CASE NO. 6178 CRB-3-17-3 CLAIM NO. 300054907	: COMPENSATION REVIEW BOARD
CHARLES KORN, JR. CLAIMANT-APPELLANT	: WORKERS' COMPENSATION COMMISSION
v.	: MARCH 21, 2018

TOWN OF GUILFORD
EMPLOYER
SELF-INSURED
RESPONDENT-APPELLEE

and

CIRMA
ADMINISTRATOR

APPEARANCES:

The claimant was represented by John M. Walsh, Jr., Licari, Walsh & Sklaver, L.L.C., 322 East Main Street, Suite 2B, Branford, CT 06405.

The respondent was represented by Jason M. Dodge, Esq., Strunk, Dodge, Aiken, Zovas, L.L.C., 200 Corporate Place, Suite 100, Rocky Hill, CT 06067 and Michael J. Dorney, Esq., LeClairRyan, 545 Long Wharf Drive, Ninth Floor, New Haven, CT 06511.

This Petition for Review from the February 17, 2017 Finding and Dismissal by Christine L. Engel, the Commissioner acting for the First District, was heard on September 29, 2017 before a Compensation Review Board panel consisting of Commission Chairman John A. Mastropietro and Commissioners Daniel E. Dilzer and Thomas J. Mullins.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has petitioned for review from the February 17, 2017 Finding and Dismissal by Christine L. Engel, the Commissioner acting for the First District. We find no error and accordingly affirm the decision of the trial commissioner. [1]

At the outset of formal proceedings, the commissioner identified the following issue for determination: whether the claimant suffered a compensable injury, as defined by the provisions of the heart and hypertension statute codified at General Statutes § 7-433c, while employed as a police officer.[2] Based on the evidence presented, the commissioner made the following factual determinations which are pertinent to our analysis of this appeal. The claimant was employed by the respondent municipality as a

[1] We note that two Motions for Extension of Time were granted during the pendency of this appeal.

[2] General Statutes § 7-433c states: "(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.

(b) Notwithstanding the provisions of subsection (a) of this section, those persons who began employment on or after July 1, 1996, shall not be eligible for any benefits pursuant to this section."

police officer on August 29, 1985 until his retirement in 2008. Prior to commencing his employment, the claimant passed a physical examination performed by Arnold C. Winokur, M.D., which examination did not reveal any evidence of heart disease or hypertension.

The commissioner took administrative notice of a Form 30C, filed by the claimant through his attorney, seeking benefits pursuant to General Statutes § 7-433c and Chapter 568 (General Statutes §§ 31-275 et seq.) for heart disease and/or hypertension. The cited date of injury was April 25, 2001. The commissioner also took administrative notice of a timely Form 43 filed by the respondent denying the claim which was received by the Third District office of the Workers' Compensation Commission on September 17, 2001. The parties have stipulated that the claimant is proceeding in this claim pursuant solely to General Statutes § 7-433c.

The claimant testified that he was not seeking workers' compensation benefits for high cholesterol, mitral valve prolapse, or Wolff-Parkinson-White Syndrome [hereinafter "WPW"]. Dr. Winokur had diagnosed the claimant with WPW in 1990; it is a congenital heart condition that causes symptoms such as palpitations, arrhythmia, tachycardia and chest heaviness. At the request of the respondent, the claimant underwent several physical examinations with Dr. Winokur during his employment as a police officer. The claimant testified that Dr. Winokur never diagnosed him with hypertension or prescribed medication for hypertension. The claimant also treated with Jeff A. Kopp, M.D., his family physician, for several years. In a report dated June 16, 2005, Dr. Kopp stated that he had "never officially diagnosed [the claimant] with hypertension." Respondent's Exhibit 1.

On February 20, 2001, Nathan L. Valin, M.D., a cardiologist, examined the claimant. In his report, he stated that the claimant complained of increasing palpitations accompanied by chest heaviness. Dr. Valin scheduled a stress test and prescribed a twenty-four hour Holter monitor to track the claimant's blood pressure. The doctor's notes indicate that he was aware of the claimant's WPW diagnosis. Dr. Valin prescribed a daily dose of twenty-five milligrams of Atenolol; in his correspondence of June 20, 2002 to the claimant's attorney, Dr. Valin stated that he had prescribed Atenolol for the claimant's WPW and his exercise-induced hypertension. Claimant's Exhibit C.

On January 15, 2002, Dr. Valin examined the claimant for episodes of palpitations; at that visit, the claimant's blood pressure was 120/72. He did not determine the reason for the palpitations, but recommended that the claimant increase his daily dose of Atenolol to fifty milligrams per day, wear a Holter monitor, and take 325 milligrams of aspirin daily "for its anti-infarct properties." Respondent's Exhibit 1 of Joint Exhibit 1. On July 20, 2009, again in correspondence to claimant's counsel, Dr. Valin stated that the claimant had "presented to [his] office for evaluation of his Wolff-Parkinson-White Syndrome." Claimant's Exhibit C; Respondent's Exhibit 9 of Joint Exhibit 1. The doctor also indicated that the claimant had informed him of his prior diagnosis of hypertension as part of his medical history and he had diagnosed the claimant with exercise-induced hypertension following a stress test on February 20, 2001.[3]

[3] In her Finding and Dismissal, the trial commissioner found that in correspondence dated July 9, 2009, Dr. Valin stated that he "had never formally diagnosed the Claimant with hypertension…." Findings, ¶ 18. Our review of this correspondence indicates that in fact, Dr. Valin indicated he did not diagnose the claimant with hypertension at the initial office visit of February 15, 2001. See Claimant's Exhibit C;

Dr. Valin was deposed on June 22, 2012. He testified that he was unable to state, with any reasonable degree of certainty, whether the claimant's palpitations were caused by WPW or stress-induced hypertension. However, in responding to a query by claimant's counsel regarding whether WPW can cause hypertension, the doctor replied, "[n]o." Joint Exhibit 1, pp. 57-58. Dr. Valin also testified that the stress test results of 2001 were the only data he had for his diagnosis of exercise-induced hypertension. During that stress test, the claimant's blood pressure had increased from 120/70 to 210/90. The doctor indicated that although an increase in blood pressure is a normal response to exercise, "it should not exceed excessive amounts. It shouldn't be over 200, and at the peak exercise, his blood pressure was 210 over 90. That indicated that he has an exaggerated response to exercise with his hypertension." Id., 14. Dr. Valin also testified that a diagnosis of hypertension is not based upon one elevated blood pressure reading but, rather, should be determined after several elevated readings. He opined that the claimant had hypertension but was not treated for it. "150 over 100 is severe hypertension; 140 over 100 is severe hypertension; 120 over 90 is hypertension." Id., 27.

Donald Rocklin, M.D., a cardiologist, performed a records review for the respondent and was deposed on December 18, 2013. As had been the case with Dr. Valin, Dr. Rocklin also opined that a diagnosis of hypertension depends on a series of blood pressure readings and not just on one high reading. He reviewed the records of Dr. Kopp, the claimant's primary care physician, and did not see any evidence of hypertension. He testified that the elevated blood pressure readings in Dr. Kopp's

---

Respondent's Exhibit 9 of Joint Exhibit 1. In light of the totality of Dr. Valin's opinion in this matter, we deem this inaccurate quotation harmless error.

records occurred when the claimant saw the doctor for upper respiratory infections, nasal congestion, or wrist pain, all of which could have caused the claimant's blood pressure to be elevated. Dr. Rocklin did not diagnose the claimant with hypertension. He testified that the Atenolol prescribed by Dr. Valin was helpful for both controlling palpitations and lowering blood pressure.

Dr. Rocklin further testified that according to guidelines recommended by the Joint National Committee and the European Society of Cardiology, blood pressure readings should be 140/90 or higher before hypertension is diagnosed. He indicated that although it is normal for blood pressure to increase during exercise, he would not agree that a blood pressure reading of 210/90 at the height of a stress test demonstrated that the claimant had underlying hypertension in addition to stress-induced hypertension. The doctor testified that individuals who have exercise-induced hypertension may go on to develop hypertension at some future point, but also stated that he would "make the distinction that exercise-induced high blood pressure is not the same as a diagnosis of hypertension." Respondent's Exhibit 2, p. 20. In addition, Dr. Rocklin opined that: "[g]iven all the variables that I've mentioned, I don't think that finding [stress-induced high blood pressure caused by a stress test] qualifies as a definition of hypertension, it qualifies as a risk for developing hypertension, but it is not, in itself, hypertension." Id., 30.

Based on the foregoing, the trial commissioner determined, after noting that neither Drs. Winokur nor Kopp had ever diagnosed the claimant with hypertension, that Dr. Valin's testimony indicating that the claimant was suffering from hypertension at the time of his stress test in 2001 was not credible. However, the commissioner did find

Dr. Rocklin's written reports and deposition testimony credible and persuasive, particularly the doctor's "opinion that exercise-induced hypertension is not the same condition as hypertension." (Emphasis in the original.) Conclusion, ¶ E. The commissioner concluded that because the claimant had never been diagnosed with hypertension, the provisions of General Statutes § 7-433c did not permit the claimant to bring a claim for that condition, and she dismissed the claim.

The claimant has appealed this decision, arguing that the trial commissioner erroneously concluded that the claimant was not suffering from hypertension in 2001.[4] The claimant further contends that the trial commissioner erred in concluding that exercise-induced hypertension is not a covered condition pursuant to General Statutes § 7-433c and dismissing the claim.[5] We find neither of these arguments persuasive.

The standard of review we are obliged to apply to a trial commissioner's findings and legal conclusions is well-settled. "The trial commissioner's factual findings and conclusions must stand unless they are without evidence, contrary to law or based on 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). Moreover, "[a]s 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

[4] The claimant did not file a Motion to Correct; as a result, "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." Corcoran v. Amgraph Packaging, Inc., 4819 CRB-2-04-6, 4948 CRB-2-05-5 (July 26, 2006).

[5] In a third claim of error, the claimant contends that the statute of non-claim raised by the respondent is meritless. The respondent did not raise this issue at trial but, rather, in a post-judgment motion pursuant to Practice Book § 63-4(a) (1) entitled "Alternative Grounds Upon Which Judgment May Be Affirmed." In its motion, the respondent contends that the claim for heart and hypertension benefits should be dismissed as untimely given that the claimant "was aware of his exercise-induced hypertension based on stress test results and medical advice in the early 1990s." In light of our analysis herein, we decline to address this argument, other than to note that the respondent's position in this regard would seem to be at odds with the analysis of our Supreme Court in Ciarlelli v. Hamden, 299 Conn. 265 (2010).

whether the trial court could have reasonably concluded as it did…." Burton v. Mottolese, 267 Conn. 1, 54 (2003).

We begin with the claimant's contention that the trial commissioner's failure to conclude that the claimant was suffering from hypertension in 2001 constituted error. The claimant points out that in Stachelczyk v. Norwalk, 1 Conn. Workers' Comp. Rev. Op. 51, 19-CRD-7-80 (August 20, 1981), this tribunal articulated the criteria for establishing a compensable claim pursuant to General Statutes 7-433c. We stated:

> There must be: (1) a claimant whose pre-employment physical exam revealed no evidence of hypertension or heart disease; (2) a condition or impairment of health caused by hypertension or heart disease; (3) resulting in death or temporary or permanent total or partial disability; (4) economic loss resulting therefrom.

Id., 52.

It is the claimant's position that the inquiry in this matter implicates the second prong of the Stachelczyk criteria; specifically, whether the claimant suffers from any "condition or impairment of health caused by hypertension or heart disease." The claimant argues that Dr. Valin opined that the claimant "had an underlying hypertensive condition that was exacerbated by the stress test resulting in the diagnosis and the prescription for atenolol." Claimant's Brief, p. 7. In support of this claim of error, the claimant relies in part on the reasoning of our Appellate Court in Salmeri v. Dept. of Public Safety, 4066 CRB-5-99-6 (August 9, 2000), *aff'd*, 70 Conn. App. 321 (2002), *cert. denied*, 261 Conn. 919 (2002). In Salmieri, the trial commissioner concluded that the claimant's atrial fibrillation constituted heart disease and therefore satisfied the second prong of the Stachelczyk requirements despite the fact that there was no "organic damage" to the claimant's heart. Salmieri, supra, 335. The Appellate Court rejected the

defendants' argument that the statutory presumption of General Statutes § 5-145a had been rebutted by "the commissioner's conclusion that the claimant's employment 'did not cause [the plaintiff's] atrial fibrillation, [but] it did produce symptoms which lit up and permanently aggravated a preexisting condition which produced a permanent impairment…'" Id., 336.

However, we note that in Salmieri, three physicians had assigned the claimant a ten (10) percent permanent partial disability due to his heart condition. As such, Salmieri is distinguished on this basis from the instant matter, in which the claimant has not been assigned a permanent partial disability rating due to either heart disease or hypertension.[6] In addition, we note that although Dr. Valin testified that he had diagnosed the claimant with exercise-induced hypertension and prescribed the Atenolol "mostly" for the claimant's exercise-induced hypertension rather than his WPW, Joint Exhibit 1, p. 15, the doctor also indicated that apart from the stress test of February 20, 2001, subsequent office visits by the claimant provided no additional evidence or "data" that the claimant continued to experience exercise-induced hypertension. Id., 25-26. In addition, Dr. Valin also testified that at the claimant's office visit of February 15, 2001, he had diagnosed the claimant as suffering from the underlying condition of hypertension in addition to exercise-induced hypertension because the claimant had given him a

[6] Our review of the evidentiary record indicates that on February 3, 2011, Dr. Valin completed a Form 42 ("Physician's Permanent Impairment Evaluation") in which he noted a 5-10 (five to ten) percentage of permanent loss. When queried at deposition regarding this notation, Dr. Valin explained: "I think that was due to at work, the time that [the claimant] would be doing lifting, physical exertion. I can't recall what my thinking was at that time, but five to ten percent, I might have been thinking of when he was performing heavy exertion lifting on the job five to ten percent of the time he was doing that. So he was instructed to avoid those situations." Joint Exhibit 1, p. 34. It may be reasonably inferred that the trial commissioner did not find this notation comports with the concept of a permanent partial impairment as contemplated by the provisions of General Statutes § 31-308 (b).

diagnosis of hypertension "by history."[7] Joint Exhibit 2, p. 47; see also Claimant's Exhibit C (correspondence dated July 20, 2009 to John M. Walsh, Jr., Esq.); Respondent's Exhibit 5 of Joint Exhibit 1 (correspondence dated June 20, 2002 to Emmet P. Hibson, Jr., Esq.)

As additional support for this claim of error, the claimant relies upon Dr. Valin's testimony reflecting his opinion that exercise-induced hypertension constitutes "a disease or condition in and of itself." Id., 19. However, Dr. Rocklin, at his deposition, disagreed with that assessment, and provided journal articles in support of the theory that stress-induced hypertension is not in and of itself hypertension but, rather constitutes a risk factor for eventually developing hypertension.[8] Respondent's Exhibit 2, pp. 20, 30. Moreover, we note that in correspondence dated September 4, 2013 and October 5, 2013, Dr. Rocklin indicated that stress-induced high blood pressure is not the same as a formal diagnosis of hypertension. Respondent's Exhibit 1.

Having reviewed the testimony and reports of the various medical experts in this matter, the trial commissioner chose to accept Dr. Rocklin's opinion rather than Dr. Valin's. This decision was well within her discretion, given that "[i]t is the quintessential function of the finder of fact to reject or accept evidence and to believe or disbelieve any expert testimony…. The trier may accept or reject, in whole or in part, the testimony of an expert." (Internal citations omitted.) Tartaglino v. Dept. of Correction, 55 Conn. App. 190, 195 (1999), *cert. denied*, 251 Conn. 929 (1999). We therefore affirm

[7] The claimant denied having given Dr. Valin this history. September 27, 2013 Transcript, pp. 24-25, 27-28.

[8] At his deposition, Dr. Valin also remarked that exercise-induced hypertension is "a marker for people that have hypertension, and if you are predisposed for hypertension, when you exercise, the hypertension gets worse." Joint Exhibit 1, p. 19.

the trial commissioner's conclusion that the claimant was not suffering from hypertension in 2001.

The claimant also identifies as error the trial commissioner's conclusion that exercise-induced hypertension is not a covered condition as contemplated by General Statutes § 7-433c. As such, the claimant points out that the statute covers "*any condition or impairment of health* caused by hypertension or heart disease." (Emphasis in the original.) Appellant's Brief, p. 9. It is the claimant's contention that because exercise-induced high blood pressure must be controlled with medication, it constitutes an impairment of health arising out of hypertension and, as a result, is a "covered condition." Id., 10. We are not persuaded that the expert medical testimony proffered in this matter compelled the trial commissioner to reach such a conclusion.

As discussed previously herein, Dr. Rocklin testified that stress-induced hypertension is not in and of itself hypertension but, rather constitutes a risk factor for eventually developing hypertension. Respondent's Exhibit 2, pp. 20, 30. We therefore disagree with the claimant's statement that the doctor's testimony implied that exercise-induced hypertension "is a condition…arising out of or caused by hypertension." Appellant's Brief, p. 10. Moreover, with specific regard to the Atenolol prescribed by Dr. Valin, we note that Dr. Rocklin testified as follows:

> So, I suspect, when choosing an agent, he said, well, atenolol will be good for the palpitations, because that's what the patient was complaining of, he wasn't complaining of high blood pressure, he was complaining of palpitations, so he started the atenolol for that, and he said while we're at it, he did have a high blood pressure response to exercise, so let's go two for one. So, I suspect in the end, he was thinking about all those things.

Respondent's Exhibit 2, p. 14.

In addition, Dr. Rocklin stated, "I got the feeling during [Dr. Valin's] deposition that he, himself, may not have been terribly clear as to why he started it when pinned down, but, I suspect, he was thinking about both of those things." Id., 15. Thus, despite Dr. Valin's testimony, as discussed previously herein, that he "mostly" prescribed the Atenolol for the claimant's blood pressure, Joint Exhibit 1, p. 15, it may be reasonably inferred that the trial commissioner simply found Dr. Rocklin's testimony more persuasive on this issue, and it was well within her discretion to do so. "[I]t is … immaterial that the facts permit the drawing of diverse inferences. The [commissioner] alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court." Fair v. People's Savings Bank, 207 Conn. 535, 540 (1988), *quoting* Del Vecchio v. Bowers, 296 U.S. 280, 287 (1935). We therefore affirm the trial commissioner's conclusion that the claimant's diagnosis of exercise-induced hypertension, in the absence of an actual diagnosis of medical hypertension, did not bring the claimant within the ambit of General Statutes § 7-433c.

There is no error; the February 17, 2017 Finding and Dismissal by Christine L. Engel, the Commissioner acting for the First District, is accordingly affirmed.

Commissioners Daniel E. Dilzer and Thomas J. Mullins concur in this Opinion.