WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

FARIDA MAL, *Applicant*

vs.

FAMILY HEALTH CENTERS OF SAN DIEGO; REDWOOD FIRE AND CASUALTY INSURANCE COMPANY dba BERKSHIRE HATHAWAY HOMESTATE COMPANIES, *Defendants*

Adjudication Number: ADJ14629670
San Diego 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 February 17, 2023, wherein the WCJ found that applicant did not sustain an injury arising out of and in the course of employment (AOE/COE) to her psyche and stress and the WCJ ordered that applicant take nothing.[1]

Applicant contends that she was precluded from calling a witness at trial. Applicant also contends that the psychiatric Panel Qualified Medical Evaluator (PQME) David M. Reiss, M.D., should not have considered the reports of a prior psychiatric PQME.

We received an answer from defendant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations in the Petition, the answer, and the contents of the Report with respect thereto. Based on our review of the record, and for the reasons discussed

[1] The adjudication file contains an envelope marked "return to sender," which was processed by the district office on February 27, 2023. We note that the street number for applicant's address on the proof of service of the F&O does not match the street number listed in the official address record. By applicant's timely Petition, we infer that applicant received the F&O. Because we rescind the F&O on other grounds, we do not further consider the issue of service.

below, we will grant the Petition, rescind the F&O, and return the matter to the WCJ for further proceedings consistent with this decision.

BACKGROUND

We will briefly review the relevant facts.

Applicant claimed injury to her psyche and stress while employed by defendant as a medical assistant, on May 13, 2019.

On January 14, 2022, defendant filed a Declaration of Readiness to Proceed (DOR), which states in pertinent part:

> Defendants wish to move forward to trial based upon reporting of QME Dr. Michael Takamura of 06/19/2020 and 01/15/2021.

(January 14, 2022 DOR, p. 7.)

` On February 22, 2022, applicant filed a Petition to disqualify and replace PQME Michael Takamura, M.D.

On May 31, 2022, the WCJ issued a replacement PQME Order. (Minutes and Replacement PQME Order, dated May 18, 2022 and served on May 31, 2022.)

On September 6, 2022, defendant filed a DOR, which states in pertinent part:

> Dr. Reiss is the second panel QME finding no industrial injury. Based upon Dr. Reiss's report, defendants sent applicant's counsel a letter of 8/26/2022 requesting they dismiss the claim. No reply yet from applicant. WCAB intervention is respectfully requested to bring this matter to resolution.

(September 6, 2022 DOR, p. 7.)

On October 6, 2022, the parties participated in a mandatory settlement conference (MSC) and the matter was set for trial. (Notice of trial, minutes, and pre-trial conference statement, issued October 11, 2022.) The parties stipulated that "Dr. David Reiss is the psychiatry panel QME. Dr. Michael Takamura is the prior psychiatry panel QME in this matter." (Pre-trial conference statement, issued October 11, 2022, p. 2.)

On December 7, 2022, trial was continued and the minutes state:

> The parties were able to retain a certified interpreter. The WCJ spoke at length with the Applicant and explained the issues with the PQME reports and also the 6 month requirement. WCJ gave the applicant time to think about the discussion and speak with her attorney how she would like to proceed. After thinking about the

> conversation and after discussing with her attorney, the applicant indicated she would be willing to consider settlement. However, defendant has been unable to obtain authority. Matter continued to February 14, 2023. Defendant is encouraged to obtain minimal settlement authority to avoid the length and process of competing this Trial.

(Amended minutes, December 8, 2022, pp. 1-2.)

On February 14, 2023, the matter proceeded to trial on the following issues:

> 1. Injury arising out of and in the course of employment to stress and psyche.
> 2. The Defendant asserts the following affirmative defenses: Labor Code Section 3208.3(D), which bars psychiatric injury, as the length of the Applicant's employment was less than six months.

(Minutes of Hearing and Summary of Evidence (MOH/SOE), February 15, 2023, p. 2.)

Applicant appeared for trial, but no testimony was taken and the matter was submitted on the record. (MOH/SOE, February 15, 2023, p. 1; February 17, 2023 Opinion on Decision ["The parties called no witnesses, preferring to submit this matter on the evidentiary record."].)

At trial, the WCJ admitted the following exhibits into evidence:

> Exhibit 1: Subpoenaed records from Family Health Centers, various dates.
> Exhibit A: Report of Dr. Reiss, dated August 22, 2022.
> Exhibit B: Report of Dr. Michael Takamura, dated January 5, 2021.
> Exhibit C: Report of Dr. Michael Takamura, dated June 19, 2020.
> Exhibit D: Payroll/timecard records.
> Exhibit E: Employment verification, dated January 10, 2020.
> Exhibit F: Report of Dr. Peter Burns, dated November 5, 2019.

(MOH/SOE, February 15, 2023, p. 3.)

DISCUSSION

Labor Code[2] section 3208.3 states that in order to establish industrial causation of a psychiatric injury, an injured worker must show, by a preponderance of the evidence, that actual

[2] All future statutory references are to the Labor Code unless otherwise specified.

events of employment predominantly caused the psychological injury.[3] In relevant part, section 3208.3 provides the following:

> (a) A psychiatric injury shall be compensable if it is a mental disorder which causes disability or need for medical treatment, and it is diagnosed pursuant to procedures promulgated under paragraph (4) of subdivision (j) of Section 139.2 or, until these procedures are promulgated, it is diagnosed using the terminology and criteria of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Third Edition–Revised, or the terminology and diagnostic criteria of other psychiatric diagnostic manuals generally approved and accepted nationally by practitioners in the field of psychiatric medicine.
>
> (b) (1) In order to establish that a psychiatric injury is compensable, an employee shall demonstrate by a preponderance of the evidence that actual events of employment were predominant as to all causes combined of the psychiatric injury.
>
> ...

(Lab. Code, § 3208.3(a)-(b)(1).)

However, even if events of employment cause a majority of an injured worker's psychiatric injury, the injury may not be compensable if the employer did not employ the injured worker for at least six months. In relevant part, section 3208.3(d) states:

> Notwithstanding any other provision of this division, no compensation shall be paid pursuant to this division for a psychiatric injury related to a claim against an employer unless the employee has been employed by that employer for at least six months. The six months of employment need not be continuous. This subdivision shall not apply if the psychiatric injury is caused by a sudden and extraordinary employment condition....

(Lab. Code, § 3208.3(d).)

The party asserting this affirmative defense has the burden of proof. Here, the WCJ's statement that "applicant was an employee of less than six months" (Opinion on Decision, p. 3) is not supported by the record before us. On the contrary, the payroll/timecard records offered by defendant suggest that applicant had earnings spanning the timeframe from May 13, 2019 to

[3] "[T]he phrase 'predominant as to all causes' is intended to require that the work-related cause has greater than a 50 percent share of the entire set of causal factors." (*Department of Corrections v. Workers' Comp. Appeals Bd.* (*Garcia*) (1999) 76 Cal.App.4th 810, 816 [64 Cal.Comp.Cases 1356].)

November 17, 2019. (MOH/SOE, February 15, 2023, p. 3, Exhibit D.) Assuming, *arguendo*, that applicant was employed through November 17, 2019, it would appear that she was employed by defendant for at least six months. Moreover, an employment verification form stating "no hours worked from 11/05/2019 - 01/10/2020" would suggest that applicant was employed by defendant as of January 10, 2020, further undermining the argument that applicant was employed by defendant for at least six months. (MOH/SOE, February 15, 2023, p. 3, Exhibit E.)

The WCJ is "charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision." (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 475-476 (Appeals Bd. en banc)[4] (*Hamilton*); see Lab. Code, § 5313 and *Blackledge v. Bank of America, ACE American Insurance Company* (2010) 75 Cal.Comp.Cases 613, 621-622 (Appeals Bd. en banc) (*Blackledge*).) A WCJ is required to "make and file findings upon all facts involved in the controversy and an award, order, or decision stating the determination as to the rights of the parties. Together with the findings, decision, order or award there shall be served upon all the parties to the proceedings a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made." (Lab. Code, § 5313; Cal. Code Regs., tit. 8, §§ 10759, 10761; see also *Blackledge, supra*, at 621-622.)

A WCJ's decision must be based on admitted evidence and must be supported by substantial evidence (Lab. Code, §§ 5903, 5952(d); *Hamilton*, *supra*, at 476; *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] (*Garza*); *LeVesque v. Workmen's Comp. Appeals Bd*. (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) The WCJ's opinion on decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Hamilton supra*, at 476, citing *Evans v. Workmen's Comp. Appeals Bd*. (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350].)

We note that judgments on the pleadings are not permitted in Workers' Compensation. (Cal. Code Regs., tit. 8, § 10515.) Although applicant was present for trial, as was an interpreter,

[4] En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, § 10325(a); *City of Long Beach v. Workers' Comp. Appeals Bd*. (*Garcia*) (2005) 126 Cal.App.4th 298, 316, fn. 5 [70 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Bd*. (2002) 96 Cal.App.4th 1418, 1424, fn. 6 [67 Cal.Comp.Cases 236].)

the matter was submitted without testimony. (MOH/SOE, February 15, 2023, p. 1.) All parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd*. (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) A fair hearing is ". . . one of 'the rudiments of fair play' assured to every litigant . . ." (*Id*., at 158.) The "essence of due process is simply notice and the opportunity to be heard." (*San Bernardino Cmty. Hosp. v. Workers' Comp. Appeals Bd*. (*McKernan*) (1999) 74 Cal.App.4th 928, 936 [64 Cal.Comp.Cases 986].) Determining an issue without giving the parties notice and an opportunity to be heard violates the parties' rights to due process. (*Gangwish v. Workers' Comp. Appeals Bd*. (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584], citing *Rucker*, *supra*, at 157-158.) A fair hearing includes but is not limited to the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (See *Gangwish, supra*, at 1295; *Rucker, supra*, at 157-158, citing *Kaiser Co. v. Industrial Acci. Com. (Baskin)* (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21]; *Katzin v. Workers' Comp. Appeals Bd*. (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].)

The Appeals Board also has a constitutional mandate to "ensure substantial justice in all cases" and may not leave matters undeveloped where it is clear that additional discovery is needed. (*Kuykendall v. Workers' Comp. Appeals Bd*. (2000) 79 Cal.App.4th 396, 403-404 [65 Cal.Comp.Cases 264].) The "Board may act to develop the record with new evidence if, for example, it concludes that neither side has presented substantial evidence on which a decision could be based, and even that this principle may be appropriately applied in favor of the employee." (*McKernan, supra*, at 937-938.)

Applicant cites *Cervantes v. Pac. Am. Fish Co*., 2021 Cal. Wrk. Comp. P.D. LEXIS 93[5] (*Cervantes*) in support of her contention that PQME Dr. Reiss should not have reviewed the prior PQME's reports because the prior PQME (Dr. Takamura) withdrew from the case without responding to applicant's request for supplemental report. (Petition, p. 1.) However, *Cervantes* does not support applicant's argument. Section 4062.3 provides in relevant part, as follows:

[5] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd*. (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc); *Griffith v. Workers' Comp. Appeals Bd*. (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].)

> (a) Any party may provide to the qualified medical evaluator selected from a panel any of the following information:
>
> > (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).)

"Statutory and case law favor the admissibility of medical reports provided they were obtained in accordance with the Labor Code." (*Cervantes, supra,* at *7, citing 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].) The language of section 4062.3(a) is fairly expansive with respect to what medical records may be provided to the PQME. As discussed in *Cervantes*, it is unclear how a comprehensive medical-legal evaluation report from a previous PQME is not a medical record under section 4062.3(a)(2). (*Cervantes, supra,* at *9.)

The Appeals Board is accorded generous flexibility by sections 5708 and 5709 to achieve substantial justice with relaxed rules of procedure and evidence. (*Barr v. Workers' Compensation Appeals Bd*. (2008) 164 Cal. App. 4th 173, 178 [73 Cal.Comp.Cases 763].) In determining whether to admit evidence, we are governed by the principles of section 5708, which states 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.) Although the Appeals Board is not bound by it, 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.) This definition has been characterized as "manifestly broad." (*In re Romeo C*. (1995) 33 Cal.App.4th 1838, 1843.)

Medical reports may be deemed inadmissible due to misconduct. (See *State Farm Ins. Co. v. Workers' Comp. Appeals Bd. (Pearson)* (2011) 192 Cal.App.4th 51 [76 Cal.Comp.Cases 69]; *Batten v. Workers' Comp. Appeals Bd*. (2015) 241 Cal.App.4th 1009 [80 Cal.Comp.Cases 1256].) In the pre-trial conference statement, the parties stipulated that "Dr. David Reiss is the psychiatry panel QME. Dr. Michael Takamura is the prior psychiatry panel QME in this matter" (Pre-trial conference statement, issued October 11, 2022, p. 2), but applicant did not allege misconduct nor raise the admissibility of Dr. Takamura's reports.

In the absence of an evidentiary record, we are unable to evaluate the basis of the WCJ's Order. Therefore, we must return this matter to the trial level for further proceedings. Upon return to the trial level, we recommend that the WCJ hold a hearing to allow the parties to frame the issues and any stipulations, clarify the date of the claimed injury, submit exhibits as evidence, call witnesses, if necessary, lodge any objections, and make their legal arguments. Because the period of employment is at issue, we expect the parties will present testimony as well as documentary evidence regarding the length of employment.

Accordingly, we grant the Petition, rescind the F&O, and return the matter to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the February 17, 2023 Findings and Order is **RESCINDED** and that this matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 15, 2023

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

FARIDA MAL
HEWGILL, COBB & LOCKARD
LAW OFFICES OF KAPLAN & BOLDY
TAJUDIN A MAL[6]

JB/*cs*

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

[6] Although the adjudication record does not contain a Substitution of Attorneys (DWC WCAB Form 36), applicant informed the district office, by way of letter dated March 8, 2023, of her intent to authorize Tajudin Mal as her representative.