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.	:	JANUARY 5, 2024
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. Mr. 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 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 August 25, 2023 before a Compensation Review Board panel consisting of Administrative Law Judges Toni M. Fatone, Soline M. Oslena, and Peter C. Mlynarczyk.[1]

[1] We note that two motions for continuance were granted during the pendency of this appeal. We also note the claimant filed a motion to submit additional evidence during this appeal, which we addressed in our Ruling: Re Motion to Submit Additional Evidence dated June 23, 2023.

OPINION

TONI M. FATONE, ADMINISTRATIVE LAW JUDGE. The claimant 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 and diabetes were not compensable and the procurement of a OSKA device was not reasonable and necessary medical treatment. The claimant, acting through his father/conservator, argued that the administrative law judge's dismissal was against the weight of the evidence and was not consistent with the record.[2] The respondents argued that the administrative law judge evaluated the evidence and we should defer to his judgment as to which evidence he deemed more reliable and persuasive. Since we believe that there was sufficient evidence supportive of the outcome herein that the administrative law judge found reliable and chose to credit, we affirm the Finding and Dismissal.

The administrative law judge found that there was no dispute that the claimant was an employee of the respondent, Stop and Shop Supermarkets Companies, on April 12, 2017 when he sustained an injury to his chest wall while moving a bin at work. This injury was accepted by the respondent as documented by a January 8, 2018 voluntary agreement. The issues under consideration by the administrative law judge were whether the claimant's alleged Post Traumatic Stress Disorder (PTSD) and type 2 diabetes were causally connected to his compensable work injuries. Additionally, the administrative

[2] The claimant is intellectually challenged and his father has been advancing this claim on his behalf.

law judge assessed whether the claimant's request for an OSKA device constituted reasonable and necessary medical care.

In reviewing the record, the administrative law judge noted the claimant sought psychiatric treatment with Jessica A. Mitchell, Psy.D., for the April 12, 2017 work injury and subsequently underwent a neuropsychological commissioners' examination with James W. Pier, Ph.D. on August 16, 2018 and August 17, 2018. Pier's report was dated October 9, 2018. The claimant also asserted that later work episodes on September 14, 2018 and January 21, 2019 created compensable psychological injuries. The administrative law judge found Pier concluded that he could not state within a reasonable degree of medical psychological certainty that the work episodes of September 14, 2018 and January 21, 2019 met the criteria for PTSD.[3] Pier did opine, however, that the claimant met the criteria for anxiety disorder.

The administrative law judge also reviewed the evidence presented with respect to the claimant's diabetes, which the claimant contended was a result of his work injuries. Robert J. Cooper, M.D., a board-certified endocrinologist, conducted a Respondent's Medical Examination which consisted of a review of the medical records related to the claimant's diabetes on July 28, 2018. He concluded that the claimant had a number of risk factors for the disease including obesity, family history of diabetes, presence of metabolic syndrome and pre-diabetes, all of which may have contributed to the development of diabetes. Cooper further concluded that the claimant carried a diagnosis of pre-diabetes prior to the dates of injuries that were the subject of this claim. Cooper testified that the claimant had experienced an upward trend consistent with diabetes prior

[3] The claimant has cited subsequent dates of injury as sequelae of the initial compensable injury. See September 8, 2021 Transcript, pp. 27-35.

to the work-related incident of April 12, 2017. As a result, Cooper determined that the injuries of April 12, 2017 and September 26, 2017 were not substantial factors in the causation of the claimant's type 2 diabetes. The administrative law judge also noted that Misbah Azmath, M.D., and Joseph Lorenzo, M.D., who were treating endocrinologists, provided medical opinions regarding the claimant's diabetes, but that these doctors did not have a complete medical file for the claimant.

The administrative law judge also dealt with whether it was necessary for the claimant to be provided with a OSKA device which the claimant's pain management treater, Jonathan A. Kost, M.D., had prescribed. The administrative law judge reviewed the opinions of the respondent's medical examiner, Eric D. Grahling, M.D., who examined the claimant on September 20, 2020 and who stated that he did not recommend the use of an OSKA device. Specifically, Grahling opined that the OSKA device was not curative or necessary to restore the claimant's ability to return to work.

Based on this record, the administrative law judge concluded that Pier's testimony was more persuasive and convincing on the issue of whether the claimant met the criteria for PTSD. He also concluded that Cooper was more credible and convincing on the issue of whether the claimant's work injuries were a substantial factor in causing his diabetes. Finally, the administrative law judge found Grahling was more credible and convincing as to the reasonableness and necessity of the OSKA device and found that this device was not curative for the claimant. The claimant's contentions that he sustained compensable PTSD and diabetes conditions were denied. The claimant's various requests for treatment were also denied.

The claimant did not file a motion to correct from this finding but did file a timely appeal. He also filed a motion to submit additional evidence, which this tribunal considered and denied. See June 23, 2023 Ruling Re: Motion to Submit Additional Evidence.

At our hearing on the underlying merits of his appeal, the claimant addressed the evidence that was presented at the formal hearing and argued that it did not support the outcome reached by the administrative law judge. He also argued that there was a due process problem since the administrative law judge did not obtain a commission medical examination (CME) regarding causation of the claimant's diabetes. The respondents contended that the expert witnesses credited by the administrative law judge offered a sufficient basis to support his decision to deny these claims and he was entitled, as the finder of fact, to decide which witnesses offered the more persuasive opinions. They also argued that there was no obligation to obtain a CME in this case and the administrative law judge could determine whether the claimant's witnesses or the respondent's witnesses were more convincing. Given the deference we must extend to a finder of fact, we find the respondents' position more persuasive.

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).

There are three grounds of appeal raised by the claimant. We will deal first with his argument that the administrative law judge erred in denying the claim that his alleged PTSD was a compensable injury. Pier, who performed a forensic neuropsychological evaluation at the request of former Commissioner Nancy Salerno, concluded a number of the standard criteria for a diagnosis of PTSD were not met by the claimant. See Respondent's Exhibit 1. He restated his opinions in a letter dated November 6, 2019 wherein he opined that, "I cannot state in my own medical/psychological opinion, expressed within reasonable medical/psychological probability, that Mr. Jinks has ever met all five criteria for the diagnosis of PTSD . . . ." Id. Pier continued, "[i]t cannot be stated, however, within a reasonable degree of medical/psychological probability, that Mr. Jinks is at increased risk of recurrence of PTSD or psychological distress specifically and causally related to the work events from April and September 2017." He further wrote, "I cannot state within a reasonable degree of medical/psychological certainty that any hypothetical, future recurrences of psychological distress or PTSD would arise out of the work injury." Id.

The claimant's father argued at oral argument before our tribunal that Pier "could not refute the diagnosis of PTSD" presented by the treaters, Mitchell and Eric Rosenberg,

M.D., FACP.[4] August 25, 2023 Transcript, p. 8. As the claimant viewed Pier's report, he did not sufficiently rebut the treater's opinion and, therefore, the treater's opinion as to compensability should have been credited by the administrative law judge. See Respondent's Exhibit B. Having read Pier's report, we conclude that the administrative law judge could reasonably have reached a different impression than that of Mitchell and Rosenberg as to the totality of this examiner's opinions. Pier fully evaluated the treatment provided to the claimant by Mitchell and Rosenberg, as well as the respondent's medical examination reports prepared by Jerrold Kaplan, M.D., and Marvin Zelman, M.D. In his report, Pier differentiated between stress and anxiety and the clinical definition of PTSD. He unequivocally opined that he could not find all of the criteria of PTSD present in the claimant and clearly opined against a nexus of workplace causation to future psychological distress.

It is black-letter law that "the claimant bore the burden of persuasion in proving that his employment was the proximate cause of his injuries. See Sapko v. State, 305 Conn. 360, 372 (2012); DiNuzzo v. Dan Perkins Chevrolet Geo, Inc., 294 Conn. 132, 142 (2009); Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440, 454 (2001)." Hyde v. Branson UltraSonics Corp., 6282 CRB-7-18-7 (July 10, 2019). We have also long held that if "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." Strong v. UTC/Pratt & Whitney, 4563 CRB-1-02-8 (August 25, 2003). Determining that Pier offered a thorough explanation for his opinions, and these opinions weighed against compensability, we find no error on the

[4] Rosenberg was the claimant's long time primary care physician. See Claimant's Exhibits B, G and L.

administrative law judge's part in deciding to credit this opinion and dismissing the claimant's PTSD claim.

We now turn to the issue regarding the denial of the claim to find the claimant's diabetes a compensable injury. The claimant raised two arguments herein. He argued that it was error to have ruled on this issue in the absence of a commission medical examination and that, substantively, the opinion of Cooper, which was credited by the administrative law judge, was too unreliable to have been accepted above the opinions of the treating physicians. Having reviewed the factual record and our precedent, we find neither argument persuasive. We do note that sustained efforts were made by various administrative law judges to obtain an endocrinologist to perform a commission medical examination, as documented in Claimant's Exhibit E, which included various notes and correspondence of Administrative Law Judge Watson in 2019 regarding the issue of obtaining a CME since September 18, 2018. Furthermore, Claimant's Exhibit O contained the notes of former Chairman Mastropietro, who presided at a March 31, 2020 informal hearing that documented the inability to schedule a CME regarding the claimant's diabetes.[5] See September 8, 2021 Transcript, pp. 11, 20-22, 34-35. In light of this record and the fact that neither party sought a continuance at the September 8, 2021 hearing in order to add such evidence to the record, we believe the administrative law judge had no choice but to rule upon the record as presented by the litigants at the formal hearing.

[5] While the claimant's father asserts that this evidence suggests that it would be impossible for him to prove his case in the absence of a CME, the exhibit actually says that a CME "should resolve the biggest issue at the formal. If not, the formal is going to be more difficult." Claimant's Exhibit O. Former Chairman Mastropietro continued that in the absence of a CME, a formal hearing was inevitable as that further settlement discussions "are going to be fruitless." Id.

Notwithstanding this history, we note that there is binding appellate precedent that there is no entitlement for a litigant before this commission to have a CME conducted in his or her case. The claimant in Jodlowski v. Stanley Works, 169 Conn. App. 103 (2016), made that argument and it was rejected by our Appellate Court. "We also agree with the board that § 31-294f[6] does not mandate that the commissioner order a commissioner's examination when conflicting medical evidence is presented to the commissioner." (Footnote from original included.) Id., 109-10. The court concluded after its examination of the statutory language that:

> [t]he statute does not require the commissioner *sua sponte* to order a commissioner's examination to resolve conflicting evidence, although there is nothing in the statute to prohibit the commissioner from doing so. Because the commissioner in the present case was under no statutory duty to order a commissioner's examination, the plaintiff's claim to the contrary fails.

(Emphasis added.) Id., 111.

As this dispute was indistinguishable from Jodlowski, we find the absence of a CME on this issue did not constitute error.

The administrative law judge was, therefore, left to determine whether the opinions rendered by the claimant's treaters, who found the claimant's diabetes was caused by workplace injuries, were more persuasive than Cooper's opinion, who opined the claimant's diabetes had been developing prior to his injuries at work. He determined

[6] General Statutes § 31-294f (a) provides: "An injured employee shall submit himself to examination by a reputable practicing physician or surgeon, at any time while claiming or receiving compensation, upon the reasonable request of the employer or at the direction of the commissioner. The examination shall be performed to determine the nature of the injury and the incapacity resulting from the injury. The physician or surgeon shall be selected by the employer from an approved list of physicians and surgeons prepared by the chairman of the Workers' Compensation Commission and shall be paid by the employer. At any examination requested by the employer or directed by the commissioner under this section, the injured employee shall be allowed to have in attendance any reputable practicing physician or surgeon that the employee obtains and pays for himself. The employee shall submit to all other physical examinations as required by this chapter. The refusal of an injured employee to submit himself to a reasonable examination under this section shall suspend his right to compensation during such refusal."

Cooper's opinion was more persuasive. We must, therefore, determine if a reasonable fact finder could conclude that opinion was worthy of reliance. See Conclusion, ¶ C.

In his finding, the administrative law judge determined that Cooper opined that the claimant had numerous risk factors for diabetes; had a diagnosis of pre-diabetes prior to his date of injury; and had an upward trend of blood sugar consistent with diabetes prior to the date of injury. The administrative law judge did not accept the opinions of Azmath or Lorenzo on causation. See Findings, ¶ 13. He, therefore, found the injuries the claimant sustained were not a substantial factor in the development of his diabetes. See Findings, ¶¶ 10-12, 14.

The claimant argued at the formal hearing and before our tribunal, that Cooper's methodology in rendering his opinion was flawed and that Rosenberg's opinion should have been deemed the more reliable opinion herein. See September 8, 2021 Transcript, pp. 33-34; see also August 25, 2023 Transcript, pp. 9-12. Rosenberg's letter of September 18, 2018 took issue with many of Cooper's July 28, 2018 conclusions, arguing, in part, that the blood sugar readings were misinterpreted and the claimant's muscular frame had not been properly considered. As Cooper was deposed on December 11, 2020, subsequent to the issuance of Rosenberg's opinion, we will look to his deposition transcript to ascertain if the administrative law judge could reasonably have relied upon Cooper's opinion. See Respondent's Exhibit 2.

At his deposition, Cooper testified that the claimant's blood sugar was exhibiting an upward trend at the time of his workplace injury. See id., p. 21. He further noted that,

> there was a predisposition towards type 2 diabetes based on the overweight and family history of diabetes with a gradual rise in blood sugars, and that somewhat unmasked by the Prednisone that was given, an eventual exacerbation of the diabetes took place

> after that. But it was probably unrelated to the -- more likely unrelated to the accident.

Id., pp. 23-24.

When asked if "within a reasonable medical certainty, were Steven's work injuries a significant factor in the onset of his type 2 diabetes mellitus?" Cooper answered, "[n]o." Id., p. 24. Later in the deposition, Cooper reviewed the claimant's glucose levels, from 2007 to 2017 which he identified as rising, and testified "[i]t's the trend that's important, not so much the absolute number." Id., p. 35.

The claimant's father cross-examined Cooper and pointed out alleged deficiencies in his report. Nonetheless, after being presented with Rosenberg's opinion as to causation the witness reiterated his opinion.

> [Mr. Jinks:] Q. So with limited facts that you received relating to not meeting with Steven in person, how could you make a determination that it was not connected with the injury that Steven had, especially after you received Dr. Rosenberg's letter pointing out each of the deficiencies in your final decision?
>
> [Cooper:] A. You're asking me to answer?
>
> [Mr. Jinks:] Q. Yes.
>
> [Cooper:] A. That's Dr. Rosenberg's opinion. I have my own opinion.
>
> [Mr. Jinks:] Q. Yeah. And you have your own opinion?
>
> [Cooper:] A. That's correct.

Id., pp. 88-89.

When asked as to the circumstances between fasting and non-fasting blood sugar readings, Cooper explained that he believed the trend of the blood sugars was the more relevant consideration. See id., pp. 92-93. On redirect examination, Cooper testified that the claimant had most of his weight around his abdomen, which he described as "almost

called metabolic syndrome or prediabetes kind of state. And it goes along with the lipid profile that we discussed earlier of metabolic syndrome or predisposition to diabetes." Id., p. 106. When asked if the "lipid profile preexist his work injury" Cooper testified, "[y]es." Id., p. 106. The witness further discussed what he believed was the claimant's likely prognosis had the work accident not occurred.

> [Attorney Henke:] Q. Okay. Is there any indication in Steven's records as to whether he was -- I want don't to say heading down the road, before his work injury?
>
> [Cooper:] A. Like I said, his sugar wasn't, frankly, elevated, but it was on the high side.
>
> [Attorney Henke:] Q. Okay. Might he have come to the onset of type 2 diabetes even if he had not had the work injury?
>
> [Cooper:] A. I believe so.

Id., p. 107.

As our Appellate Court held in O'Reilly v. General Dynamics Corp., 52 Conn. App. 813 (1999), our administrative law 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…." (Citation omitted.) Id., 818, *quoting* Gillis v. White Oak Corp., 49 Conn. App. 630, 637, *cert. denied*, 247 Conn. 919 (1998). We further note that it is long standing precedent that "it is within the discretion of the trial commissioner to accept some, but not all, of a physician's opinion." Lopez v. Lowe's Home Improvement Center, 4922 CRB-6-05-3 (March 29, 2006). While the claimant has proffered a cogent argument for why Rosenberg offered the more persuasive opinion on the issue of the causation of the claimant's diabetes, the administrative law judge was not obligated, as a

matter of law, to accept that opinion. We find that Cooper's opinion on causation remained unwavering during the course of his deposition and, as a result, the administrative law judge could reasonably have found this opinion reliable.[7]

We now turn to the issue regarding the denial of an OSKA device. The claimant argued that the recommendation of Kost that he receive this device as a pain management tool should be accepted. The administrative law judge decided Grahling's opinion that it was not medically necessary at this time was more persuasive. Our precedent has been the determination of the most appropriate modality of treatment, consistent with the provisions of General Statutes § 31-294d, is factual in nature.[8] See Cervero v. Mory's Assn., Inc., 5357 CRB-3-08-6 (May 19, 2009), *aff'd*, 122 Conn. App. 82 (2010), *cert. denied*, 298 Conn. 908 (2010). See also Greco v. Precision Devices, Inc., 6265 CRB-8-18-4 (June 17, 2019) and Attardo v. Temporaries of New England, Inc., 5858 CRB-2-13-7 (June 19, 2014). As our Appellate Court stated in Cervero, supra, "[*i]t [is] the province of the commissioner to accept the evidence which impress[es] him as being most credible and more weighty*." (Emphasis in the original; internal quotation marks omitted.) Id., 93, *quoting* Anderson v. R & K Spero Co., 107 Conn. App. 608, 617

[7] In Wickson v. A.C. Moore, 6478 CRB-2-22-6 (May 1, 2023), we noted that we reversed the award of benefits in Tarantino v. Sears Roebuck & Co., 5939 CRB-4-14-5 (April 13, 2015), when a treating physician recanted his opinions at a deposition after being presented with accurate information and the trier failed to incorporate those revised opinions in his finding. However, in Wickson, supra, the witness relied upon by the administrative law judge was unwavering and unequivocal as to the issue of workplace causation, and we affirmed that decision. We believe the Wickson precedent governs this case as well as the administrative law judge could rely upon a witness who did not recant his opinions at a deposition.

[8] General Statutes § 31-294d states: "(a)(1) The employer, as soon as the employer has knowledge of an injury, shall provide a competent physician or surgeon to attend the injured employee and, in addition, shall furnish any medical and surgical aid or hospital and nursing service, including medical rehabilitation services and prescription drugs, as the physician or surgeon deems reasonable or necessary. The employer, any insurer acting on behalf of the employer, or any other entity acting on behalf of the employer or insurer shall be responsible for paying the cost of such prescription drugs directly to the provider. If the employer utilizes an approved providers list, when an employee reports a work-related injury or condition to the employer the employer shall provide the employee with such approved providers list within two business days of such reporting."

(2008). Based on this precedent, this board will not interfere with the trial judge's findings of fact if they are supported by the evidence.

Grahling was deposed on March 21, 2021, and opined that an OSKA device was not currently reasonable or necessary treatment for the claimant. See Respondent's Exhibit 4, p. 8. He further testified that he believed that a nerve block would be a necessary preliminary step prior to considering an OSKA device. See id., p. 12. The administrative law judge decided to credit these opinions and we do not believe it was unreasonable for him to have done so. After reviewing the evidence, we believe he was clearly acting within his discretion given the precedent in Cervero, supra, since as this tribunal pointed out in Greco, supra, "when the record contains evidence which supports the commissioner's findings, this board is not empowered to disturb those findings on appeal." Id.

As we previously noted herein, Dengler, supra, stands for the proposition that it is the claimant's burden to establish his or her entitlement to benefits under chapter 568. Our review of the record indicates that the administrative law judge could reasonably have determined the claimant did not prevail in this effort.

As we find sufficient evidence on the record and there were no errors of law, we affirm the Finding and Dismissal of Pedro E. Segarra, Administrative Law Judge acting for the Sixth District.[9]

[9] In the appellant's brief, the failure of the administrative law judge to rule on a post decision motion to strike is asserted as an error of law. We find the substantive merits of this matter were addressed in our decision on the motion to submit additional evidence. See June 23, 2023 Ruling Re: Motion to Submit Additional Evidence. In addition, our precedent has been the failure of a trier of fact to rule on a post-decision motion may be deemed to be a denial of said motion. See Spatafore v. Yale University, 14 Conn. Workers' Comp. Rev. Op. 310, 312, 2011 CRB-3-94-4 (September 14, 1995), *aff'd*, 239 Conn. 408 (1996). The appellant has also asserted various vague due process arguments herein which we cannot substantiate after a thorough review of the record.

Administrative Law Judges Soline M. Oslena and Peter C. Mlynarczyk concur in this Opinion.