CASE NO. 6188 CRB-3-17-4 : COMPENSATION REVIEW BOARD
CLAIM NO. 700167495

JOSEPH J. LaLUNA : WORKERS' COMPENSATION
CLAIMANT-APPELLEE COMMISSION

v. : MAY 16, 2018

CONNECTICUT AIR SYSTEMS, INC.
EMPLOYER

and

FEDERATED MUTUAL INSURANCE COMPANY
INSURER
RESPONDENTS-APPELLANTS

APPEARANCES:

The claimant was represented by Dennis W. Gillooly, Esq., D'Elia Gillooly DePalma, L.L.C., Granite Square, 700 State Street, New Haven, CT 06511.

The respondents were represented by Nicholas C. Varunes, Esq., Varunes & Associates, P.C., 5 Grand Street, Hartford, CT 06106.

This Petition for Review from the April 4, 2017 Finding and Award of Jack R. Goldberg, the Commissioner acting for the Fifth District, was heard October 27, 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]

[1] We note that three motions for extension of time were granted during the pendency of this appeal.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The respondents have appealed from the April 4, 2017 Finding and Award issued by the trial commissioner acting for the Fifth District. In his Finding and Award, the trial commissioner determined that the claimant was entitled to temporary total disability benefits. The respondents argue that the evidence in the record did not support the trial commissioner's conclusion that the claimant was totally disabled as a result of a compensable back injury. The claimant contends that the trial commissioner relied on the opinion of medical experts who had opined that the claimant lacked a work capacity and, therefore, the award should be affirmed. Upon review, we find that this decision meets the "totality of the evidence" standard for awarding temporary total disability benefits as articulated in Marandino v. Prometheus Pharmacy, 294 Conn. 564 (2010). We affirm the Finding and Award.

The trial commissioner reached the following factual findings which are relevant to our review. The claimant testified that he sustained a back injury on June 3, 2013, while working for the respondent-employer. On October 25, 2011, the claimant had sustained a prior back injury with the same employer, which injury was acknowledged to be compensable by the respondents. Kenneth M. Kramer, M.D., returned the claimant to work with restrictions after that injury. On January 8, 2015, the Workers' Compensation Commission [hereinafter "Commission"] approved a Voluntary Agreement for the 2013 injury which designated Dr. Kramer as the treating physician and established a compensation rate. The claimant indicated that he had worked in the heating and air conditioning business since 1988 and held three state licenses related to heating and air conditioning, all of which had lapsed since his injury.

The claimant testified that he injured his back on June 3, 2013, while pulling an air-handler unit into an attic. He indicated that the crew was short-handed and he should have requested additional assistance. His narrative of the incident was corroborated by David Arbachouskas, the claimant's close friend and co-worker. Arbachouskas testified that he was working with the claimant on the day of the injury and was pushing the air handler while the claimant was pulling it. The claimant said that the next day, he attempted to work but ended up just sitting in the truck, unable to work. He has not returned to work since then. Arbachouskas also testified that prior to the incident, the claimant was able to perform the job duties required by HVAC installation.

The claimant returned to Dr. Kramer on July 30, 2013, who noted that following the 2011 injury, the claimant had tolerated his employment in the family HVAC business until a pulling incident the month before caused increased pain in his mid- and lower back. Dr. Kramer, in an October 7, 2013 letter to claimant's counsel, opined that the June incident "was a substantial contributory factor to [the claimant's] current condition…." Claimant's Exhibit A. The claimant testified that he did not treat until July 30, 2013, because he did not have transportation and his family did not believe he was injured. An MRI of the lumbar spine taken on August 28, 2013, revealed a central disc protrusion with canal narrowing at L4-L5 and protrusion at the L5-S1 level. Id.

The claimant also noted his prior medical ailments. He testified that he treated for fibromyalgia in 2002 and continuously from 2002 through 2013 for chronic pain in the hips, shoulders, chest, back, and legs due to fibromyalgia. He was prescribed Suboxone and Cymbalta for the fibromyalgia. The claimant testified that he also underwent

acupuncture, chiropractic adjustments, and therapeutic massage for pain management with Karen Warner, M.D.

On August 3, 2009, he consulted Judith Gorelick, M.D., a neurosurgeon, for progressive diffuse body pain and mid-back pain.[2] Beginning on March 10, 2008, he also treated with Jeffrey Gross, M.D., a neurologist, for lower back pain which was causing pain to radiate into his toes. Finally, he testified regarding the mechanism of his 2011 injury, stating that he fell off a ladder, struck his head, and injured his cervical spine after landing on his back.

The trial commissioner also noted that the claimant treated with Michael J. Murphy, M.D., and Mark Thimineur, M.D. The claimant obtained a referral to see Dr. Murphy from Dr. Kramer, and testified that Dr. Kramer did not listen to all of his complaints regarding how his mid-back was being affected. The claimant also alleged that Dr. Murphy's office lied about the claimant missing an appointment. Dr. Murphy, in a December 9, 2014 letter to claimant's counsel, stated the claimant has had no work capacity due to the back injury that occurred on June 3, 2013. See Claimant's Exhibit B. Dr. Thimineur, a pain management specialist, recommended the installation of a spinal cord stimulator and physical therapy. He stated in a May 12, 2016 note that the claimant remains disabled from work. See Claimant's Exhibit C.

The claimant takes issue with various elements of Dr. Thimineur's reports. He testified that he cannot drive because his feet become numb when driving a standard shift and that Dr. Thimineur did not listen to him. The claimant also testified that Dr. Thimineur's notes indicating that the claimant was performing yard work, taking care

[2] We note that in Findings, ¶ 13, of the Finding and Award, the trial commissioner indicated that the date of the consultation with Dr. Gorelick was August 8, 2008. We deem this harmless scrivener's error. See D'Amico v. Dept. of Correction, 73 Conn. App. 718, 729 (2002), *cert. denied*, 262 Conn. 933 (2003).

of chickens in his backyard, and attending to beekeeping tasks are not accurate. He stated that Arbachouskas bears most of the responsibility for taking care of the chickens and bees as he is unable to do so because of his severe back pain.

The respondents presented evidence from their expert witness, John G. Strugar, M.D., a neurosurgeon. Dr. Strugar performed a Respondent's Medical Examination on April 6, 2015. Dr. Strugar stated in his report that the claimant's fibromyalgia is an underlying cause of his back pain and is unrelated to the June 3, 2013 incident. See Claimant's Exhibit D. Dr. Strugar also opined that the claimant's back symptoms worsened because of the work incident, and indicated that although the claimant's symptoms may seem out of proportion relative to the work incident, they can be better understood in a patient with pre-existing fibromyalgia. Id.

Based on this factual record, the trial commissioner concluded that the claimant and Arbachouskas were credible regarding the circumstances of the June 3, 2013 incident. The trial commissioner did not find credible the claimant's complaints relative to his medical providers. The June 3, 2013 incident created a compensable injury which was accepted by the respondents in the January 8, 2015 Voluntary Agreement. Although the trial commissioner found the claimant suffered from fibromyalgia and back pain that pre-existed the June 3, 2013 work-related back injury, he also concluded that the medical opinion of Dr. Murphy, including the December 9, 2014 statement that the "[claimant] has not had any work capacity as a result of his back injury of 6/03/2013," was more persuasive than the opinion of Dr. Strugar.[3] Claimant's Exhibit B.

[3] We note that in Conclusion, ¶ f., of the Finding and Award, the trial commissioner indicated that the date of Dr. Murphy's report was December 14, 2014. We deem this harmless scrivener's error. See D'Amico, supra.

The trial commissioner also concluded, based on Dr. Thimineur's opinion that the claimant requires physical therapy and the implantation of a spinal cord stimulator, that such treatment is reasonable and necessary pursuant to General Statutes § 31-294d.[4] The trial commissioner found that the claimant was temporarily partially disabled from July 30, 2013 through October 1, 2013, and temporarily totally disabled from October 2, 2013 forward. The trial commissioner ordered the respondents to pay indemnity benefits to the claimant and to provide reasonable and necessary medical care, including the spinal cord stimulator recommended by Dr. Thimineur.

The respondents filed a motion to correct. The corrections sought to: (1) add additions to the various findings relative to the medical reports and opinions on the record; (2) substitute conclusions indicating that the claimant was not totally disabled and had not suffered additional disability as a result of the June 3, 2013 incident; and (3) substitute conclusions removing elements of relief. The trial commissioner denied this motion in its entirety and the respondents have pursued this appeal. The gravamen of their argument is that the evidence presented in this case does not support the conclusions reached by the trial commissioner.

We note that the standard of deference 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.

[4] General Statutes § 31-294d (a) (1) states in relevant part: "The employer, as soon as the employer has knowledge of an injury, shall provide a competent physician or surgeon to attend the injured employee and, in addition, shall furnish any medical and surgical aid or hospital and nursing service, including medical rehabilitation services and prescription drugs, as the physician or surgeon deems reasonable or necessary…."

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 whether the trial court could have reasonably concluded as it did...." Burton v. Mottolese, 267 Conn. 1, 54 (2003), *quoting* Thalheim v. Greenwich, 256 Conn. 628, 656 (2001). "This presumption, however, can be challenged by the argument that the trial commissioner did not properly apply the law or has reached a finding of fact inconsistent with the evidence presented at the formal hearing." Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007).

The appropriate legal standard for awarding temporary total disability benefits was recently re-stated by our Appellate Court in O'Connor v. Med-Center Home Health Care, Inc., 140 Conn. App. 542 (2013). In O'Connor, the respondents argued that the medical evidence presented by the claimant did not sufficiently support a bid for temporary total disability benefits. Nonetheless, the court held that a trial commissioner must engage in "a holistic determination of work capacity" when ascertaining if a claimant is entitled to temporary total disability benefits. Id., 554. Although a claimant must present "sufficient evidence before the commissioner that the plaintiff is unemployable," we have generally deferred to the trier of fact regarding the sufficiency of this evidence. Id., 554-555.

The analysis of this board in recent cases such as Katsovich v. Herrick & Cowell Co., Inc., 6148 CRB-3-16-11 (October 4, 2017), *appeal withdrawn*, A.C. 40971 (March 6, 2018); Ramsahai v. Coca-Cola Bottling Company, 5991 CRB-1-15-2 (January 26, 2016); and Nelson v. Revera, Inc., 5977 CRB-5-15-1 (September 21, 2015), follows this path. Our duty as an appellate panel is to ascertain whether a reasonable fact-finder could

determine that the totality of the evidence supports the conclusion that the claimant was totally disabled. We note that because the respondents in the present matter accepted that the claimant had sustained a compensable injury on June 3, 2013 by virtue of executing a Voluntary Agreement, the only issue before the trial commissioner was the extent of the injuries sustained by claimant due to this incident. Therefore, we must determine if the evidence found persuasive and credible by the commissioner supports his decision.

The trial commissioner specifically found Dr. Murphy more credible and persuasive than the respondents' expert witness, Dr. Strugar. The commissioner was entitled to reach this decision when asked to weigh conflicting medical opinions. Dellacamera v. Waterbury, 4966 CRB-5-05-6 (June 29, 2006), *appeal withdrawn*, A.C. 27853 (September 12, 2006). In his December 9, 2014 letter to claimant's counsel, Dr. Murphy made an unequivocal representation that the claimant was totally disabled as a result of the June 3, 2013 back injury. See Claimant's Exhibit B. The respondents argue that the treatment records of this physician did not support his opinion and, therefore, should have been disregarded. We disagree, and find that this determination was a matter of discretion for the trier-of-fact. There is no dispute that Dr. Murphy had conducted a number of physical examinations of the claimant's back prior to rendering his opinion. Therefore, we do not find his opinion inherently unreliable, unlike the expert opinion offered in DiNuzzo v. Dan Perkins Chevrolet Geo, Inc., 294 Conn. 132 (2009), which was clearly rooted in surmise and/or conjecture.

In addition, although the respondents question the basis for Dr. Murphy's opinion regarding causation and disability, they chose not to depose this witness. As this tribunal has previously remarked, "[h]aving forsaken their opportunity to challenge this evidence,

… the respondents must accept the testimony 'as is,' as well as the permissible inferences which the trial commissioner drew from it." [5] (Citation omitted.) Berube v. Tim's Painting, 5068 CRB-3-06-3 (March 13, 2007). Dr. Murphy's unequivocal finding that the claimant was totally disabled due to the June 3, 2013 work injury was therefore probative evidence on which the commissioner could rely.

The respondents argue that the claimant's activities relative to his avocations such as beekeeping evidence a work capacity, and the claimant's own testimony was incompatible with the trial commissioner's ultimate conclusions. They argue that the weight of the evidence would support the conclusion that the claimant had a work capacity. We note, however, that although the trial commissioner did find the claimant credible relative to his narrative concerning the mechanism of his injury, the commissioner did not conclude that the claimant's statements regarding some disputed comments he made to his medical providers constituted reliable evidence. See Conclusion, ¶ c. It may therefore be inferred that the trial commissioner did not credit all of the claimant's testimony relative to his various activities.

The task of resolving discrepancies in witness testimony is reserved for the trial commissioner. [6] Williams v. Bantam Supply Co., 5132 CRB-5-06-9 (August 30, 2007). Although evidence of significant non-remunerative activities *can* constitute evidence of a work capacity, in the present matter, the trial commissioner was not persuaded that the claimant's activities reached this level. See Clukey v. Century Pools, 5683 CRB-6-11-9

[5] We note that on October 14, 2016, Dr. Thimineur also opined that the claimant was totally disabled as a result of the June 3, 2013 work injury. Claimant's Exhibit C. In addition, in an October 7, 2013 letter to counsel, Dr. Kramer attributed the cause of the claimant's current back condition to the June 2013 work injury. Claimant's Exhibit A.

[6] At the July 26, 2016 formal hearing, the claimant testified that he sustained a traumatic brain injury at age five (5) and again at age nineteen (19). As a result of these injuries, he has trouble remembering dates and names. Transcript, p. 53.

(August 22, 2012). Moreover, the testimony of Arbachouskas was consistent with the trial commissioner's finding that the claimant lacked a work capacity, given that Arbachouskas testified that the claimant's ability to engage in his hobbies was extremely limited. December 14, 2016 Transcript, pp. 58-61. Therefore, the record contained testimony by a layperson which was consistent with expert medical opinion in that it also suggested that the claimant lacked a work capacity.

On the other hand, the claimant notes that the respondents' expert, Dr. Strugar, did not offer a specific opinion regarding the claimant's work capacity. See Claimant's Exhibit D. Although Dr. Strugar suggested the claimant's pre-existing fibromyalgia was the primary reason for his current ailments and proposed a disability rating, the claimant correctly points out that this expert did not offer an opinion regarding the claimant's work capacity. In the absence of conflicting evidence on this point, the trial commissioner only needed to find that the claimant met his prima facie burden of proof on this issue. Having done so, the commissioner was entitled to award benefits, particularly given that he found the claimant's expert credible and persuasive on the issue of causation. In cases in which the causation of an injury is contested, "the commissioner's findings of basic facts *and* his finding as to whether those facts support an inference that the plaintiff's injury arose from his employment are subject to a highly deferential standard of review." (Emphasis in the original.) Blakeslee v. Platt Bros. & Co., 279 Conn. 239, 253-254 (2006) (Sullivan, C.J., dissenting).

The respondents may believe that the weight of the evidence in this case did not support the result. We, however, had no difficulty finding evidence in the record which supports the Finding and Award. It is the trial commissioner's job to weigh the relative

merits of the evidence which is presented for consideration. See Huertas v. Coca Cola Bottling Company, 5052 CRB-1-06-2 (January 22, 2007); Arnott v. Taft Restaurant Ventures, L.L.C., 4932 CRB-7-05-3 (March 1, 2006). Given that we do not find the trial commissioner's determination "clearly erroneous," we therefore affirm the Finding and Award.[7] Dudley v. Radio Frequency Systems, 4995 CRB-8-05-9 (July 17, 2006).

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

[7] The respondents contend that the trial commissioner erred in denying their motion to correct. The standard of review on appeal is whether the denial of such a motion was arbitrary or capricious. Vitti v. Richards Conditioning Corp., 5247 CRB-7-07-7 (August 21, 2008), *appeal withdrawn*, A.C. 30306 (September 29, 2009). It may be inferred that the trial commissioner did not find that the proposed corrections signified probative or credible evidence. Beedle v. Don Oliver Home Improvement, 4491 CRB-3-02-2 (February 28, 2003). A trial commissioner is not obligated to adopt a litigant's view of the evidence presented on the record. See D'Amico v. Dept. of Correction, supra, 728; 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); Liano v. Bridgeport, 4934 CRB-4-05-4 (April 13, 2006).

CERTIFICATION

THIS IS TO CERTIFY THAT a copy of the foregoing was mailed this 16th day of May 2018 to the following parties:

JOSEPH J. LaLUNA
579 Glenwood Drive
Orange, CT 06477

DENNIS W. GILLOOLY, ESQ. 7011 2970 0000 6088 8631
D'Elia Gillooly DePalma, L.L.C.
Granite Square
700 State Street
New Haven, CT 06511

CONNECTICUT AIR SYSTEMS, INCORPORATED
270 Rowe Avenue
Milford, CT 06460-3031

NICHOLAS C. VARUNES, ESQ. 7011 2970 0000 6088 8648
Varunes & Associates, P.C.
5 Grand Street
Hartford, CT 06106

_____
Jackie E. Sellars
Administrative Hearings Specialist
Compensation Review Board
Workers' Compensation Commission