WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JANET WINSTON, *Applicant*

vs.

STATE OF CALIFORNIA, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION; STATE COMPENSATION INSURANCE FUND, *Defendants*

Adjudication Number: ADJ10387327
Van Nuys District Office

OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.[1]

In the Findings and Award of May 27, 2021, the workers' compensation administrative law judge ("WCJ") found that applicant, while employed as a Supervising Parole Officer by the California Department of Corrections and Rehabilitation during the period October 1, 1984 through July 7, 2004, sustained industrial injury to her heart, hypertension, kidney, stroke, upper digestive tract/GERD and acid reflux, causing permanent disability of 90%, entitling applicant to 753.25 weeks of disability indemnity commencing June 8, 2019 payable at the rate of $270.00 per week for a total of $203,377.50, followed by a life pension of $231.92 per week, subject to adjustment under Labor Code section 4659(c), and less adjustment for reasonable attorney's fees. The WCJ also found that the date of injury under Labor Code section 5412, for Statute of Limitations purposes, is June 8, 2019, and that applicant's claim is not barred by the one-year Statute of Limitations under Labor Code section 5405(a).

Defendant filed a timely petition for reconsideration of the WCJ's decision. Defendant contends that under Labor Code section 5412, the evidence justifies a finding that the date of

[1] Commissioners Marguerite Sweeney and Deidra E. Lowe signed the Opinion and Order Granting Petition for Reconsideration dated August 26, 2021. As the two Commissioners are no longer members of the Appeals Board, new panel members have been substituted in their place.

applicant's cumulative trauma injury "was on or about June 29, 2007, or at some point before the end of 2007." Defendant further contends that under Labor Code section 5405(a), applicant's claim is barred by the Statute of Limitations because she did not file her Application for Adjudication of Claim within one year of the date of her cumulative trauma injury.

Applicant filed an answer.

The WCJ submitted a Report and Recommendation ("Report").

We have considered the allegations of defendant's Petition for Reconsideration and the contents of the WCJ's Report with respect thereto. Based on our review of the record, and for the reasons stated below and in the WCJ's Report, which we adopt and incorporate, we will affirm the Findings and Award of May 27, 2021. In affirming the WCJ's decision, we have given the WCJ's determination of applicant's credibility great weight because the WCJ had the opportunity to observe the demeanor of the witness. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination. (*Id*.)

In addition, we observe that Labor Code section 3208.1(b) defines a cumulative injury as "repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment." Section 3208.1 also states, "[t]he date of a cumulative injury shall be the date determined under Section 5412."

Under Labor Code section 5412, "[t]he date of injury in cases of…cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment."

Section 5412 requires a convergence of two elements: (1) the date when the employee first suffers disability; and (2) the employee's acquisition of knowledge that such disability was caused by the employee's present or prior employment.

As for the first element, there is no "disability" within the meaning of section 5412 until there has been either compensable temporary disability or permanent disability. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (2004) 119 Cal.App.4th 998, 1003 [69 Cal.Comp.Cases 579] ("*Rodarte*"); *Chavira v. Workers' Comp. Appeals Bd.* (1991) 235 Cal.App.3d 463, 474 [56 Cal.Comp.Cases 631].)

Here, it appears there is no dispute that applicant sustained compensable temporary disability in June 2007, when she was hospitalized for the stroke that is the basis for this claim.

In connection with the second element, it is settled law that "an applicant will not be charged with knowledge that his disability is job related without medical advice to that effect unless the nature of the disability and applicant's training, intelligence and qualifications are such that applicant should have recognized the relationship between the known adverse factors involved in his employment and his disability." (*County of Riverside v. Workers' Comp. Appeals Bd.* (*Sylves*) (2017) 10 Cal.App.5th 119, 124-125 [82 Cal.Comp.Cases 301] ("*Sylves*"), quoting *City of Fresno v. Workers' Comp. Appeals Bd.* (1985) 163 Cal.App.3d 467, 473.)

In this case, the record shows that applicant had an industrial claim for hypertension in the 1980s and was treated and advised by Dr. Thompson, then and throughout applicant's career ending in 2004, that her hypertension was work-related, with the doctor fearing she would suffer a stroke if she did not change jobs. Defendant alleges that in light of this medical history, applicant had the "training, intelligence and qualifications" – without further, specific medical advice – that she should have recognized the relationship between the known adverse factors of her employment and the stroke and disability she suffered in June 2007. (See Petition for Reconsideration, p. 8:11-13.)

We are not persuaded. Despite Dr. Thompson's treatment of applicant's hypertension and the doctor's warnings about her potential for stroke after 1987 and continuing, it was almost three years after applicant retired (from the summer of 2004 until the summer of 2007) before she suffered a stroke, even though she continued to smoke heavily during retirement. There is a reasonable inference that given her relatively good health in retirement, applicant's "training, intelligence and qualifications" led her to believe she was not in danger of having a stroke or injuring her heart, kidneys, upper digestive tract/GERD and acid reflux, as found by the WCJ. Such an inference is supported by applicant's trial testimony that her overall level of health was good when she retired in 2004, that her life was a "middle-aged dream" at the time, and that her life was not stressful when she had her stroke in June 2007. (Summary of Evidence, 12/8/20, pp. 7:24-8:16.)

Defendant's allegation that applicant knew or should have known in 2007 that her stroke was work-related is further rebutted by the medical opinion of Dr. Rodas, the Panel Qualified Medical Evaluator ("PQME") in internal and occupational medicine. In his supplemental report

dated March 2, 2020, Dr. Rodas described applicant's stroke as a "sudden occurrence of a cerebrovascular incident." The doctor further stated that although applicant's stroke was related to the original diagnosis of hypertension, it was a "new and unexpected injury with different pathology which occurred as a complication over and above her underlying disease of hypertension[,]" with this new pathology involving "thrombosis of the region of the small blood vessels of the brain and the infarcted area which includes the right thalamocapsular and right basal ganglia areas." (Exhibit CC, Rodas report dated March 2, 2020, p. 16.) Since Dr. Rodas believed the stroke suffered by applicant in June 2007 was a "new and unexpected injury with different pathology," it is unreasonable to conclude that applicant knew or should have known, at the time of the stroke, that it was caused by the stressful job from which applicant had retired three years before.

We further note that defendant refers to no evidence rebutting applicant's testimony about why she waited so long to file a claim (in 2016) for the stroke she suffered in 2007. Applicant's testimony concerning this issue was as follows: "When asked why it took so long for her to file her claim after her stroke in 2007, she indicated that she did not know that the stroke was related to her employment. She thought it was because of her cigarette smoking, and she did not think that she had a claim…she would be responsible for anything after her employment stopped." (Summary of Evidence, 1/19/21, p. 4:17-21.) This testimony, found credible by the WCJ, directly rebuts defendant's allegation that applicant's training, intelligence and qualifications were such that she should have recognized the relationship between her stressful job as a supervising parole officer and the stroke she suffered three years after retiring.

Accordingly, we affirm the WCJ's finding that under Labor Code section 5412, the date of applicant's cumulative trauma injury is June 8, 2019, the date of Dr. Rodas's first medical report. In that report, Dr. Rodas provided applicant with a straightforward statement that his medical findings were consistent with the work injuries she had alleged, i.e., hypertensive vascular disease, stroke, chronic renal failure and gastroesophageal/upper GI issues. (Exhibit FF, p. 60.) By the time of this report dated June 8, 2019, applicant knew or should have known that her stroke was related to her former job as a supervising parole officer. Since applicant already filed her Application for Adjudication in 2016, her claim of cumulative trauma injury is not barred by the one-year Statute of Limitations under Labor Code section 5405(a).

Finally, we conclude that defendant's reliance upon *Nielsen v. Workers' Comp. Appeals Bd.* (1985) 164 Cal.App.3d 918 [50 Cal.Comp.Cases 104] is misplaced. In that case, the Court of Appeal affirmed the WCAB in applying the Statute of Limitations to bar applicant's claim of cumulative trauma to his low back. Applicant filed his Application about eighteen months after he first suffered disability, when he called in sick due to severe pain in his left leg - ultimately diagnosed as nerve root impingement caused by lifting at work. In *Nielsen*, the Court recognized the rule announced in *City of Fresno v. Workers' Comp. Appeals Bd.* (1985) 163 Cal.App.3d 467, that an applicant will not be charged with knowledge that her disability is job related without medical advice to that effect, unless the nature of the disability and applicant's training, intelligence and qualifications are such that she should have recognized the relationship between the known adverse factors involved in her employment and her disability.

Even under the "*City of Fresno*" rule, however, the *Nielsen* Court found the WCAB correctly barred applicant's claim because he delayed filing for an injury whose cause was not "obscure and debatable," but involved a low back injury suffered in a job involving frequent and heavy lifting. Significantly, in *Nielsen* the record included clear evidence that applicant believed from his first day off work that his injury was work-related, with applicant himself suggesting the possibility of both industrial and non-industrial causes to the physicians who first treated him. (*Nielsen, supra,* 163 Cal.App.3d at 930.)

There is no reasonable comparison of the facts in this case with those presented in *Nielsen*. In that case, the injury was a common low back injury sustained in a job involving heavy lifting and bending, with the applicant himself immediately recognizing his job as the cause of the pain in his left leg. Here, by contrast, Dr. Rodas opined that although applicant had a history of industrial hypertension, her stroke was a new and unexpected injury with different pathology, which occurred as a complication over and above the underlying hypertension. Unlike *Nielsen*, in this case there was a three-year gap between the time applicant last worked as a parole officer and the onset of her stroke and disability. Unlike *Nielsen*, here applicant credibly testified that she did not know her stroke was related to her employment, that she believed it was due to her cigarette smoking, and that she herself was responsible for her medical condition rather than her former job. To repeat, defendant's reliance upon *Nielsen* is misplaced because its facts are markedly different from those presented here.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award of May 27, 2021 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 12, 2023

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

JANET WINSTON
LEWIS, MARENSTEIN, WICKE, SHERWIN & LEE
STATE COMPENSATION INSURANCE FUND
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I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
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REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

Janet Winston was employed from October 1, 1984 or through July 7, 2004 as a Supervising Parole Officer by the California Department of Corrections and Rehabilitation, and alleges to have sustained injury arising out of and in the course of employment to the heart, hypertension, diabetes, kidneys and stroke.

The applicant retired after she stopped working at CDCR. Subsequently, the applicant suffered a stroke in June 2007. The applicant filed an Application dated January 12, 2016. (Joint Exhibit BB). The claim was denied by the defendant.

The matter proceeded trial with the undersigned, and the Findings and Award issued dated May 27, 2021. Therein, the undersigned found that the applicant had sustained injuries as alleged, except her diabetes was found to be nonindustrial. The undersigned also found, inter alia, that the date of injury per Labor Code §5412 is June 8, 2019, and that the claim is not barred by the Statute of Limitations per Labor Code §5405. Permanent disability was awarded in the amount of 90%, based upon the opinions of PQME Dr. Anthony Rodas.

The defendant filed a timely verified Petition for Reconsideration dated June 15, 2021. The petitioner asserts that by the order, decision or award, the WCJ acted without were in excess of its powers, the evidence does not justify the findings of fact and that the findings of fact do not support the order, decision or award. The Petitioner asserts that the applicant should have known that her stroke was industrial on or about June 29, 2007, or before the end of 2007, and thereby the claim is barred by the Statute of Limitations per Labor Code §5405.

At the time of the preparation of this Report, there was no responsive pleading filed by the applicant.

II. DISCUSSION

As per Labor Code §5012, the date of injury for cases of occupational disease or cumulative injury is that date upon which the employee first suffered disability, and either knew or in the exercise of reasonable diligence should have known, that such disability was caused by his/her present or prior employment.

The petitioner's argument that the claim is barred by the statute of limitations is an affirmative defense. The party raising this affirmative defense has the burden of proof by a preponderance of the evidence. Accordingly, the petitioner has the burden of proof in this regard.

Generally speaking, an employee is not charged with knowledge that his or her disability is job-related without medical evidence to that effect, unless the nature of the disability and the employee's training, intelligence and qualifications are such that he/she should recognize the relationship between his or her employment in his/her disability.

The unrebutted medical reports and deposition transcript from QME Dr. Rodas found that the applicant's injuries to her heart, hypertension, kidneys, upper digestive tract, acid reflux and stroke arose out of and occurred in the course of her employment. (Joint Exhibits CC through GG), and it does not appear that the defendant is disputing that finding. In the opinion of the undersigned, there is no substantial medical evidence prior to those reports that established that the applicant's stroke was work-related.

In the opinion of the undersigned, the applicant was a credible witness. During the trial, the applicant was asked why it took so long for her to file her claim after her stroke in 2007. The applicant testified that she did not know that the stroke was related to her employment. The applicant testified that she smoked an average of approximately two pack per day before her stroke. (MOH, page 4, lines 4-5) She thought the stroke was because of her cigarette smoking, and she did not think that she had a claim. (MOH, January 19, 2021, page 4, lines 17 through 20). In the opinion of the undersigned, the defendant did not submit substantial or persuasive evidence to the contrary.

The date of injury under Labor Code §5412 is the date of the concurrence of compensable disability and knowledge that it is industrial. In the opinion of the undersigned, the date of injury per Labor Code §5412 is June 8, 2019, based upon the QME report from Dr. Rodas, which found the applicant's injuries to be industrial. (Joint Exhibit FF, pages 55-56).

The Application is dated January 12, 2016. The date of injury date of injury per Labor Code §5412 is June 8, 2019. Accordingly, the Application was timely filed, and the claim is not barred by the statute of limitations.

In the opinion of the undersigned, based upon the foregoing, and in light of the entire record, the petitioner did not sustain their burden of proof to establish that this claim is barred by the statute of limitations per Labor Code §5405. Accordingly, the applicant is entitled to disability benefits as previously awarded.

III.
RECOMMENDATION

Therefore, it is respectfully recommended that the Petition for Reconsideration be denied.

DATE: June 28, 2021

ROBIN A. BROWN
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE