WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ELLA YEGHIAZARYAN, *Applicant*

vs.

STATE OF CALIFORNIA IHSS, LEGALLY UNINSURED, ADMINISTERED BY INTERCARE, *Defendants*

Adjudication Number: ADJ10223508
Los Angeles District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Applicant seeks reconsideration of the April 11, 2023 Findings and Order (F&O), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a health aide on November 22, 2015, sustained industrial injury to her neck, back, and left shoulder. The WCJ found that applicant is not entitled to an evaluation in psychology.

Applicant contends that the F&O incorrectly states there is no evidence that applicant suffers from fibromyalgia, or that the condition is work related. Applicant asserts that because applicant has been diagnosed with industrial fibromyalgia by the QME, the WCJ's determination that applicant is not entitled to an evaluation in psychology is in error.

Applicant has attached two documents to her petition in violation of WCAB Rule 10945, and we have not considered those documents herein. (Cal. Code Regs., tit. 8, § 10945(c)(2).)

We have received an Answer from defendant. The WCJ prepared 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. Based on our review of the record, and for the reasons discussed below, we will rescind the F&O, and return the matter to the WCJ for further proceedings consistent with this opinion.

FACTS

Applicant sustained injury to her neck, back, and shoulder, while employed by defendant as a health aide on November 22, 2015. Applicant's claim for workers' compensation benefits was originally resolved by Stipulations with Request for Award on July 23, 2018.

On March 20, 2019, applicant filed a Petition to Reopen for New and Further Disability. Applicant alleged the need for additional treatment as a result of spinal surgery on October 9, 2018, and further alleged that applicant's "condition and symptoms have worsened since the execution of the Stipulation with Request for Award, resulting in an increase in disability to many or substantially all of the body parts listed above." (Petition to Reopen, March 19, 2019, at p. 2:8.)

On June 13, 2022, applicant was reevaluated by secondary treating physician Jonathan Kohan, M.D., who noted a previous lumbar spine surgery, as well as history of depression, anxiety, and insomnia. (Ex. 2, Report of Jonathan Kohan, M.D., June 13, 2022, at p. 1.)

On June 15, 2022, the parties undertook the deposition of Renee Rinaldi, M.D., who had previously evaluated applicant and authored a report in the specialty of rheumatology. (Ex. 1, Transcript of the deposition of Renee Rinaldi, M.D., June 15, 2022, at p. 5:14.)

On August 25, 2022, applicant filed an Amended Application for Adjudication, alleging injury to the psyche, and in the form of depression and anxiety.

On February 6, 2023, the parties proceeded to trial on the issues of applicant's Petition to Reopen for New and Further Disability, and whether applicant was entitled to a Qualified Medical Evaluator (QME) in psychiatry/psychology and the need to develop the record. (Minutes of Hearing (Minutes), February 6, 2023, at p. 2:12.)

On April 11, 2023, the WCJ issued the F&O, determining that "applicant is not entitled to an evaluation in psychology." (F&O, Finding of Fact No. 2.) The Opinion on Decision observed:

> Applicant's Petition for New and Further Disability does not include a specific allegation of fibromyalgia; however, based on the deposition of Dr. Rinaldi (Applicant Exhibit 1 page 13 lines 7-13), this is the basis for the need of a psychological examination of the Applicant. There is no empirical medical evidence finding the Applicant is suffering from fibromyalgia and/or that this

> condition is a result of her specific injury to her spine, upper extremities, neck, or shoulders. There are no medical reports which timely link the Applicant's claim of fibromyalgia to the stipulated body parts per the Stipulated Award of 41% to the neck, back, and shoulder. Thus, the Applicant is not entitled to a psychological examination.
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> (F&O, Opinion on Decision, pp. 1-2.)

Applicant's Petition for Reconsideration (Petition) contends that Dr. Rinaldi's deposition testimony establishes that applicant sustained injury in the form of fibromyalgia, and that a psychiatric evaluation is medically appropriate.

Defendant's Answer responds that applicant did not include a specific allegation of fibromyalgia/rheumatology in the Petition for New and Further Disability. Defendant also avers applicant improperly attached documents to her Petition that were not being offered on the grounds of newly discovered evidence. (Answer, at p. 4:7.) The answer also observes that the evidentiary record does not contain medical reports establishing a diagnosis of fibromyalgia. (*Id.* at p. 3:14.)

DISCUSSION

Labor Code section 5410 confers on the Workers' Compensation Appeals Board continuing jurisdiction over a prior award when a timely petition is filed within five years of the date of injury.[1] The section provides:

> Nothing in this chapter shall bar the right of any injured worker to institute proceedings for the collection of compensation within five years after the date of the injury upon the ground that the original injury has caused new and further disability. The jurisdiction of the appeals board in these cases shall be a continuing jurisdiction within this period. This section does not extend the limitation provided in Section 5407.
>
> (Lab. Code, § 5410.)

However, for an applicant to recover additional temporary or permanent disability benefits, he or she must not only have filed a petition to reopen within five years from the date of injury, but must also have suffered a "new and further disability" within that five-year period, unless there is otherwise "good cause" to reopen the prior award. An injured worker therefore cannot confer jurisdiction on the Board by filing a petition to reopen an award before the five-year period has

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

expired for anticipated new and further disability to occur thereafter. (*Sarabi v. Workers' Comp. Appeals Bd.* (2007) 151 Cal.App.4th 920, 926, [72 Cal.Comp.Cases 778] (*Sarabi*); *Nicky Blair's Rest. v. Workers' Comp. Appeals Bd.* (1980) 109 Cal.App.3d 941 [45 Cal.Comp.Cases 876].)

In *Sarabi*, *supra*, applicant sustained right shoulder injury on August 28, 1999, resulting in findings and award issuing December 15, 2000. Applicant underwent an additional right shoulder surgery on January 18, 2002, and filed a November 15, 2002 petition to reopen alleging a "change in condition had resulted in further periods of temporary disability." (*Id.* at p. *922.)* On May 26, 2004*,* applicant's orthopedic surgeon stated applicant was temporarily disabled and needed further right shoulder surgery, and that the physician had repeatedly requested that this surgery take place. On August 17, 2004, the orthopedic agreed medical examiner reported applicant required right shoulder surgery and temporary total disability. The surgery was postponed several times to allow applicant to treat for nonindustrial conditions before he could be medically cleared for surgery. (*Id*. at p. 923.) A subsequent dispute arose as to whether the continuing jurisdiction of the Appeals Board was timely invoked. The Court of Appeal held that applicant's timely filing of a petition to reopen, along with the need for additional surgery in 2004 was sufficient to invoke the Board's continuing jurisdiction. The court held:

> """[N]ew and further disability" has been defined to mean disability… result[ing] from some demonstrable change in an employee's condition…' [citation]," including a "'gradual increase in disability.'" (*Nicky Blair's Restaurant v. Workers' Comp. Appeals Bd.* (1980) 109 Cal.App.3d 941, 955 [167 Cal. Rptr. 516].) """Historically, a change in physical condition necessitating further medical treatment ha[s] been considered new and further disability…[Citation.]" Thus, "[c]ommonly, new and further disability refers to a recurrence of temporary disability, *a new need for medical treatment*, or the change of a temporary disability into a permanent disability." [Citation.]'"
> …
> [T]he need for surgery was clear as early as May 26, 2004, when Dr. McCarthy made his recommendation for right shoulder surgery, or at the latest by August 17, 2004, when Dr. Edington opined that Sarabi had a TTD and needed right shoulder surgery. Because Sarabi's disability worsened and further medical treatment in the form of right shoulder surgery became necessary within the five-year period, Sarabi suffered "new and further disability" within the meaning of section 5410 and the Board had jurisdiction to award him additional TTD benefits.
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> (*Sarabi*, *supra*, at p. 926.)

More recently, the Court of Appeal in *Applied Materials v. Workers' Comp. Appeals Bd.* (*Chadburn*) (2021) 64 Cal.App.5th 1042 [86 Cal.Comp.Cases 331] (*Applied Materials*), defined new and further disability as "disability resulting from some demonstrable change in the employee's condition, including a gradual increase in disability, a recurrence of TD, a new need for medical treatment, or the change of a temporary disability into a permanent disability." (*Id.* at p. 1080.) In *Applied Materials*, *supra*, the applicant sustained injury to her neck and right arm on November 27, 2001. The applicant settled her claim in 2005 by way of stipulated Award. (*Id.* at p. 1054.) Applicant then filed a timely petition to reopen for new and further disability in October, 2006. When the parties eventually appeared for trial in 2017, defendant contended that the applicant had not suffered new and further disability "because her alleged new and further disability arose more than five years after November 27, 2001, the date of injury for its claim." (*Id*. at p. 1080.) Defendant asserted the reports of the orthopedic AME and QME found no evidence of any new and further disability due to applicant's 2001 injury. However, the Court of Appeal rejected this argument, noting that the applicant's *treatment* for injury to her psyche, including evaluations with at least eight doctors between May, 2005 and November, 2006 "satisfied the definition of new and further disability in *Sarabi*." (*Id*. at p. 1081.)

Applying these principles to the present matter, the salient question becomes whether applicant's alleged fibromyalgia and psychiatric sequelae resulted in a demonstrable change in the employee's condition, including a gradual increase in disability, a recurrence of TD, a new need for medical treatment, or the change of a temporary disability into a permanent disability." (*Applied Materials, supra*, at p. 1080.)

Here, the F&O determined that applicant's Petition for New and Further Disability did not include a specific allegation of fibromyalgia, and that the need for a psychiatric evaluation was based on the opinions of evaluating rheumatologist Dr. Rinaldi. (F&O, Opinion on Decision, p. 1.) However, the record contains no medical reporting establishing a specific diagnosis in rheumatology. As the WCJ observed, "there are no medical reports which timely link applicant's claim of fibromyalgia to the stipulated body parts per the Stipulated Award of 41% to the neck, back, and shoulder." (F&O, Opinion on Decision, p. 2.)

We acknowledge that decisions of the Appeals Board "must be based on admitted evidence in the record. (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc).) However, the WCJ and the Appeals Board have a duty to further develop the record

where there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) The Appeals Board has a constitutional mandate to "ensure substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) "It is well established that the WCJ or the Board may not leave undeveloped matters which its acquired specialized knowledge should identify as requiring further evidence." (*Id.* at p. 404; *Garza v. Workers' Comp. App. Bd.* (1970) 3 Cal.3d 312, 318 [35 Cal.Comp.Cases 500].)

Following our review of the record, we are persuaded that development of the record is appropriate and warranted. Dr. Rinaldi acknowledges at the outset of her deposition testimony that she has previously evaluated applicant, and authored a report with respect to applicant's claim. (Ex. 1, Transcript of the deposition of Renee Rinaldi, M.D., June 15, 2022, at p. 5:14.) However, the report is not in evidence.

In addition, secondary treating physician Jonathan Kohan, M.D. notes in his June 13, 2022 report that applicant has a history of depression, anxiety and insomnia, treated with medication, and a current clinical impression of depression, anxiety, and insomnia. (Ex. 2, Report of Jonathan Kohan, M.D., dated June 13, 2022, at pp. 1-2.) Taken together, we believe that the deposition testimony of Dr. Rinaldi and the medical reporting of Dr. Kohan establish that further evidence is necessary to a full adjudication of the issues presented.

The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) In our en banc decision in *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 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*, at p. 141.) The preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. (*Ibid*.)

We therefore conclude that the record must be developed to address the issue of whether applicant has incurred disability that is both new and further, within five years of the date of injury. Upon return of this matter to the trial level, we suggest that the record be developed to facilitate the WCJ's review of all relevant medical and medical-legal reporting, including the reporting of Dr. Rinaldi, as well as applicant's primary and secondary treating physicians. Additionally, the testimony of applicant may prove germane to the inquiry. Once the record has been developed, the parties and, if necessary, the WCJ, may determine whether applicant has met the requirements for continuing jurisdiction under section 5410 and the standards set forth in *Applied Materials, supra,* and *Sarabi, supra,* of a demonstrable change in condition, including a new need for medical treatment, occurring within five years of the date of injury.

In the interim, we observe that section 4600 makes an employer liable for all "medical, surgical, chiropractic, acupuncture, and hospital treatment . . . that is reasonably required to cure or relieve from the effects of the injury . . . ." (Lab. Code, § 4600; see also, *Barnes v. Workers' Comp. Appeals Bd.* (2000) 23 Cal.4th 679, 685 [65 Cal.Comp.Cases 780, 784] ["open-ended liability for medical treatment [is] consistent with section 4600's mandate to employers to pay for medical treatment 'to cure or relieve' the effects of an industrial injury"]; *Granado v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 399, 406 [33 Cal.Comp.Cases 647, 652] ["So long as the treatment is reasonably required to cure or relieve from the effects of the industrial injury, the employer is required to provide the treatment"].) Indeed, an employer will even be liable for the cost of treatment for a non-industrial condition, if that treatment is reasonably required to cure or relieve the effects of the industrial injury. (Lab. Code, § 4600; *Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (*Bolton*) (1983) 34 Cal.3d 159, 165-166 [48 Cal.Comp.Cases 566, 570]; *Granado, supra*, at pp. 405-406.)

In addition, we observe that the defendant has a regulatory duty to conduct a reasonable and good faith investigation to determine whether benefits are due. Division of Workers' Compensation (DWC) Rule 10109 requires the claims administrator to conduct a "reasonable and timely investigation upon receiving notice or knowledge of an injury or claim for a workers' compensation benefit," and further provides that the investigation "must attempt to obtain the information needed to determine and timely provide each benefit, if any, which may be due the employee." (Cal. Code Regs., tit. 8, § 10109.)

Accordingly, we will rescind the F&O, and return the matter to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the April 11, 2023 Findings and Order is **RESCINDED** and the matter is **RETURNED** to the WCJ to conduct further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 30, 2023

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

ELLA YEGHIAZARYAN
LEVIN & NALBANDYAN
COLEMAN CHAVEZ & ASSOCIATES

SAR/abs

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