

CASE NO. 6286 CRB-2-18-8 : COMPENSATION REVIEW BOARD
CLAIM NO. 200131754

RICHARD A. DELORGE : WORKERS' COMPENSATION
CLAIMANT-APPELLEE COMMISSION

v. : AUGUST 5, 2019

CITY OF NORWICH/
POLICE DEPARTMENT
EMPLOYER
SELF-INSURED

and

FUTURECOMP/USI INSURANCE SERVICES
THIRD-PARTY ADMINISTRATOR
RESPONDENTS-APPELLANTS

APPEARANCES: The claimant was represented by Lawrence F. Morizio,
Esq., Morizio Law Firm, P.C., 6580 Main Street, Suite 200,
Stratford, CT 06614.

The respondents were represented by David C. Davis, Esq.,
McGann, Bartlett & Brown, L.L.C., 111 Founders Plaza,
Suite 1201, East Hartford, CT 06108.

This Petition for Review from the July 13, 2018 Finding &
Award by Thomas J. Mullins, the Commissioner acting for
the Second District, was heard January 25, 2019 before a
Compensation Review Board panel consisting of
Commissioners Peter C. Mlynarczyk, David W.
Schoolcraft and Daniel E. Dilzer.

OPINION

PETER C. MLYNARCZYK, COMMISSIONER. The respondents in this matter have appealed from a Finding & Award in which Commissioner Thomas J. Mullins (commissioner) awarded the claimant temporary total disability benefits as a result of a compensable heart and hypertension condition. The commissioner also determined that the claimant's retinal aura migraines were the result of that compensable condition and directed the respondents to provide medical care for this ailment. The respondents contest both conclusions. Upon review, we find that there was a sufficient amount of evidence which the commissioner found credible and persuasive to support his conclusions. Accordingly, we affirm the Finding & Award in this matter.

The claimant had been a full-time police officer for the City of Norwich, and the parties stipulated that he had sustained a compensable injury pursuant to General Statutes § 7-433c prior to his retirement in 1987. The commissioner identified the issues for consideration as whether the claimant had been totally disabled due to medical conditions resulting from his compensable hypertension "including but not limited to migraines with aura, from June 8, 2015 to June 7, 2016," and whether the migraines with aura were a compensable sequela of the claimant's compensable hypertension.¹ Issues, ¶ 1.

The commissioner's findings provide the following background information. Subsequent to his retirement in 1987, the claimant had worked as a security guard and as a gaming commissioner with Foxwoods casino. He sustained the first of a series of

¹ The respondents voluntarily began paying total incapacity benefits as of June 7, 2016, when the claimant was hospitalized due to his compensable heart condition. The claimant, however, contended that he was entitled to total incapacity benefits for the year preceding that hospitalization, something the respondents contested. The respondents argued that if the claimant had been incapacitated during the prior year, it was due to his migraine condition. The respondents maintained that the migraine condition was unrelated to the compensable heart and hypertension condition, while the claimant contended that it was related.

post-retirement cardiac events in 2000, when he was diagnosed at The William W. Backus Hospital (Backus Hospital) with a myocardial infarction. Subsequent to that infarction, a coronary artery bypass graft procedure was performed at St. Francis Hospital. Six months before the bypass procedure, the claimant suffered symptoms which included sweating, nausea, tightness in the chest, shortness of breath, and lightheadedness.² The claimant was disabled for two years after this surgery but eventually returned to work with a private security firm.

The commissioner further found that the claimant sustained another heart attack in 2006 and, prior to this event, had experienced symptoms that included nausea, vomiting, difficulty catching his breath, and lightheadedness. Following this 2006 heart attack, the claimant underwent a stent procedure at St. Francis Hospital, which procedure again rendered the claimant totally disabled for some period of time.

In 2012, the claimant began treating for his heart and hypertension condition with a physician in South Carolina, Mark P. Karavan, M.D., who performed a “re-stent” procedure after the claimant suffered yet another heart-related incident in 2012. The claimant described his condition prior to the 2012 cardiac event as involving “the same pain, the same thing, nausea, shortness of breath,” adding, “[e]very time I’ve ever had a heart episode they’re all the same.” December 19, 2017 Transcript, p. 33. Karavan had opined that the claimant was totally disabled from work due to his compensable heart and hypertension condition on multiple occasions prior to the period of disability in dispute in the present matter. In an office note dated November 13, 2013, he wrote that

“Mr. Delorge has a history of myocardial infarction, subsequent coronary artery bypass

² The claimant also testified that he suffered a stroke at some point after the 2000 bypass procedure. He testified that after the stroke, he treated with a neurologist, Anthony G. Alessi, M.D., for symptoms such as headaches.

surgery and has received coronary stents. He continues to have chest pain and is New York Heart Association Class III. He is permanently disabled.” Claimant’s Exhibit A.

The commissioner also found that the claimant began to suffer from headaches in 2014, and Karavan referred him to Michael M. McCaffrey, M.D. McCaffrey diagnosed the claimant with a possible seizure disorder and headaches related to the underlying strokes; he also opined that the claimant’s seizures “were secondary to his previous stroke” and the claimant was unemployable due to the frequency and severity of the seizures. Claimant’s Exhibit B [June 8, 2015 office note]. The claimant was prescribed medication for the seizures.

Karavan also referred the claimant to a board-certified neurologist, Jonathan L. Halford, M.D., in December 2015. Halford diagnosed retinal migraines as the cause of the claimant’s headaches and believed this condition could be secondary to his cardiac and hypertension ailments. Halford opined that the retinal migraines rendered the claimant unable to seek gainful employment until his medical condition stabilized.

The claimant was back in Connecticut on June 5, 2016, when he was hospitalized at Backus Hospital with symptoms of pain, sweating and vomiting. He was also experiencing angina symptoms which he described as “identical to his past symptoms.” Claimant’s Exhibit E [June 6, 2016 Backus Hospital Consultation Report, p. 2]. The hospital staff noted that symptoms had been progressing over the past six months and recommended cardiac catheterization. The claimant was transferred to Hartford Hospital on June 6, 2016, where he underwent a repeat coronary artery bypass graft surgery on June 13, 2016, performed by Jonathan A. Hammond, M.D. The claimant began receiving total incapacity benefits.

A cardiologist, John A. Foley, M.D., was the claimant's treating physician following the bypass procedure. He assessed the claimant's heart and hypertension condition post-surgery as well as his medications to control ocular migraines. He believed the ocular migraines were related to the claimant's underlying hypertension and were "part of his disability under the heart and hypertension coverage." Claimant's Exhibit D [November 23, 2016 Progress Note]. Foley referred the claimant to a neurologist, Amre Nouh, M.D., in order to try and prevent further strokes following the bypass procedure. Nouh's August 14, 2017 Progress Note indicated that the claimant stated his migraine episodes were "markedly improved." Claimant's Exhibit H.

At the formal hearing on December 19, 2017, the claimant testified that he had recovered well from the June 2016 bypass procedure and was presently not suffering from migraines. While he believed, as of the date of the formal hearing, that he could resume employment, he said that immediately after the 2016 surgery, it would have been impossible to have held employment. See December 19, 2017 Transcript, p. 49.

In addition to the reports of the various treating physicians, the commissioner considered evidence presented by two other medical experts. Robert H. Berland, M.D., conducted a records review for the respondents. The commissioner found that Berland had been "noncommittal" relative to whether the claimant's retinal migraines rendered him incapable of gainful employment. Findings, ¶ 55. The commissioner also found that Berland had deferred to the claimant's treating physicians regarding whether the claimant's hypertension or strokes had rendered him incapable of employment.

A commissioner's examination was performed by Robert L. Lesser, M.D., a neuro-opthamologist, who was asked to opine on whether the claimant's migraines were

compensable and totally disabling. The commissioner found that Lesser had “related the claimant’s migraine with aura to the underlying hypertension claim...” Findings, ¶ 57. He further found that Lesser did not think the migraines alone were “totally disabling,” *id.*, but would defer to the treating physicians on the issue of whether the claimant had been totally disabled from his combined conditions.

Based on the various opinions of the claimant’s treating physicians, the commissioner concluded that the claimant had been totally disabled from work during the period from June 8, 2015 to June 7, 2016. The commissioner specifically relied upon the following opinions: (1) November 13, 2013 correspondence from Karavan stating that the claimant was “permanently disabled,” Conclusion, ¶ 3, *quoting* Claimant’s Exhibit A; a June 8, 2015 opinion from McCaffrey stating that the claimant was totally disabled; (3) Halford’s opinions from January and March of 2016 stating that the claimant was totally disabled; and (4) a December 5, 2017 opinion from Foley stating that the claimant was totally disabled for the year preceding his June 2016 hospitalization for bypass surgery.

Regarding the compensability of the migraines, the commissioner, in his conclusion, noted that Halford had opined that the claimant’s migraines were compensable. See Conclusion, ¶ 9. The commissioner also noted that the commissioner’s examiner, Lesser, had opined that the migraines were related to the claimant’s underlying hypertension. See Conclusion, ¶ 11.

In addition to finding the claimant’s testimony credible and persuasive, the commissioner also found credible and persuasive the opinions of McCaffrey, Halford, Foley, Karavan and Nuh. He found the opinions of Lesser and Berland to be “credible,”

but did not state that he found them persuasive. Order, ¶ B. In the end, he held that the claimant's "migraine with aura condition" was compensable and awarded the claimant temporary total disability benefits from June 8, 2015 to June 7, 2016. Order, ¶ G.

The respondents filed a motion to correct seeking to substitute findings that the claimant was not temporarily totally disabled during the period in question. They also sought to substitute findings to the effect that the claimant's headache condition was not compensable; specifically, the respondents sought a finding reflecting Lesser's opinion that the headaches were *not* linked to the claimant's compensable heart disease and hypertension. The commissioner denied this motion in its entirety and the respondents have pursued this appeal, contending that only the headaches with aura could justify an award of temporary total disability benefits, and the evidence supporting both disability and compensability was inadequately based on the testimony of the commissioner's examiner. The claimant argues that whatever shortcomings may exist in the testimony of any one witness, the totality of the circumstances supports the commissioner's decision. We find the claimant's position more persuasive.

The standard of deference we are obliged to apply to a commissioner's findings and legal conclusions on appeal is well-settled. "The 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 respondents argue that the claimant can only prevail on the issue of temporary total disability if he establishes that causation of his retinal migraines was due to his compensable condition. We note, however, that the claimant did not pursue relief at the formal hearing upon that basis alone.

You’ll see Dr. Foley ultimately deemed Mr. Delorge totally disabled from work after he had done Mr. Delorge’s bypass, or treated him post bypass, as well. And those records you’ll see which have been marked into evidence today.

So, in summary the [panoply] of symptoms that lead to Mr. Delorge’s disability are not limited to the migraines that we’re claiming still should be deemed compensable today.

Should you find that those migraines are not compensable, it is still within your purview to find that Mr. Delorge was totally disabled from gainful employment from June 8, 2015 to June 7, 2016 based on the medical evidence before you.

December 19, 2017 Transcript, pp. 9-10.

The commissioner found that all of the claimant’s treating physicians during this period were “credible and persuasive.” Orders, ¶ C. On November 13, 2013, Karavan described the claimant as “permanently disabled” due to his cardiac issues. Claimant’s Exhibit A. On June 8, 2015, McCaffrey determined that the claimant was “unemployable at this time” due to seizures he deemed “more than likely secondary to [the claimant’s]

previous stroke.”³ Claimant’s Exhibit B. On May 23, 2016, Halford deemed the claimant “disabled from gainful employment due to his frequent retinal migraines.” Claimant’s Exhibit C. On December 5, 2017, Foley opined that due to the claimant’s cardiovascular condition and based on reasonable medical probability, he was “disabled from gainful employment from the period of June 2015 to June 2016.” Claimant’s Exhibit D. The commissioner chose to credit a substantial number of medical opinions which supported his conclusion concerning the claimant’s period of total disability.

In affirming this conclusion, we look to this board’s analysis in Katsovich v. Herrick & Cowell Co., Inc., 6148 CRB-3-16-11 (October 4, 2017), *appeal withdrawn*, A.C. 40971 (March 6, 2018), in which the respondents challenged the adequacy of the claimant’s medical evidence supportive of total disability. We affirmed the award of benefits, noting in part that the commissioner, pursuant to O’Connor v. Med-Center Home Health Care, Inc., 140 Conn. App. 542, *cert. denied*, 308 Conn. 942 (2013), and Bode v. Connecticut Mason Contractors, The Learning Corridor, 130 Conn. App. 672, *cert. denied*, 302 Conn. 942 (2011), must consider a “totality of the factors” standard as described in Romanchuk v. Griffin Health Services, 5515 CRB-4-09-12 (October 20, 2010), in deciding whether to award benefits.

The long medical history of this claimant presents a litany of cardiac interventions and ailments, including strokes and transient ischemic attacks, which have been linked to his compensable cardiac condition. In light of this history, we do not find the commissioner’s reliance on the medical opinions of the claimant’s treating physicians to

³ The respondents contend that the claimant’s seizures were at some point “medically ruled out” as a cause of the claimant’s disability. Respondents’ Brief, pp. 1-2. However, the trial commissioner did not find this fact at trial and we will not find it as a fact on appeal. Had the respondents wished to challenge McCaffrey’s opinion, they could have deposed him; given that this deposition did not occur, we must accept his medical reports “as is.” Berube v. Tim’s Painting, 5068 CRB-3-06-3 (March 13, 2007).

be unreasonable, particularly because we have long held that if “this board is able to ascertain a reasonable diagnostic method behind the challenged medical opinion, we must honor the trier’s discretion to credit that opinion above a conflicting diagnosis.” Strong v. UTC/Pratt & Whitney, 4563 CRB-1-02-8 (August 25, 2003). We note that the respondents offered no responsive expert opinion challenging the opinion of the treating physicians on issues other than the retinal headaches. As such, it was the commissioner’s prerogative to rely upon the opinions of Foley and McCaffrey and find the claimant totally disabled for the period in which benefits have been awarded in this case.

Relative to the compensability of the claimant’s migraines, the respondents take issue with the commissioner’s conclusion that the commissioner’s examiner, Lesser, related the claimant’s migraines to his compensable heart and hypertension claim. They cite portions of Lesser’s deposition as a basis for his opinion that the claimant’s hypertension was not causing his migraines. Having reviewed the deposition transcript, we believe the respondents’ concerns are meritorious.

In examining Lesser’s opinion, we are struck by how equivocal it was. Lesser’s initial report of December 14, 2016, to Commissioner Ernie R. Walker was discussed at the doctor’s May 22, 2017 deposition. In that letter, which was prepared after a physical examination of the claimant, Lesser had written that “[h]e has what sounds like classic migraine with aura, which in his case may be triggered by his hypertension.”

Respondents’ Exhibit 1 [Exhibit 1, p. 6]. Lesser explained at the deposition that the claimant had given him the following information:

I just want to clarify when you say was a factor [sic]. I base that primarily on his history because I would say, normally, I don’t associate hypertension with migraine with aura. He said that. So I put that into the note.

Could it possibly be? The answer is possible, perhaps, yes. It's not something that's overwhelmingly commonly associated with migraine.

Id., 14.

Lesser agreed with claimant's counsel that the hypertension could "perhaps" be a factor in the claimant's migraines with aura, id., 15, but when asked if the hypertension was the triggering event within a reasonable degree of medical probability, he responded, "[i]f you're defining probability greater than 51 percent, I would say no." Id. Lesser agreed with counsel that "based on what we're saying from an educational standpoint, his hypertension is not causing the migraines...." Id. He later associated causation with a "primarily neuronal discharge." Id., 16.

Upon review, we agree with the respondents that Findings, ¶ 57, appears to suggest that the commissioner's examiner affirmatively found that the claimant's hypertension was a significant contributing factor to the claimant's migraines with aura, and Conclusion, ¶¶ 9 and 11, make such an unequivocal representation.⁴ The record does not support this finding or support these conclusions. Nonetheless, we determine that the commissioner's failure to address the proposed corrections constituted harmless error.⁵ See Peters v. Corporate Air, Inc., 14 Conn. Workers' Comp. Rev. Op. 91, 1679 CRB-5-

⁴ These findings and conclusions are as follows:

Findings, ¶ 57: "Dr. Robert Lesser, a neuro ophthalmologist, the commissioner's examiner, was ordered specifically to address whether the claimant's migraines were (a) compensable and (b) totally disabling the claimant from gainful employment. Dr. Lesser evaluated the claimant on or about December 14, 2016 in a 'neuro-ophthalmic' evaluation. Dr. Lesser related the claimant's migraine with aura to the underlying hypertension claim, but did not think the migraines independently were totally disabling."

Conclusion, ¶ 9: "The claimant's diagnosed medical condition, migraine with aura, was deemed compensable by treating physician, Dr. Halford and by the commissioner's examiner, Dr. Lesser."

Conclusion, ¶ 11: "Dr. Robert Lesser, a neuro ophthalmologist, the commissioner's examiner, was ordered specifically to address whether the claimant's migraines were (a) compensable and (b) totally disabling the claimant from gainful employment. Dr. Lesser related the claimant's migraine with aura to the underlying hypertension claim, but did not think the migraines independently were totally disabling."

⁵ See July 18, 2018 Motion to Correct, ¶ H, seeking corrections to Findings, ¶¶ 57, 58.

93-3 (May 19, 1995). We find this tribunal’s prior analysis in Madden v. Danbury Hospital, 5745 CRB-7-12-4 (April 22, 2013), as articulated in Sanchez v. Edson Manufacturing, 5980 CRB-6-15-1 (October 6, 2015), *aff’d*, 175 Conn. App. 105 (2017), is applicable to the circumstances of the present matter.

In Madden, the trial commissioner decided to credit the opinion of the claimant’s treating physicians as to the causation of his shoulder injury over the opinion of the commissioner’s examiner. We affirmed that decision on appeal. We noted that “[t]here are few principles of jurisprudence more fundamental than the principle that a trier of fact must be the one party responsible for finding the truth amidst conflicting claims and evidence” *quoting* O’Connor v. Med-Center Home Healthcare, Inc., 4954 CRB-5-05-6 (July 17, 2006). We found the claimant’s witnesses in Madden offered unequivocal testimony, while the opinion of the commissioner’s examiner in that case was more equivocal. We therefore determined that after reviewing the entire record ... the commissioner in Madden could reasonably discount the opinion of the commissioner’s examiner, and her failure to specifically outline her reasons for doing so was harmless error.

Sanchez, *supra*.

On January 14, 2016, Halford, the claimant’s treating physician for the migraines, opined that the claimant’s “hypertension and cardiovascular disease is the probable cause of his past strokes and is probably a significant factor in his retinal migraines.”

Claimant’s Exhibit C [January 14, 2016 Progress Note, p. 7]. In correspondence dated January 28, 2016, Halford stated that the claimant’s “transient monocular blindness is likely due to retinal migraine and this condition is probably secondary to his cardiac disease and hypertension.” *Id.* His March 23, 2016 report stated that the claimant suffered from a “rare condition, about which not much is known,” *id.*, and also indicated that “[r]etinal migraine tends to occur in patients with a history [of] hypertension and

cardiovascular disease, like Mr. DeLorge. But there is no conclusive evidence that retinal migraine is caused by hypertension or cardiovascular disease.” *Id.*

It may be reasonably inferred that the commissioner, in finding Halford “credible and persuasive” and Lesser merely “credible,” placed greater weight on the opinion of the treating physician. Given that such a determination is consistent with the analysis of this board in Madden, *supra*, it was entirely permissible. We do note that Halford’s opinion did not rise to the “magic words” standard as described in Struckman v. Burns, 205 Conn. 542, 555 (1987). However, given that Struckman stands for the principle that a trier of fact may consider the entire substance of a witnesses’ testimony, we believe that the commissioner retained the discretion to rely upon Halford’s repeated use of the term “probably” as a basis for concluding that the claimant’s compensable hypertension was a significant contributing factor causing his retinal migraines.⁶

In reaching this conclusion, we are guided by the analysis of our Appellate Court opinion in Estate of Haburey v. Winchester, 150 Conn. App. 699, *cert. denied*, 312 Conn. 922 (2014). Haburey concerned another rare disease, Legionnaire’s Disease, which, according to the decedent’s surviving spouse, the decedent had contracted in the course of his employment. The respondents contested the commissioner’s conclusion that the medical evidence supporting the claim was adequate to establish causation, noting the absence of empirical laboratory results which would have provided a basis for the claimant’s theory of causation. *Id.*, 714-715.

⁶ We note that Halford practices in South Carolina and may not be well-versed in drafting causation opinions consistent with Connecticut protocols. In any event, as discussed previously herein, given that the respondents did not take Halford’s deposition, his written opinions must be considered “as is,” and it was well within the commissioner’s discretion to determine the evidentiary weight to be assigned to those written opinions. Berube, *supra*.

Our Appellate Court affirmed the award, stating that the “law does not demand metaphysical certainty in its proofs.” *Id.*, 716, *quoting* Curran v. Kroll, 118 Conn. App. 401, 408 (2009), *aff’d*, 303 Conn. 845 (2012). “Rather, the commissioner need only be convinced that it was ‘reasonably probable’ that the decedent died of Legionnaires’ Disease.” *Id.*, *citing* DiNuzzo v. Dan Perkins Chevrolet GEO, Inc., 294 Conn. 132, 142 (2009). Even though the respondents in Haburey pointed to other evidence in the record unresponsive of that theory of causation, including an earlier report from the same physician which was inconsistent with his later opinion, our Appellate Court held that the commissioner was “well within his authority to choose which evidence he found persuasive and which evidence he found unpersuasive, and adjudicate the claim accordingly.” *Id.*, 717. In the present matter, the commissioner found Halford’s opinion persuasive, and we therefore conclude that even if the evidence presented by Halford relative to the causation of retinal migraines was admittedly not “conclusive,” our Appellate Court’s analysis in Haburey, *supra*, provides a sufficient basis for affirming the Finding & Award.

There is no error; the July 13, 2018 Finding & Award of Thomas J. Mullins, the Commissioner acting for the Second District, is accordingly affirmed.

Commissioners David W. Schoolcraft and Daniel E. Dilzer concur in this opinion.