CASE NO. 6273 CRB-5-18-5 : COMPENSATION REVIEW BOARD
CLAIM NO. 300078471

ARLETTE JACKSON : WORKERS' COMPENSATION
CLAIMANT-APPELLANT COMMISSION

v. APRIL 4, 2019

YALE UNIVERSITY
EMPLOYER
SELF-INSURED
RESPONDENT-APPELLEE

APPEARANCES: The claimant was self-represented at proceedings below and during the course of this appeal.

The respondent was represented by Neil J. Ambrose, Esq., Letizia, Ambrose & Falls, P.C., 667-669 State Street, Second Floor, New Haven, CT 06511.

This Petition for Review from the May 4, 2018 Finding and Decision of Charles F. Senich, the Commissioner acting for the Third District, was heard on August 17, 2018 before a Compensation Review Board panel consisting of Commissioners Jodi Murray Gregg, Peter C. Mlynarczyk and David W. Schoolcraft.

OPINION

JODI MURRAY GREGG, COMMISSIONER. The claimant has appealed from a May 4, 2018 Finding and Decision (finding) reached by Commissioner Charles F. Senich (commissioner) at the conclusion of a formal hearing. The claimant argues that she presented sufficient evidence to prove that her current medical condition and disability are the results of an accepted compensable injury sustained on January 8, 2007, and the commissioner erred in denying benefits for that incident. The respondent argues that the commissioner weighed the evidence presented at the hearing and deemed more credible evidence suggesting that the claimant's condition was the result of an etiology unrelated to her work accident. We find that the claims of error advanced in this appeal essentially concern issues of fact, not law, and it is well-settled that an appellate panel may not retry the facts on appeal. Given that the record contains sufficient probative evidence to sustain the commissioner's decision, we affirm the finding.

The commissioner reached the following factual findings at the conclusion of the formal hearing in this matter. The commissioner took administrative notice of an approved voluntary agreement of August 1, 2007, acknowledging that the claimant had sustained a compensable back injury while at work on January 8, 2007. The claimant alleged that she injured her back while lifting laundry; the evidentiary record indicated that she had a history of back problems. On January 9, 2007, the claimant was treated at Yale University Health Services for back pain and then sought treatment with Kenneth M. Kramer, M.D., on January 29, 2007. In his report of that date, Kramer diagnosed the claimant with "cervical and lumbar strains … my recommendations consisting of physical therapy with a focus on therapeutic exercise…." Joint Exhibit 1 (Kramer report

of January 29, 2007, p. 2). Dr. Kramer also performed facet injections to treat the claimant's back pain**.** See Joint Exhibit 1 (Kramer report of March 22, 2007). The claimant underwent an MRI of her lumbar spine on May 4, 2007, which demonstrated the following:

> IMPRESSION:
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> 1. L4-5 posterior right lateral disc protrusion.
> 2. Some canal narrowing is incidentally noted with degenerative changes at L3-4.
> 3. Probable right adnexal cyst with fibroid uterus. Consideration for pelvic ultrasound is recommended.

Findings, ¶ J, *quoting* Joint Exhibit I (Connecticut Orthopaedic Specialists, P.C., MRI report of May 4, 2007).

On May 8, 2007, Kramer reported that the MRI scan was "generally unremarkable" but did demonstrate a "lateral right sided disc protrusion." Findings, ¶ K, *quoting* Joint Exhibit 1 (Kramer report of May 8, 2007). On June 21, 2007, Kramer issued a more detailed report relative to the claimant's condition in which he stated:

> I received your correspondence of 6/20/07 regarding Arlette Jackson. She has, in medical probability, reached maximum medical improvement with regard to her work-related lumbar sprain/disc injury of January 2007, and at this point should be on permanent light duty restrictions of 15 pounds lifting, no repetitive lifting or bending. In accordance with AMA Guidelines she has a DRE Category II 7 percent permanent partial impairment of the lumbar spine on the basis of this injury, in medical probability, given her chronic pre-existing history of lower back injury and back pain in her medical records, extending back to work-related and motor vehicle-related incidents in 2006, half of this impairment is attributable to her pre-existing history of lower back problems, the [remaining] half directly attributable to the work-related incident of 1/8/07.

Findings, ¶ L, *quoting* Joint Exhibit 1 (Kramer report of June 21, 2007).

The claimant underwent a respondent's medical examination with Gerald J. Becker, M.D., on June 11, 2007. Becker noted that the claimant had experienced "chronic back pain dating back to well before her injury in January of 2007" and "there are subjective complaints that are well in excess of objective findings…." Findings, ¶ N, *quoting* Joint Exhibit 1 (Becker report of June 11, 2007, p. 3). He opined that "there is considerable psychological overlay" and "her current symptoms are largely due to her pre-existing condition of degenerative disc disease at L4-5 but that there is a very small contribution from her work activities of January 2007." Id. Becker believed that the claimant had a light-duty work capacity.

The commissioner noted that the claimant had been involved in several motor vehicle accidents subsequent to January 2007 and had treated with a number of physicians, including Thomas J. Arkins, M.D., and Michael J. Robbins, D.O., a pain management doctor. On April 11, 2016, the claimant sought treatment with Jeffrey M. Sumner, M.D., who recommended that the claimant undergo a decompression and fusion from L2 to L5. Sumner performed this back surgery on the claimant and, on September 8, 2017, opined as follows:

> She [has] a previous Worker's Comp. injury that has been discussed on numerous occasions in the chart. She [has] reached maximum medical improvement and has a prior partial stability 25% based on AMA guidelines 5. She [has already] been informed that the Worker's Compensation injury does not encompass the entire fusion so of the 25% just given 12-1/2% belongs to Worker's Comp. and 12-1/2% is a function of degeneration [which] occurred after her injury.

Findings, ¶ Y, *quoting* Joint Exhibit 1 (Sumner report of September 8, 2017, pp. 1-2).

In addition to the respondent's medical examination with Becker, the claimant also underwent a second respondent's medical examination and a commissioner's

examination. On February 23, 2016, the claimant underwent a respondent's medical examination with Judith Gorelick, M.D., who opined that "the patient's ongoing symptomatology [was] principally related to her preexisting disease and not substantially [to] the incident of January 8, 2007." Findings, ¶ U, *quoting* Joint Exhibit 1 (Gorelick report of February 23, 2016, p. 8). On July 12, 2017, Howard Lantner, M.D., conducted a commissioner's examination of the claimant and opined as follows:

> Ms. Jackson has had low back complaints since prior to the January 2007 work related injury. There were lumbar spine complaints prior to 2007 and lumbar x-rays were obtained in 2006. She went on to have progressive spondylosis leading to a multilevel lumbar decompression and fusion surgery with Dr. Sumner in 2016. It is my opinion that she may have sustained an exacerbation of her lumbar strain as a result of the January 2007 work related injury but this injury was [not] a significant contributing factor in leading to the surgery which transpired 9 years later. The surgery was as a result of the natural history of the underlying degenerative process and the January 2007 injury was not a significant contributing factor in this process.[1]

Findings, ¶ AA, *quoting* Commissioner's Exhibit 1, pp. 3-4.

On the basis of the foregoing, the commissioner reached the following conclusions:

1. I do not find that the claimant's current back problems and need for surgery are a result of the accepted work-related injury of January 8, 2007.

2. Therefore, the claim for temporary total disability benefits pursuant to C.G.S. § 31-307 from January 8, 2007, forward is denied.

3. Further, the claim for medical bills pursuant to C.G.S. § 31-294d is denied.

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[1] We note that in Findings, ¶ AA, and Conclusion, ¶ 17, of the trial commissioner's May 4, 2018 Finding and Decision, the word "not" was omitted from Dr. Lantner's July 12, 2017 report. In light of the totality of Lantner's opinion, we consider this harmless "scrivener's error." D'Amico v. Dept. of Correction, 73 Conn. App. 718, 729 (2002), *cert. denied*, 262 Conn. 933 (2003).

4. I find that the claimant has failed to sustain her burden of proof in this matter.

5. I do not find the testimony of the claimant to be fully credible and persuasive.

6. The claimant was involved in several personal injury accidents over the years that were not work-related.

7. Subsequent to January of 2007, the claimant sought treatment with various doctors as a result of motor vehicle accidents that the claimant was involved in.

8. I find the opinions and reports of Dr. Kramer fully credible and persuasive.

9. I find the opinions and reports of Dr. Becker to be fully credible and persuasive.

10. On June 11, 2007, Dr. Becker reported that the claimant's current symptoms are largely due to her preexisting condition of degenerative disk disease at L4-5, but that there is a very small contribution from her work activities of January 2007.

11. I do not find the opinions and reports of Dr. Arkins fully credible and persuasive.

12. I do not find the opinions and reports of Dr. Robbins fully credible and persuasive.

13. I find the opinions and reports of Dr. Gorelick fully credible and persuasive.

14. Dr. Gorelick opined that the patient's ongoing symptomatology is principally related to her preexisting disease and not substantially by the incident of January 8, 2007.

15. I do not find the opinions and reports of Dr. Sumner fully credible and persuasive.

16. I find the opinion of Dr. Lantner fully credible and persuasive.

17. On July 12, 2017, Dr. Lantner reported:

> Ms. Jackson has had low back complaints since prior to the January 2007 work related injury. There were lumbar spine complaints prior to 2007 and lumbar x-rays were obtained in 2006. She went on to have progressive spondylosis leading to a multilevel lumbar decompression and fusion surgery with Dr. Sumner in 2016. It is my opinion that she may have sustained an exacerbation of her lumbar strain as a result of the January 2007 work related injury but this injury was [not] a significant contributing factor in leading to the surgery which transpired 9 years later. The surgery was as a result of the natural history of the underlying degenerative process and the January 2007 injury was not a significant contributing factor in this process.

Conclusion, ¶¶ 1-17.

The commissioner dismissed the claimant's bid to have her medical treatment and surgery attributed to the prior accepted compensable injury. He also denied her claim for temporary total disability benefits. The claimant, who is proceeding as a self-represented party, filed a timely petition for review from the finding but did not file any pleading styled as a motion to correct. She has filed two reasons for appeal, an appellant's brief, and a number of other documents pertaining to evidence presented at the hearing. The gravamen of her appeal is that she believes that the commissioner did not credit the opinions of her treating physicians who opined that her current medical condition was compensable. She criticizes what she describes as the commissioner's overemphasis on the "car situation"; i.e., the non-compensable motor vehicle accidents in which she has been involved. The respondent argues that the commissioner's decision was consistent with the opinions on the record which he found most reliable. We find the respondent's position more persuasive.

The standard of deference we are obliged to apply to a 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).

In the present matter, the claimant's argument appears to arise from her belief that that once the respondent had accepted her 2007 back injury, it had a continuing obligation to authorize any medical treatment for her back recommended by her treating physicians. We note that within a year from the initial injury, Kramer, the claimant's treating physician, opined that she had reached maximum medical improvement from that injury. See Findings, ¶ L, *citing* Joint Exhibit 1 (Kramer report of June 21, 2007). Subsequent to that point in time, the respondent was within its rights to leave the claimant to her proof that her condition had deteriorated and her compensable injury was the cause of that deterioration. See Camp v. Lupin Pharmaceuticals, Inc., 5936 CRB-6-14-05 (April 24, 2015), *appeal withdrawn*, A.C. 37932 (November 14, 2016).

Moreover, it is well-settled that the issue of causation between a claimant's current condition and a prior compensable injury must be established to the commissioner's satisfaction in order to award benefits. In Zezima v. Stamford, 5918

CRB-7-14-3 (May 12, 2015), this board observed that "[e]ssentially the question of whether a nexus of proximate cause exists between a compensable injury and a subsequent medical condition is, and always has been, an issue of fact for the trial commissioner to resolve." Id.

> The question of proximate causation … belongs to the trier of fact because causation is essentially a factual issue…. It becomes a conclusion of law only when the mind of a fair and reasonable [person] could reach only one conclusion; if there is room for a reasonable disagreement the question is one to be determined by the trier as a matter of fact. (Citations omitted; internal quotation marks omitted.)

Sapko v. State, 305 Conn. 360, 373 (2012), *quoting* Stewart v. Federated Dept. Stores, Inc., 234 Conn 597, 611 (1995).

In the present matter, the commissioner found "fully credible and persuasive" the opinions of Gorelick and Lantner, Conclusion, ¶¶ 13, 16, both of whom opined that the claimant's current medical condition was not due to her compensable injury but, rather, was primarily the result of pre-existing degenerative changes to her spine. It is axiomatic that the trial commissioner is responsible for evaluating the weight and probative value of medical evidence. "It is the trial commissioner's function to assess the weight and credibility of medical reports and testimony…." O'Reilly v. General Dynamics Corp., 52 Conn. App. 813, 818 (1999), *quoting* Gillis v. White Oak Corp., 49 Conn. App. 630, 637, *cert. denied*, 247 Conn. 919 (1998). In the present appeal, the commissioner's conclusions are consistent with expert testimony he found persuasive and, in a "dueling expert" case, we must respect that determination.[2] See Dellacamera v. Waterbury, 4966 CRB-5-05-6 (June 29, 2006), *appeal withdrawn*, A.C. 27853 (September 12, 2006).

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[2] We note that the respondent's brief cites various medical reports from the claimant's treating physicians suggesting that she did not accurately recall the mechanism of her 2007 injury when she offered her medical history to those physicians. To the extent that the trial commissioner believed that those witnesses

The claimant argues that it was error for the commissioner to not rely upon the opinions of Arkins and Robbins; however, both O'Reilly, supra, and Dellacamera, supra, provide a basis for the argument that the commissioner retained the discretion to determine which medical opinion(s) were more reliable. The claimant also argues that it was error for the commissioner and the medical witnesses to consider the impact of the motor vehicle accidents in which the claimant had been involved subsequent to her compensable injury. However, any evaluation of the claimant's present medical situation requires an examination of the totality of the circumstances, which examination reasonably encompasses an investigation into possible alternative explanations for her injuries. In any event, both Gorelick and Lantner cited degenerative spinal changes as the primary factor in the claimant's current condition.

Had the commissioner reached a conclusion unsupported by probative evidence in the record, the claimant's appeal would be meritorious. Given that our review of the opinions of Gorelick and Lantner indicates that their opinions supported the commissioner's conclusions, we are obligated, consistent with Fair, supra, to affirm the decision of the commissioner. As this tribunal has previously observed, "[i]f the trier is not persuaded by the claimant's evidence, there is nothing that this board can do to override that decision on appeal."[3] Wierzbicki v. Federal Reserve Bank of Boston, 4147 CRB-1-99-11 (December 19, 2000), *appeal dismissed*, A.C. 21533 (June 14, 2001).

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rendered an opinion based on inaccurate assumptions, he was at liberty to discount their opinions. See Abbotts v. Pace Motor Lines, Inc., 4974 CRB-4-05-7 (July 28, 2006), *aff'd*, 106 Conn. App. 436, *cert. denied*, 287 Conn. 910 (2008).

[3] Our customary deference to a commissioner's factual findings is enhanced in cases such as the present matter, in which the claimant did not avail herself of the opportunity to file a motion to correct. In such a situation, this board is essentially "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). See also DeJesus v. R.P.M. Enterprises, Inc., 6201 CRB-1-17-7 (November 8, 2018); Stevens v. Raymark Industries, Inc., 5215 CRB-4-07-4 (March 26, 2008), *appeal dismissed*, A.C. 29795 (June 26, 2008).

There is no error; the May 4, 2018 Finding and Decision of Charles F. Senich, the Commissioner acting for the Third District, is accordingly affirmed.

Commissioners Peter C. Mlynarczyk and David W. Schoolcraft concur in this Opinion.