

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

ELIZABETH VENEGAS, *Applicant*

vs.

**STATE OF CALIFORNIA DEPARTMENT OF CORRECTIONS AND
REHABILITATION - CALIPATRIA STATE PRISON; legally uninsured,
administered by STATE COMPENSATION INSURANCE FUND, *Defendants***

Adjudication Number: ADJ13732919

San Diego District Office

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Applicant seeks reconsideration, and defendant seeks reconsideration and removal, of the Interim Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on November 7, 2023, wherein the WCJ found in pertinent part that pursuant to Labor Code section 3212.10, applicant's heart trouble (left ventricular hypertrophy) is presumed to be an injury arising out of and occurring in the course of employment (AOE/COE); that the presumption is rebuttable; that the reports and deposition testimony of cardiology/internal medicine qualified medical examiner (QME) Richard G. Friedman, M.D., are not substantial evidence; and that the record needs further development to determine if the Labor Code section 3212.10 presumption has been rebutted.¹

Applicant contends that defendant did not meet its burden of proof to rebut the section 3212.10 presumption, and that further development of the record violates the provisions of sections 5502 and 4062.3.

Defendant contends that that the reports and deposition testimony of QME Dr. Friedman are substantial evidence rebutting the section 3212.10 presumption, and that further development of the record would be a denial of its due process rights.

We received a Report and Recommendation on Petition for Reconsideration/Removal (Report) from the WCJ recommending that defendant's Petition for Reconsideration/Removal

¹ All further statutory references are to the Labor Code unless otherwise noted.

(Petition) be denied. We did not receive a Report addressing applicant's Petition for Reconsideration (Petition). We received an Answer from defendant; we did not receive an Answer from applicant.

We have considered the allegations in the Petitions, defendant's Answer, and the contents of the Report. Based on our review of the record, for the reasons stated by the WCJ in the Report, and for the reasons discussed below, we will deny reconsideration.

BACKGROUND

Applicant claimed injury to her circulatory system, in the form of heart trouble (left ventricular hypertrophy), while employed by defendant as a correctional officer during the period from March 11, 2002, through October 15, 2020.

QME Dr. Friedman evaluated applicant on March 16, 2021, (Joint Exh. 1, Richard G. Friedman, M.D., March 18, 2021), and he re-evaluated applicant on January 20, 2022 (Joint Exh. 2, Richard G. Friedman, M.D., January 27, 2022). The doctor's deposition was taken on December 1, 2022. (Joint Exh. 3, Richard G. Friedman, M.D., December 1, 2022, deposition transcript.)

The parties proceeded to trial on February 23, 2023. The parties stipulated that applicant claimed to have sustained injury AOE/COE "in the form of heart trouble as defined by Labor Code section 3212.10" and the issues submitted for decision included injury AOE/COE. (Minutes of Hearing and Summary of Evidence (MOH/SOE) February 23, 2023, p. 2.) The WCJ issued an Order Vacating Submission on February 28, 2023. The matter was re-submitted on April 24, 2023. On June 2, 2023 and August 1, 2023, the WCJ issued orders rescinding the previous decisions and on November 1, 2023, the WCJ ordered that the matter be re-submitted for decision.

DISCUSSION

We first note that 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, although the F&O resolves the threshold issue of the existence of an employment relationship, both applicant's and defendant's Petitions are in regard to interlocutory discovery issues, i.e. further development of the record. It is therefore appropriate that the parties seek

reconsideration, but we will address the issues raised in the Petitions by utilizing the applicable removal standard.

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (Cal. Code Regs., tit. 8, § 10955(a); *Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 600, fn. 5 [71 Cal.Comp.Cases 155, 157, fn. 5]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 281, fn. 2 [70 Cal.Comp.Cases 133, 136, fn. 2].)

The Appeals Board will grant removal only if the petitioner shows that substantial prejudice or irreparable harm will result if removal is not granted. 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, § 10955(a); *Cortez, supra*; *Kleemann, supra*.) Here, we are not persuaded that substantial prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy if the matter ultimately proceeds to a final decision adverse to either applicant or defendant.

Any award, order, or decision of the Appeals Board must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16]; *Universal City Studios, Inc. v. Workers' Compensation Appeals Bd. (Lewis)* (1979) 99 Cal.App.3d 647 [44 Cal.Comp.Cases 1133].)

In the Report, the WCJ stated:

The parties have previously attempted to obtain a supplemental opinion of the qualified medical evaluator as to whether applicant's left ventricular hypertrophy has arisen out of and occurred within the course of employment. Unfortunately, despite supplemental reporting and a deposition, the qualified medical evaluator did not address this issue in clear terms that will constitute substantial evidence.
(Report, p. 5.)

The Appeals Board, including the WCJ, has the discretionary authority to further develop the record where there is insufficient evidence to determine an issue that was submitted for decision. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) Having reviewed the record we see no basis for disturbing the WCJ's conclusion that the reports and deposition testimony of QME Dr. Friedman are not substantial

evidence, and are not an appropriate basis for making a final determination regarding the issues submitted for decision.

Further, it is important to note that in his reports Dr. Friedman stated:

Since she is a peace officer and developed this in the course of her work, it would be considered to be apportioned 100% to her work and to her employment.
(Joint Exh. 1, Richard G. Friedman, M.D., March 18, 2021, p. 4 [EAMS p. 6].)

If the normal left ventricular mass index by Devereux formula is reviewed, it would appear that this falls into the normal range and is corrected out by her weight and therefore apportionment would be 100% to nonindustrial causes. If, however, the left ventricular hypertrophy is considered to be the validating factor, then it would be 100% apportioned to her work.
(Joint Exh. 2, Richard G. Friedman, M.D., January 27, 2022, p. 4.)

In the Opinion on Decision the WCJ noted, “The issues of injury AOE-COE and apportionment of any resulting permanent disability are separate issues, and should not be confused.” (Opinion on Decision, p. 3.) A medical report predicated upon an incorrect legal theory does not constitute substantial evidence. (*Zemke v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 794 [33 Cal.Comp.Cases 358, 363]; *Milpitas Unified School District v. Workers' Comp. Appeals Bd. (Guzman)* (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837].) Again, we agree with the WCJ that the reports from Dr. Friedman indicate there is some confusion as to cause of injury and apportionment of disability.

Finally, regarding the section 3212.10 presumption, the Second District Court of Appeal adopted the meaning of “heart trouble” to include hypertension. (*Muznik v. Workers' Comp. Appeals Bd.* (1975) 51 Cal.App.3d 622, [40 Cal.Comp.Cases 578].) In his reports and deposition testimony Dr. Friedman repeatedly discusses applicant’s hypertension. However, it is not clear that he identifies hypertension to be “heart trouble” in the context of the section 3212.10 presumption.

As stated above, we grant removal only if the petitioner shows that substantial prejudice or irreparable harm will result if removal is not granted, and that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. Based on our review of the record, we do not see that either party is subject to substantial prejudice or irreparable harm as a result of the WCJ’s order that the record be further developed. Therefore, we will deny both parties’ Petitions.

Under the circumstances of this matter, it would be appropriate for the WCJ to have the parties provide their respective input as to the questions to be submitted to Dr. Friedman for further development of the record. Thus, we recommend that the WCJ schedule a Status Conference so that he and the parties can discuss and ultimately agree on the questions that will be submitted to Dr. Friedman in order to clarify his opinions pertaining to the issues of applicant's injury claim, as discussed herein.

Accordingly, we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Interim Findings and Order issued by the WCJ on November 7, 2023, is **DENIED**.

IT IS FURTHER ORDERED that defendant's Petition for Reconsideration/Removal of the November 7, 2023 Interim Findings and Order is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 25, 2024

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

**ELIZABETH VENEGAS
FERRONE & FERRONE
STATE COMPENSATION INSURANCE FUND**

TLH/abs

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