CASE NO. 6473 CRB-8-22-4 CLAIM NOS. 800209326 & 100219205	:	COMPENSATION REVIEW BOARD
ANGELA BELL N/K/A ANGELA FIASCONARIO CLAIMANT-APPELLANT	:	WORKERS' COMPENSATION COMMISSION
v.	:	AUGUST 18, 2023
HARTFORD HEALTHCARE AT HOME EMPLOYER		
and		
ST. PAUL TRAVELERS INSURER RESPONDENTS-APPELLEES		

APPEARANCES:

The claimant appeared at oral argument before the board as a self-represented party. At the trial level, the claimant was represented by Alan J. Rome, Esq., Rome Clifford Katz & Koerner, LLP, 214 Main Street, Hartford, CT 06106.

The respondents were represented by James L. Pomeranz, Esq., McGann, Bartlett & Brown, LLC, 111 Founders Plaza, Suite 1201, East Hartford, CT 06108.

This Petition for Review from the March 23, 2022 Finding and Dismissal of Peter C. Mlynarczyk, Administrative Law Judge acting for the Eighth 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 a motion for continuance was granted during the pendency of this appeal. Additionally, the claimant submitted a motion to submit additional evidence, which was ruled upon on November 28, 2022.

OPINION

STEPHEN M. MORELLI, CHIEF ADMINISTRATIVE LAW JUDGE. The claimant has appealed from a March 22, 2022 Finding and Dismissal issued by Administrative Law Judge Peter C. Mlynarczyk, who determined that the claimant's shoulder condition and her need for surgery were not the result of a compensable injury sustained during the course of her employment with the employer-respondent. The claimant argued that this conclusion was against the weight of the evidence. She further argued that her counsel at the time of the formal hearing did not do a good job presenting the evidence that was supportive of her claim. The respondents argued that the administrative law judge was not persuaded by the claimant's evidence and that the claimant simply did not succeed in overcoming the burden of persuasion that she faced to prove her injuries were compensable. Upon reviewing the record, we conclude that the administrative law judge could have reasonably found the claimant's case was not sufficiently persuasive to award benefits. Therefore, we affirm the Finding and Dismissal.

The administrative law judge found the following facts in his Finding and Dismissal which are pertinent to our consideration of the appeal. He found the claimant had been a licensed practical nurse since 2014 and had been employed by Hartford Healthcare since 2017 as a "revisit nurse" providing home health services to patients. Findings, ¶ 1.a. Her job required her to carry a blood pressure cuff as well as a backpack weighing about 18 pounds with her right arm. See Findings, ¶ 1.b-c. The claimant testified that while working on October 23, 2019, she experienced significant swelling of

her right arm.[2] These symptoms had been present for some time, but on that day the pain became unbearable and her entire arm was inflamed. She reported it to Amy Brown, her immediate supervisor, and went to her primary care physician, Terry Baksh, who prescribed a prednisone taper and diagnosed her with epicondylitis. See Findings, ¶ 1.d. The claimant could not ascertain the source of her pain as it started at the top of her shoulder in the front and radiated all the way down to the outside of her pinky. See Findings, ¶ 1.e. After notifying her supervisor, the claimant presented at the Med-East Walk-In Clinic on October 25, 2019 where Craig Sweeney, M.D., concurred with the prior diagnosis of epicondylitis, directed her to stop working and to undergo physical therapy. Sweeney also referred her to Stephen Scarangella, an orthopedist. See Findings, ¶ 1.f. The claimant testified that the physical therapy was unsuccessful, while the prednisone provided some relief, but the pain from her job duties was still unbearable. See Findings, ¶ 1.g.

The claimant testified that she treated with a physician assistant's from Scarangella's practice prior to being examined by Scarangella, and that the first examination concurred with a diagnosis of epicondylitis while the second examination suggested the source of her pain was from her shoulder. See Findings, ¶ 1.h. Scarangella subsequently referred her to another physician, Randall Risinger, who examined the claimant on May 18, 2020. The claimant testified Risinger opined the source of her pain was in her shoulder and her elbow issues were secondary to her shoulder ailment. Risinger recommended shoulder surgery at this visit which the respondents did not authorize. See Findings, ¶ 1.i.

[2] The form 30C filed by the claimant cited a date of injury of October 24, 2019. This difference between the notice of claim and the claimant's testimony is not material to the consideration of this appeal.

The claimant also testified as to her condition prior to October 2019. She attributes the blood pressure cuff, the heavy lifting, the backpack, and the use of her arm for work as the causes of her injury. See Findings, ¶ 1.j. She remembered taking her backpack and slinging it over her arm one day and feeling a tear in her shoulder, but she never really thought about it. She denied any specific accident. The claimant didn't mention the backpack to the initial medical provider after the October 2019 incident because she was not sure of its origin. See Findings, ¶ 1.k. The pain was mostly from the elbow, so she was diagnosed with epicondylitis, which was why she originally assumed it was the blood pressure cuff. She also testified that she did not discuss her backpack when she treated with Sweeney, although she did believe her problem was work related. See Findings, ¶ 1.l. The claimant did discuss the backpack with Risinger. When she was examined by Clinton Jambor, M.D., for a commission examination, the claimant brought both the blood pressure cuff and the backpack and offered an explanation as to how she used them. See Findings, ¶ 1.m-o. The claimant testified that after March of 2020, her employer provided a rolling backpack for her. See Findings, ¶ 1.p. She also noted that her shoulder pain had been increasing gradually for months prior to October 2019. See Findings, ¶ 1.n. She also testified as to an August 5, 2020 incident where a patient had fallen in a bathroom and in the process of helping to lift the patient, she injured her back and worsened her right shoulder. This incident occurred after Risinger had already recommended shoulder surgery. See Findings, ¶ 1.r.

The administrative law judge reviewed the medical evidence presented by the claimant's treaters. On October 24, 2019, the claimant saw Baksh and his report noted that she complained of "reoccurrence and worsening right elbow. No specific trauma or

injury." Claimant's Exhibit A. The diagnosis section of the report states, "[r]ight elbow pain seems to be getting worse over the past year" and mentions "[q]uestionable tendinitis." Id. On November 25, 2019, Allyson Ripke, PA-C of Risinger's practice group, examined the claimant and noted that the claimant was not complaining of any shoulder pain. There is also a statement of "[n]o new injury or trauma" and that the claimant was complaining of continuing pain from her right elbow to her right wrist. Claimant's Exhibit C. The claimant was examined by Allyson Forsyth, PA-C of the same practice group on March 20, 2020, who reported that the claimant's "pain symptoms may be aggravated by carrying a duffle bag on her right shoulder. She also notes pain symptoms are aggravated upon return back to work full time. Pain is located in the right shoulder and does radiate into the right hand." Claimant's Exhibit E. The report goes on to say, "[s]he denies any specific trauma or injury." Id.

The administrative law judge also reviewed Risinger's reports. The May 18, 2020 report diagnosed the claimant with shoulder impingement, bicipital tendinitis, subacromial bursitis, and derangement of the shoulder joint and recommended right shoulder surgery. See Claimant's Exhibit I. The June 1, 2020 report noted that the claimant complained of left shoulder pain and believed her left shoulder pain resulted from her favoring the right shoulder. Following a right shoulder MRI, the claimant presented to Risinger on September 18, 2020, who diagnosed chronic bursitis/impingement, long head biceps tendinitis, and possibly an occult SLAP tear. He maintained his surgical recommendation. The administrative law judge further noted the opinions Risinger provided to respondents' counsel in a March 24, 2021 letter:

> Although Ms. Bell did report exacerbation of some symptoms by wearing a backpack during her office evaluations, this is not

> felt to be relevant to her current shoulder condition in question. It is unclear how wearing a backpack would cause primary symptoms of bursitis/impingement and biceps tendinitis in a shoulder. In her case, symptoms are felt to be related to overuse from her work activities, not from wearing a backpack.

Respondent's Exhibit 5.

The reports and opinions of Jambor, the commission examiner, and the respondents' examiner, Christopher Lena, M.D., were also reviewed. Lena testified at a deposition that he examined the claimant on two occasions, June 16, 2020 and October 7, 2020, at the respondents' request and determined that there was no significant pathology inside her right shoulder. See Findings, ¶ 10.a, *citing* Joint Exhibit 1, pp. 6-8. Lena testified the claimant did express her opinion at the first examination that a blood pressure cuff was the cause of her condition, brought the backpack with her at the second examination, and discussed her use of this as a possible cause, but she had not provided a history of a specific accident. See Joint Exhibit 1, pp. 8-10. In his opinion, the mechanical nature of the blood pressure cuff and/or the lifting of the backpack onto her shoulder was not consistent with biceps inflammation or tendonitis, nor did he believe that biceps tendonitis was present on the claimant's MRI. See id., pp. 6-7. Lena further opined that the repetitive use of these objects would not cause any significant issue with the biceps unless the claimant had a specific incident where she slipped, fell with her arm outstretched, or if she felt a significant pull. See id., pp. 12-13. Lena did note from reviewing the claimant's medical records that she had a chronic inflammatory condition throughout her body and had been treating with prednisone, baclofen, and meloxicam. See Joint Exhibit 2, pp. 13-14. He further opined that the claimant could have sustained such an injury from carrying a backpack as is done in an airport, rolling it and extending

your arm. See Joint Exhibit 1, p. 7. Additionally, after reviewing Risinger's July 7, 2021 operative report, Lena agreed that the claimant had a SLAP tear, that surgery was appropriate, and that a SLAP tear can result from a traumatic event. See Joint Exhibit 3, pp. 8-12.

The administrative law judge also cited Jambor's deposition testimony. Jambor examined the claimant on September 15, 2020 regarding a right shoulder surgery recommendation. See Findings, ¶ 11.a. Jambor noted that the claimant first mentioned that her pain was from using a blood pressure cuff and then mentioned having carried a briefcase and a backpack. She attributed her shoulder pain to an acute onset, which led Jambor to believe she had sustained a single traumatic injury. Jambor noted, however, that the medical records only referenced the August 5, 2020 incident. He testified that he relied on the truthfulness of the claimant in determining causation as the medical records "clearly don't document the shoulder injury, a work-related shoulder injury occurring." Findings, ¶ 11.e., *quoting* Respondent's Exhibit 9, p. 11. He did not believe the use of a blood pressure cuff could have caused the claimant's shoulder injury, nor that changing a blood pressure cuff or carrying a backpack constitutes repetitive trauma. He further opined that the claimant could have injured her shoulder while using a backpack if it were an acute injury, but repetitively putting on and taking off a backpack or repetitively using a blood pressure cuff did not constitute repetitive use. Jambor also noted that had the claimant lifted a backpack in October of 2019, and had an acute shoulder injury, she would have realized it. He also noted the August 5, 2020 lifting incident was after surgery had been recommended, which was on May 18, 2020, but concurred with the

claimant's need for surgery. Finally, Jambor opined that bicep tendinitis could occur without an injury and without having a nexus to work.

Based on this record, the administrative law judge concluded that the claimant's testimony and actions were "inconsistent, unreliable, and unpersuasive" citing how her theory of injury had evolved during the claim. Conclusion, ¶ A. He found Risinger's opinion as to the claimant's need for surgery persuasive but did not accept his opinion as to workplace causation of the injury, deeming it "vague and unpersuasive." Conclusion, ¶ B. He credited and evaluated the opinions of Lena and Jambor as follows:

> Dr. Lena's and Dr. Jambor's opinions that the Claimant's condition could not have resulted from repetitive use of a blood pressure cuff, and repetitive use of a backpack, are persuasive. They also appear to agree that an acute event could have resulted in the Claimant's shoulder condition, and their opinions are persuasive. However, the medical records do not support the premise that an acute event occurred, except for the one on August 5, 2020. I do not find it persuasive that the August event contributed to the Claimant's need for surgery, given that surgery was recommended several months prior.

Conclusion, ¶ D.

The administrative law judge noted that Jambor had originally thought that a traumatic workplace injury had created the claimant's condition, but that was "unsupported by the evidence and unpersuasive." Conclusion, ¶ E. He noted the witness became aware of the absence of an acute event and his subsequent testimony became more credible and persuasive. Concluding that the claimant's shoulder condition emanated neither from an acute workplace injury nor from overuse or repetitive trauma, the administrative law judge dismissed the claim for benefits.

The claimant did not file a motion to correct but did file a timely appeal of the Finding and Dismissal. Her appeal focused on alleged discrepancies in the narrative and

evidence relied upon by the administrative law judge. She believed that, in the absence of preexisting shoulder injuries, that her injuries could only be the result of an injury sustained as a result of using her various tools in the workplace. She also argued her prior counsel did not properly present her case at the hearing and that the respondents' medical examiner inappropriately outsourced his medical reports to a third-party. The respondents argued that the claimant was essentially seeking to retry the facts of the case on appeal and that the administrative law judge had a sufficient basis to deny the claim. Since an appellate body such as ours cannot reweigh the evidence considered at a formal hearing, our review is limited to determining if the decision herein can be supported by the evidence the trier of fact chose to credit. We conclude the administrative law judge had sufficient evidence supportive of his conclusion that the claimant did not prove her injury was compensable.

On appeal, we generally extend deference to the decisions made by the administrative law judge. "As 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." Daniels v. Alander, 268 Conn. 320, 330 (2004), *quoting* Burton v. Mottolese, 267 Conn. 1, 54 (2003). The Compensation Review Board cannot retry the facts of the case and may only overturn the findings of the administrative law judge if they are without evidentiary support, contrary to the law, or based on unreasonable or impermissible factual inferences. See Kish v. Nursing and Home Care, Inc., 248 Conn. 379, 384 (1999) and Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988). In addition, the burden of

proof in a workers' compensation claim for benefits rests with the claimant. See Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440 (2001).

In the present appeal, we must remind the claimant that, although she earnestly believes she has a meritorious claim, that the burden is on her to prove that her current condition is the result of a compensable injury. See Larocque v. Electric Boat Corporation, 5942 CRB-2-14-6 (July 2, 2015), *citing* Sapko v. State, 305 Conn. 360 (2012). See also DiNuzzo v. Dan Perkins Chevrolet Geo, Inc., 294 Conn. 132 (2009) and Voronuk v. Electric Boat Corp., 118 Conn. App. 248 (2009). "[O]ur 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. In order for this tribunal to overcome the fact-finding presumption that we extend to an administrative law judge, we would need to determine the claimant presented such a case and that it was "clearly erroneous" for the administrative law judge not to find this evidence more persuasive than the evidence relied upon by the respondents. Dudley v. Radio Frequency Systems, 4995 CRB-8-05-9 (July 17, 2006) *quoting* Moutinho v. Planning & Zoning Commission, 278 Conn. 660, 665-666 (2006). Consequently, we will review the evidence presented to ascertain if sufficient grounds support the result which was reached in this matter. In conducting this review, we must give the facts found by the administrative law judge conclusive effect, as there was no motion to correct filed. See Stevens v. Raymark Industries, Inc., 5215 CRB-4-07-4 (March 26, 2008), *appeal dismissed*, A.C. 29795 (June 26, 2008).

We note that the claimant offered live testimony before the administrative law judge who, after considering this testimony, as noted previously, deemed it "inconsistent, unreliable, and unpersuasive." Conclusion, ¶ A. As an appellate panel, we cannot intercede in how a trier of fact evaluates the probative value of live testimony. See Baron v. Genlyte Thomas Group, LLC, 132 Conn. App. 794, 804 (2012), *cert. denied*, 303 Conn. 939 (2012), *citing* Samaoya v. Gallagher, 102 Conn. App. 670, 673-74 (2007). In the present case, it appears that the claimant initially believed her shoulder ailments were the result of a traumatic injury,[3] but the administrative law judge credited reports suggesting her shoulder pain had been increasing prior to the October 23, 2019 incident.[4] The claimant later ascribed the cause of her ailments to the overuse of a blood pressure cuff and a backpack, which would apply a repetitive trauma theory of recovery. Given the ambiguous nexus of the claimant's injuries we cannot conclude that her testimony compelled an award of benefits as a matter of law.

We now turn to the medical evidence presented by the claimant. We do note that her treater, Risinger, did unambiguously opine that the claimant's employment, specifically the repetitive use of a blood pressure cuff, did cause her shoulder ailment. See Claimant's Exhibit T. However, Risinger specifically discounted the claimant's use of a backpack as a cause of her ailments, see Respondent's Exhibit 5. The administrative law judge was not persuaded by Risinger's opinion and, as our Appellate Court held in O'Reilly v. General Dynamics Corp., 52 Conn. App. 813 (1999), our administrative law

[3] We note that at the opening of the formal hearing the administrative law judge stated that "we're here solely for the 2019 date of injury, the 10/24/2019." April 1, 2021 Transcript, p. 3. At that point, counsel for the claimant did not advise the administrative law judge that a repetitive trauma theory of recovery was being pursued at the hearing. However, later at the hearing, the claimant testified that she had not sustained a traumatic injury on or about that date. See id., pp. 33-35.

[4] See Claimant's Exhibit A and April 1, 2021 Transcript, pp. 41-42.

judges, as triers of fact, are responsible for evaluating the weight and probative value of medical evidence. "[I]t is the trial commissioner's function to assess the weight and credibility of medical reports and testimony…." Id., 818, *quoting* Gillis v. White Oak Corp., 49 Conn. App. 630, 637, *cert. denied*, 247 Conn. 919 (1998).

The claimant also contended at oral argument before our tribunal that Jambor "changed my words" and claimed he had been "coached" at his deposition. May 19, 2023 Transcript, p. 14. We note that in Claimant's Exhibit K, Jambor, following his examination of the claimant, opined that based on his assumption that the claimant's narrative of her injury was accurate, that "her current right shoulder symptoms are work related and, therefore, indirectly due to the October 24, 2019 right elbow injury." Id. However, we have reviewed Jambor's deposition, and he clearly revised his opinions in a manner adverse to the claimant. See Respondent's Exhibit 9. He noted "the medical records clearly don't document the shoulder injury, a work-related shoulder injury occurring." Id., p. 11. When asked if using the blood pressure cuff could cause the injury, he testified that, "I don't see how that could cause a shoulder injury." Id., p. 12. He also agreed with Risinger that just putting on and taking off a backpack would not cause the claimant's shoulder ailment. See id., p. 13.[5] After claimant's counsel informed Jambor of the claimant's work duties, he held to this position. "But I don't think just repetitively putting on and off her backpack or repetitively using a blood pressure cuff, I don't think this is a repetitive-use claim. I just -- I can't say that within a reasonable degree of medical probability." Id., p. 30. Jambor ultimately opined the claimant's injury was essentially idiopathic in nature. "So, I don't know what to attribute it to. I

[5] The witness did not agree with the causation opinion proffered by Risinger regarding use of the blood pressure cuff. See Respondent's Exhibit 9, p. 12.

just know it doesn't meet the criteria for a repetitive use work injury to me. That's -- you know, I'd love to say it is. I can't. I have to tell you what I think it is." Id., p. 33.

"We have held that it is within the discretion of the trial commissioner to accept some, but not all, of a physician's opinion." Williams v. Bantam Supply Co., 5132 CRB-5-06-9 (August 30, 2007), *quoting* Lopez v. Lowe's Home Improvement Center, 4922 CRB-6-05-3 (March 29, 2006). It is apparent that the administrative law judge found Jambor's deposition testimony weightier than his written reports and he was permitted to do so under our precedent. His deposition testimony supports the result reached in this case.

The claimant also expressed dissatisfaction with the administrative law judge finding Lena a reliable witness, raising numerous criticisms as to his testimony and opinions. See May 19, 2023 Transcript, pp. 15-22. Specifically, the claimant alleged that Lena's reports and notes were not actually generated by him but were outsourced to and prepared by a third-party. However, if that were the case, the appropriate response to such unreliable evidence would have been to object to its admission at the formal hearing. Having reviewed the hearing transcript, we find that claimant's counsel did not object to the admission of Lena's reports once he had been deposed. See April 1, 2021 Transcript, pp. 5-7. For the reasons stated in DeLeon v. Walgreen's, 5568 CRB-4-10-6 (May 13, 2011) and Paige v. Hartford Insurance Co., 4594 CRB-2-02-12 (January 9, 2004), we cannot consider issues as to the possible bias of a witness in the absence of a timely objection filed on the record at the hearing. In the absence of a timely objection, the administrative law judge was entitled to place whatever weight he believed was appropriate on Lena's opinions.

Finally, we must address the argument presented by the claimant that her counsel did a poor job presenting her case. We note that prior claimants in Velky v. Regional School District #12, 6368 CRB-7-20-1 (December 3, 2020) and Serrano v. Bridgeport Towers Apt., LLC, 5572 CRB-4-10-7 (September 29, 2011), have advanced similar arguments to this tribunal. Our precedent has been we can only rule upon the record that was presented at the formal hearing, and we will not deviate from that precedent now.[6]

As we held in Williams, supra,

> [W]hen the board reviews a commissioner's determination of causation, it may not substitute its own findings for those of the commissioner . . . . A commissioner's conclusion regarding causation is conclusive, provided it is supported by competent evidence and is otherwise consistent with the law.

(Internal citations omitted.) *Quoting* Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440, 451 (2000).

In light of the burden of proof delineated in Larocque, supra, we find the administrative law judge had a reasonable basis for reaching his conclusions. Therefore, we find no error and affirm the March 22, 2022 Finding and Dismissal issued by Administrative Law Judge Peter Mlynarczyk.

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

[6] We have reviewed the case law as to when a party has raised an ineffective counsel argument as grounds to set aside an administrative hearing decision in Connecticut. Our Supreme Court did grant this relief in one instance in Salmon v. Dept. of Public Health & Addiction Services, 259 Conn. 288 (2002), but described such relief as an "extraordinary remedy." Id., 323, *quoting* Boughner v. Secretary of Health, Education & Welfare, 572 F.2d 976 (3d Cir. 1978). The factual predicate justifying such relief in Salmon were proceedings before the Statewide Grievance Committee determining that the plaintiff's attorney had failed to adhere to appropriate professional standards. In the absence of any such determination in this matter by an objective fact-finder finding counsel erred in his performance, we are powerless as an appellate body to render such extraordinary relief.