CASE NO. 6416 CRB-8-21-2 CLAIM NOS. 100210567, 100139210, 100214273 & 800139074	:	COMPENSATION REVIEW BOARD
BERTIL LOVEN CLAIMANT-APPELLANT	:	WORKERS' COMPENSATION COMMISSION
v.	:	DECEMBER 30, 2021

PRATT & WHITNEY
EMPLOYER

and

LIBERTY MUTUAL INSURANCE GROUP
INSURER
RESPONDENTS-APPELLEES

and

WALCO ELECTRIC
EMPLOYER

APPEARANCES:

The claimant was represented by Amity L. Arscott, Esq., Embry, Neusner, Arscott & Shafner, LLC, 118 Poquonnock Road, P.O. Box 1409, Groton, CT 06340-1409.

The respondents, Pratt & Whitney and Liberty Mutual Insurance Group, were represented by Marian Yun, Esq., Law Offices of Meehan, Roberts, Turret & Rosenbaum, 108 Leigus Road, First Floor, Wallingford, CT 06492.

The respondent, Walco Electric, was represented by Jamie Spiller Kaplan, Esq., Chartwell Law, 170 Worcester Street, Suite 200, Wellesley, MA 02481.

This Petition for Review from the January 25, 2021 Finding and Dismissal by Peter C. Mlynarczyk, the Administrative Law Judge acting for the Eighth District, was heard June 25, 2021 before a Compensation Review Board panel consisting of Chief Administrative Law Judge Stephen M.

Morelli and Administrative Law Judges Brenda D. Jannotta and Maureen E. Driscoll.[1]

OPINION

STEPHEN M. MORELLI, CHIEF ADMINISTRATIVE LAW JUDGE. The claimant has appealed from the January 25, 2021 dismissal of his claim for benefits resulting from his development of lung cancer that he alleges arose out of and in the course of his employment with the respondent, Pratt & Whitney, between 1964 and 1966. After formal hearings conducted on June 17, 2020 and August 17, 2020, Peter C. Mlynarczyk, the Administrative Law Judge acting for the Eighth District, dismissed his claim and the claimant appealed to this tribunal. A motion to correct was filed on February 24, 2021 and denied in its entirety on March 1, 2021. In his reasons of appeal, the claimant contended that (1) the judge's findings of fact were arbitrary and capricious; (2) the judge applied an incorrect standard of causation; (3) the judge applied a higher than required and improper burden of proof; (4) the judge's conclusions resulted from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them; and (5) the judge's conclusions were without support in the evidence and/or omitted admitted or undisputed material facts. We find no error and accordingly affirm the decision of the judge.[2]

The administrative law judge identified the issues for determination as compensability, compensation rate, General Statutes § 31-284b fringe benefits, medical

[1] Effective October 1, 2021, the Legislature directed that the phrase "Administrative Law Judge" be substituted when referencing a workers' compensation commissioner. See Public Act 21-18.
[2] We note that a motion for extension of time was granted during the pendency of this appeal.

bills, medical treatment, permanent partial disability, temporary partial disability, and temporary total disability. The judge also listed his jurisdiction over Walco Electric as an issue to be decided.

After the close of the record, the administrative law judge made the following findings that were pertinent to our review of this matter. Between 1960 and 1963, the claimant was in the United States Air Force where he worked as an automotive technician. During that employment, the claimant was exposed to asbestos while working on brakes, clutches, transmissions, and seals containing asbestos. Following the claimant's discharge from the Air Force, he took various jobs as an automotive mechanic where he continued to be exposed to asbestos. The claimant also worked for Pratt & Whitney from 1964 through 1966 and was exposed to asbestos during the course of this employment as well. Subsequent to his employment with Pratt & Whitney, the claimant worked for multiple employers, including Walco Electric, a Rhode Island company, from 1971 through 1972. The claimant continued to be exposed to asbestos in some of this later employment. He could not remember, though, if any of this later workplace exposure to asbestos occurred in Connecticut. Furthermore, the claimant testified that he was a mechanic for most of his life and liked working on cars. See Findings, ¶¶ 1.c-1.f, 1.h-1.i, 1.m, 1.p and 1.r-1.s.

The claimant was never a smoker. He had a history of thyroid cancer. In the 1990s, the claimant was diagnosed with vasculitis and was prescribed steroids for the treatment of that condition. The claimant also had a history of cardiac disease. See Findings, ¶¶ 1.u-1.v, 2.a and 2.i.

In 2017, the claimant was diagnosed with lung cancer. A form 30C was filed with the Workers' Compensation Commission on October 30, 2017. The date of injury listed on the form 30C was "on or about September 1, 2017." A form 43 denying compensability was filed on behalf of the respondent, Pratt & Whitney, on November 16, 2017.

The claimant introduced numerous medical reports documenting his condition and the treatment that was provided to him into the evidentiary record. The claimant also introduced the opinions of two physicians to support his contention that his employment with Pratt & Whitney was a significant contributing factor to the development of his lung cancer.

Michael M. Conway, a board-certified pulmonologist, reviewed the claimant's file and issued a causation opinion. Conway also testified via deposition. In his August 20, 2018 narrative report, Conway opined, in part:

> 1) Mr. Loven has early stage lung cancer. Because he never smoked, the only identified cause of his malignancy was his extensive occupational exposure to respirable asbestos.
> 2) All the asbestos exposures throughout his career contribute additively to the asbestos burden, and therefore each workplace where he was exposed to respirable asbestos should be considered significant contributing exposures. I have detailed the exposures under the occupational history, but it is beyond the scope of my expertise to refine the relative contributions of each employer.
> 3) His pulmonary function testing reveals an unusual pattern of both restrictive and obstructive disease. Given the extensive history of valvular heart disease, however, I believe cardiac disease and chest surgery are likely the cause of the abnormalities. I doubt the vasculitis contributes since he is ANCA negative and the pattern is more consistent with a quiescent non-pulmonary systemic vasculitis.

Claimant's Exhibit L, pp. 3-4

> 5) While his diffusion capacity is reduced, because I found no diffuse interstitial changes on his chest CT's, at this time I cannot make a diagnosis of pulmonary fibrosis or asbestosis.

Id., p. 4.

Jerrold L. Abraham, a board-certified pathologist, also reviewed the claimant's file, after which he issued three narrative reports dated October 25, 2018, November 8, 2018, and February 21, 2019. Abraham also testified via deposition. In his written reports, Abraham stated, in part:

> The lung itself not involved by the cancer shows focal peribronchiolar and interstitial fibrosis associated with marked accumulation of iron rich material consistent in some areas with hemosiderin and in others more typical for welding or similar metal working. In addition there are areas with macrophages containing mixed opaque and strongly birefringent dust consistent with silicates as well as some silica.

Claimant's Exhibit M.

> Asbestos exposure is well recognized to increase the risk of development of lung cancer. It is not necessary for there to be a diagnosis of asbestosis for asbestos exposure to cause lung cancer, since asbestosis and lung cancer are two separate adverse outcomes from asbestos exposure. Mr. Loven had a well described history of asbestos exposure and confirmation of the diagnosis of a primary lung cancer. The available records and pathology materials neither confirm nor exclude a diagnosis of asbestosis. Based on all the available information I can conclude to a reasonable degree of medical certainty that Mr. Loven's asbestos exposure (cumulative) was a substantial contributing cause of his lung cancer.

Claimant's Exhibit O.

The respondents introduced a report from Milo Pulde, a physician at Brigham & Women's Hospital. Pulde issued a 61-page report relative to his review of the claimant's records but did not testify either live or via deposition. Pulde stated, in part:

Based on a review of the medical records, the literature relating to the pathogenesis and diagnosis of malignant and non-malignant asbestos related pleural and parenchymal lung disease, systemic vasculitis, and the carcinogenic effects of immunosuppressive agents (Cytoxan), and to a reasonable degree of medical certainty, there is no evidence that Mr. Loven's employment as an aircraft mechanic Tests Cell area 7 from 10/01/63 to 12/30/66 (27 months) by Pratt & Whitney (UTC) or 10/01/63 to 12/30/66 intermittent occupational exposure to undisturbed quick disconnect wiring or undisturbed control room insulation and ceiling tiles alleged composed of asbestos, or use of gloves alleged composed of asbestos caused or contributed to his MPO-ANCA/MPA vasculitis, MPO-ANCA related vasculitis related immune dysfunction (activation of proto-oncogenes and deactivation of suppressor genes), MPO-ANCA/MPA related pulmonary nodules and pulmonary vasculitis, or MPO-ANCA/MPA vasculitis and immunosuppressive drug related non-small cell lung cancer (NSCLC), influenced the natural history or affected the outcome of his MPO-ANCA/MPA vasculitis and immunosuppressive drug related non-small cell lung cancer (NSCLC), or is responsible for any short or long term pulmonary disability. Mr. Loven's NSCLC (well differentiated adenocarcinoma with predominant lepidic/acinar pattern) by CT-guided left lower lobe biopsy 10/03/17, immunohistochemistries (TTF-1 and Napsin A positive) 10/03/17, and left lower lobe lobectomy 11/20/17 is a direct and exclusive consequence of his MPO-ANCA/MPA vasculitis related immune dysfunction and pulmonary vasculitis and the treatment of his MPO-ANCA/MPA vasculitis with Cytoxan 09/01/09 to 11/08/12. Mr. Loven fails to fulfill the objective criteria for a diagnosis of parenchymal asbestosis, the pre-requisite for the attribution even in part, of a tobacco, vasculitis, or medication induced lung cancer to occupational asbestos exposure. Mr. Loven fails to fulfill Hill's Criteria for Causation for the attribution of his MPO-ANCA/MPA vasculitis, MPO-ANCA/MPA related pulmonary vasculitis and pulmonary nodules, or vasculitis and medication induced NSCLC to his 10/01/63 to 12/30/66 (27 months) occupational asbestos exposure. Dr. Conway's conclusions 08/20/18 are not supported by the medical facts or literature. On 08/20/18 Dr. Conway failed to accurately and completely review Mr. Loven's history of microscopic polyangiitis (MPA) and ANCA-associated vasculitis (AAV), noted an erroneous diagnosis of negative p and c ANCA serologies, failed to appreciate the treatment of his vasculitis with Cytoxan, made a diagnosis of "quiescent non-pulmonary systemic vasculitis despite his recurrent hemoptysis and reportedly positive bronchoscopies, and exhibited a lack of understanding of the risk

> of lung cancer secondary to microscopic polyangiitis (MPA) and ANCA-associated vasculitis (AVV) and its treatment.

Respondents' Exhibit 3, pp. 28-29.

> Mr. Loven's non-small cell lung cancer (NSCLC) is a direct and exclusive consequence of his ANCA-associated vasculitis (AAV) related immune dysfunction, MPO-ANCA/MPA vasculitis related focal interstitial lung disease, and the treatment of his MPO-ANCA/MPA vasculitis with immunosuppressive medications (Cytoxan) from 09/01/09 to 11/08/12.

Id., pp. 37-38.

After reviewing all of the evidence and testimony in this matter, the administrative law judge concluded that Conway's opinions regarding causation were not credible because he ruled out vasculitis as a possible cause of the claimant's adenocarcinoma based on an erroneous assumption, thereby tainting the entire analytical process. The administrative law judge similarly found Abraham's opinions unpersuasive because Abraham failed to demonstrate a complete awareness of the claimant's various diagnoses and treatment modalities. Of the three expert opinions, the administrative law judge found Pulde's analysis to be the most complete and most persuasive.

Conclusions, ¶¶ B-D.

Based on these credibility assessments, the administrative law judge dismissed the claim against the respondent, Pratt & Whitney.[3] The administrative law judge also dismissed the claim against the respondent, Walco Electric, on jurisdictional grounds since the claimant could not state with any certainty that he was exposed to asbestos while working in the State of Connecticut for Walco Electric.[4]

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[3] Having dismissed the underlying claim, it was not necessary for the administrative law judge to issue findings with respect to the other questions before him.

[4] The dismissal of the claim against the respondent, Walco Electric, was not a subject of this appeal.

The standard of review we are obliged to apply to an administrative law judge's findings and legal conclusions is well-settled. "The [administrative law judge'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). Thus, "it is … immaterial that the facts permit the drawing of diverse inferences. The commissioner alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court." Fair v. People's Savings Bank, 207 Conn. 535, 540 (1988), *quoting* Del Vecchio v. Bowers, 296 U.S. 280, 287 (1935).

We will first address the claimant's contention that Pulde's opinion should not have been considered by the administrative law judge absent a vetting of his credentials. Although a judge normally reviews the qualifications of a proposed expert prior to assessing his opinions, the laying of a foundation is not mandatory. See Struckman v. Burns, 205 Conn. 542, 552-53 (1987). Furthermore, a comparison of the credentials of the various expert witnesses is not determinative. As long as the judge can ascertain a reasonable diagnostic method behind the medical opinion, his reliance thereon will not be overruled. See Huertas v. Coca Cola Bottling Company, 5052 CRB-1-06-2 (2007). In Dixon v. United Illuminating Co., 57 Conn. App. 51 (2000), our Appellate Court

specifically noted that, "[e]xpert testimony should be admitted when: (1) the witness has a special skill or knowledge directly applicable to a matter in issue, (2) that skill or knowledge is not common to the average person, and (3) the testimony would be helpful to the court or jury in considering the issues." Id., 54 *quoting* State v. Freeney, 228 Conn. 582, 591 (1994). "Once the threshold question of usefulness . . . has been satisfied, any other questions regarding the expert's qualifications properly go to the weight, and not to the admissibility, of his testimony." Id., 54-55 *quoting* Davis v. Margolis, 215 Conn. 408, 417 (1990). Consequently, once the administrative law judge determined that Pulde had the appropriate knowledge and his opinions were useful to the resolution of the question of compensability, he was within his authority to consider those opinions.

Having found that the administrative law judge acted within his authority when he considered Pulde's opinions, we must next assess whether he applied the appropriate analyses with respect to his findings of fact, conclusions of law, and burden of proof.

The administrative law judge reviewed the medical opinions of three physicians, none of whom actually treated the claimant for his condition. These expert opinions were from Conway, who is a board-certified pulmonologist; Abraham, who is a board-certified pathologist; and Pulde, who is a physician at Brigham & Women's Hospital. The reports and transcripts from the depositions of Conway and Abraham were entered into evidence by the claimant. Despite Pulde not testifying either live or via deposition, his report was entered into the record without objection. The administrative law judge's decision contained in-depth analyses of the claimant's medical records, as well as the reports and conclusions of the three medical experts. Based on his review of the medical records and

the expert opinions, the administrative law judge found Pulde's opinions to be the most complete and the most persuasive. Since the administrative law judge is the sole trier of facts, and since his findings and conclusions are based on evidence that is part of the record, his findings are not subject to review. Although the administrative law judge's findings of fact must stand, however, we will review whether or not he correctly applied the law to those underlying facts.

The claimant alleged that the administrative law judge applied an incorrect standard of causation and applied a higher than required, and thus improper, burden of proof. The claimant further alleged that the administrative law judge incorrectly applied the law to the underlying facts and that his conclusions were without support in the record or omitted admitted or undisputed facts. We find these arguments to be without merit.

Our courts have long held that the traditional concepts of proximate cause furnish the proper analysis for determining causation in workers' compensation cases. See Voronuk v. Electric Boat Corp., 118 Conn. App. 248, 253 (2009). In assessing proximate cause, the appropriate standard is the "substantial factor" standard. Birnie v. Electric Boat Corp., 288 Conn. 392, 408 (2008). This standard "was adopted not only to distinguish compensable injuries from those that are 'merely contemporaneous or coincident with the employment,' but also to distinguish those injuries where the employment 'play[s] a part so minor a character that the law cannot recognize [it] as a cause.'" Id., 411 *quoting* Norton v. Barton's Bias Narrow Fabric Co., 106 Conn. 360, 364-65 (1927). The substantial contributing factor standard is met if the employment materially or essentially contributes to bring about the injury or condition. See id., 412.

The employment, or risks inherent therein, must contribute to the development of the injury or condition in more than a de minimis way. See id., 413. Based on this standard, the court in Voronuk, supra, affirmed the decision of the administrative law judge who acknowledged that the decedent's asbestosis may have "contributed" to his cardiorespiratory failure and ultimate death but found that it was not a significant contributory factor to that death and, therefore, dismissed the claim.

In reviewing the administrative law judge's decision in the current matter, it is clear that he appropriately applied these standards. He was presented with three expert opinions that were all admitted into the record. After assessing those opinions, the administrative law judge found Pulde's opinions to be more credible. He, therefore, concluded that the claimant's employment with Pratt & Whitney was not a significant contributing factor in the development of his adenocarcinoma. The mere fact that the claimant was exposed to some asbestos in the 1960s was not determinative in this situation. There was no evidence to support the claimant's contention that the administrative law judge ignored the opinions of his experts. Instead, the administrative law judge acted within the scope of his authority when he assigned credibility to the various experts' opinions. There is also no evidence that the administrative law judge applied a "higher than normal" standard of proof upon the claimant, made unsupported inferences, or that he misapplied the law to the underlying facts. His conclusions regarding causation, therefore, will not be disturbed.

With regard to the denial of the motion to correct, we find that the administrative law judge acted within his authority. An administrative law judge is not obligated to adopt the legal opinions and factual conclusions of a litigant. See Testone v. C. R.

Gibson Co., 114 Conn. App. 210, 221-22 (2009), *cert. denied*, 292 Conn. 914 (2009) and D'Amico v. Dept. of Correction, 73 Conn. App. 718, 728 (2002), *cert. denied*, 262 Conn. 933 (2003). As in the aforementioned cases, the claimant in the current action sought to replace the administrative law judge's findings and conclusions with those more favorable to his claim. Since the administrative law judge is the ultimate trier of facts, and since the facts found are supported by the record, there was no error in the denial of the motion to correct.

There is no error; the January 25, 2021 Finding and Dismissal of Peter C. Mlynarczyk, Administrative Law Judge acting for the Eighth District, is accordingly affirmed.

Administrative Law Judges Brenda D. Jannotta and Maureen E. Driscoll concur in this Opinion.