CASE NO. 6268 CRB-6-18-4 : COMPENSATION REVIEW BOARD
CLAIM NOS. 601071158 & 601076851

ROBERT MANGIONE : WORKERS' COMPENSATION
CLAIMANT-APPELLANT COMMISSION

v. APRIL 12, 2019

TOWN OF WEST HARTFORD
EMPLOYER
SELF-INSURED

and

PMA MANAGEMENT CORPORATION OF NEW ENGLAND
THIRD-PARTY ADMINISTRATOR
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Bruce E. Bergman, Esq., Law Offices of Bruce E. Bergman, 63 Imlay Street, Hartford, CT 06105.

The respondents were represented by Marie Gallo-Hall, Esq., Coventry Legal Services, 101 Oak Street, Hartford, CT 06106.

This Petition for Review from the January 26, 2018 Finding & Dismissal of Nancy E. Salerno, Commissioner acting for the Sixth District, was heard October 26, 2018 before a Compensation Review Board panel consisting of the Commission Chairman Stephen M. Morelli and Commissioners Scott A. Barton and Jodi Murray Gregg.[1]

[1] We note that a motion for extension of time was granted during the pendency of this matter.

OPINION

STEPHEN M. MORELLI, CHAIRMAN. The claimant has appealed from the January 26, 2018 Finding & Dismissal (finding) by Commissioner Nancy E. Salerno (commissioner) acting on behalf of the Sixth District. The claimant is a firefighter for the Town of West Hartford who is seeking benefits pursuant to General Statutes § 7-433c, the Heart and Hypertension Act. The following facts are pertinent to our inquiry.

The commissioner's findings reflect that the claimant was hired on November 14, 1990 and, upon entry into the municipality's firefighting service, passed a pre-employment physical which gave no indication that the claimant was suffering from heart disease or hypertension.[2] At some point in the 1990s, following his hire as a firefighter, the claimant was diagnosed with hypertension. The claimant's primary care physician, Amor C. Lomibao, M.D., prescribed Atenolol on April 14, 1997, and Lisinopril on July 23, 1999. The commissioner found that both of these medications were prescribed to address a diagnosis of hypertension.

In November 2003, the claimant applied for "hazmat" certification. In order to be hazmat-certified, the claimant underwent a stress test and echocardiogram, which tests were completed on January 7, 2004. The claimant testified that James E. Kallal, M.D., informed him that he had an enlarged heart but was not suffering from heart disease. The claimant indicated that on April 5, 2004, "he filed a First Report of Injury that set forth a 'possible heart & hypertension and elevated blood pressure claim.'" Findings, ¶ 3.b; see also Respondents' Exhibit 12, p. 61.

[2] The claimant retired on December 31, 2014.

The January 7, 2004 stress test was interpreted as normal. The echocardiogram demonstrated a "[t]echnically adequate study showing mild left ventricular hypertrophy with normal ventricular function. The aortic valve is structurally normal but there is mild regurgitation by Doppler imaging." See Findings, ¶ 4, quoting Claimant's Exhibit A. The trier concluded that any claim related to the claimant's hypertension was untimely because the claimant had neither filed a timely notice of claim nor requested a timely hearing. See Findings, ¶ 3.c; Conclusion, ¶ D. The commissioner also determined that the record was devoid of any evidence indicating that the respondents had paid for any of the medical testing conducted in January 2004.[3]

In the spring of 2013, the claimant developed pneumonia. A course of several rounds of antibiotics failed to resolve the pneumonia, and the claimant was referred to Richard N. Krinsky, D.O., a pulmonologist. The claimant was admitted to Charlotte Hungerford Hospital where he was found to have dysfunctional mitral and aortic cardiac valves. The claimant was then transferred to Hartford Hospital with a diagnosis of endocarditis secondary to a bacterial infection. See Findings, ¶¶ 7-8. On May 30, 2013, Robert C. Gallagher, M.D., a cardiac surgeon, replaced the claimant's aortic valve and repaired the mitral valve. Thereafter, the claimant began treatment with a cardiologist, Joseph E. Abreu, M.D.

[3] In her January 26, 2018 Finding, the trier specifically found the following: "On June 4, 2004, the third-party administrator issued a check in the amount of $1,712.38 to Cardiology, P.C. On June 24, 2004, that check was cancelled. The only payment made under the January 7, 2004 claim was a $10.15 payment to Loss Control Management, Inc. There was no evidence presented that the respondents paid for any medical bills, including bills for the November 2003 and/or January 2004 testing, under any claim made pursuant to the Heart & Hypertension Act." Findings, ¶ 5, *citing* Claimant's Exhibits B, C; Respondents' Exhibit 13. Thus, while there was an initial payment, it was retracted. We note that on appeal, the appellant has not identified any payments which would serve to satisfy the written notice exception of General Statutes § 31-294c(a).

Relying in part on the opinion of the claimant's treating physician, Dr. Abreu, the commissioner determined that the heart disease which had been found in the 2004 cardiac testing was related to the "claimant's longstanding hypertension." Conclusion, ¶ F. Given that the claimant neither filed a written notice of claim ("form 30C") nor satisfied any of the statutory exceptions to the requirement of written notice, the claim for General Statutes § 7-433c benefits on the basis of his hypertension was time-barred. See Conclusion, ¶ F.

The issue on appeal thus turns on whether the claimant's cardiac mitral and aortic valve repair/replacement constituted an instance of heart disease within the ambit of General Statutes § 7-433c. The commissioner concluded that the claimant's heart condition was "not the type of heart disease contemplated within the meaning of Connecticut General Statutes § 7-433c…" and dismissed the claim. Conclusion, ¶ J.

However, we find that our Supreme Court's decision in Holston v. New Haven Police Dept., 323 Conn. 607 (2016), requires a reversal of the commissioner's conclusion that the claimant's heart condition failed to satisfy the statutory elements for a diagnosis of heart disease as contemplated by the provisions of General Statutes § 7-433c. Our conclusion reversing the commissioner's January 26, 2018 finding is further buttressed by the decision of this board in Brocuglio v. Thompsonville Fire District #2, 6165 CRB-1-16-12 (December 21, 2017), *appeal pending*, A.C. 41237 *(*January 9, 2018).

In Holston, the claimant, who was seeking General Statutes § 7-433c benefits for heart disease, filed a claim pursuant to General Statutes § 7-433c for hypertension and heart disease on March 14, 2011. The factual circumstances were such that the commissioner found that the claimant had been diagnosed with hypertension more than

one year from the date he filed his claim. However, the claimant suffered a myocardial infarction on March 10, 2011. Although the commissioner found that the claimant's "hypertension was a significant contributing factor in the development of his heart disease," the existence of other contributing factors to the claimant's heart disease led the commissioner to dismiss the claim for hypertension but to award General Statutes § 7-433c benefits on the basis of the claimant's heart disease. Id., 611. The Holston court affirmed this award, and its analysis appears to stand for the proposition that an untimely claim for hypertension under General Statutes § 7-433c does not foreclose a timely claim for heart disease because they are separate conditions.

In Brocuglio, the claimant was diagnosed with pericarditis in November 2000. On July 3, 2013, the claimant underwent a coronary bypass and mitral valve replacement, and the medical evidence included an opinion by the commissioner's examiner indicating that the "pericarditis represents a completely separate episode of heart disease." Id. Findings, ¶ 53. The trier concluded that "pericarditis and mitral valve replacement and coronary artery disease are separate and distinct conditions." Id. This board affirmed, and we are persuaded that the same reasoning applies to the matter at hand; i.e., dysfunction in the valves of the claimant's heart represents another form of heart disease.

In McGinty v. Stamford Police Department, 6197 CRB-4-17-6 (July 17, 2018), *appeal pending*, A.C. 41943 (August 3, 2018), we referenced Brocuglio, supra, and stated that we were affirming the trier's findings in McGinty because:

> the role of the trial commissioner [is] 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.

McGinty, supra.

In essence, we are being asked to determine whether the commissioner in the present matter erroneously determined that the dysfunction in the claimant's mitral and aortic valves and related cardiac surgery did not constitute heart disease pursuant to General Statutes § 7-433c. We find, contrary to the commissioner's conclusion, that the claimant's heart condition did constitute heart disease. Moreover, the trier's reliance on the fact that the "claimant's need for [cardiac] valve replacements in 2013 and 2014 was due to bacteria originating elsewhere in the body and migrating to the heart through the blood stream" did not provide a sufficient justification for concluding that the claimant's heart issues did not constitute "heart disease" as contemplated by General Statutes § 7-433c. Conclusion, ¶ J.

In addition to the aforementioned cases, our conclusion relies on the language of General Statutes § 7-433c[4] itself. In summary, in order to be among the class of persons

[4] General Statutes Sec. 7-433c provides in pertinent part (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

to whom the conclusive presumption set out in General Statutes § 7-433c applies a claimant must satisfy the threshold elements of the statute. The claimant must be: (1) among the class of persons that the statute identifies as eligible (i.e,-., a uniformed member of a paid municipal fire department or a regular member of a paid municipal police department), (2) must have successfully passed a physical examination upon entry into service that did not reveal any evidence of hypertension or heart disease and (3) suffered a condition of impairment caused by hypertension or heart disease.[5]

If the claimant satisfies the elements of General Statutes § 7-433c it is presumed that the hypertension or heart disease arose out of the course of the claimant's employment. As noted herein, the trial commissioner was required to determine if the claimant's 2013 2014 cardiac issues constituted "heart disease". The trial commissioner was not required to determine if the type of heart disease was one that the statute was intended to cover. It was only necessary to determine if the claimant's malady was heart disease or a form thereof.

When applying the language of a statute we are guided by the rule of statutory construction set out in General Statutes § 1-1 (a) "In the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language; and technical words and phrases, and such as have acquired a peculiar and appropriate meaning in the law, shall be construed and understood accordingly."

---

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.

[5] For the sake of discussion we have summarized the salient points of the statute relevant to our consideration. It should be noted that Sec. 7-433c(b) provides, "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."

When confronted with a question as to whether a malady qualifies as heart disease we are guided by the opinion medical expert witnesses.[6] In a reference to the deposition of Dr. Martin Krauthamer in Finding ¶10 the commissioner states the following. "during his deposition, Dr. Krauthamer explained that endocarditis 'is a disease of the heart because the heart is diseased because the bacteria have invaded it, but it is not a native heart disease that occurred as a disease of the heart—it became a disease of the heart when the bacteria invaded the heart.' (Respondent's Exhibits 1 and 2 at page 28)". We see no language in General Statutes § 7-433c limiting the forms of heart disease to only those that are "native" heart disease. There is no distinction drawn by the legislature as to types of heart disease covered under General Statutes § 7-433c. Therefore, the statute does not require the exclusion of a form of heart disease for which the etiology is, as here, a bacterial infection. [7]

We are aware that there may be instances when hypertension and/or heart disease may not fall within the ambit of General Statutes § 7-433c. We recognize that some may believe that our conclusion here is inapposite to our conclusion in Brooks v. West Hartford, 4907 CRB-6-05-1 (January 24, 2006). In Brooks we affirmed the trial commissioner's determination the decedent's sarcoidosis was not heart disease under General Statutes § 7-433c. Specifically referenced and relied on by the trial commissioner in Brooks was the opinion of a medical expert stating that the decedent's sarcoidosis was not heart disease. However, in the instant matter there is an opinion

[6] "An exception to the general rule [requiring] expert medical opinion evidence ... is when the medical condition is obvious or common in everyday life....
Boone v. William W. Backus Hosp., 272 Conn. 551, 567 (2005)

[7] Query as to once the situs of the malady was in the cardiac valves whether an expert medical opinion was necessary to determine heart disease was present. It strikes us that once a malfunction is identified to exist within heart's anatomy it is within the common ken of laymen to declare it as heart disease.

that the decedent's condition was heart disease. See also, Korn v. Guilford, 6178 CRB-3-17-3 (March 21, 2018) (medical expert opined that exercise-induced hypertension was not considered to be medical hypertension).

Finally, we consider a procedural issue raised by the respondents. The respondents filed a motion to dismiss the claimant's appeal on the grounds that it was not timely filed. Our review of the record indicates that the trier's finding was issued on January 26, 2018. On February 6, 2018, the claimant filed a motion for extension of time to file a motion to correct with the commissioner. On February 7, 2018, the respondents filed an objection to the claimant's motion for extension of time. On February 9, 2018, the commissioner granted the claimant's motion for extension of time and denied the respondents' objection to the claimant's motion for extension of time. The claimant's motion for extension of time to file a motion to correct sought an extension until forty-five days after receipt of the transcript. The motion to correct was filed on March 23, 2018.

On March 29, 2018, the respondents filed a motion to dismiss the claimant's appeal, contending that the appeal was not timely filed.[8] The appellees' argument relies, inter alia, upon our Supreme Court's analysis in Stec v. Raymark Industries, Inc., 299 Conn. 346 (2010). The appellees contend that in Stec, the court acknowledged that there is a twenty-day time period following a commissioner's award during which an appellant must file its appeal. That proposition is certainly consistent with § 31-301 (a) of the

[8] The appellees' motion to dismiss does not suggest that the claimant's motion to correct was not timely filed within the period extended by the commissioner.

Workers' Compensation Act.[9] However, the factual circumstances in Stec were substantially different from those in the present matter.

In Stec, the commissioner issued his award on September 29, 2006. The appellant filed nothing relating to the prosecution of an appeal until November 8, 2016, at which time the appellant filed a motion to correct. This motion to correct was clearly filed more than twenty days after the trier's decision. As such, no documentation was filed by the Stec appellant that arguably could serve as a motion which would toll the time for filing an appeal.

Subsequent to the legislative extension of the appeal period in § 31-301 (a) from ten days to twenty days, this board has held that a motion to correct filed within the appeal period can toll the appeal period.[10] See Turrell v. State/DMHAS, 5640 CRB-8-11-3 (March 21, 2012), *aff'd*, 144 Conn. App. 834 (2013), *cert. denied*, 310 Conn. 930 (2013); Garvey v. Atlas Scenic Studios, Inc., 5493 CRB 4-09-9 (February 14, 2012).

We note that the preferred appeal procedure is for an appellant to file a petition for review within the twenty-day time period set out in § 31-301 (a). That is generally the methodology by which any questions relative to this board's jurisdiction over an alleged untimely appeal are settled post-haste. Nonetheless, if there is one thing of which we are assured, litigants and their representatives can be quite creative in their legal filings and submissions. Far be it from this board to chill a party's use of a legal

[9] General Statutes Sec. 31-301(a) provides: "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."

[10] See Public Act 01-22.

stratagem which it believes will more accurately advance or articulate its quest, as long as the stratagem is consistent with our law. However, in the instant matter, the appeal is timely.

There is error; the January 26, 2018 Finding & Dismissal by Nancy E. Salerno, the Commissioner acting for the Sixth District, is accordingly reversed and remanded for additional proceedings consistent with this Opinion.

Commissioners Scott A. Barton and Jody Murray Gregg concur.