WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOSE ALBARRAN, *Applicant*

vs.

ARAMARK; ACE AMERICAN INSURANCE COMPANY, administered by SEDGWICK, *Defendants*

Adjudication Number: ADJ15539450
Stockton District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks removal of the March 5, 2022 Findings of Fact and Order (F&O), wherein the workers' compensation administrative law judge (WCJ) found Qualified Medical Evaluator (QME) panel no. 7464239 to be invalid.

Defendant contends it properly relied on a July 7, 2021 notice denying injury to the left shoulder as a basis for its January 13, 2022 request for the issuance of a QME panel.

We have received an answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Removal (Report), recommending that the Petition be denied.

We have also received a May 4, 2022 Request for Leave to File Supplemental Petition for Removal, and Supplemental Reply to Answer for Removal (Supplemental Reply). Pursuant to WCAB Rule 10964, we accept defendant's supplemental pleadings and have considered them herein. (Cal. Code Regs., tit 8, § 10964.)

We have considered the Petition for Removal, the Answer, and the Supplemental Reply, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will deny the Petition as one seeking reconsideration.

FACTS

Applicant Jose Albarran (applicant) claimed injury to the back, chest, ribs and left shoulder while employed at Yosemite National Park by Aramark on October 19, 2020. Defendant admits injury to the back, chest and ribs, but disputes injury to the left shoulder.

On June 30, 2021, primary treating physician Gurinder Dhindsa, M.D. issued a supplemental report identifying injury to the left shoulder and requested an MRI of the left shoulder and thoracic region. (Ex. 116, report of Gurinder Dhindsa, M.D., dated June 30, 2021.) Applicant was not represented at the time.

On July 7, 2021, defendant denied the requested left shoulder MRI, stating the "left shoulder is not an accepted body part." (Ex. 102, Sedgwick letter denying left shoulder, dated July 7, 21 2021.) Defendant's letter further stated that, "Any dispute regarding liability for the treatment being requested on this claim will be resolved either by agreement of all parties or through the dispute resolution process or the Workers' Compensation Appeals Board." The letter was copied to the primary treating physician, but was not accompanied by any enclosures. (*Ibid.*)

On December 14, 2021, applicant retained counsel and filed an application for adjudication.

On January 3, 2022 defendant served applicant's counsel with medical reports, benefits notices and a wage statement, via U.S. Mail. (Ex. 103, letter from Sedgwick to applicant's attorney, dated January 3, 2022.)

On January 13, 2022, defense counsel served its Notice of Representation and Request for Service. Also on January 13, 2022, defendant requested a panel of QMEs, noting its objection dated July 7, 2021 as the basis for a dispute under Labor Code section 4062.[1] (Ex. 104, Bradford Barthel Panel Request, Panel No. 7464239, dated January 13, 2022.) Defendant served panel no. 7464239 in orthopedic surgery.

Applicant declared a dispute and requested an Expedited Hearing regarding the QME panel on January 19, 2022. The parties proceeded to expedited hearing on February 9, 2022, placing in issue "the validity of panel no. 7464239." (February 9, 2022 Minutes of Hearing, at 2:10.)

The WCJ issued the F&O on March 5, 2022, finding "Panel no. 7464239 is not valid." (Findings of Fact No. 3.) Defendant filed a Petition for Removal on April 4, 2022, averring "the

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

panel QME list requested by defendant is valid despite the request having been made prior to applicant's representation by counsel." (Petition to Removal, dated March 5, 2022, at 3:21.)

Applicant's Answer responded that because applicant was represented at the time of defendant's panel request, section 4062.2 controlled. (Answer, at 4:1.) Applicant asserted that the claims file was mailed to applicant's counsel on January 3, 2022, and that the ten days specified in section 4062.2(b) plus five days for mailing per WCAB Rule 10605(a) resulted in January 19, 2022 as the first possible day to file a QME request. (*Id*. at 4:2; Cal. Code Regs. tit. 8, §10605(a).)

On April 16, 2022, the WCJ issued the Report, noting that defendant's January 13, 2022 panel request was based on its objection of July 7, 2021, made while applicant was unrepresented. The WCJ observed that defendant's objection letter failed to provide applicant with the QME panel request form required under section 4061(c). (Report, at p. 5.) The WCJ concluded that because "[d]efendant has presented no evidence of the immediate provision of the form to request a panel to Applicant, who on 7/7/21 was unrepresented," defendant's claimed objection of July 7, 2021 was rendered invalid, nullifying defendant's subsequent QME panel request. (*Ibid.*)

Defendant's Supplemental Reply asserts that the July 7, 2021 objection was valid, as there is no statutory or regulatory requirement that defendant advise applicant of his rights to a panel QME. (Supplemental Reply, at 3:8.) Defendant also asserts section 4062.1 provides no "form or content" requirements for a defendant lodging an objection to the determinations of an unrepresented worker's primary treating physician. (*Id*. at 3:11.)

DISCUSSION

A petition is generally considered denied by operation of law if the Appeals Board does not grant the petition within 60 days after it is filed. (Lab. Code, § 5909.) However, we believe that "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 the applicant's petition for reconsideration because it had not acted on the petition within the statutory time limits of Labor Code section 5909. This occurred because the Appeals Board 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. (*Shipley,*

supra, 7 Cal.App.4th 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.)

In this case, the WCJ issued the Findings and Order on March 5, 2022 and defendant filed a timely petition on April 4, 2022. Thereafter, the Appeals Board failed to act on the petition within 60 days, through no fault of the parties. Therefore, considering that defendant filed a timely petition and that the Appeals Board's failure to act on that petition was in error, we find that our time to act on defendant's petition was tolled.

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 arising out of and in the course of employment, 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 of employment and injury arising out of and in the course of employment. These are final orders subject to reconsideration and not removal. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1075 [65 Cal.Comp.Cases 650].)

Although the decision contains findings that are final, the petitioner is only challenging an interlocutory finding/order invalidating a QME panel. Therefore, we will apply the removal standard to our review. (See *Gaona, supra,* 5 Cal.App.5th 658, 662.)

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 significant 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 determined defendant's July 7, 2021 objection letter was not a valid objection because it did not include the form prescribed by the medical director with which to request assignment of a panel of three qualified medical evaluators, as mandated by section 4061(c). (Report, at p. 6.) Defendant responds that this dispute, involving a contested body part on an admitted injury, is governed by section 4062, not section 4061. (Supplemental Reply, at 2:12.)

"Sections 4060 and 4061, like section 4062, are dispute resolution provisions. Section 4060 governs disputes over the compensability of an injury, and section 4061 covers disputes over permanent disability." (*State Compensation Ins. Fund v. Workers' Compensation Appeals Bd. (Sandhagen)* (2008) 73 Cal.Comp.Cases 981, 987 [2008 Cal. Wrk. Comp. LEXIS 241].) Section 4062, on the other hand, applies to any medical determination made by the treating physician concerning medical issues "not covered by Section 4060 or 4061 and not subject to Section 4610." (Lab. Code § 4062(a).) Here, the dispute does not involve compensability of the claimed injury or permanent disability or the need for future medical care, but rather a dispute as to the parts of body injured. Accordingly, we agree with the Supplemental Reply that "a panel request seeking a QME to address the nature and extent of the injury in an accepted claim is properly requested under section 4062." (Supplemental Reply, at 2:12.)

Defendant avers the WCJ improperly relied on section 4061 to determine that defendant's failure to include a QME panel request form invalidated the subsequent panel request. (Supplemental Reply, at 2:26.) We note that defendant does not maintain that it complied with section 4061, and that it attached the mandated QME request form to its July 7, 2021 letter. Rather, defendant asserts there is no requirement as to the "form or content" of the objection, and therefore, irrespective of whether defendant attached the mandatory QME request form, its July 7, 2021 objection was a valid basis upon which to later assert a dispute under section 4062.

However, whether the dispute arises out of a determination of permanent disability, the need for future medical care, or a disputed body part, sections 4061 and 4062 *both* require the provision of a QME panel request form to an unrepresented applicant. Section 4061(c) provides that "[i]f either the employee or employer objects to a medical determination made by the treating physician concerning the existence or extent of permanent impairment and limitations or the need for future medical care, and if the employee is not represented by an attorney, the employer shall immediately provide the employee with a form prescribed by the medical director with which to request assignment of a panel of three qualified medical evaluators." (Lab. Code § 4061(c).) Section 4062(a) contains identical language, requiring that for all objections to medical determinations not covered by sections 4060 or 4061 involving unrepresented employees, "the employer shall immediately provide the employee with a form prescribed by the medical director with which to request assignment of a panel of three qualified medical evaluators." (Cal. Lab. Code § 4062(a).) The provision of the required form in both instances is mandatory.

In the analogous case of *J.C. Penney Co. v. Workers' Compensation Appeals Bd. (Edwards)* (2009) 74 Cal.Comp.Cases 826, 831-832 [2009 Cal. Wrk. Comp. LEXIS 201], the dispute involved the time in which a party may lodge an objection under section 4062. The Court of Appeal observed that "[t]he evident purpose of the time limits in section 4062 is to induce both employer and employee to declare promptly medical determination disputes and expeditiously resolve them through the prescribed mechanisms." (*Id*. at 831.) Accordingly, where a party fails to raise a timely dispute to a medical determination governed by section 4062, "they may not attack that determination thereafter." (*Id*. at 832.)

While *J.C. Penney* involved the time limitations in which a party may object under section 4062 rather than the failure to provide a QME request form, we find the Court of Appeal's reasoning to be analogous and applicable. Here, the mandatory language of section 4062 requires provision of a QME request form to the unrepresented applicant, to accompany defendant's objection to requested medical treatment arising out of a disputed body part. The evident purpose of the provision of a QME request form is to allow the unrepresented employee to promptly engage the dispute resolution protocols of section 4062 and 4062.1.[2] When defendant failed to provide the

[2] The workers' compensation system "was intended to afford a *simple and nontechnical path* to relief. (Italics added.)" (*Elkins v. Derby* (1974) 12 Cal.3d 410, 419 [39 Cal.Comp.Cases 624] citing 1 Hanna, Cal. Law of Employee Injuries and Workmen's Compensation (2d ed. 1973) § 4.01[1], pp. 4-2 to 4-3. Cf. Cal. Const., art. XX, § 21; § 3201.)

required QME panel request forms, it lost the right to invoke the accompanying objection as a basis for a subsequent panel QME request. (See also *Ramirez v. Jaguar Farm Labor Contracting* (2018) 84 Cal.Comp.Cases 56 [2018 Cal. Wrk. Comp. P. D. LEXIS 442] (WCAB panel decision).)

We therefore agree with the WCJ that defendant's July 7, 2021 objection was not a valid basis for its January 13, 2022 panel QME request. Consequently, we find that defendant has not established significant prejudice or irreparable harm in the WCJ's finding that panel no. 7464239 is not valid. We will deny reconsideration, accordingly.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 9, 2022

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

JOSE ALBARRAN
KELLY, DUARTE, URSTOEGER & RUBLE
BRADFORD & BARTHEL

SAR/abs

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