 Finding & Dismissal of Ernie R. Walker the Commissioner acting for the Second District was heard January 22, 2016 before a Compensation Review Board panel consisting of

¹ We note that a postponement and extensions of time were granted during the pendency of this appeal.

the Commission Chairman John A. Mastropietro and
Commissioners Nancy E. Salerno and Stephen M. Morelli.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant, Julie Drayton, appeals from a February 19, 2015 Finding & Dismissal which found that she had not proven that she sustained a compensable injury in 1977. The claimant asserts that the trial Commissioner, Ernie R. Walker, erred in this decision because he reached improper credibility determinations as to the claimant and her treating physicians. It is black letter law that a trial commissioner is the ultimate judge of the credibility to be extended to witnesses and such a credibility determination may extend to medical opinions reliant on a witness's narrative. Therefore, we affirm the Finding & Dismissal.

The trial commissioner found the following facts in his Finding & Dismissal. He noted that the claimant alleged she sustained an injury to her back at age twenty-six after falling against a machine when bumped by a co-worker on August 9, 1977. She testified that her supervisor, Dave Doherty, sent her to the yard hospital which in turn referred her to a physician or emergency facility. The claimant did not present a yard hospital report as evidence. She testified that Lawrence & Memorial emergency room personnel told her that her 1977 injury could be a sciatic nerve and to follow-up with her primary doctor. The claimant presented various documentary pieces of evidence (Claimant's Exhibits A thru E) which included references to an initial visit to the yard hospital on January 25, 1978. The claimant also presented records of her primary care doctor at the time, Dr. Morris Sulman, whose record of October 19, 1977 and note of December 28, 1977 reflect pain over the left hip with diagnosis of sacro-iliac syndrome and secondary sciatica. A

March 15, 1978 note from this doctor relates the sciatica to the patient's employment with first symptoms or accident having happened October 15, 1977. The claimant left the employ of Electric Boat about 1989.

The claimant also presented evidence from Dr. Jeffrey Salkin, whom she testified she began seeing in June or July of 2013. In fact, Dr. Salkin's records began on December 19, 2012 with a visit by the claimant to Allyson Forsyth, his physician's assistant. Dr. Salkin's records indicate the claimant initially related to having sustained a traumatic motor vehicle accident about fifteen or twenty years earlier which had required her to undergo a year of physical therapy. His records did not indicate she had provided a history of the alleged 1977 work accident. The claimant was working at the time as a school bus driver. A Lawrence & Memorial physical therapy note of February 1, 2013 recites a history of low back pain for about one year and getting worse with radiating pain down the leg and into her foot; and this therapy note referenced the claimant driving a school bus until June of 2012 but stopping due to back pain. Dr. Salkin's notes indicate he had referred the claimant to a Dr. Maletz for back and neck pain, but the claimant did not present any medical reports or opinions from Dr. Maletz. The claimant testified that she saw Dr. Salkin for "several things" other than what happened in 1977, and that she drove school buses for seven and a half years before getting off one and being unable to move.

The trial commissioner also considered a letter the claimant presented which was sent from Dr. Salkin to her attorney in 2014. The trial commissioner considered this letter a "qualified" opinion on the issue of causation between the claimant's condition and her alleged 1977 injury, based on the basis of a lack of details and the passage of

time. The commissioner stated “Dr. Salkin’s letter renders no opinion with a reasonable medical probability that the claimant’s current condition or need for treatment and/or any disability is due to the 1977 alleged incident.” Findings, ¶ 25.

Based on these subordinate facts the trial commissioner concluded the claimant’s position as to her claimed work injury not to be credible or persuasive. The commissioner did not find reports of Dr. Morris Sulman of March 15, 1978 to be credible and persuasive as they did not align with the history taken by the treater on October 19, 1977 and December 28, 1977. Commissioner Walker also concluded the records of Dr. Jeffrey Salkin were not credible and or persuasive on the issue of compensability of the 1977 injury, as his opinion was based upon a history provided by the claimant which was not credible. Therefore, the trial commissioner dismissed her claim for benefits.

The claimant did not file a Motion to Correct. She did file a timely Petition for Review and Reasons for Appeal. The claimant argues that the trial commissioner should not have relied on Dr. Salkin’s reports as he did not treat the claimant for the injuries she sustained in 1977. The claimant also argues it was error on the commissioner’s part to assess the credibility of medical witnesses whom the commissioner had not observed having testified. In her brief, the claimant also argues that the trial commissioner did not justify his conclusion that her testimony was not credible or persuasive. We find none of these arguments persuasive.

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 and Home Care, Inc., 248 Conn. 379 (1999) and Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988). In addition, the burden of proof in a workers' compensation claim for benefits rests with the claimant. Dengler v. Special Attention Health Services, 62 Conn. App. 440 (2001).

The claimant argues that it was improper for the trial commissioner to have concluded her testimony was not credible or persuasive. She argues that this conclusion was not supported by the subordinate findings and was inconsistent. She cites Osborn v. Lowe's Home Centers, Inc., 5800 CRB-5-12-11 (October 28, 2013) for this position. We do not find Osborn stands for the proposition the claimant advances. Osborn was a case where the trial commissioner found the claimant's narrative credible and the respondents appealed on the grounds that there were too many alleged discrepancies in her testimony to find her testimony reliable. We affirmed the trial commissioner in Osborn as this was essentially an effort to retry the case, which pursuant to Fair, supra, we may not do as an appellate panel. We must accord the trial commissioner in this case the same level of deference we extended the trial commissioner in Osborn. In the present case, the trial commissioner found that the claimant's testimony as to events that occurred over 35 years ago were not persuasive enough and sufficiently collaborated by contemporaneous medical records to support a bid for benefits.² Since the trial commissioner observed the

² We note that the trial commissioner in Findings, ¶ 8 noted the claimant's first visit to the yard hospital was months after the alleged date of injury: and that in Findings, ¶ 11 noted that the claimant's original treater associated an October 1977 date of injury for the claimant, and not the August 1977 date of injury

claimant's testimony, we may not intercede on appeal, for the reasons we stated in

Osborn.

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. Burton v. Mottolese, 267 Conn. 1, 40 (2003).

Id.

In addition, we believe that this case is more congruent with the decision we issued in Barbee v. Sysco Food Services, 5892 CRB-8-13-11 (October 16, 2014), *aff'd*, 161 Conn. App. 902 (2015)(Per Curiam) than Osborn, supra. In Barbee the trial commissioner did not find the claimant's testimony credible and therefore, discounted the medical testimony she presented reliant on her narrative as unreliable. We affirmed this decision for the following reasons.

A claimant's credibility also bears heavily on whether medical testimony reliant on his or her narrative is to be given weight by the trial commissioner. When a trial commissioner does not find the claimant credible, the commissioner is entitled to conclude any medical evidence which relied on the claimant's statements was also unreliable. See Abbotts v. Pace Motor Lines, Inc., 4974 CRB-4-05-7 (July 28, 2006), *aff'd*, 106 Conn. App. 436 (2008), *cert. denied*, 287 Conn. 910 (2008); Baker v. Hug Excavating, Inc., 5443 CRB-7-09-3 (March 5, 2010) and Do v. Danaher Tool Group, 5029 CRB-6-05-12 (November 28, 2006). The trial commissioner in this case concluded that the medical witnesses relied on the claimant's narrative and were therefore unreliable.

she asserted. A reasonable fact finder could determine that the medical records of the claimant's original treater were materially inconsistent with the claimant's narrative of injury.

Based on the precedent in Abbotts, supra, he was entitled to reach that conclusion.

Id.

Since the trial commissioner did not find the claimant's testimony credible, the trial commissioner could reasonably conclude, based on the precedent in Barbee, supra, and Abbotts, supra, that the medical evidence reliant on the claimant's narrative could not be relied upon. We must defer to a trial commissioner's evaluation of contested medical evidence, O'Reilly v. General Dynamics Corp., 52 Conn. App. 813, 816 (1999), and believe the trial commissioner's inferences herein were reasonable.

It is the claimant's burden before our Commission to establish that her injuries "(1) arose out of the employment and (2) occurred in the course of the employment." Lamar v. Boehringer Ingelheim Corp., 138 Conn. App. 826, 832 (2012). See also Lentini v. Connecticut College, 4933 CRB-2-05-4 (May 15, 2006) and Zezenia v. Stamford, 5918 CRB-7-14-3 (May 12, 2015). The trial commissioner, after hearing the claimant testify and evaluating the documentary evidence, was left unpersuaded. "If the trier is not persuaded by the claimant's evidence, there is nothing that this board can do to override that decision on appeal." Wierzbicki v. Federal Reserve Bank of Boston, 4147 CRB-1-99-11 (December 19, 2000), *appeal dismissed*, A.C. 21533 (2001). After our review of the record we believe the commissioner could reasonably have reached this conclusion. As a result, we conclude the trial commissioner's determination was a reasonable exercise of his discretion.

We affirm the Finding & Dismissal.

Commissioners Nancy E. Salerno and Stephen M. Morelli concur in this opinion.