WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DEXTER NITTA, *Applicant*

vs.

RALPHS GROCERY COMPANY, Permissibly Self-Insured;
SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants*

Adjudication Numbers: ADJ3459081 (LAO 0822105); ADJ183911 (LAO 0822102); ADJ3352607 (LAO 0822104); ADJ477044 (LAO 0825294); ADJ3699308 (LAO 0822103)
Los Angeles District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant Ralphs Grocery Company, permissibly self-insured, seeks reconsideration of the Findings and Award and Order, issued January 6, 2021, wherein a workers' compensation administrative law judge (WCJ) found that applicant, Dexter Nitta, sustained permanent total disability as a result of five industrial injuries he sustained while employed as a produce manager. By a prior Findings and Award, issued June 12, 2020, applicant was found to have sustained an industrial cumulative trauma injury over the period 1991 to February 6, 2002, in the form of chronic pain and fibromyalgia, in addition to admitted injuries to his bilateral shoulders, lumbar spine, cervical spine, bilateral knees, bilateral upper extremities, psyche, hypertension. He was also found to have sustained admitted injuries to his right knee on June 7, 1991, to his back on January 6, 1999, to his right knee on August 3, 1999, and to his left shoulder and throat on December 23, 2001. In the challenged Findings and Award and Order, the WCJ made permanent disability and apportionment findings with regard to applicant's lumbar spine, cervical spine and hypertension, before finding applicant is totally disabled and unable to compete in the open labor market, and is non-feasible for vocational rehabilitation services. Applicant was awarded indemnity at the rate of $507.16 per week for life, based on the parties' stipulation, less attorney fees and credit for sums paid.

Defendant contests the award of 100% permanent disability, contending that the final award is subject to apportionment per Labor Code section 4664(b), for applicant's prior 16% permanent disability award for a 1997 injury to his lumbar spine. Next, defendant contends the award of benefits at the rate of $507.16 per week, to which the parties had stipulated at the hearing on January 22, 2020, was in error as it was above the statutory rate. Defendant further contends that the WCJ failed to adequately explain his consideration of Dr. Bluestone's finding that applicant did not have fibromyalgia, as he had indicated he would at the time of the March 11, 2020 hearing. Next, defendant argues that applicant cannot be found to be permanently totally disabled due to his fibromyalgia, as Dr. Berman, the Agreed Medical Examiner in orthopedics, did not find him permanently totally disabled on an orthopedic basis. Defendant next contends the WCJ erred in relying upon the rheumatology opinion of Dr. Salick, as his 2010 report is old and Dr. Salick did not review subsequent medical reports. Finally, defendant contends the WCJ erred in relying upon applicant's vocational expert to find applicant is not feasible for vocational rehabilitation, rather than on the report of defendant's vocational expert, where there is evidence that applicant participated in a 3 month vocational rehabilitation program in 2005. Defendant seeks to reopen the record to further investigate this rehabilitation program.

We have reviewed applicant's Answer to the Petition for Reconsideration. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

At the outset, we note that the Appeals Board has 60 days from the filing of a Petition for Reconsideration to act on that petition. (Lab. Code §5909.) Here, however, through no fault of defendant, the timely-filed petition did not come to the attention of the Appeals Board until July 2, 2021, after expiration of the statutory time period. Consistent with fundamental principles of due process, we are persuaded, under these circumstances, that the running of the 60-day statutory period for reviewing and acting upon a timely filed Petition for Reconsideration begins no earlier that the Board's actual notice of the petition. (See *Shipley v. Workers' Comp. Appeals Bd*. (1992) 7 Cal.App.4th 1104, 1107-1108 [57 Cal.Comp.Cases 493]; *State Farm Fire and Casualty v. Workers' Comp. Appeals Bd*. (*Felts*) (1981 119 Cal.App.3d 193 [146 Cal.Comp.Cases 622, 624].) Therefore, we will consider the Petition for Reconsideration on its merits.

We have considered the allegations and arguments of the Petition for Reconsideration, as well as the answer thereto, and have reviewed the record in this matter and the WCJ's Report and

Recommendation on Petition for Reconsideration of February 25, 2021, which considers, and responds to, each of the defendant's contentions. Based upon our review of the record, and for the reasons stated in the WCJ's Report, which we adopt and incorporate as the decision of the Board, except for the first paragraph in Section II, we will affirm the WCJ's Findings and Award and Order, and deny the Petition for Reconsideration.

With regard to defendant's contention that the WCJ erred in awarding indemnity at the rate of $507.16 per week, we note that at the hearing on January 22, 2020, the parties stipulated that at the time of injury, applicant's earnings warranted an indemnity rate of $507.16 for temporary disability. Prior to entering into the trial stipulations, the parties prepared a pre-trial conference statement on September 23, 2019, in which they raised an issue as to applicant's earnings. Defendant has not proffered an explanation sufficient for it to be relieved of its stipulation, as the parties chose to enter into this stipulation to narrow the issues to be litigated and remove the issue of the rate of indemnity from contention. (See *County of Sacramento v. Workers' Comp. Appeals Bd*. (*Weatherall*) (2001) 65 Cal.Comp.Cases 1. A showing of good cause required to be relieved of stipulation.)

Additionally, we see no error in the WCJ's exercise of his discretion to rely upon the opinion of Dr. Salick to find applicant's fibromyalgia has resulted in permanent total disability and an inability to compete in the open labor market. It is well settled that the WCJ as the trier of fact has the power to choose from among conflicting medical reports, those which he deems most appropriate (*Jones* v. *Workers' Comp. Appeals Bd.* (1968) 86 Cal.2d 476 [33 Cal.Comp.Cases 221]), and the relevant and considered opinion of one doctor may constitute substantial evidence even though inconsistent with other reports in the record. (*Place* v. *Workers' Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378 [35 Cal.Comp.Cases 525]; *Smith* v. *Workers' Comp. Appeals Bd.* (1969) 71 Cal.2d 588, 592 [34 Cal.Comp.Cases 424]; *Patterson* v. *Workers' Comp. Appeals Bd.* (1975) 53 Cal.App.3d 916, 921 [40 Cal.Comp.Cases 799].)

Defendant did not avail itself of the opportunity to seek additional reporting from Dr. Salick, or obtain his deposition testimony, to clarify or challenge his opinion regarding the effect applicant's fibromyalgia has on his ability to return to competitive employment. Also, defendant cannot now challenge the WCJ's finding that applicant's fibromyalgia arose out of and in the course of his employment, by raising a dispute that the WCJ did not justify his reliance upon Dr. Salick's opinion versus that of Dr. Bluestone. The finding that applicant's fibromyalgia is

industrial was made in the June 12, 2020 Findings and Award, and defendant did not seek reconsideration from that award.

Finally, defendant argues that applicant's vocational evidence was insufficient to establish that applicant is not amenable to vocational rehabilitation since Mr. Vega, applicant's vocational expert, indicated that applicant participated in a vocational rehabilitation program in 2005. Defendant's contention that the record should be further developed to determine whether applicant is feasible for vocational rehabilitation is not timely given that defendant was not diligent in pursuing this issue. We note that defendant did not address this issue at trial and did not question applicant about Mr. Vega's report, wherein Mr. Vega noted that applicant attempted, but was not able to complete, the vocational rehabilitation program.

Accordingly, we will affirm the WCJ's determination and will deny defendant's Petition for Reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings and Award and Order, issued January 6, 2021 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 30, 2021

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

DEXTER NITTA
GRAIWER & KAPLAN
MICHAEL SULLIVAN & ASSOCIATES

SV/*pc*

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

According to the stipulations of the parties, as shown in the Minutes of Hearing and Summary of Evidence for January 22, 2020, in ADJ477044 (LAO-0825924) the applicant, Dexter Nitta, who is 70 years old, did sustain injury at work from 1991 to February 6, 2002 while employed as a produce clerk. In this injury, the applicant did sustain injury to right shoulder, left shoulder lumbar spine, cervical spine, right knee, left knee, psyche, hypertension, bilateral upper extremities, chronic pain and fibromyalgia. The information in EAMS did not explain how this injury happened.

According to the stipulations of the parties at the hearing on January 22, 2020, in case ADJ3459081 (LAO-822105) the applicant did sustain injury at work on December 23, 2001 while employed as a produce clerk. In this injury, the applicant did sustain injury to left shoulder and throat. According to the applicant's testimony on March 11, 2020, he developed problems in his throat as a result of being given anesthesia for the shoulder surgery.

According to the stipulations of the parties at the hearing on January 22, 2020, in case ADJ3352607 (LAO-822104) the applicant did sustain injury at work on August 3, 1999 while employed as a produce clerk. In this injury, the applicant did sustain injury to his right knee. The information in EAMS did not explain how this injury happened.

According to the stipulations of the parties at the hearing on January 22, 2020, in case ADJ3699308 (LAO-822103) the applicant did sustain injury at work on June 7, 1991 while employed as a produce clerk. In this injury, the applicant did sustain injury to his back. The information in EAMS did not explain how this injury happened.

According to the stipulations of the parties at the hearing on January 22, 2020, in case ADJ 183911 (LAO-822102) the applicant did sustain injury at work on June 7, 1991 while employed as a produce clerk. In this injury, the applicant did sustain injury to his right knee. The information in EAMS did not explain how this injury happened.

On January 6, 2021, the court issued a Findings and Award which at Finding 9 found that the applicant's injuries caused a combined permanent disability of 100%.

On January 29, 2021, the defendant filed a timely Petition for Reconsideration. According to the petition, the applicant sustained an injury to his lumbar spine on March 14, 1997, and that injury claim was resolved on 12/2/1998 for 16% permanent disability. The petition for reconsideration contends that assuming the applicant is totally disabled, the permanent disability award of 100%.should be reduced to 84% after subtraction.

According to the Petition for Reconsideration, the parties stipulated that the applicant had an average weekly wage of $760.74, resulting in a temporary rate of $507.16. According to the petition, the applicant stopped working in February 2002, and the applicant cannot be awarded a higher rate than $490.00 per week. According to the petition, this would apply to permanent disability payments at the TD rate.

According to the petition for reconsideration, Dr. Bluestone did not diagnose the applicant has having fibromyalgia. The petition asks that the cases be remanded back to the trial level with instructions for the WCJ to analyze, discuss and compare the opinions of Dr. Bluestone versus Dr. Salick.

According to the petition for reconsideration AME Jeff Berman, after reviewing sub rosa footage, stated that from an orthopedic perspective, the surveillance footage would not suggest that the applicant is permanently and totally disabled. The petition contends that it was error for the WCJ to find applicant totally disabled based on Dr. Salick's opinion as a consulting physician versus Dr. Berman's opinion as the Agreed Medical Examiner in Orthopedics.

According to the petition for reconsideration, the court should not have relied on the medical report of Dr. Allen Salick, dated July 21, 2010 because the report is over 10 years old and there has been a plethora of medical reporting since Dr. Salick's report was generated, and Dr. Salick has not reviewed those reports. According to the petition, if the applicant is 100% disabled, 16% should be deducted for the prior disability.

The Petition for Reconsideration questions whether or not the court should have relied on the opinions of applicant's vocational evaluator, Enrique Vega. According to the petition, Mr. Vega's report makes reference to a non-industrial left hand injury, which the petition states is detrimental to the applicant's ongoing functioning. The petition states that the defendant is not responsible for this detriment as this injury was entirely non-industrial. The petition also states that the applicant successfully completed a vocational rehabilitation plan. According to the petition, Mr. Vega's report is incomplete absent a reading of the documentation regarding applicant's

successful rehabilitation in 2005, and Mr. Vega's conclusionary holding on page 19 of his report that there is no apportionment cannot be allowed to stand as substantial evidence.

The Petition for Reconsideration suggests that the court should not have relied on the opinions of applicant's vocational evaluator, Enrique Vega, but on the opinions submitted by defendant's expert, Kelly Winn. According to the petition, Ms. Wynn on page 31 of her 9/22/17 report states that the applicant's work restrictions do not preclude him from vocational retraining or return to the open labor market.

II
DISCUSSION

The weekly rate at which the applicant should be paid permanent disability benefits is $507.16, and not $490.00 as the Petition for Reconsideration contends. $490.00 per week would have been the amount payable to the applicant had the defendant paid the applicant permanent total disability benefits in 2002. For permanent total disability benefits paid to the applicant after 2002, the amount payable to the applicant would be $507.16 per week. $507.16 is the temporary disability rate payable to the applicant based on earnings of $706.74 per week. $507.16 per week is also the amount payable to the applicant for permanent total disability benefits. The permanent total disability benefits are payable based on the time the benefits are paid, and not based on the date of injury. The benefit rate is higher now than it was in 2002, and the applicant should be paid at the higher rate, which is now $507.16 per week.

As the Petition for Reconsideration indicates, orthopedic AME Jeffrey A. Berman reviewed subrosa film of the applicant, and concluded the surveillance footage would not, from an orthopedic perspective, suggest that the applicant is permanently and totally disabled.

If the applicant is not totally and permanently disabled from an orthopedic perspective, then he is permanently and totally disabled from a rheumatological perspective because the medical report of Allen I. Salick, M.D., a rheumatologist, dated July 21, 2010 (Exhibit 2) at page 25, states that the applicant is totally disabled and unable to compete in the open labor market. The Petition for Reconsideration, at page 8, referred to Dr. Salick as a rheumatologist. The court relied on the opinions of Dr. Salick in finding that the applicant has a combined permanent disability of 100%.

The court issued a combined permanent disability award because Dr. Salick at page 29 of his report stated that 100% of the fibromyalgia disability is industrial, and did not apportion out disability or causation among the various injuries.

As Exhibit K shows, the applicant received a prior stipulated permanent disability of 16% for permanent disability to lower back. According to the Petition for Reconsideration, if the applicant receives a permanent disability of 100%, the award should be reduced to 84% to account for the prior award of 16% permanent disability.

This was not done in these cases because, in order to account for the prior award, it would be necessary to know what percentage of the fibromyalgia was attributable to the applicant's orthopedic limitations. This information is not available because Dr. Salick in his medical report at page 25 simply stated that the objective factors of disability are the tender points of Fibromyalgia.

It would not be appropriate at this point to review the medical evidence, especially the medical reports of Dr. Bluestone vis-a-vis the opinions of Dr. Salick, as the Petition for Reconsideration suggests be done, in order to determine whether or not the applicant has fibromyalgia because the Findings and Award dated June 12, 2020 found at finding 1 that the applicant in the injury from 1991 to February 6, 2002 (ADJ477044; LAO-0825924) did sustain injury to chronic pain and fibromyalgia. As the Applicant's Answer to Petition for Reconsideration, dated February 5, 2021, points out at page 5, line 25, of the answer, neither party filed a Petition for Reconsideration of the June 12, 2020 Findings and Award.

According to the report of Access Employment Network, dated March, 15, 2009 (Exhibit 1), and signed by Enrique Vega, M.S., at page 2, the applicant is non-feasible for vocational rehabilitation services. The court relied on that opinion to find in the Findings and Award and Order, dated January 6, 2021, at finding 8 that the applicant is non-feasible for vocational rehabilitation services. The Petition for Reconsideration questions why the court relied on the opinions of applicant's vocational evaluator, Enrique Vega, and not the opinions of defendant's expert, Kelly Winn, who concluded that the applicant is vocationally feasible. The Petition for Reconsideration also states that the applicant completed a vocational rehabilitation program in 2005, and that the records from the vocational rehabilitation program should be reviewed before any determination of non-feasibility is entered. The Petition for Reconsideration states at page 12 that Ms. Wynn noted that the applicant indicated his left hand has a partial amputation due to the

use of a power tool three years ago. According to the Petition for Reconsideration, the partial amputation is detrimental to his ongoing functioning, and the defendant is not responsible for this detriment as this injury was entirely non-industrial.

In the Minutes of Hearing and Summary of Evidence for March 11, 2020, at pages 2 and 3, the applicant testified that he is not capable of working and that about 2006 Social Security determined that he is totally disabled .

The report of Kelly Winn date July 15, 2019 (Exhibit I) at page 2 stated that the applicant's work restrictions do not preclude him from vocational retraining or return to work. Those statements made by Ms. Wynn conflict with the testimony of the applicant that he is not capable of working and that Social Security determined that he is totally disabled.

The report by Enrique Vega (Exhibit 1) at page 2, states that the applicant is non-feasible for vocational rehabilitation services. The report at the bottom of page 16 states that he (meaning the applicant) is totally disabled. Those statements made by Mr. Vega are not in conflict with the applicant's testimony, and in the court's opinion, the opinions of Enrique Vega, M.S. should be relied on rather than the opinions of Ms. Wynn.

The applicant also testified that he worked until February 6, 2002, and that he injured his hand on a power saw after he stopped working while shimming a door.

If the applicant completed a vocational rehabilitation program in 2005, it apparently did not lead to gainful employment because the applicant apparently last worked in 2002, so the completion of a vocational rehabilitation by the applicant is not necessarily an indication that he is capable of working.

If the applicant had a left hand injury while doing a non-work activity, it might mean the applicant is not capable of working successfully in a work environment.

The injury to the applicant's left hand apparently happened after the applicant had left his employment, and the applicant may have been 100% disabled prior to the left hand injury, so it is not clear to what extent the left hand injury may have contributed to the applicant's total disability.

III

RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration filed on January 29, 2021 (and also dated January 29, 2021) be denied.

DATE: 2/25/2021
Kacey Keating
WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE