CASE NO. 6329 CRB-1-19-5 CLAIM NO. 100135002	:	COMPENSATION REVIEW BOARD
CORDELL GOULBOURNE CLAIMANT-APPELLANT	:	WORKERS' COMPENSATION COMMISSION
v.	:	JUNE 10, 2020

STATE OF CONNECTICUT/
DEPARTMENT OF CORRECTION
EMPLOYER
SELF-INSURED

and

GALLAGHER BASSETT SERVICES, INC.
THIRD-PARTY ADMINISTRATOR
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by James Quinn, Esq., Quinn & Quinn, LLC, 248 Hudson Street, Hartford, CT 06106.

The respondents were represented by Lawrence Widem, Esq., Assistant Attorney General, Office of the Attorney General, 165 Capitol Avenue, Suite 4000, Hartford, CT 06106-1668.

This Petition for Review from the April 30, 2019 Finding and Dismissal by Daniel E. Dilzer, the Commissioner acting for the First District, was heard January 31, 2020 before a Compensation Review Board panel consisting of Commission Chairman Stephen M. Morelli and Commissioners Randy L. Cohen and William J. Watson III.[1]

[1] We note that two motions for extension of time and a motion for continuance were 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 Daniel E. Dilzer (commissioner) on April 30, 2019, which determined that the claimant had not established his claim for temporary total disability benefits under General Statutes Sec. 31-307(a).[1] The claimant argues that this decision was against the weight of the evidence and the commissioner erred in not crediting the opinion of the Commissioner's Medical Examiner that he lacked a work capacity. The respondents argue that the claimant simply failed to meet his burden of persuasion in this forum and the decision of the commissioner should be affirmed.

While we note that the commissioner in this matter did not find the claimant a credible witness, we are troubled by the manner in which the commissioner addressed the opinions presented by the commissioner's examiner in this matter. It appears that both may have conflated the concept of medical disability and vocational disability. Therefore, in accordance with our precedent in Hubbard v. University of Connecticut Health Center, 5705 CRB-6-11-12 (November 30, 2012), we remand this matter for further proceedings.

The commissioner reached the following factual findings at the conclusion of the formal hearing. He noted the long history of the claimant's claim for benefits, which started

[1] 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."

after he left the employ of the Department of Correction (DOC) in November 2001.[3] He also noted that it is now undisputed that the claimant sustained a compensable coronary artery injury due to workplace stress on February 20, 2001, but that his prior bid for total disability benefits was rejected in 2013. Findings, ¶ 2. He also examined the medical opinions presented by the claimant's treating physician, Kathleen Kennedy, M.D.

Kennedy, in October of 2010, had assigned a 75 percent permanent partial disability to the claimant's heart. Findings, ¶ 3. "At the Formal hearing in 2013, the Commissioner found the Claimant sustained a fifty-six (56%) permanent partial disability rating to his heart." Id. In May of 2013, Kennedy opined the claimant was disabled from a cardiac standpoint from employment that would place him under physical or emotional stress. Findings, ¶ 4. "On October 16, 2014, Dr. Kennedy opined the Claimant is disabled from all work due to his severe and progressive coronary artery disease." Findings, ¶ 5. "Then, in October of 2016, Dr. Kennedy wrote, 'I am not proficient in disability determination and therefore feel uncomfortable in making an official disability determination. However . . . it is my medical opinion that he has significant cardiac disability that severely limits his ability to manage the physical and emotional stressors of work.'" Id.

The claimant testified at length at the formal hearing. He testified that subsequent to his employment at DOC he had worked for The Hartford Association for Retarded Citizens but had to leave the position because of a shoulder injury. See December 18, 2018 Transcript, p. 27. He also held a position with My People Services as a mentor for

[3] Please see Goulbourne v. State/Department of Correction, 5192 CRB-1-07-1 (January 17, 2008), Goulbourne v. State/Department of Correction, 5461 CRB-1-09-5 (May 12, 2010), *appeal withdrawn*, A.C. 32294 (June 30, 2011) and Goulbourne v. State/Department of Correction, 5955 CRB-1-14-8 (July 29, 2015), for the procedural history herein.

at-risk youths. Id., pp. 27-28. He was last employed, he testified, in 2009 or 2010. Id., pp. 38-39. He worked as a literacy volunteer for several years until two years ago.

The claimant also testified that he had received two degrees after leaving DOC, a Bachelor of Arts degree from Charter Oak State University in 2006 and a Master of Business Administration from the University of Phoenix in 2008, but neither degree had helped him obtain employment. See Findings, ¶¶ 11-12. He also testified as to his work searches in recent years. He said he had looked for work unsuccessfully on the internet but offered no corroboration for this testimony. See Findings, ¶13. He said that a thumb drive that had stored his job searches had crashed and he retained no other records and did not know how to download records from his computer, nor had he asked anyone else to do so. See Findings, ¶ 15. He said he now did not use a computer and relied on his wife to turn on an iPad tablet. See Findings, ¶ 16.

As for his medical condition, the claimant testified it had worsened since 2013. Nonetheless, the commissioner noted that he has not been hospitalized since 2013 and the permanency rating to his heart has not been increased by Kennedy since December of 2013 when this issue had previously been litigated. See Findings, ¶ 16. He testified that he is physically drained after one to three hours per day and only searched for jobs that allowed a short workday. See Findings, ¶ 22. He also testified that his condition does not allow him to drive more than a minimal distance, though he is not under medical driving restriction. See Findings, ¶ 24.

The commissioner also considered vocational evidence from the claimant's expert, Hank Lerner, as well as the respondents' expert, Jeffrey Joy, Ph.D. Additionally, the commissioner considered the opinion of the commissioner's medical examiner,

Joseph Robert Anthony, M.D. The claimant's vocational expert opined that the claimant lacked a work capacity. While he believed the claimant was capable of sedentary work, the claimant's inability to consistently work due to fatigue and tolerance issues made him unlikely to obtain employment. Findings, ¶ 18.

The respondent's vocational expert examined the claimant on July 6, 2017, and concluded the claimant has a rehabilitation potential. Joy believed the claimant could with minimal training be employed as a self-employed bookkeeper or tax preparer. He also believes the claimant could obtain telecommuting work from his home as a telemarketer or appointment scheduler. He also suggested the claimant consider tutoring work or obtain assistance of the vocational rehabilitation services to help identify appropriate opportunities. Findings, ¶ 19.

Anthony conducted a commissioner's examination on May 30, 2018 and determined that while the claimant underwent numerous cardiac surgeries prior to 2009, he still has angina-type symptoms. He concluded the claimant presently has a "50% impairment to the coronary artery disease, with 13% specifically related to the hypertensive cardiovascular disease with a combined rated of 56% impairment (Id.), the same rating the Claimant had in 2013." Findings, ¶ 7. The commissioner noted as well that in response to a letter he sent Anthony that the examiner opined that he did not believe the claimant had the ability to perform any gainful work, writing in a handwritten note the claimant "is unable to perform any gainful work capacity." Claimant's Exhibit F, Findings, ¶ 8.

Based on this record, the commissioner concluded that he did not find Kennedy's opinion as to the claimant's medical condition credible or persuasive, finding her

opinions as to work capacity inconsistent and noting she had not increased his level of disability. He determined that Anthony also had not increased the claimant's disability rating since the last formal hearing and the commissioner did not choose to rely on his opinion as to work capacity, finding it is "a vocational opinion for which there is no data or evidence to suggest that Dr. Anthony is a vocational expert qualified to provide a vocational opinion . . . ." Conclusion, ¶ C. Therefore, he found the claimant had not met his burden of proof on the issue of medical disability. On the question of vocational disability, the commissioner found the respondents' expert witness credible and persuasive that the claimant had a work capacity and did not find the claimant's testimony as to conducting work searches credible. Accordingly, he dismissed the claim for vocational disability.

The claimant filed a motion to correct and a motion for articulation. The motion to correct sought to amend the finding concerning Kennedy's opinions, to substitute a finding that the claimant's medical condition had deteriorated since 2013 and to find that Anthony had issued a medical opinion finding the claimant totally disabled. The motion for articulation sought to have the commissioner explain his reasoning behind finding that Anthony offered a vocational and not a medical opinion. The commissioner granted one correction which did not materially impact the outcome of this decision and denied the motion for articulation. The claimant has now pursued this appeal. He argues that notwithstanding the commissioner's assessment of his testimony that it was error not to rely on the opinions of the medical experts in this case to find him medically disabled from gainful employment.

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).

In considering this matter we note that our Appellate Court has explained that a claimant can pursue a bid for temporary total disability benefits by presenting two theories of recovery. He or she can argue that medical opinions have found that they lack a work capacity, or they may pursue a claim based on vocational evidence establishing that they are unemployable. We look to the precedent in O'Connor v. Med-Center Home Health Care, Inc., 140 Conn. App. 542, *cert. denied*, 308 Conn. 942 (2013), as expounding on this matter, *citing* Bode v. Connecticut Mason Contractors, The Learning Corridor, 130 Conn. App. 672, *cert. denied*, 302 Conn. 942 (2011):

> In *Bode*, this court explained that a medical determination of total disability is merely one way a claimant can establish total incapacity to work, and one of many types of evidence the commissioner may consider in making this finding. ''[I]n order to

> receive total incapacity benefits . . . a plaintiff bears the burden to demonstrate a diminished earning capacity by showing either that she has made adequate attempts to secure gainful employment or that she is truly unemployable. . . . Whether the plaintiff makes this showing of unemployability by demonstrating that she actively sought employment but could not secure any, or by demonstrating through nonphysician vocational rehabilitation expert or medical testimony that she is unemployable . . . as long as there is sufficient evidence before the commissioner that the plaintiff is unemployable, the plaintiff has met her burden. . . .

O'Connor, supra, pp. 553-554.

The claimant has not appealed the commissioner's adverse determination as to the vocational claim he presented, and we therefore can deem this issue resolved. He does firmly believe the commissioner erred in finding Anthony submitted a vocational opinion. As the claimant views the record, both medical witnesses found that he was medically disabled from employment and in light of this uncontroverted evidence he should have been awarded benefits based on establishing he was medically disabled. The respondents argue that the record and the law support the commissioner's decision, *citing* Pereira v. State/Department of Developmental Services, 6204 CRB-3-17-6 (August 1, 2018), although they concede that Anthony's opinion on work capacity was "cryptic." See Respondents' Brief, p. 10. As we review the record, we believe Anthony's opinion as to the claimant's work capacity was so conclusory that it cannot be reasonably be deemed either a vocational opinion or a medical opinion and under the circumstances herein it was the commissioner's duty to seek further clarification from the witness. See Claimant's Exhibit F.

We find that the precedent in Hubbard, supra, is on point and compels us to remand this matter for additional proceedings. In Hubbard, we reviewed the supporting evidence for the trial commissioner's decision and after this review, we deemed it too ambiguous to support the finding and directed a remand to the trial commissioner.

> In the matter at bar, it could be argued that based on the ambiguity of the medical evidence relative to the extent of the claimant's disability, and absent additional elucidation from Dr. Murray in the form of deposition testimony or a clarification of his original report, the trier simply could not reasonably infer that the claimant's disability entitled her to temporary total disability benefits. As discussed previously herein, there can be little question that the trier was clearly hampered by the lack of deposition testimony from the various doctors who examined the claimant. Nevertheless, precisely because of the ambiguity of the evidence at hand, we are unable to sustain the trier's dismissal of the claim for temporary total disability benefits. We therefore remand this matter to the trial commissioner for additional proceedings relative to the issue of whether the claimant currently has an entitlement to temporary total disability benefits. 'No case under this Act should be finally determined when the ... court is of the opinion that, through inadvertence, or otherwise, the facts have not been sufficiently found to render a just judgment.' Cormican v. McMahon, 102 Conn. 234, 238 (1925).

Id.[4]

[4] As a result, we can distinguish this case from the case respondents rely upon, Pereira v. State/Department of Developmental Services, 6204 CRB-3-17-6 (August 1, 2018), where we found the commissioner thoroughly reviewed evidence on the record and made determinations which had proper support in the record.

The commissioner is imbued with statutory powers pursuant to General Statutes §§ 31-294f[5], 31-278[6] and 31-298[7], to conduct further inquiry if the record presented is

[5] General Statutes § 31-294f states: "(a) An injured employee shall submit himself to examination by a reputable practicing physician or surgeon, at any time while claiming or receiving compensation, upon the reasonable request of the employer or at the direction of the commissioner. The examination shall be performed to determine the nature of the injury and the incapacity resulting from the injury. The physician or surgeon shall be selected by the employer from an approved list of physicians and surgeons prepared by the chairman of the Workers' Compensation Commission and shall be paid by the employer. At any examination requested by the employer or directed by the commissioner under this section, the injured employee shall be allowed to have in attendance any reputable practicing physician or surgeon that the employee obtains and pays for himself. The employee shall submit to all other physical examinations as required by this chapter. The refusal of an injured employee to submit himself to a reasonable examination under this section shall suspend his right to compensation during such refusal.

(b) All medical reports concerning any injury of an employee sustained in the course of his employment shall be furnished within thirty days after the completion of the reports, at the same time and in the same manner, to the employer and the employee or his attorney."

[6] General Statutes § 31-278 states: "Each commissioner shall, for the purposes of this chapter, have power to summon and examine under oath such witnesses, and may direct the production of, and examine or cause to be produced or examined, such books, records, vouchers, memoranda, documents, letters, contracts or other papers in relation to any matter at issue as he may find proper, and shall have the same powers in reference thereto as are vested in magistrates taking depositions and shall have the power to order depositions pursuant to section 52-148. He shall have power to certify to official acts and shall have all powers necessary to enable him to perform the duties imposed upon him by the provisions of this chapter. Each commissioner shall hear all claims and questions arising under this chapter in the district to which the commissioner is assigned and all such claims shall be filed in the district in which the claim arises, provided, if it is uncertain in which district a claim arises, or if a claim arises out of several injuries or occupational diseases which occurred in one or more districts, the commissioner to whom the first request for hearing is made shall hear and determine such claim to the same extent as if it arose solely within his own district. If a commissioner is disqualified or temporarily incapacitated from hearing any matter, or if the parties shall so request and the chairman of the Workers' Compensation Commission finds that it will facilitate a speedier disposition of the claim, he shall designate some other commissioner to hear and decide such matter. The Superior Court, on application of a commissioner or the chairman or the Attorney General, may enforce, by appropriate decree or process, any provision of this chapter or any proper order of a commissioner or the chairman rendered pursuant to any such provision. Any compensation commissioner, after ceasing to hold office as such compensation commissioner, may settle and dispose of all matters relating to appealed cases, including correcting findings and certifying records, as well as any other unfinished matters pertaining to causes theretofore tried by him, to the same extent as if he were still such compensation commissioner."

[7] General Statutes § 31-298 states: "Both parties may appear at any hearing, either in person or by attorney or other accredited representative, and no formal pleadings shall be required, beyond any informal notices that the commission approves. In all cases and hearings under the provisions of this chapter, the commissioner shall proceed, so far as possible, in accordance with the rules of equity. He shall not be bound by the ordinary common law or statutory rules of evidence or procedure, but shall make inquiry, through oral testimony, deposition testimony or written and printed records, in a manner that is best calculated to ascertain the substantial rights of the parties and carry out the provisions and intent of this chapter. No fees shall be charged to either party by the commissioner in connection with any hearing or other procedure, but the commissioner shall furnish at cost (1) certified copies of any testimony, award or other matter which may be of record in his office, and (2) duplicates of audio cassette recordings of any formal hearings. Witnesses subpoenaed by the commissioner shall be allowed the fees and traveling expenses that are allowed in civil actions, to be paid by the party in whose interest the witnesses are subpoenaed. When liability or extent of disability is contested by formal hearing before the commissioner, the claimant shall be entitled, if he prevails on final judgment, to payment for oral testimony or deposition

insufficient to properly determine a claim. The ambiguous opinion presented by the commissioner's examiner herein was precisely the sort of evidence that required the commissioner to seek clarification, as per Hubbard, supra, and Cormican, supra. We believe it was error for the trial commissioner to reach a determination in this matter without obtaining such a clarification as to the basis for Anthony's cryptic and conclusory opinion as to the claimant's work capacity. Consequently, we cannot affirm Conclusion, ¶¶ C-D.

There is error; the April 30, 2019 Finding and Dismissal of Daniel E. Dilzer, Commissioner acting for the First District, is remanded for further proceedings consistent with this Opinion.

Commissioners Randy L. Cohen and William J. Watson III concur in this Opinion.

testimony rendered on his behalf by a competent physician, surgeon or other medical provider, including the stenographic and videotape recording costs thereof, in connection with the claim, the commissioner to determine the reasonableness of such charges."