WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MICHAEL LEONARD, ***Applicant***

vs.

CENTRAL CONCRETE SUPPLY, U.S. CONCRETE, permissibly self-insured, administered by SEDGWICK PLEASANTON, ***Defendants***

Adjudication Number: ADJ10984573
Oakland District Office

OPINION AND ORDER
GRANTING PETITION
FOR RECONSIDERATION
AND DECISION
AFTER RECONSIDERATION

Applicant seeks removal of the Findings and Order Re Second QME Panel (Represented Case) and Opinion on Decision (F&O) issued by the workers' compensation administrative law judge (WCJ) on February 23, 2021. By the F&O, the WCJ found that the medical record requires further development and cannot be developed with the existing panel qualified medical evaluator (QME). She further found that a new panel should issue in the specialty of pulmonary disease and ordered the Medical Unit to issue a panel in this specialty.

Applicant contends that the medical reporting of the existing QME is substantial evidence and should be relied on regarding causation. Applicant also contends that a replacement panel is not appropriate in this case.

We received an answer from defendant. The WCJ issued a Report and Recommendation on Petition for Removal (Report) recommending that the F&O be amended to order the Medical Unit to issue a replacement panel in pulmonary disease and occupational medicine-toxicology or occupational medicine.

We have considered the allegations of applicant's Petition for Removal, defendant's answer and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will grant the Petition as one seeking reconsideration, rescind the F&O and return this matter to the trial level for further proceedings consistent with this opinion.

FACTUAL BACKGROUND

Applicant claims injury to the lungs, trachea, psyche and throat through June 6, 2017 while employed as a cement mixer/driver by Central Concrete Supply. Defendant has denied this claim in its entirety.

Sophie Cole, M.D. evaluated applicant as the internal medicine QME. Dr. Cole issued several reports and was deposed. (Applicant's Exhibits Nos. 1-9.) She diagnosed applicant with accelerated silicosis and attributed this condition to industrial exposure to cement dust. (Applicant's Exhibit No. 7, QME Report by Dr. Sophie Cole, December 16, 2019, pp. 2-3.)

Defendant filed a Petition to Strike Reporting and Opinions of PQME and Request for Replacement Panel or in the Alternative A Request to Direct Applicant to be Examined by a Regular Physician (Petition) dated February 6, 2019. In its Petition, defendant alleged that Dr. Cole's opinions are not substantial evidence and requested a replacement panel or a physician be appointed per Labor Code[1] sections 5701 and 5906. (Lab. Code, §§ 5701, 5906.) Applicant filed an objection to defendant's Petition. Defendant also filed a Request for a Replacement Panel on February 19, 2020 alleging that one of Dr. Cole's supplemental reports was untimely issued.

The matter initially proceeded to trial on July 14, 2020 with the Minutes of Hearing identifying several issues, including defendant's February 6, 2019 Petition, whether Dr. Cole's reporting is substantial medical evidence and defendant's February 19, 2020 Request for Replacement Panel. (Minutes of Hearing (Corrected), July 14, 2020, p. 3.) Informal minutes of hearing dated October 6, 2020 reflect that the "sole issue for trial is a replacement PQME." (Minutes of Hearing, October 6, 2020.) Submission of the matter was subsequently vacated on November 10, 2020 and the matter placed back on the trial calendar. Minutes of hearing from January 26, 2021 contain this comment:

> The threshold issue is whether QME Dr. Cole should be removed and replaced. Based on the MOH of trial (as corrected) of 7-14-20, this issue is SUBMITTED. A decision will issue.
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> (Minutes of Hearing, January 26, 2021.)

In the resulting F&O, the WCJ found in relevant part that applicant claims injury while employed as a cement mixer/driver. She also found that the "medical record in this case requires

[1] All further statutory references are to the Labor Code unless otherwise stated.

further development of the record to determine applicant's diagnosis and causation of injury and a supplemental report or the deposition testimony of panel QME, Dr. Sophie Cole, will not sufficiently develop the record." (F&O, February 23, 2021, p. 1.) The F&O included a finding that "[a] new QME panel should issued [*sic*] in the specialty of MMP-pulmonary disease." (*Id.* at p. 2.) An order for a new panel in the specialty of pulmonary disease was issued.

DISCUSSION

I.

Applicant sought removal of the F&O. 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 (AOE/COE), 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.

The F&O included a finding that applicant claims injury AOE/COE while employed as a cement mixer/driver by defendant. Employment is a threshold issue fundamental to the claim for benefits. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

II.

Although the F&O contains a finding that is final, applicant only challenges the WCJ's

finding that Dr. Cole's opinions are not substantial evidence and that a new panel must issue in another specialty. This is an interlocutory decision and is subject to the removal standard rather than reconsideration pursuant to the discussion above. (See *Gaona*, *supra*.)

The sole issue at trial was ultimately identified as whether Dr. Cole should be removed and replaced as the QME. Defendant argued that Dr. Cole should be replaced because her reporting is not substantial evidence and she had issued an untimely supplemental report.

It is well established that decisions by the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *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]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) To constitute substantial evidence ". . . a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].)

Administrative Director (AD) Rule 31.5(a) enumerates 16 circumstances under which a party may request a replacement QME panel. (Cal. Code Regs., tit. 8, § 31.5(a).) Despite the evidentiary requirement that decisions by the Appeals Board be supported by substantial evidence, this is not one of the enumerated reasons for a replacement QME panel pursuant to Rule 31.5(a). Consequently, Rule 31.5(a) does not provide authority for a replacement QME panel on the grounds that the QME's reports are not substantial evidence.

Additionally, with respect to defendant's Request for Replacement Panel based on an untimely supplemental report from Dr. Cole, the Labor Code does not mandate a replacement QME panel where a supplemental report is untimely issued. (See *Corrado v. Aquafine Corporation* (June 24, 2016, ADJ9150446, ADJ9150447) [2016 Cal. Wrk. Comp. P.D. Lexis 318] [the WCJ has discretion to order a replacement QME panel based on a late supplemental report since a replacement is not mandated by the Labor Code or Administrative Director Rule 31.5(a)(12)].)

Applicant contends that Dr. Cole should not be replaced as the QME. We agree that a replacement panel is not required where the QME's reporting is not substantial evidence, nor is it required for an untimely supplemental report. However, the F&O does not actually contain a finding of fact or order removing and replacing Dr. Cole as the QME. Rather, the F&O found that the record could not be further developed with Dr. Cole and that a *new* QME panel must be issued in pulmonary disease. Although the Opinion on Decision refers to this as a replacement panel, there is no finding of fact or order regarding a replacement panel in the F&O. 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.)

Whether a new QME panel in another specialty is warranted was not one of the issues identified for adjudication at trial. 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].) Due process requires, in relevant part, that a party receive notice and an opportunity to be heard before an action adverse to its interest is taken. (*Beverly Hills Multispecialty Group, Inc. v. Workers' Comp. Appeals Bd*. (*Pinkney*) (1994) 26 Cal.App.4th 789 [59 Cal.Comp.Cases 461]; *Fortich v. Workers' Comp. Appeals Bd*. (1991) 233 Cal.App.3d 1449 [56 Cal.Comp.Cases 537].)

The WCJ issued a finding of fact and order that a *new QME panel in another specialty* must issue. The F&O therefore improperly addressed an issue that was not submitted for adjudication.

III.

The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence to determine causation of a disputed body part. (See 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].) Accordingly, upon return of this matter to the trial level, the WCJ may exercise her authority to develop the record if necessary to adjudicate the disputed issues between the parties. In our en banc decision in *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 (Appeals Board en banc), we stated that "[s]ections 5701 and 5906 authorize the WCJ and the Board to obtain additional evidence, including medical

evidence, at any time during the proceedings (citations) [but] [b]efore directing augmentation of the medical record . . . the WCJ or the Board must establish as a threshold matter that specific medical opinions are deficient, for example, that they are inaccurate, inconsistent or incomplete." (*McDuffie, supra,* 67 Cal.Comp.Cases at 141.)

Although the preferred procedure to develop a deficient medical record per *McDuffie* is to return to the existing physicians who have already reported in the case, we agree with the WCJ that further discovery with Dr. Cole will not cure the deficiencies in this record. Per *McDuffie*, if the existing physicians cannot cure the need for development of the record, the selection of an agreed medical evaluator (AME) should be considered by the parties. If the parties cannot agree to an AME, the WCJ can then appoint a physician to evaluate applicant's injury pursuant to section 5701.

Alternatively, AD Rule 31.7(b) provides as follows in relevant part:

> (a) Once an Agreed Medical Evaluator, an Agreed Panel QME, or a panel Qualified Medical Evaluator has issued a comprehensive medical-legal report in a case and a new medical dispute arises, the parties, to the extent possible, shall obtain a follow-up evaluation or a supplemental evaluation from the same evaluator.
>
> (b) Upon a showing of good cause that a panel of QME physicians in a different specialty is needed to assist the parties reach an expeditious and just resolution of disputed medical issues in the case, the Medical Director shall issue an additional panel of QME physicians selected at random in the specialty requested. For the purpose of this section, good cause means:
> . . .
> (3) An order by a Workers' Compensation Administrative Law Judge for a panel of QME physicians that also either designates a party to select the specialty or states the specialty to be selected and the residential or employment-based zip code from which to randomly select evaluators . . .
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> (Cal. Code Regs., tit. 8, § 31.7(a) and (b)(3); see also Cal. Code Regs., tit. 8, § 32.6.)

Accordingly, although it was improper to order a new QME panel in another specialty without first providing the parties with notice and an opportunity to be heard, the WCJ has the authority to issue an order for an additional QME panel in another specialty per AD Rule 31.7(b). Upon return of this matter to the trial level, the WCJ may order further development of the record pursuant to *McDuffie* or order an additional QME panel in another specialty.

The WCJ raised the possibility of various specialties for an additional QME panel in her Report. We defer to the trier of fact to develop the record as she deems most appropriate. However, it would appear prudent to begin with a panel in a single specialty.

Therefore, we will grant reconsideration, rescind the F&O and return this matter to the trial level for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings and Order Re Second QME Panel (Represented Case) and Opinion on Decision issued by the WCJ on February 23, 2021 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order Re Second QME Panel (Represented Case) and Opinion on Decision issued by the WCJ on February 23, 2021 is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 7, 2021

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

LAW OFFICE OF FARNSWORTH LAW GROUP
LAW OFFICE OF JENNA ROUSE
MICHAEL LEONARD

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