CASE NO. 6197 CRB-4-17-6 CLAIM NO. 700152588	: COMPENSATION REVIEW BOARD
THOMAS McGINTY CLAIMANT-APPELLEE	: WORKERS' COMPENSATION COMMISSION
v.	: JULY 17, 2018

CITY OF STAMFORD
POLICE DEPARTMENT
EMPLOYER

and

PMA MANAGEMENT CORPORATION
OF NEW ENGLAND
ADMINISTRATOR
RESPONDENTS-APPELLANTS

APPEARANCES:

The claimant was represented by David J. Morrissey, Esq., Morrissey, Morrissey & Mooney, L.L.C., 203 Church Street, P.O. Box 31, Naugatuck, CT 06770.

The respondents were represented by James D. Moran, Jr., Esq., Williams Moran L.L.C., 2 Enterprise Drive, Suite 412, Shelton, CT 06484

This Petition for Review from the May 24, 2017 Finding and Award of Jodi Murray Gregg, the Commissioner acting for the Seventh District, was heard December 15, 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 six motions for extension of time were granted during the pendency of this appeal.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The respondents have appealed from the May 24, 2017 Finding and Award issued by Jodi Murray Gregg, the Commissioner acting for the Seventh District, concluding that the claimant suffered from compensable heart disease as contemplated by the provisions of General Statutes § 7-433c.[2] The respondents contend that the claimant's ailment was systemic and, therefore, did not constitute compensable heart disease. In support of this contention, the respondents cite Brooks v. West Hartford, 4907 CRB-6-05-1 (January 24, 2006). The claimant argues that the respondents are misapplying Brooks because that case stands for the proposition that under our statutes, the trial commissioner determines whether an ailment constitutes "heart disease." The claimant points out that the substantial probative

[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, 'municipal employer' has the same meaning as provided 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."

evidence credited by the trial commissioner supports her decision. We find the claimant's analysis more persuasive and, therefore, affirm the Finding and Award.

The trial commissioner noted the parties' positions at the onset of the formal hearing. The claimant contends that he sustained an injury within the scope of General Statutes § 7-433c. The respondents, however, argue that the claimant's injury was systemic and not confined to the claimant's heart. They also argue that the claimant has refused the reasonable and necessary medical treatment recommended by his providers and, as such, has not reached maximum medical improvement. In the alternative, the respondents challenge the extent of permanent disability.

The trial commissioner noted the following jurisdictional facts. The claimant was employed as a police officer for the city of Stamford [hereinafter "city"] from January 8, 1990, through April 15, 2011, and his pre-employment physical in 1989 did not reveal any evidence of hypertension or heart disease. He retired from his position with the city prior to the formal hearing held on October 30, 2014, due to injuries sustained during the course of his employment. The claimant contends that he sustained injuries to his low back, bilateral knees, left shoulder, left hip and bilateral hands. As a result of these injuries, the claimant was unable to continue performing his duties as an officer, and he was granted a service-connected disability pension on April 15, 2011.

The claimant testified that while employed as a police officer, he performed a daily exercise regimen at the police station gym and, once he retired, joined The Edge Fitness Center. On March 16, 2007, the claimant came under the care of Christian A. Heineken, M.D., a primary care physician. Dr. Heineken referred the claimant to a nutritionist to help him lose weight, and throughout the course of his treatment of the

claimant, Dr. Heineken proposed that the claimant lose weight. However, the claimant said that while he continued to diet and exercise, he found it difficult to lose weight and he inquired about diet pills. He testified that during the time period between his date of hire and 2009, he gained forty-three (43) pounds, and when he retired, he weighed 244 pounds. He also testified that he had quit smoking and he attributed half of his weight gain to that fact. At the formal hearing held on June 8, 2015, the claimant indicated that his weight had decreased to 236 pounds.

In her Finding and Award, the trial commissioner also discussed the claimant's medical issues during calendar year 2007. At that time, the claimant began experiencing left leg pain, and consulted with Edward H. Schuster, M.D., F.A.C.C., a cardiologist who had treated him for high cholesterol. Preliminary testing revealed that the claimant had a complete blockage of his iliac artery. On February 28, 2007, an EKG and nuclear stress test were conducted, and those test results were normal. The claimant was not diagnosed with heart disease.

Dr. Schuster referred the claimant to Marsel Huribal, M.D., F.A.C.S., a vascular surgeon who, on March 6, 2007, diagnosed the claimant with peripheral vascular disease. Dr. Huribal performed an angioplasty with stenting of the left iliac system on April 23, 2007. He performed a second angioplasty on July 13, 2007, because the iliac artery had re-occluded. At his deposition, Dr. Huribal testified that during this time period, the claimant was suffering from LeRiche Syndrome, a condition that presents in people in their late 40's to early 50's.[3] It results in a blockage of the aorta as it divides into the two

[3] The trial commissioner found that Dr. Huribal had diagnosed "LeRoche Syndrome" and performed the second angioplasty on July 23, 2007. Findings, ¶¶ 16, 17. We deem these inaccuracies harmless scrivener's error. See Hernandez v. American Truck Rental, 5083 CRB-7-06-4 (April 19, 2007).

iliac vessels and is isolated to peripheral, rather than central, artery disease. He testified that the claimant was not suffering from heart disease.

The trial commissioner also addressed the claimant's medical issues during the time period from 2009 to 2011. In 2009, the claimant began to experience shortness of breath and chest pain, and on April 2, 2009, Dr. Schuster ordered a stress test, which was positive. The doctor noted that "[a]s compared to prior study dated 2/28/07, the defect is 'new.'" Findings, ¶ 19; Claimant's Exhibit I. Subsequent to that test, the claimant was diagnosed with coronary artery disease and hypertension and was prescribed medication to help control these conditions. In addition, on April 24, 2009, the claimant underwent a cardiac catheterization. The attending physician, Edward R. Tuohy, M.D., reported that the catheterization revealed "[s]ignificant 2-vessel coronary artery disease with high-grade proximal left anterior descending disease as well as a total occlusion of the distal right coronary artery." Findings, ¶ 21; Claimant's Exhibit F.

On October 23, 2009, the claimant underwent another angioplasty to his femoral artery. On November 19, 2009, the claimant was diagnosed with atrial fibrillation for which he underwent an ablation on February 16, 2010. On September 14, 2011, the claimant underwent a cardiac catheterization, which showed a progression of his coronary artery disease. Finally, in December 2011, the claimant underwent bypass surgery to correct this condition.

On April 28, 2009, the claimant filed a Form 30C with the Workers' Compensation Commission claiming entitlement to benefits pursuant to General Statutes § 7-433c as a result of hypertension and heart disease. A second Form 30C was filed on May 28, 2009. On May 12, 2009, two Forms 43 dated May 1, 2009, and May 11, 2009,

respectively, were filed by the respondents contesting this claim. A supplemental Form 43 was filed on June 4, 2009.

Joseph Robert Anthony, M.D., F.A.C.P., F.A.C.C., a cardiologist, examined the claimant on September 3, 2010. Dr. Anthony diagnosed the claimant with both coronary heart disease and hypertension, stating that "on the basis of his hypertensive cardiovascular disease, I would grade him as approximately 25% impairment [sic] specifically related to the hypertensive cardiovascular disease." Findings, ¶ 29; Claimant's Exhibit B. The doctor further noted that "[o]n the basis of his coronary artery disease, I would grade him as approximately 20% impairment [sic] specifically related to the coronary artery disease." Id. The doctor's ratings are predicated on the sixth edition of the American Medical Association guidelines for assessing permanent impairment.

On September 23, 2010, the claimant presented for a respondents' examination with Martin J. Krauthamer, M.D., F.A.C.C., F.A.C.P., the Chief of Cardiology, Emeritus, at Norwalk Hospital. The doctor reported that he could find no evidence that the claimant was suffering from hypertension more than one year prior to April 2, 2009. He further noted that the claimant's cardiovascular disease appeared to have begun during 2007. On April 24, 2013, Dr. Krauthamer assigned an eight (8) percent permanent partial disability rating due to the claimant's hypertensive cardiovascular disease and a seventeen (17) percent permanent partial disability rating due to his coronary artery disease, for a combined permanent partial disability rating of twenty-two (22) percent. These ratings were predicated on the sixth edition of the American Medical Association guidelines. Findings, ¶ 31; Respondents' Exhibit 6.

On July 15, 2014, following Dr. Krauthamer's examinations, Dr. Anthony decreased his permanent partial disability rating to twenty-four (24) percent for the claimant's hypertensive cardiovascular disease and increased his disability impairment rating to twenty-six (26) percent for the coronary artery disease, resulting in a combined permanent partial disability rating of forty-four (44) percent pursuant to the sixth edition of the American Medical Association guidelines. Findings, ¶ 32; Claimant's Exhibit B.

The trial commissioner noted the testimony of Dr. Anthony at the formal hearing held on March 31, 2016. Dr. Anthony testified that his opinion differed from Dr. Krauthamer with regard to the claimant's disability impairment ratings because Dr. Anthony believed that the claimant suffered from left ventricular hypertrophy [hereinafter "LVH"]. LVH, which occurs when either the free wall or septum of the heart thickens as a result of the heart beating under pressure with increased resistance, can lead to heart failure. Dr. Anthony said that four out of five of the claimant's echocardiograms showed LVH, and he believed that the June 4, 2015 study which did not reveal LVH was inaccurate because it had been taken incorrectly.

Dr. Anthony also testified that weight loss, diet and lowered blood pressure could help reduce the symptoms of LVH; however, the weight loss would need to be significant and the process would take a long time. The doctor indicated that he was unaware of any studies which establish a time frame with respect to the impact of weight loss on the reduction of LVH symptoms. He also testified that the claimant suffers from ventricular tachycardia (arrhythmia), which causes an abnormal heartbeat. Pursuant to the American Medical Association guidelines, Dr. Anthony assigned a rating of "Class 2-B 13% or

Class 2-A 11%" for the ventricular tachycardia. Findings, ¶ 44; March 31, 2016 Transcript, p. 19.

At the formal hearing held on June 8, 2015, Dr. Krauthamer testified that when he initially examined the claimant in 2010, the claimant clearly had vascular disease. The doctor opined that because the vascular disease had not impacted the claimant's heart at that point, he did not diagnose the claimant with cardiovascular disease. With regard to his April 24, 2013 examination of the claimant, Dr. Krauthamer testified as follows:

> [the] chest symptoms were noted by Mr. McGinty and a nuclear stress test was run on 4/2/09 was abnormal. Because of the abnormality it was recommended correctly that he had a cardiac cauterization or angiogram to look at the blood vessels that feed the heart muscle. The same coronary arteries that are like blood vessels in the rest of the body.

Findings, ¶ 48; June 8, 2015 Transcript, p. 16.

Dr. Krauthamer indicated that the disease process which had resulted in the blockage of the coronary artery was the same process which had caused the blockage of the peripheral arteries in the claimant's groin. He further testified that the atherosclerotic process occurs separately in different parts of the body, and atherosclerosis is a systematic disease process in the human body. He indicated that the response to this condition would be lifestyle modifications such as smoking cessation, which the claimant had done, as well as weight loss and dietary changes.

With regard to the assignment of a disability impairment rating, the doctor testified that upon review and comparison of echocardiograms from 2014 and June 2015, the echocardiogram of June 2015 revealed no LVH. Dr. Krauthamer opined that the claimant suffers from hypertension and has an eight (8) percent disability impairment rating of the cardiovascular system. Findings, ¶ 53; Id., p. 20. In his report of

August 29, 2016, Dr. Krauthamer further opined that the claimant suffered from minimal premature ventricular contractions for which he assigned a "Class 2A – 11%" disability rating. Findings, ¶ 54; Respondents' Exhibit 13.

Based on this record, the trial commissioner concluded that the claimant's testimony and medical evidence were credible and persuasive and supported a claim for heart disease and hypertension. She found the opinion offered by Dr. Anthony more persuasive and credible than the opinion of Dr. Krauthamer, and also determined that the claimant had not been denied reasonable or necessary medical care. Finally, she found that the claimant had reached maximum medical improvement on September 3, 2010, with the following permanency ratings: for hypertension, twenty-four (24) percent; for heart disease due to coronary artery disease, twenty-six (26) percent; and for heart disease due to arrhythmia, eleven (11) percent. As a result, she concluded that the claim satisfied the requirements of General Statutes § 7-433c and ordered the respondents to accept the claim and pay permanency benefits based on the combined values chart.

The respondents filed a motion to correct the finding. The motion sought to clarify the medical testimony and requested that the trier find Dr. Krauthamer's opinion more persuasive and credible than the opinion of Dr. Anthony, thereby rendering the claim non-compensable. The trial commissioner denied this motion in its entirety and the respondents have pursued this appeal. The gravamen of their appeal is that the circumstances in this matter are governed by this tribunal's analysis in Brooks, supra, which, in their opinion, mandates dismissal of this claim. The claimant argues that the respondents are misapplying Brooks and the facts of this case support the trial commissioner's conclusion that the claimant presented a proper claim for benefits

pursuant to General Statutes § 7-433c. We find the claimant's arguments more persuasive.

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. 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 respondents contend that the peripheral artery disease from which the claimant was suffering in 2007 was not heart disease and, further, was the proximate cause of the claimant's subsequent coronary ailments in 2009. As a result, they believe the claimant's illness is indistinguishable from the systemic sarcoidosis which, in Brooks, supra, was not deemed to be heart disease. Consequently, they argue that the claimant's illness is outside the ambit of General Statutes § 7-433c.

Having reviewed the record and applicable case law, we are not so persuaded. In O'Brien v. Stamford, 5945 CRB-7-14-7 (September 11, 2015), this board pointed out that

in Brooks, we affirmed a factual finding that the cardiac issues which led to the death of the decedent were clearly the sequelae of his sarcoidosis, an inflammatory ailment similar to cancer which was not specific or isolated to the heart. Moreover, in O'Brien, we noted that in Brooks, the decedent had not been diagnosed with any other sign of coronary disease. As such, the facts in the present matter are clearly distinguishable from Brooks. Indeed, we find the facts in the instant matter more consistent with Brocuglio v. Thompsonville Fire District #2, 6165 CRB-1-16-12 (December 21, 2017), *appeal pending*, A.C. 41237 (January 9, 2018), in which the trial commissioner determined that the claimant's mitral valve ailment was separate from and unrelated to his prior hypertension and pericarditis.

In the case at bar, the trial commissioner cited evidence in the record suggesting that the claimant suffered from peripheral artery disease in 2007 but did not have heart disease. Findings, ¶¶ 13, 17. The record also reflects that the claimant's 2009 coronary artery disease was a separate incident for which the claimant filed a timely notice of claim for General Statutes § 7-433c benefits. Support for this conclusion can be found in the testimony from the respondents' expert witness, Dr. Krauthamer, who testified as follows at the formal hearing:

> Q: Did the arteriosclerosis in the peripheral artery area … cause the blockage in the coronary region?
>
> A: No[4]

June 8, 2015 Transcript, p. 17.

[4] We note that Dr. Krauthamer did testify that arteriosclerosis was a systemic ailment. See June 8, 2015 Transcript, p. 20. We believe that the trial commissioner could have reasonably determined that this ailment was materially different from the systemic inflammatory disease experienced by the claimant in Brooks v. West Hartford, 4907 CRB-6-05-1 (January 24, 2006), given "that there is an element of 'line-drawing' that must take place in defining heart disease." Id. We further note that the trial commissioner found Dr. Krauthamer less persuasive and credible than Dr. Anthony and we may infer that she discounted his opinion on this issue.

In Brocuglio, supra, we cited Holston v. New Haven, 5940 CRB-3-14-5 (May 27, 2015), *aff'd*, 323 Conn. 607 (2016), for the proposition that it is within the trial commissioner's discretion to distinguish between separate and distinct heart diseases. We also cited O'Brien, supra, and Vitti v. Milford, 6066 CRB-4-15-12 (April 21, 2017), *appeal pending*, A.C. 40399 (May 2, 2017), as examples of prior cases in which the respondents argued that this tribunal's analysis in Brooks rendered the claim invalid. We affirmed the trial commissioner in Brocuglio for the following reasons:

> We note that in all these cases, we pointed out that it is the role of the trial commissioner to determine whether an ailment is or is not "heart disease." We extend this reasoning to the role of a trial commissioner in determining whether a "new" heart disease is similar to or different from a prior heart disease. If the new heart disease can be distinguished from the prior disease, then the holding of Holston, supra, renders the subsequent claim jurisdictionally valid.

Brocuglio, supra.

We believe that the record in this matter provided an adequate basis for the trial commissioner's findings that the claimant suffered from heart disease in 2009 and this heart disease was separate and distinct from the prior peripheral artery disease he had experienced in 2007.[5]

There is no error; the May 24, 2017 Finding and Award issued by Jodi Murray Gregg, the Commissioner acting for the Seventh District, is accordingly affirmed.

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

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[5] We uphold the trial commissioner's denial of the respondents' motion to correct. This motion sought to interpose the respondents' conclusions relative to the law and the facts presented and, as such, the trial commissioner retained the discretion to deny this motion. See D'Amico v. Dept. of Correction, 73 Conn. App. 718, 728 (2002), *cert. denied*, 262 Conn. 933 (2003); 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 17th day of JULY 2018 to the following parties:

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