CASE NO. 6504 CRB-3-23-5 CLAIM NO. 300124154	:	COMPENSATION REVIEW BOARD
BRIANNE F. WRATCHFORD CLAIMANT-APPELLANT	:	WORKERS' COMPENSATION COMMISSION
v.	:	DECEMBER 8, 2023
STOP & SHOP SUPERMARKET COMPANIES, L.L.C./AHOLD USA EMPLOYER		
and		
CHUBB INSURANCE COMPANY INSURER		
and		
RETAIL BUSINESS SERVICES, L.L.C. ADMINISTRATOR RESPONDENTS-APPELLEES		

APPEARANCES:

The claimant was represented by Robert F. Carter, Esq., Carter & Civitello, Woodbridge Office Park, One Bradley Road, Suite 305, Woodbridge, CT 06525.

The respondents were represented by James P. Henke, Esq., Nuzzo & Roberts, L.L.C., One Town Center, P.O. Box 747, Cheshire, CT 06410.

This Ruling Re: Claimant's Motions to Present Additional Evidence regarding the Petition for Review from the May 19, 2023 Finding and Decision of Maureen E. Driscoll, Administrative Law Judge acting for the Third District, was heard October 20, 2023 before a Compensation Review Board panel consisting of Chief Administrative Law Judge Stephen M. Morelli and Administrative Law Judges Soline M. Oslena and William J. Watson III.

RULING RE: CLAIMANT'S MOTIONS TO PRESENT ADDITIONAL EVIDENCE

STEPHEN M. MORELLI, CHIEF ADMINISTRATIVE LAW JUDGE. The claimant, who appealed the May 19, 2023 Finding and Decision denying her claim for temporary total disability benefits, filed two motions to present additional evidence. The first motion, filed August 31, 2023, sought to add two disability forms dated August 11, 2023 that were completed by Elizabeth R. Hamilton, D.O., the claimant's primary care physician, that had been affixed to an application to discharge the claimant's student loan obligations due to her disability. The second motion, filed October 2, 2013, sought to add the approval of the claimant's loan servicer, Firstmark Services, to discharge her student loan due to her disability. The claimant argued that this documentation should be considered by this board as it was material and was unavailable at the time of the formal hearing. The respondents filed timely objections that asserted that these opinions from Hamilton could have been obtained by the claimant prior to the closing of the record in the formal hearing; the evidence was cumulative to medical evidence already submitted, and the late arrival of such evidence without the opportunity for cross-examination created due process concerns pursuant to our precedent in Ghazal v. Cumberland Farms, 5397 CRB-8-08-11 (November 17, 2009).[1]

Having reviewed the proposed evidence and the parties' arguments, we are not persuaded by the claimant that the standard required pursuant to General Statutes

[1] We note the respondents have raised arguments consistent with our precedent in Ghazal v. Cumberland Farms, 5397 CRB-8-08-11 (November 17, 2009), as weighing against admission of the Firstmark Services loan discharge approval documents. We concur that the individuals responsible for this document have not been made available for cross-examination and under those circumstances a due process problem may exist in their admission after the record has closed.

§ 31-301 (b)[2] and Administrative Regulation § 31-301-9[3] have been met, particularly based on the binding precedent established in Diaz v. Pineda, 117 Conn. App. 619 (2009). Finding the respondent's objections meritorious, we herein deny the motions to present additional evidence.

The following facts are pertinent to our consideration of the two motions. The claimant was employed by the respondent, Stop & Shop Supermarket Companies, on October 23, 2019. The claimant alleged that on that date, she was "zapped" for five to ten seconds when she plugged in an iPad at work. Findings, ¶ 13. She filed a timely claim for chapter 568 benefits and began treating for various ailments she attributed to that incident, including right arm pain and paresthesia. The claimant moved to Maryland after the incident and received treatment there from several providers, including Hamilton. See Respondent's Exhibit K. Treatment with Hamilton commenced on February 17, 2022.

A formal hearing was conducted on December 5, 2022, before Administrative Law Judge Maureen Driscoll, with the record closing on January 20, 2023. Hamilton's treatment notes were admitted into the record. On May 19, 2023, the administrative law judge issued her Finding and Decision in which she found that the respondents had

---

[2] 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 administrative law judge, 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 administrative law judge, the Compensation Review Board may hear additional evidence or testimony."

[3] Administrative Regulation § 31-301-9 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 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."

acknowledged compensability of the 2019 work injury but that the claimant had not proven her claims for temporary total disability or for various treatment modalities. The claimant commenced a timely appeal from that decision and filed the aforementioned motions. She claimed that the opinions generated by Hamilton in August of 2023 were material and relevant to the Finding and Decision reached in May of 2023. She further argued that the two forms from Hamilton and the loan discharge approval letter should be considered by this board because they did not exist at the time the record closed.

In conducting our inquiry, we are bound by our Appellate Court's long-standing precedent in Diaz v. Pineda, 117 Conn. App. 619 (2009). After citing the relevant statute and regulation, see id., pp. 627-28, the court promulgated the test which we cite herein.

> 'Thus, in order to request the board to review additional evidence, the movant must include in the motion (1) the nature of the evidence, (2) the basis of the claim that the evidence is material and (3) the reason why it was not presented to the commissioner.' *Mankus v. Mankus*, 107 Conn. App. 585, 595–96, 946 A.2d 259, cert. denied, 288 Conn. 904, 953 A.2d 649 (2008). The question whether additional evidence should be taken calls for an exercise of discretion by the board, which we review under the abuse of discretion standard. See *Salmon v. Dept. of Public Health & Addiction Services*, 58 Conn. App. 642, 664, 754 A.2d 828 (2000), rev'd on other grounds, 259 Conn. 288, 788 A.2d 1199 (2002).

Id., 628.

Relying on that test, the Appellate Court affirmed our decision in Diaz v. Pineda, a/k/a Jamie Pineda d/b/a J.P. Landscaping Company, 5244 CRB-7-07-7 (July 8, 2008), *aff'd in part; rev'd in part*, 117 Conn. App. 619 (2009), and noted the manner in which this tribunal applied the facts in that case to the law:

> The plaintiff argued before the board that he had good reason to submit Rubinstein's medical report after the close of the formal hearing before the commissioner because he could not afford to be examined at the time of the hearing before the commissioner. The

> board found that the additional evidence presented was material to the case but that the plaintiff had not shown sufficient reasons for not presenting such evidence to the commissioner. The board found that the plaintiff had not established that the evidence could not have been obtained at the time of the original hearing. The board stated: "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 . . . . The . . . [s]econd [i]njury [f]und . . . points out that in *Smith v. UTC/Pratt & Whitney*, 3134 CRB 3–95–6 (June 4, 1996), we held the moving party in such a motion must establish [that] the evidence could not have been obtained at the time of the original hearing. The [second injury] [f]und points to the absence of any referral from the treating physician to . . . Rubinstein, and the record does not reflect [that] the [plaintiff] made an effort to obtain this testimony prior to the hearing by utilizing this avenue. The [plaintiff] also did not make any request to the trial commissioner seeking to change the [plaintiff's] treating physician. We believe this would have been a better direction for the [plaintiff] to have pursued." (Citation omitted.)
>
> The board reasonably could have concluded that the plaintiff had not demonstrated that he had good reasons for not presenting such evidence to the commissioner. In the absence of good reason, the plaintiff is not permitted to submit additional evidence before the board. See General Statutes § 31–301 (b). The board has consistently followed a policy of not encouraging the piecemeal presentation of evidence. See, e.g., *Green v. General Motors Corp. New Departure*, 5111 CRB–6–06–7 (August 21, 2007); *Schreiber v. Town & Country Auto Service*, 4239 CRB–3–00–5 (June 15, 2001). The board did not abuse its discretion in denying the plaintiff's motion to submit additional evidence.

Id., 628-29.

This precedent was reiterated by our Appellate Court in Diaz v. Dept. of Social Services, 184 Conn. App. 538 (2018), *cert. denied*, 330 Conn. 971 (2019). In that case, the claimant also sought to have additional evidence added after the finding and dismissal had been issued and our tribunal declined the request. See Diaz v. State/Dept. of Social

Services, 6072 CRB-3-16-1 (December 22, 2016). We were affirmed for the following reasons:

> Here, the plaintiff submitted her freedom of information request in April, 2016, five months after the commissioner closed the record in November, 2015. In her motion, she offers no reason why the additional evidence was not presented to the commissioner during the formal hearing. Furthermore, we note that in *Diaz* [*v. Pineda*, 117 Conn. App. 619 (2009)], the additional evidence was not in existence at the time of the formal hearing, and this court still concluded that the board did not abuse its discretion in finding that the plaintiff had not demonstrated good reason for not presenting such evidence to the commissioner. Here, although the plaintiff characterizes this evidence as "new evidence," the documents that the plaintiff sought to submit as additional evidence were in existence in 2010, approximately four years before the formal hearing on her workers' compensation claim commenced in 2014. In light of this, we conclude that the board reasonably could have concluded that the plaintiff did not demonstrate that she had good reason for not presenting such evidence to the commissioner. The board did not abuse its discretion in denying the plaintiff's motion to submit additional evidence.

(Footnote omitted.) Diaz v. Dept. of Social Services, 184 Conn. App. 538, 564 (2018), *cert. denied*, 330 Conn. 971 (2019).

We further note that our tribunal cited the standard delineated in Diaz v. Pineda, a/k/a Jamie Pineda d/b/a J.P. Landscaping Company, 5244 CRB-7-07-7 (July 8, 2008), *aff'd in part; rev'd in part*, 117 Conn. App. 619 (2009), to support decisions denying motions to add additional evidence in subsequent compensation review board decisions such as in Mikulski v. A. Duie Pyle, Inc., 6448 CRB-7-21-11 (January 11, 2023) and Callahan v. Healthcare Services Group-Meriden Care Center, 6453 CRB-8-21-11 (November 4, 2022), *appeal pending*, A.C. 46035 (November 22, 2022). Having reviewed the relevant case law on this topic, we now review the case at hand to determine if it is substantially similar to prior applications that this tribunal has denied.

Hamilton's treatment notes were admitted as Respondent's Exhibit K. The medical opinions that the claimant sought to admit through the aforementioned motions, however, did not exist at the time the record closed. We also reviewed the transcript of the formal hearing and there was no indication that the claimant had not submitted all the evidence she intended to present. Nevertheless, at the hearing before this board, counsel for the claimant stated that, at the time of the formal hearing, the claimant had not yet applied to discharge her student loans. Consequently, he argued that the causation report submitted with her loan discharge application could not have been presented as evidence.

We disagree. The claimant was obviously capable of obtaining a report from Hamilton when she needed it for her student loan forgiveness application. There was, therefore, no apparent reason why she could not have requested a report from Hamilton concerning the issues being adjudicated before the administrative law judge before the formal hearing record closed. Furthermore, counsel did not present any substantiative argument that there was "good cause" to admit Hamilton's reports at this time. Although we will not second guess counsel's litigation strategy, we find that his failure to present a causation opinion from Hamilton was essentially indistinguishable from the evidence that was disallowed by this tribunal in the two Diaz cases, both of which were upheld by our Appellate Court.[4]

Moreover, we note that the forms completed by Hamilton were proffered in furtherance of the discharge of a student loan due to the claimant's alleged disability. As

[4] In Diaz v. Pineda a/k/a Jamie Pineda d/b/a J.P. Landscaping Company, 5244 CRB-7-07-7 (July 8, 2008), *aff'd in part; rev'd in part*, 117 Conn. App. 619 (2009), the claimant asserted he had good cause to submit a medical report generated after the close of the formal hearing asserting he "could not afford to be examined at the time." Id., 628. In Diaz v. State/Dept. of Social Services, 6072 CRB-3-16-1 (December 22, 2016), *aff'd,* 184 Conn. App. 538 (September 4, 2018), *cert. denied*, 330 Conn. 971 (2019), the claimant submitted the results of a Freedom of Information Act request she initiated after the record closed. We do not find any material distinction wherein the proposed evidentiary submission is more meritorious than those we previously declined to grant.

the standards for resolving the issue of disability in another forum may be considerably different than the standards applied in resolving disputes under chapter 568, see Larocque v. Electric Boat Corporation, 5942 CRB-2-14-6 (July 2, 2015), it is not clear to us that an administrative law judge would find this evidence material even if it had been presented in a timely fashion. This is even more salient when considering the claimant's second request, the motion to add the decision of the loan servicer, Firstmark Services, to discharge her student loan to the record. As we pointed out in our decision in Dzienkiewicz v. State/Dept. of Correction, 5211 CRB-8-07-3 (March 18, 2008), *aff'd*, 291 Conn. 214 (2009),

> 'The standards of the Social Security Administration in adjudicating total disability are not the same standards used by our workers' compensation commission and, thus, a commissioner may decline to admit them into evidence.' Bidoae [v. Hartford Golf Club, 4693 CRB-6-03-7 (June 23, 2004), *aff'd*, 91 Conn. App. 470, 480-81 (2005), *cert. denied*, 276 Conn. 921 (2005)] supra, 480-481. The record herein indicates the Medical Examining Board applies an analogous standard to their decisions as applied by the Social Security Administration. Therefore, we conclude there was no error when the trial commissioner determined that the Medical Examining Board's decision was not probative evidence on the issue of whether the claimant was entitled to an award under workers' compensation.

Our Supreme Court affirmed our decision in Dzienkiewicz v. Dept. of Correction, 291 Conn. 214 (2009), because "the plaintiff has failed to demonstrate that it was an abuse of discretion to exclude it." Id., 222-23. If evidence submitted to a medical examining board for disability retirement may be found to not be probative in our forum, we can conclude that we are not obligated as a matter of law to admit evidence submitted in an effort to discharge a student loan.

In addition, we note that Hamilton's opinion was largely derivative of the claimant's narrative as to her condition, which the administrative law judge decided was not credible after hearing her testimony. See Conclusion, ¶ C. Based on the precedent in Abbotts v. Pace Motor Lines, Inc., 4974 CRB-4-05-7 (July 28, 2006), *aff'd*, 106 Conn. App. 436 (2008), *cert. denied*, 287 Conn. 910 (2008), expert opinions reliant upon an unreliable narrative may be discounted by a trier of fact, and we do not believe that additional evidence offered by Hamilton would have any impact upon that paradigm.

Considering the foregoing, we find this constitutes the type of piecemeal litigation we have consistently discouraged before our commission.[5] As we stated in Mikulski v. A. Duie Pyle, Inc., 6448 CRB-7-21-11 (January 11, 2023):

> 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.

Id., [Ruling Re: Motion for Additional Evidence issued August 8, 2022, p. 3,] *quoting* Kearns v. Torrington, 119 Conn. 522, 529 (1935).

In conclusion, there is nothing in the factual record which would indicate that the claimant could not have obtained a causation opinion letter from Hamilton prior to the

[5] The respondents additionally argued that the proposed evidence was essentially cumulative in nature, and we have long-held precedent disfavoring the admission of cumulative evidence. See Valenti v. Norwalk Hospital, 5871 CRB-3-13-8 (July 16, 2014), *appeal dismissed*, A.C. 37054 (April 6, 2015). See also 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 that neither the Hamilton letter nor the Firstmark decision regarding the claimant's student loan discharge, deal with any issues substantially different than other evidence previously presented by the claimant.

closing of the record. We will not speculate as to why this did not occur, but now that the record in this matter has closed, we do not find good cause exists to add such evidence and we deny the claimant's motions to present additional evidence.

Administrative Law Judges Soline M. Oslena and William J. Watson III concur in this Opinion.