

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

ESMERALDA CHAVEZ, *Applicant*

vs.

**OCEAN VIEW SCHOOL DISTRICT, permissibly self-insured, administered by
SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants***

**Adjudication Number: ADJ11886650
Marina del Rey District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

Applicant seeks reconsideration of the Findings of Fact & Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on August 4, 2021, wherein the WCJ found in pertinent part that applicant did not sustain her burden of proving injury arising out of and occurring in the course of employment (AOE/COE), and the WCJ ordered that applicant take nothing by her injury claim.

Applicant contends that the finding that she did not sustain an injury AOE/COE is based on the finding that the reports from Joseph Bahan, D.C., and Isaac Merino D.C., are not substantial evidence, and that based thereon the trial record must be further developed.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be denied. We did not receive 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 grant reconsideration, rescind the F&O, and return the matter to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

BACKGROUND

Applicant claimed injury to her bilateral shoulders, bilateral wrists, bilateral legs, and bilateral feet, and in the form of headaches, high blood pressure, and diabetes, while employed by defendant as a noon aide during the period from September 1, 2003, through September 6, 2018.

Primary treating physician (PTP) Joseph Bahan, D.C., initially evaluated applicant on February 13, 2019. (App. Exh. 1, Dr. Bahan, February 13, 2019.) Based on his examination of applicant, Dr. Bahan concluded:

The patient has a work-related cumulative trauma of 09/01/2003 to 09/06/2018, due to repetitive work activities. As a consequence, the patient injured various body parts to include the shoulders and legs. The patient also developed headaches, poorly controlled high blood pressure and diabetes, as well as psychological issues with anxiety, depression, and insomnia secondary to the injury.

(App. Exh. 1, p. 3.)

Applicant was evaluated by chiropractic qualified medical examiner (QME) Isaac Angel Merino D.C., on July 23, 2019. (Joint Exh. W, Dr. Merino, July 23, 2019.) Dr. Merino examined applicant, took a history, and reviewed the medical record. The diagnoses included bilateral shoulder sprain, bilateral wrist sprain, bilateral knee sprain, and lumbar sprain/spondylolisthesis. (Joint Exh. W, p. 27.) Regarding the cause of applicant's condition, Dr. Merino stated:

In my opinion and within reasonable medical probability, the symptoms that Ms. Esmeralda Chavez reports with her bilateral shoulders, bilateral wrist and bilateral knee was due to the CT: 09/01/03 to 09/06/18 date of injury. The Lumbar spine injury was due to the specific injury on 06/02/17 addressed by a PQME, Dr. Payam Farjoodi, M.D. included in my review of records: ¶ My Physical examination of Ms. Esmeralda Chavez reveals the presence of a bona fide condition with the bilateral shoulder, bilateral wrist, and bilateral knee pain. My diagnoses include 1) lumbar discopathy-industrial and 2) Lumbar Radiculopathy-industrial and 3) Bilateral shoulder sprain-industrial, and 4) Bilateral Wrist Sprain-industrial. 5) Bilateral Knee Sprain-industrial Thus, Ms. Chavez's subjective report of symptoms are supported by positive objective examination findings including MRI studies and positive orthopedic testing. (Joint Exh. W, pp. 27 - 28.)

On January 9, 2020, Dr. Merino's deposition was taken and at the request of counsel he agreed to re-examine applicant. (Joint Exh. Y, Dr. Merino, January 9, 2020, deposition transcript, pp. 22 – 24.)

After re-examining applicant and reviewing additional medical records, Dr. Merino concluded that applicant's condition had reached maximum medical improvement/permanent and stationary status and his opinion as to the cause of applicant's condition had not changed. (Joint Exh. X, Dr. Merino, June 23, 2020, p. 15.)

On December 3, 2020, Dr. Merino's deposition was taken again. (Joint Exh Z, Dr. Merino, December 3, 2020, deposition transcript.) The testimony included the following:

[MR. MCCORMICK] Q. [Y]ou testified that if these work activities caused her to have pain, it would be reasonable to assume that she had pain in those parts of her body while she was working.

A. That's correct.

Q. Okay. And the evidence that you've seen so far indicates that there is no evidence of pain in those body parts until after she stopped working.

A. Yes. No reports, yes.

Q. Would that not then lead to the assumption that any pain and impairment she has now in those body parts, other than her low back and right leg, would be nonindustrial and not related to a continuing trauma claim?

A. That's true. ...

MR. GARCIA: Doctor, could it be possible that the applicant was asymptomatic? ...

THE WITNESS: Yes, there is a possibility she was asymptomatic. (Joint Exh Z, pp. 45 – 46.)

The parties proceeded to trial on June 8, 2021, and the matter was continued. (Minutes of Hearing and Summary of Evidence (MOH/SOE), June 8, 2021.) Applicant testified at the July 27, 2021 trial and the matter was submitted. (MOH/SOE July 27, 2021.) The issue submitted for decision was injury AOE/COE. (MOH/SOE, June 8, 2021.)

DISCUSSION

In the Opinion on Decision and the Report the WCJ explained in detail why she found applicant not to be credible. A WCJ's opinions regarding witness credibility are entitled to great weight, (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 319 [35 Cal.Comp.Cases 500, 505]), and we do not question the WCJ's opinion as to applicant's credibility. However, when deciding a medical issue, such as whether an applicant sustained a cumulative injury, the WCJ must utilize expert medical opinion. (See *Insurance Company of North America v. Workers' Comp. Appeals Bd. (Kemp)* (1981) 122 Cal.App.3d 905 [46 Cal.Comp.Cases 913].) With respect to matters requiring medical knowledge, the WCJ cannot disregard a medical expert's conclusion

when the conclusion is based on expertise in evaluating the significance of medical facts. (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006)145 Cal.App.4th 922 [71 Cal.Comp.Cases 1687].)

Here, the only medical evidence in the trial record are the reports from PTP Dr. Bahan and the reports and deposition testimony of QME Dr. Merino. Both doctors concluded that applicant sustained a cumulative injury AOE/COE. However, as noted above, at his December 3, 2020 deposition, Dr. Merino stated that because applicant had not complained of pain in the claimed body parts before she stopped working for defendant, her condition was due to non-industrial factors. He then testified, "...there is a possibility she was asymptomatic." (Joint Exh Z, pp. 45 – 46.) Also, we note that although Dr. Bahan stated, "The patient has a work-related cumulative trauma..." (App. Exh. 1, p. 3), it appears that he did not review applicant's medical record, nor did he explain the basis for his opinion that applicant sustained a cumulative injury. A medical opinion is not substantial evidence if it is based on an inadequate medical history or if it fails to sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. (*Heggin 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, 407 [33 Cal.Comp.Cases 647].) Thus, the opinions of Dr. Merino and Dr. Bahan are not substantial evidence as to the issue of injury AOE/COE.

As discussed above, a decision regarding whether an applicant sustained a cumulative injury must be based on an expert medical opinion that constitutes substantial evidence. Based on our review of the trial record, it is clear that there is no substantial evidence addressing the issue of whether applicant sustained a cumulative injury AOE/COE.

The Appeals Board has a constitutional mandate to "ensure substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) The Appeals Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id.* at p. 404.) The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on a threshold issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) The Appeals Board may direct the augmentation of the medical record where there are material deficiencies in specific medical records or reports. (*Id.* at 1121-1122.) Under the circumstances of this matter, it is necessary that the record be further developed as to the issue of applicant's cumulative injury

claim. 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).) Upon return of this matter it is appropriate for the parties to request a supplemental report from Dr. Merino clarifying his opinion regarding the cause of applicant's orthopedic conditions at issue herein. Alternatively, the parties may choose to have applicant evaluated by an agreed medical examiner or request that the WCJ appoint a regular physician. (Lab. Code, § 5701.)

Accordingly, we grant reconsideration, rescind the F&O, and return the matter to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings of Fact & Order issued by the WCJ on August 4, 2021, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the August 4, 2021 Findings of Fact & Order is **RESCINDED** and the matter is **RETURNED** to the WCJ to conduct further proceedings consistent with this opinion, and to issue a new decision from which any aggrieved person may timely seek reconsideration.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 20, 2021

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

**ESMERALDA CHAVEZ
BARKHORDARIAN LAW FIRM
WALL, MCCORMICK, BAROLDI & DUGAN**

TLH/pc

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