CASE NO. 6323 CRB-4-19-5 CLAIM NO. 400064209	:	COMPENSATION REVIEW BOARD
KEVIN SCHRECKENGOST CLAIMANT-APPELLANT	:	WORKERS' COMPENSATION COMMISSION
v.	:	JULY 15, 2020
ZWALLY HAULING EMPLOYER		
and		
MARKEL CORP INSURER RESPONDENTS-APPELLEES		

APPEARANCES:

The claimant was represented by Enrico Vaccaro, Esq., Law Offices of Enrico Vaccaro, P.O. Box 120761, Trolley Square, 175 Main Street, Suite 2, East Haven, CT 06512.

The respondents were represented by Gerald Davino, II, Esq., Testan Law, 2080 Silas Deane Highway, Suite 304, Rocky Hill, CT 06067.

This Petition for Review from the April 22, 2019 Finding by Jodi Murray Gregg, the Commissioner acting for the Seventh District, was heard February 28, 2020 before a Compensation Review Board panel consisting of Commission Chairman Stephen M. Morelli and Commissioners William J. Watson III and Toni M. Fatone.[1]

[1] We note that two motions for extension of time and a continuance were granted during the pendency of this appeal.

OPINION

STEPHEN M. MORELLI, CHAIRMAN. The claimant has appealed from a Finding reached by Commissioner Jodi Murray Gregg (commissioner) on April 22, 2019, which determined that he was no longer totally disabled, and no longer entitled to benefits pursuant to General Statutes § 31-307 (a).[2] The claimant argues that the commissioner's decision was arbitrary and unsupported by the evidence. After reviewing the record, we are satisfied that the commissioner reached a reasonable determination in her finding. Accordingly, we affirm the Finding.

The commissioner found the following facts at the conclusion of the formal hearing in this case. She noted the claimant sustained a compensable back injury on July 18, 2005, which necessitated decompression and fusion surgery at L4-5. The claimant returned after that surgery to his occupation as a dump truck driver. "On November 10, 2010, the claimant had another surgery performed by his treater, Dr. Mastroianni. This surgery was a decompressive laminectomy and discectomy at L3-4." Findings, ¶ 4. He returned to his job until Mastroianni found him medically disabled on June 13, 2012. Mastroianni referred him to Pardeep K. Sood, M.D., for pain management. See Findings, ¶¶ 5-6.

[2] General Statutes § 31-307 states: "(a) If any injury for which compensation is provided under the provisions of this chapter results in total incapacity to work, the injured employee shall be paid a weekly compensation equal to seventy-five per cent of the injured employee's average weekly earnings as of the date of the injury, calculated pursuant to section 31-310, after such earnings have been reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contributions Act made from such employee's total wages received during the period of calculation of the employee's average weekly wage pursuant to section 31-310; but the compensation shall not be more than the maximum weekly benefit rate set forth in section 31-309 for the year in which the injury occurred. No employee entitled to compensation under this section shall receive less than twenty per cent of the maximum weekly compensation rate, as provided in section 31-309, provided the minimum payment shall not exceed seventy-five per cent of the employee's average weekly wage, as determined under section 31-310, and the compensation shall not continue longer than the period of total incapacity."

"The Claimant testified that he cannot sit or stand for more than short periods of time; needs to change his position frequently; cannot climb, bend or twist; has difficulty going from a sitting to a standing position; and that his back pain increases with activity." Findings, ¶ 7. He also "testified that for the last forty years he has maintained manual labor jobs and does not have skills that are transferable for sedentary work." Findings, ¶ 8. The claimant also testified that the respondents had failed to authorize his prescriptions in a timely fashion. The claimant presented on February 26, 2015, for a Respondents' Medical Examination (RME) with Dr. Gary Zimmerman. Zimmerman reported that the claimant had reached maximum medical improvement. Zimmerman opined at that time the claimant did not have a work capacity; however, in a report he issued on March 17, 2015, he changed his opinion after he reviewed surveillance videos which had been done depicting the claimant's activities.

Zimmerman reported that:

> the videos proved that the Claimant has some ability to work, likely more than sedentary. The doctor noted that surveillance depicted the Claimant engaging in various activities. 'At one point, he was on top of truck, clearing off snow. I have seen him driving a plow. I have seen him fixing a tail light on his truck, which included him lying on the ground on a mat and working. In these videos, he rarely used a cane. In addition, on the day of his independent Medical Examination with me, on 2/26/15, he did not use a cane in the morning, but did use a cane on the way to my office to be seen and did not use the cane afterwards. However, there are many instances of him walking with a limp suggesting some ongoing pain and limitation.'

Findings, ¶ 12. This report was affixed to a June 23, 2015 form 36, which sought to terminate the claimant's temporary total disability benefits and convert the benefits to permanent partial disability benefits. This form 36 was denied.

On September 30, 2015, the claimant presented for a Commissioner's Examination with Dr. Jarob N. Mushaweh, a neurosurgeon. The doctor opined that "the Claimant suffers from a classic case of failed back syndrome and that he does not believe that 'the interventional pain management has any yield at this stage and should be abandoned. The amount of narcotics he is taking should be of significant concern.'" Findings, ¶ 14. Mushaweh opined that the claimant had a sedentary work capacity and that the claimant had a "40% permanent partial disability to the lumbar spine, 75% attributable to the Claimant's prior spinal condition and the remaining 25% is attributable to the work related injury of July 18, 2005." Findings, ¶ 15. The respondents filed a form 36 on October 21, 2015, which relied on Mushaweh's commissioner's examination report. The form 36 was denied. At his deposition, Mushaweh:

> maintained his position that based upon the medical evidence as well as surveillance video, that the Claimant has a work capacity and that he should be weaned off of the opioid medications. The doctor further testified that 'the patient fooled me by making me – by exhibiting pain behavior that I was somewhat sold into. He seemed to be in a lot less pain that I was led to believe. He does have, well, what I characterize as failed back syndrome, but the typical syndrome of failed back is somebody who's unable to do anything, whether it's because of physiological or because of anatomical or physical inabilities, but this gentleman, on one hand, you know, he's making me think he has failed back syndrome, but on the other hand, physically seemed to be more capable of doing a lot of things typical failed back syndrome cannot do.'

Findings, ¶ 19.

Sood's deposition occurred on November 8, 2017. "Sood testified that he has prescribed the Claimant the following medications for pain: Oxycotin 20 mg; Percocet 10mg 3-4x a day; Gabapentin 600 mg 3x a day; Flexeril 10 mg 3x a day; Lidoderm 5% patch topically; Zoloft 100 mg a day." Findings, ¶ 20. He also testified that:

> he did not see the Claimant 'getting back to gainful employment at all. If he has anything it's sedentary work with the ability to change positions frequently. But honestly, with his educational background, I have no idea, I'm not exactly sure of how much and the kind of work he did and the time period he's been out of the workforce, the chances of that happening are pretty much nil.'

Findings, ¶ 21. He also testified "the medications, 'do improve activities of daily living per his description. He is functional and he drives himself to my office every month and he says that he does do all of his activities of daily living.'" Findings, ¶ 22. Sood further said "the Claimant is 'absolutely clear that whatever function he has is because of the medications and treatment, otherwise he would be pretty much bedridden and not able to do anything.'" Findings, ¶ 23.

On March 8, 2016, Dr. Jerold Kaplan performed a record review for the respondents. Dr. Kaplan reported that:

> the total MED [morphine equivalent dose] for the OxyContin and oxycodone is 147.5. 'This exceeds the 90 MED recommended in the CT workers' comp pain guidelines. Dr. Mushaweh has recommended decreasing this opioid dosage. I would need to see Mr. Schreckengost to have a more specific plan in terms of how this opioid decrease could be accomplished.'

Findings, ¶ 24.

Based on this record, the commissioner concluded Zimmerman's reports and opinion as to the claimant's work capacity and attainment of maximum medical improvement were credible and persuasive and granted the form 36 that had been filed in June of 2015, to convert the claimant's benefits to partial permanency benefits pursuant to General Statutes § 31-308 (b). She also found Mushaweh's reports and opinions as to work capacity and MMI to be credible and persuasive and granted the form 36 filed October 3, 2016, although she did not accept Mushaweh's opinion as to discontinuing

narcotic medication. She adopted Mushaweh's opinion that "the Claimant has failed back syndrome and has a permanent partial disability rating of 40% of his lumbar spine; however, only 25% of that rating is related to the July 18, 2005 work injury." Conclusion, ¶ C. She did not find Mastroianni's opinions persuasive and credible. On the issue of medications, she found Sood's opinion credible and persuasive that the pain medication helps the claimant function for daily living, but also found "Kaplan's report and opinion credible and persuasive that the Claimant's narcotic medication exceeds the workers' compensation guidelines and that the claimant needs to be evaluated to create a specific plan to decrease the opioid dosage." Conclusion, ¶ F.

Based on these conclusions she granted all three pending forms 36, directed the respondents to work with Kaplan to create a plan to decrease the claimant's opioid dosage to conform with the workers' compensation guidelines, and denied the respondent's bid to fine the claimant and the claimant's bid to fine the respondents as being responsible for undue delay. The claimant filed a motion to correct seeking over forty-two corrections and the substitution of conclusions that he was entitled to benefits under § 31-307 and to assess sanctions against the respondents for undue delay. The commissioner denied this motion in its entirety and the claimant has pursed this appeal, arguing the finding was not supported by the evidence in this case.

The standard of deference we are obliged to apply to a commissioner's findings and legal conclusions on appeal 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).

A claimant who is receiving total disability benefits has the obligation of continuing to prove he or she is totally disabled. See Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440, 454 (2001). The commissioner decided to credit the opinions supporting the forms 36 filed to stop total disability benefits and we will examine those opinions to ascertain if they are consistent with the result she reached.

The March 17, 2015 letter affixed to the first form 36 specifically states that Zimmerman, after viewing surveillance videos of the claimant, determined "that the claimant has some ability to work, likely more than sedentary." Respondent's Exhibit 1. While Zimmerman's opinion as to medical disability had changed subsequent to his initial RME report, the claimant did not avail himself of the opportunity to depose this witness to obtain a more complete explanation of how this opinion had changed. Consequently, we must accept this evidence "as is" and the trial commissioner could afford it whatever weight she deemed appropriate. Berube v. Tim's Painting, 5068 CRB-3-06-3 (March 13, 2007).

The other two forms 36 which the respondents had filed were reliant on the opinions of the commissioner's examiner, Mushaweh. We have long noted that in contested cases we generally anticipate that a trial commissioner will afford great weight to the opinions of a commissioner's examiner. See Carroll v. Flattery's Landscaping, Inc., 5385 CRB-8-08-10 (September 24, 2009). The commissioner herein specifically found Mushaweh a credible and persuasive witness on the issues of the claimant's work capacity and maximum medical improvement.[3] The claimant argues that this conclusion was in error and that Mushaweh's testimony should have been disregarded by the trial commissioner. He also argues that it was improper for the witness to have considered any of the surveillance video. We are not persuaded by these arguments. The claimant had the opportunity to extensively depose Mushaweh and seek to elicit a retraction of his opinions and our reading of this deposition establishes that the witness continued to hold to his original opinions. Having had the opportunity to cross-examine this witness we do not believe there was a due process issue as to admitting an opinion from Mushaweh based on his viewing of surveillance videos, see Nisbet v. Xerox Corporation, 5867 CRB-7-13-7 (July 17, 2014); nor did counsel for the claimant file an objection to the admission of his testimony at the formal hearing. See DeLeon v. Walgreen's, 5568 CRB-4-10-6 (May 13, 2011). Given these facts, the commissioner could accord whatever weight she deemed appropriate to these opinions, and as there was conflicting expert testimony presented, we must respect the right of the commissioner to choose the opinion she

[3] While claimant's counsel argued at oral argument before our tribunal that the trial commissioner erroneously relied on Zimmerman and Mushaweh for vocational opinions and not medical opinions, we find that these witnesses were specifically opining on the medical evidence for continued temporary total disability presented by the claimant's treating physician, Mastroainni, and that neither party in this hearing presented any evidence from a vocational expert.

deemed more persuasive. See O'Reilly v. General Dynamics Corp., 52 Conn. App. 813, 818-819 (1999).[4]

We further note the claimant testified at length in person before the commissioner. When a claimant for temporary total disability benefits testifies at a formal hearing a commissioner may consider the demeanor of the claimant in determining whether he or she is still totally disabled. Leandres v. Mark IV Construction, Inc., 5159 CRB-4-06-11 (October 22, 2007). While the commissioner did not reach a conclusion as to the credibility or persuasiveness of the claimant's testimony, we may reasonably infer that it did not act to persuade her that he remained incapable of any form of remunerative work. While the claimant's brief points at length to his work history as being limited to industrial occupations such as truck driving, the claimant's testimony at the hearing could provide grounds to believe the claimant had aptitude for some form of sedentary occupation, which was consistent with the opinions of Zimmerman and Mushaweh. The claimant argues that based on the precedent in O'Connor v. Med-Center Home Health Care, Inc., 140 Conn. App. 542, *cert. denied*, 308 Conn. 942 (2013), that he presented sufficient evidence that he was unemployable, but as we pointed out in Pereira v. State/Department of Developmental Services, 6204 CRB-3-17-6 (August 1, 2018), "we have generally deferred to the trier of fact as to the sufficiency of this evidence." Id.

[4] The claimant cites the precedent in Bode v. Connecticut Mason Contractors, The Learning Corridor, 130 Conn. App. 672, *cert. denied*, 302 Conn. 942 (2011), as grounds for this panel to find him totally disabled, arguing the commissioner could not consider the credibility and persuasive value of written reports. As we explained in Ferrua v. Napoli Foods, Inc., 6137 CRB-5-16-9 (July 27, 2017), *aff'd*, 185 Conn. App. 904 (October 9, 2018) (per curiam), Bode stands for the proposition that a trial commissioner cannot ignore uncontroverted expert opinions. In the present case, where the respondents presented evidence that the claimant was not totally disabled and the commissioner's examiner was extensively deposed, Bode is not on point.

We would like to address three final issues at this time. The claimant included the issue of the commissioner adopting Kaplan's position as to appropriate medication in his reasons of appeal, but we do not find his counsel briefed this issue nor addressed this issue at oral argument before our tribunal. Consequently, we deem this issue abandoned on appeal, see Jamieson v. State/Military Department, 5888 CRB-1-13-9 (August 15, 2014), particularly as we find Kaplan offered probative evidence and a reasonable opinion as to this issue. The claimant did brief and argue the issue of the commissioner approving three separate forms 36 establishing three different dates of maximum medical improvement and three different dates in which benefits would be changed from temporary total disability benefits to payments against permanency benefits. The claimant argues that this constitutes a due process issue. The respondents argue that once the commissioner approved the first form 36 this issue of maximum medical improvement in the subsequent forms 36s became moot, as the date of MMI from the first approved form 36 was now the law of the case. We find the respondents' position well-reasoned and therefore find no error.

Finally, the claimant argues that it was error for the trial commissioner to have denied his motion to correct. Our review of the proposed corrections demonstrates that the claimant was merely reiterating the arguments made at trial which ultimately proved unavailing. Therefore, based on our review of this evidence, we find no error in the trier's decision to deny the motion to correct. See D'Amico v. Dept. of Correction, 73 Conn. App. 718, 728 (2002), *cert. denied*, 262 Conn. 933 (2003).

The claimant believes that whatever work capacity he may have was too speculative to justify granting a form 36 ending § 31-307 benefits, *citing* Bailey v. State,

3922 CRB-2-98-10 (November 30, 1999), *aff'd in part, rev'd in part*, 65 Conn. App. 592 (2001) and Covaleski v. Casual Corner, 4419 CRB-1-01-7 (June 27, 2002). This decision turned on the facts and as the standard promulgated in O'Connor, supra, points out, a claimant must establish facts that persuade a trial commissioner of a lack of work capacity. We have affirmed denials of temporary total disability benefits even when a claimant asserted significant limitations to their ability to earn wages. See Vallier v. Cushman & Wakefield, 5822 CRB-1-13-2 (February 21, 2014) and Clarizio v. Brennan Construction Company, 5281 CRB-5-07-10 (September 24, 2008). This case turned on contested medical opinions and, in such cases, we must defer to the decision reached by the finder of fact. As our Appellate Court pointed out in Jodlowski v. Stanley Works, 169 Conn. App. 103 (2016), it is the commissioner's prerogative to determine what evidence he or she deems persuasive. "The [commissioner] alone is charged with the duty of initially selecting the inference [that] seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court." (Internal quotation marks omitted.) Id., 108-109, *quoting* Estate of Haburey v. Winchester, 150 Conn. App. 699, 714, *cert. denied*, 312 Conn. 922 (2014).

There is no error; the April 22, 2019 Finding of Jodi Murray Gregg, the Commissioner acting for the Fourth District, is accordingly affirmed.

Commissioners William J. Watson III and Toni M. Fatone concur in this Opinion.