WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JAMES MCDANIEL, ***Applicant***

vs.

CITY OF SACRAMENTO, permissibly self-insured, administered by OD LEGAL ***Defendant***

Adjudication Number: ADJ11331456
Sacramento District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted defendant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.[1]

Defendant seeks reconsideration of the Findings and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on February 17, 2022, wherein the WCJ found in pertinent part that applicant's October 31, 2017 injury caused 56% permanent disability and that, "There is no good cause for a replacement QME or an appointment of a regular physician." (F&A, p. 1.)

Defendant contends that the reports/opinions of internal medicine qualified medical examiner (QME) Roger G. Nacouzi, M.D., are not substantial evidence regarding applicant's permanent disability, and that pursuant to Labor Code section 5701 defendant is entitled to have applicant evaluated by a regular physician.

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 applicant.

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, and for the reasons discussed below, we will affirm the F&A.

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[1] Commissioner Sweeney who was previously a panelist in this matter, no longer serves on the Appeals Board. Another panel member has been assigned in her place.

BACKGROUND

Applicant claimed injury to his heart/circulatory system while employed by defendant as a firefighter on October 31, 2017.

QME Dr. Nacouzi evaluated applicant on April 6, 2018. Dr. Nacouzi examined applicant, took a history, and reviewed the medical record. The diagnoses included left main coronary artery aneurysm [enlargement of the coronary artery] and dyspnea [difficult or labored breathing] on exertion. (Def. Exh. I, Roger G. Nacouzi, M.D., April 6, 2018, p. 14.) Using the American Medical Association Guides to the Evaluation of Permanent Impairment, (AMA Guides) Table 3-6a to rate applicant's disability (see AMA Guides, p. 36), Dr. Nacouzi stated, "I find an impairment on the high end of Class 2 under Table 3-6a. I am of the opinion that the left main coronary artery aneurysm left Firefighter McDaniel with 29% whole person impairment." (Def. Exh. I, p. 16.)

After reviewing additional records, including surveillance videos, Dr. Nacouzi stated that review of the records did not change his opinions as expressed in his prior reports.(See Def. Exh. G, Def. Exh. H, and WCAB Exh. AA.)

Dr. Nacouzi's deposition was taken on November 7, 2019. Defense counsel and Dr. Nacouzi engaged in several arguments throughout the deposition regarding Dr. Nacouzi's rating of applicant's impairment/disability, for example:

> A. The requirement under Class 2 -- let me answer, Counsel, please. ¶ The requirement under Class 2 is to have no symptoms while performing ordinary daily activities. The defense counsel is arguing that because of no symptoms while performing ordinary daily activities, the impairment should fall on the low end of Class 2, that is ten percent. And this is an incorrect interpretation, Counsel.
> Q. What is the correct interpretation then, Doctor? Tell me what is correct, please?
> A. Then because you said he has no symptoms in the performance of ordinary activity, he does qualify for Class 2, under Table 3, dash, 6, small a. ¶ Then the question goes what level of safe energy expenditure this individual can perform following the level of METs? ¶ Now, we know that at 11 METs, he was reaching three millimeter of ST segment depression with evidence for a nine millimeter aneurysm in the left main artery. So I think that energy expenditure around seven METs would be a safe recommendation to this individual.
> Q. Is there anywhere in the AMA Guides that suggests that your recommendation on a safe energy expenditure at seven METs is to be used to determine where he should fall between 10 percent and 29 percent?
> A. It says here, Counsel, in Table 3, dash, 6a, anything above seven METs would qualify for Class 2. ¶ I'm saying to a reasonable degree of medical

> probability based on objective evidence including the angiogram and the treadmill stress test that the safe recommendation for this individual is to stay around seven METs, which, according to Table 3, dash, 6, small a, is at the upper end of Class 2 range of impairment.
> (Def. Exh. M, Roger G. Nacouzi, M.D., November 7, 2019, pp. 61 – 63, deposition transcript; see also pp. 64 – 65, 68 – 69.)

The parties proceeded to trial on December 9, 2021. The issues submitted for decision included permanent disability, whether a new evaluator should be selected per Labor Code 4062.3(g), and whether a regular physician should be appointed per Labor Code section 5701.

DISCUSSION

There are 25 days allowed within which to file a petition for reconsideration from a "final" decision that has been served by mail upon an address in California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, § 10605(a)(1).) This time limit is extended to the next business day if the last day for filing falls on a weekend or holiday. (Cal. Code Regs., tit. 8, § 10600.) To be timely, however, a petition for reconsideration must be *filed* with (i.e., received by) the Appeals Board within the time allowed; proof that the petition was mailed (posted) within that period is insufficient. (Cal. Code Regs., tit. 8, §§ 10940(a), 10615(b).)

This time limit is jurisdictional and, therefore, the Appeals Board has no authority to consider or act upon an untimely petition for reconsideration. (*Maranian v. Workers' Comp. Appeals Bd*. (2000) 81 Cal.App.4th 1068, 1076 [65 Cal.Comp.Cases 650, 656]; *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1182; *Scott v Workers' Comp. Appeals Bd.* (1981) 122 Cal.App.3d 979, 984 [46 Cal.Comp.Cases 1008, 1011]; *U.S. Pipe & Foundry Co. v. Industrial Acc. Com.* (*Hinojoza*) (1962) 201 Cal.App.2d 545, 549 [27 Cal.Comp.Cases 73, 75-76].)

Where an order can be shown to have been defectively served, the time limit begins to run as of the date of receipt of the order. (*Hartford Accident & Indemnity Co. v. Workers' Comp. Appeals Bd. (Phillips)* (1978) 86 Cal.App.3d 1 [43 Cal.Comp.Cases 1193].)

Here, the WCJ's decision was served on February 17, 2022, and March 19, 2022 was 25 days later, so that the last day to file was on Monday, March 21, 2022. However, defendant's attorney filed a "Petition for Leave to File Petition for Reconsideration Beyond the Time Limits Set Forth in Labor Code section 5903," which we accept and consider as a supplemental pleading under WCAB Rule 10964 (Cal. Code Regs., tit. 8, § 10964). As set forth in defendant's supplemental pleading, and the Declarations under penalty of perjury attached thereto, it appears

that neither defendant nor its attorney received the Findings and Award until March 28, 2022, Based on our review of the supplemental pleading and the attached Declarations, we conclude that the Petition is deemed timely and has been considered on its merits.

It is well established that the relevant and considered opinion of one physician, though inconsistent with other medical opinions, may constitute substantial evidence and the Appeals Board may rely on the medical opinion of a single physician unless it is "based on surmise, speculation, conjecture, or guess." (*Place v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 372, 378 [35 Cal.Comp.Cases 525]; *Market Basket v. Workers' Comp. Appeals Bd*. (1978) 86 Cal.App.3d 137 [46 Cal.Comp.Cases 913.) To be substantial evidence a medical opinion must be based on pertinent facts, on an adequate examination and accurate history, and it must set forth the basis and the reasoning in support of the conclusions. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).) Here, Dr. Nacouzi examined applicant, took a history, and reviewed the extensive medical record. We see no indication that his opinions are based on surmise, speculation, conjecture, or guess. The fact that defendant disagrees with Dr. Nacouzi is not evidence that his opinions are incorrect, arguments are not evidence.

Defendant asserts that Dr. Nacouzi's opinions are inconsistent with those of applicant's treating cardiologist Milind Dhond, M.D. However, after reviewing an October 13, 2017 stress echocardiogram, a November 8, 2017 cardiac catheterization report, and Dr. Dhond's deposition testimony, Dr. Nacouzi stated:

> I agree with the treating cardiologist Dr. Dhond, [sic] that Firefighter James McDaniel has left main coronary artery aneurysm, a form of heart trouble that developed and manifested during his employment with the City of Sacramento Fire Department. There were no nonindustrial factors precipitating the heart trouble. As such, the left main coronary artery aneurysm ought to be considered industrial in origin. ¶ I agree with the treating cardiologist Dr. Dhond, MD that the industrial left main coronary artery aneurysmal was responsible for the exercise-induced myocardial ischemia with 3 mm ST segment depression documented on the October 31, 2017 stress echocardiogram. The mechanism of disease for the myocardial ischemia is represented by the microvascular coronary spasm within the heart muscle induced by the further stretching of the left main coronary aneurysm during increased cardiac burden of the physical stress at the time of the October 31, 2017 stress echocardiogram. October 31, 2017 stress echocardiogram. The exercise-induced myocardial ischemia is responsible for the subjective complaint reported by the patient. I remain of the opinion that a safe level of maximal physical exercise is 7 METs, that is, around 60% of the maximum exercise of 11.1 METs which induced myocardial

> ischemia during the October 31, 2017 stress echocardiogram. Firefighter McDaniel is not able to resume his usual and customary work duties
> (WCAB Exh. AA, Roger G. Nacouzi, M.D., April 24, 2021, p. 2.)

Having reviewed the entire record, we see no legal basis for disputing or disagreeing with Dr. Nacouzi's conclusions regarding applicant's injury and the permanent disability caused by the injury. Thus, we agree with the WCJ that, "The findings of Dr. Nacouzi are substantial medical evidence [and] there is no good cause to appoint a regular physician." (Report, p. 3.)

Accordingly, we affirm the F&A.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the February 17, 2022 Findings and Award is **AFFIRMED.**

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 29, 2023

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

JAMES MCDANIEL, IN PRO PER
TWOHY, DARNEILLE & FRYE

TLH/mc

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