CASE NO. 6465 CRB-6-22-1 CLAIM NOS. 601085492, 601085199, 601087576, 601089395, 601093842 & 601055882	:	COMPENSATION REVIEW BOARD
STEVEN R. JINKS CLAIMANT-APPELLANT	:	WORKERS' COMPENSATION COMMISSION
v.	:	JUNE 23, 2023
STOP & SHOP SUPERMARKET COMPANIES, LLC/AHOLD USA EMPLOYER		
and		
RETAIL BUSINESS SERVICES, LLC INSURER RESPONDENTS-APPELLEES		

APPEARANCES:

The claimant appeared at oral argument before the board as a self-represented party. Robert Jinks, the claimant's court appointed guardian and conservator, assisted the claimant in the proceedings.

The respondents were represented by James P. Henke, Esq., Nuzzo & Roberts, LLC, One Town Center, Cheshire, CT 06410.

This Ruling Re: Motion to Submit Additional Evidence regarding the Petition for Review from the January 6, 2022 Finding and Dismissal of Pedro E. Segarra, Administrative Law Judge acting for the Sixth District, was heard May 19, 2023 before a Compensation Review Board panel consisting of Chief Administrative Law Judge Stephen M. Morelli and Administrative Law Judges Toni M. Fatone and Soline M. Oslena.[1]

[1] We note that two motions for continuance were granted during the pendency of this appeal.

RULING RE: MOTION TO SUBMIT ADDITIONAL EVIDENCE

STEPHEN M. MORELLI, CHIEF ADMINISTRATIVE LAW JUDGE. The claimant has appealed from the January 6, 2022 Finding and Dismissal of Pedro E. Segarra, Administrative Law Judge acting for the Sixth District, which determined that, although the claimant had sustained a prior compensable chest injury, additional claims related to post-traumatic stress disorder, diabetes and the procurement of a OSKA device were not compensable. During the pendency of this appeal, the claimant filed a motion to submit additional evidence, the details of which we will address in greater detail herein. The motion to submit additional evidence was bifurcated from the underlying merits of the claimant's appeal and was the subject of oral argument that was started on September 30, 2022 and continued to May 19, 2023. After hearing oral argument and having reviewed the documents marked for identification at the May 19, 2023 hearing, we deny the motion.

The procedural history of this motion is somewhat unconventional and requires a detailed explanation. During the pendency of a formal hearing on his underlying claim, but prior to the issuance of a finding, the claimant, acting through his father/conservator, filed a brief on or about November 10, 2021, which included evidence that had not been previously admitted into the formal hearing record.[2] The respondents objected on November 19, 2021, and the administrative law judge sustained this objection on December 2, 2021.[3] The claimant appealed to this tribunal, and we remanded the matter

[2] The claimant is intellectually challenged, and his father has been advancing this claim on his behalf.
[3] We note that the administrative law judge closed the record on the issue of compensability at the conclusion of the formal hearing. See September 8, 2021 Transcript, p. 38.

as there was no record for us to review. See Jinks v. Stop & Shop Supermarket Companies, LLC/Ahold USA, 6462 CRB 6-21-12 (January 4, 2022). Days after that remand, the administrative law judge issued his Finding and Dismissal on January 6, 2022. The claimant filed a timely appeal to our tribunal and, on January 31, 2022, he filed a motion to submit additional evidence that reiterated his belief that additional evidentiary documents should be added to the record. The claimant filed a supplemental brief on July 11, 2022, which contained additional evidence he wanted to have considered. He also filed a brief on September 30, 2022, which contained additional evidence he wanted added to the record. This occurred at a hearing during which this tribunal agreed to postpone hearing the merits of the pending motion to enable the claimant to seek to retain counsel, which he stated he had been unable to do. The claimant filed another brief referencing more additional evidence on March 15, 2023, and the respondents filed another objection on March 17, 2023. We considered this matter at our May 19, 2023 hearing.

Connecticut General Statutes § 31-301 (b) authorizes the board to review additional evidence not submitted to the administrative law judge in limited circumstances.[4] The procedure that parties must employ in order to request the board to review additional evidence is provided in Section 31-301-9 of the Regulations of Connecticut State Agencies.[5] Based on this unambiguous language, this board has held

[4] General Statutes § 31-301 (b) states: "The appeal shall be heard by the Compensation Review Board as provided in section 31-280b. The Compensation Review Board shall hear the appeal on the record of the hearing before the commissioner, provided, if it is shown to the satisfaction of the board that additional evidence or testimony is material and that there were good reasons for failure to present it in the proceedings before the commissioner, the Compensation Review Board may hear additional evidence or testimony."

[5] Section 31-301-9 of the Regulations of Connecticut State Agencies states: "If any party to an appeal shall allege that additional evidence or testimony is material and that there were good reasons for failure to present it in the proceedings before the commissioner, he shall by written motion request an opportunity to

"it is the claimant's burden to recognize and resolve any inconsistencies in the evidence at the formal hearing, whether or not those discrepancies seemed significant to the claimant at the time of the hearing." Abdule v. Walnut Hill Convalescent Home, 3383 CRB-6-96-7, *appeal withdrawn*, (August 27, 1997), *quoting* Ruling on Motion to Submit Additional Evidence issued March 25, 1997; see also Fusco v. J.C. Penney Company, 1952 CRB-4-94-1 (March 20, 1997*), appeal withdrawn*, A.C. 17050 (July 17, 1997). "Moreover, a motion to submit additional evidence may not properly be used to alter a party's evidentiary decisions regarding the presentation of evidence at a formal hearing." Abdule, supra.

As our Supreme Court has stated,

> A party to a compensation case is not entitled to try his case piecemeal, to present a part of the evidence reasonably available to him and then, if he loses, have a rehearing to offer testimony he might as well have presented at the original hearing. He must be assumed to be reasonably familiar with his rights and with the requisites of proof necessary to establish his claim; and to permit him intentionally to withhold proof, or to shut his eyes to the reasonably obvious sources of proof open to him, would be fair neither to the commissioner and the court nor to the defendant. Where an issue has been fairly litigated, with proof offered by both parties, a claimant should not be entitled to a further hearing to introduce cumulative evidence, unless its character or force be such that it would be likely to produce a different result.

Kearns v. Torrington, 119 Conn. 522, 529 (1935).

Finally, as our Appellate Court has noted, "[a]lthough we allow pro se litigants some latitude, the right of self-representation provides no attendant license not to comply

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present such evidence or testimony to the compensation review division, indicating in such motion the nature of such evidence or testimony, the basis of the claim of materiality, and the reasons why it was not presented in the proceedings before the commissioner. The compensation review division may act on such motion with or without a hearing, and if justice so requires may order a certified copy of the evidence for the use of the employer, the employee or both, and such certified copy shall be made a part of the record on such appeal."

with relevant rules of procedural and substantive law." Tomaszek v. Girard Motors, Inc., 70 Conn. App. 122, 124 (2002), *quoting* Wittman v. Krafick, 67 Conn. App. 415, 416 (2001), *cert. denied*, 260 Conn. 916 (2002).

With these parameters in mind, we will address the proposed submissions. We reiterate at the outset that any additional evidence admitted in an appeal must pertain to the claimant's condition at the point in time the initial claim for benefits was presented. Subsequent medical examinations and opinions pertaining to the claimant's condition after the formal hearing record closed cannot be considered unless he meets the requirements of Section 31-301-9 of the Regulations of Connecticut State Agencies. In addition, there is no need to add material to the record that is duplicative of evidence already on the record or would not be material or probative to a fact-finder.

We find the following documents, which the claimant wants to have added to the record, need not be admitted because they constitute notes and notices which are already within the claimant's file. Such a determination would be consistent with Kummer v. BIC Corporation, 5406 CRB-3-08-12 (December 15, 2009). The administrative law judge determined on September 8, 2021, that he would take administrative notice of the file and therefore, these documents may be incorporated into the record by reference to that order. See September 8, 2021 Transcript, p. 4. These documents are:

1. Hearing request forms dated November 21, 2021 and December 18, 2021;
2. March 31, 2020 hearing notes from former Commissioner Mastropietro; and
3. A letter dated February 1, 2019 from Attorney Henke to the claimant.

The claimant has sought to add other additional documents as exhibits, but upon review we determine that these documents have already been admitted to the record as

elements of other exhibits. Consequently, they would constitute cumulative evidence unnecessary for the determination of this claim and, therefore, we deny their admission. After review of the standards delineated in Reid v. Sheri A. Speer d/b/a Speer Enterprises, LLC, 5818 CRB-2-13-1 (January 28, 2014), *aff'd*, 209 Conn. App. 540 (2021) (per curiam), *cert. denied*, 342 Conn. 908 (2022), we believe these documents should not be admitted as evidence. These documents include:

1. A copy of the claimant's appeal of the Finding and Dismissal. All pleadings are already part of the record in this case;

2. A November 6, 2019 report from James Pier, M.D., which was admitted as Respondent's Exhibit 1;

3. A September 18, 2018 report from Eric Rosenberg, M.D., which was admitted as Claimant's Exhibit L;

4. A March 27, 2020 report from Robert Cooper, M.D., which was admitted as Respondent's Exhibit 3;

5. A February 21, 2021 letter from Joseph Lorenzo, M.D., which was admitted as Claimant's Exhibit P;

6. A page from the March 24, 2021 deposition transcript of Eric Grahling, M.D. The entire transcript was admitted as Respondent's Exhibit 4; and

7. An August 31, 2021 report from Robert Brancato, P.A., which was admitted as Claimant's Exhibit P.

One tenet of our precedent is that if evidence is available to a party prior to the conclusion of the formal hearing, they should present it at that time and not belatedly bring it to the attention of the administrative law judge or this tribunal after the record has closed. We conclude that the claimant was aware of the February 2, 2018 respondents' medical examination report of Marvin Zelman, M.D., prior to the conclusion of the formal hearing. Based on the February 16, 2021 correspondence between respondents' counsel and the claimant's conservator, the claimant was aware that the respondents were

not planning to admit this evidence themselves. The claimant had the opportunity to seek to have it admitted as his exhibit prior to the closure of the record on September 8, 2021, but chose not to do so. To allow the claimant to admit this document now would constitute impermissible piecemeal litigation. This rationale also extends to the photographs of the claimant that are being sought to be added as evidence. Presumably, they could have been presented as exhibits prior to the close of the formal hearing and we have not been presented with good cause as to why that was not done. As we find admission of these documents, at this time, would be inconsistent with precedent in Krajewski v. Atlantic Machine Tool Works, Inc., a/k/a Atlantic Aerospace Textron, 4500 CRB-6-02-3 (March 7, 2003), we deny this request.

We also note that evidence may be sought to be admitted which may not be material to the issues being litigated or may be irrelevant to those issues. Documents produced from news articles, professional journals or commercial brochures that have not been reviewed or relied upon by a witness in a hearing may not meet a standard of materiality and need not be admitted to the record. Correspondence between parties or between a party and a nonparty to the case may also not be relevant to the issue being considered. A witness' resumé may have no material evidentiary value. As our Supreme Court has stated, "[i]t is axiomatic that '[e]vidence is admissible only to prove material facts, that is to say, those facts directly in issue or those probative of matters in issue; evidence offered to prove other facts is 'immaterial.' '" Salmon v. Dept. of Public Health & Addiction Services, 259 Conn. 288, 316 (2002), *quoting* C. Tait, Connecticut Evidence (3d Ed. 2001) § 4.1.3, p. 200, *citing* Adams v. Way, 32 Conn. 160, 167-69 (1864). Upon

review, we conclude the following documents which the claimant seeks to add to the record are not sufficiently relevant or material to warrant admission.

1. A PowerPoint presentation from Matthew Friedman, M.D., from the National Center for PTSD;

2. An internet article regarding blood sugar levels;

3. The biography for Robert Cooper, M.D.;

4. An internet article on assessing one's weight;

5. A letter dated July 2, 2020 from the claimant to Carl Malchoff, M.D., at UConn;

6. The biography for Joseph Lorenzo, M.D.;

7. An article from the Centers for Disease Control website on how to prevent diabetes;

8. An article from the American Psychological Association as to stress effects on the body;

9. Handwritten notes from the claimant dated November 10, 2021; and

10. A letter from the claimant to Crista Silen at SPR Therapeutics.

Finally, we note that documents generated subsequent to the closure of the record of a formal hearing are generally not admissible. If a party questions the validity of a medical report or wishes to clarify an expert opinion, the time to do so is prior to the closure of the hearing record. If a party requires additional time to accomplish this, the proper means to do so is to seek a continuance of the initial hearing, not to attempt to add this material subsequent to the issuance of a finding by the administrative law judge. The claimant seeks to admit the following documentary evidence, all of which were generated subsequent to the issuance of the finding and dismissal. Admission of such late arriving

evidence creates a due process issue as the respondents closed their case prior to this evidence being presented. See Ghazal v. Cumberland Farms, 5397 CRB-8-08-11 (November 17, 2009). We do not believe the claimant has established good cause to have the following documents admitted at this time for the pending appeal.

1. A letter dated January 25, 2022 from Jonathan Kost, M.D., to the claimant re: OSKA device;

2. A letter dated March 8, 2022 issued by James W. Pier, M.D., a commission examiner, in response to inquiries from the claimant;

3. A November 2, 2022 letter from Kost to the claimant;

4. A January 10, 2022 report from Lindsay Mitchell Hernandez, M.D., regarding PTSD; and

5. A November 15, 2022 report from Misbah Aznath, M.D., regarding the claimant's weight gain and his development of diabetes.

We draw specific attention to the March 8, 2022 letter issued by James W. Pier, M.D., a commission examiner, in response to the claimant's inquiries. We note that this letter was generated in response to an *ex parte* inquiry by the claimant, who did not utilize the appropriate channels via our procedures to make such inquiry solely through the administrative law judge who would properly notice respondents' counsel. See Commission Memorandum No. 2019-09 (September 10, 2019). In light of the claimant's failure to adhere to established protocol, this document would be inadmissible in our judgment even it had been proffered in a timely manner.

It is black-letter law that a party who wishes to submit additional evidence to this board must prove that they had good reasons not to present such evidence at the formal hearing. See Diaz v. Pineda, 117 Conn. App 619, 627-29 (2009) and Carney-Bastrzycki v. Hospital for Special Care, 4722 CRB-6-03-9 (September 3, 2004). As we are not

persuaded that the claimant had good cause not to present this evidence prior to the closing of the record, we deny this motion.

Administrative Law Judges Toni M. Fatone and Soline M. Oslena concur in this Ruling.