CASE NO. 6027 CRB-6-15-9 : COMPENSATION REVIEW BOARD
CLAIM NO. 601024997

ALBERT RIOS, SR.
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: JUNE 21, 2016

BOEHLE'S EXPRESS
EMPLOYER

and

MEADOWBROOK INSURANCE GROUP
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant filed the appeal on his own behalf. At the trial level the claimant was represented by Richard Joaquin, Esq., Kocian Law Group, 365 Middle Turnpike West, Manchester, CT 06040.

The respondents were represented by Joseph Marotti, Esq., Montstream & May, LLP, 655 Winding Brook Drive, Glastonbury, CT 06033.

This Petition for Review from the May 4, 2015 Finding & Award In Part/Dismissal In Part of Stephen B. Delaney the Commissioner acting for the Sixth District was heard January 22, 2016 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Nancy E. Salerno and Stephen M. Morelli.

OPINION

JOHN A.MASTROPIETRO, CHAIRMAN. The claimant has appealed from a Finding & Award In Part/ Dismissal In Part issued on May 4, 2015 by the trial Commissioner Stephen B. Delaney. The claimant argues that this decision did not properly credit medical evidence supportive of his bid for continued temporary total disability benefits. The trial commissioner did not find this evidence persuasive and on appeal, we are bound to accept facts found by the trial commissioner. However, the respondents have filed a Motion to Dismiss this appeal, arguing it was statutorily untimely and we lack jurisdiction to consider the appeal. We find this motion meritorious and dismiss the claimant's appeal.

The facts in this matter are as follows. On November 17, 2014 Commissioner Delaney held a formal hearing. After the hearing he determined that on October 18, 2000 an employment relationship existed between the claimant, Albert Rios and the respondent Boehle's Express. The commissioner also noted three approved voluntary agreements.[1] The commissioner also took administrative notice of a Form 36 received December 30, 2013 approved on April 21, 2014[2] based upon the report of a treating physician, Dr. Alfredo Axtmayer, wherein he opined, "It is my medical opinion that Mr. Rios is disabled due to [a] multiplicity of problems but not because of [a] solid ankle fusion. He has adjacent [joint] degeneration, but that is not the reason that he cannot walk and get

[1] We cannot find evidence in our file that the third voluntary agreement increasing the claimant's ppd rating for his left ankle to 46% was ever approved by the Commission. Our records show a voluntary agreement to implement this rating was submitted to the Commission on November 8, 2012 but was returned to the respondents to correct the verbiage of the agreement and it was never resubmitted. While respondents' counsel stated that this voluntary agreement had been approved, see pp. 4-5 November 17, 2014 Transcript, this representation appears to be inaccurate. The parties may need to address this discrepancy in further proceedings.

[2] We have corrected a scrivener's error in the finding.

around." Findings, ¶ 4. The commissioner noted the claimant's testimony at the formal hearing wherein he noted he was 53 years old and had not worked since the 2000 injury. The claimant was a high school graduate with trade program education in automobile repair and had worked as an auto mechanic, various jobs in auto parts stores, an assembly line worker and then was employed as a truck driver with the respondent. The claimant had been experiencing sharp pain in his left ankle for the last six or seven years which has affected his ability to work. He wears an ankle brace and uses crutches to walk. The claimant was taking three (3) prescriptions for his ankle pain on a daily basis (OxyContin, Cyclobenzaprine and Cymbalta), experienced weight gain since his date of injury and significant, physical restrictions. The claimant testified to his desire to lose weight and his interest in returning to work, but had sought gainful employment without success. The claimant also testified he would be unable to be seated for eight hours per day and can only sit for approximately one half hour before having to stand.

The trial commissioner also considered the opinions and reports of five physicians before rendering a decision; Dr. Axtmayer, Dr. Benjamin Kahn, one of claimant's treating physicians, Dr. Jerrold Kaplan, an expert retained by the respondents, Dr. David Roccapriore, an expert retained by the claimant, and Dr. Clinton Jambor, the commissioner's examiner. Dr. Axtmayer noted in his reports of November 14, 2013 and May 21, 2014 that the claimant suffers from significant and numerous comortibities. Dr. Kahn opined that the only medication the claimant was taking which was responsive to the compensable ankle injury was oxycontin. Dr. Kaplan concluded after examining the claimant that he was totally disabled from gainful employment. Dr. Roccapriore opined that the claimant was "not employable and totally disabled." Findings, ¶ 15. On the

other hand, Dr. Jambor concluded after examining the claimant and reviewing his medical records that the claimant had a work capacity and recommended seated work. The commissioner's examiner further opined the only additional medical treatment needed for the claimant was a home exercise program. In addition Dr. Jambor opined that the claimant had reached maximum medical improvement and the majority of his sormatic complaints are due to his morbid obesity and chronic degenerative changes. He further concluded that the claimant's back, left elbow and left knee injuries are not related to his accepted 2000 work related injury.

At the conclusion of the hearing the respondents contested whether the claimant sustained his burden of proof that he is totally disabled and was entitled to total incapacity benefits and medical treatment as recommended by Dr. Kaplan. The trial commissioner concluded after considering the aforementioned evidence that the claimant has not sustained his burden of proof that he is and remains totally disabled. Commissioner Delaney reached this conclusion because he found the opinions and conclusions of Dr. Jambor to be more persuasive on the issue of the claimant's work capacity than those of the other physicians who rendered opinions on the issue. He found the opinions of Drs. Jambor and Kaplan to be persuasive as to the need for the claimant to continue an exercise program, and directed the respondents to provide a YMCA membership. He found Dr. Kahn's opinion on prescription drugs persuasive, and directed that oxycontin be the one drug the respondents were obligated to provide the claimant. The commissioner further concluded that the claimant has met the statutory requirements which made him eligible for C.G.S. Section 31-308a benefits, and ordered

the payment of such benefits for the period of April 21, 2014 through October 31, 2014 at the rate of $300.00 per week minus any advances previously made.

The claimant did not file a Motion to Correct or any other responsive pleading to this Finding within the twenty days subsequent to May 4, 2015. Instead, the initial response of the claimant was to file a Petition for Review appealing this decision to our tribunal on September 10, 2015.

We note that the respondents have raised a challenge as to the jurisdiction of our tribunal to act on this appeal via a motion to dismiss. This motion asserts the appeal herein was not filed within the statutory twenty day period from a trial commissioner's decision and therefore we lack jurisdiction. We must resolve this question prior to taking any action of the merits of an appeal. We have had opportunities in recent years to deal with the argument that an appeal has been filed in an untimely manner. In Brown v. Lawrence & Memorial Hospital, 5853 CRB-2-13-5 (April 21, 2014) the claimant offered an explanation for her late filing of an appeal but we concluded that we were not in a position to consider her appeal, as "[o]ur courts have determined that the failure of a party to file a timely appeal deprives the board of jurisdiction over the appeal. See Stec v. Raymark Industries, Inc., 299 Conn. 346 (2010)." Id. The claimant was obligated if he was dissatisfied or confused with this ruling to either appeal to this tribunal within twenty days, or file an appropriate motion to the trial commissioner seeking a correction or clarification within that period (see Garvey v. Atlas Scenic Studios, Inc., 5493 CRB-4-09-9 (February 14, 2012)), or his appellate rights would be extinguished pursuant to § 31-301(a) C.G.S. The claimant took neither action within that twenty day window. As the claimant herein was aggrieved by the May 4, 2015 decision of the trial commissioner and

took no responsive action within twenty days, we lack subject matter jurisdiction to consider the appeal.[3]

The issues raised by the claimant in oral argument before our tribunal are essentially issues of fact which were considered by the trial commissioner at the formal hearing, or which could have been raised at the time of that hearing. The claimant obviously believes that the opinions of his treating physicians should have been the opinions relied upon by the trial commissioner, but the commissioner was under no legal obligation to adopt their opinions. Zezima v. Stamford, 5918 CRB-7-14-3 (May 12, 2015), *citing* O'Reilly v. General Dynamics Corp., 52 Conn. App. 813, 818 (1999). We cannot retry the case on appeal and we find the trial commissioner had a reasonable basis in the record supporting his decision.

However, since the untimely appeal deprives us of jurisdiction in this case, we dismiss the appeal.

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

[3] The claimant said at oral argument before our tribunal that he had not been advised of the appeal deadline and that was why the late appeal should be excused. As we explained in Byczajka v. Stamford, 5023 CRB-7-05-11 (March 26, 2008) a party must present persuasive evidence that they did not receive notice within the appeal period that prevented the filing of a timely appeal, citing Kudlacz v. Lindberg Heat Treating Co., 250 Conn. 581 (1999) and Schreck v. Stamford, 250 Conn. 592, 595 (1999). In the absence of evidence claimant's counsel at the formal hearing had not received timely notice of the May 4, 2015 Finding, we cannot grant this relief.