

CASE NO. 6173 CRB-5-17-1
CLAIM NO. 500112974

: COMPENSATION REVIEW BOARD

DARNELL SUTHERLAND HOFER
CLAIMANT-APPELLANT

: WORKERS' COMPENSATION
COMMISSION

v.

: DECEMBER 12, 2017

STATE OF CONNECTICUT/
DEPARTMENT OF DEVELOPMENTAL
SERVICES, WEST REGION
EMPLOYER
SELF-INSURED
RESPONDENT-APPELLEE

and

GALLAGHER BASSETT SERVICES, INC.
ADMINISTRATOR

APPEARANCES:

The claimant appeared at the trial level and at oral argument as an unrepresented party.

The respondent was represented by Joy L. Avallone, Esq., Assistant Attorney General, Office of the Attorney General, 55 Elm Street, P.O. Box 120, Hartford, CT 06141-0120.

This Petition for Review from the December 14, 2016 Finding and Denial of Thomas J. Mullins, the Commissioner acting for the Fifth District, was heard June 30, 2017 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Christine L. Engel and Daniel E. Dilzer.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant in this matter has appealed from a Finding and Denial issued on December 14, 2016 by the trial commissioner acting for the Fifth District, Thomas J. Mullins. The commissioner determined that the claimant failed to offer a persuasive case proving the current condition of her right eye was due to a compensable injury. The claimant believes the trial commissioner should have credited statements made by the treating physicians which the commissioner failed to cite in his finding. She believes that had the trial commissioner cited this evidence, he would have found her current condition compensable. The respondent filed a Motion to Dismiss arguing that the Workers' Compensation Commission ["Commission"] lacks jurisdiction to act on this appeal due to an untimely filing. We find the appeal was initiated beyond the jurisdictional time limits of General Statutes § 31-301 (a) and we therefore lack jurisdiction to grant the claimant relief.¹ However, even had we retained jurisdiction, we would affirm the Finding and Denial because the claimant is essentially re-arguing the facts on appeal.

The trial commissioner reached the following factual findings in his Finding and Denial. He noted the claimant had sustained a compensable right eye injury on June 9, 1997. Her employer, the Department of Developmental Services, paid the claimant's medical bills through September 19, 2000. The claimant received no

¹ General Statutes § 31-301 (a) states: "(a) At any time within twenty days after entry of an award by the commissioner, after a decision of the commissioner upon a motion or after an order by the commissioner according to the provisions of section 31-299b, either party may appeal therefrom to the Compensation Review Board by filing in the office of the commissioner from which the award or the decision on a motion originated an appeal petition and five copies thereof. The commissioner within three days thereafter shall mail the petition and three copies thereof to the chief of the Compensation Review Board and a copy thereof to the adverse party or parties. If a party files a motion subsequent to the finding and award, order or decision, the twenty-day period for filing an appeal of an award or an order by the commissioner shall commence on the date of the decision on such motion."

indemnity benefits because her authorized treating physician, W. Scott Peterson, M.D., assigned no permanency and the claimant lost no time from work. On April 1, 1998, nearly one year after the compensable date of injury, Dr. Peterson noted the claimant's vision was 20/20 for each eye and entirely within normal limits. A respondent's medical examiner, Robert L. Lesser, M.D., observed that the claimant's eyes had unequal pupils which were not related to the accepted right eye injury.

The claimant then unilaterally sought evaluations and/or treatment with a series of physicians, none of whom were authorized by the Commission. The unauthorized physicians included the following: Thomas J. Walsh, M.D.; Jehangir Durrani, M.D.; David M. Waitzman, M.D.; Jonathan Parkhurst, M.D.; and Yanina Kostina-O'Neil, M.D. Dr. Walsh diagnosed the claimant with Horner's syndrome but failed to offer an opinion regarding causation. Dr. Walsh also submitted a Form 42 dated May 13, 2008, in which he indicated that the claimant had no loss of vision or function and assigned a zero percent permanent partial disability rating to the claimant's right eye. Dr. Kostina-O'Neil opined in September 2000 that the claimant exhibited no sign of traumatic damage to the papillary sphincter and reassured the claimant that her unequal pupils represented physiologic anisocoria and were not related to the injury she had sustained. Dr. Waitzman determined the claimant's right eye was normal with no evidence of Horner's syndrome.

Based on this record, the trial commissioner concluded that a number of various medical experts who offered evidence (Drs. Peterson, Kostina-O'Neil, Waitzman, Lesser, and Walsh) were credible and persuasive. He found the testimony of the claimant less credible and dismissed the claim. The claimant, who is a self-represented party, did not

file a Motion to Correct the December 14, 2016 Finding and Denial but did file a Petition for Review which was received by the Commission on January 20, 2017. The claimant subsequently filed Reasons for Appeal which were received by the Commission on January 25, 2017. The respondent then filed a Motion to Dismiss asserting that the claimant's appeal was commenced in an untimely manner which, pursuant to General Statutes § 31-301 (a), deprives this tribunal of jurisdiction.

We note, consistent with Mankus v. Mankus, 4958 CRB-1-05-6 (August 22, 2006), *aff'd*, 107 Conn. 585 (2008), *cert. denied*, 288 Conn. 904 (2008), and 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), that “[o]nce a determination is reached that we lack subject matter jurisdiction no further inquiry is warranted.” Mankus, *supra*. Our decision in Bond v. Lee Manufacturing, Inc., 5868 CRB-8-13-8 (April 21, 2016), also stands for the proposition that prior to taking any action on the merits of an appeal, we must resolve any questions pertaining to whether we have jurisdiction to consider the appeal. 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 the matter because “[o]ur courts have determined that the failure of a party to file a timely appeal deprives the board of jurisdiction over the appeal.” *Id.* See also Stec v. Raymark Industries, Inc., 299 Conn. 346 (2010).

In the present matter, the claimant was obligated, if she was dissatisfied with or confused about the trial commissioner's Finding and Denial, to either appeal to this tribunal within twenty days, or file an appropriate motion with 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). Otherwise, her appellate rights would be extinguished pursuant to General Statutes § 31-301 (a). The claimant failed to take either action within that twenty-day window. Given that the claimant, although aggrieved by the December 14, 2016 decision of the trial commissioner, took no responsive action within twenty days, we therefore lack subject matter jurisdiction to consider the appeal.

However, in light of the fact that the claimant is unrepresented, we provide the following additional analysis. Even had we retained jurisdiction to consider the claimant's appellate arguments, we would deem these arguments an effort to retry the factual findings of the trial commissioner on appeal. Macon v. Colt's Manufacturing, 5505 CRB-1-09-10 (September 27, 2010), *appeal dismissed*, A.C. 32785 (December 13, 2010), is dispositive of that issue. Our standard of review is limited to addressing findings of fact that are "clearly erroneous." Berube v. Tim's Painting, 5068 CRB-3-06-3 (March 13, 2007). The trial commissioner in this matter, similar to the trial commissioner in Macon, reached findings of fact which were consistent with the testimony and evidence that he found credible and probative, but were unresponsive of the relief the claimant sought. In neither Macon nor the present case was a Motion to Correct filed challenging the factual findings of the trial commissioner. Therefore, as we pointed out in Stevens v. Raymark Industries, Inc., 5215 CRB-4-07-4 (March 26, 2008), *appeal dismissed*, A.C. 29795 (June 6, 2008), when this occurs, "we must accept the validity of the facts found by the trial commissioner, and ... this board is limited to reviewing how the commissioner applied the law." *Id.* See also Admin. Reg. § 31-301-4.

The claimant is essentially arguing on appeal that the expert witnesses in this case made statements which were supportive of compensability but were not deemed credible by the trial commissioner. Nevertheless, “[w]e have held that it is within the discretion of the trial commissioner to accept some, but not all, of a physician’s opinion.” Williams v. Bantam Supply Co., 5132 CRB-5-06-9 (August 30, 2007), *quoting* Lopez v. Lowe’s Home Improvement Center, 4922 CRB-6-05-3 (March 29, 2006). Given that the trial commissioner is responsible for evaluating the weight and probative value of medical evidence, O’Reilly v. General Dynamics Corp., 52 Conn. App. 813, 818 (1999), we cannot re-visit these issues on appeal.

As this board pointed out in Torres v. New England Masonry Company, 5289 CRB-5-07-10 (January 6, 2009), “[t]he burden of proof in a workers’ compensation claim for benefits rests with the claimant.” *Id.* See also Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440 (2001); Lentini v. Connecticut College, 4933 CRB-2-05-4 (May 15, 2006). While the claimant did advance what she believed to be a cogent argument at the formal hearing, it appears that the trial commissioner did not find the argument persuasive and determined that the expert evidence presented herein did not support a finding of compensability. As an appellate body, we must respect that decision. In any event, we do not have jurisdiction to take any action due to the untimely filing of the appeal.

We affirm the Finding and Denial.

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 12th day of December, 2017 to the following parties:

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