WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

CHARLENE NIXON, *Applicant*

vs.

WESTCARE; BERKSHIRE HATHAWAY, *Defendants*

Adjudication Number: ADJ12031563
Santa Barbara District Office

OPINION AND DECISION
AFTER RECONSIDERATION

We granted reconsideration in order to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.[1]

Defendant filed a Petition seeking removal of the Findings of Fact and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on September 14, 2020. By the F&O, the WCJ found that applicant's claim was not barred by the statute of limitations or the post-termination defense. The WCJ also found that the record needs to be developed and appointed a regular physician pursuant to Labor Code[2] section 5701. (Lab. Code, § 5701.)

We received an answer from applicant. The WCJ issued a Report and Recommendation on Petition for Removal (Report) recommending that we deny defendant's Petition.

We issued an Opinion and Order Granting Petition for Reconsideration (Order) on May 26, 2021. Applicant filed a Petition seeking to dismiss this Order or in the alternative seeking reconsideration of it.

We have considered the allegations of defendant's Petition for Removal, applicant's answer and the contents of the WCJ's Report with respect thereto. We have also considered the allegations of applicant's Petition challenging the Opinion and Order Granting Petition for Reconsideration. Based on our review of the record and for the reasons discussed below, we will rescind the F&O in response to defendant's Petition and return this matter to the trial level for further proceedings consistent with this opinion. Applicant's Petition will be dismissed.

---

[1] Commissioner Dodd was unavailable to participate further in this decision and was replaced by another panelist.

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

FACTUAL BACKGROUND

Applicant claims injury to the neck, left upper extremity, right upper extremity, bilateral shoulders and feet through December 10, 2017 while employed as a counselor tech by WestCare. Defendant denies compensability for this claim in its entirety.

Pavel Moldavskiy, M.D. evaluated applicant as the orthopedic panel qualified medical evaluator (QME). In his September 21, 2019 report, Dr. Moldavskiy found that applicant had sustained injury to her neck from cumulative trauma while employed with defendant, but did not sustain an industrial injury to her hands, shoulders or feet. (Defendant's Exhibit A, Report of PQME Dr. Moldavskiy, September 21, 2019, pp. 37-38.) He assigned a whole person impairment (WPI) rating of 25% to the neck based on a DRE Category 4. (*Id.* at p. 38.) Applicant's permanent impairment was apportioned 10% to her work with defendant with the balance due to her prior industrial spine injury with a different employer. (*Id.* at pp. 39-40.)

Dr. Moldavskiy was cross-examined on January 13, 2020, during which he was questioned about his opinion regarding apportionment. (Defendant's Exhibit B, Deposition transcript of Dr. Moldavskiy, January 13, 2020, pp. 10-15, 17-19.) His opinions remained unaltered in his testimony.

The matter proceeded to a mandatory settlement conference on February 12, 2020, at which time the matter was set for trial on several issues. On May 12, 2020, applicant filed a Petition to Strike PQME Dr. Moldavskiy on the basis that his opinions are not substantial evidence.

The matter proceeded to trial on August 19, 2020. The issues identified for adjudication included in relevant part: injury arising out of and in the course of employment (AOE/COE), permanent disability, apportionment, the post-termination defense and the statute of limitations. (Minutes of Hearing and Summary of Evidence, August 19, 2020, p. 2.) Defendant submitted Dr. Moldavskiy's report and deposition transcript as exhibits, to which there was no objection by applicant. (*Id.* at p. 3.) The Minutes of Hearing contain no discussion of applicant's May 12, 2020 Petition to Strike PQME Dr. Moldavskiy.

The WCJ issued the resulting F&O as outlined above. In his Opinion on Decision, the WCJ explained the rationale for developing the record as follows:

> The PQME in this case has not properly addressed apportionment Vis a Vis L.C. § 4663 nor has he addressed apportionment properly pursuant to the *Bentson*

[*sic*] case. His deposition transcript reflects an apportionment determination partly based on a lack of particular work duty; excessively heavy lifting.

Since has [*sic*] written a report and been deposed and his apportionment is not just Defendant's burden, but there has to be a discussion that constitutes substantial medical evidence.

Based on the above, Peter Newton, M.D. is appointed pursuant to L.C. 5701.

(Opinion on Decision, September 14, 2020, p. 2.)

DISCUSSION

I.

Defendant sought removal of the F&O. If a decision includes resolution of a "threshold" issue, then it is a "final" decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc).) Threshold issues include, but are not limited to, the following: injury AOE/COE, jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd*. (*Gaona*) (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or court of appeal. (See Lab. Code, § 5904.) Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision issues.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the petitioner challenging a hybrid decision only disputes the WCJ's determination regarding interlocutory issues, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions.

Here, the WCJ's decision includes a finding regarding whether applicant's claim is barred by the statute of limitations. This is a threshold issue fundamental to the claim for benefits. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

II.

Section 5909 provides that a petition for reconsideration is deemed denied unless the

Appeals Board acts on the petition within 60 days of filing. (Lab. Code, § 5909.) However, "it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice…." (*Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493].) In *Shipley*, the Appeals Board denied applicant's petition for reconsideration because the Appeals Board had not acted on the petition within the statutory time limits of Labor Code section 5909. The Appeals Board did not act on applicant's petition because it had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board's decision holding that the time to act on applicant's petition was tolled during the period that the file was misplaced. (*Id.* at p. 1108.)

Like the Court in *Shipley*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Shipley, supra*, 7 Cal.App.4th at p. 1108.) Defendant's Petition was timely filed on October 6, 2020. Our failure to act was due to a procedural error and our time to act on defendant's Petition was tolled.

III.

Although the decision contains a finding that is final, defendant is only challenging an interlocutory finding/order in the decision regarding development of the record with a regular physician per section 5701. Therefore, we will apply the removal standard to our review. (See *Gaona, supra*.)

Decisions of 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].) The Appeals Board has the discretionary authority under section 5701 to develop the record when the medical record is not substantial evidence or when necessary to adjudicate the issues in dispute. (See Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd*. (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd*. (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].)

Per *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138, 142 (Appeals Board en banc), the preferred procedure for developing a deficient record is to first allow supplementation of the medical record by the physicians who have

already reported in the case. In *McDuffie*, the WCJ had found the reporting of the existing physicians was inadequate and appointed a new physician to evaluate applicant. The en banc panel stated in response:

> We disagree, however, that the first and best option for further developing the medical record is the appointment of a new medical examiner unfamiliar with the case.
>
> Rather, where the WCJ determines after trial or submission of a case for decision that the medical record requires further development, the preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. Each side should be allowed the opportunity to obtain supplemental or additional reports and/or depositions with respect to the area or areas requiring further development, i.e., the deficiencies, inaccuracies or lack of completeness previously identified by the WCJ and/or the Board. [Citation omitted.] Only if the supplemental opinions of the previously reporting physicians do not or cannot cure the need for development of the medical record, should other physicians be considered.
>
> (*Id*.)

The *McDuffie* decision went on to state that "[i]f the use of physicians new to the case becomes necessary, the selection of an AME by the parties should be considered at this stage in the proceedings." (*Id.*) Thereafter, "if none of the procedures outlined above is possible, the WCJ may resort to the appointment of a regular physician, as authorized by Labor Code section 5701." (*Id.* at pp. 142-143.)

In this matter, the WCJ found that the record must be developed regarding apportionment and that this issue cannot be addressed by the existing QME Dr. Moldavskiy. As outlined above, the preferred procedure to develop a deficient record is to return to the existing physicians first before considering the selection of physicians new to the case. While there are circumstances where returning to the existing physicians is unlikely to create a record that constitutes substantial evidence and is consequently futile, the current record does not support a conclusion that Dr. Moldavskiy is incapable of curing the deficiencies in his opinions.[3]

Therefore, upon return of this matter to the trial level, we recommend the parties initially

[3] It is noted that the trier of fact may find a physician's opinions regarding apportionment to be deficient, but still rely on that physician's opinion to determine other issues in dispute if those opinions constitute substantial medical evidence. (See e.g., *County of El Dorado v. Workers' Comp. Appeals Bd.* (*Farrar*) (2007) 72 Cal.Comp.Cases 1149 (writ den.) [the Appeals Board made a finding of injury AOE/COE based on applicant's QME's opinion, although the QME did not adequately apportionment].)

conduct further discovery with Dr. Moldavskiy. If Dr. Moldavskiy is unable to adequately address the issues in dispute, the parties should be given the opportunity to agree to an AME to develop the record, which is the second preferred method under *McDuffie*. If the parties are unable to agree to an AME, then the WCJ may appoint a physician to evaluate applicant per section 5701.

IV.

The WCJ is charged with the duty to make determinations on all issues in controversy. (Lab. Code, §§ 5313, 5815.) One of the issues at trial included injury AOE/COE. However, the F&O contains no finding or order regarding this issue and there is no discussion of it in the Opinion on Decision. While acknowledging the WCJ's authority to defer issues, it is incumbent on the WCJ to provide the reason(s) in his Opinion on Decision for deferring issues submitted for determination at trial. (See *Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc), citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350] [the WCJ's decision must set forth clearly and concisely the reasons for the decision made on each issue, and the evidence relied on so that the parties, and the Board if reconsideration is sought, can ascertain the basis for the decision].) In the absence of any determination or discussion of the issue of injury AOE/COE, it is unclear if the WCJ found the record to be deficient to address this dispute.

Therefore, the F&O will also be rescinded since it does not adequately address the issues identified at trial or explain why certain issues were not adjudicated.

V.

Applicant filed a "Petition to Dismiss 5/26/21 Order Granting Reconsideration or Petition for Reconsideration" on May 26, 2021. In her Petition, applicant contends that the Appeals Board granted reconsideration for further study in error because defendant filed a petition for removal, not a petition for reconsideration of the F&O.

Although defendant filed its Petition seeking removal of the WCJ's decision, the underlying decision by the WCJ was a final order subject to reconsideration per the discussion above. In other words, despite the title of defendant's Petition, the Appeals Board treated the Petition as warranted based on the determinations contained in the F&O. Our May 26, 2021 Order was not a decision on the merits of defendant's Petition and was solely issued in order to provide

additional time to further study the factual and legal issues beyond our statutorily mandated timeframe. Since we are now issuing our Decision After Reconsideration in response to defendant's Petition, applicant's Petition is moot and will be dismissed.

Therefore, we will rescind the F&O in response to defendant's Petition and return this matter to the trial level for further proceedings consistent with this opinion. Applicant's Petition will be dismissed.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Facts and Order issued by the WCJ on September 14, 2020 is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

IT IS FURTHER ORDERED that applicant's Petition for Reconsideration of the Opinion and Order Granting Petition for Reconsideration issued by the Workers' Compensation Appeals Board on May 26, 2021 is **DISMISSED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ AMBER INGELS, DEPUTY COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 21, 2021

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

CHARLENE NIXON
GHITTERMAN GHITTERMAN & FELD
GOLDMAN MAGDALIN & KRIKES

AI/*pc*

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