

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

PARDIS SHOKOHI, *Applicant*

vs.

**LOS ANGELES UNIFIED SCHOOL DISTRICT, permissibly self-insured; administered by
SEDGWICK CLAIMS MANAGEMENT SERVICES, INC., *Defendants***

Adjudication Number: ADJ8538699

Van Nuys District Office

**OPINION AND DECISION
AFTER
RECONSIDERATION**

We previously granted applicant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Amended Findings and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on February 15, 2022, wherein the WCJ found in pertinent part that applicant sustained injury arising out of and in the course of her employment (AOE/COE) to her neck, lumbar spine, wrists, knees, skin, and psyche; and that the injury caused 62% permanent disability.

Applicant contends that the trial record is "stale" and must be further developed to constitute substantial evidence.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be denied. We did not receive an Answer from defendant.

We have considered the allegations in the Petition, and the contents of the Report. Based on our review of the record, for the reasons stated by the WCJ in the Report, which we adopt and incorporate by this reference thereto, and for the reasons discussed below, we will affirm the F&A except that we will amend the F&A to find that the permanent disability indemnity weekly rate is \$264.50, resulting in a permanent disability indemnity award of \$96,841.91 (Finding of Fact 5).

BACKGROUND

Applicant claimed injury to her head, back, knees, wrists, skin, heart, lungs, gastrointestinal system, and psyche, while employed by defendant as a teacher during the period from January 1, 1994, through November 16, 2011.

Applicant underwent various medical-legal evaluations including examinations by psychology qualified medical examiner (QME) Jo Anne Kaplan Ph.D. (Court Exh. W), internal medicine QME Stanley J. Majcher, M.D. (Court Exh. Y1), orthopedic QME Richard C. Rosenberg, M.D. (Court Exhs. Z1 and Z2), and dermatology QME Howard L Sofen, M.D. (Court Exh. X). Applicant also underwent vocational evaluations by Reggie Caruthers (App. Exh. 1) and John C. Meyers (Def. Exh. C).

The parties proceeded to trial on November 24, 2021. (Minutes of Hearing and Summary of Evidence (MOH/SOE), November 24, 2021, pp. 2 – 3.) The matter was continued and the January 5, 2022, MOH/SOE indicated the matter would be referred to the Disability Evaluation Unit. (MOH/SOE, January 5, 2022, p. 1.) The issues submitted for decision were parts of body injured, permanent disability/apportionment, need for further medical treatment, and attorney fees. (MOH/SOE, November 24, 2021, pp. 2 – 3.)

DISCUSSION

In his Report, the WCJ addressed applicant's arguments that the QME and vocational consultant reports should be further developed. Regarding Dr. Kaplan's report the WCJ noted that:

There is no allegation or evidence of a change in Applicant's condition. There was no request for re-examination. While the report is old, there is no valid reason to question the substantial nature of the evidence presented without evidence that the Applicant's condition has materially changed and without a request for re-examination.

(Report, p. 4.)

As to the report from Dr. Majcher, the WCJ stated:

Dr. Majcher reviewed all the records and examined the Applicant. He had a full history. His conclusions that she did not have an industrially aggravated condition in the field of internal medicine was clearly substantive evidence. There is no reason established to cause a development of the record because no new evidence has been presented that would justify same.

(Report, p. 4.)

The WCJ then explained that:

The Applicant's VR report was rendered insubstantial when the counsellor failed to review the evidence upon which the WCJ's decision is based. In this case the counsellor did not see the report from PQME Dr. Kaplan whose opinion confirms that Applicant is capable of employment. ¶ Any VR report finding the employee to be totally disabled is rendered insubstantial when the counsellor is completely unaware that the Applicant is working.

(Report, pp. 4 – 5.)

Having reviewed the entire record, we see no legal or factual basis in support of applicant's argument that the F&A should be rescinded.

Finally, it is important to note that at the January 5, 2022, trial applicant testified that defendant had not offered her modified work. (MOH/SOE, January 5, 2022, p. 2.) At the November 24, 2021, trial, the parties stipulated that defendant had paid applicant permanent disability indemnity at the weekly rate of \$264.50. (MOH/SOE, November 24, 2021, p. 2.) However, Finding #5 in the F&A states that the permanent disability indemnity rate is \$230.00 which results in a total of \$84,467.50. Based upon the parties' stipulation, this appears to be a mistake. The term "clerical error" includes all errors, mistakes, or omissions which are not the result of the exercise of the judicial function. The Appeals Board may correct a clerical error at any time without the need for further hearings. (*Toccalino v. Workers' Comp. Appeals Bd.* (1982) 128 Cal.App.3d 543 [47 Cal.Comp.Cases 145].) Thus, we will amend Finding #5 to find that the permanent disability indemnity weekly rate is \$264.50, resulting in a total of \$96,841.91.

Accordingly, we affirm the F&A except that we amend the F&A to find that the permanent disability indemnity weekly rate is \$264.50, resulting in a permanent disability indemnity award of \$96,841.91.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Amended Findings and Award of February 15, 2022, is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

5. The injury caused permanent disability of 62%, equating to 367.25 weeks of indemnity, payable at the rate of \$264.50 per week, commencing November 15, 2016, for a total of \$96,841.91.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 2, 2022

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

**MICHAEL MOGHTADER, ESQ.
EQUITABLE LAW FIRM APLC
TOBIN LUCKS LLP
TLH/mc**

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

The Applicant is a 55 year old school teacher who is claiming cumulative trauma ending on 11/16/2011 to multiple (10) different body parts.

The Petitioner is the Applicant who has filed a timely and verified Petition for Reconsideration claiming that the undersigned failed to develop the record under the terms of *Tyler v. WCAB* (1997) 56 Cal. App. 4th 389, 62 CCC 924.

The undersigned will recommend that the Petition be denied.

II. STATEMENT OF FACT

The Applicant sustained admitted cumulative trauma to her neck, low back, wrists, knees, skin and psyche as the result of her employment from 1/1/1994 through 11/16/2011. As set forth in the Minutes of Hearing dated 11/24/2021 the only issues that were tried were (1) body parts, (2) permanent disability, (3) apportionment, (4) need for further medical care, and (5) attorneys' fees.

The Applicant did not raise the issue of development of the record *nor* did Applicant request same at the trials.

Applicant sustained temporary disability as set forth in the Minutes. The Applicant testified at trial as to her present complaints along with a detailed recitation of the cause of injury.

The PQME in psychology was JoAnne Kaplan Ph.D who wrote a report of 1/17/2014 (Court's Ex. W) declaring Applicant to have sustained psychological injury both from her work directly and as a compensable consequence of her orthopedic complaints (p.25). They were the predominant cause of injury. She was permanent and stationary with a resulting GAF of 55 (23% wpi). This impairment was transferred to the DEU for rating. The injury pre-dates the enactment of SB863 (Cal. Lab. Code sec.4660.1), so psychiatric impairment is an allowable factor of disability even as a compensable consequence of her orthopedic injuries.

Dr. Richard Rosenberg acted as QME in orthopedics who wrote two reports dated 3/1/2014 and 2/8/2017 (Court's Exs. Z1 & Z2). Applicant was permanent and stationary with factors of impairment that were transmitted to the DEU for rating.

Dr. Stanley Majcher acted as PQME in internal medicine (Court's Exs. Y1 & Y2). He did not find a work related injury.

Dr. Howard Sofen acted as PQME in dermatology. He found an industrial injury to the skin resulting from prolonged sun exposure and issued an impairment rating of 5% wpi that was transmitted to the DEU for rating.

There were factors of apportionment. The factors of apportionment found by Dr. Kaplan were rejected by the undersigned as unsupported per *Escobedo v. Marshalls* (2005) 70 CCC 604, en

banc. The factors of apportionment found by Drs. Rosenberg and Sofen were adopted and conveyed to the DEU.

Both parties submitted vocational rehabilitation reports. Applicant's report from Reggie Carruthers dated 9/26/219 (App's Ex. 3) concluded that Applicant could not work. Defendant's report from John Meyers dated 5/25/2021 (Df. Ex. C) indicated that Applicant was in fact working part time and was capable to working with limitations.

The undersigned rejected the vocational rehabilitation report filed by Applicant for the following reasons: (1) the counsellor did not review the QME report of Dr. Kaplan upon whom the WCJ relied for assessment of impairment, (2) the counsellor did not consider or even obtain a history that Applicant was employed, (3) the counsellor gave no consideration to or took a history of the Applicant's present income sources, and (4) the counsellor failed to consider if Applicant, who is retired at age 66, has any motivation whatsoever to return to work.

A formal rating was issued for 62% on 1/12/2022. A Findings and Award was issued on 2/14/2022. A clerical error was corrected, and an amended Findings and Award was issued on 2/15/2022.

The Petitioner did not question any of the ratings.

Petitioner seeks relief by claiming that (1) Dr. Kaplan should have re-examined the Applicant more recently, (2) Dr. Majcher should have been questioned more thoroughly on the issue of causation or aggravation to diabetes, and (3) if one is going to develop the record, then one should develop the record with regards to the vocational rehabilitation reports as well.

III. DISCUSSION

Denial of Petition under Cal. Lab. Code sec. 5900

Cal. Lab. Code sec. 5900(a) states:

“Any person aggrieved directly or indirectly by any final order, decision, or award made and filed by the appeals board or a workers’ compensation judge under any provision contained in this division, may petition the appeals board for reconsideration in respect to any matter determined or covered by the final order, decision or award,...” (emphasis added).

If one reviews the Petition for Reconsideration it is apparent that “development of the record” is the only relief sought. There is no other allegation of error.

The Petitioner did not raise the issue of a need to develop the record. The Minutes of Hearing dated 11/24/2021 set forth the issues to be addressed at trial. The Petitioner specifically did not request that the trial judge order a development of the record. The issue was never raised. Hence there is no finding of fact, decision or final order from which the Petitioner can seek relief.

Since development of the record is the only relief sought, and since the issue was never raised at trial, the Petition should be summarily denied.

Development of the Record

Under Cal. Lab. Code sec. 5701 and 5906 the WCJ and the Appeals Board have the jurisdiction to order development of the record if there is insufficient evidence upon which to base a decision. *McDuffie v. LA Metro* (2002) 67 CCC 138.

Dr. Kaplan's Reporting

Dr. Kaplan's report of 1/17/2014 (Court's Ex. W) is a thorough psychological report based upon an examination and a review of all pertinent records. She declared Applicant to be permanent and stationary. There is no allegation or evidence of a change in Applicant's condition. There was no request for re-examination.

While the report is old, there is no valid reason to question the substantial nature of the evidence presented without evidence that the Applicant's condition has materially changed and without a request for re-examination. The age of the report, per se, is not a valid reason to order development of the record without some compelling reason.

And again, this matter was not raised at trial.

Dr. Majcher's Reporting

Dr. Majcher's reports simply state (as the Petitioner states) that diabetes can be aggravated by stress. However the burden of proof is on Applicant to prove with reasonable medical probability that this Applicant's diabetes in fact was aggravated by work to the extent that it caused a need for treatment or disability. Cal. Lab. Code sec. 3208.1. For the doctor to state what can happen is no proof of what in fact has occurred to this particular patient.

Dr. Majcher reviewed all the records and examined the Applicant. He had a full history. His conclusions that she did not have an industrially aggravated condition in the field of internal medicine was clearly substantive evidence. There is no reason established to cause a development of the record because no new evidence has been presented that would justify same.

Vocational Rehabilitation Reporting

The Petitioner does not put forth any reason to develop the record based upon the vocational rehabilitation reports on file. The Petitioner simply asserts that if development of the record should proceed then "we might as well" develop the vocational rehabilitation records too. No evidence or reasoning is set forth.

As set forth above, the undersigned rejected the vocational rehabilitation report from Applicant for several reasons.

The Applicant's VR report was rendered insubstantial when the counsellor failed to review the evidence upon which the WCJ's decision is based. In this case the counsellor did not see the report from PQME Dr. Kaplan whose opinion confirms that Applicant is capable of employment.

Any VR report finding the employee to be totally disabled is rendered insubstantial when the counsellor is completely unaware that the Applicant is working.

Any VR report is rendered insubstantial when the counsellor fails to analyze an Applicant's feasibility to return to the open labor market when that Applicant claims to be retired at age 66 and has three separate sources of income as this Applicant has.

Petitioner offers no reasoning for development of the record. In fact, Petitioner does not assert that the undersigned's rejection of the VR report was objectionable. They simply request development of the record.

The final assertion by the Petitioner is stated as follows (p.5, lines 9-12):

“If nothing else, the WCJ's conclusion that the vocational evidence was not substantial should have led him to direct the parties' to revise their opinions to conform to the legal standards that the WCJ believes apply to this situation.”

This assertion is essentially incomprehensible. The only legal standard the undersigned employed in deciding this case was that of substantial medical evidence.

The last portion of the Petition is repetitive. It seems that Paragraph 16 is simply a repeat of Paragraph 14 and does not state a new issue.

Petitioner has produced no evidence to support a request for development of the record. The decision herein is based upon substantial medical evidence. The request to develop the record in vocational rehabilitation is also unsupported by any evidence.

IV. RECOMMENDATION ON PETITION FOR RECONSIDERATION

[V.]

For the reasons and arguments set forth above, it is respectfully recommended that the Petition for Reconsideration be DENIED.

DATE: 3/17/2022

/s/ Dean M. Stringfellow
Dean Stringfellow
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

Filed and Served by email on selected Parties as shown on the attached Official Address record on the above date.by: Rocelynn Roncal