WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

SUZANNE CAILLIEZ, *Applicant*

vs.

SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendants*

Adjudication Number: ADJ7609168
Santa Barbara Satellite Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant Suzanne Cailliez seeks reconsideration of the May 12, 2022 Findings of Fact and Order, wherein the workers' compensation administrative law judge (WCJ) found, in relevant part, that applicant failed to present evidence to substantiate a preexisting labor disabling permanent disability and is therefore not entitled to benefits from the Subsequent Injuries Benefits Trust Fund (SIBTF).

Applicant contends that the WCJ erred in determining that the preexisting disability must be shown through evidence that predated the subsequent injury and cannot be shown through subsequent medical reporting.

We did not receive an answer from SIBTF. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we grant reconsideration, amend the Findings of Fact and Order to defer the issue of SIBTF benefits, and return this matter to the trial level for further proceedings consistent with this Opinion.

FACTS

As the WCJ stated,

> Applicant filed a continuous trauma claim for industrial injuries while employed as a waitress. The claim was resolved by way of Compromise & Release (C&R) on May 1, 2015.
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> Applicant filed for Subsequent Injury Benefits Trust Fund (SIBTF) benefits on September 1, 2015. Applicant was evaluated by numerous physicians following the C&R.
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> Following trial, the WCJ un-submitted the matter for decision and ordered development of the record, specifically, for the internal medicine and psychological doctors to comment on whether applicant had a pre-existing labor disabling permanent disability prior to the industrial injury. The WCAB affirmed that determination with an amendment as to the dates for those medical records.
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> The matter proceeded to trial on February 16, 2022, with no additional medical evidence being submitted.
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> An Opinion on Decision and Findings of Fact and Award issued on May 16, 2022 finding Applicant did not qualify for SIBTF benefits because she had failed to present evidence of a pre-existing labor disabling permanent disability.
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> Applicant filed the instant petition for reconsideration contending they did meet their burden of proof on that issue. (Report, p. 2.)

All of the medical evidence in the record are dated after the subsequent cumulative trauma injury ending on July 28, 2009. (Defendant Exhibit C, Alan Moelleken, M.D., Report dated March 1, 2013; Applicant Exhibit 4, Jeffrey A. Hirsch, M.D., Report dated February 19, 2018; Applicant Exhibit 2, Dr. Hirsch's report dated September 26, 2019; Applicant Exhibit 3, Jamie Rotnofsky, M.D., Report dated February 3, 2017; Applicant Exhibit 1, Dr. Rotnofsky's report dated December 27, 2019.)

However, these medical reports make reference to prior injuries. In his review of applicant's prior medical records, Dr. Moelleken notes an office visit dated January 19, 2009 that indicates that applicant may have suffered from hypertension. (Defendant Exhibit C, Dr. Moelleken's report dated March 1, 2013, p. 6.) He also notes a hospital discharge summary dated June 2, 2004 with the following diagnosis: severe dilated cardiomyopathy, ejection fraction of approximately 25-30%, atrial fibrillation, resolved acute congestive heart failure, hyperthyroidism,

anxiety and depression. (Defendant Exhibit C, Dr. Moelleken's report dated March 1, 2013, p. 7.) In her February 2, 2017 report, Dr. Rotnofsky notes a medical history of high blood pressure since the 2000s as well as heart problems since 2004. (Applicant Exhibit 3, Dr. Rotnofsky's report dated February 3, 2017, p. 8.) She also notes that applicant has a 35-year history of depression. (Applicant Exhibit 3, Dr. Rotnofsky's report dated February 3, 2017, p. 16.) Lastly, in his February 19, 2018 report, Dr. Hirsch also notes that applicant sought diagnosis and treatment for her heart condition at a community clinic in Carpinteria, California, prior to applicant developing her orthopedic problems. (Applicant Exhibit 4, Dr. Hirsch's report dated February 19, 2018, pp. 2-4.)

DISCUSSION

Labor Code[1], section 4751, provides:

> If an employee who is permanently partially disabled receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree of disability caused by the combination of both disabilities is greater than that which would have resulted from the subsequent injury alone, and the combined effect of the last injury and the previous disability or impairment is a permanent disability equal to 70 percent or more of total, he shall be paid in addition to the compensation due under this code for the permanent partial disability caused by the last injury compensation for the remainder of the combined permanent disability existing after the last injury as provided in this article; provided, that either (a) the previous disability or impairment affected a hand, an arm, a foot, a leg, or an eye, and the permanent disability resulting from the subsequent injury affects the opposite and corresponding member, and such latter permanent disability, when considered alone and without regard to, or adjustment for, the occupation or age of the employee, is equal to 5 percent or more of total, or (b) the permanent disability resulting from the subsequent injury, when considered alone and without regard to or adjustment for the occupation or the age of the employee, is equal to 35 percent or more of total. (§ 4751.)

The employee must prove the following elements:

> (1) The combined disability of the preexisting disability and the disability from the subsequent industrial injury must be 70 percent or more; [footnote omitted]

[1] All subsequent statutory references are to the Labor Code unless otherwise indicated.

(2) The combined disability of the two injuries must be greater than that of the disability from the subsequent injury alone; and

(3) One of the following conditions must be met:

(a) The previous disability or impairment must have affected a hand, leg, arm, foot, or eye; the disability from the subsequent injury must affect the opposite and corresponding member; and the disability from the subsequent industrial accident, when considered alone and without regard to or adjustment for the employee's age or occupation, must be equal to 5 percent or more of the total; or

(b) The permanent disability resulting from the subsequent industrial injury, when considered alone and without regard to or adjustment for the employee's age or occupation must be equal to 35 percent or more of the total. [Footnote omitted.] (1 CA Law of Employee Injuries & Workers' Comp § 8.09 [1].)

There are no requirements as to the origin of the preexisting disability; it may be congenital, developmental, pathological, or due to either an industrial or nonindustrial accident. (1 CA Law of Employee Injuries & Workers' Comp § 8.09 [1].) The purpose of the statute is to encourage the employment of the disabled as part of a "complete system of workmen's compensation contemplated by our Constitution." (*Patterson* (1952) 39 Cal.2d 83 [17 Cal.Comp.Cases 142]; *Ferguson v. Indus. Acc. Comm.* (1958) 50 Cal.2d 469, 475.)

The Supreme Court in *Ferguson* held that the "previous disability or impairment" contemplated by section 4751 "'must be actually 'labor disabling,' and that such disablement, rather than 'employer knowledge,' is the pertinent factor to be considered in determining whether the employee is entitled to subsequent injuries payments under the terms of section 4751." (*Ferguson, supra,* p. 477; *Escobedo v. Marshall*, 70 Cal.Comp.Cases 604, 619 (Appeals Board en banc).) The court further noted that "'the prior injury under most statutes should be one which, if industrial, would be independently capable of supporting an award. It need not, of course, be reflected in actual disability in the form of loss of earnings [as this court has already held in *Smith* v. *Industrial Acc. Com*. (1955) 44 Cal.2d 364, 367 [2, 3] [288 P.2d 64]], but if it is not, it should at least be of a kind which could ground an award of permanent partial disability. . . .'" (*Ferguson,* at p. 477, quoting Larson's Workmen's Compensation Law (1952) § 59.33 (vol. 2, p. 63).)

Further, the preexisting disability "need not have interfered with the employee's ability to work at his employment in the particular field in which he was working at the time of the subsequent injury. [citations]" (*Franklin v. Workers' Comp. Appeals Bd.* (1978) 79 Cal.App.3d 224, 238.) "The ability of the injured to carry on some type of gainful employment under work conditions congenial to the preexisting disability does not require a finding that the preexisting disability does not exist. [citations]" (*Ibid.*)

To prove a preexisting disability, there needs to be evidence prior to the subsequent injury of a medically demonstrable impairment.

> A preexisting disability cannot be established by a "retroactive prophylactic work restriction" on the preexisting condition placed on the injured after the subsequent industrial injury in absence of evidence to show that the worker was actually restricted in his work activity prior to the industrial injury. (*Hulbert* v. *Workmen's Comp. Appeals Bd., supra*, 47 Cal.App.3d 634, 640; *Gross* v. *Workmen's Comp. Appeals Bd., supra*, 44 Cal.App.3d 397, 404-405; *Amico* v. *Workmen's Comp. Appeals Bd., supra*, 43 Cal.App.3d 592, 606; see also *Bookout* v. *Workmen's Comp. Appeals Bd., supra*, 62 Cal.App.3d 214, 224-225.) Where the injured was actually under a prophylactic restriction for a preexisting condition at the time of the industrial injury, apportionment to a preexisting disability is proper. It is only the *retroactive* application of a prophylactic restriction to an otherwise nonexistent previous disability that is prohibited. (*Ibid*.)
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> The prohibition against "retroactive prophylactic work restrictions" to establish a preexisting disability is not inconsistent with the fact that prophylactic restrictions are ratable factors of permanent disability stemming from the industrial injury. (*Gross, supra*, 44 Cal.App.3d at p. 404.) Applying a prophylactic work restriction retroactively creates "a sort of factual or legal fiction of an otherwise nonexistent previous disability or physical impairment." (*Ibid*.) Apportionment involves a factual inquiry. (See *Mercier* v. *Workers' Comp. Appeals Bd., supra*, 16 Cal.3d 711, 716; see also, *State Comp. Ins. Fund* v. *Workers' Comp. Appeals Bd. (Gaba)* (1977) 72 Cal.App.3d 13, 16-17 [139 Cal.Rptr. 802].)
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> (*Franklin, supra,* 79 Cal.App.3d at p. 238.)

Here, although all of the medical evidence in the record is dated after the subsequent injury, there are references in these medical reports of prior injuries. For example, in summarizing prior medical records, Dr. Moelleken notes that applicant may have suffered from hypertension in January 2009 and from heart disease as far back as 2004. (Defendant Exhibit C, Dr. Moelleken's report dated March 1, 2013, pp. 6, 7.) Dr. Rotnosfky also notes a medical history of high blood

pressure since the 2000s and again notes heart problems since 2004, as well as a 35-year history of depression. (Applicant Exhibit 3, Dr. Rotnofsky's report dated February 3, 2017, pp. 8, 16.) Dr. Hirsch also notes that applicant sought diagnosis and treatment for her heart condition at a community clinic in Carpinteria, California, prior to applicant developing her orthopedic problems. (Applicant Exhibit 4, Dr. Hirsch's report dated February 19, 2018, pp. 2-4.)

In *Franklin, supra,* 79 Cal.App.3d at p. 241, the Court found that there was no preexisting disability to apportion from because the doctors' statements in that case that they would have placed applicant in work restrictions due to her heart condition had they seen her before the subsequent injury constitutes a retroactive prophylactic restriction. The difference here, however, is that there are prior medical records indicating prior disabilities. Dr. Moelleken reviewed these prior medical records. Dr. Rotnofsky and Dr. Hirsch alluded to the existence of these prior medical records; Dr. Rotnofsky when she requested them and Dr. Hirsch when he made a reference to treatment at a community clinic. Dr. Rotnofsky reserved the right to revise her conclusions if additional information became available and specifically stated that she did not review any medical records, relying on her interview with applicant for past events, who she acknowledged to be a poor historian. (Dr. Rotnofsky's report dated February 3, 2017, pp. 3, 10, 15, 16.) It does not appear, though, that she was provided with applicant's prior medical records. Applicant's counsel failed to develop the prior medical evidence and instead chose to solely rely on reports obtained after the subsequent injury.

Accordingly, we grant reconsideration, amend the Findings of Fact and Order to defer the issue of SIBTF benefits, and return this matter to the trial level for further development of the record. (*Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal. App.4th 389, 393-395 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; see §§ 5701 and 5906 and *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Bd. en banc).) In developing the record, however, care should be made in determining whether the preexisting disability is truly preexisting the subsequent injury or whether it is "merely a component part of the industrial injury itself." (*Franklin, supra,* 79 Cal.App.3d at p. 241.)

For the foregoing reasons,

IT IS ORDERED that applicant Suzanne Cailliez's Petition for Reconsideration of the May 12, 2022 Findings of Fact and Order is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the May 12, 2022 Findings of Fact and Order is **AFFIRMED**, **EXCEPT** that it is **AMENDED** as follows, and **RETURNED** to the trial level for further proceedings consistent with this Opinion.

Findings of Fact

. . .

7. The issue of whether applicant had a preexisting labor disabling permanent disability is deferred.

8. The issue of whether applicant met the requirements for benefits under Labor Code section 4751 is deferred.

9. The issue of whether applicant is entitled to SIBTF benefits is deferred.

Order

Any orders regarding SIBTF benefits are deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

CRAIG SNELLINGS, COMMISSIONER
PARTICIPATING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JULY 22, 2022

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

SUZANNE CAILLIEZ
GHITTERMAN, GHITTERMAN & FELD
OFFICE OF THE DIRECTOR LEGAL

LSM/*pc*

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