CASE NO. 6326 CRB-4-19-5 CLAIM NO. 400042278	:	COMPENSATION REVIEW BOARD
JOHN W. CONNORS CLAIMANT-APPELLANT	:	WORKERS' COMPENSATION COMMISSION
v.	:	APRIL 3, 2020
AMERICAN FROZEN FOODS, INC. EMPLOYER		
and		
LIBERTY MUTUAL INSURANCE CO. INSURER RESPONDENTS-APPELLEES		

APPEARANCES:

The claimant was represented by Steven D. Jacobs, Esq., Jacobs & Jacobs, LLC, 700 State Street, Third Floor, New Haven, CT 06511.

The respondents were represented by Christopher J. Powderly, Esq., Law Offices of Meehan, Roberts, Turret & Rosenbaum, 108 Leigus Road, First Floor, Wallingford, CT 06492.

This Petition for Review from the May 10, 2019 Finding and Dismissal by Jodi Murray Gregg, the Commissioner acting for the Fourth District, was heard October 25, 2019 before a Compensation Review Board panel consisting of Commission Chairman Stephen M. Morelli and Commissioners Peter C. Mlynarczyk and David W. Schoolcraft.[1]

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

OPINION

STEPHEN M. MORELLI, CHAIRMAN. The claimant has appealed from a Finding and Dismissal (finding) reached by Commissioner Jodi Murray Gregg (commissioner) on May 10, 2019. In the finding, the commissioner found that the claimant was not entitled to temporary total disability benefits for the period from July 21, 2016 to July 21, 2017.[2] The claimant has appealed arguing that this decision was inconsistent with the evidence presented at the hearing. The respondents argue that the claimant had the burden of persuasion that he was entitled to total disability benefits and the commissioner simply was not persuaded by his evidence. Noting the deference that we must afford a finder of fact we find the respondents' position more persuasive, and therefore we affirm the finding.

The commissioner reached the following findings of fact at the conclusion of the formal hearing which were relevant to the determination of the temporary total disability issue. She found the claimant sustained a compensable injury to his lumbar spine on June 7, 2000 and Lawrence Kirschenbaum, M.D., was his treating physician. On June 23, 2016, Kirschenbaum opined that the claimant had a full-time light-duty work capacity with a 30-pound lifting restriction. On July 21, 2016, Kirschenbaum changed the claimant's work status to temporarily and totally disabled.[3] At his deposition on January 30, 2018, Kirschenbaum testified that he made the decision to switch the claimant from

[2] The commissioner also reached findings on the issue of medical treatment but as we note, at the March 28, 2018 formal hearing, the claimant focused his claim for relief on the issue of temporary total disability benefits, see March 28, 2018 Transcript, pp. 2-3, and we deem this the pertinent issue under appeal.
[3] The evidence indicates the actual date of this report was July 21, 2016, but the finding uses the date "July 21, 2017" at various places referencing this report. Neither party moved to correct this scrivener's error, and we afford it no weight, see Hernandez v. American Truck Rental, 5083 CRB-7-06-4 (April 19, 2007). We have used the correct date in this opinion.

full-time light-duty work capacity with a 30-pound lifting restriction to temporarily and totally disabled based upon the claimant's subjective complaints of pain. He further testified that there were no objective findings on the MRI that would explain an increase in the claimant's pain symptoms.

Based on this record, the commissioner determined that Kirschenbaum's July 21, 2016 report that changed the claimant's work status from a full-time light-duty work capacity to being totally disabled was not credible or persuasive. As a result, she denied the claim for total disability benefits. The claimant filed a motion to correct seeking seven corrections, including citations to the deposition transcript that Kirschenbaum's opinion, as to the claimant's work capacity, was uncontroverted; that Kirschenbaum thought he had an "honest relationship" with the claimant, and that subjective reports of pain, and not just objective imaging reports, can justify changing a claimant's treatment plan. The commissioner denied this motion in its entirety and the claimant has pursued this appeal. He argues that the decision herein was against the weight of the evidence.

On appeal, we generally extend deference to the decisions made by the trial commissioner. "As 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." Daniels v. Alander, 268 Conn. 320, 330 (2004), *quoting* Burton v. Mottolese, 267 Conn. 1, 54 (2003). The Compensation Review Board cannot retry the facts of the case and may only overturn the findings of the trial commissioner if they are without evidentiary support, contrary to the law, or based on unreasonable or impermissible factual inferences. Kish v. Nursing & Home Care, Inc., 248 Conn. 379, 384 (1999) and Fair v. People's Savings Bank, 207

Conn. 535, 539 (1988). Nonetheless, while we must provide deference to the decision of a trial commissioner, we may reverse such a decision if the commissioner did not properly apply the law or reached a decision unsupported by the evidence on the record. Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007).

The claimant herein sought benefits under General Statutes § 31-307 for temporary total disability. We look to O'Connor v. Med-Center Home Health Care, Inc., 140 Conn. App. 542 (2013), *cert. denied*, 308 Conn. 942 (2013), as establishing the standard for seeking benefits under that statute. In O'Connor, our Appellate Court determined the claimant did not submit reliable medical evidence supportive of her claim for § 31-307 benefits, id., 549, but determined that pursuant to a "holistic determination" that a claimant could prove entitlement to such benefits by submitting evidence of futile job searches or an opinion from a vocational expert that they were unemployable. Id., 553-554. In the present case, the claimant did not testify before the commissioner at the formal hearing, nor did he submit any unsuccessful job searches. There was no vocational evidence submitted on behalf of the claimant. Consequently, the sole evidence presented to the commissioner supporting the claimant's bid for temporary total disability benefits was Kirschenbaum's opinion. If the commissioner was not persuaded by this evidence, she was obliged to deny the claim.

The argument presented is that as Kirschenbaum's opinion was uncontroverted it is was legal error for the commissioner not to credit it. Our Appellate Court has held that a commissioner can disbelieve any or all expert medical testimony, even if it is uncontradicted. See Cummings v. Twin Tool Mfg. Co., 40 Conn. App. 36, 43-44 (1996).

We must review the report and testimony of Kirschenbaum to ascertain if the decision not to credit this evidence was an abuse of discretion.

The commissioner noted that on June 23, 2016, Kirschenbaum opined that the claimant had a work capacity and that on July 21, 2016, the claimant did not. A claimant who has previously not received benefits under § 31-307 for total disability can later receive these benefits if he or she can demonstrate that their condition has deteriorated. See Schenkel v. Richard Chevrolet, Inc., 5302 CRB-8-07-12 (November 21, 2008), *aff'd*, 123 Conn. App. 55 (2010). In this case, the sole basis for this conclusion was the subjective complaints of the claimant to his treating physician. The respondents note that no objective testing such as an x-ray or imaging study occurred prior to the July 21, 2016 report which documented a change in claimant's condition. Nor is there anything in the record documenting any incident which would cause a reasonable person to conclude that the claimant's condition would have changed.[4] The claimant did not testify at the formal hearing as to any change in his circumstances in July 2016.[5] The sole basis to award benefits would be the treater's personal assessment of the veracity of the claimant's complaints.

The basis for Kirschenbaum's opinion was probed at his deposition on January 30, 2018. See Claimant's Exhibit B. He said that on both June 23 and July 21 "[t]he severity of the pain was noted to be the same." But, "I took him out of work . . . because he felt that the severity was increasing. . . ." Id., p. 7. He also noted that when dealing

[4] In addition, the pain medication referenced in both reports was exactly the same; Oxycodone HCL 15 mg 4 times per day (as needed) and 2 Lidoderm 5% (Lidocaine) patches 1-2 daily. Respondents' Exhibit 1.
[5] In this case, where the commissioner was unable to reach an independent assessment of the claimant's credibility by viewing his live testimony, we do not accept the claimant's position that the commissioner was obligated to afford a treating physician's opinion of the claimant's credibility full faith and credit.

with subjective complaints "there are all kinds of secondary gain issues." Id., p. 8. He also agreed with the statement of respondents' counsel that "by in large Mr. Connor's symptoms have been stable over the course of your treatment of him." Id., p. 9. While Kirschenbaum said he had "an honest relationship" with the claimant, id., p. 27, he further noted that, "I cannot, and no one can, tell you what the effect of his family illnesses have on him . . . [w]hether or not they contributed to his pain, I would suspect they did." Id.

The evidence herein is solely based on the treater's assessment of subjective complaints. After review of this evidence, we believe the commissioner could have awarded the claimant total disability benefits were she persuaded by it; however, we cannot find that she was obligated, as a matter of law, to accept Kirschenbaum's opinion.

Recent appellate cases have addressed circumstances where claimants have argued trial commissioners should not have rejected uncontroverted medical opinions which the commissioners found unpersuasive. However, these cases have affirmed the decision of the commissioner when there were some grounds in the record to find this determination reasonable. See Diaz v. Dept. of Social Services, 184 Conn. App. 538, 547-556 (2018), *cert. denied*, 330 Conn. 971 (2019) and Sanchez v. Edson Manufacturing, 175 Conn. App. 105, 131-134 (2017). The absence of objective findings, Kirschenbaum's testimony as to the claimant's consistent baseline condition, and the presence of possible factors unrelated to a work injury created reasonable grounds for the commissioner to find his July 21, 2016 report unpersuasive.[6]

[6] For the reasons stated in 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), we also find no error in the commissioner's denial of the claimant's motion to correct.

There is no reversable error; the May 10, 2019 Finding and Dismissal of Jodi Murray Gregg, Commissioner acting for the Fourth District, is accordingly affirmed.

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