WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

LOUIS REYN, *Applicant*

vs.

HOUSE OF IMPORTS; ACE AMERICAN INSURANCE COMPANY, administered by GALLAGHER BASSETT SERVICES, INC., *Defendants*

Adjudication Number: ADJ10311023
Anaheim District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of the Findings and Order and Award issued by a workers' compensation administrative law judge (WCJ) on July 10, 2023, wherein the WCJ found in pertinent part that applicant sustained injury to his back, bilateral knees, left ankle, psyche, lower gastrointestinal system (colonic and rectal disorders), hypertension and the upper gastrointestinal system (upper digestive tract); that applicant was not a victim of a violent act or directly exposed to a significant violent act as a result as a result of the injury of October 30, 2015, pursuant to Labor Code[1] section 4660.1(c)(2)(A); that the injury of October 30, 2015 was not catastrophic pursuant to Labor Code section 4660.1(c)(2)(B); and that applicant is entitled to a permanent disability award of 61% after apportionment.

Applicant contends as follows:

> Labor Code section 4660.1(c) does not preclude an injured worker from being entitled to an award of permanent total disability pursuant to Labor Code section 4662(b) and *LeBoeuf v. WCAB* (1983) 48 Cal. Comp. Cases 587; that the Courts mistakenly relied on the factors set forth in the case of *Wilson v. State of California Fire* (2019) 84 Cal. Comp. Cases 393 (Appeals Bd. en banc.) to determine applicant was not entitled to a psychiatric impairment because the applicant in the Wilson case was not 100% disabled; that Labor Code section 4661(c) does not apply because the mechanism of injury was the result of an act that is vehemently or passionately threatening and that the injury was catastrophic because of the intensity and seriousness of treatment applicant received, the ultimate outcome when applicant's physical injury is permanent and stationary, the severity of the physical injury and its impact on applicant's abilities to perform average daily activities and that the physical injury is

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

> closely analogous to a severe head injury and to an incurable and progressive disease; that the permanent impairments should have been added and not combined due to the synergistic nature of the orthopedic, psychiatric and internal impairments; that applicant is permanently and totally disabled because he is not amenable to vocational rehabilitation; and that the Court erred by failing to exclude defendant's vocational experts' report as evidence.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied. As stated by the WCJ in the Report:

> The scheduled rating is prima facie evidence of an employee's level of permanent disability resulting from an injury. (Lab. Code, § 4660.1(d).) However, an employee may challenge the scheduled percentage of permanent disability "by demonstrating that due to industrial injury the employee is not amenable to rehabilitation." (*Ogilvie v. Workers' Comp. Appeals Bd*. (2011) 197 Cal. App. 4th 1262, 1277 [129 Cal. Rptr. 3d 704, 76 Cal. Comp. Cases 624].)
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> …"The first step in any *LeBoeuf* analysis is to determine whether a work-related injury precludes the employee from taking advantage of vocational rehabilitation and participating in the labor force." (*Contra Costa County vs. Workers' Comp. Appeals Bd. (Dahl)* (2016) 240 Cal. App. 4th 746, 758 [193 Cal. Rptr. 3d 7, 80 Cal. Comp. Cases 1119].) This necessitates an "individualized approach," which, pursuant to *Ogilvie*, looks at the impact of only the industrial injury without consideration for nonindustrial factors on the employee's amenability to vocational rehabilitation. (*Id*.) Nonindustrial factors include "general economic conditions, illiteracy, proficiency in speaking English, or an employee's lack of education." (*Ogilvie, supra*, 197 Cal. App. 4th at p. 1275.) (Opinion on Decision dated 07/10/2023, at p. 30.)

"The appeals board may appoint one or more workers' compensation administrative law judges in any proceeding, as it may deem necessary or advisable, and may refer, remove to itself, or transfer to a workers' compensation administrative law judge the proceedings on any claim. . . ." (Lab. Code, § 5310.)

Based upon our preliminary review of the record, we will grant applicant's Petition for Reconsideration, and pursuant to Labor Code section 5310, we will order that this matter be referred to the WCJ at the Appeals Board for a status conference.

Our order granting applicant's Petition for Reconsideration ***is not a final order*** subject to writ of review.[2] (Lab. Code, § 5950 et seq.) Thus, we will defer issuance of our final decision on the merits of the Petition for Reconsideration (*Ibid*.)

We note the following:

A WCJ's decision 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]; *LeVesque v. Workmen's Comp. Appeals Bd*. (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].)

To be substantial evidence, a medical opinion must be well-reasoned, based on an adequate history and examination, and it must disclose a solid underlying basis for the opinion. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Bd. en banc).) A medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. (*Granado v. Workers' Comp. Appeals Bd*. (1970) 69 Cal.2d 399, 407 [33 Cal.Comp.Cases 647].) A medical report predicated upon an incorrect legal theory and devoid of relevant factual basis, as well as a medical opinion extended beyond the range of the physician's expertise, cannot rise to a higher level than its own inadequate premises. (*Zemke v. Workers' Comp. Appeals Bd*. (1968) 68 Cal.2d 794, 801 [33 Cal.Comp.Cases 358] (distinguished on other grounds).) Also, a medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. (*Escobedo, supra*, at 620*; Hegglin v. Workmen's Comp. Appeals Bd*. (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93]; *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525]; *Zemke v. Workmen's Comp. Appeals Bd*. (1968) 68 Cal.2d 794, 798.) The Appeals Board has the discretionary authority to

[2] 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; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]), or determines a "threshold" issue that is fundamental to the claim for benefits. Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Maranian v. Workers' Comp. Appeals Bd*. (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final' "]; *Rymer, supra*, at 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer, supra*, at 45 ["[t]he term ['final'] does not include intermediate procedural orders"].)

further develop the record where there is insufficient evidence to determine an issue that was submitted for decision. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) Normally, 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 Bd. en banc).) Here, it is unclear from our preliminary review whether the medical and vocational reporting in this case is substantial evidence to support the decision, and whether further development of the record may be necessary.

Accordingly, we grant applicant's petition for reconsideration, and pursuant to our authority under Labor Code section 5310, we order the matter to a status conference before the WCJ at the Appeals Board.

This is not a final decision on the merits of the Petition for Reconsideration, and we will order that issuance of a final decision after reconsideration deferred. Once a final decision is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code sections 5950 et seq.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings, Award and Order issued on July 10, 2023 by a workers' compensation administrative law judge is **GRANTED**.

IT IS FURTHER ORDERED that pursuant to Labor Code section 5906, this matter will be set for a Status Conference with the workers' compensation administrative law judge at the Appeals Board. Notice of the date, time, and format of the conference will be served separately, to be heard in the Lifesize or Microsoft Teams electronic platform, in lieu of an in person appearance at the San Francisco office of the Appeals Board.

IT IS FURTHER ORDERED that a final decision after reconsideration after consideration of the entire record, including the issues raised by applicant's Petition for Reconsideration and the Findings, Award and Order issued on July 10, 2023 by a workers' compensation administrative law judge, is **DEFERRED.**

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

NATALIE PALUGYAI, COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 2, 2023

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

LOUIS REYN
ROBERT PEARMAN
LAW OFFICES OF OWENS O. MILLER

JB/*cs*

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