COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

JOHN GARRISON,
MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION,
Complainants

v. DOCKET NO. 07-BEM-00796

LAHEY CLINIC MEDICAL CENTER,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Betty Waxman in favor of Respondent, Lahey Clinic Medical Center ("Lahey"). Following an evidentiary hearing, the Hearing Officer concluded that Respondent was not liable for discrimination based on Complainant's disability or his alleged constructive discharge when it refused to excuse Complainant, a staff psychologist, from overnight on-call duty. The Hearing Officer found that Complainant failed to establish a prima facie case of disability discrimination based on a failure to accommodate because Complainant was not a handicapped individual within the meaning of Chapter 151B and because there was no credible evidence that Complainant required or ever requested an accommodation. The Hearing Officer also found that even if he had requested an accommodation, Complainant prevented any interactive process from occurring because of his unreasonable refusal to discuss any possible accommodations other than being exempted from on-call duty. The Hearing Officer further concluded that Complainant's abrupt

decision to resign after learning that Respondent's on-call duty policy had changed could not be construed as constructive discharge. Complainant has appealed to the Full Commission. For the reasons stated below, we affirm the Order of Dismissal.

STANDARD OF REVIEW

The responsibilities of the Full Commission are outlined by statute, the Commission's Rules of Procedure (804 CMR 1.00 et seq.), and relevant case law. It is the duty of the Full Commission to review the record of proceedings before the Hearing Officer. M.G.L. c. 151B, § 5. The Hearing Officer's findings of fact must be supported by substantial evidence, which is defined as "....such evidence as a reasonable mind might accept as adequate to support a finding...." Katz v. Massachusetts Comm'n Against Discrimination, 365 Mass. 357, 365 (1974); M.G.L. c. 30A. It is the Hearing Officer's responsibility to evaluate the credibility of witnesses and to weigh the evidence when deciding disputed issues of fact. The Full Commission defers to these determinations of the Hearing Officer. See, e.g., School Committee of Chicopee v. Massachusetts Comm'n Against Discrimination, 361 Mass. 352 (1972); Bowen v. Colonnade Hotel, 4 MDLR 1007, 1011 (1982). The role of the Full Commission is to determine, inter alia, whether the decision under appeal was rendered in accordance with the law, or whether the decision was arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law. See 804 CMR 1.23.

BASIS OF THE APPEAL

Complainant's appeal to the Full Commission asserts that the Hearing Officer erred in determining that Complainant was not a handicapped individual in 2006, that she erred in ruling he failed to establish a case of failure to accommodate, that she erred in her analysis of the ADA Amendments Act of 2008, that she improperly ruled that Complainant could not serve as his own expert witness, and erred in other evidentiary rulings and findings. We have reviewed Complainant's Petition and the full record in this matter and have weighed all the objections to the decision in accordance with the standard of review stated herein. We find no material errors with respect to the Hearing Officer's findings of fact and conclusions of law. We properly defer to the Hearing Officer's findings that are supported by substantial evidence in the record. Quinn v. Response Electric Services, Inc., 27 MDLR 42 (2005). Substantial evidence is defined as evidence that a "reasonable mind" would accept as adequate to form a conclusion. M.G.L. c. 30A, s. 1(6). See also Gnerre v. Massachusetts Comm'n Against Discrimination, 402 Mass. 502, 509 (1988). The standard does not permit us to substitute our judgment for that of the Hearing Officer even if there is evidence to support the contrary point of view. See O'Brien v. Director of Employment Security, 393 Mass. 482, 486 (1984).

Complainant's appeal asserts that the Hearing Officer erred in determining that Complainant, who experienced a minor heart attack in 2000,[1] was not a handicapped individual in 2006. He asserts that even if he had "the same capability as compared to the average person, his heart disease would still qualify him as a disabled person because the Commission has accepted that a heart condition is a disability pursuant M.G.L.c.151B."

[1] Complainant's treating cardiologist described the heart attack as a "miniscule" cardiac event.

While this assertion may be true in many circumstances, there was sufficient evidence in this case to support the finding that Complainant was not suffering from active heart disease or experiencing cardiac symptoms which required limitations on his activity at the time of the incidents in question, or that he was disabled for purposes of requiring an accommodation. Indeed, the evidence supported the Hearing Officer's contrary conclusion. In any event, the determination as to whether a person is a "handicapped person" within the meaning of Chapter 151B is an "individualized inquiry." Ocean Spray Cranberries, Inc., v. Massachusetts Com's Against Discrimination, 441 Mass. 632, 637 (2004). Complainant's internist testified that upon his personal examinations of Complainant and review of the medical records, he did not believe that Complainant was substantially limited or impaired in his ability to carry out any normal life activity or functions. He further testified that he could not identify any medical reason why Complainant should have avoided on-call duty, and that he did not advise Complainant to restrict his life activities in any way.

Further, as the Hearing Officer noted in her decision, where a non-disabling heart disease has been deemed a disability within the meaning of Chapter 151B, "such recognition has been premised on an employer's perception of the employee as disabled," and the subsequent adverse action by the employer is based on that perception. See Talbert Trading Co. v. Massachusetts Comm'n Against Discrimination, 37 Mass. App. Ct. 56, 62 (2004), (holding that although there was no evidence that the employee suffered limitations of any major life activities other than the one incident that led to his firing, there was evidence that "he was regarded by his employer as someone with a heart condition" and was terminated for that reason); overruled on other grounds, City of New

Bedford v. Massachusetts Comm'n Against Discrimination, 440 Mass. 450 (2003); Bianchi v. Duchess Chemical, Inc., 24 MDLR 168 (2002) (even if heart condition did not impair major life activity, Complainant's absence and request for reduced hours caused employer to perceive him as incapacitated and to discharge him from his position); Williams v. Town of Stoughton, 13 MDLR 1385 (1991) (Complainant who was prescribed certain medication following a heart procedure was regarded as handicapped and denied re-instatement to his position as a police officer). The Hearing Officer correctly observed that there was no evidence in this matter that Complainant was perceived as handicapped by Respondent, or that Respondent acted out of any such perception and indeed, Complainant made no such allegation. Respondent's change in its on-call duty policy in the spring of 2006 had nothing to do with Complainant. Instead, the Respondent's on-call duty policy which had permitted Department heads to exempt employees from on-call duty when they reached the age of sixty was revoked for all Departments.

Likewise, the cases Complainant cites to that address "actual," as opposed to perceived handicap, do not support his argument. In those cases, unlike in this case, there was a finding that the employee was substantially limited with respect to a major life activity. See Miller v. Northeast Security, Inc., 17 MDLR 1067, 1081 (1995) (finding that Complainant's coronary artery disease "restricts his ability to perform functions involving physical exertion"); Mortimer v. Atlas Distributing Co., 15 MDLR 1233 (1993) (finding that Complainant was disabled from all employment at the time he was terminated due to total, permanent disability). The Hearing Officer specifically found that in contrast to these cases, Complainant "was able to carry out all major life functions

at the time he resigned," and that the medical evidence did not support a finding that Complainant was handicapped. The Hearing Officer noted that Complainant's cardiac episode occurred six years prior to his resignation in 2006 and that there was "no credible evidence that Complainant's cardiac condition limited him from performing any aspect of his job as a Lahey staff psychologist." There was evidence indicating that despite having a diagnosis of coronary artery disease and hypertension, Complainant's heart function, following treatment, was normal. His doctor testified that he was prescribed preventative medications for elevated blood pressure and cholesterol, but otherwise had no "symptoms" of coronary artery disease and was not "disabled." He was not counseled to limit his activities in any way and he returned to full duty with no restrictions or limitations after a brief period of treatment. Given these circumstances, the Hearing Officer properly concluded that because of "the limited impact of Complainant's one cardiac episode and his physician's credible testimony that he has no other symptoms consistent with active coronary artery disease," he was not actually disabled for purposes of requiring any accommodation. [2]

In addition, Complainant's argument that he is in fact disabled but such disability is controlled by ameliorative measures, namely medications he took in the wake of his cardiac episode in 2000, is not convincing in light of the facts and circumstances of this matter. In support of his argument, Complainant cites Dahill v. Police Dept. of Boston, 434 Mass. 233 (2001), a case in which the court held that the use of hearing aids to mitigate the effects of a severe hearing impairment did not prevent a hearing-impaired

[2] While the definition of disability in G.L. c. 151B includes persons with a record of disability or persons regarded as disabled, Complainant claims that he was actually disabled and denied an accommodation that was required because of his disability. He does not claim that Respondent acted adversely because of his record of heart disease or because it perceived him as suffering from heart disease.

individual from being considered handicapped under applicable law. Yet the Hearing Officer properly distinguished Complainant from the individual in Dahill by pointing out that such individual had an actual impairment, namely hearing loss, while Complainant did not establish that he had an actual impairment between 2000 and 2006, as discussed above. Further, while Complainant makes the argument on appeal that just as the individual in Dahill would be deaf if he did not use hearing aids, Complainant would be "dead" without the use of "medication and vigilant monitoring," this contention is belied by the testimony of Complainant's primary care physician. Dr. Orfanos testified that although he prescribed preventative medications for Complainant for elevated blood pressure and cholesterol, Complainant did not have "symptoms" of active coronary artery disease and was not limited in any manner, his heart muscle was not affected by the episode, and his heart function, following treatment, was normal. Thus the Hearing Officer rejected as speculative "the possibility that Complainant's condition might have ripened into an actual ailment" without the use of medication. She also recognized that if Complainant were to be considered a handicapped individual merely on the basis of taking preventative medication, "the law would have to recognize most adults as similarly disabled."

Complainant further challenges the Hearing Officer's conclusion that Complainant failed to establish that Respondent had an obligation to provide him with a reasonable accommodation in 2006, i.e. exempting him from on-call duty, as a result of his purported heart condition. The Hearing Officer concluded that there was no credible evidence that Complainant ever requested an accommodation, i.e. asked to be relieved of on-call duty obligations as an accommodation for coronary artery disease and/or

hypertension. Therefore, an essential element of notice in a failure to accommodate case was not satisfied. Moreover, the Hearing Officer found no credible evidence that Respondent even knew that Complainant viewed himself as disabled or in need of an accommodation to perform his job. We see no reason to disturb these findings supported by substantial evidence.

Complainant argues on appeal that Respondent knew "precisely" the accommodation that Complainant "needed to keep working" because he already "had been provided with the accommodation" of not having to perform on-call duty for six and a half years. Complainant presumably refers to the fact that in 1999, prior to his cardiac episode, Complainant sought and received such an exemption pursuant to Respondent's then-policy of allowing department chairs to excuse clinical staff members from on-call duty once they reached sixty years of age. This policy was reversed in the spring of 2006, when Respondent informed department chairs that they could no longer exempt any employees from on-call duty. Complainant testified that he sought the exemption in 1999 because he did not like taking calls as it disturbed his evening plans and his sleep, and that he found on-call duty increasingly undesirable as he grew older. There was sufficient evidence to find that Complainant's 1999 exemption request, made prior to his cardiac episode, was not sought as an accommodation for a disability. When he sought to be excused from on-call duty, he did not reference any cardiac issues or his health in any way. According to his testimony, Complainant's 1999 request reflected his personal preference not to work on-call duty. The Hearing Officer's determination that the Complainant did not request an accommodation was supported by substantial evidence.

Similarly, Complainant's argument that he informed Respondent in 2006 that he could not continue to work without what he characterizes as "this accommodation" is not persuasive. The record evidence demonstrates that Complainant did not seek an accommodation when he submitted a resignation letter stating that he was "psychologically unsuited" to working on-call hours, or when he subsequently submitted his letter of retirement. Complainant testified that when he spoke to the Chair of Respondent's Department of Psychiatry about resigning he pointed to his heart and said, "my heart," however, the Hearing Officer credited the Chair's denial that Complainant mentioned his heart condition or his health as the reason for his resignation. Complainant takes issue with the Hearing Officer's credibility finding stating that the Chair did not deny Complainant made the gesture referring to his heart, but merely stated she could not recall it happening. Complainant challenges the Hearing Officer's characterization of this as a denial. We decline to disturb the credibility determinations of the Hearing Officer where she was present to hear the testimony first hand and to observe the demeanor of the witnesses. As the fact-finder, she is uniquely suited to evaluate the reliability and trustworthiness of the testimony and the overall credibility of witnesses.

Finally, the Hearing Officer noted that even if Complainant had requested an accommodation based on his purported heart condition, his insistence on only one solution, a blanket exclusion from all on-call duty, prevented any meaningful interactive dialogue or process to arrive at a reasonable accommodation. Accordingly, the Hearing Officer found that Complainant prevented any true interactive process from occurring. See, e.g., Ferraz v. Boston Public Schools, 29 MDLR 57 (2007) (employee's insistence upon transfer to a different position as the only acceptable accommodation "doomed the

interactive process to failure") Complainant argues on appeal that "no interactive process is necessary when the employer takes away an effective accommodation that it had provided for more than six and a half years." This argument ignores the facts that the early exemption from on-call duty was not an accommodation for a disability and the change in policy was not directed at him, but involved all employees. The evidence also demonstrates that Complainant was told that despite his name being placed on the on-call rotation schedule, efforts would be made to secure moonlighters, namely, per diem clinicians, so that it was unlikely that Complainant would ever be called for on-call duty. Complainant was not satisfied with this response, even though Respondent's Department of Psychiatry on-call schedules for the period from January through September 2006 show that the majority of on-call assignments were ultimately covered by moonlighters. The record also shows that Complainant refused the offer of one of his colleagues to cover Complainant's on-call responsibilities for the month of June 2006, deciding instead to resign. Thus even if Complainant had requested an accommodation, the totality of the evidence demonstrates that he made an abrupt decision to resign his employment once he learned of Respondent's shift in policy regarding exemption from on-call duty in lieu of engaging in the required interactive process.

Complainant asserts that the Hearing Officer improperly applied the ADA Amendments Act of 2008 ("ADAAA") to his situation arguing that his heart condition qualifies as a disability under the regulations promulgated by the Equal Employment Opportunity Commission to implement the ADA Amendments. He also notes that the ADAAA encouraged a more liberal and less restrictive interpretation of the term "disability" to discourage extensive analysis of whether or not a particular impairment

constitutes a disability. Complainant argues that, under the ADAAA, an impairment is considered to be substantially limiting of an individual's ability to perform a major life activity only as compared to most people in the general population and that Complainant is disabled under this broader, more liberal formulation. Complainant also argues that as a result of his cardiac episode in 2000, he has an "impairment of the circulatory system" that although "in remission," is still an impairment that conforms to the ADAAA's definition of disability: i.e. "an impairment is a disability that is episodic or in remission is a disability if it would substantially limit a major life activity when active." While the Hearing Officer did make passing reference to the ADAAA, she specifically noted in her decision that the ADAAA, which took effect on January 1, 2009, does not apply retroactively and had "no impact on the facts of this case" which occurred in 2006. See, Thornton v. United Parcel Serv. Inc., 587 F.3d 27, 34 n. 3 (1st Cir. 2009).

While the Hearing Officer recognized the inapplicability of the ADAAA to this matter, she also recognized that even under the Act's less restrictive and more liberal construction of the term disability, which the Commission has historically adhered to in interpreting Chapter 151B, there remains a requirement that the alleged impairment "limit one or more major life activities which is not the case here." We concur with her conclusion that where Complainant's cardiac episode occurred six years' prior, and was described by his treating cardiologist as "miniscule," absent any further or recurrent symptoms, his alleged impairment was not "episodic" or "in remission" as contemplated by the ADAAA. As previously discussed, the Complainant had no limitations or restrictions of any kind upon his activities and returned to a full-time work schedule within a month of his cardiac episode. This supports the Hearing Officer's suggestion

that even under the ADAAA's liberal construction Complainant's condition would not qualify as an actual disability because he was not impaired in any major life activity.

Finally, Complainant contends that the Hearing Officer erred in finding that Complainant could not serve as his own expert witness. We conclude that this was a reasonable ruling within the Hearing Officer's discretion. As the trier of fact, the Hearing Officer could reasonably determine that self-serving testimony from the Complainant characterized as "expert" opinion would not assist her in her determination. See, Commonwealth v. Francis, 390 Mass. 89, 98 (1983) (no error of law in excluding expert opinion on reliability of eyewitness identification evidence in armed robbery trial, recognizing focus is on the "question whether, in the wide discretion of the trial judge, the subject was one on which the opinion on an expert would have been of assistance to the jury.")

Complainant claimed that he was a handicapped person because he suffered from chronic heart disease. Complainant identified three expert witnesses in his Amended Pre-Hearing Memorandum: Dr. Garrison (Complainant), Dr. Labib and Dr. Orfanos.[3] Complainant was permitted to provide testimony concerning his view of his own medical condition, even though he was a psychologist, not a cardiologist, and did not hold a medical degree. Dr. Orfanos was Complainant's internist during the late 1990s through May of 2005: his testimony was permitted and considered in the Public Hearing. There is no indication in the administrative record that Complainant sought to proffer Dr. Labib's expert opinion.[4] Given that Complainant was not a cardiologist, his opinion testimony

[3] No expert witnesses were identified in the Parties' Joint Pre-Hearing Memorandum. Instead, Complainant (Dr. Garrison) was only identified to "testify as to the facts..." (emphasis added).
[4] Dr. Garrison's testimony indicated that Dr. Labib concluded in a pre-hearing deposition that it was a "minor cardiac event" which occurred in the spring of 2000. Transcript of Public Hearing, Vol. 2, p.215.

could reasonably be determined to be unreliable due to his subjectivity and that the expert he identified, Dr. Orfanos, could not identify any medical reason why Dr. Garrison should have avoided on-call duty, we find no error in the Hearing Officer's exclusion of the Complainant as his own as expert witness. We do not believe that the Hearing Officer abused her discretion in so ruling.

Based on all of the above we conclude that there is substantial evidence in the record to support the findings of fact made by the Hearing Officer and she made no error of law. Therefore we affirm the dismissal of the claim.

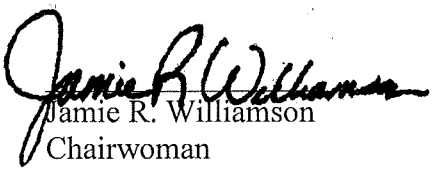
ORDER

Complainant's appeal to the Full Commission is hereby denied and the Order of dismissal is affirmed.

This Order represents the final action of the Commission for purposes of M.G.L. c. 30A. Any party aggrieved by this final determination may appeal the Commission's decision by filing a complaint seeking judicial review, together with a copy of the transcript of the proceedings. Such action must be filed within 30 days of service of this decision and must be filed in accordance with M.G.L. c. 30A, c. 151B, § 6, and the 1996 Superior Court Standing Order on Judicial Review of Agency Actions. Failure to file a

petition in court within 30 days of service of this Order will constitute a waiver of the aggrieved party's right to appeal pursuant to M.G.L. c. 151B, § 6.

SO ORDERED[5] this 6th day of January, 2017.



Jamie R. Williamson
Chairwoman

Charlotte Golar Richie
Commissioner

[5] Commissioner Sunila Thomas George was the Investigating Commissioner in this matter, so did not take part in the Full Commission decision. See, 804 CMR 1.23