CASE NO. 6137 CRB-5-16-9 : COMPENSATION REVIEW BOARD
CLAIM NOS. 500153512, 400084188

ELTON FERRUA
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: JULY 27, 2017

NAPOLI FOODS, INC.
EMPLOYER

and

GALLAGHER BASSETT SERVICES, INC.
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Eddi Z. Zyko, Esq., Law Office of Eddi Z. Zyko, 120 Fenn Road, Middlebury, CT 06762-2515.

The respondents were represented by Dominick C. Statile, Esq., Montstream & May, L.L.P., Salmon Brook Corporate Park, 655 Winding Brook Drive, P.O. Box 1087, Glastonbury, CT 06033-6087.

This Petition for Review[1] from the September 7, 2016 Finding and Orders of Scott A. Barton, the Commissioner acting for the Fifth District, was heard February 17, 2017 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Christine L. Engel and Daniel E. Dilzer.

[1] We note that a Motion for Extension of Time was granted during the pendency of this appeal.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has appealed from the Finding and Orders issued by the trial commissioner on September 7, 2016. The commissioner granted a Form 36 presented by the respondents and awarded the claimant permanent partial disability benefits. The commissioner also determined that the claimant was not totally disabled. The claimant has appealed, arguing that the evidence he presented established he was totally disabled based on the precedent in Osterlund v. State, 135 Conn. 498 (1949). We have reviewed the record and conclude that the trial commissioner was not persuaded by the claimant's evidence and found the evidence presented by the respondents, which indicated that the claimant had a work capacity, more credible and persuasive. Since the trial commissioner's decision in this matter was supported by a substantial quantum of probative evidence, it cannot be disturbed by an appellate panel. We affirm the Finding and Orders.

The trial commissioner reached the following factual findings at the conclusion of formal hearings held on August 31, 2015 and December 16, 2015. The claimant sought temporary total disability benefits while the respondents filed a Form 36 on January 8, 2014 asserting the claimant was at maximum medical improvement.[2] The claim emanated from an incident on April 22, 2011, when the claimant injured his lumbar spine while unloading a truck for Napoli Foods. Although a voluntary agreement has not been approved, the respondents have accepted compensability of this injury and have paid workers' compensation benefits. Subsequent to the injury, the claimant treated with an

[2] We note that this Form 36 recites a date of injury of March 11, 2011, which date is associated with a related back claim bearing file number 400084188.

authorized treater, Jarob Mushaweh, M.D., who initially prescribed conservative treatment. After this treatment proved insufficient, Dr. Mushaweh performed an L5-S1 lumbar discectomy procedure on December 27, 2012.

The claimant underwent a functional capacity examination ("FCE") on April 20, 2012 and June 5, 2013. The pre-surgical evaluation found the claimant could not resume his "full duty occupational position." Findings, ¶ 4. The post-surgical evaluation found the claimant could perform to a medium physical demand level, with a bilateral carrying restriction of forty-two (42) pounds and a bilateral lifting restriction of thirty-seven (37) pounds. Findings, ¶ 6. On June 11, 2013, Dr. Mushaweh evaluated the claimant and found he was "doing fairly well" and did not need narcotics for pain. Findings, ¶ 5. Dr. Mushaweh opined that "[t]he patient is ready to reenter the workforce. I will release him to do so once I receive the report of his functional capacity evaluation...." Claimant's Exhibit A.

On September 23, 2013, the claimant returned to Dr. Mushaweh following the June 5, 2013 FCE. Dr. Mushaweh "cleared" Mr. Ferrua to work but limited his weight-lifting ability to no more than "25-30 pounds." Findings, ¶ 7. Dr. Mushaweh also recommended the claimant pursue "vocational rehab" in the event he could not find a "driving job with limited lifting." Id. The respondents filed a Form 36 responsive to this report which was approved by the commissioner on January 8, 2014.

The claimant returned to Dr. Mushaweh on December 23, 2013. Dr. Mushaweh again noted the claimant was "doing fairly well." Findings, ¶ 9. Dr. Mushaweh directly implied that the claimant had attained maximum medical improvement relative to the April 22, 2011 injury and resulting surgery. Dr. Mushaweh stated that the claimant "has

lost 15% of his lumbosacral spine functions." Respondents' Exhibit 1. The claimant was released from Dr. Mushaweh's care and the December 23, 2013 office visit was the claimant's final treatment with Dr. Mushaweh. Subsequent to this visit, the respondents filed a Form 36 to convert the claimant's temporary total disability payments to permanent partial disability payments, which Form 36 was approved January 8, 2014.

At the formal hearing, the claimant sought to obtain total disability benefits pursuant to an "Osterland" theory. [3] He believed that his inability to speak English and his physical restrictions caused him to be vocationally unemployable. He offered the following testimony regarding his physical condition. "I have cases which I feel tired, my lower back. Sometimes I feel my leg. When I go shopping around two or two and a half hours, I feel pain or I feel my lower back very tired, and I couldn't move. I couldn't do nothing." Findings, ¶ 14. He further testified that he was in the same physical condition that he was in when he stopped treating with Dr. Mushaweh in 2013, and he has been self-treating with medications such as Advil.

The claimant testified that he moved to the United States from Albania after he completed his nursing education in 2008. While in Albania, he received his degree in nursing from the University of Xhuvani in March, 2007. He indicated he could have obtained employment in Albania with this degree. However, he and his wife moved to America. He testified that neither he nor his wife spoke English when they moved to America. The claimant is a citizen of the United States and has a commercial driver's license. The trial commissioner noted that both examinations require proficiency in the

[3]The Osterlund doctrine holds that a claimant may have some earning capacity but his physical condition is such that he cannot with "the exercise of reasonable diligence" find employment. Bode v. Connecticut Mason Contractors, The Learning Corridor, 130 Conn. App. 672, 680 (2011), *cert. denied*, 302 Conn. 942 (2011), *quoting* Osterlund, supra, 506. See also Goulbourne v. State/Department of Correction, 5955 CRB-1-14-8 (July 29, 2015).

English language. The claimant said that he had passed the CDL examination by being coached and memorizing the answers. The claimant worked for Napoli Foods as a truck driver for approximately "two years" prior to his injury. He was able to keep this job despite his alleged language difficulties.

At trial, evidence was presented that the claimant spoke to customers on his delivery route in English and spoke to his supervisors in English. While other Albanians worked for Napoli, one of the claimant's "helpers" named Pedro is from Puerto Rico. Pedro does not speak Albanian. The claimant does not speak Spanish. They were able to communicate in English throughout the workday. The paperwork the claimant had to submit as part of his job was in English. The claimant testified that speaking English was not an important aspect of his job due to the routine nature of his stops. The claimant also testified that he had a prior job at Coreslab which required him to speak English. The claimant said that he thought he could work as a driver for a company as long as he was not required to lift anything. He also said he had attended Naugatuck Valley Community College to try to learn English and presented a report card showing he had failed Reading and Writing II.

The claimant also testified regarding his activities subsequent to the injury. He said he had been seeking employment with "Albanian businesses" through a notary public that specializes in helping fellow Albanians with legal and social issues. He said he did not know which businesses were hiring. He testified that he usually spent several hours a night at a local Albanian club. The trial commissioner noted the claimant's demeanor during his testimony in that he appeared to understand questions posed in

English, conferred with his counsel without an interpreter, and did not appear to be in physical distress.

The claimant's wife, Milika Ferrua, also testified at the formal hearing. She learned to speak English at Naugatuck Valley Community College and translated for the claimant when he was examined by Dr. Mushaweh and the claimant's vocational examiner, Albert Sabella. Mrs. Ferrua confirmed that she would not let the claimant pick up their child due to her fear that he might drop the child because of his back injury. She further testified that she does the lifting when they go shopping and performs the household chores and cleaning. She cooks all the meals, including preparing and leaving the claimant his breakfast and lunch.

The trial commissioner noted that both the claimant and the respondents presented evidence as to the claimant's vocational abilities. Albert Sabella testified for the claimant at the formal hearing and presented a report dated August 18, 2014. As a result of his interview and review of the claimant's physical restrictions, Mr. Sabella determined that the claimant's "employment opportunity and options will be extremely limited at best." Findings, ¶ 47. He focused on the following factors as impeding the claimant's employability:

1. The claimant's lack of "useful or marketable vocational ability";
2. His determination that the claimant "is illiterate and has no functional Math ability";
3. The claimant's "prolonged absence from the workforce"; and
4. A lack of job-seeking skills due to the claimant's inability to speak "English" or use a "computer."

Findings, ¶ 46.

Mr. Sabella testified, however, that the claimant is able to read simple sentences in English as well as converse in basic English. He also considered the claimant to be "a bright, intelligent young man," apparently based on the claimant's ability to successfully graduate from nursing school in Albania. Findings, ¶ 53. He made the following recommendation: "So I recommended that he upgrade his English skills, his reading skills, certainly his computer ability ... and that he go on and get some type of retraining." Id. Mr. Sabella also opined that the claimant could perform his previous job at Coreslab or work as a truck driver as long as there was no heavy lifting required. He believed that enrolling the claimant in a "vocational rehabilitation program" could enhance his ability to find a job. Findings, ¶ 57. The claimant has not enrolled in such a program.

The respondents presented testimony and a report from their vocational expert, Kerry A. Skillin, CRC/LPC, ABVE, to support their position that the claimant had a work capacity. Ms. Skillen interviewed the claimant and prepared a twenty-four (24) page report, concluding as follows:

> • That the Claimant "is unable to return to his former" employment.
>
> • There are "alternative jobs" available in the Claimant's "local economy" that he can perform. These include a "van/shuttle driver" as well as a "variety of manufacturing position" [sic] including "assembler, inspector, packer, grinder, polisher and some machine tender/operator positions."
>
> • The Claimant is capable of earning "between $9.00 and $18.49 per hour."
>
> • The Claimant would be competing for these jobs with other "individuals with minimal to no work history" and that have "less than a high school diploma" as well as similar "language barriers." The Claimant is "minimally as competitive, if not more so, than" these competing applicants.

> • The Claimant "possesses the cognitive ability to enhance his English language ability." Based upon his prior work history the Claimant is of "average intelligence" and "will have access to a number of customer service, clerical and related occupations."

Findings, ¶ 62.

Ms. Skillin indicated that the "claimant has not performed a diligent work search," deeming his efforts "haphazard." Findings, ¶ 65. She noted that the claimant was able to converse in English during his interview, assisting his interpreter, and the claimant denied any significant current physical limitation other than a four-to-five (4-5) hour tolerance for sitting. She also "testified that the Claimant's medical lifting restriction is not unduly vocationally restrictive" and stated that "there are many 'real jobs' available where employees are not required to lift anything more than (25) pounds." Findings, ¶ 75. She indicated that she found deficiencies with Mr. Sabella's report but "agreed that the Claimant is a good candidate for a personally structured vocational rehabilitation program." Findings, ¶ 77.

Based on these facts, the trial commissioner reached the following conclusions which directly impacted the outcome of this formal hearing:

> T. I do not find the Claimant's testimony as fully credible. I find the Claimant has provided inconsistent, contradictory, and unreliable testimony throughout the formal hearing and with the vocational experts regarding his level of intelligence and English speaking ability. This is fully supported by the evidence of the Claimant's ability to obtain and hold jobs that require him to speak in English as well as the undersigned's observation of his ability to understand and communicate in English.
>
> U. I do not find the report and opinions of Mr. Sabella as credible. I specifically find that he did not undertake several important tasks when rendering his opinion, including performing telephonic job searches and performing all available intelligence and vocational functioning tests. I specifically find as compelling Mr. Sabella's conclusion that the Claimant's English speaking

> skills are an absolute impediment to obtaining a job despite the overwhelming evidence of his ability to get and hold jobs that require a working understanding of English.
>
> V. I find the report and opinions of Ms. Skillin as fully credible and persuasive regarding whether the Claimant is employable. I find that Ms. Skillin performed sufficient and reliable testing and vocational assessments to justify her report and opinions. Her work was complete and took into consideration Mr. Ferrua's education, physical restrictions, work history, level of intelligence, and functional English speaking ability. Ms. Skillin's report and opinions further included direct potential employer contact to determine if jobs are currently available in light of the current economy as well as a search of available jobs utilizing governmental data….
>
> Z. I find that the Claimant is employable pursuant to the opinions of Ms. Skillin. The Claimant has failed to meet his burden of proof that he is unemployable pursuant to the standards enunciated in the Osterlund line of cases. I find that Mr. Ferrua has failed to sustain his burden of proof that he is permanently totally disabled, especially in light of the Claimant's medical lifting restrictions that are not unduly vocationally restrictive.

September 7, 2016 Finding and Orders.

Based on these conclusions, the trial commissioner approved the Form 36 filed on January 8, 2014 and directed the respondents to prepare a voluntary agreement recognizing the claimant's fifteen-percent (15%) permanent partial disability rating of the lumbar spine with a maximum medical improvement date of January 8, 2014. The claimant's claim for permanent total disability benefits was denied. The claimant filed a Motion to Correct seeking to have various facts added to the Finding and Orders and asserting that the commissioner's conclusions were inconsistent with Bode v. Connecticut Mason Contractors, The Learning Corridor, 130 Conn. App. 672 (2011), *cert. denied*, 302 Conn. 942 (2011). The trial commissioner denied the Motion to Correct in its entirety. The claimant has pursued this appeal. He argues that had the trial

commissioner properly credited the evidence presented by Dr. Mushaweh and Mr. Sabella, the commissioner would have awarded total disability pursuant to an Osterland theory.

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." (Internal quotation marks omitted.) Daniels v. Alander, 268 Conn. 320, 330 (2004), *quoting* Burton v. Mottolese, 267 Conn. 1, 54 (2003). 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, 384 (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 claimant takes issue with the trial commissioner not crediting all of the evidence he presented. At oral argument before our tribunal, claimant's counsel argued that this was inconsistent with the precedent in McQuade v. Ashford, 130 Conn. 478 (1944), where it was error for a fact finder in a workers' compensation case not to include all material facts pertinent to the decision. We disagree. The Finding and Orders contain seventy-seven (77) factual findings and twenty-nine (29) conclusions based on those

findings. We believe the commissioner did a thorough job of considering all the evidence presented in this case. To the extent that the commissioner did not credit certain evidence in the Finding, we conclude he found the evidence was not probative or persuasive. Brockenberry v. Thomas Deegan d/b/a Tom's Scrap Metal, Inc., 5429 CRB-5-09-2 (January 22, 2010), *aff'd*, 126 Conn. App. 902 (2011)(Per Curiam).

The claimant's reliance on Bode, supra, is also not persuasive. In Bode, the trial commissioner decided not to rely on uncontroverted documentary evidence supportive of finding the claimant totally disabled.

> In the present case, there was also the plaintiff's testimony, proof that he attempted to secure employment and two timely vocational reports in which the experts opined he was completely unemployable. The record reflects no reason for the commissioner to have summarily disregarded this evidence. Under the Osterlund standard, and given the specific facts of this case, the commissioner had to consider the vocational evidence in his finding that the plaintiff failed to meet his burden.

Id., 687.

In Bode, there was no testimony inconsistent with the claimant's documentary evidence and therefore no evidence in the record that justified nonreliance on his doctors' opinions. In contrast, in the case at bar, both sides presented evidence. Moreover, the trial commissioner fully considered the opinions of both Dr. Mushaweh and Mr. Sabella and cited their opinions at some length. He specifically found Mr. Sabella's opinion not credible. He was permitted to do so because he found the claimant's testimony was not credible and found the testimony of the respondents' expert witness, Ms. Skillin, credible and persuasive. Therefore, although there "must be some basis in the record to support the [trier of fact's] conclusion that the evidence of the [expert witness] is unworthy of

belief," such evidence appears as of record herein. (Internal quotation marks omitted.) Bode, supra, 685, *citing* Pietraroia v. Northeast Utilities, 254 Conn. 60 (2000).

As this board pointed out in Vallier v. Cushman & Wakefield, 5822 CRB-1-13-2 (February 21, 2014), "[t]he burden is on the claimant to demonstrate he or she is entitled to temporary total disability benefits," even pursuant to an Osterlund theory of disability. See Hernandez v. American Truck Rental, 5083 CRB-7-06-4 (April 19, 2007); Romanchuk v. Griffin Health Services, 5515 CRB-4-09-12 (October 20, 2010). We further elaborated on this standard in Shevlin v. SNET, 5824 CRB-3-13-3 (March 3, 2014), stating, "[t]he sum total of our recent decisions applying the Osterlund precedent has been that our trial commissioners may consider the 'totality of the factors' in ascertaining whether at the time of the formal hearing the claimant has proven he is entitled to temporary total disability benefits" and may consider either medical or vocational evidence in determining whether the claimant is unemployable. Shevlin, supra, fn.1.

In the present case, the trial commissioner noted that Dr. Mushaweh only outlined minimal physical limitations on the claimant, as did Mr. Sabella, who recommended only a lifting restriction. The commissioner specifically found persuasive and credible Ms. Skillin's opinion that the claimant could work at a number of available occupations. We point out that in any "dueling expert" case, it is the trial commissioner's prerogative to determine which expert he or she finds more reliable, Dellacamera v. Waterbury, 4966 CRB-5-05-6 (June 29, 2006), fn.1, and in this matter, the commissioner chose to rely on the respondents' expert. We further note that the trial commissioner did not find the claimant to be a credible witness and recited demeanor evidence he deemed

inconsistent with total disability. See Leandres v. Mark IV Construction, Inc., 5159 CRB-4-06-11 (October 22, 2007). In Ciaglia v. ITW Anchor Stampings, 5440 CRB-5-09-3 (March 2, 2010), a claimant established that his lack of fluency in the English language rendered him unemployable; however, in Ciaglia, the claimant was found to be a credible and persuasive witness. In the present case, the trial commissioner clearly believed the claimant's English language skills did not render him unemployable.

This matter turned on the trial commissioner's evaluation of the evidence presented. As the finder of fact, it was his prerogative to weigh the evidence, and a sufficient quantum of probative evidence was clearly presented to sustain the Finding and Orders.

We affirm the Finding and Orders.

Commissioners Christine L. Engel and Daniel E. Dilzer concur in this opinion.

CERTIFICATION

THIS IS TO CERTIFY THAT a copy of the foregoing was mailed this 27th day of July 2017 to the following parties:

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