WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ADRIANA GONZALEZ, *Applicant*

vs.

HUNTINGTON DRIVE HEALTH REHABILITATION; LIBERTY MUTUAL INSURANCE, *Defendants*

Adjudication Number: ADJ14413931
Van Nuys District Office

OPINION AND ORDER GRANTING PETITION FOR REMOVAL AND DECISION AFTER REMOVAL

Applicant seeks removal of the Findings of Fact and Orders (F&O) issued by the workers' compensation administrative law judge (WCJ) on July 22, 2021. By the F&O, the WCJ found that applicant sought panel number 7413157 before defendant had denied the claim and without any party making a request for a medical evaluation. The WCJ further found that panel number 7413157 was improperly obtained in violation of Labor Code[1] section 4062.2. (Lab. Code, § 4062.2.) The panel was ordered stricken.

Applicant contends that she validly obtained qualified medical evaluator (QME) panel number 7413157 in accordance with the Labor Code and she must be evaluated using this panel.

We did not receive an answer from defendant. The WCJ issued a Report and Recommendation on Petition for Removal (Report), as well as an Amended Report and Recommendation on Petition for Removal (Amended Report) recommending that we deny applicant's Petition.

We have considered the allegations of applicant's Petition for Removal and the contents of the WCJ's two Reports with respect thereto. Based on our review of the record and for the reasons discussed below, we will grant the Petition, rescind the F&O and issue a new decision finding that

[1] All further statutory references are to the Labor Code unless otherwise stated.

panel number 7413157 was properly obtained and the panel specialty is not medically or otherwise inappropriate to address the disputed medical issue(s). The parties will be ordered to utilize panel number 7413157.

FACTUAL BACKGROUND

Applicant claims injury to the back through May 4, 2020 while employed as a nurse's assistant by Huntington Drive Health Rehabilitation. An Application for Adjudication of Claim was filed on March 23, 2021.

On April 23, 2021, defendant sent applicant a Notice Regarding Delay of Workers' Compensation Benefit stating in pertinent part:

> Workers' compensation benefits are being delayed because further information is needed to make a determination on your claim. In order to make a decision, we need your statement, prior medical records, med-legal examination.
>
> (Defendant's Exhibit A, Defendant's delay letter, April 23, 2021, p. 1.)

On May 19, 2021, applicant submitted a request for a QME panel in the specialty of chiropractic citing section 4060 and utilizing defendant's April, 23, 2021 delay letter. (Defendant's Exhibit D, Chiropractic Panel No. 7413157, May 19, 2021, exh. pp. 1 and 3.) Panel number 7413157 issued that day in response to applicant's request. (*Id.*)

On June 1, 2021, defendant sent applicant a Notice Regarding Denial of Workers' Compensation Benefit stating that her claim was being denied for lack of medical evidence to support an industrial injury to the back and based on a post-termination filing. (Defendant's Exhibit C, Denial letter, June 1, 2021, p. 1.)

The matter proceeded to an expedited hearing on July 19, 2021 on the following issues: 1) defendant's "petition"[2] to strike panel number 7413157 as improperly obtained, and 2) the appropriateness[3] of medical specialty requested. (Minutes of Hearing (Expedited), July 19, 2021, p. 2.)

The WCJ issued the F&O as outlined above.

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[2] Although the Minutes refer to a "petition "by defendant to strike the panel, the record of proceedings in the Electronic Adjudication Management System (EAMS) does not contain a petition by defendant seeking to strike the QME panel.
[3] The Minutes inadvertently refer to the "appropriate miss" of the specialty. It is presumed that this was an error and it should say "appropriateness."

DISCUSSION

I.

Removal is discretionary and is generally employed only as an extraordinary remedy which must be denied absent a showing of significant prejudice or irreparable harm, or that reconsideration will not be an adequate remedy after issuance of a final order, decision or award. (Cal. Code Regs., tit. 8, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020); *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].)

Section 4060 provides as follows in relevant part:

> (a) This section shall apply to disputes over the compensability of any injury. This section shall not apply where injury to any part or parts of the body is accepted as compensable by the employer.
>
> …
>
> (c) If a medical evaluation is required to determine compensability **at any time after the filing of the claim form**, and the employee is represented by an attorney, a medical evaluation to determine compensability shall be obtained only by the procedure provided in Section 4062.2.
>
> (Lab. Code, § 4060(a) and (c), emphasis added.)

To obtain a QME panel in a represented case, section 4062.2 provides, in relevant part, as follows:

> (a) Whenever a comprehensive medical evaluation is required to resolve any dispute arising out of an injury or a claimed injury occurring on or after January 1, 2005, and the employee is represented by an attorney, the evaluation shall be obtained only as provided in this section.
>
> (b) No earlier than the first working day that is **at least 10 days after the date of mailing of a request for a medical evaluation pursuant to Section 4060** or the first working day that is at least 10 days after the date of mailing of an objection pursuant to Sections 4061 or 4062, **either party may request the assignment of a three-member panel of qualified medical evaluators to conduct a comprehensive medical evaluation. The party submitting the request shall designate the specialty of the medical evaluator**, the specialty of the medical evaluator requested by the other party if it has been made known to the party submitting the request, and the specialty of the treating physician. The party submitting the request form shall serve a copy of the request form on the other party.
>
> (Lab. Code, § 4062.2(a)-(b), emphasis added.)

Section 4060 permits a medical-legal evaluation to determine compensability "at any time after the filing of the claim form." Section 4062.2(b) requires the party requesting a medical evaluation pursuant to section 4060 to wait until the first working day that is "at least 10 days after the date of mailing of a request for a medical evaluation." Accounting for an additional five days for mailing within California pursuant to WCAB Rule 10605(a)(1), the requesting party may consequently request a panel on or after the 15th day from the mailing date of a request for an evaluation. (See *Murray v. County of Monterey* (May 29, 2015, ADJ9541181) [2015 Cal. Wrk. Comp. P.D. LEXIS 304] [panel found that the existing version of section 4062.2 allows a QME panel request on the 10th day after a written objection (or 15th day if the request is mailed), unlike in *Messele v. Pitco Foods, Inc.* (2011) 76 Cal.Comp.Cases 956 (Appeals Board en banc), which required waiting until the 16th day per a previous version of the statute];[4] Cal. Code Regs., tit. 8, former § 10507(a)(1), now § 10605(a)(1) (eff. Jan. 1, 2020).)

Defendant sent applicant a delay letter on April 23, 2021 stating that her claim was on delay pending, among other items, a "med-legal examination." Defendant's delay letter thus expressly stated that a medical-legal evaluation was necessary in order to make a decision regarding her claim. Applicant waited the requisite time from mailing of defendant's delay letter before requesting a QME panel from the Medical Unit on May 19, 2021. She therefore properly obtained a QME panel in accordance with sections 4060 and 4062.2.

The WCJ concluded that there must be a dispute before applicant may initiate the QME panel process and found that there was no dispute at the time of applicant's panel request. In *Chavarria v. Crews of California, Inc.* (December 2, 2019, ADJ12402022) [2019 Cal. Wrk. Comp. P.D. LEXIS 534], the Appeals Board held that a party may request a QME panel per sections 4060 and 4062.2(b) by using a claim delay notice as a "mailing of a request for a medical evaluation." In *Chavarria*, the panel explained that "the parties have a dispute because applicant's claim is not accepted." (*Id.* at p. *8.) The panel further concluded that "[b]oth parties have the right to perform discovery regarding the causation of applicant's injury while an employer determines whether to accept a claimed injury." (*Id.*) "[R]equiring parties to wait before conducting permissible

[4] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc).)

discovery would violate the public policy favoring the expeditious resolution of workers' compensation claims." (*Id.*; see also *Bahena v. Charles Virzi Construction* (December 17, 2014, ADJ8417754) [2014 Cal. Wrk. Comp. P.D. LEXIS 638] [applicant's QME panel request was validly made ten days from the date of defendant's denial notice without sending a second letter notifying defendant of his intent to request a QME panel because "[e]liminating the requirement that a party requesting a QME panel propose an AME first, but retaining the requirement that a letter must still be sent and an additional 10-day waiting period must pass before a panel can be requested, does nothing to streamline the current process and eliminate unnecessary delays"].)

The WCJ attempts to distinguish *Chavarria* because "in *Chavarria* there was medical evidence presented in the form of a treating physician's opinion." (Amended Report, August 5, 2021, p. 5.) Review of the decision in *Chavarria* does not reveal discussion of medical evidence or indicate that medical evidence influenced the analysis in that matter. Additionally, one of the panelists on *Chavarria* expressly disavowed *Rayo v. Certi-Fresh Foods, Inc.* (2018) 83 Cal.Comp.Cases 939, which the WCJ relied on in this matter in reaching his decision. To the extent that *Chavarria* and *Rayo* contain conflicting analyses, we find the reasoning in *Chavarria* to be more persuasive.[5]

Additionally, although amendments were made to the QME panel process by SB 863 effective January 1, 2013, the language of section 4060(c) remains the same as it was at the time of the Appeals Board's 2010 en banc decision, *Mendoza v. Huntington Hospital* (2010) 75 Cal.Comp.Cases 634 (Appeals Board en banc). The *Mendoza* decision found that sections 4060 and 4062.2 when read together establish that either party may request a QME panel at any time. (*Id.* at p. 642.) The decision observed that "section 4060(c) specifically provides that the section 4062.2 procedure for medical evaluations on compensability may be undertaken 'at any time' after a claim form has been filed." (*Id.*) This analysis of sections 4060 and 4062.2 in the *Mendoza* decision remains accurate for the current versions of these statutes.

Therefore, applicant validly obtained panel number 7413157.

II.

The WCJ did not address the appropriateness of the panel specialty in the F&O because this issue was rendered moot by the finding that applicant did not validly obtain her panel. Since

[5] See also Commissioner Sweeney's concurring opinion below.

we conclude that the panel was validly obtained, we will address this issue.

Section 4062.2(b) provides that "[t]he party submitting the request shall designate the specialty of the medical evaluator." (Lab. Code, § 4062.2(b).) Thus, the party first requesting a QME panel has the legal right to designate the panel specialty pursuant to section 4062.2(b). (See also Cal. Code Regs., tit. 8, § 30.5 ["Medical Director shall utilize in the QME panel selection process the type of specialist(s) indicated by the requestor"].) However, Administrative Director (AD) Rule 31.5(a)(10) allows for a request for a replacement QME panel in a different specialty from the Medical Director as follows:

> The Medical Director, upon written request, filed with a copy of the Doctor's First Report of Occupational Injury or Illness (Form DLSR 5021 [see 8 Cal. Code Regs. §§14006 and 14007) and the most recent DWC Form PR-2 ("Primary Treating Physician's Progress Report" [See 8 Cal. Code Regs. §9785.2) or narrative report filed in lieu of the PR-2, determines after a review of all appropriate records that the specialty chosen by the party holding the legal right to designate a specialty is medically or otherwise inappropriate for the disputed medical issue(s). The Medical Director may request either party to provide additional information or records necessary for the determination.
>
> (Cal. Code Regs., tit. 8, § 31.5(a)(10).)

AD Rule 31.1(b) separately provides that:

> Disputes regarding the appropriateness of the specialty designated shall be resolved pursuant to section 31.5(a)(10) of Title 8 of the California Code of Regulations. Either party may appeal the Medical Director's decision as to the appropriateness of the specialty to a Workers' Compensation Administrative Law Judge.
>
> (Cal. Code Regs., tit. 8, § 31.1(b).)

As the moving party, defendant bears the burden of showing that the specialty chosen by applicant is "is medically or otherwise inappropriate for the disputed medical issue(s)" per AD Rule 31.5(a)(10). (See Lab. Code, § 5705.) There is no evidence in this matter that defendant submitted a request for a replacement QME panel in another specialty to the Medical Director on the basis that the chosen specialty was inappropriate. The record contains no evidence or pleadings filed by defendant regarding why applicant's chosen specialty is inappropriate. In the absence of substantial evidence showing the panel specialty is inappropriate, we discern no basis in the record to conclude that applicant may not be evaluated by a physician in the specialty she requested. (See

Hamilton v. Lockheed Corp. (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc) [decisions of the Appeals Board must be supported by substantial evidence in the record]; see also *Ramirez v. Jaguar Farm Labor Contracting, Inc.* (2018) 84 Cal.Comp.Cases 56 [2018 Cal. Wrk. Comp. P.D. LEXIS 442] [a QME panel may be chosen in the specialty of chiropractic regardless of applicant's treatment needs].)

In conclusion, we will grant applicant's Petition, rescind the F&O and issue a new decision finding that panel number 7413157 was properly obtained and the panel specialty is not medically or otherwise inappropriate to address the disputed medical issue(s).

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Removal of the Findings of Fact and Orders issued by the WCJ on July 22, 2021 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Removal of the Workers' Compensation Appeals Board that the Findings of Fact and Orders issued by the WCJ on July 22, 2021 is **RESCINDED** and the following is **SUBSTITUTED** in its place:

FINDINGS OF FACT

1. Panel number 7413157 was properly obtained by applicant.

2. The medical specialty of chiropractic for panel number 7413157 is not medically or otherwise inappropriate to address the disputed medical issue(s).

ORDER

IT IS ORDERED that the parties utilize panel number 7413157.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

I CONCUR (See Attached Concurring Opinion.)

/s/ MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 18, 2021

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

ADRIANA GONZALEZ
BARKHORDARIAN LAW FIRM
WENDEROFF LAW

AI/*pc*

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

CONCURRING OPINION OF COMMISSIONER SWEENEY

I concur with the disposition reached here. Although our panel decisions are not binding precedent, I write separately to address the prior opinion that issued in *Rayo v. Certi-Fresh Foods, Inc.* (2018) 83 Cal.Comp.Cases 939, which I participated in as a panelist. (*Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].)

In *Rayo*, we affirmed the WCJ's decision that a represented applicant prematurely obtained a QME panel pursuant to section 4060 because the defendant had not requested a medical evaluation in accordance with the Labor Code. (*Rayo, supra,* 83 Cal.Comp.Cases at p. 942.) As with Chair Zalewski in *Chavarria v. Crews of California, Inc.* (December 2, 2019, ADJ12402022) [2019 Cal. Wrk. Comp. P.D. LEXIS 534], I have since reconsidered the disposition in *Rayo* and, to the extent that it does not comport with the analysis above, I now disagree with it and conclude that the determination in *Rayo* is inconsistent with sections 4060 and 4062.2. Accordingly, I now adopt the analysis outlined herein.

Therefore, I concur with the disposition reached here.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 18, 2021

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

ADRIANA GONZALEZ
BARKHORDARIAN LAW FIRM
WENDEROFF LAW

AI/*pc*

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