WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JAIME LUGO PENA, *Applicant*

vs.

SUTTER MEMORIAL HOSPITAL, permissibly self-insured, SUTTER HEALTH, *Defendants*

Adjudication Number: ADJ8761355
Sacramento District Office

OPINION AND ORDER DISMISSING PETITION FOR RECONSIDERATION AND DENYING PETITION FOR REMOVAL

Defendant filed this Petition for Reconsideration and/or Removal ("Petition"), seeking review of the workers' compensation administrative law judge (WCJ)'s March 8, 2022 Findings and Order ("F&O"), wherein the WCJ ordered the parties to further develop the record with regard to whether the applicant's fall on August 23, 2021 was a compensable consequence of his prior industrial injury. Defendant argues that the WCJ erred by ordering further development of the record because applicant's medical records supporting the August 23, 2021 fall were not timely disclosed and served pursuant to Labor Code section 5502, subdivision (d)(3)[1] and the Pre-trial Conference Statement ("PTCS").

We did not receive an Answer. We did receive a Report and Recommendation on Petition for Reconsideration and Removal from the WCJ, recommending that the petition be denied. For the reasons discussed below, we will dismiss the Petition to the extent it seeks reconsideration and deny it to the extent it seeks removal.

FACTS

On July 20, 2012, applicant sustained an industrial injury to his lower back while working for defendant as a surgical technician. Applicant filed an Application for Adjudication for this injury under Case No. ADJ8761355, and the parties agreed to a stipulated award, issued on December 19, 2014.

[1] Further references are to the Labor Code unless otherwise specified.

Applicant subsequently sought to reopen the case on the basis that he had sustained further disability. After various proceedings,[2] the matter was taken off calendar at a hearing on July 28, 2021, with the parties ordered to take the deposition of Agreed Medical Examiner Beth Bathgate, M.D. on September 26, 2021. Just prior to that date, applicant's attorney became aware that applicant had sustained a further, serious injury in August 2021 from falling down the stairs at his sibling's home in Mexico when his leg "gave out," resulting in serious injuries necessitating immediate surgery and further surgical follow-up. (Applicant's Objection to Proceed, at p. 1.) Applicant therefore cancelled the deposition, on the basis that it would be pointless to go forward without a re-evaluation of applicant's injuries post-surgery. (*Ibid.*)

Defendant responded by filing a further Declaration of Readiness to Proceed seeking a trial date; applicant apparently attempted to file an Objection noting the above information, but for reasons that are unclear, the Objection was not successfully filed in the Electronic Adjudication Management System (EAMS) until the date of the Mandatory Settlement Conference itself, on November 10, 2021. The WCJ presiding over the MSC set the matter for trial on February 14, 2022, finding there was no timely Objection and noting as an issue for trial whether applicant required reevaluation by the AME. (PTCS, at pp. 3-4.)

Applicant filed a Petition for Removal, which we denied based upon a lack of irreparable harm, noting that applicant could raise the issue of development of the record at trial. (Opinion and Order Denying Petition for Removal, at p. 1.)

At trial on February 14, 2022, applicant sought to admit post-fall treatment records from a number of doctors, dated between August 30, 2021 and November 3, 2021. (Minutes of Hearing/Summary of Evidence ("MOH/SOE"), 2/14/2022, at p. 3.) Defendant objected on the basis that these records were not listed clearly on the PTCS and were not served in compliance with the PTCS' instruction that all exhibits should be served 20 days prior to trial, and should therefore be inadmissible pursuant to Section 5502; the WCJ denied the objection and admitted the exhibits. (*Id.* at p. 4.)

Applicant testified that his August 23, 2021 fall occurred at his sister's house in Mexico. (*Id.* at p. 4.) He was there for the funeral of his brother. (*Ibid.*) He was climbing the outdoor

[2] Applicant also filed a second Application for Adjudication in Case No. ADJ13541403 alleging a cumulative trauma injury to multiple body parts; this case was ultimately dismissed without prejudice at applicant's request at the February 2022 trial and is therefore not further considered in this opinion.

concrete stairs to the second floor of the house when his leg gave out. (*Ibid.*) His leg had been weak ever since the surgery from his prior injury, and his doctors had told him that the weakness was caused by vertebrae slippage placing pressure on the nerve roots. (*Ibid.*)

Applicant fractured his ankle in the fall; he was taken to a local hospital but was told he needed to return to the US for surgery because of the complexity of the fracture and because it had developed an infection. (*Ibid.*) His foot was put in a cast, he was discharged on August 25 or 26, and he returned to the US. (*Ibid.*)

Applicant testified that he saw Dr. Jeffrey Bergeson on August 30, 2021. (*Id.* at p. 5.) Applicant was told it was a very difficult fracture and that he should see an orthopedic trauma surgeon. (*Ibid.*) Applicant used a wheelchair for two or three months before seeing Dr. Paul Gregory, who said he needed surgery on the ankle. (*Ibid*.) Post-surgery, applicant is using a walker, but he cannot put his whole weight on his leg yet. (*Ibid.*) Most of his daily activities have been impacted by the fall because of his inability to stand on that leg. (*Ibid.*) He also sustained four new fractures in his back from the fall and a broken rib, which is documented in the report and CT scan from Drs. Bergeson and Gregory. (*Ibid.*)[3]

Applicant was the only witness to testify, and the WCJ took the matter under submission at the end of his testimony. (*Id.* at p. 9.) On March 8, 2022, the WCJ issued her F&O, finding there was a need to develop the record with regard to applicant's August 2021 fall. (F&O, at p. 1.) Specifically, the WCJ found that AME Bathgate needed to reevaluate applicant to determine whether his fall was a compensable consequence of his prior industrial injury. (*Ibid.*)

This Petition for Reconsideration and/or Removal followed.

DISCUSSION

A petition for reconsideration may properly be taken only from a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (*Pointer*) (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (*Kramer*) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]) or determines a "threshold" issue that is fundamental to the claim for benefits. (*Maranian v.*

[3] Cross-examination is omitted from this summary because it covered issues not directly relevant to the issue before us in the Petition.

Workers' Comp. Appeals Bd. (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Id*. at p. 1075 ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final'"]; *Rymer, supra*, at p. 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer, supra*, at p. 45 ["[t]he term ['final'] does not include intermediate procedural orders"].) Such interlocutory decisions include, but are not limited to, pre-trial orders regarding evidence, discovery, trial setting, venue, or similar issues.

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 280, fn. 2 [70 Cal.Comp.Cases 133].) The Appeals Board will grant removal only if the petitioner shows that substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a); see also *Cortez, supra*; *Kleemann, supra*.) Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10955(a).)

Here, the WCJ's order to develop the record is not a final order because it does not determine any substantive right or liability, nor is it a threshold issue fundamental to the claim for benefits. Accordingly, we will dismiss the Petition to the extent it seeks reconsideration.

Considering the Petition as a Petition for Removal, defendant's primary argument appears to be that the WCJ admitted and relied upon medical evidence that applicant's attorney failed to timely list and serve ahead of the trial date in order to establish the need to develop the record. Section 5502, subdivision (d)(3) provides that if the dispute over a claim is not resolved at the MSC, "the parties shall file a pretrial conference statement . . . listing the exhibits and disclosing witnesses. Discovery shall close on the date of the mandatory settlement conference. Evidence not disclosed or obtained thereafter shall not be admissible unless the proponent of the evidence can demonstrate that it was not available or could not have been discovered by the exercise of due diligence prior to the settlement conference." The WCAB's authority to order development of the record cannot be used simply to bail out an employee who has failed to properly build his case. (*San Bernardino Cmty. Hosp. v. Workers' Comp. Appeals Bd.* (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986].)

Nevertheless, it is well established that decisions by the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) To be substantial evidence a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

Here, we think defendant misstates the issue by focusing on whether the WCJ erred in admitting the records in question in the abstract, without reference to the specific situation before her. Applicant testified credibly to a serious injury sustained subsequent to the most recent AME report. Any decision rendered based on such a report would by definition not be supported by substantial evidence because it would not be based upon an adequate examination and history.

Confronted with an applicant providing credible testimony identifying a further injury sustained after the last medical evidence in the case, the WCJ's consideration of the medical records related to that injury – which defendant does not contest the authenticity or accuracy of – was only sensible. To the extent that the admission of these records was for the purpose of confirming the credibility of applicant's testimony, and therefore to support development of the record, we do not think the WCJ erred. Perhaps more importantly, even if the WCJ did err by admitting the records in question, it did not change the need for further development of the record. Even without consideration of the medical records, the WCJ had an obligation to order development of the record to address applicant's credible testimony of further injury.

To be clear, none of the above excuses applicant's attorney's failure to timely list and serve the records in question. But by the same token, that failure does not absolve the WCJ of the responsibility to issue a decision based upon substantial medical evidence when confronted with an applicant providing credible testimony of further injury. Here, the WCJ's decision to order development of the record was compelled by that testimony. Accordingly, we will deny the Petition to the extent it seeks removal.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DISMISSED** and the Petition for Removal is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

I DISSENT. (See attached Dissenting Opinion.)

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 23, 2022

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

JAIME LUGO PENA
SHATFORD LAW
LAW OFFICES OF TIMOTHY H. HUBER

AW/ara

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
CS

DISSENTING OPINION OF COMMISSIONER RAZO

I respectfully dissent. I agree with my co-panelists that the Petition should be dismissed to the extent it seeks reconsideration. However, I would grant the Petition as a Petition for Removal, for the reasons stated below.

From review of the record, it appears that applicant's attorney has acted with a serious lack of diligence in this matter. All the treatment records in question pertain to treatment received between August 30, 2021 and November 3, 2021. Although the record is silent as to when applicant's attorney first became aware of applicant's fall, at a minimum he would have been aware by September 15, 2021, the date that he unilaterally cancelled the deposition with AME Bathgate. Despite this knowledge, applicant's attorney not only failed to obtain the relevant treatment records by the date of the November 10, 2021 Mandatory Settlement Conference ("MSC") or to adequately list them on the Pre-trial Conference Statement, he also failed to timely object to the Declaration of Readiness that prompted the setting of the MSC. To make matters worse, despite being ordered by the WCJ to serve all exhibits at least 20 days prior to trial, the treatment records were not served on defense counsel until the Saturday before trial.

Pursuant to Labor Code Section 5502(d)(3)[4], "Discovery shall close on the date of the mandatory settlement conference. Evidence not disclosed or obtained thereafter shall not be admissible unless the proponent of the evidence can demonstrate that it was not available or could not have been discovered by the exercise of due diligence prior to the settlement conference." Although the WCAB has authority to order development of the record in appropriate circumstances, this authority cannot be used to circumvent the requirements of Section 5502(d)(3) if the lack of evidence is attributable to the applicant's lack of diligence. (*San Bernardino Cmty. Hosp. v. Workers' Comp. Appeals Bd.* (1999) (*San Bernardino*) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986].) Therefore, "when a party appears at trial and asks the WCJ to permit the introduction of evidence which was not disclosed at the time of the MSC, the party must explain either why the evidence was not earlier available or why it could not have been discovered in the exercise of due diligence." (*Id.* at p. 936.)

[4] Further references are to the Labor Code unless otherwise stated.

Neither the Findings and Order nor the Report analyzed the admissibility of the treatment records in question in light of Section 5502 and the standards articulated in *San Bernardino*. Accordingly, I would grant the Petition as a Petition for Removal, and return the matter to the WCJ for a new decision that properly analyzes the admissibility of the evidence in light of the legal standards articulated above.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 23, 2022

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

JAIME LUGO PENA
SHATFORD LAW
LAW OFFICES OF TIMOTHY H. HUBER

AW/ara

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
CS