

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

JOHANNA MOULTRIE, *Applicant*

vs.

**OAKLAND UNIFIED SCHOOL DISTRICT, permissibly self-insured, administered by
HAZELRIGG CLAIMS MANAGEMENT SERVICES, *Defendants***

**Adjudication Number: ADJ10010348
Oakland District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted applicant's Amended Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings, Award and Order (F&A), issued by the workers' compensation administrative law judge (WCJ) on August 31, 2020, wherein the WCJ found in pertinent part that applicant sustained an injury arising out of and occurring in the course of employment (AOE/COE) to her right shoulder and lumbar spine, that the injury caused 4% permanent disability, that applicant is not in need of further medical treatment for her lumbar spine, and that applicant did not sustain injury AOE/COE to her cervical spine.

Applicant contends that the reports and deposition testimony of the physical medicine and rehabilitation qualified medical examiner (QME) Timothy C. Shen, M.D., are not substantial evidence as to the issues of injury AOE/COE and permanent disability, so the record should be further developed, and that Dr. Shen should no longer act in the capacity of the QME in this matter.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the Presiding WCJ recommending the Petition be denied.¹ We received an Answer from defendant.

We have considered the allegations in the Petition and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will affirm the F&A except that we will amend the F&A to defer the following issues: injury AOE/COE to applicant's cervical

¹ The WCJ that tried this matter and issued the F&A has retired and as such did not submit the Report and Recommendation on Petition for Reconsideration.

spine (Finding of Fact 3); permanent disability (Finding of Fact 5); future medical treatment for applicant's cervical and/or lumbar spine (Finding of Fact 8); overpayment of permanent disability indemnity (Finding of Fact 9); and attorney fees (Finding of Fact 10). Based thereon, we will amend the Award and Order and return the matter to the trial level for further proceedings consistent with this opinion.

BACKGROUND

Applicant claimed injury to her cervical spine, right shoulder, and lumbar spine, while employed by defendant as a clerk typist on November 7, 2014.

QME Dr. Shen evaluated applicant on September 2, 2016. Dr. Shen examined applicant, took a history, and reviewed treating physician reports regarding treatment applicant received during the period from November 13, 2014, through November 7, 2015. (App. Exh. 7, Dr. Shen, September 20, 2016, pp. 4 – 5 [EAMS pp. 17 – 18].) He concluded that:

Taking into account the history according to the patient, the physical exam, and the review of the medical records made available, I believe that Johanna Moultrie's symptoms are consistent with 1. a right rotator cuff tendinopathy [sic] without tear, 2. Right shoulder pain (aggravation of pre-existing shoulder pain, 3. acute on chronic cervical strain/sprain (exacerbation of pre-existing neck pain), and 4 acute on chronic lumbar strain/sprain. (exacerbation of pre-existing low back pain). Although the shoulder MRI reveals mild finding, the increased shoulder pain subsequent to this injury represents an aggravation of the previous shoulder injury in contrast to an exacerbation. It is my medical opinion that the reports of neck and low back pain subsequent to this injury represent an exacerbation of the pre-existing neck and low back pain. On exam there are findings suggestive of non-organic factors influencing her neck and low back pain.

(App. Exh. 7, pp. 5 – 6 [EAMS pp. 18 – 19].)

Dr. Shen re-examined applicant on May 31, 2019. He reviewed additional treatment records for the period from September 9, 2016, through February 18, 2019. Dr. Shen repeated his earlier opinion that:

Taking into account the history according to the patient, the physical exam, and the review of the medical records available, I believe that Johanna Moultrie's symptoms are consistent with a 1. a right rotator cuff tendinopathy [sic] without tear, 2. right shoulder pain (aggravation of pre- existing shoulder pain), 3. acute on chronic cervical strain/sprain (exacerbation of pre-existing neck pain), and 4. acute on chronic lumbar strain/sprain (exacerbation of pre-existing low back

pain). My opinions regarding this determination has not changed from the previous report.

(App. Exh. 7, Dr. Shen, May 31, 2019, p. 4 [EAMS p. 10].)

Dr. Shen subsequently noted that his review of a May 2019 treatment report from Tariq Mirza, M.D. did not change his opinions. (App. Exh. 7, Dr. Shen, August 30, 2019, p. 2 [EAMS p. 6].) In response to correspondence received from applicant's counsel, Dr. Shen reviewed an August 21, 2006 report from AME Vatche Cabayan M.D. regarding a cumulative injury during the period ending in October 2003, and a specific injury of January 3, 2005 [App. Exh. 8], a February 10, 2003 treatment note from B. Ravi Nayak, M.D., regarding the November 27, 2000 right shoulder injury/surgery [App. Exh. 6], and treatment notes for the period from September 14, 2019, through January 28, 2020. Dr. Shen submitted a supplemental report wherein he reiterated his previously stated opinions. (App. Exh. 7, Dr. Shen, April 10, 2020, p. 2 [EAMS p. 2].)

On May 22, 2020, Dr. Shen's deposition was taken. (App. Exh.9/Def. Exh E, Dr. Shen, May 22, 2020, deposition transcript.) The deposition testimony included the following:

Q. ... [T]he primary question was whether the 2014 injury represented more than an exacerbation. And if the treatment records that you're reviewing stem from the injury from 2014 and not 2005, how can we maintain that the 2014 injury was only an exacerbation? It doesn't seem to fit.

A. Right. I guess ... most in that incidence... is based heavily on what the patient was telling me. ... I guess I would admit I did not see records that made me support that. (App. Exh.9/Def. Exh E, pp. 18 – 19.)

A. I understand there may be a mistake. I can't really say that the records support -- I would equally say if the records don't support an exacerbation, they also may not support an aggravation. Because I don't know what the previous baseline was. (App. Exh.9/Def. Exh E, p. 21.)

A. I think my position is her back pain has probably been the same for the last 15 years.

Q. Okay. And I asked you where did you get that from. Because you didn't review records to support that. She didn't tell you that, did she?

A. She told me her back pain has been the same. Yes.

Q. For 15 years?

A. No. I'm saying from the date of injury.

Q. What date of injury?

A. She said she had a claim back in 2005 or 2006. (App. Exh.9/Def. Exh E, pp. 34 – 35.)

A. To be honest, I'm totally confused. So I have no idea what I think. Um, yeah. I mean, I guess I may have just basically based it on what she had told me. I

guess if I'm supposed to not accept what she told me, then I have no idea. Yeah. I guess there is no evidence to support anything. And even when she comes to see me, she never tells me she wants to get any kind of procedural work done. (App. Exh.9/Def. Exh E, p. 38.)

Q. Okay, And so in terms of your opinion that you said expressed in your reports that her 2014 injury in the lumbar spine had returned to baseline, that was primarily based on her reporting to you and your understanding of how she reported her prior history; correct?

A. That is correct.

Q. But in terms of medical records, I think you have said that you have not seen medical records other than the Dr. Cabayan report from, I think, 2006. You have not seen medical records between 2006 and 2014; is that correct?

A. That is correct. (App. Exh.9/Def. Exh E, p. 53.)

Q. ... [D]o you think that a reevaluation of the patient would be necessary so you can have a complete, accurate history that matches up with the medical records to provide or make your opinion for substantial evidence? ...

THE WITNESS: I think -- I don't think so. I don't think it would help that much. I would have to admit that I think my evaluation would be colored by a lot of this experience.

MR. WOOD: Q. Well, do you think that you shouldn't be the QME in this case anymore because of that? ...

A. I guess I would have to say, if I was being fully honest, I would love to not be badgered anymore. Then I would therefore, yeah, I would love to be off this case. (App. Exh.9/Def. Exh E, pp. 61 – 62.)

The parties proceeded to trial on July 10, 2020. The parties stipulated that applicant sustained injury AOE/COE to her right shoulder and claimed injury to her cervical and lumbar spine. (Minutes of Hearing and Summary of Evidence (MOH/SOE), July 10, 2020, p. 2.) The issues submitted for decision included parts of body injured, permanent disability/apportionment, and need for further medical treatment. (MOH/SOE, p. 2.)

DISCUSSION

Any award, order, or decision of the Appeals Board must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].) To be substantial evidence a medical opinion must be based on pertinent facts, on an adequate examination and accurate history, it cannot be based on surmise, speculation,

or guess, and it must set forth the basis and the reasoning in support of the conclusions. (*Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372 [35 Cal.Comp.Cases 525]; *Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93]; *Granado v. Workers' Comp. Appeals Bd.* (1970) 69 Cal.2d 399 [33 Cal.Comp.Cases 647]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

Here, Dr. Shen repeatedly stated that applicant's cervical and lumbar spine conditions were an exacerbation of "the pre-existing neck and low back pain." (See App. Exh. 7, pp. 5 – 6 [EAMS pp. 18 – 19]; p. 4 [EAMS p. 10]; p. 2 [EAMS p. 2].) However, our review of his reports indicate that of the entire medical record he reviewed, only two reports pertained to treatment applicant received prior to the November 7, 2014 injury, at issue herein. Also, Dr. Shen testified that he had not reviewed any medical records that supported his conclusions as to whether the cervical and lumbar spine conditions were an exacerbation or an aggravation of the pre-existing conditions.² (App. Exh.9/Def. Exh E, pp. 18 – 19, p. 21, and p. 53.) Further, Dr. Shen testified that:

I understand there may be a mistake. I can't really say that the records support -
- I would equally say if the records don't support an exacerbation, they also may
not support an aggravation. Because I don't know what the previous baseline
was.

(App. Exh.9/Def. Exh E, p. 21.)

To be honest, I'm totally confused. So I have no idea what I think. Um, yeah. I
mean, I guess I may have just basically based it on what she had told me.

(App. Exh.9/Def. Exh E, p. 38.)

It is clear that Dr. Shen's opinions are not based on an adequate or accurate history and it appears that they are in fact based on surmise, speculation, or guess. Thus, his reports and deposition testimony do not constitute substantial evidence on the issue of injury AOE/COE and cannot be the basis for the F&A. We also note that having reviewed all of the medical reports in the trial record, none of the doctors (except Dr. Shen) addressed the issue of whether applicant's cervical and lumbar spine conditions were an aggravation of the prior injuries, i.e. constitute a new injury, or if they were simply an exacerbation of the prior injuries. Therefore, the trial record does not contain evidence upon which a finding regarding the issue of injury AOE/COE may be based.

² Aggravation is an increase in the severity of a pre-existing condition where the underlying pathology is permanently moved to a higher level. ... Exacerbation is a temporary increase in the symptoms of a pre-existing condition that returns to its prior level within a reasonable period of time. (*Tanenbaum v. Industrial Acc. Com.* (1935) 4 Cal.2d 615, 617 [1935 Cal. LEXIS 590]; *City of Los Angeles v. Workers' Comp. Appeals Bd. (Clark)* (2017 W/D) 82 Cal.Comp.Cases 1404.)

The Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence pertaining to a threshold issue. (Lab. Code §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) Injury AOE/COE is a threshold issue and based thereon, the record must be further developed. Normally, when the medical record requires further development, the record should first be supplemented by physicians who have already reported in the case. (See *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) However, as noted above, Dr. Shen testified that his re-evaluation of applicant "would be colored by a lot of this experience" and he "would love to be off this case." (App. Exh.9/Def. Exh E, p. 61 and p. 62.) Under the circumstances of this matter, the parties shall either have applicant evaluated by an agreed medical examiner or in the alternative, the WCJ may appoint a regular physician. (Lab. Code § 5701.)

Accordingly, we amend the F&A to defer the issues of: injury AOE/COE to applicant's cervical spine (Finding of Fact 3); permanent disability (Finding of Fact 5); future medical treatment for applicant's cervical and/or lumbar spine (Finding of Fact 8); overpayment of permanent disability indemnity (Finding of Fact 9); and attorney fees (Finding of Fact 10). Based thereon, we amend the Award and Order and return the matter to the trial level for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that August 31, 2020 Findings, Award and Order is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

3. The issue of injury arising out of and occurring in the course of employment to applicant's cervical spine is deferred.

* * *

5. The issue of the permanent disability caused by the November 7, 2014 injury is deferred.

* * *

8. The issue of applicant's entitlement to future medical treatment for her cervical spine and/or lumbar spine is deferred.

9. The issue of whether there was an overpayment of permanent disability indemnity is deferred.

10. The issue of attorney fees for applicant's attorney is deferred.

AWARD

AWARD IS MADE in favor of Johanna Moultrie and against Oakland Unified School District as follows:

(a) The award of permanent disability indemnity is deferred pending development of the record.

(b) Applicant is awarded further medical treatment for her right shoulder; the award of medical treatment for applicant's cervical spine and/or lumbar spine is deferred pending development of the record.

ORDER

It is **HEREBY ORDERED** that defendant's liability for applicant's attorney's fees is deferred pending development of the record.

IT IS FURTHER ORDERED that the matter is **RETURNED** to the Presiding WCJ for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 6, 2022

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

**JOHANNA MOULTRIE
LAW OFFICES OF ROBERT E. WOODS
HANNA BROPHY MACLEAN MCALEER & JENSON**

TLH/pc

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