

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

REBECCA GRAY, *Applicant*

vs.

SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendants*

**Adjudication Number: ADJ11554890
San Jose District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Subsequent Injuries Benefits Trust Fund (SIBTF) seeks reconsideration of the April 7, 2022 Second Findings and Award, wherein the workers' compensation administrative law judge (WCJ) found, in pertinent part, that applicant has a pre-existing disability to her left shoulder, that the subsequent injury involved an opposite and corresponding part to applicant's right shoulder, and that the subsequent injury permanent disability is in excess of 5%, thereby meeting the 5% SIBTF eligibility threshold.

SIBTF contends that the WCJ's finding of a prior labor disability to the left shoulder is not supported by substantial evidence because the Panel Qualified Medical Examiner (PQME), Ilya Sabsovich, M.D., in the underlying matter opined that applicant had full range of motion in her left shoulder.

We received an answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer and the contents of the Report, and we have reviewed the record in this matter. Based on the WCJ's Report, which we adopt and incorporate, we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that SIBTF's Petition for Reconsideration of the April 7, 2022 Second Findings and Award is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ MARGUERITE SWEENEY, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 5, 2022

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

**REBECCA GRAY
ROBERT BLEDSOE SAN JOSE
OFFICE OF THE DIRECTOR LEGAL**

LSM/pc

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

**REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION**

**I.
INTRODUCTION**

Applicant, Rebecca Gray, while employed during the period 04/15/2017 through 05/03/2017, as an administrative associate, occupational group number 112, in Menlo Park, California, by Robert Half Recruiting Agency, sustained an injury arising out of and arising in the course of employment to the cervical spine, right shoulder and right wrist.

The SECOND Findings and Award in this case issued on 04/07/2022. The Petitioner is OD Legal on behalf of the Subsequent Injuries Benefits Trust Fund [SIBTF], who has timely filed the Petition for Reconsideration on 05/03/2022. The Petition for Reconsideration is not legally defective. Applicant has filed an Answer on 05/10/2022.

Petitioner SIBTF contends that the opinions of Dr. Chen are speculative and do not constitute substantial medical evidence, and that Applicant has not met the “5% opposite and corresponding” threshold for SIBTF benefits.

**II.
FACTS**

Applicant claimed an industrial injury to her cervical spine and right upper extremity after a short period of employment with Robert Half Recruiting Agency. The case-in-chief resolved by Compromise and Release on 05/02/2019 in an amount of \$12,000.00.

The parties presented to trial on 01/04/2022 and the FIRST Findings and Award issued on 02/28/2022. Defendant SIBTF filed a Petition for Reconsideration arguing the reports of Dr. Chen were not substantial evidence, and that it was error to rate the psychiatric condition as part of the industrial injury when it had not been pled. Applicant filed an Answer addressing these contentions, and also pointing out that the SIBTF impairment should have been added rather than combined.

This Judge rescinded submission and issued a SECOND Findings and Award on 04/07/2022. Defendant SIBTF has filed a Second Petition for Reconsideration and Applicant has filed a Second Answer.

Applicant had a number of pre-existing conditions, as set forth in the Findings and Award, including removal of her uterus/fallopian tubes, scars on her face, vertigo, impairment in the right wrist, impairment in her lumbar spine, psychiatric impairment, and impairment to her cervical spine, left shoulder and

left knee. Using the Combined Values Chart (CVC) these pre-existing impairments rate to 86% permanent disability.

Defendant SIBTF does not appear to take issue with any of these pre-existing conditions other than the left shoulder, and relies upon a QME report of Dr. Sabsovich to support this contention. SIBTF also alleges that the “5% opposite and corresponding” threshold has not been met so as to qualify for SIBTF benefits.

III. LEGAL ARGUMENTS

1. THE LEFT SHOULDER IMPAIRMENT

As discussed in detail in the Opinion on Decision, the primary dispute here is over existence of disability to the left shoulder and whether the determination of pre-existing disability to the left shoulder is substantial medical evidence.

Dr. Sabsovich was the Panel Qualified Medical Examiner (PQME) in the case-in-chief and was tasked with determining the industrial impairments. He was not tasked with determining what pre-existing non-industrial conditions Applicant may or did actually have. The medical records reviewed by Dr. Sabsovich [Joint Exhibit 1] demonstrate the following:

- 04/23/2007 – office visit for left shoulder complaints since long time;
- 04/23/2008 – x-ray of left shoulder due to left shoulder pain;
- 05/03/2008 – MRI of left upper extremity joint; partial tear of the rotator interval with increased T2 signal and mild biceps tendon tendinopathy;
- 05/24/2011 – complaints of left shoulder pain;
- 01/22/2016 – complaint of chronic shoulder dysfunction; symptoms consistent with bursitis; diagnosis: left shoulder scapular bursitis; restriction of no pushing, lifting or carrying greater than 5 pounds;
- 01/26/2016 – long history of left shoulder pain; shoulder never felt normal or strong; diagnosis: sprain of left rotator capsule.

As such, the medical evidence establishes that Applicant had at least a ten-year history of complaints as to the left shoulder, and that Applicant had x-rays and an MRI of the left shoulder during that ten-year period. She was diagnosed during that ten-year period with a tear, bursitis and a sprain. She was given restrictions during that ten-year period.

Defendants indicate that Dr. Sabsovich found normal range of motion when he examined the left shoulder on the one occasion, while Applicant contends the examination (as referenced on page one of the report) was limited to the neck, right shoulder, right wrist, right forearm, right thumb and low back and never included the left shoulder.

Defendant is correct that Dr. Sabsovich indicates in his report that there is normal range of motion in the left shoulder. **However**, Dr. Sabsovich does not state that there is no impairment in the left shoulder, as he was not tasked with determining if there was pre-existing impairment in a non-industrial body part. Dr. Sabsovich is aware that Applicant has a tear in the left shoulder as objectively verified by MRI on 05/03/2008 because he reviewed the MRI report and summarized the MRI results in his report. Defendant contends that because there is normal range of motion that there cannot be other impairment; this is speculative.

On the other hand, Dr. Chen examined Applicant to specifically address SIBTF issues, and whether or not there were pre-existing conditions which were labor disabling. Dr. Chen also had this information about Applicant's extensive 10-year history of left shoulder complaints, and had the information about the 2008 left shoulder MRI. At the time of the evaluation with Dr. Chen, Applicant DID have a loss of range of motion in the left shoulder.

Defendant stresses that Dr. Chen gave impairment to the left shoulder solely due to the range of motion measurements, and **this is not accurate**. Referring the page 14 of Dr. Chen's report, he indicates that there is left shoulder weakness, pain, impingement, and that there was a prior documented sprain of the left rotator capsule, plus he found tenderness and muscle spasms.

So is the 3% indicated by Dr. Chen substantial medical evidence? I say yes. While concurrent medical evidence is not required, Applicant has documented a long history of left shoulder complaints and has also documented left shoulder diagnoses. She has documented left shoulder work restrictions. A 3% disability for the left shoulder is based on substantial medical evidence and is reasonable given the findings of a tear and bursitis. It is inappropriate for Defendant SIBTF to concentrate solely on range of motion findings by Dr. Sabsovich and/or Dr. Chen, while ignoring long-standing objective evidence from diagnostic testing demonstrating a tear and bursitis. And, it is inaccurate to state that Dr. Chen found impairment "solely" due to the range of motion measurements, as clearly he considered the prior sprain, tenderness, spasms, weakness and pain as well.

2. SIBTF THRESHOLD REQUIREMENTS

SIBTF alleges that the right shoulder impairment alone does not reach the 5% threshold and therefore Applicant's claim for SIBTF benefits must fail.

I direct everyone's attention to the well-established legal authority set forth in *SIF v. WCAB (Post)* (1976) 41 CCC 436 (w/d) in which SIBTF was found liable for benefits where the injured employee had a pre-existing right hand disability though the subsequent industrial injury resulted in a disability of

less than 5% to the left hand, but the overall disability from the subsequent industrial injury was equal to 5% or more of total.

In other words, SIBTF's reading of the threshold requirements in Labor Code section 4751 is too restrictive. It is not required that the 5% be to the opposite and corresponding member, but rather than there be an opposite and corresponding member involved, with the overall disability from the subsequent injury resulting in at least 5% or more disability. Applicant has met those requirements here, as she has 3% disability to the right shoulder. It was not error to award SIBTF benefits.

IV.
RECOMMENDATION

The Petition for Reconsideration should be denied.

DATE: 05/13/2022
ADORALIDA PADILLA
WORKERS' COMPENSATION JUDGE