WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ROXANNE HEISINGER, *Applicant*

vs.

WATSONVILLE COMMUNITY HOSPITAL; ACE AMERICAN INSURANCE COMPANY, administered by GALLAGHER BASSETT, *Defendants*

Adjudication Number: ADJ10356941
Salinas District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

Preliminarily, we note that a petition is generally considered denied by operation of law if the Appeals Board does not grant the petition within 60 days after it is filed. (Lab. Code, § 5909.) However, we believe that "it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice …." (*Shipley v. Workers' Comp. Appeals Bd*. (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493].) In *Shipley*, the Appeals Board denied the applicant's petition for reconsideration because it had not acted on the petition within the statutory time limits of Labor Code section 5909. This occurred because the Appeals Board had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board's decision holding that the time to act on applicant's petition was tolled during the period that the file was misplaced. (*Shipley, supra*, 7 Cal.App.4th at p. 1108.) Like the Court in *Shipley*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Shipley, supra*, 7 Cal.App.4th at p. 1108.)

In this case, the Appeals Board failed to act on defendant's timely petition within 60 days of its filing on May 14, 2021, through no fault of defendant. Therefore, considering that the

Appeals Board's failure to act on the petition was in error, we find that our time to act on defendant's Petition for Reconsideration was tolled. While we find our time to act on defendant's petition tolled, we deny reconsideration on the merits for the reasons stated below and in the Report.

The WCJ properly relied upon the opinion of the agreed medical evaluator (AME), who the parties presumably chose because of the AME's expertise and neutrality. The WCJ was presented with no good reason to find the AME's opinion unpersuasive, and we also find none. (See *Power v. Workers' Comp. Appeals Bd*. (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114].)

Moreover, we have given the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witnesses. (*Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determinations. (*Id*.)

Defendant's Petition for Reconsideration fails to cite with specificity to the record. WCAB Rule 10945(a) provides, in relevant part: "Every petition for reconsideration … shall fairly state all of the material evidence relative to the point or points at issue … [and] shall support its evidentiary statements by specific references to the record." (Cal. Code Regs., tit. 8, former § 10842, now § 10945 (eff. Jan. 1, 2020), emphasis added.) Rule 10945(b) then goes on to specify in detail how references to the record must be made. Defendant failed to comply with these requirements of Rule 10945. For example, defendant asserts, "The applicant's activity level is reflective of Dr. Anderson's finding of no atrophy, normal objective findings, and no loss of muscle tone." (Petition for Reconsideration, at p. 6:26-27.) However, this assertion is made without sufficient specific references to the record and a review of Dr. Anderson's reports and deposition reveal many abnormal objective findings which defendant failed to address.

The requirements of Rule 10945 regarding specific references to the record are consistent with case law regarding proper citation to the record in appellate proceedings. (*Flores v. Cal. Dept. of Corrections and Rehab*. (2014) 224 Cal.App.4th 199, 204 ("an appellant must do more than assert error and leave it to the appellate court to search the record … to test his claim"); *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 287 ("[r]ather than scour the record unguided, we may decide that the appellant has waived a point urged on appeal when it is not

supported by accurate citations to the record"); *Salas v. Cal. Dept. of Transp*. (2011) 198 Cal.App.4th 1058, 1074 ("[w]e are not required to search the record to ascertain whether it contains support for [plaintiffs'] contentions"); *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246 ("[t]he appellate court is not required to search the record on its own seeking error" and "[i]f a party fails to support an argument with the necessary citations to the record, … the argument [will be] deemed to have been waived"); *Nielsen v. Workers' Comp. Appeals Bd.* (1985) 164 Cal.App.3d 918, 923 [50 Cal.Comp.Cases 104] ("Instead of a fair and sincere effort to show that the trial court was wrong, appellants brief … is an attempt to place upon the court the burden of discovering without assistance from appellant any weakness … . An appellant is not permitted to evade or shift his responsibility in this manner").)

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 18, 2021

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

ROXANNE HEISINGER
WILSON & WISLER, LLP
DOMINGO ELIAS & VU

PAG/ara

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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REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

Defendant has filed a timely, verified Petition for Reconsideration from the Findings & Award of April 27, 2021, wherein it was found, inter alia, that the employee's industrial injury caused permanent total disability. Defendant argues that the finding of permanent total disability is not based on substantial evidence, citing in particular the reports and deposition of the Agreed Medical Examiner and the report of applicant's vocational expert, Scott Simon. The Petition for Reconsideration is without merit and should be denied.

II
STATEMENT OF MATERIAL FACTS

Roxanne Heisinger was employed during the period 6/15/01 through 3/30/16 as a nurse by Watsonville Community Hospital, when she sustained injury arising out of and occurring in the course of her employment to her thoracic spine, lumbar spine, bilateral shoulders, and bilateral hands (carpal tunnel syndrome); and to her bilateral lower extremities (planter fasciitis).

At the trial on 3/11/21, Applicant credibly testified (MOH/SOE 3/11/21, pp. 4-9) that she developed symptoms in her feet and back in the course of her work that progressively worsened over time, to the point that her leg stopped functioning. She takes narcotic pain medication, which makes her groggy, forgetful, and hard to engage in conversation. The pain medications help with functioning but do not correct her functioning fully. She can only sit still five to ten minutes in a chair or up to 15 minutes, depending on the type of chair she uses. She has to keep changing position due to discomfort and spasm. On her best day, she will spend 80 percent of her day in her recliner and on her worst day, she will spend the entire day in the recliner.

She would not be able to spend up to 16-hour shifts at work without needing to be in her recliner more. She describes the problem in her leg as a temporary paralysis, in which her leg does not hold her up, and to avoid falling, she has to use a cane, a service dog or her husband's arm to support her. Her problem with stumbling and falling began sometime during the 2015 to 2016 time frame before she stopped working and is now increasing in frequency.

The service dog was prescribed by Dr. Cluff. She will walk the dog, using a leash, but only for five minutes to 15 minutes, depending on how her day is going, and her husband is with her most of the time while she walks the dog. She also uses the cane while holding onto the leash and walks generally on a level surface in her neighborhood.

She had to acquire a vehicle equipped with special safety features in order to drive. On longer trips, she uses her TENS unit and has stop once an hour in order to move around and relieve her back pain and other problems with her body.

She can only shower twice a week because of pain, and she makes sure someone else is nearby, in case she falls. She no longer does housekeeping and has hired a housekeeper.

She believes there are problems that she did not describe to Dr. Anderson. She did not tell Dr. Anderson about having to use her husband's arm while walking, but she believes she did tell Dr. Anderson about her past golfing activity and about riding her motorcycle, which she no longer does. She also told Dr. Anderson about her participation in "Wings of Safety." Applicant is a certified instructor for Wings of Safety, but she has not actually done it for years.

Applicant owns a Harley-Davidson motorcycle and for a while after she stopped working, she would occasionally ride it to the gas station to put air in the tires. She is able to ride her motorcycle if she has help with the kickstand. Her husband has taken over the cleaning and maintenance of the motorcycle. She used a TENS unit whenever she rode on the motorcycle.

It has been years since she has been on a golf course since stopping work in 2016. She would use a golf cart and use a club for chipping and putting.

Applicant has a home exercise program that she does now. She lies down on the floor and puts her legs on the wall to stretch her low back. She walks up and down stairs at home and walks her service dog. She does go to the grocery store and uses an electric cart at Costco, but uses a regular cart at the grocery store.

She rarely uses alcohol (Ibid, p. 8)

Applicant's husband, Harold Heisinger, confirmed (Ibid, p.10) that his wife developed lower extremity and back problems with walking and standing at work, which got worse over time. She has issues with mental clarity. Her speech has slowed down over the last couple of years and she takes a long time to get her words out. She is not able to do the things they used to do together. She cannot do most anything for herself. He brings meals to her in her recliner that he mostly prepares himself, and he has to support her when she walks to prevent her falling.

Dr. Mark Anderson, the Agreed Medical Examiner, concluded that, by reason of Applicant's need to spend 80-90% of her day in a recliner, coupled with her need to use strong narcotic medication to control her pain, she was totally disabled for work in the open labor market, all due to cumulative trauma from her work with Watsonville Community Hospital (Anderson report, 12/29/19, Ex. J-4). In the same report, he stated that she no longer rides her motorcycle and no longer rides along with friends when they play golf, due to her chronic pain and depression. On pages 5 and 6, Dr. Anderson detailed Applicant's complaints, discussing her abilities and limitations, her problems falling down, her breathing problems, and her problems in activities of daily living. He noted Applicant tries to walk for 15 minutes, two or three times a week and tries to use a pedal-assisted bicycle once a month, to go around the block. Once a week, she goes grocery shopping, limiting her lifting to 5-7 lbs.

He considered the specific event in September of 2015, which he called a "lifting incident," to be part of the cumulative trauma injury, rather than a significant injury to be dealt with separately. In his 10/30/2020 deposition (Ex. J-5), he said that continued use by Applicant of narcotic medication

would be up to her treating physician but that in his opinion, absent a change in the underlying reason for Applicant's pain, changing her medication would not be reasonable (p. 12 et seq.).

Applicant's vocational expert, Scott Simon, reported the results of his evaluation on 5/14/2020 (Ex. A-1). He found that Applicant was not amenable to vocational rehabilitation, based on the findings of Dr. Anderson, on Applicant's physical tolerances and on the impact of the injury on activities of daily living (Ibid, pp. 6-8). In his final summary (p. 30), he agreed with Dr. Anderson that the injury rendered Applicant totally disabled in the open labor market. There was no evaluation by a defense vocational expert.

III
DISCUSSION

I found Applicant and her husband to be very credible witnesses [*Garza v. WCAB* (1970) 355 CCC 500], and based on their testimony, on AME Anderson's opinion, and on Scott Simon's conclusions, I find that the evidence strongly supports a finding that Applicant has rebutted the Permanent Disability Rating Schedule and has proven that she is permanently totally disabled as a result of cumulative trauma from her work with this employer [*Ogilvie v. WCAB* (2011) 76 CCC 624]. She is not amenable to vocational rehabilitation, and her total loss of employability has reduced her earning capacity to a degree not contemplated by the PDRS [*Contra Costa County v. WCAB (Dahl)* (2015) 80 CCC 1119].

Petitioner's arguments to the contrary have no merit. I find Dr. Anderson's opinions to be reasonable, credible and of solid value and, thus, to constitute substantial medical evidence. *Braewood Convalescent Hospital v. WCAB (Bolton)* (1983) 48 CCC 566. Dr. Anderson examined Applicant three times as the AME and provided the parties with multiple reports. He also submitted to a deposition at the request of defense counsel, whose questioning was as much about the doctor's qualifications, as it was about the particular case of Roxanne Heisinger. The step-by-step analysis of Dr. Anderson's compliance with 8 CCR 10606 demanded by Petitioner is not necessary: he has provided all the elements of a medical-legal evaluation required by law, including, most importantly, a full explanation of how he arrived at his opinions. Dr. Anderson's findings constitute substantial evidence of permanent total disability.

Petitioner makes several allegations, which are not supported by the evidence, in its effort to prove that Dr. Anderson has relied on a flawed history, thereby to disqualify his report as substantial evidence. First, it argues that Applicant is able to walk her dog by herself without assistive devices. This is contradicted by Applicant's testimony, that she uses a cane, her husband's arm and her service dog to support her when she walks, to avoid falling (Dr. Anderson says she fell anyway, four times in 2019), and she only walks the dog 5 to 15 minutes.

Secondly, Petitioner contends that Dr. Anderson deferred to pain management doctors to determine whether she could be weaned from her narcotic medication and thereby improve her functionality. However, Dr. Anderson testified that changing Applicant's medication, without eliminating the underlying cause for it, would be unreasonable. In addition, Applicant testified that her pain management doctor, Dr. Gowda, never asked her to wean off the narcotic medication. Petitioner contends that unless he obtained a urinalysis, Dr. Anderson could not express opinions

on Applicant's use of narcotic medication. Dr. Anderson testified in his deposition that Applicant was a credible historian, and he also reviewed reports from the two pain management doctors who prescribed the medication. His findings concerning Applicant's use of narcotic medication were well-founded.

Thirdly, Petitioner asserts that Applicant failed to disclose her alcohol usage to the pain management doctors or to Dr. Anderson. The only evidence on this subject is applicant's unrebutted testimony that she rarely uses alcohol and drinks only one glass of wine per week. Additionally, Petitioner points to no evidence that Applicant actively concealed this rare use from any physicians.

Fourthly, Petitioner's charge that Applicant has not been "up front" with Dr. Anderson regarding her ailments is belied by his description of what she told him about her symptoms and the limitations they cause. She testified that she tends to downplay her problems when she talks to doctors.

Fifthly, Petitioner asserts that Applicant does not dispute her ability to bathe, drive or do errands. However, Applicant told Dr. Anderson (Ex. J-4, p. 6) that she only showers 2-3 times a week, is very slow in doing so, and uses a shower chair. Her driving requires her to use a specially equipped vehicle, to use a TENS unit for pain and to stop for breaks once an hour, on longer trips. As to "errands," Petitioner does not explain what errands besides once-a-week grocery shopping Applicant is able to perform, or what evidence exists on this subject. Finally, Applicant testified without rebuttal that she has not participated in training with "Wings of Safety" for years.

The only activity deserving more discussion is the motorcycle riding. Applicant told Dr. Anderson that she was no longer riding the motorcycle, and she also testified that way (MOH/SOE, 3/11/21, page 9). However, she also testified (Ibid, p. 8) that she is able to ride the motorcycle now so long as someone helps her, and she is able to operate the hand controls. Despite this contradiction, I find that Dr. Anderson had an adequate understanding of Applicant's use of the motorcycle, considering Applicant's statement that with the TENS unit and with the balanced design of the vehicle, she did not have pain. In addition, there is no evidence that Applicant uses the motorcycle frequently or on a regular basis, and no evidence that she has taken any long trips on it since she stopped working in 2016.

Mr. Simon's report is also substantial evidence of total disability. While taking into consideration Dr. Anderson's findings, he arrived at the same conclusion based on his own evaluation, which included an interview of the Applicant, who displayed considerable discomfort and pain during her participation in the evaluation; which included a series of tests and analysis of transferable skills; and most importantly, which included a detailed assessment of vocational amenability, which he determined did not exist.

IV
RECOMMENDATION

I respectfully recommend that the Petition for Reconsideration be Denied.

Respectfully submitted,

MICHAEL H. YOUNG
Workers' Compensation
Administrative Law Judge