WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

KWAKU AGYEIFOSU, ***Applicant***

vs.

BALDY VIEW ROP;
YORK RISK SERVICES, ***Defendants***

Adjudication Number: ADJ9511844
Santa Barbara District Office

OPINION AND ORDER DENYING PETITIONS FOR RECONSIDERATION

Applicant, in pro per, filed two Petitions for Reconsideration on November 7, 2022. We have considered the allegations of the Petitions 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 dismiss the Petition for Reconsideration addressing the January 10, 2017, Findings and Order as untimely and deny the Petition for Reconsideration addressing the October 14, 2022, Findings and Award/Order.

For the foregoing reasons,

IT IS ORDERED that the Petitions for Reconsideration are **DISMISSED/DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

KATHERINE WILLIAMS DODD, COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 6, 2023

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

KWAKU AGYEIFOSU, IN PRO PER
C. PATRICK HAMBLIN, ESQ.

PAG/mc

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

REPORT AND RECOMMENDATIONS
ON PETITIONS FOR RECONSIDERATION

I

INTRODUCTION

1.	Applicant's Occupation:	Substitute teacher
	Applicant's Age:	67
	Date of Injury:	March 7, 2012
	Parts of Body Injured:	Neck; right rib/chest well; and left cheek
2.	Identity of Petitioner:	Applicant, in pro per, has filed the Petitions
	Timeliness:	One petition is filed timely (EAMS Doc ID # 76114289); one petition is untimely filed (EAMS Doc ID # 76114288)
	Verification:	Verifications are attached to the petitions
3.	Date of service of Findings Award:	October 14, 2022 Judge Buscaino, SBR and January 10, 2017 Judge Armstrong, AHM

II

CONTENTIONS

1. That by order, decision or award, the Board acted without or in excess of its powers;

2. The evidence does not justify the findings of fact;

3. Petitioner has discovered new evidence material to him which he could not with reasonable diligence have discovered and produced at the hearing; and

4.The findings of fact do not support the order, decision, or award.

III

FACTS

The Applicant, Samuel Kwaku Agyei-Fosu Godman, born [ ] , was involved in an incident on March 7, 2012 where he was allegedly assaulted by two Deputy Sheriffs while working as a credentialed substitute teacher for Baldy View ROP at Rancho Cucamonga, California. The Applicant, by and through his then-attorney of record Kaeni Law, filed an Application for Adjudication of Claim for injuries to his trunk and excretory system in the form of renal failure as a result if the March 7, 2012 incident.

The parties participated in the QME Panel process upon which a panel in Internal Medicine was secured. The parties were left with Dr. Denise Townsend to serve as the Internal Medicine PQME. After evaluating the Applicant on August 13, 2015, Dr. Townsend opined that there was no direct injury to the Applicant's kidneys as a result of the March 7, 2012 incident and that the Applicant's renal failure was related to his uncontrolled hypertension.

The Applicant then dismissed his attorney of record, Kaeni Law, and sought counsel with Solimon Rodgers, P.C. This matter then proceeded to Trial on December 6, 2016 before Judge Louise Armstrong in the Anaheim District Office of the WCAB. In the Opinion on Decision and Findings and Order dated and served on January 10, 2017, Judge Armstrong found injury AOE/COE to the Applicant's neck, right rib/chest wall, and left cheek based on the unrebutted testimony from the Applicant and the exhibits admitted into evidence, including reports from Dr. Townsend. (Joint Exhibit A-3.) Judge Armstrong further found that the Applicant

did not sustain industrial injury causing hypertension or renal failure, relying upon the aforementioned reporting from PQME Dr. Townsend. (*Ibid*.) Neither the Applicant nor his then-attorney of record, Solimon Rodgers, filed a timely Petition for Reconsideration to Judge Armstrong's January 10, 2017 Findings and Order.

Applicant subsequently filed a Petition for Discrimination under Labor Code section 132a on November 16, 2017. He would eventually dismiss his attorney, Solimon Rodgers, on July 3, 2018. The parties would also secure an additional QME Panel in Orthopedic Surgery upon which Dr. Luigi Galloni was selected to serve the Orthopedic PQME.

With venue having been previously transferred, this matter proceeded to another Trial at the San Bernardino District Office of the WCAB on August 9, 2022 before the undersigned WCALJ. The undersigned WCALJ issued his Findings and Award on October 14, 2022. The Applicant has filed two Petitions for Reconsideration on November 7, 2022, one of which appears to appeal the determinations made by Judge Armstrong on January 10, 2017 and the other of which appears to appeal the determinations made by the undersigned WCALJ on October 14, 2022.

IV

DISCUSSION

Under Labor Code section 5900(a), a Petition for Reconsideration may only be taken from a "final" order, decision, or award. A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal. App. 3d 1171, 1180) or determines a threshold issue that is fundamental to the claim for benefits (*Maranian v. Workers' Comp. Appeal Bd.* (2000) 81 Cal. App. 4th 1068, 1070.) Pursuant to Labor Code section 5903, any person aggrieved by any final order, decision, or award may petition for reconsideration upon one or more of the following grounds:

(a) That by the order, decision, or award made and filed by the appeals board or the workers' compensation judge, the appeals board acted without or in excess of its powers.

(b) That the order, decision, or award was procured by fraud.

(c) That the evidence does not justify the findings of fact.

(d) That the petitioner has discovered new evidence material to him or her, which he or she could not, with reasonable diligence, have discovered and produced at the hearing.

(e) That the findings of fact do not support the order, decision, or award.

First and foremost, the Applicant has filed two separate Petitions for Reconsideration, both filed on November 7, 2022. The Court first addresses the Petition for Reconsideration that is attached to a pleading entitled "Motion to Reconsider/Remove Findings and Order as to Claim for Workers' Compensation Injury from Assault & Battery, Labor Code §§ 3600, 3602." (EAMS Doc ID # 76114288.) This Petition for Reconsideration includes the following:

> "I disagree with WCJ Louie Armstrong as to his findings of fact regarding hypertension injury I sustained on March 7, 2012. The excretory system injury is compensable in that it is industr[ially] related. The court's findings do not support the order that I did not sustain injury arising out of and occurring during the course of employment; causing hypertension or renal disease. The Applicant was working for Baldy View ROP as a part-time teach/instructor. The court's decision on January 10, 2017 was based on PQME Dr. Denise Townsend's evaluation report (August 13, 2015) that I did not sustain industrial injury to my excretory system, causing renal failure. I request the court to reconsider its decision and order, because there is evidence of industrial injuries (*see attached brief*) on March 7, 2012, hence I objected to Dr. Townsend['s] report for being bias on August 19, 2016 before the court made its ruling. *Continued.*"

This Petition for Reconsideration appears to be Applicant's attempt to appeal Judge Armstrong's Findings and Order and Opinion on Decision dated January 10, 2017 resulting from the December 6, 2016 Trial. This Petition for Reconsideration is grossly untimely,

having been filed nearly 6 years later. (See *Garcia v. Vons Co.*, 66 Cal. Comp. Cases 469 [WCAB held that a party's untimely filing of a Petition for Reconsideration six months after the WCJ's decision was sanctionable bad faith].) Because this Petition for Reconsideration is untimely, the Court will not respond to the same.

The Applicant's other Petition for Reconsideration appears directly related to the findings after the August 9, 2022 Trial. (EAMS Doc ID # 76114289.) The Applicant asserts under Labor Code section 5903 that the undersigned acted without or in excess of his powers, that the evidence does not justify the findings of fact, that the Petitioner has discovered new evidence material to him which he could not with reasonable diligence have discovered and produced at hearing, and that the findings of fact do not support the order, decision, or award.

Applicant does not explicitly cite to any new evidence recently discovery that could not with reasonable diligence have been discovery and produced at the August 9, 2022 Trial.

Thus, the undersigned now addresses whether the undersigned acted in excess of his powers, whether the evidence justifies the findings of fact, and whether the findings of fact supports the decision issued.

Discrimination under Labor Code section 132a

Proceedings for increased compensation under Labor Code section 132a(1) may not be commenced more than one year from the discriminatory act or date of termination of the employee. (*Lab. Code*, § 132a(4).)

The Applicant asserts within his verified Petition for Discrimination that his termination from Baldy View ROP on or around October 13, 2013 was discriminatory in violation of Labor Code section 132a. Accordingly, a timely Petition for Violation of Labor Code section 132a should have been filed 1 year from his termination, or on or around October

13, 2014. The Applicant did not file his Petition until November 16, 2017, over 3 years after the expiration of the statute of limitations. The Petition is untimely.

The Applicant asserts that Defendant had an affirmative duty to advise the Applicant of the 1-year statute of limitations for commencing proceedings under Labor Code section 132a. This Court disagrees. The Applicant relies upon the California Supreme Court's holding in *Reynolds v. Workmen's Comp. Appeals Bd.,* 12 Cal. 3d, 726. However, the *Reynolds* case is distinguishable to the instant facts. The Court in *Reynolds* held that the Applicant's claim for *workers' compensation benefits* was not barred under Labor Code sections 5404 and 5405 because the employer knew that the injured worker's heart attack was industrially related and failed to provide the Applicant with the required notices regarding the commencement of a workers' compensation claim.

The holdings in *Reynolds* applied to instituting proceedings for workers' compensation benefits, not Petitions for Discrimination under Labor Code §132a. Furthermore, there is no evidence in the record showing that the employee knew the Applicant suffered from discriminatory conduct at their hands.

Applicant further asserts that it was Defendant's duty under Labor Code section 5401(b)(8) to advise the Applicant of the one-year statute of limitations for filing Petitions for Discrimination under Labor Code section 132a. (Petition for Reconsideration, pg. 4.) However, nothing in Labor Code section 5401(b) requires Defendant's disclosure of the 1-year statute of limitations. In fact, the approved content within the notice of potential eligibility as it relates to Labor Code section 132a as prescribed by the administrative director after consultation with the Commission on Health and Safety and Workers' Compensation per Labor Code section 5401(b) does not include statute of limitations information.

Furthermore, at the time the 1-year statute of limitations was expiring, the Applicant was represented by counsel. Through the exercise of reasonable diligence, this Court believes that Applicant's counsel should have been aware of the Applicant's potential claim for discrimination under Labor Code section 132a, and that the failure to timely file the same acts as a waiver. Accordingly, the undersigned maintains that Applicant's Petition for Discrimination under Labor Code section 132(a) is untimely.

Excretory System (Kidneys/Renal Failure)

Collateral estoppel, or issue preclusion, precludes the relitigation of issues argued and decided in prior proceedings or a prior case, even if the second suit raises different causes of action. (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.th 813, 824.)

The Applicant alleged in his original Application for Adjudication of Claim injury to his excretory system, specifically to his kidneys in the form of renal failure resulting from the March 7, 2012 incident. The issue the industrial-relatedness of the Applicant's excretory system/kidneys/renal failure was previously adjudicated by Judge Louise Armstrong in the Anaheim District Office of the WCAB on December 6, 2016. (Joint Exhibit A-3.) Judge Armstrong relied upon the substantial reporting from PQME Dr. Townsend and definitely found that the Applicant's renal failure was not industrially-related. (*Ibid*.) The Applicant, who was represented by counsel at the time, did not appeal Judge Armstrong's findings.

The Applicant is again trying to seek a finding that his excretory system is compensable; he is attempting to re-litigate this parts of body dispute. Under the principles of collateral estoppel, the Applicant should be precluded from re-litigating issues previously decided by Judge Armstrong. The Applicant's remedy would have been to timely appeal Judge Armstrong's findings.

Lumbar Spine

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.) A doctor's opinion is not substantial medical evidence if he does not set forth the facts and reasoning behind the opinion and is merely conclusory. (*Granado v. Workmen's Comp. Appeals Bd.* (1970) 69 Cal.2d 399A; *Zemke v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 794.) To constitute substantial evidence, a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, must be based on pertinent facts and on an adequate examination and history, and must set forth reasoning in support of its conclusions. (*Escobedo v. Marshalls* (2005) 70 Cal. Comp. Cases 604, 621.)

The Applicant continues to claim injury to the lumbar spine. He asserts that the force on his cervical spine also affected his lumbar spine, reasoning that a neck injury affects the whole body, including causing renal failure. (Petition for Reconsideration, pg. 6.) He further asserts that the knee blows sustained during the March 7, 2012 incident impacted his lumbar spine. (*Id*., at 7.) However, upon review of the totality of the record, there still remain serious questions as to whether the March 7, 2012 incident in fact involved the lumbar spine. The contemporaneous medical evidence do not document any injury, symptoms, or complaints to the lumbar spine.

Admitted medical evidence from the San Antonio Regional Hospital for treatment on March 7, 2012 for the industrial incident does not document anything related to the lumbar spine. (Applicant's Exhibit 2.) In fact, the first indication of subjective complaints to the lumbar spine appear in Dr. Galloni's report dated June 25, 2017, more than 7 years from the incident. (Joint Exhibit A-2.)

Though Dr. Galloni would find industrial causation for the lumbar spine, his conclusions are conclusory and not supported by any substantial facts or reasoning. Within his initial report dated June 25, 2019, Dr. Galloni merely states, "I think that the way this patient explains the injury seems to be industrial to the cervical spine and lumbosacral spine. Therefore, the causation will be industrial[.]" (Joint Exhibit A-1, pg. 43.) Subsequently in his July 16, 2021 re-evaluation report, Dr. Galloni simply states that "[c]ausation is industrial." (Joint Exhibit A-2, pg. 2.) And significant to this Court's consideration, Dr. Galloni does not attempt to reconcile the fact there is a complete lack of reporting by the Applicant of any injury, symptoms, or complaints to the lumbar spine relating to the March 7, 2012 incident until his June 25, 2019 med-legal evaluation.

The Court cannot rely upon Dr. Galloni's reporting as substantial evidence to support a finding of industrial causation to the Applicant's lumbar spine. Absent any other reporting, the Applicant cannot said to have met his burden in proving industrial injury to the lumbar spine. Thus, the undersigned WCJ maintains that the Applicant did not sustain injury to the lumbar spine.

Earnings

The undersigned WCALJ found Applicant's weekly earning capacity to be $1,327.60 under Labor Code section 4453(c)(4). The Applicant does not dispute the undersigned WCALJ's findings regarding the average weekly earnings.

Temporary Disability

Whether an applicant is permanent and stationary or temporarily disabled is an issue that typically requires medical evidence. (*Huston v. Workers' Comp. Appeals Bd.* (1979) 95 Cal.App.3d 856.) A medical opinion must disclose the underlying basis for its conclusions in order to constitute substantial evidence. (*Zemke v. WCAB*, *supra,* 68 Cal. 2d 794.)

As aforementioned, Judge Armstrong previously found industrial injury to the Applicant's neck, right rib/chest wall, and left cheek only as a result of the March 7, 2012 incident. (Joint Exhibit A-3.) During the August 9, 2022 Trial, the undersigned WCALJ did not find industrial causation to any other parts of body beyond those previously found. And the Applicant did not offer into the record any substantial medical evidence that certifies him as being temporarily disabled for the industrially-related parts, either the neck, right rib/chest wall, and/or the left cheek during the period at issue.

Accordingly, the undersigned WCALJ maintains that the Applicant did not meet his burden in proving his entitlement to temporary disability.

Permanent Disability

As it relates to permanent disability, the Applicant appears to object to the Award of 10% final permanent disability for the cervical spine only. He further suggests that he should have at least 19% permanent disability when including consideration for the lumbar spine per Dr. Galloni. However, the lumbar spine was deemed non-industrial.

Applicant further contests the 30% non-industrial apportionment opinions by Dr. Galloni. However, the undersigned WCALJ did not find Dr. Galloni's apportionment opinions to be substantial medical evidence. Thus, the 10% final permanent disability award for the cervical spine was unapportioned.

Lastly, the Applicant believes his total permanent disability indemnity value is calculated by multiplying the total number of weeks of indemnity by $885.00. However, the maximum weekly rate for permanent disability rating between 1 and 69 is $230.00. Then, the weekly rate is increased by 15%, or to $264.50, after 60 days in accordance with Labor Code section 4658(d)(2).

Accordingly, the undersigned WCALJ maintains that the Applicant is entitled to a 10% permanent disability award for the cervical spine, which correlates to $7,705.41 in total indemnity.

QME Panel in Urology

Once an Agreed Medical Evaluator, an Agreed Panel QME, or panel Qualified Medical Evaluator has issued a comprehensive medical-legal report in a case and *a new medical dispute arises*, the parties, to the extent possible, shall obtain a follow-up evaluation or a supplemental evaluation from the same evaluator. (*Emphasis added*) (*Cal. Code Regs., tit. 8, § 31.7(a)*.) If an additional QME panel in a different specialty is necessary, California Code of Regulations, title 8, section 31.7(b) requires a showing of good cause. Good cause, as relevant to this matter, is met when the parties jointly agree on the need for an additional evaluator in a different specialty or the WCJ orders an additional panel. (*Ibid.*)

In his Petition for Reconsideration, the Applicant relies upon Labor Code section 4060 to support his entitlement to an additional QME panel in Urology (MUU). The Applicant was afforded his right to a compensability panel. The parties had previously obtained a QME Panel in Internal Medicine, upon which Dr. Denise Townsend was the last remaining physician to evaluate the Applicant's complaints. And Dr. Townsend evaluated the Applicant's hypertension and excretory system/kidney in the form of renal failure. Accordingly, Dr. Townsend had definitely commented upon Applicant's complaints relating to his hypertension and renal failure, opinions of which Judge Armstrong had relied upon when issuing findings.

Absent any outstanding or new medical dispute, the undersigned maintains that the Applicant has not shown sufficient good cause for an additional QME Panel in Urology. And his reliance upon Labor Code section 4060 is not convincing as he was afforded a QME compensability panel already.

As such, the undersigned WCALJ maintains that the Applicant is not entitled to an additional QME Panel in Urology.

V

RECOMMENDATION

For the reasons stated above, it is respectfully recommended that the Defendant's Petition for Reconsideration be denied.

DATE: November 21, 2022

JASON L. BUSCAINO
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

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Served on all parties as shown above: On: November 21, 2022
By: C. Ramirez-Reyna