WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ROSNY AGUILAR, *Applicant*

vs.

WM OF ALAMEDA COUNTY, INC.;
ACE AMERICAN INSURANCE COMPANY, administered by GALLAGHER BASSETT SERVICES, INC., *Defendants*

Adjudication Number: ADJ11448738
Fresno District Office

OPINION AND ORDER
DENYING PETITION
FOR RECONSIDERATION

We have considered the allegations of defendant's Petition for Reconsideration and the contents of the Report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record and for the reasons discussed below, we will deny the Petition.

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 arising out of and in the course of employment, 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.) 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 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 a threshold issue. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

Generally, a petition for reconsideration must be filed within 20 days of a "final" decision, plus an additional five days if service of the decision is made by mail upon an address in California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, former § 10507(a)(1), now § 10605(a)(1) (eff. Jan. 1, 2020).) To be timely, however, a petition must be *filed* with (i.e., received by) the WCAB within the time allowed; proof that the petition was mailed within that period is insufficient. (Cal. Code Regs., tit. 8, former § 10845(a), now § 10940(a); former § 10392(a), now § 10615(b) (eff. Jan. 1, 2020).) Where an order can be shown to have been defectively served, the time limit begins to run as of the date of receipt of the order. (*Hartford Accident & Indemnity Co. v. Workers' Comp. Appeals Bd. (Phillips)* (1978) 86 Cal.App.3d 1 [43 Cal.Comp.Cases 1193].)

The WCJ designated defendant's attorney to serve the October 16, 2020 Findings of Fact, Order and Opinion on Decision (F&O) and the F&O was reportedly emailed to defendant to serve it on all parties.[1] However, defendant in its verified Petition reports that it never received the F&O via email and only discovered it had been issued when checking the Electronic Adjudication Management System (EAMS) on December 8, 2020.

Service of the F&O on defendant appears to have been defective. We will therefore treat defendant's December 29, 2020 Petition as timely.

Although the decision contains a finding that is final, defendant is only challenging the WCJ's finding that the reporting of the qualified medical evaluator (QME), Dr. Ernest Miller, is not substantial evidence and appointment of an independent medical evaluator. Therefore, we will apply the removal standard to our review. (See *Gaona, supra*.)

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd*. (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155];

[1] The WCJ cited the Appeals Board's March 18, 2020 In Re: COVID-19 State of Emergency En Banc (Misc. No. 260) for emailing the F&O only to defendant's attorney and designating service. In the en banc decision, the Appeals Board suspended WCAB Rule 10628, which requires service by the WCAB by mail unless a party has designated email for service. (Cal. Code Regs., tit. 8, former § 10500, now § 10628 (eff. Jan. 1, 2020).) The decision stated that service by the WCAB may be made electronically with or without parties' consent, but did not state that the WCAB may designate a party to serve a final decision, order or award. The district offices should still serve all parties of record with a final decision, order or award (whether electronically or otherwise), not designate a party to serve.

Kleemann v. Workers' Comp. Appeals Bd. (2005) 127 Cal.App.4th 274, 280, fn. 2 [70 Cal.Comp.Cases 133].) The Appeals Board will grant removal only if the petitioner shows that significant prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020); see also *Cortez, supra*; *Kleemann, supra*.) 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).)

Here, we are not persuaded that significant prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy. The Appeals Board has the discretionary authority under section 5701 to develop the record when the medical record is not substantial evidence. (See also Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd*. (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd*. (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) Nothing in the F&O limits the parties' ability to seek clarification from the independent medical evaluator once he has issued his report.

Defendant states that the WCJ improperly struck the QME's reports from the record. Although the Opinion on Decision states that these reports are stricken from the record and are not to be provided to the appointed evaluator, there is nothing in the findings of fact or orders in the F&O striking the QME's reporting. The Opinion on Decision provides the rationale for the F&O, but the actual findings of fact and orders must be contained in the F&O. (Lab. Code, § 5313.) There is consequently no order striking Dr. Miller's reporting from the record from which relief may be granted.

To assist the parties, we note that 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 qualified medical evaluator (see e.g., *Batten v. Workers' Comp. Appeals Bd.* (2015) 241 Cal.App.4th 1009 [80 Cal.Comp.Cases 1256]). Based on the current record, there does not appear to be a basis to strike the QME's reporting or not to provide his findings to the independent medical evaluator as part of his review of the medical record.

Therefore, we will deny defendant's Petition.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the October 16, 2020 Findings of Fact, Order and Opinion on Decision is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 1, 2021

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

BOSQUEZ & SIEMENS
PATRICO HERMANSON & GUZMAN
ROSNY AGUILAR

AI/*pc*

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