WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

LINDA MAYFIELD, ***Applicant***

vs.

SUBSEQUENT INJURIES BENEFITS TRUST FUND, ***Defendants***

Adjudication Number: ADJ10282592, ADJ10645796
Oakland District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the June 7, 2022 Findings and Order, wherein the workers' compensation administrative law judge (WCJ) found that applicant did not suffer a preexisting labor disabling disability prior to her subsequent injury and does not meet eligibility requirements from the Subsequent Injuries Benefits Trust Fund (SIBTF).

Applicant contends that (1) the WCJ erred in finding that the opinions of Scott Anderson, M.D., are not substantial evidence, (2) the WCJ erred in finding that applicant's preexisting conditions are not labor disabling, (3) the WCJ erred in finding that applicant did not meet the eligibility requirements of Labor Code[1], section 4751, and (4) the WCJ failed to give proper weight to applicant's trial testimony.

We did not receive an answer from SIBTF. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we grant reconsideration, rescind the Findings and Order, and return to the trial level for further proceedings consistent with this Opinion.

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[1] All subsequent statutory references are to the Labor Code unless otherwise indicated.

FACTS

As the WCJ stated in her Report:

> Applicant Linda Mayfield, (hereinafter referred to as "applicant") petitions for reconsideration of the Findings and Order that issued in this case (ADJ10282592) on 06/07/2022 wherein I found applicant did not suffer a pre-existing labor disabling disability prior to the subsequent industrial injury and does not meet the eligibility requirements for benefits from the Subsequent Injuries Benefits Trust Fund.
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> Applicant has filed a timely verified Petition for Reconsideration contending that the evidence does not justify the findings of fact, and that the findings of fact do not support the order, decision or award. Applicant takes issue with my finding applicant did not suffer a pre-existing labor disabling disability prior to the subsequent industrial injury and does not meet the eligibility requirements for benefits from the Subsequent Injuries Benefits Trust Fund and contends that adding her non-overlapping pre-existing conditions to the subsequent injury results in her being 100 percent PTD. (Applicant's Petition for Reconsideration, dated 07/01/2022, at page 2.) As of 07/14/2022, defendant Subsequent Injuries Benefits Trust Fund (hereinafter referred to as "defendant") has not filed an Answer. (Report, p. 1.)

In her Opinion on Decision, the WCJ stated:

> At trial, applicant and SIBTF stipulated that applicant sustained cumulative trauma injury from 06/13/2012 to 06/13/2013 to her knees while employed by the San Francisco Unified School District (hereinafter referred to as "District") and claims to have sustained industrial injury to her internal systems. (Minutes of Hearing hereinafter referred to as "M.O.H.", dated 04/11/2022.) In her trial brief, applicant further claims she is 100 percent permanently and totally disabled and that she has met the requirements of a SIBTF case. Defendant submits applicant is not entitled to SIBTF benefits because she has not demonstrated the threshold requirement of having suffered a pre-existing labor disabling condition at the time of subsequent cumulative trauma injury from 06/13/2012 to 06/13/2013 sustained while working for the District.
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> In ADJ10282592, the parties entered into Stipulations with Request for Award reflecting applicant's cumulative trauma injury from 06/13/2012 to 06/13/2013 to her knees caused temporary disability, permanent disability of 52 percent, and a need for future medical treatment. WCJ Friedman approved the stipulations on 06/18/2019. (Joint Exhibit 107)
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> In ADJ10645796, the parties entered into Stipulations with Request for Award reflecting applicant's specific injury of 05/06/2016 to her right shoulder caused temporary disability, permanent disability of 9 percent, and a need for

further medical treatment. WCJ Friedman also approved those stipulations on 06/18/2019.

In ADJ5821243, parties entered into Stipulations with Request for Award reflecting applicant's 08/15/2007 injury to her left shoulder caused permanent disability of 5 percent and a need for further medical treatment. PJ Lam approved those stipulations on 06/18/2009 (Applicant's Exhibit 2)

Applicant testified at trial on 04/11/2022 and at her 02/17/2017 deposition that she had worked for the District for almost 40 years, that she had returned to work for the District full time after her cumulative trauma injury from 06/13/2012 to 06/13/2013 to her knees, and that she did not stop working for the District until May of 2016, after her specific injury of 05/06/2016. (M.O.H., dated 04/11/2022; Joint Exhibit 105, at pages 10, 13, 32, 33.)

Applicant subsequently filed an Application in ADJ10282592 (cumulative trauma injury from 06/13/2012 to 06/13/2013 to her knees) seeking benefits from the SIBTF describing her pre-existing asthma, diabetes, heart disease, gout, arthritis occurring as a result of pre-existing systemic disease and claiming she is 100 percent permanently and totally disabled. (Opinion on Decision, pp. 2-3.)

DISCUSSION

Section 4751, provides:

> If an employee who is permanently partially disabled receives a subsequent compensable injury resulting in additional permanent 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 permanent 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 permanent 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. (§ 4751.)

The employee must prove the following elements:

(1) The combined disability of the preexisting disability and the disability from the subsequent industrial injury must be 70 percent or more; [footnote omitted]

(2) The combined disability of the two injuries must be greater than that of the disability from the subsequent injury alone; and

(3) One of the following conditions must be met:

(a) The previous disability or impairment must have affected a hand, leg, arm, foot, or eye; the disability from the subsequent injury must affect the opposite and corresponding member; and the disability from the subsequent industrial accident, when considered alone and without regard to or adjustment for the employee's age or occupation, must be equal to 5 percent or more of the total; or

(b) The permanent disability resulting from the subsequent industrial injury, when considered alone and without regard to or adjustment for the employee's age or occupation must be equal to 35 percent or more of the total. [Footnote omitted.] (1 CA Law of Employee Injuries & Workers' Comp § 8.09 [1].)

There are no requirements as to the origin of the preexisting disability; it may be congenital, developmental, pathological, or due to either an industrial or nonindustrial accident. (1 CA Law of Employee Injuries & Workers' Comp § 8.09 [1].) The purpose of the statute is to encourage the employment of the disabled as part of a "complete system of workmen's compensation contemplated by our Constitution." (*Patterson* (1952) 39 Cal.2d 83 [17 Cal.Comp.Cases 142]; *Ferguson v. Indus. Acc. Comm.* (1958) 50 Cal.2d 469, 475.)

The Supreme Court in *Ferguson* held that the "previous disability or impairment" contemplated by section 4751 "'must be actually 'labor disabling,' and that such disablement, rather than 'employer knowledge,' is the pertinent factor to be considered in determining whether the employee is entitled to subsequent injuries payments under the terms of section 4751." (*Ferguson, supra,* p. 477; *Escobedo v. Marshall*, 70 Cal.Comp.Cases 604, 619 (Appeals Board en banc).) The court further noted that "'the prior injury under most statutes should be one which, if industrial, would be independently capable of supporting an award. It need not, of course, be reflected in actual disability in the form of loss of earnings [as this court has already held in *Smith* v. *Industrial Acc. Com*. (1955) 44 Cal.2d 364, 367 [2, 3] [288 P.2d 64]], but if it is not, it should

at least be of a kind which could ground an award of permanent partial disability. . . .'" (*Ferguson,* at p. 477, quoting Larson's Workmen's Compensation Law (1952) § 59.33 (vol. 2, p. 63).)

Further, the preexisting disability "need not have interfered with the employee's ability to work at his employment in the particular field in which he was working at the time of the subsequent injury. [citations]" (*Franklin v. Workers' Comp. Appeals Bd.* (1978) 79 Cal.App.3d 224, 238.) "The ability of the injured to carry on some type of gainful employment under work conditions congenial to the preexisting disability does not require a finding that the preexisting disability does not exist. [citations]" (*Ibid.*)

To prove a preexisting disability, there needs to be evidence prior to the subsequent injury of a medically demonstrable impairment.

> A preexisting disability cannot be established by a "retroactive prophylactic work restriction" on the preexisting condition placed on the injured after the subsequent industrial injury in absence of evidence to show that the worker was actually restricted in his work activity prior to the industrial injury. (*Hulbert* v. *Workmen's Comp. Appeals Bd., supra*, 47 Cal.App.3d 634, 640; *Gross* v. *Workmen's Comp. Appeals Bd., supra*, 44 Cal.App.3d 397, 404-405; *Amico* v. *Workmen's Comp. Appeals Bd., supra*, 43 Cal.App.3d 592, 606; see also *Bookout* v. *Workmen's Comp. Appeals Bd., supra*, 62 Cal.App.3d 214, 224-225.) Where the injured was actually under a prophylactic restriction for a preexisting condition at the time of the industrial injury, apportionment to a preexisting disability is proper. It is only the *retroactive* application of a prophylactic restriction to an otherwise nonexistent previous disability that is prohibited. (*Ibid*.)
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> The prohibition against "retroactive prophylactic work restrictions" to establish a preexisting disability is not inconsistent with the fact that prophylactic restrictions are ratable factors of permanent disability stemming from the industrial injury. (*Gross, supra*, 44 Cal.App.3d at p. 404.) Applying a prophylactic work restriction retroactively creates "a sort of factual or legal fiction of an otherwise nonexistent previous disability or physical impairment." (*Ibid*.) Apportionment involves a factual inquiry. (See *Mercier* v. *Workers' Comp. Appeals Bd., supra*, 16 Cal.3d 711, 716; see also, *State Comp. Ins. Fund* v. *Workers' Comp. Appeals Bd. (Gaba)* (1977) 72 Cal.App.3d 13, 16-17 [139 Cal.Rptr. 802].)
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> (*Franklin, supra,* 79 Cal.App.3d at p. 238.)

The issues here are whether applicant established, for purposes of SIBTF benefits, that her internal injuries in the form of asthma, diabetes, heart disease, gout, and arthritis are (1) labor

disabling, and (2) preexisting permanent disabilities to the subsequent June 13, 2012 through June 13, 2013 cumulative trauma permanent disability of 52% to her bilateral knees.

The WCJ concludes that the evidence is not sufficient to carry applicant's burden of establishing preexisting labor disabling disabilities. Specifically, the WCJ concludes that Dr. Anderson's opinions are not substantial medical evidence because there is no basis for his opinions. The WCJ points out that the medical reports that Dr. Anderson reviewed do not address applicant's internal injuries and that the current medications identified in his report do not describe that they are to treat applicant's hypertension, diabetes, chronic asthma or chronic gout. (Opinion on Decision, pp. 5-6.; Report, p. 6) Additionally, the WCJ concludes that applicant's trial testimony that she sought treatment for her internal injuries is not sufficient to establish her burden to prove preexisting disability. (Opinion on Decision, p. 6; Report, p. 7.) The WCJ notes that applicant returned to work full time after the subsequent cumulative trauma injury and had continued to work until May 2016, when she sustained another injury. (Opinion on Decision, p. 6; Report, p. 7.) The WCJ also seems to call into question applicant's testimony that she took time off from work because of her internal conditions by pointing out that applicant also testified that she took time off from work for physical therapy appointments and vacation. (Opinion on Decision, p. 6; Report, p. 7.)

Here, we note that an employee's ability to work does not determine whether a disability is labor disabling. (*Ferguson, supra,* 50 Cal.2d at p. 477; *Franklin, supra,* 79 Cal.App.3d at p. 238.) A preexisting permanent disability is labor disabling when the injury "would be independently capable of supporting an award." (*Ferguson,* at p. 477.) The internal conditions here: asthma, diabetes, heart disease, gout, and arthritis, are all ratable permanent disabilities for which Dr. Anderson provided a permanent disability rating. Thus, applicant's internal conditions are labor disabling. The question, however, is whether Dr. Anderson's permanent disability ratings are a retroactive prophylactic work restriction.

In his May 7, 2021 report, Dr. Anderson notes that applicant's current medication includes losartan hydrochlorothiazide (to treat hypertension), diclofenac (to treat pain and swelling caused by arthritis), atorvastatin (to treat cholesterol), loratadine (an antihistamine), furosemide (for leg swelling), ciclosonide (to treat asthma), albuterol (inhaler), and fluticasone (nasal spray). (Joint Exhibit 101, Dr. Anderson's May 7, 2021 report, p. 5.) Dr. Anderson stated, "the medications from Kaiser Permanente are documented in medical records indicating a history of hypertension, diabetes and chronic asthma, as well as chronic gout with manifestations including peripheral edema." (Joint Exhibit 101, Dr. Anderson's May 7, 2021 report, p. 39.) The WCJ is correct that

Dr. Anderson's extensive review and summary of applicant's past medical records do not address these internal conditions and that the list of medications in his report do not establish that these internal disabilities preexisted the subsequent cumulative trauma injury.

However, applicant provided uncontroverted trial testimony that she treated these conditions before the subsequent cumulative trauma injury (Minutes of Hearing and Summary of Evidence (MOHSOE) dated April 11, 2022, p. 4:36-45); and the WCJ points out that the 2016, 2017, and 2018 reports of Michael Charles, M.D., and Babak Jamasbi, M.D., note that applicant suffers from these internal conditions (Opinion on Decision, pp. 4-5). The WCJ cites to *Ruiz v. Workers' Comp. Appeals Bd.* (2013) 78 Cal.Comp.Cases 1182 (writ den.) for the proposition that a history of medical treatment does not equate to a prior labor disabling disability. (Opinion on Decision, p. 6; Report, p. 7.) The Appeals Board panel in *Ruiz* concluded that the report of a psychiatrist constituted an impermissible retroactive assignment of prior psychiatric disability. (*Ruiz, supra*, at p. 1185.) "The medical treatment records from Kaiser do not establish that applicant's pathological non-industrial psychiatric condition was causing permanent disability *prior* to the subsequent industrial injury. [¶] In the absence of a *pre-existing* ratable permanent disability attributable to her psychiatric condition, applicant has not met the threshold for entitlement to SITBF benefits." (*Id.*, emphasis added.) ". . . section 4751 'was not intended to apply to *asymptomatic disease processes* which were unknown to both the employee and employer and *which in nowise interfered with the employee's ability to work.*'" (*Id.* at p. 1186 citing *Ferguson, supra,* 23 Cal.Comp.Cases at p. 110; italics in original.)

Here, given the totality of the evidence in the record, Dr. Anderson's report coupled with applicant's trial testimony and the mention of these internal conditions in Dr. Charles's and Dr. Jamasbi's reports, we believe that applicant did suffer from these internal conditions and that they were labor disabling. However, the evidence in the record is lacking as to whether applicant's internal conditions preexisted her subsequent cumulative trauma injury. For this reason, we return this matter to the trial level for further development of the record on the specific issue of whether applicant's labor disabling asthma, diabetes, heart disease, gout, and arthritis preexisted the subsequent cumulative trauma injury ending on June 13, 2013. (*Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal. App.4th 389, 393-395 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; see §§ 5701 and 5906 and *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67

Cal.Comp.Cases 138 (Appeals Bd. en banc).) In developing the record, the parties should note that Labor Code section 5412 defines the date of injury for cumulative trauma injuries. (Lab. Code, § 5412.)

For the foregoing reasons,

IT IS ORDERED that applicant Linda Mayfield's Petition for Reconsideration of the June 7, 2022 Findings and Order is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the June 7, 2022 Findings and Order is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 30, 2022

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

LINDA MAYFIELD
ARJUNA H. FARNSWORTH
OFFICE OF THE DIRECTOR LEGAL

LSM/*pc*

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