CASE NO. 6345 CRB-7-19-9 CLAIM NO. 700179854	:	COMPENSATION REVIEW BOARD
JAMES ARRICO CLAIMANT-APPELLANT	:	WORKERS' COMPENSATION COMMISSION
v.	:	NOVEMBER 17, 2020

CITY OF STAMFORD/
BOARD OF EDUCATION
EMPLOYER
SELF-INSURED

and

PMA MANAGEMENT CORPORATION
OF NEW ENGLAND
THIRD-PARTY ADMINISTRATOR
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Daniel A. Benjamin, Esq., Benjamin, Gold & Troyb, P.C., 350 Bedford Street, Suite 403, Stamford, CT 06901.

The respondents were represented by Scott Wilson Williams, Esq., Williams Law Firm, L.L.C., 2 Enterprise Drive, Suite 412, Shelton, CT 06484.

This Petition for Review from the August 20, 2019 "*De Novo* Ruling on the Form 36 of February 28, 2018" by Michelle D. Truglia, the Commissioner acting for the Seventh District, was heard May 22, 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 three 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 *de novo* ruling (ruling) reached by Commissioner Michelle D. Truglia (commissioner) after granting the respondents' form 36 which found the claimant had reached maximum medical improvement. The claimant takes issue with elements of the ruling which determined that his continued disability was due to non-work related factors, as well as a conclusion that any further treatment for him would be palliative and not curative. The claimant argues that the commissioner failed to apply the proper test as to whether a work injury was a substantial contributing factor in his disability. He also argues that the issue of further treatment was neither noticed nor litigated at the formal hearing and it was improper to reach any findings on that issue in the ruling. The respondents argued that we should not address the issue of medical treatment at this time and should treat this conclusion as dicta. They argue on the other hand that substantial evidence supports the commissioner's conclusion regarding approving the form 36, as well as the source of the claimant's current disability.

We concur with the respondents that there was substantial evidence in support of granting the form 36. We are persuaded by the claimant; however, that the manner in which the commissioner addressed this evidence was sufficiently unorthodox as to impair his right to a fair hearing based on established standards in this forum. Accordingly, we remand the issues of disability and medical treatment for further proceedings.

The commissioner reached the following factual findings which are pertinent to our consideration of this appeal. She noted that the claimant had sustained two different back injuries; the first occurred on July 21, 2008 at the L4 level and the second injury on

February 10, 2017, when the claimant fractured his sacrum lifting a table.[2] The commissioner noted that voluntary agreements were approved in 2016, establishing a 16 percent permanent partial disability rating for the first injury and a date of maximum medical improvement. She also noted that two jurisdictional voluntary agreements were approved in 2017, accepting the claimant's more recent injury. The commissioner also noted the numerous ailments unrelated to his work injury the claimant suffered from during the period between his initial and subsequent back injuries, which included colitis, essential hypertension, seizures and epilepsy, and spinal stenosis. She noted that one of the claimant's treaters, Vincent R. Carlesi, M.D., had diagnosed him in 2008 with a history of chronic low back pain which radiates into his buttocks and down his left lower extremity. An MRI in 2008 noted "degenerative disc narrowing at the L4-L5 level . . . a large left foraminal and extra foraminal extruded disc herniation causing severe compression of the left L4 nerve root . . . bilateral facet disease at the L5-S1 level . . . ." Ruling, ¶ 4, *citing* Claimant's Exhibit C. The commissioner noted the claimant chose not to undergo surgery at that time and opted for pain management. She also noted a gap in the medical records presented for the period from September 2008 to January 2017.

Reports from two physicians were entered into evidence as to the claimant's condition in early 2017. On January 17, 2017, Michael J. Brennan, M.D., noted the claimant had returned to work and was functioning at a satisfactory level while being prescribed narcotic pain medication such as Oxycontin and Percocet. He opined the claimant should continue this regimen of pain medication. Carlesi examined the claimant on March 7, 2017, and diagnosed him with lumbar radiculopathy and lumbar spinal

[2] The ruling stated this date as "March 23, 2017." As the medical evidence documents a February 10, 2017 date of injury, we will refer to that date in this opinion and deem the March 23, 2017 date a mere scrivener's error and place no weight upon it.

stenosis. Carlesi noted the claimant's medical history included colitis, ulcerative colitis, disc disease, degenerative joint disease, and that he is currently an "every day smoker." Ruling, ¶ 7, *citing* Claimant's Exhibit C. Carlesi also noted that the claimant's prior treatment had included the use of a number of steroids. Subsequent to his 2017 injury, the claimant treated with a neurosurgeon, Scott Simon, M.D.

Simon noted on March 23, 2017 that a February 25, 2017 MRI showed the claimant with an acute sacral insufficiency fracture. Noting the claimant's use of prednisone, Simon referred the claimant for an evaluation of bone health and prescribed rest. Simon examined the claimant again on May 10, 2017 and July 12, 2017. As of September 13, 2017, the claimant was weaned off prednisone. An MRI reviewed at this visit revealed "L3-five lateral recess stenosis . . . with STIR signal abnormalities associated with his sacral fractures." Ruling, ¶ 8.d, *citing* Claimant's Exhibit A. Simon examined the claimant again on November 2, 2017, and determined his condition was essentially unchanged from the last visit. He continued to keep the claimant out of work while recommending that he undergo medial branch blocks, SI joint injections and possible lumbar and SI joint RFAs.

The respondents had their expert, Stuart Belkin, M.D., an orthopedic surgeon, examine the claimant on February 20, 2018. Belkin found the claimant had reached maximum medical improvement (MMI) with a 5 percent permanent partial disability of the lumbar spine, independent of any previous impairment. Belkin's report was affixed to the February 2018, form 36. The claimant filed an objection to the form 36 on March 5, 2018, disputing that he had reached MMI. On March 12, 2018, Carlesi sent a letter to claimant's counsel stating that the claimant's 2017 injury had:

> exacerbated his underlying pain and that he has been incapable of returning to work due to the severity of his pain. He is unable to ambulate without a cane and he has severe pain [from his] back radiating [into] both lower extremities. [His] pain worsens with activity, significant decrease in ability to lift, bend, and carry anything at this point in time. [He] is unable to perform most of his activities of daily living and pretty much rests in a recliner or in a [bed]. He lacks physical endurance and frequently awakens from sleep due to pain.

Ruling, ¶ 11, *quoting* Claimant's Exhibit C.

Carlesi deemed the claimant totally disabled from all work activities as a result of the progressive degenerative disc disease, lumbar spinal stenosis and sacral insufficiency fractures. He did agree the claimant was at MMI and assigned an 11 percent permanent partial disability rating of the lumbar spine. On March 20, 2018, Carlesi further assessed the claimant as to his pain level and medication use, and noted the claimant was using a cane and was unable to return to work. Carlesi's notes also indicate the claimant suffered from a number of digestive system ailments.

A commissioner's examination was performed by Michael E. Karnasiewicz, M.D., on June 28, 2018. Karnasiewicz opined that the claimant had reached MMI from the 2017 injury and had sustained a 5 percent additional permanent disability to his sacral spine from the incident, and that the claimant had a sedentary work capacity. The commissioner noted these other opinions from the examiner.

> a. The claimant's underlying spinal stenosis was probably aggravated by the injury of February 10, 2017 and is causing the radiculopathy the claimant is experiencing. (Cl. Ex. "F").
>
> b. The claimant's need for treatment is multifactorial in that both the injury from 2008 and the injury from 2017 were "substantial factors" in the production of the claimant's need for treatment. (Cl. Ex. "F").

> c. Other factors complicating the claimant's current inability to work are ulcerative colitis, acid reflux and seizure disorder. He also has poor concentration skills and a slowed thought process. He is an "easy" bruiser and bleeder and has unspecified difficulty with his immune system. He uses a cane for ambulation, his ankle reflexes are absent bilaterally with diminished sensation bilaterally in both of his feet. (Cl. Ex. "F").
>
> d. Between the claimant's first injury in 2008 and his second injury in 2017, his diagnostics reveal a steady worsening of his stenotic condition. In addition, an EMG study with Dr. Sahler shows multiple level radiculopathy consistent with spinal stenosis.
>
> e. Dr. Karnasiewicz gives the claimant a sedentary work capacity and recommends that the claimant be re-evaluated by Dr. Simon for decompressive surgery in the treatment of his bilateral pain. (Cl. Ex. "F").

Ruling, ¶ 13.

The claimant continued to treat for his ailments with Carlesi who on July 20, 2018 examined him and noted he "continues to experience chronic lower back pain, sacral pain and radicular pain in both lower extremities associated numbness, tingling and pins and needles in his feet." Ruling, ¶ 14. Carlesi said the claimant was a surgical candidate for either a lumbar laminectomy and decompression surgery to treat the spinal stenosis or a spinal cord stimulator trial for pain relief. He also opined that the claimant was still disabled. The claimant was examined by Simon on August 16, 2018. He noted the claimant had resumed using prednisone for his ulcerative colitis. Simon also noted the claimant presented with "worsening low back and leg pain and numbness." Ruling, ¶ 15. Simon opined the claimant was permanently disabled by his pain and unable to work and that due to his comorbidities he was not a good surgical candidate. He recommended pain management and weight management. The claimant was examined on October 19, 2018, by a neurologist, Sarah E. Buckingham, M.D., regarding his seizures. She noted

prior seizures in May 2018 and in 2016; diagnosed "generalized epilepsy" and prescribed medication. Ruling, ¶ 17.

Belkin was deposed on December 5, 2018 and discussed his prior February 2018 examination and his review of the claimant's medical records. He noted the claimant had a bilateral sacral fracture on February 10, 2017 and needed no additional treatment as of February 2018. He deemed the claimant at MMI with a 5 percent permanent partial disability rating in addition to any previous rating. He opined that the claimant could return to work as a custodian based solely on his lumbar spine condition "but that any current disability at the time I examined him was as a result of his pre-existing chronic spinal problems" which he testified were "diffuse degenerative disc disease and spinal stenosis of the lumbar spine." Ruling, ¶18.b., *citing* December 5, 2018 Transcript, pp. 37-38. He agreed with Karnasiewicz's opinions as to the claimant's level of permanency and having a sedentary work capacity. He was more equivocal on Simon's opinion that the claimant was disabled from work, deeming it "possible." Belkin opined the claimant's comorbidities are not germane to his orthopedic examination and he did not unequivocally agree that the claimant's comorbidities and medication regime would necessarily preclude any form of work status for the claimant. He did not believe the claimant's spinal stenosis had necessarily worsened and opined the claimant's sacral fractures should have healed.

The commissioner also took note of a letter from Robert Plansky, M.D., dated December 12, 2018, who is treating the claimant for colitis, wherein he opined "in my opinion, the combined effect for [sic] the patient's severe spinal stenosis, chronic pain, chronic colitis and seizure disorder (and the associated medication regimens) render the

patient unemployable and unable to work. He is at this time, and for the foreseeable future, disabled from any type of work." Ruling, ¶ 19, *citing* Claimant's Exhibit G.

Based on this record, the commissioner approved form 36 of February 28, 2018 effective the date of filing. She determined the claimant reached MMI with an additional 5 percent PPD to his sacrum and that the combined PPD from the 2008 and 2017 dates of injury is 21 percent of the low back.

The claimant filed a motion seeking a number of corrections, including the date of the 2017 accident; the addition of findings concerning the claimant's return to work and medical condition during the period between the 2008 and 2017 injuries, a finding that his hearing testimony was credible, and a finding that the 2017 injury aggravated the claimant's spinal stenosis based on the opinions of Carlesi and Karnasiewicz. The motion also sought a finding that further treatment for the claimant's back injuries was reasonable or necessary. The commissioner denied this motion in its entirety. The claimant also filed a motion for reconsideration of the commissioner's Conclusion, ¶ D, based on the MRI review performed by Simon as well as the opinions of Carlesi and Karnasiewicz. She denied this motion as well.

As a result, the claimant pursued this appeal. He argues the commissioner failed to properly apply the "substantial contributing factor" standard to the 2017 work injury in ascertaining if this made his continued disability compensable, that the commissioner improperly held his decision not to pursue surgery after his 2008 injury against him at this time, and that the commissioner's conclusions as to further treatment being palliative were erroneous. He also argues the ruling was inconsistent with the evidence, and on the

issue of further medical care he was denied due process as the matter had not been a noticed issue at the hearing.

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).

Notwithstanding the broad deference we extend to a fact finder on appeal, we must also review a decision for its compliance with the principles of due process and adherence to established legal precedent. We are persuaded by the claimant's arguments and determine the commissioner issued an order on the issue of future medical treatment in the absence of having offered the parties an opportunity to litigate this issue. We also cannot ascertain the legal standard the commissioner applied on the issue of whether the claimant's current disability was or was not the result of compensable injuries. As a result, we must vacate various elements of the ruling.

Future medical treatment for the claimant was not an issue noticed for consideration at the formal hearing. We do not find the commissioner clearly presented this issue as a matter for consideration when she commenced the formal hearing. We have allowed a commissioner to address an issue which was clearly raised during the course of the proceedings, see DiDonato v. Greenwich, 5431 CRB-7-09-2 (May 18, 2010). However, we are unable to support the idea that the finding of MMI compelled a determination that his future medical treatment was palliative, especially as respondents' brief cites no authority for this position.

It is of course black-letter law "that it is a *factual matter* as to whether medical care satisfies the 'reasonable and necessary' standard of § 31-294d C.G.S." (Emphasis added). Carroll v. Flattery's Landscaping, Inc., 4499 CRB-8-02-2 (March 25, 2003). We believe a proper determination of facts requires both parties to be able to present their arguments and evidence. See Wilson v. Capitol Garage, Inc., 6109 CRB-2-16-6 (May 16, 2017). We believe the claimant should be able to be heard on this issue. "Due process requires that both parties be properly advised as to the relief under consideration at the formal hearing so that they may prepare their most persuasive arguments." Henry v. Ansonia, 5674 CRB-4-11-8 (August 8, 2012). Consistent with the holding in Henry, we vacate Conclusion, ¶¶ G-I, and remand the issue of future medical treatment for additional proceedings.[3]

We turn to the issue of whether the commissioner applied the proper standard in determining the claimant's current condition was not due to a compensable injury. The respondents argued that it is the claimant's burden to establish that his or her disability is

[3] In any event, it is black-letter law that a current determination as to whether medical treatment is "reasonable or necessary" cannot bar a future request seeking such treatment. Serluca v. Stone & Webster Engineering, 5118 CRB-8-06-8 (July 13, 2007).

the result of a compensable injury, *citing* Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440, 447 (2001). They claim the outcome herein is indistinguishable from Olwell v. State/Dept. of Developmental Services, 5731 CRB-7-12-2 (February 14, 2013). After reviewing Olwell, we do not agree, and the nature of the differences support a remand in this matter.

In Olwell, the claimant presented to commissioner's examiners with ailments related to compensable orthopedic injuries and noncompensable conditions such as "multiple sclerosis, severe depression and psychosocial problems." The examiner whom the trial commissioner primarily relied upon opined that the compensable injuries left the claimant with a work capacity but her noncompensable injuries rendered her unemployable. The commissioner thus dismissed her claim for benefits pursuant to General Statutes § 31-307. We affirmed this decision finding that the trial commissioner could rely on the opinions of the commissioner's examiner to determine the claimant failed to prove her compensable ailment was a substantial factor in her current disability, *citing* Weir v. Transportation North Haven, 5226 CRB-1-07-5 (April 16, 2008); Lamontagne v. F&F Concrete Corporation, 5198 CRB-4-07-2 (February 25, 2008) and Vitti v. Richards Conditioning Corp., 5247 CRB-7-07-7 (August 21, 2008), *appeal withdrawn*, A.C. 30306 (September 29, 2009).

Had Karnasiewicz offered similar testimony to that of the commissioner's examiner in Olwell, supra, we would affirm this ruling, however, he did not. The commissioner's examiner in this case opined that the 2017 compensable injury probably aggravated the claimant's underlying spinal stenosis and was causing the claimant's radiculopathy. The trial commissioner rejected this opinion and chose to rely upon an

opinion offered by Carlesi nine years prior to the compensable injury. See Conclusion, ¶ D. While we fully appreciate the role of a trial commissioner as to being the sole person "responsible for finding the truth amidst conflicting claims and evidence" O'Connor v. Med-Center Home Healthcare, Inc., 4954 CRB-5-05-6 (July 17, 2006), we still must ensure these determinations comport with our precedent.

We note we have frequently affirmed a trial commissioner who found a treating physician or a respondent's examiner more persuasive than a commissioners' examiner, see Sanchez v. Edson Manufacturing, 5980 CRB-6-15-1 (October 6, 2015), *aff'd*, 175 Conn. App. 105 (2017) and Madden v. Danbury Hospital, 5745 CRB-7-12-4 (April 22, 2013). In those cases, the commissioner chose to rely upon an examination contemporaneous with the compensable injury and offered a detailed explanation for finding a different medical witness more credible or persuasive than the commissioner's examiner.[4] Here the commissioner offered no opinion as to the relative credibility or persuasiveness of any of the witnesses in this case. Moreover, the rationale for her decision is based on an old examination, the failure of the claimant to seek surgery, and the lapse of time, see Conclusion, ¶¶ D-E. Had the commissioner cited a medical witness who stated this point, we would find the ruling sustainable. The ruling does not cite such evidence, however. Consequently, we are concerned the ruling does not comport with the precedent in DiNuzzo v. Dan Perkins Chevrolet Geo, Inc., 294 Conn. 132 (2009), where a trial commissioner's finding cannot rely on an evidentiary foundation based on

[4] Often in a case where the result is favorable to a respondent and the rationale presented in the finding is opaque, we will review the opinions of the respondents' expert witness to see if they support the result. However, while the commissioner concluded the claimant was totally disabled due to pre-existing noncompensable injuries, the respondents' examiner, Belkin, did not unequivocally testify to that point. In Ruling, ¶ 18.e., the commissioner found Belkin opined "he did not unequivocally agree that the claimant's comorbidities and medication regime would necessarily preclude any form of work status for the claimant. (Belkin Depo. Tr. 12/05/18, pp. 39-41)." In any event, the commissioner failed to make any determination as to Belkin's relative credibility and persuasiveness as opposed to the other witnesses in this case.

"conjecture, speculation or surmise." Id., 136-137. After review we are not persuaded the underpinnings of Conclusion, ¶¶ D-E, meet the standard mandated under DiNuzzo.[5]

The commissioner may have been dissatisfied with Karnasiewicz's report and preferred that he opine as to the relative weight of the factors behind the claimant's disability, as was done in Weir, supra. However, she did not seek to clarify the opinion of Karnasiewicz, and we believe she should have done so, especially in the absence of identifying an expert whose contemporaneous opinions she deemed more credible and persuasive. See Goulbourne v. State/Dept. of Correction, 6329 CRB-1-19-5 (June 10, 2020).

We now turn to the argument that the commissioner did not apply the proper standard in this case in determining whether the claimant's disability was due to a compensable injury. The claimant argues the standard in Thelors v. Jewish Home for the Elderly, 6155 CRB-4-16-11 (April 10, 2018), was not properly applied. In Thelors, we cited our precedent in Singh v. CVS, 6038 CRB-7-15-10 (July 20, 2016), *aff'd*, 174 Conn. App. 841 (2017) (per curiam), in determining whether a claimant established his condition was compensable when he had both compensable and noncompensable prior injuries.

> The trial commissioner concluded the claimant's preexisting diabetic condition was the proximate cause of his current medical condition. In reviewing this conclusion we look at our analysis of the proximate cause standard as recently delineated in cases such as Kladanjcic v. Woodlake at Tolland, 5995 CRB-1-15-3 (March 2, 2016) and Nelson v. Revera, Inc., 5977 CRB-5-15-1 (September 21, 2015). "We also have reviewed the precedent since Marandino [v. Prometheus Pharmacy, 294 Conn. 564 (2010)] on the

[5] The respondents on pages 6 and 7 of their brief, outline the evidence on the record supportive of the result reached herein. However, in light of the fact the commissioner placed greater weight upon an examination performed by Carlesi nine years prior to the 2017 injury than the evidence cited herein, we are not persuaded.

> evidentiary burden regarding proximate cause a claimant must meet in order to be awarded benefits under Chapter 568. We recently engaged in an extensive review of this standard in Larocque v. Electric Boat Corporation, 5942 CRB-2-14-6 (July 2, 2015). Citing Sapko v. State, 305 Conn. 360 (2012), DiNuzzo v. Dan Perkins Chevrolet Geo, Inc., 294 Conn. 132 (2009) and Voronuk v. Electric Boat Corp., 118 Conn. App. 248 (2009), we concluded 'our appellate courts have restated the need for claimants seeking an award under Chapter 568 to present reliable, nonspeculative evidence and to carry their burden of proof that there is a clear nexus of proximate cause between employment and injury. Larocque, supra.

Singh, supra, *quoting* Nelson, supra.

The trial commissioners in both Thelors and Singh determined that the claimants in those cases failed to prove their compensable injury "was a substantial factor in the claimed disability." Cassella v. O & G Industries, 6017 CRB-4-15-5 (June 27, 2018). On the other hand, claimants who had extensive pre-existing conditions have persuaded the trial commissioner that their condition was substantially due to a compensable injury. See Woodmansee v. Electric Boat Corporation, 6252 CRB-8-18-3 (September 11, 2019), in particular fn.8, and Hadden v. Capitol Region Education Council, 5843 CRB-1-13-5 (May 20, 2014), *aff'd*, 164 Conn. App. 41 (2016). In all of those cases we could ascertain the manner in which the trial commissioners reached their conclusions; which was by weighing the probative value of conflicting contemporaneous opinions. We fully appreciate the arduous task a trial commissioner faces in reviewing the lengthy and often extremely equivocal medical evidence presented when a claimant has sustained multiple injuries or ailments. Nonetheless, we believe the commissioner should have identified the specific expert witness or witnesses who offered recent testimony supportive of the result in this case. In the absence of the commissioner stating this specifically in the text

of the ruling, we cannot, as an appellate panel, sustain the conclusion reached herein. Therefore, we must vacate Conclusion, ¶¶ D-F.

The parties have not contested the determination of a date of maximum medical improvement or contested the additional permanency awarded to the claimant. We affirm those elements of the ruling. As we find the record cannot sustain Conclusion, ¶¶ D-I, we vacate those conclusions and remand the issues of whether the claimant is totally disabled, whether the claimant's disability was caused by a compensable injury, and whether further medical care for the claimant is reasonable or necessary for further proceedings.

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