CASE NO. 6433 CRB-8-21-6 CLAIM NO. 500142687	:	COMPENSATION REVIEW BOARD
DOMINGO LAZU CLAIMANT-APPELLANT	:	WORKERS' COMPENSATION COMMISSION
v.		
STATE OF CONNECTICUT/ DEPARTMENT OF CHILDREN AND FAMILIES EMPLOYER SELF-INSURED RESPONDENTS-APPELLEES	:	FEBRUARY 18, 2022
and		
GALLAGHER BASSETT SERVICES, INC. ADMINISTRATOR		

APPEARANCES:

The claimant was represented by Richard B. Grabow, Esq., Law Office of Richard B. Grabow, LLC, P.O. Box 330760, West Hartford, CT 06133.

The respondents were represented by Frank C. Vignati, Jr., Esq., Assistant Attorney General, and Christopher Boyer, 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 29, 2021 Findings and Orders by Peter C. Mlynarczyk, the Administrative Law Judge acting for the Eighth District, was heard October 29, 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]

[1] Effective October 1, 2021, the Legislature directed that the phrase "Administrative Law Judge" be substituted when referencing a workers' compensation commissioner. See Public Acts 2021, No. 18, § 1.

OPINION

STEPHEN M. MORELLI, CHIEF ADMINISTRATIVE LAW JUDGE. The claimant has appealed from the April 29, 2021 Findings and Orders (findings) of Administrative Law Judge Peter C. Mlynarczyk, acting for the Eighth District, who denied the claimant's bid for temporary total disability benefits. In his decision, the administrative law judge found the claimant's presentation at the formal hearing inconsistent with activities he performed in video evidence presented at the hearing and, therefore, found the claimant's testimony regarding the extent of his disability misleading. Accordingly, the administrative law judge discounted the opinions of the claimant's treater, the commission medical examiners, as well as the claimant's vocational expert. The claimant argues that by discounting these opinions, the administrative law judge reached impermissible inferences that the claimant's presentation influenced the opinions of the medical and vocational witnesses. The claimant contends that this constitutes reversible error. However, we take note of our precedent in O'Connor v. Med-Center Home Health Care, Inc., 140 Conn. App. 542 (2013), *cert. denied*, 308 Conn. 942 (2013), which held that a trier of fact must engage in "a holistic determination of work capacity" id., 554, when ascertaining if a claimant is entitled to temporary total disability benefits. We are satisfied the administrative law judge evaluated the totality of the evidence presented and was left unsatisfied as to the claimant's entitlement to benefits. As it is the claimant's burden to persuade the trier of fact that he or she is totally disabled, see Hernandez v. American Truck Rental, 5083 CRB-7-06-4 (April 19, 2007), we affirm the Findings and Orders.[2]

[2] We note that two motions for extension of time were granted during the pendency of this appeal.

The following facts are pertinent to our assessment of this appeal. The claimant was hired in 1991 by the State of Connecticut as a social worker and was promoted through the years to various managerial positions. At the time of his retirement from state service in 2017, he was a program manager. As a program manager, the claimant was responsible for managing grants and programs, as well as for a life skills program being created for adolescents. See June 13, 2019 Transcript, pp. 15-18. The claimant testified that his work required him to spend 80 percent of his time seated in front of a computer doing research. The remainder of the time the claimant spent reading reports or visiting contractors. See id., pp. 19-21. The claimant underwent multiple surgeries on his upper extremities, the first of which was a compensable bilateral carpal tunnel release performed in 1997 by H. Kirk Watson, a hand surgeon. The claimant also testified he subsequently had a neurolysis on the ulnar nerve of his right elbow in 2006, followed by similar surgery on his left elbow. He also had surgery to treat epicondylitis on his right elbow in 2007. See id., pp. 24-28.

The claimant testified as to commencing treatment with Richard M. Linburg, an orthopedic hand surgeon, in 2008. Linburg performed a repeat right carpal tunnel release in April 2009 and a neurolysis of the radial nerve and release of extensor on the left side in August 2011. The claimant also had left elbow surgery on July 22, 2015. After each surgery, the claimant was released for full-duty work. See id., pp. 29-35. However, when he returned to work in January 2016, the claimant testified that he had a great deal of pain in both hands and found himself unable to write or hold a pencil due to cramps in his hands, as well as tingling and numbness in his hands and fingers. He testified that these symptoms impeded him from performing core functions of his job, such as holding

a phone in his hand. See id., pp. 35-36. The claimant further testified that, after consulting with Linburg, he stopped working, but that his condition did not improve. As a result, he testified he has had to use braces on his hands as a result of the pain. See id., pp. 39-40.

The claimant testified that at present he has no strength in his hands and arms and is incapable of holding anything heavier than a small water bottle, which he will drop if his hands cramp up. He testified he cannot do household chores, needs to have his wife cut his meat, and cannot use a computer keyboard. Instead, the claimant stated he used a touchscreen computer just to check e-mails. See id., pp. 45-49. He stated he can only grasp a pen for about a minute and can only drive about 10 or 15 minutes away from his home in Wethersfield. His wife must drive him longer distances. See id., pp. 59-60. The claimant also testified that he wears braces on his hands except to eat, sleep and shower. He testified that he has a Masters' degree in social work and is fluent in Spanish and English, but has not sought work since August of 2016. The claimant also testified that, besides a trip to a college in New York City, he had not travelled outside Connecticut, that he had not done any snow removal around the house in many years, and he required assistance from his wife to do grocery shopping since he cannot lift grocery bags. See id., pp. 71-74, 82-83.

The administrative law judge took note of various medical reports entered into evidence. In a May 2, 2017 report, Linburg noted that "Domingo Lazu is having ongoing problems with his arms and hands. The swelling and epicondylitis have not resolved. He is still disabled. I will see him in 2 months for a check. This individual is not going back to work. He has no functional capacity at this point." Findings, ¶ 3 *quoting* Claimant's

Exhibit A-10. Pavel Straznicky, an orthopedic surgeon, performed a respondents' medical examination of the claimant on February 11, 2017, and found the claimant "had a work capacity with no lifting over ten pounds with either hand and no prolonged typing or writing, and that the claimant had not yet reached MMI. The restrictions were not permanent. (Resp. Ex. 1 at 14, 15)." Findings, ¶ 4. There were two Commission Medical Examinations performed on the claimant. Kenneth R. Alleyne, an orthopedic surgeon, performed an examination on June 22, 2017, and concluded:

> Given the nature of his injuries and lack of improvement despite operative intervention, considerable amount of physical therapy, and medications, I find that this patient would have no reasonable work capacity at his current employment, and it would be very difficult to find employment where usage of the upper extremities is not required.

Findings, ¶ 5 *quoting* Claimant's Exhibit A-18.

A second Commission Medical Examination was performed by Clinton A. Jambor, an orthopedic surgeon, on October 26, 2017. After examining the claimant, Jambor opined that "[t]he [Claimant] would have difficulty with any repetitive use of his upper extremities. He is most likely not employable. He would be capable of using a telephone headset with limited use of his upper extremities." Findings, ¶ 6 *quoting* Claimant's Exhibit A-19.

Two vocational experts testified at the hearing. The claimant's expert, Hank Lerner, testified that he did not know of any job that could be totally accommodated to make every aspect of the job non-physical with no lifting, no reaching, no handling, and no sustained fingering and feeling. Based upon the claimant's restrictions, Lerner could not identify any occupation that existed that the claimant could perform and, therefore, he did not perform a labor market survey for the claimant.

The respondents' vocational expert, Erin Bailey, also testified at the formal hearing. She performed a vocational assessment on the claimant on November 28, 2018. The administrative law judge cited her testimony at length in the finding.

> a. The Claimant indicated that he had braces for his wrists and hands, but had not worn them in four years because they were no longer helpful. (Transcript of August 5, 2020 Formal Hearing "T4" at 17)
>
> b. The Claimant has not worked since August of 2016, has not engaged in any job searches, nor has he applied to any vocational programs since August of 2016. (T4 at 21)
>
> c. In her opinion, the Claimant's transferable skills include working with people, directing others, planning, organizing, meeting deadlines, having attention to detail, budgeting, complex decision-making, responding calmly in high pressure situations, program management, analyzing, record-keeping and documentation, public speaking, conflict resolution, maintaining budgets and coordination. (T4 at 30)
>
> d. She found six employers that responded that someone of the Claimant's background would be qualified for jobs that they had available and that could be performed at the sedentary level. (T4 at 34)
>
> e. In evaluating the Claimant's employability, she viewed surveillance video and noted the following:
>
> On October 1, 2018 the Claimant was observed exiting Walmart with bags in his hand. He opened the hatch of his vehicle and placed the bags into the cargo space. After returning home he stood in his driveway holding his cell phone in his left hand while typing with his right hand. He did not engage in any pain behavior and was not wearing any arm braces. (T4 at 40, 41) (Resp. Ex. 6)
>
> On February 21, 2019 the Claimant drove his daughter to school. After returning home he was observed carrying two shovels, one in each hand, then placing them in the cargo area of his vehicle. He was also seen scraping ice or snow from his driveway. (T4 at 42, 43) (Resp. Ex. 6)
>
> On March 4, 2019 the Claimant briefly operated a snowblower and then pushed the handles down to tilt the front of the machine

upward so that another person could clean the auger. He then was seen carrying two shovels. (T4 at 43, 44) (Resp. Ex. 6)

On June 3, 2019 the Claimant opened the hatch of his vehicle and removed a wheelchair or walker. He then drove to BJ's and was observed holding packages of meat. When he left the store, he was observed talking on his cell phone while placing a large bag of potatoes into his vehicle from a shopping cart with one hand. (T4 at 44) (Resp. Ex. 6)

On June 5, 2019 the Claimant drove his wife to the MGM Casino in Springfield, Massachusetts. At the casino he operated slot machines with his right hand with no apparent difficulty. (T4 at 46) (Resp. Ex. 10)

Findings, ¶ 8.a-e.

Based on this record, the administrative law judge reached the following conclusions at the end of the formal hearing:

A. It is apparent from viewing the surveillance video that the Claimant's testimony as to his physical limitations and daily activities was almost entirely false and misleading.

B. Given that the Claimant's testimony and presentation were misleading, the opinions of Drs. Linburg, Alleyne and Jambor are not persuasive, given that they would have been based, in part, upon the Claimant's presentation.

C. The opinion of Dr. Straznicky is somewhat persuasive, especially given that the physical limitations he attributed to the Claimant seemed to be supported by the Claimant's activities on the various surveillance videos.

D. The opinion of Mr. Lerner is not persuasive, partly because he failed to perform a labor market survey or an employer sampling. He relied too heavily on the doctors' opinions that the Claimant was unemployable when, in fact, those opinions strayed beyond simple physical limitations and were based, in part, upon the Claimant's presentation.

E. Ms. Bailey's opinions were persuasive, especially in light of the fact that she applied her observations from the surveillance videos.

Conclusions, ¶¶ A-E.

Based on these findings, the administrative law judge denied the claimant's bid for temporary total disability benefits and determined the claimant reached maximum medical improvement on July 3, 2017. The claimant filed a motion to correct seeking various corrections which would deem Lerner a persuasive witness, Bailey an unpersuasive witness, and remove the conclusion that the claimant's presentation influenced the medical witnesses. This motion was denied in its entirety. He has now commenced this appeal asserting that the administrative law judge's finding were based upon unreasonable inferences from the record presented.

The standard of deference we are obliged to apply to an administrative law judge's findings and legal conclusions 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).

The claimant's brief asserts that the finding herein contravenes the precedent in Bode v. Connecticut Mason Contractors, The Learning Corridor, 130 Conn. App. 672 (2011), *cert. denied*, 302 Conn. 942 (2011), in that the trier of fact failed to reach a reasonable conclusion based on the evidence presented at the hearing. We note that in recent years we have frequently re-examined Bode after claimants have raised similar averments on appeal. See Diaz v. Dept. of Social Services, 6072 CRB-3-16-1 (December 22, 2016), *aff'd*, 184 Conn. App. 538 (2018), *cert. denied*, 330 Conn. 971 (2019) and Cassella v. O & G Industries, 6017 CRB-4-15-5 (June 27, 2018). We have generally found distinctions between the fact pattern in Bode, supra, where the trier of fact did not evaluate documentary evidence supportive of the claimant in the text of his finding, and the later cases this tribunal have considered. As we held in Diaz:

> We have reviewed our precedent interpreting Bode [v. Connecticut Mason Contractors, The Learning Corridor, 130 Conn. App. 672 (2011), *cert. denied*, 302 Conn. 942 (2011)] and it does not stand for the proposition presented by the claimant. In particular we find our decisions in Olwell v. State/Dept. of Developmental Services, 5731 CRB-7-12-2 (February 14, 2013) and Pupuri v. Benny's Home Service, LLC, 5697 CRB-2-11-11 (November 5, 2012) address somewhat similar interpretations of Bode offered by claimants, which this tribunal rejected.
>
> In Pupuri, supra, the claimant alleged that his injuries were the result of an incident lifting rocks at a quarry. The trial commissioner did not find his testimony credible and denied the claim. On appeal, he argued that because he submitted a substantial amount of uncontroverted documentary evidence supportive of his claim that the Bode precedent indicated that his testimony should have been credited by the trier of fact. We disagreed.

> 'We find Bode factually distinguishable and therefore are not persuaded by this argument. The dispute in Bode did not deal with the compensability of the claim as that issue had been resolved through a voluntary agreement. The Bode opinion essentially concluded the trier of fact had failed to properly weigh evidence as to the claimant's entitlement to benefits under the Osterlund v. State, 135 Conn. 498 (1949) standard of temporary total disability. Id., at 679-684. The Appellate Court also determined that a trier of fact was not entitled to the same level of deference in evaluating the credibility of documentary evidence as he or she would be accorded in evaluating the credibility of live witness testimony. Id., at 685-686. The Appellate Court concluded the trial commissioner in Bode failed to properly credit undisputed documentary evidence and awarded the claimant temporary total disability benefits. Id., at 689.'
>
> Pupuri, supra.
>
> We further noted in Pupuri that in Bode, supra, the decision of the trial commissioner to deny the claimant an award for psychiatric injuries was affirmed because "[t]he Appellate Court affirmed the decision of the trial commissioner who found the claimant failed in his burden to prove that those injuries were caused by the accepted compensable injury. Id., at 689-691." Id. In the present case, as in Pupuri, the burden of proof in a workers' compensation claim for benefits rests with the claimant. Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440 (2001). Both in Pupuri and in the present case the trial commissioner concluded the claimant failed to satisfy this burden.

Id.

In the present case, the administrative law judge did conduct an evaluation of the claimant's supportive evidence and determined that these medical and vocational expert opinions were unpersuasive, based on the administrative law judge's belief that the claimant did not offer an accurate presentation to these witnesses. We note that in evaluating total disability a trier of fact is directed to conduct a "holistic determination"

O'Connor, supra, and therefore, we believe the administrative law judge herein could have considered the claimant's demeanor in reaching his conclusions.[3]

The central point raised as alleged error is the administrative law judge's inference that the various medical experts whom he chose to discount relied on an inaccurate presentation by the claimant as to the extent of his physical limitations. The claimant argues that there was no evidence to support this inference, but notes in his brief that:

> Dr. Alleyne does recite a history in his rather length[y] evaluation. See Exhibit 18. The report is 12 pages, with one paragraph being devoted to the complaints of the appellant. Therein, Mr. Lazu states that he is unable to carry heavy objects, unable to open bottles, difficulty with cutting, no longer does lawn work, typing or writing.

Claimant's Brief, p. 13.

If the trier of fact believed that this narrative was not an accurate depiction of the claimant's condition based on other probative evidence in the record, such as the video evidence presented to Bailey, he or she may reasonably discount an opinion reliant upon it.[4] See Anderson v. Target Capital Partners, 5615 CRB-6-10-12 (January 3, 2012), *citing* Abbotts v. Pace Motor Lines, Inc., 4974 CRB-4-05-7 (July 28, 2006), *aff'd,* 106

[3] See Anderson v. Target Capital Partners, 5615 CRB-6-10-12 (January 3, 2012) and Leandres v. Mark IV Construction, Inc., 5159 CRB-4-06-11 (October 22, 2007).

[4] Our review of the hearing transcript supports the administrative law judge's finding that the claimant testified to an inability to perform numerous activities that he was depicted as performing on surveillance video. See for example snow removal, June 13, 2019 Transcript, pp. 73-74 and February 18, 2020 Transcript, p. 26; and driving outside his hometown, June 19, 2019 Transcript, pp. 59-60 and February 18, 2020 Transcript, pp. 47-49.

Conn. App. 436 (2008), *cert. denied*, 287 Conn. 910 (2008). See also Tarantino v. Sears Roebuck & Co., 5939 CRB-4-14-5 (April 13, 2015).

The claimant believes that in the absence of a specific reference in the medical reports to a specific limitation he stated to a medical professional that it is an unreasonable inference to believe that his presentation had an impact upon the opinion rendered. In light of the wide discretion a trier of fact has in evaluating contested medical evidence, see Tartaglino v. Dept. of Correction, 55 Conn. App. 190, 195 (1999), *cert. denied*, 251 Conn. 929 (1999) and O'Reilly v. General Dynamics Corp., 52 Conn. App. 813, 818 (1999), we do not agree.

In part we reach this conclusion as we find the administrative law judge's determination that Straznicky offered the most persuasive medical opinion of great significance. Straznicky determined, after examining the claimant, that he was "able to perform most of the activities of daily living" and concluded "[c]laimant can return to modified duty work with restrictions of no lifting over 10 lbs with either hand, and any prolonged typing or writing." Respondents' Exhibit 1 [Exhibit Straznicky 3]. While the claimant critiques this opinion as not being sufficiently detailed, see Claimant's Brief, pp. 14-15, we note that decisions as to the weight of medical evidence are the province of the trier of fact. Strong v. UTC/Pratt & Whitney, 4563 CRB-1-02-8 (August 25, 2003), stands for the proposition that "[i]f on review this board is able to ascertain a reasonable diagnostic method behind the challenged medical opinion, we must honor the trier's discretion to credit that opinion above a conflicting diagnosis" and upon review we do not find reliance upon Straznicky unreasonable. Id. See also Champagne v. O.Z.

Gedney, 4425 CRB-5-01-8 (May 16, 2002), *appeal withdrawn*, A.C. 23137 (May 8, 2003).

In addition, we note that while the claimant appears to believe that Straznicky's opinion on work restrictions would be onerous, his position does not render Straznicky's opinion as to work capacity invalid. See Vallier v. Cushman & Wakefield, 5822 CRB-1-13-2 (February 21, 2014); Clarizio v. Brennan Construction Company, 5281 CRB-5-07-10 (September 24, 2008) and Leandres v. Mark IV Construction, Inc., 5159 CRB-4-06-11 (October 22, 2007). The administrative law judge could have found Straznicky's conclusion as to the claimant having a work capacity reliable.

The claimant also believes it was erroneous for the administrative law judge to find Bailey's vocational opinions more persuasive than Lerner's opinions. He identifies what he believes were deficiencies in Bailey's methodology and claims she "unraveled upon cross-examination." Claimant's Brief, p. 14. He argues Lerner offered persuasive testimony and that the administrative law judge erred in finding the absence of a labor market study in Lerner's report a material reason to discount his opinions. The administrative law judge obviously reached a different conclusion as to the value of these opinions, and as each expert offered live testimony at the hearing that the administrative law judge was in a position to assess, we are disinclined to question his decision. As we stated in Cassella, supra.

> We note that the claimant's vocational expert and the respondents' expert offered live testimony at the formal hearing. The respondents' expert, Kerry Skillin, opined that the claimant had a work capacity, and the trial commissioner found her opinion more persuasive. Under these circumstances, the commissioner's assessment of the persuasive value of a witness is essentially inviolate on appeal. See Burton [v. Mottolese, 267 Conn. 1, 54 (2003), *quoting* Thalheim v. Greenwhich, 256 Conn. 628, 656

> (2001)], supra, 40; Tarantino v. Sears Roebuck & Co., 5939 CRB-4-14-5 (April 13, 2015). In a "dueling expert" case, this tribunal is obligated to affirm the trial commissioner's determination relative to the persuasiveness of the expert witnesses. Dellacamera v. Waterbury, 4966 CRB-5-05-6 (June 29, 2006), *appeal withdrawn*, A.C. 27853 (September 12, 2006).

Id.

We take note that Bailey's opinion was found more persuasive by the administrative law judge in part because she offered her opinion after viewing surveillance video. We believe that this was a legitimate conclusion, and consistent with precedent in cases such as Barbee v. Sysco Food Services, 5892 CRB-8-13-11 (October 16, 2014), *aff'd*, 161 Conn. App. 902 (2015) (per curiam) and Nisbet v. Xerox Corporation, 5867 CRB-7-13-7 (July 17, 2014), and, therefore, believe that the administrative law judge could give the video surveillance and opinions derivative upon this evidence the weight that he deemed appropriate.

This analysis is also dispositive of the motion to correct, which we find essentially an attempt to replace the conclusions reached by the administrative law judge with the claimant's view of the evidence. The administrative law judge was under no obligation to adopt the claimant's position. See 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).

Given the holistic standard applied to determinations as to whether a claimant is totally disabled, the deference we must apply to conclusions reached by the trier of fact in

evaluating evidence, and the claimant's burden to prove entitlement to benefits under our act, we cannot find reversable error in the finding. The April 29, 2021 Findings and Orders of Administrative Law Judge Peter C. Mlynarczyk, acting on behalf of the Eighth District, is accordingly affirmed.

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