CASE NO. 6062 CRB-7-15-12 : COMPENSATION REVIEW BOARD
CLAIM NO. 700128735

JAMES M. STACKPOLE
CLAIMANT-APPELLEE : WORKERS' COMPENSATION COMMISSION

v.

: NOVEMBER 17, 2016

CITY OF STAMFORD
EMPLOYER
SELF-INSURED
RESPONDENT-APPELLANT

and

PMA MANAGEMENT CORP.
OF NEW ENGLAND
ADMINISTRATOR

APPEARANCES: The claimant was represented by Andrew J. Morrissey, Esq., and Laura M. Mooney, Esq., Morrissey, Morrissey & Mooney, LLC, 203 Church Street, Naugatuck, CT 06770.

The respondent was represented by Scott Wilson Williams, Esq., Williams Moran, LLC, 2 Enterprise Drive, Suite 412, Shelton, CT 06484.

This Petition for Review from the December 14, 2015 Finding and Award of Jodi M. Gregg, the Commissioner acting for the Seventh District, was heard June 17, 2016 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Ernie R. Walker and Nancy E. Salerno.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The respondent City of Stamford has appealed from a Finding and Award issued on December 14, 2015 by Commissioner Jodi Murray Gregg. The respondent argues that the trial commissioner erred in awarding the claimant heart and hypertension benefits. The City argues that the claimant's pre-employment physical examination contained evidence of heart disease or hypertension, and therefore the terms of § 7-433c C.G.S. bar recovery.[1] The City also argues that the claimant had been informed that he had hypertension more than one year prior to filing his claim for benefits; and therefore under Ciarlelli v. Hamden, 299 Conn. 265 (2010) the claim is untimely. After review we are not persuaded that the trial commissioner's decision favoring the claimant on these issues was arbitrary or unreasonable. As we are not persuaded there was reversible error in the Finding and Award, we affirm the decision.

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[1] Section 7-433c(a) C.G.S. (Rev. to 2012) 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."

Commissioner Gregg reached the following findings of fact in the Finding and Award. On January 9, 2002, the claimant filed a Form 30C with the Commission for a hypertension claim pursuant to § 7-433c C.G.S. with a stated date of injury of January 16, 2000. On June 9, 2011, the claimant filed a second Form 30C for hypertension pursuant to § 7-433c C.G.S. with a stated date of injury of January 16, 2001. Timely Forms 43 were filed by the respondent disclaiming the injury asserted in both claim forms. In regard to the Form 30C Notice of Claim filed on January 9, 2002 listing a date of injury of January 16, 2000, the claimant testified that the 2000 date was a scrivener's error.

The commissioner found the claimant was hired by the City of Stamford Police Department on June 5, 1995. His pre-employment physical extended over two dates, February 6, 1995 and February 27, 1995. The February 6, 1995 blood pressure reading was 130/80. The pre-stress test reading on February 27, 1995 was 140/90. The peak stress test blood pressure on February 27, 1995 was 190/80. The physician who conducted the pre-employment physical report stated that the claimant's results were normal and that the claimant's performance was superior.

On April 28, 2014, the claimant's treating physician, Dr. Jeremy Nadelmann, a cardiologist, reported that based upon the information that he was provided, "Mr. Stackpole had a normal blood pressure reading on February 7, 1995 [sic]. The blood pressure of 140/90 taken before the stress test on February 27, 1995, is not indicative of hypertension. In addition, Mr. Stackpole had a normal blood pressure response to exercise during the stress test." Findings, ¶ 11. Dr. Nadelmann was deposed and testified at the deposition that if a blood pressure reading of 140/90 was taken in the proper position with a person seated for five minutes there could be some indication of

hypertension. However, his routine for taking a blood pressure before a stress test is not with a person seated for five minutes so that reading "could easily be taken out of context." Findings, ¶ 12. Dr. Nadelmann testified that his opinion was based upon the normal reading on February 6, 1995 and the decrease in the diastolic reading during the exercise stress test. "In somebody with hypertension, often both numbers go up. So the fact that you had the diastolic reading of 80 is suggestive, indicative of a person who does not have hypertension. This is a normal blood pressure response to exercise." Findings, ¶ 13. He further testified that the "normal physiologic blood pressure response exercise reaffirms my opinion that he did not have evidence of hypertension at that point in time." Findings, ¶ 14.

Dr. Martin Krauthamer, a cardiologist, testified for the respondent at the formal hearing held June 12, 2014. The doctor testified that pursuant to the Joint National Commission on Hypertension, which is a report that provides guidelines for practicing physicians on how to treat hypertension, that the claimant's blood pressure reading of 140/90 on February 27, 1995 was hypertensive. He further stated the claimant's hypertension was related to the claimant's heredity and social factors, such as the claimant's failure to lose weight rather than his job, thus the claimant's employment was not a causal factor in his hypertension.

The commissioner found that Dr. Nadelmann became the claimant's primary care physician in December of 1996. The records reflected the following information as to the claimant's blood pressure during that time period.

December 13, 1996: 130/90 (L) 120/82 (R) – (High /Normal BP)

February 11, 1998: 140/100 (L) 130/95 (R) – (BP High)

> November 10, 1998: 144/95 – (BP Borderline High). Dr. Nadelmann testified that he had a conversation with the Claimant regarding his elevated blood pressure and about the possible use of medication to address this issue. However, the Claimant wanted to try life style modifications first.
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> January 27, 1999: Echocardiogram report - clinical indication section states EKG abnormal, hypertension, and rule out LVH.
>
> January 27, 1999: Follow-up office visit – 122/90 (R) 120/86 (L). The doctor noted that the Claimant's blood pressure was better, he lost twelve pounds and that he recommended that the Claimant continue his diet to reach the goal weight of 175.
>
> March 21, 2000: 120/89 (R) 120/86 (L) – Borderline hypertension.
>
> January 16, 2001: 154/110. 160/120, 140/108, 146/115. The doctor testified that on this date all five readings were elevated as well as the Claimants weight had elevated to 205. He formally diagnosed the Claimant with hypertension and started him on anti-hypertensive medication.

Findings, ¶¶ 19-25.

Commissioner Gregg also found that on February 17, 2000, the claimant went to the Yale-New Haven Hospital Emergency Room for complaints of chest pain. Diet controlled hypertension is listed under past medical history in the February 17, 2000 Yale-New Haven Hospital medical record. The claimant testified that he recalled informing the medical staff at Yale-New Haven Hospital that his blood pressure sometimes gets elevated but he was not on any kind of medication. However, he did not tell them that he had hypertension.

Based on these subordinate facts the trial commissioner concluded that she accepted the claimant's position and that she found his testimony and the medical evidence offered to be persuasive and credible to support this claim. She found that the claimant's initial Form 30C contained a scrivener's error as there was no record of the

claimant having been treated on the date of injury cited in this claim. The trial commissioner concluded that the correct date of injury was January 16, 2001, the date claimant was prescribed medicine to treat hypertension, and that the notice of claim was therefore timely. The commissioner concluded that prior to that date there was no credible evidence of a formal diagnosis of heart disease or hypertension having been conveyed to the claimant and pursuant to Ciarlelli, supra, the claim was valid. The trial commissioner denied the respondents' bid to apply the "rebuttable presumption" version of § 7-433c C.G.S. which was in effect at the time of the claimant's initial date of hire, finding that the precedent in Vitti v. Milford, 5877 CRB-4-13-8 (September 16, 2014) established that the "date of injury" rule governed which version of the statute should be applied. As to the issue as to whether the pre-employment physical contained evidence of hypertension, the commissioner found the opinion of Dr. Nadelmann more persuasive than that of Dr. Krauthamer.

The respondent filed a Motion to Correct after the Finding and Award was issued. The Motion sought to revise the findings pertaining to Dr. Nadelmann's testimony, essentially on the grounds the witness conflated the concepts of "evidence" as opposed to "diagnosis" of hypertension. The trial commissioner denied this Motion in its entirety and the respondent has pursued this appeal.

The respondent's appeal focuses on two issues: a) was there "evidence of hypertension" in the claimant's pre-employment physical which would bar recovery in a § 7-433c C.G.S. case? Or b) was the claimant's notice of claim filed more than one year after he had been diagnosed by a physician as having hypertension, and therefore under Ciarlelli, supra, the claim was jurisdictionally invalid due to an untimely filing? 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 & Home Care, Inc., 248 Conn. 379 (1999) and Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988). Nonetheless, while we must provide deference to the decision of a trial commissioner, we may reverse such a decision if the commissioner did not properly apply the law or reached a decision unsupported by the evidence on the record. Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007).

The respondent argues that the 140/90 blood pressure reading at the claimant's pre-employment physical constitutes "evidence of hypertension" barring recovery under the statute. The claimant disputes this and points to the testimony of Dr. Nadelmann as supporting the trial commissioner's conclusion that it was not. The respondent argues that its Motion to Correct showed that this conclusion from Dr. Nadelmann's testimony was an unreasonable determination. We must review the testimony and the law to determine if the commissioner's conclusion was indeed reasonable.

The respondent's argument is centered on the testimony of Dr. Nadelmann at his October 22, 2014 deposition. They point to the following colloquy as supporting their

view that Dr. Nadelmann, as well as Dr. Krauthamer, opined that the pre-employment physical contained “evidence of hypertension.”

> Attorney Williams: And just so that I understand, in your mind there is no distinction between evidence of hypertension and diagnosis of hypertension?
>
> Dr. Nadelmann: Answering your question without thinking of all the potential ramifications and what ifs, I will answer yes.
>
> Attorney Williams: And if you assume for purposes of this question that the standard of evidence of hypertension is broader than the standard for a supported diagnosis of hypertension - -
>
> Dr. Nadelmann: You’re trying to make a distinction between evidence of a diagnosis and I don’t think there is a real distinction.

Joint Exhibit 16, pp. 29-30.

While it is true that the witness herein clearly chose not to separate the concepts of “diagnosis” and “evidence” as related to hypertension, we find that the remainder of this testimony does <u>not</u> support the respondent’s position that Dr. Nadelmann opined that the claimant’s 140/90 reading at the pre-employment physical constituted either evidence or a diagnosis of hypertension. On page 29 of this Transcript the witness clearly explained his rationale for discounting this reading.

> “I think evidence and diagnosis of hypertension are pretty much the same. I think taking one blood pressure reading in some context in a stressful situation, which before a stress test is by definition stressful, does not constitute evidence or a diagnosis of hypertension.”

Id.

Dr. Nadelmann reiterated this point on pages 30 and 31 of the Transcript.

> “What you’re trying to do, what you’re trying to pin me into is because there is one reading of 140/90, is that evidence of hypertension or a diagnosis of hypertension. And what I’ve tried

> to say is one reading [is] not evidence or a diagnosis of hypertension."

The witness reiterated this position at later points during the deposition. We look to this colloquy with claimant's counsel on page 45 of the Transcript.

> Attorney Morrissey: Understanding that, are you still of the opinions that you voiced here today that the pre-employment physical fails to show evidence of hypertension?
>
> Dr. Nadelmann: Yes
>
> Attorney Morrissey: And my July 1, 2004 letter asks whether or not the pre-employment physical shows "evidence of hypertension" or not?
>
> Dr. Nadelmann: Yes.

Dr. Nadelmann responded to a lengthy inquiry on re-cross examination as to the 140/90 reading that the reading in and of itself was not evidence of hypertension in the absence of context.

> "No. That one random reading of 140/90 not knowing how that reading was taken is not indicative of some evidence of hypertension."

Id., p. 47.

We also note that the witness offered an explanation for discounting the single equivocal reading of hypertension in the claimant's pre-employment physical. He testified at pages 39 and 40 in the Transcript that since during the stress test that the claimant's diastolic blood pressure had declined from the initial reading that this fact "[b]ased upon my interpretation of the medical records, [he] did not have evidence of hypertension at this point in time." See also Dr. Nadelmann's August 28, 2014 letter to Attorney Morrissey, included as Respondents' Exhibit 2 to Joint Exhibit 16.

We have long rejected the effort of litigants to try and "cherry-pick" favorable statements to their cause from medical reports or testimony without considering the totality of the witnesses' opinion. See Williams v. Bantam Supply Co., 5132 CRB-5-06-9 (August 30, 2007). We conclude the totality of Dr. Nadelmann's opinion is consistent with the trial commissioner's conclusions. Nonetheless, we must examine the precedent on this issue to ascertain if that was sufficient to affirm the Finding and Award.

The respondent argues that the result in this case is inconsistent with precedent such as Cooper v. Seymour, 11 Conn. Workers' Comp. Rev. Op. 274, 276-77, 1336 CRD-5-91-11 (November 19, 1993), Suprenant v. New Britain, 28 Conn. App. 754, 759 (1992) and Horkheimer v. Stratford, 4 Conn. Workers' Comp. Rev. Op. 139, 143, 163 CRD-4-82 (December 31, 1987). As the respondent views the pre-employment physical the blood pressure readings essentially constituted *per se* evidence of hypertension and the trial commissioner should have disregarded any expert opinion to the contrary. We note that on the facts these cases may be distinguished from the present case. In Cooper the claimant's 146/88 reading in his pre-employment physical persuaded the trial commissioner that it constituted evidence of hypertension. We affirmed this factual determination, notwithstanding the absence of expert medical opinion on the record. In Horkheimer we reversed a trial commissioner's determination that a pre-employment physical did not show evidence of hypertension. In that case, however, it was clear the commissioner's decision was simply inconsistent with the factual record. The pre-employment examination itself specifically found the claimant had hypertension and the claimant specifically testified at the formal hearing that he had been told by a physician at the time of his pre-employment physical that his blood pressure was high. Indeed, the

dissenting opinion in Horkheimer noted that the claimant's pre-employment physical recorded a blood pressure of 165/90. None of the pre-employment blood pressure readings in the present case reached as high a systolic pressure as the readings in Cooper and Horkheimer, and therefore a differing result as to compensability in this case would not be adverse to the concept of *stare decisis*.

As this tribunal noted in Leary v. Stamford, 3280 CRB-7-96-3 (September 17, 1997) "[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." In Leary, "the doctor who performed the pre-employment physical did not think that the claimant's blood pressure reading of 140/85 was indicative of hypertension, and the trial commissioner agreed with him." Id. We affirmed that decision based on a "totality of the factors" test. We affirmed the Leary precedent in Kohn v. Wilton, 5894 CRB-7-13-11 (March 11, 2015) where we determined that a pre-employment physical that documented a blood pressure of 120/90 was not "evidence of hypertension" that defeated the claimant's eligibility for § 7-433c C.G.S. benefits. In Kohn, supra, we noted this standard for adjudicating such claims *citing* Cefaratti v. Wethersfield, 4179 CRB-6-00-1 (February 27, 2001).

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

We also note that a trial commissioner must review the four corners of the pre-employment physical to ascertain whether it offers evidence of hypertension, and may not rely on parol evidence, if otherwise the examination provided the claimant a "clean bill of health." Gillette v. Monroe, 56 Conn. App. 235, 242-243 (1999). The stress test included in the claimant's physical examination dated February 27, 1995 opined the claimant demonstrated "superior performance." See Joint Exhibit 1. Therefore, the totality of the evidence herein could reasonably support Commissioner Gregg's conclusion that the pre-employment physical did not constitute "evidence of hypertension" and the outcome herein is consistent with our precedent in Kohn, supra.

The second averment of error raised by the respondent is that the claimant was on notice that he had hypertension more than one year prior to filing his Form 30C initiating the claim, and therefore the claim is jurisdictionally barred as untimely. The respondent points to Findings, ¶ 21, as documenting this point.

> November 10, 1998: 144/95 – (BP Borderline High). Dr. Nadelmann testified that he had a conversation with the Claimant regarding his elevated blood pressure and about the possible use of medication to address this issue. However, the Claimant wanted to try life style modifications first.

As the respondent views this evidence what Dr. Nadelmann conveyed to the claimant on that date, was sufficient under the standard delineated in footnote 18 of Ciarlelli, supra, to commence the time period to file a § 7-433c C.G.S. claim.[2] Since this claim was not commenced prior to November 11, 1999 they believe it was untimely. The

[2] In Ciarlelli v. Hamden, 299 Conn. 265 (2010), the court stated: "Of course, this standard is not so inflexible as to require a finding in all cases that the medical professional used the term 'hypertension' in communicating the diagnosis to the employee. For example, evidence that an employee was prescribed antihypertensive medication for the treatment of high blood pressure related to hypertension, and not some other illness, likely would support a finding that the employee formally had been diagnosed with hypertension and knew, or should have known, of that diagnosis." Id., fn. 18.

respondent cites Holston v. New Haven, 5940 CRB-3-14-5 (May 27, 2015), *appeal pending 38012*, where the trial commissioner found the claimant failed to file a timely claim, as grounds to dismiss this claim.

We have reviewed Holston. In both cases at a time more than one year prior to the claimant filing his claim the claimant had exhibited elevated blood pressure readings. In Holston, however, the medical records "indicated a diagnosis of Stage I hypertension." In addition, the treating physician in Holston testified "it was his standard protocol to discuss a diagnosis with the patient at the time of the office visit and that he would have discussed the diagnosis of Stage I hypertension with the claimant on October 28, 2009." Id. When the claimant appealed from the trial commissioner's determination that this evidence established that pursuant to Ciarlelli, the time period to file a § 7-433c C.G.S. claim commenced, we affirmed the trial commissioner.

In the present case the trial commissioner was not persuaded that the communication from Dr. Nadelmann to the claimant on November 10, 1998 was definitive enough to reach the standard delineated in Ciarlelli, supra. We have reviewed the record to ascertain if this conclusion was reasonable. At his February 14, 2013 deposition Dr. Nadelmann said that he had conveyed to the claimant "that he had a high blood pressure issue." Joint Exhibit 2, p. 42. Dr. Nadelmann however testified at his May 9, 2013 deposition he had not formally diagnosed the claimant with hypertension at the November 10, 1998 or January 27, 1999 office visits. Joint Exhibit 3, pp. 98-101. Dr. Nadelmann testified the formal diagnosis did not occur until January 16, 2001 when he placed the claimant on Diovan. Id., 101. Therefore, this fact pattern could be deemed more similar to the situation in Conroy v. Stamford, 5900 CRB-7-13-12 (November 24,

2014) than Holston, supra. In Conroy the claimant was advised of an elevated blood pressure reading and his treating physician recommended lifestyle and diet changes. The record indicated the claimant was not diagnosed with hypertension at that time. The trial commissioner concluded that the circumstances did not place the claimant on notice to file a claim for § 7-433c C.G.S. benefits. We affirmed that decision on appeal. The Appellate Court affirmed our decision. Conroy v. Stamford, 161 Conn. App. 691 (2015).[3]

The respondent clearly believes that they presented a compelling argument that the actions of Dr. Nadelmann on November 10, 1998 were sufficiently definitive to fall within the ambit of footnote 18 in Ciarlelli, supra, and trigger the claimant's obligation to file a claim. We note that a reasonable fact finder could have found this argument persuasive. This constitutes a factual dispute however, and the trial commissioner was not persuaded by this argument. "The trial commissioner's factual findings and conclusions must stand unless they are without evidence, contrary to law or based on

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[3] In Conroy v. Stamford, 161 Conn. App. 691 (2015) the Appellate Court affirmed the decision not to apply an expansive reading of the holding in Ciarlelli v. Hamden, 299 Conn. 265 (2010) to cases where the circumstances were somewhat equivocal as to whether the claimant had been "diagnosed with hypertension."

> Turning to the present appeal, we conclude that the board's decision to affirm the trial commissioner's finding and award was correct in law and adequately supported by facts in evidence. We reach this conclusion because the trial commissioner's finding that the plaintiff was not formally diagnosed with hypertension until January 6, 2012, is clearly supported by evidence in the record. Furthermore, the trial commissioner's finding does not leave this court with the "definite and firm conviction that a mistake has been made." (Internal quotation marks omitted.) *Brymer v. Clinton*, supra, 302 Conn. 765.

Conroy, supra, 706.

The Appellate Court rejected the respondent's argument that when a claimant has been offered options as to how to address his or her blood pressure it is tantamount to a diagnosis of hypertension. Id., 707. This paradigm is consistent with the trial commissioner's reasoning in the present case.

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). We are not persuaded this determination by Commissioner Gregg was "clearly erroneous", Berube v. Tim's Painting, 5068 CRB-3-06-3 (March 13, 2007), and therefore we affirm her conclusion that the claim herein was filed in a jurisdictionally timely manner.

Therefore, we affirm the Finding and Award.

Commissioners Ernie R. Walker and Nancy E. Salerno concur in this opinion.