WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ABIY ANBESSIE, ***Applicant***

vs.

G4S SECURE SOLUTIONS INC;
AIG AMERICAN HOME ASSURANCE, ***Defendants***

Adjudication Number: ADJ10586171
San Jose District Office

OPINION AND ORDER DISMISSING PETITION FOR RECONSIDERATION AND GRANTING RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the Findings & Award (F&A) issued on October 13, 2023 by a workers' compensation administrative law judge (WCJ), wherein the WCJ found in pertinent part that applicant sustained injury arising out of and arising in the course of employment on September 17, 2016 to the back, head, and hearing loss, including left mastoiditis, but not to the left eye.

Applicant contends that the record requires further development as to the issue of injury to his left eye.

We received an Answer from defendant.

We received a Report and Recommendation (Report) from the WCJ, which recommends that the Petition be dismissed as untimely and that otherwise it be denied.

We have considered the allegations of the Petition for Reconsideration and the Answer and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will dismiss the Petition for Reconsideration, grant reconsideration on Appeals Board motion, amend the F&A to defer the issues of injury to applicant's left eye and permanent disability and attorney's fees, and otherwise affirm the F&A.

FACTUAL BACKGROUND

As set forth in the WCJ's Report:

Applicant, Abiy Anbessie, while employed on 09/17/2016, in San Jose, California as a security guard by G4S Secure Solutions, Inc., sustained an injury arising out of and in the course of his employment to his back, head, and hearing loss, and claims to have sustained injury arising out of and in the course of employment to the left eye.

On 5/04/2022, the parties presented to trial and the matter was submitted for decision. Based upon review of the admitted medical evidence, the undersigned found that the record needed further development to address applicant's blurred vision of the left eye and potential additional rating for applicant's tinnitus and mastoiditis.

On 7/01/2022, an Order Rescinding Submission and Order to Develop the Record issued. The parties were to provide Dr. Ronald Rubenstein with Dr. Ahmed's 4/26/2021, 3/15/2021 and 9/29/2020 reports, including the MRI of brain discussed in his reports, and request he issue a supplemental report further addressing applicant's tinnitus and left mastoiditis. Further, Dr. Xeller, or a specialist, was to address applicant's left eye blurred vision. Upon receipt of the additional evidence, the parties filed and served the 8/15/2022 report of Dr. Rubenstein, the 9/01/2022 report of Dr. Xeller, and the 6/16/2023 report of Dr. Zeiter.

On 7/27/2023, a Notice of Intention to Augment the Record and a Notice of Intention to Resubmit the Matter for Decision issued. On 8/21/2023, having received no objection to said Notice of Intention, an Order of Submission and Order to Augment the Record issued with the three reports admitted as Court Exhibits X, Y, and Z, respectively. On 10/13/2023, the undersigned issued Findings and Award and Opinion on Decision, finding that applicant sustained injury arising out of and in the course of employment to the back, head, and hearing loss, including left mastoiditis, and further finding that applicant did not sustain injury arising out of and in the course of employment to the left eye.

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At the 12/09/2021 Mandatory Settlement Conference, the parties completed a Pre-Trial Conference Statement (PTCS) setting the matter for Trial. The parties listed joint exhibits that included the QME reports of Dr. Xeller, Neurology consultation reports of Dr. Ahmed, and an ENT consultation report of Dr. Rubenstein. The only issue listed on the PTCS was permanent disability. On 5/04/2022, the parties presented to Trial, wherein defendant stipulated to hearing loss, headaches, and the lumbar spine as part of he admitted injury. Further, applicant added left eye as an issue for Trial.

As discussed above, on 7/01/2022, the undersigned issued an Order Rescinding Submission and Order to Develop the Record ordering the parties to further develop the record with regard to applicant's tinnitus and mastoiditis and to have QME Dr. Xeller, or a specialist, address applicant's claimed left eye blurred vision. On 7/27/2023, the undersigned issued a Notice of Intention to Augment the Record and Resubmit the Matter for Decision. As there was no objection to said Notice of Intention, the undersigned issued an Order of Submission and Order to Augment the Record on 08/21/2023 admitting said reports and re-submitting the matter for decision as of the date of the Order.

Notably, in his petition, applicant asserts that in his 3/21/2018 report, QME Dr. Xeller documented his complaints of headaches and left eye blurred vision. However, although the Application had been amended to include the left eye, by the time of the 5/04/2022 trial, applicant had not conducted any discovery with regard to the left eye, nor requested a QME evaluation by an optometrist or ophthalmologist, and had not listed the left eye as an issue for Trial in the pre-trial conference statement. As discussed in the 7/01/2022 Order Rescinding Submission and Order to Develop the Record, applicant testified he was told at O'Connor Hospital that he had blurred vision and that he should follow up with his physician, but did not do so because he had no insurance. Applicant also testified he does not wear eyeglasses and has never seen an optometrist nor reported any vision issues to the Department of Motor Vehicles (DMV). The undersigned considered Dr. Xeller's 3/21/2018 report noting applicant's complaints of headaches and blurred vision in his left eye, and found supplemental reporting was necessary to address applicant's tinnitus, left mastoiditis, and left eye. In his 9/01/2022 report, Dr. Zeller stated,

> With regard to the blurring of his vision, which apparently has not been adequately addressed to specifically address that problem, he needs to see an ophthalmologist. So, let us make a referral to an ophthalmologist that can check on his visual complaints and ascertain degree that would be related to his industrial complaints or trauma.
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> (Court Exhibit Y, p. 2)

On 6/16/2023, applicant was evaluated by Ophthalmologist Dr. Joseph Zeiter, M.D., who issued a First Report of Occupational Injury or Illness. (Exhibit Z) Dr. Zeiter noted applicant's complaints of "blurry vision, pain around left side of head and around left eye" but after evaluation opined there was no pathology from the accident and that the eye exam "looks normal." Dr. Zeiter discharged applicant from care with no impairment and no future medical care indicated. Applicant had ample opportunity to object to Dr. Zeiter's report, and request an ophthalmologist

QME evaluation under LC 4062 prior to and after receipt of the 7/27/2023 Notice of Intention to Augment the Record and Notice of Intention to Re-submit the Matter for Decision. However applicant did not so object. There was also no objection to the 8/21/2023 Order of Submission and Order to Develop the Record.

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Here, applicant had not conducted discovery nor had he requested a 4060 QME evaluation to address his left eye complaints and had not listed the left eye as an issue on the pre-trial conference statement by the time of the 5/04/2022 Trial. However, because the left eye had not yet been addressed, the undersigned ordered the parties to return to QME Dr. Xeller or have him refer applicant to a specialist to address his left eye complaints. Having undergone the evaluation, and if unsatisfied with the resulting report and recommendations of the specialist, applicant had the opportunity to object to Dr. Zeiter's report prior to or after the Notice of Intention and Order issued. However, applicant did not do so and further, did not timely file his Petition for Reconsideration. Applicant has the burden to prove his injury arose out of and in the course of employment by a preponderance of the evidence and must exercise due diligence in doing so. Here, applicant did not exercise due diligence in presenting evidence with regard to his left eye prior to trial, and when given another opportunity to do so, did not object to Dr. Zeiter's report, and was late in filing his Petition for Reconsideration.

DISCUSSION

I.

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 WCAB 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]; *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]; *U.S. Pipe & Foundry Co. v. Industrial Acc. Com. (Hinojoza)* (1962) 201 Cal.App.2d 545, 549 [27 Cal.Comp.Cases 73].)

The Petition in this matter was filed on November 17, 2023. This was more than 30 days after the service of the WCJ's October 13, 2023 decision, and beyond whatever extension of time, if any, the petitioner might have been entitled to under WCAB Rule 10600. Thus, the Petition for Reconsideration must be dismissed.

However, Labor Code section 5900(b) allows the Appeals Board to grant reconsideration of a decision within 60 days of the decision on its own motion. (Lab. Code, § 5900(b).) Here, the WCJ issued the F&A on October 13, 2023, and December 15, 2023 is 60 days after that date. Thus, we will grant reconsideration on our own motion.

II.

All parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) "Due process requires notice and a meaningful opportunity to present evidence in regards to the issues." (*Rea v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 625, 643 [70 Cal.Comp.Cases 312]; see also *Fortich v. Workers' Comp. Appeals Bd*. (1991) 233 Cal.App.3d 1449, 1452-1454 [56 Cal.Comp.Cases 537].) A fair hearing includes, but is not limited to, the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (See *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584]; *Rucker*, *supra*, at pp. 157-158 citing *Kaiser Co. v. Industrial Acci. Com.* (*Baskin*) (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21]; *Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].) As stated by the Court of Appeal: "A denial of due process to a party ordinarily compels annulment of the Board's decision only if it is reasonably probable that, absent the procedural error, the party would have attained a more favorable result. However, if the denial of due process prevents a party from having a fair hearing, the denial of due process is reversible per se." (*Beverly Hills Multispecialty Group, Inc. v. Workers' Comp. Appeals Bd*. (*Pinkney*) (1994) 26 Cal.App.4th 789, 806 [59 Cal.Comp.Cases 461], citations omitted.)

It is well established that decisions by the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) To constitute substantial evidence ". . . a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93, 97].)

The WCJ or the WCAB, "may act to develop the record with new evidence if, for example, it concludes that neither side has presented substantial evidence on which a decision could be based." (*San Bernardino Community Hospital v. Workers. Comp. Appeals Bd.* (*McKernan*) 74 Cal.App.4th 928 (64 Cal.Comp.Cases 986); see also *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 (63 Cal.Comp.Cases 261) [lack of substantial medical evidence on issue in dispute supported development of record]; *M/A Com-Phi v. Workers' Comp, Appeals Bd.* (*Sevadjian*) (1998) 65 Cal.App.4th 1020 [63 Cal.Comp.Cases 821] [appropriate to develop record lacking competent medical evidence].) 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 it 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].) The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence. (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. (*Id*.)

Here, as set forth by the WCJ in his Report, the record regarding applicant's claimed injury to his left eye is not sufficient. Thus, as a matter of due process, further development of the record is appropriate. Applicant is admonished that he should obtain the additional evidence forthwith.

Accordingly, we dismiss the Petition for Reconsideration, grant reconsideration on Appeals Board motion, affirm the F&A except that we amend it to defer the issues of claimed injury to applicant's left eye, permanent disability, and attorney's fees.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings & Award issued by the WCJ on October 13, 2023 is **DISMISSED**.

IT IS FURTHER ORDERED that reconsideration on motion of the Appeals Board is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award of October 13, 2023 is **AFFIRMED** except that it is **AMENDED** as follows:

FINDINGS OF FACT

2. The issue of claimed injury to applicant's left eye is deferred.

4. The issue of permanent disability is deferred.

6. The issue of attorney's fees is deferred.

AWARD

AWARD IS MADE in favor of applicant Abiy Anbessie and against defendant AIG American Home Assurance as follows:

1) Liability for injury as set forth in Finding No. 1;

2) Medical Care as set forth in Finding No. 5.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 15, 2023

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

ABIY ANBESSIE
THE FLETCHER BROWN LAW FIRM
MANNING & KASS ELLROD, RAMIREZ, TRESTER LLP

AS/mc

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