WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

KRISTINA GALLO, *Applicant*

vs.

SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendant*

Adjudication Number: ADJ10049929
San Jose District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case. We now issue our Opinion and Decision After Reconsideration.[1]

Applicant seeks reconsideration of the July 16, 2021 Findings and Order issued by the workers' compensation administrative law judge (WCJ) wherein the WCJ found that "applicant has not established through substantial medical evidence that she had permanent partial disability to her left lower extremity, specifically varicose vein, as of the date of her subsequent industrial injury to the opposite and corresponding member on [September 5, 2014]." The WCJ further found that applicant is not entitled to benefits from the Subsequent Injuries Benefits Trust Fund (SIBTF).

Applicant contends that the WCJ should have relied on the substantial medical evidence in the record to find entitlement to SIBTF benefits and asserts that there is newly discovered evidence.

Defendant filed an Answer. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of the Petition for Reconsideration and the contents of Report with respect thereto. Based on our review of the record and for the reasons stated in the

[1] Commissioner Lowe, who was on the panel which granted reconsideration to further study the factual and legal issues in this case, no longer serves on the Appeals Board. Another panelist has been assigned in her place.

WCJ's Report, which we adopt and incorporate, and for the reasons stated below, we will vacate our grant of reconsideration and affirm the July 16, 2021 Findings and Order.

We agree with the WCJ that the opinion of Christopher Chen, M.D., is not substantial medical evidence. To be considered substantial evidence, a medical opinion "must be predicated on reasonable medical probability." (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413, 416–17, 419 [33 Cal.Comp.Cases 660].) A physician's report must also be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions. (*Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 612 (Appeals Board en banc), 70 Cal.Comp.Cases 1506 (writ den.).)

Finally, as to the assertion of newly discovered evidence, we note that applicant has failed to comply with the requirements of WCAB Rule 10974, which provides:

> Where reconsideration is sought on the ground of newly discovered evidence that could not with reasonable diligence have been produced before submission of the case or on the ground that the decision had been procured by fraud, the petition must contain an offer of proof, specific and detailed, providing:
>
> (a) The names of witnesses to be produced;
> (b) A summary of the testimony to be elicited from the witnesses;
> (c) A description of any documentary evidence to be offered;
> (d) The effect that the evidence will have on the record and on the prior decision; and
> (e) As to newly discovered evidence, a full and accurate statement of the reasons why the testimony or exhibits could not reasonably have been discovered or produced before submission of the case.
>
> A petition for reconsideration sought upon these grounds may be denied if it fails to meet the requirements of this rule, or if it is based upon cumulative evidence.
> (Cal. Code Regs., tit. 8, § 10974.)

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that our Opinion and Order Granting Petition for Reconsideration is **VACATED**.

IT IS FURTHER ORDERED that the July 16, 2021 Findings and Order is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 26, 2024

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

KRISTINA GALLO
LAW OFFICES OF ROBERT T. BLEDSOE
OFFICE OF THE DIRECTOR-LEGAL UNIT (OAKLAND)

PAG/abs

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

1. Applicant's Occupation: Office Manager/Stock Clerk
   Applicant's Age: 45 at the time of subsequent industrial injury
   Date of SII Injury: 09/05/2014
   Parts of Body Injured: back, trunk, lower extremities

2. Identity of Petitioner: Applicant filed the petition.
   Timeliness: The petition was timely filed.
   Verification: The petition was properly verified.

3. Date of Issuance of Award: 7/15/2021

4. Petition Contends: Applicant contends the evidence does not justify the findings of fact, the evidence fails to justify the decision and the undersigned acted in excess of her power. Applicant also contends there has been newly discovered evidence.

Defendant has not filed a response at the time of writing this recommendation.

FACTS

Applicant sustained admitted subsequent industrial injury (SII) on 9/5/2014 while working Rooster T. Feathers Comedy Club to her back, trunk and lower extremities. Dr. Renee Ownbey acted as the panel QME for the subsequent industrial injury wherein he diagnosed the applicant with right ankle fracture, right hip trochanteric bursitis. Dr. Ownbey assigned 16% WPI to the ankle and 3% WPI for pain add on. SII which was resolved by Compromise and Release agreement on 11/20/2107 at $60,000.00.

Application for SIBTF benefits was filed on 08/03/2018 alleging injury to the back, right side, right lower extremity with pre-existing disability to internal organs, bilateral upper and lower extremities, spine and psyche.

Applicant alleged she has met the LC §4751 threshold via opposite and corresponding and her overall disability to be 100% PD. Defendant alleged that applicant did not meet the opposite and corresponding threshold and not entitled to SIBTF benefits.

Dr. Christopher Chen, Dr. Joshua Kirz and Dr. Massoud Mahmoudi served as applicant's SIBTF QMEs. SIBTF did not seek its own med-legal report. Matter proceeded to trial wherein applicant testified via AT&T teleconference. Parties were advised the undersigned would not be able to make any determination as to credibility of applicant's

testimony via AT&T teleconference versus LifeSize Cloud. Parties nonetheless stipulated to proceed with testimony via AT&T teleconference. Parties also submitted pre-trial briefs and matter was subsequently submitted for decision.

Upon review of the entire records admitted, the undersigned issue a Findings and Order on 7/15/2021 finding that Labor Code §4751 threshold of opposite and corresponding member was not met and that applicant was not entitled to Subsequent Injuries Benefits Trust Fund.

It is from this Findings and Order that applicant seeks relief.

III
DISCUSSION

Standard to qualify for SIBTF benefits: pre-existing labor disabling disability

LC§ 4751 provides as follows: "If an employee who is permanently partially disabled receives a subsequent compensable injury resulting in additional pe1111anent 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 pe1manent 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 pe1manent 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."

The legislative intent of the Labor Code§ 4751 and the purpose of SIBTF benefits is both to encourage disabled persons to seek employment and to encourage employers to hire them. Chief requirement for SIBTF benefits is that the condition must have been actually "labor disabling" prior to the occurrence of the subsequent industrial injury. *Ferguson v. Industrial Acc. Com. (1958) 50 Cal.2d. 469 (California Supreme Court)*. Applicant must establish that at the time of his industrial injury, he was suffering from a ratable pre-existing partial permanent disability, although it need not have caused actual earning loss; it must simply be a disability which partial permanent disability could be made if it were industrial. *Brown v. WCAB (1970) 20 Cal.App.3d 903*. A pre-existing permanent disability "is one which causes impairment of earning capacity, impairment of the normal use of a member, or a competitive handicap in the open labor market." *Franklin v. WCAB (1978) 79 Cal.App.3d 224.*

Further, a pre-existing disability cannot be established by a retroactive prophylactic work retraction on the pre-existing condition placed on the injured worker after the subsequent injury in absence of evidence to show that the work was actually restricted in her work activity prior to the industrial injury. Meaning, whether it can be demonstrated by competent evidence that the pre-existing condition did interfere or would have interfered with any type of work activity. *Franklin supra, also Ruiz v. Workers' Comp. Appeals Ed. (2013) 78Cal.Comp.Cases1182 (writ denied).*

In the present case, upon review of the entire records, the undersigned found that Dr. Chen's report was not substantial in that it failed to demonstrate by competent evidence that she had ratable pre-existing partial disability to her alleged varicose vein. Further, applicant's testimony at trial was inconsistent with medical records. What applicant reported to her QMEs were also inconsistent with medical history as reviewed by the doctors.

Applicant testified during trial she had varicose vein starting in her early 30s, that she had symptoms prior to her 9/5/2014 subsequent injuries and had to change her work activities as a result. She also testified that during marathon training in 2005, she fell on her left side, injuring her left hip, left knee, and lower back and may have been seen by Dr. Rodney Wong. Applicant testified that she started limping on the left side shortly after the 2005 injury and continued every day but episodic. The undersigned could not rely on applicant's testimony as unsupported and contradicting.

First, based on the review of records, applicant was not a great historian. For instance, applicant reported to Dr. Kirz that she "consequently" gained approximately 80 pounds since her injury. She also reported to Dr. Mahmoudi and Dr. Chen that she gained approximately 40 pounds due to her injury. She reported to Dr. Mahmoudi that she used to weigh 187 pounds prior to her injury but now weighed 227 pounds. Review of medical records that the last time applicant weighed near the reported 187 pounds was in 2003. On 8/3/2003, it was noted that she weighed approximately 188 pounds, after successful attempts of losing weight. Subsequent to 2003, applicant continued to gradually regain her weight. Shortly before her 9/5/2014 subsequent industrial injury, her weight was recorded as 228 pounds on 10/4/2013 and 244 pounds on 8/19/2014. Nothing in the records supported applicant's allegation that she gained approximately 80 pounds or even 40 pounds due to her subsequent industrial injury.

Next, applicant's testimony was not supported by any evidence whatsoever. Based on Dr. Kirz, he reviewed in excess of 1000 pages of records dating back to the 1990s. Yet, based on Dr. Chen, Dr. Kirz and Dr. Mahmood's reports, there were no documents nor history of any lower extremities complaints, treatment, nor any documented history of limping. There was a document of left arch rash with intermittent lower back pain on 1/23/2006. There was a follow up of plantar dermatitis on 3/17/2006 with another dermatology visit for the probably dyshidrotic eczema vs psoriasis on 4/14/2006. With the exception of these three visits, there were no other medical evidence that remotely mentions lower extremities nor varicose. While applicant testified that she had varicose veins starting in her early 30s and that she sought medical treatment with Stephanie Wong at El Camino Hospital, no such records were reviewed nor mentioned by any of the doctors.

The undersigned also found that Dr. Chen's opinion was not substantial to establish that as of the date of applicant's subsequent industrial injury, applicant was suffering ratable permanent disability in the opposite and corresponding member.

Applicant appears to rely on Dr. Chen's opinion which stated that in part that "medical records" showed applicant had back problems going back to 2001 and that applicant "likely" had left L4 radiculopathy since 2005, which affected the opposite and corresponding lower extremity under LC §4751. Undersigned however could not find any "records" that Dr. Chen stated to support this opinion. While there is no doubt that applicant had prior low back complaints as well as other symptoms, evidence failed to show prior or pre-existing labor disabling condition to the opposite and corresponding left lower extremity. Dr. Chen miserably failed to point to a single evidence supporting "chronic left L4 radiculopathy" despite having reviewed extensive medical records. He did not support his reason for his opinion that applicant "likely" had left L4 radiculopathy since 2005 when the records he reviewed only related to low back pain.

Applicant alleges that per Dr. Chen, varicose vein has latency period and genetic factors. Dr. Chen did not provided any opinion regarding latency of varicose vein. He did not specify the latency period nor any medical literature or evidence to support that applicant's varicose vein was present and developed over many years. As for the genetic factor, again, Dr. Chen failed to provide any evidence. While medical record did confirm family history of heart disease in maternal grandparents and hyperlipidemia in applicant's mother, where applicant's mild hypertriglyceridemia was most likely genetic, records were silent as to any family history of varicose vein. The undersigned can only logically conclude Dr. Chen's opinion is speculative or relying on facts not supported by any evidence.

Based on the medical records, applicant's varicose vein did not manifest to any level of disability until after applicant's subsequent industrial injury. While Dr. Ownbey did not review any of medical records prior to the subsequent industrial injury, he did conduct a thorough physical examination in 2015 and 2016. Based on his examination, lower extremities neurological tests were insignificant except for the right foot plantar flexion, dorsiflexion, inversion and eversion. Left ankle physical examination were rather normal. Again, varicose vein was mentioned for the first time on 2/2/2017 when applicant was seen after her leg hit a chair that morning. At that time, there was no evidence of left lower extremity deep vein thrombosis per NIVL dated 2/2/2017 and on 4/3/2017.

Applicant failed to provide any medical records or sufficient evidence establishing the nature and extent of applicant's condition prior to her subsequent industrial injury.

In *Lopez v WCAB* (2018) 83 Cal.Comp.Cases 543 (writ denied), Dr. Khuong, the SIBTF med-legal evaluator's opinioned that as osteoarthritis condition takes years to develop and that applicant's condition to the opposite and corresponding member reached permanent and stationary status with ratable permanent disability as of the subsequent industrial injury. However, it was determined that in the absence of any contemporaneous medical records establishing the nature and extent of applicant's condition prior to the subsequent industrial injury, Dr. Khuong's opinion was entirely speculative and could not support the legally required finding that as of the date of

applicant's subsequent injury applicant was suffering ratable permanent disability in an opposite and corresponding member.

Standard of proof as applied to the evidence

In order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability, and may not be based on facts no longer germane, inadequate medical histories, or on surmise, speculation, or conjecture. *Hegglin v. WCAB (/971) 4 Cal.3d 162.*

While applicant argues that since the un-contradicted evidence showed a medical opinion finding a disability affecting the lower extremity prior to the industrial injury, she met the threshold, again Dr. Chen's report is not substantial evidence as it was not supported by any medical evidence, especially when varicose veins was not detected until 2017. While applicant argues that substantial evidence only requires that the doctor have an accurate history and that the decision be framed in terms of medical probability, such evidence still needs to be supported by scientific evidence, not mere speculation. He also did not have accurate history regarding the 2005 injury while training for marathon. Dr. Chen failed to reference any medical records he reviewed nor reference any other medical explanation to find pre-existing labor disabling disability to the left lower extremity.

Further development of the records based on newly discovered evidence

The Board's authority and duty to develop the record, first requires a finding that the existing record is inadequate to determine the issues in dispute. No such finding was made in the instant case.

Applicant asks that should applicant's evidence be disregarded, then she be allowed to obtain supplemental report with additional evidence that was not available when setting the matter for trial. She wishes to introduce evidence of family history of varicose vein in response to what applicant alleges new issues raised by the undersigned.

The undersigned denies raising any new issues warranting reopening of the record. It was applicant's own expert who opined that varicose vein develops over the years and was caused by family history but failed to provide substantial evidence to support the expert's opinion. It is highly unlikely that these records were not available at the time of MSC. Applicant was aware that SIBTF was objecting to Dr. Chen's report as not substantial evidence when proceeding with trial. The undersigned does not see any need to develop the record.

IV
RECOMMENDATION

It is respectfully recommended that the applicant's Petition for Reconsideration be denied for the reasons stated above.

DATE: 8/23/2021

Pauline H. Suh
WORKERS' COMPENSATION JUDGE