WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CELIA CERVANTES, *Applicant*

vs.

**PACIFIC AMERICAN FISH COMPANY;
MAJESTIC INSURANCE COMPANY; TECHNOLOGY INSURANCE COMPANY,
administered by AMTRUST NORTH AMERICA, *Defendants***

Adjudication Number: ADJ8204680
Marina Del Rey District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on January 28, 2021. By the F&O, the WCJ found in relevant part that applicant sustained an injury arising out of and in the course of employment (AOE/COE) to several body parts. The WCJ further found that the reports of the prior qualified medical evaluators (QMEs) in rheumatology may not be sent to the current rheumatological QME and that the prior QMEs' reports are not admissible as evidence.

Applicant contends that the WCJ erred in precluding review of the prior QME reports by the current QME and in finding those reports to be inadmissible.

We did not receive an answer from defendant. The WCJ issued a Report and Recommendation of Workers' Compensation Judge on Petition for Reconsideration (Report) that explains the rationale for the F&O, but does not provide a specific recommendation on how the Appeals Board should address applicant's Petition.

We have considered the allegations of applicant's Petition for Reconsideration and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will grant reconsideration, rescind the F&O and return this matter to the trial level for further proceedings consistent with this opinion.

FACTUAL BACKGROUND

On June 18, 2015, the WCJ approved Stipulations with Request for Award between the parties, wherein it was stipulated that applicant sustained injury AOE/COE to the lumbar spine, cervical spine and right upper extremity through December 8, 2011 while employed as a senior assistant to the president by the Pacific American Fish Company.

Applicant filed a Petition to Reopen her claim for new and further disability in August 2016. Additional body parts pled included psyche, fibromyalgia, head and jaw.

Applicant obtained a QME panel in rheumatology on July 29, 2017 (panel number 7128097) and Dr. Daniel Silver was the resulting QME after the striking process. (Minutes of Hearing, December 23, 2020, p. 2.) Applicant objected to Dr. Silver's report on January 10, 2018 as late. (*Id.*) Dr. Silver issued his report dated October 19, 2017, but was replaced as the QME. (*Id.*) The parties have stipulated that this replacement was legitimate. (*Id.*)

Another panel in rheumatology issued on February 20, 2018 (panel number 2221520). (Minutes of Hearing, December 23, 2020, p. 2.) Defendant requested a replacement from this panel based on the selected QME's inability to set a timely appointment. (*Id.*) The parties also stipulated that this replacement was legitimate. (*Id.*)

A third panel in rheumatology issued on April 20, 2018 (panel number 2246938), from which Dr. Allen Salick was selected as the QME. (Minutes of Hearing, December 23, 2020, p. 2.) Dr. Salick issued a report dated June 18, 2018.

The matter proceeded to an expedited hearing on August 26, 2019. On that day, the WCJ issued a Finding and Order Re: Replacement QME Panel replacing Dr. Salick pursuant to "31.5(a)(8) – per parties agreement."

On September 13, 2019, a fourth panel in rheumatology issued (panel number 2459463) and Dr. Robert Freed was selected from this panel following the striking process. (Minutes of Hearing, December 23, 2020, p. 3.) In his April 23, 2020 report, Dr. Freed noted that "in the review of records there were no records from the two Rheumatologists, Doctors Salick and Silver." (Applicant's Exhibit No. 1, Medical report of Dr. Robert Freed, April 23, 2020, p. 1.) His report further stated in relevant part: "I would have to see the reports from the two Rheumatologists to see what the patient's complaint was at the time and her physical findings to see if she met the criteria for fibromyalgia at that time." (*Id.* at p. 6.)

Applicant proposed sending the reports of Drs. Silver and Salick to Dr. Freed, but defendant objected to submission of these reports to the current QME. (Minutes of Hearing, December 23, 2020, p. 3.) The matter proceeded to trial on the following issues:

> 1. Where the prior rheumatological PQMEs have been replaced, may their reports be sent to the current rheumatological PQME, where he has requested to review these reports?
>
> 2. Whether or not the reporting of the replaced rheumatological PQMEs, Dr. Allen Salick and Dr. Daniel Silver, in Applicant's Exhibits 3 and 4 for identification, are admissible.
>
> (*Id.*)

In the resulting F&O, the WCJ found that the reports of Drs. Salick and Silver may not be sent to Dr. Freed. He further found that the reports from these doctors are not admissible as evidence.

DISCUSSION

I.

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.)[1] 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

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

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 injury AOE/COE to multiple parts. Injury AOE/COE 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.

Although the decision contains a finding that is final, applicant is only challenging the WCJ's finding that the reports of the prior rheumatological QMEs may not be sent to Dr. Freed and that these reports are not admissible. These are interlocutory decisions regarding evidence and discovery. Therefore, we will apply the removal standard to our review. (See *Gaona, supra*.)

It is acknowledged that a grant of removal is an extraordinary remedy and that the petitioner must show significant prejudice or irreparable harm will result if removal is not granted. (*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]; Cal. Code Regs., tit. 8, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020).) 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, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020).)

Preliminarily, we address whether the reports from Drs. Silver and Salick offered by applicant as evidence at trial are admissible.

Statutory and case law favor the admissibility of medical reports provided they were obtained in accordance with the Labor Code. (See Lab. Code, §§ 4064(d), 5703(a), 5708; e.g., *Valdez v. Workers' Comp. Appeals Bd.* (2013) 57 Cal.4th 1231 [78 Cal.Comp.Cases 1209].) Medical reports may be deemed inadmissible due to misconduct such as a party's ex parte communication with the medical-legal evaluator prior to issuance of the report (see e.g., *State Farm Ins. Co. v. Workers' Comp. Appeals Bd*. (*Pearson*) (2011) 192 Cal.App.4th 51 [76 Cal.Comp.Cases 69] [the Court of Appeal found that the reports of an independent medical examiner should have been stricken because the applicant engaged in ex parte communication with the examiner prior to the evaluation]), or where a report is obtained from a private expert *solely* to

rebut the opinion of the panel QME (see e.g., *Batten v. Workers' Comp. Appeals Bd.* (2015) 241 Cal.App.4th 1009 [80 Cal.Comp.Cases 1256]).

The reports from Drs. Silver and Salick were obtained when they were acting in their capacity as panel QMEs in rheumatology, i.e., as part of a medical-legal evaluation conducted pursuant to section 4062.2. (Lab. Code, § 4062.2.) Both QMEs were replaced for different reasons and the parties have stipulated that the replacements were legitimate. However, there is no evidence in the record that there was ex parte communication with either QME such that their reports must be stricken from the record.[2] There is nothing else in the record that would render these reports inadmissible. Based on the current record, we can discern no basis to exclude the reports of the previous QMEs from evidence.

Therefore, it was improper for the WCJ to find that the reports of Drs. Silver and Salick are not admissible as evidence.

III.

Section 4062.3 provides in relevant part, as follows:

> (a) Any party may provide to the qualified medical evaluator selected from a panel any of the following information:
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> > (1) Records prepared or maintained by the employee's treating physician or physicians.
> > (2) Medical and nonmedical records relevant to determination of the medical issue.
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> (b) Information that a party proposes to provide to the qualified medical evaluator selected from a panel shall be served on the opposing party 20 days before the information is provided to the evaluator. If the opposing party objects to consideration of nonmedical records within 10 days thereafter, the records shall not be provided to the evaluator. Either party may use discovery to establish the accuracy or authenticity of nonmedical records prior to the evaluation.
>
> (Lab. Code, § 4062.3(a)-(b)

The trier of fact has the authority to determine what information may be provided to the

[2] It is noted that even where there has been an ex parte communication with a medical-legal evaluator, in general only those reports tainted by the improper communication must be stricken from the record.

QME if the parties cannot informally agree on what information to provide to the QME. (*Suon v. California Dairies* (2018) 83 Cal.Comp.Cases 1803, 1814 (Appeals Board en banc).) However, 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].) To constitute substantial evidence ". . . a medical opinion must 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." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].)

In this matter, Dr. Freed has expressly requested to view the reports from the prior rheumatological QMEs. These reports are admissible pursuant to the discussion above. These reports must be provided to Dr. Freed to ensure that his resulting opinions are based on review of an adequate record.

Furthermore, section 4062.3(a)(2) permits any party to provide medical records relevant to determination of the medical issue to a QME. The WCJ in his Report concludes that the reports from Drs. Silver and Salick are not medical records, and are not relevant. These records are comprehensive medical-legal evaluation reports from previous panel QMEs. It is unclear how these reports would not constitute medical records under section 4062.3(a)(2). The replacement of these doctors as the QME did not render their reports non-medical records.

Additionally, the language of section 4062.3(a) is fairly expansive in what medical records may be provided to the QME. In determining whether the disputed medical records may be considered "relevant," it is noted that the Evidence Code defines relevant evidence as "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the

determination of the action." (Evid. Code, § 210.)[3] This definition has been characterized as "manifestly broad." (*In re Romeo C.* (1995) 33 Cal.App.4th 1838, 1843.) The prior QMEs evaluated applicant's claimed fibromyalgia and the current QME has specifically requested to review their reports to assist in his evaluation of this condition. Causation for this condition remains in dispute since defendant has not accepted it as compensable. The prior QMEs' reports consequently are relevant to determination of the medical issues and may be provided to the current QME for his review.

Therefore, we will grant reconsideration, rescind the F&O and return this matter to the trial level for further proceedings consistent with this opinion.

[3] It is acknowledged that the Appeals Board "shall not be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this division." (Lab. Code, § 5708.) However, the rules of evidence may provide guidance in addressing evidentiary disputes.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings and Order issued by the WCJ on January 28, 2021 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order issued by the WCJ on January 28, 2021 is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 12, 2021

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

BRADFORD & BARTHEL
CELIA CERVANTES
MITCHELL LAW

AI/*pc*

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