

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

SEBASTIANO BONFIGLIO, *Applicant*

vs.

**KAISER FOUNDATION HEALTH PLAN, permissibly self-insured; administered by
SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants***

**Adjudication Number: ADJ13056523
Oakland District Office**

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

Applicant seeks reconsideration of the Findings and Award (F&A), issued by the workers' compensation administrative law judge (WCJ) on June 11, 2021, wherein the WCJ found in pertinent part that applicant did not sustain a cumulative injury arising out of and occurring in the course of employment (AOE/COE), and that applicant's injury claim was barred by the Labor Code section 3600 post termination defense.¹ Based thereon, the WCJ ordered that applicant take nothing by way of his injury claim.

Applicant contends that the reports from physical medicine and rehabilitation qualified medical examiner (QME) Steven D. Feinberg, M.D., and applicant's trial testimony constitute substantial evidence that applicant sustained injury to his low back and psyche.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We received an Answer from defendant.

We have considered the allegations in the Petition for Reconsideration (Petition) and the Answer, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration, rescind the F&A, 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.

¹ All further statutory references are to the Labor Code unless otherwise noted.

BACKGROUND

Applicant claimed injury to his back, hips, lower extremities, chest, upper extremities, nervous system, and psyche, while employed by defendant as an area superintendent during the period from December 3, 2018, through December 4, 2019. Applicant had a prior low back injury while employed by defendant on March 10, 2014 (ADJ11188148). That claim was settled by Stipulations with Request for Award. The settlement included 8% permanent disability and an award of future medical treatment; the Award was issued on February 7, 2018.

On July 13, 2020, QME Dr. Feinberg evaluated applicant. (Join Exh. 100, Dr. Feinberg, July 13, 2020.) Dr. Feinberg examined applicant, took a history, and reviewed the medical record. The diagnoses included “History of chronic low back pain” and “Psychiatric comorbidity.” (Joint Exh. 100, p. 7.) In the Records Summary section of his report Dr. Feinberg noted that in a December 11, 2019 Doctor’s First Report of Injury, Dr. Bunyaviroch stated:

He [applicant] was having bad chest pains, difficulty breathing, back spasms, and vertigo. He had been unable to get a full night's sleep due to an unusual stress level over the past year. He had tingling of his right leg. He was diagnosed with adjustment disorder and acute stress disorder. His care was transferred to a psychologist or psychiatrist. He was able to continue working full duty. (Joint Exh. 100, p. 7.)

Dr. Feinberg then noted:

Psychologist Dr. Debra Puryear evaluated him on 2/13/20. He was having trouble sleeping, anxiety attacks, erratic behavior, and night sweats. He felt better after leaving his job. He was diagnosed with adjustment disorder with anxiety, severe. (Joint Exh. 100, p. 7.)

Regarding the issue of the cause of applicant’s condition, Dr. Feinberg concluded:

The threshold for work-related causation is low and is reasonable from a medical standpoint that the nature of his work duties over the years would have contributed to his low back pain. (Joint Exh. 100, p. 8.)

After reviewing a transcript of applicant’s deposition testimony, Dr. Feinberg submitted a supplemental report wherein he stated:

There is no way to prove one way or the other whether his reported back problems are secondary to psychiatric issues or to musculoskeletal discomfort

related to his work activities. It certainly sounds from reading his deposition that his emotional state has a lot to do with his musculoskeletal discomforts of the reports continued back pain even currently.

(Joint Exh. 101, Dr. Feinberg, November 12, 2020, p. 3.)

The parties proceeded to trial on May 18, 2021. The issues submitted for decision were injury AOE/COE, the laches/lack of due diligence defense, and whether the record should be developed to include a psychiatric evaluation of applicant. The issues of the” good faith personnel” defense and the “post-termination defense” were deferred. (Minutes of Hearing and Summary of Evidence (MOH/SOE), May 18, 2021, p. 2.) The WCJ’s summary of applicant’s testimony included:

He testified that Dr. Arnold Bunyaviroch saw him for chest pain, back spasms, and vertigo. The diagnosis was due to stress. The doctor tried to give him pills. Muscle relaxants made him tired so he stopped taking them. Dr. Bunyaviroch prescribed other pills. Those were for his psyche. Those were for a psych patient. They made him constipated so he stopped taking them. ¶ He was referred to Dr. Debra Puryear in 2020. He recalls seeing a psychologist in 2020. He was diagnosed with adjustment disorder. He was told stress was causing his back pain. ...¶... He quit in 2019. He describes his quitting as he was forced to quit. He was not terminated; he resigned. ...¶... He testified that he was forced to quit because everyone has bills to pay, and he was reduced to \$16 an hour. He had to look for a different job to pay the same as Kaiser.

(MOH/SOE, pp. 5 and 6.)

DISCUSSION

First, as stated above, the MOH/SOE clearly indicate that the parties intended to defer the issue of the post-termination defense pending a ruling on the issue of injury AOE/COE. (MOH/SOE, p. 2.) Thus, that issue was not submitted for decision. However, if the issue had been submitted it must be noted that the Third District Court of Appeals determined the Appeals Board had correctly concluded that section 3600, subd. (a)(10), which bars a claim for compensation filed after notice of termination or layoff, including voluntary layoff, did not bar an employee's claim filed after he voluntarily resigned from employment. (*CJS Co. v. Workers’ Comp. Appeals Bd.*, (1999) 74 Cal. App. 4th 294 [64 Cal.Comp.Cases 954].) The Court explained that the plain meaning of the statute does not include voluntary resignations. (*Id.* at 296 – 297.) The Court also stated that it agreed with the Appeals Board’s earlier panel decision (*Jeffrey Mabe v. Mikes Trucking* (1998) 63 Cal.Comp.Cases 1394) wherein the Appeals Board concluded that that statute applies to instances when the employer gives notice of termination or layoff, but not to those

instances when the applicant simply quits. (*CJS Co. v. Workers' Comp. Appeals B, supra*, at 296, footnote 1.)

Regarding defendant's laches/lack of due diligence argument, the doctrine of laches is an equitable defense by which an unreasonable delay by a party may bar the party's right to any benefits claimed or defenses asserted. (See *Bell v. Workers' Comp. Appeals Bd.* (1987 W/D) 52 Cal.Comp.Cases 72; *Midas Recovery Services v. Workers' Comp. Appeals Bd. (Baker)* (1995 W/D) 60 Cal.Comp.Cases 783; *Truck Insurance Exchange v. Workers' Comp. Appeals Bd. (Cyr-Remus)* (1997 W/D) 62 Cal.Comp.Cases 240; *K-Mart v. Workers' Comp. Appeals Bd. (Acevedo)* (2003 W/D) 68 Cal.Comp.Cases 494.) But "[d]elay alone ordinarily does not constitute laches, as lapse of time is separately embodied in statutes of limitation. [Citation.] What makes the delay unreasonable in the case of laches is that it results in prejudice." (*Lam v. Bureau of Security & Investigative Services* (1995) 34 Cal.App.4th 29, 36 [40 Cal.Rptr.2d 137], citing *Brown v. State Personnel Bd.* (1985) 166 Cal.App.3d 1151, 1159 [213 Cal. Rptr. 53].) Here, there is no evidence in the record that defendant was in any way prejudiced by applicant's delay in replying to defendant's psychiatry Panel Request correspondence. (Def. Exh. D, November 16, 2020 correspondence.) Therefore, applicant's injury claim is not barred by the laches defense.

Regarding the issue of injury AOE/COE, at the trial applicant claimed a psychiatric injury and injury to his back. As noted above, QME Dr. Feinberg diagnosed applicant as having chronic low back pain and psychiatric comorbidity. (Joint Exh. 100, p. 7.) He later stated that the nature of applicant's work duties over a course of years, would have contributed to his low back pain. (Joint Exh. 100, p. 8.) In his supplemental report Dr. Feinberg concluded that there was "no way to prove" whether applicant's back problems are secondary to psychiatric issues or to musculoskeletal discomfort related to his work activities. Based on applicant's deposition testimony, it appeared to Dr. Feinberg that applicant's emotional state "has a lot to do with his musculoskeletal discomfort." (Joint Exh. 101, p. 3.)

It must be clarified that the issue of injury AOE/COE is not limited to whether applicant's back problems are "secondary to psychiatric issues or to musculoskeletal discomfort related to his work activities." As we noted earlier, applicant claimed injury to his back and to his psyche. In his initial report, as the orthopedic QME, Dr. Feinberg stated that the nature of applicant's work duties "would have contributed to his low back pain." (Joint Exh. 100, p. 8.) It appears to be Dr. Feinberg's opinion that the physical demands of applicant's work were a cause of applicant's back

condition. In his report, Dr. Feinberg also noted that Dr. Bunyaviroch and Dr. Puryear diagnosed applicant as having an adjustment disorder and an acute stress disorder, which caused various symptoms including “back spasms,” as a result of applicant’s work stress. (Joint Exh. 100, p. 7.)

Although Dr. Feinberg’s July 13, 2020 report indicates applicant’s work for defendant was a cause of his back symptoms, his statement in the November 12, 2020 report, that there was, “no way to prove” whether applicant’s back problems were “secondary to psychiatric issues or to musculoskeletal discomfort related to his work activities” is inconsistent with his earlier stated opinions. Thus, his reports do not constitute substantial evidence.

Any award, order, or decision of the Appeals Board must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen’s Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen’s Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500].) The Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence pertaining to a threshold issue, or when it is necessary in order to 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].) Dr. Feinberg’s reports are the only medical evidence in the trial record and since they are not substantial evidence, the record must be further developed.

When the medical record requires further development, the record should first be supplemented by physicians who have already reported in the case. (See *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) Upon return of this matter to the WCJ, the parties will need to request a supplemental report from Dr. Feinberg to clarify his opinions as to injury AOE/COE, as discussed above; i.e. whether applicant sustained an injury AOE/COE to his back, and if he did was it due to the physical demands of his work, or the stress related psychiatric condition he developed, or both. It appears that under these circumstances, in order to provide Dr. Feinberg an adequate medical record upon which to clarify his opinion, it is appropriate that the parties have applicant undergo a psychiatry (or psychology) medical-legal evaluation and that the medical-legal report be forwarded to Dr.

Feinberg for his review. In turn, the medical-legal report would be a proper basis for determining whether applicant did or did not sustain a psychiatric injury AOE/COE, as claimed.²

Accordingly, we grant reconsideration, rescind the F&A, 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.

² Clearly, an opinion as to whether applicant sustained a psychiatric injury AOE/COE, is outside the field of Dr. Feinberg's expertise and should be provided by a psychiatrist or a psychologist.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings and Award issued by the WCJ on June 11, 2021, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the June 11, 2021 Findings and Award 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/ MARGUERITE SWEENEY, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 27, 2021

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

**SEBASTIANO BONFIGLIO
PACIFIC WORKERS' COMPENSATION LAW CENTER
MICHAEL SULLIVAN & ASSOCIATES**

TLH/pc

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

CS