WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JUANA RODRIGUEZ*, Applicant*

vs.

TAYLOR FRESH FOODS; AMERICAN ZURICH INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ17603587
Salinas District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of the October 13, 2023 Findings of Fact, Orders and Opinion on Decision (F&O), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed from October 21, 2020 to October 21, 2021, claims to have sustained industrial injury to the neck, hips, knee and upper extremities. The WCJ determined that Qualified Medical Evaluator (QME) panel numbers 7584902 and 7586333 are not valid.

Applicant contends that she complied with the procedural requirements of Labor Code[1] sections 4060 and 4062.2, and that panel number 7584902 is therefore validly issued.

We have not received an answer from any party. 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, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will deny reconsideration.

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

FACTS

Applicant claimed injury to her neck, hips, knee, and upper extremities while employed by defendant Taylor Fresh Foods from October 21, 2020, to October 21, 2021. Defendant denies the injury arose out of and in the course of employment.

On April 20, 2023, applicant completed a Workers' Compensation Claim Form, alleging cumulative injury to the knee, neck, hip and upper extremities while employed by Taylor Farms. (Ex. A-1, Panel No. 7584902 and Supporting Documentation, dated May 15, 2023, at p. 21.)

On April 22, 2023, applicant's counsel transmitted an opening letter to defendant American Zurich Insurance. (*Id.* at p. 6.) The letter is 12 pages in length, and in relevant part, states:

> The applicant will be requesting an evaluation to determine compensability. The applicant specifically requests a State Panel QME to assist with issues evident as to the applicant's ability to engage in usual and customary job duties, nature and scope of injury and potential permanent and stationary status.
>
> (*Id.* at p. 10 [Letter to American Zurich, April 22, 2023, p. 5].)

The letter of April 22, 2023 appears to indicate that a report of August 6, 2021 from primary treating physician Dr. Klick was attached to the letter, however, no reporting from Dr. Klick has been offered in evidence. (*Id.* at p. 17 [Letter to American Zurich, April 22, 2023, p. 12].)

On May 14, 2023, applicant obtained panel number 7584902 in the specialty of chiropractic medicine from the Division of Workers' Compensation (DWC) Medical Unit. On the same day, applicant served her strike of one of the physicians from the panel. (*Id.* at p. 1.)

On May 19, 2023, the DWC Medical Unit issued panel number 7586333 in response to a defense request for a panel of QMEs in the specialty of orthopedic surgery. (Ex. D-3, QME Panel No. 7586333.)

On September 25, 2023, the parties proceeded to trial on the issue of the validity of both panels.

On October 13, 2023, the WCJ issued her decision, finding that both panels were invalid. With respect to panel number 7584902, requested by applicant, the WCJ found that applicant's request for a section 4060 evaluation was "ambiguous, not readily ascertained, and simply did not rise to the level of proper notice." (F&O, Opinion on Decision, at p. 5.) The WCJ further determined that applicant's April 22, 2023 opening letter was inconsistent as to the nature and basis for the panel QME request. With respect to panel number 7586333, requested by defendant,

the WCJ observed that the request was made pursuant to section 4062, despite the claim being under investigation at the time of the request. (*Id.* at p. at p. 6.) Accordingly, the defense request for a QME panel should have been submitted pursuant to section 4060, rather than section 4062. Moreover, the report which was the basis of defendant's objection under section 4062 was not offered into evidence. (*Ibid*.)

Applicant's Petition avers the request for a compensability evaluation was not "unduly burdensome, as evidenced by the fact that Defendant used [applicant attorney's] objection to the medical determination of Dr. Klick on the last page of the 11-page letter to request its own orthopedic panel." (Petition for Reconsideration (Petition), at p. 6:27.) Applicant avers the request was perhaps "inartfully worded," but nonetheless complied with the statutory requirements for the issuance of a section 4060 QME panel. (*Id.* at p. 2:15.)

DISCUSSION

If a decision includes resolution of a "threshold" issue, then it is a "final" decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc).) Threshold issues include, but are not limited to, the following: injury arising out of and in the course of employment, jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd.* (*Gaona*) (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or court of appeal. (See Lab. Code, § 5904.) Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision issues.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the petitioner challenging a hybrid decision only disputes the WCJ's determination regarding interlocutory issues, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions. Here, the WCJ's decision includes a finding regarding a threshold issue on employment. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal. Although the decision contains a finding that is

final, the petitioner is only challenging interlocutory findings/orders in the decision regarding the discovery dispute. Therefore, we will apply the removal standard to our review. (See *Gaona, supra*.)

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 280, fn. 2 [70 Cal.Comp.Cases 133].) The Appeals Board will grant removal only if the petitioner shows that significant prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a); see also *Cortez, supra; Kleemann, supra*.) Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10955(a).)

Section 4060 provides as follows in relevant part:

> (a) This section shall apply to disputes over the compensability of any injury. This section shall not apply where injury to any part or parts of the body is accepted as compensable by the employer.
>
> ...
>
> (c) If a medical evaluation is required to determine compensability at any time after the filing of the claim form, and the employee is represented by an attorney, a medical evaluation to determine compensability shall be obtained only by the procedure provided in Section 4062.2.
>
> (Lab. Code, § 4060(a) and (c).)

To obtain a QME panel in a represented case, section 4062.2 provides, in relevant part, as follows:

> (a) Whenever a comprehensive medical evaluation is required to resolve any dispute arising out of an injury or a claimed injury occurring on or after January 1, 2005, and the employee is represented by an attorney, the evaluation shall be obtained only as provided in this section.
>
> (b) No earlier than the first working day that is at least 10 days after the date of mailing of a request for a medical evaluation pursuant to Section 4060 or the first working day that is at least 10 days after the date of mailing of an objection pursuant to Sections 4061 or 4062, either party may request the assignment of a three-member panel of qualified medical evaluators to conduct a comprehensive medical evaluation. The party submitting the request shall designate the

> specialty of the medical evaluator, the specialty of the medical evaluator requested by the other party if it has been made known to the party submitting the request, and the specialty of the treating physician. The party submitting the request form shall serve a copy of the request form on the other party.
>
> (Lab. Code, § 4062.2(a)-(b).)

Section 4060 permits a medical-legal evaluation to determine compensability "at any time after the filing of the claim form." Section 4062.2(b) requires the party requesting a medical evaluation pursuant to section 4060 to wait until the first working day that is "at least 10 days after the date of mailing of a request for a medical evaluation." Accounting for an additional ten days for mailing outside California pursuant to WCAB Rule 10605(a)(2), the requesting party may consequently request a panel on or after the 20th day from the mailing date of a request for an evaluation. (See *Murray v. County of Monterey* (May 29, 2015, ADJ9541181) [2015 Cal. Wrk. Comp. P.D. LEXIS 304] [panel found that the existing version of section 4062.2 allows a QME panel request on the 10th day after a written objection (or 15th day if the request is mailed), unlike in *Messele v. Pitco Foods, Inc.* (2011) 76 Cal.Comp.Cases 956 (Appeals Board en banc), which required waiting until the 16th day per a previous version of the statute].)

The WCJ has determined that applicant's initial request for a compensability evaluation, as contained in her letter of April 22, 2023, was sufficiently vague and internally inconsistent as to invalidate the request. Applicant acknowledges the request was "inartfully worded" but nonetheless was sufficiently clear to communicate applicant's request for a compensability evaluation. (Petition, at p. 2:15.) We agree. There is no statutory requirement that a request under section 4060 be made in a separate document or pleading, or that the request cannot be made among other legal requests and demands made in the course of communications between the parties. We also note that the defendant used the same letter of April 22, 2023 as the basis for its own request for a panel of QMEs. (F&O, Opinion on Decision, at p. 6.) We therefore conclude that the defendant was reasonably apprised of applicant's request for an evaluation pursuant to section 4060.

However, and notwithstanding the above analysis, we also observe that applicant's claim form was attached to applicant's opening letter to defendant. (Ex. A-1, Panel No. 7584902 and Supporting Documentation, dated May 15, 2023, at p. 21.) Applicant's opening letter, in turn, contained the request for a compensability evaluation pursuant to section 4060. (*Id.* at p. 10.) Section 4060 provides that, "[i]f a medical evaluation is required to determine compensability *at*

any time after the filing of the claim form, and the employee is represented by an attorney, a medical evaluation to determine compensability shall be obtained only by the procedure provided in Section 4062.2." (Lab. Code, § 4060(c), italics added.) Accordingly, applicant's request for a compensability evaluation was not made after the filing of the claim form. The record does not establish that any claim form was filed prior April 22, 2023. Section 4062.2(b) requires a party to wait 10 days after making an appropriate request for a comprehensive medical legal evaluation before obtaining a panel of QMEs. Because applicant's initial request for a compensability evaluation was made *simultaneously* with the service of a claim form, applicant's request for a compensability evaluation did not comport with section 4060. Accordingly, panel number 7584902, which issued as a result of applicant's April 22, 2023 request, was invalid.

With respect to panel number 7856333, requested by defendant, we agree with the WCJ that the request for an evaluation pursuant to section 4062 was improper because the claim was still being investigated at the time of defendant's request, and because the claim was ultimately denied. Moreover, the parties have not moved the underlying report of primary treating physician Dr. Klick into evidence, and thus the basis for a section 4062 evaluation is not established in the evidentiary record.

We therefore agree with the WCJ's ultimate decision invalidating both panel numbers 7584902 and 7586333. We will deny reconsideration, accordingly.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

***I DISSENT*. (*See separate dissenting opinion*)**

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 4, 2024

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

JUANA RODRIGUEZ
KNOPP PISTIOLAS
BAVA & ASSOCIATES

SAR/abs

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

DISSENTING OPINION OF COMMISSIONER CAPURRO

I respectfully dissent. Applicant's request for a panel of QMEs pursuant to section 4060 was made following the statutory time limits described in section 4062.2. Accordingly, I would grant applicant's Petition, and amend Finding of Fact No. 8 to reflect that Panel No. 7584902 is valid.

I agree with my colleagues that the request for a compensability evaluation pursuant to section 4060 as contained in applicant's April 22, 2023 opening letter was sufficiently clear for defendant to understand the nature and legal significance of the request. I also agree with the WCJ that defendant's understanding of the nature and legal significance of the request is reflected in defendant's reliance on the same letter as the basis for its own request for a panel of QMEs, albeit in a different medical specialty.

However, I believe that applicant's May 14, 2023 request for a compensability evaluation with the Division of Workers' Compensation (DWC) Medical Unit was made *after* her filing of a claim form, resulting in the issuance of a valid panel of QMEs.

Subdivision (c) of section 4060 provides, "If a medical evaluation is required to determine compensability at any time after the filing of the claim form, and the employee is represented by an attorney, a medical evaluation to determine compensability shall be obtained only by the procedure provided in Section 4062.2." (Lab. Code, § 4060(c).)

Subdivision (c) of section 5401 provides that "a claim form is deemed filed when it is personally delivered to the employer or received by the employer by first-class or certified mail." (Lab. Code, § 5401(c).) Subsection (d) of section 5401 also provides that, "[t]he claim form shall be filed with the employer … prior to the injured employee's request for a medical evaluation under Section 4060, 4061, or 4062." (Lab. Code, § 5401(d).) Thus, completed *service* of the claim form on the defendant employer satisfies the requirement that the claim form be *filed*.

Here, a claim form and an application for adjudication were both served on the employer and filed with the Appeals Board on April 22, 2023. (See Exhibit A-1, Panel No. 7584902 and Supporting Documentation, May 14, 2023, at p. 28.) Accordingly, applicant's request for a panel of QMEs pursuant to section 4060, submitted to the DWC Medical Unit on May 14, 2023, was made "after the filing of the claim form." (Lab. Code, § 4060(c).)

I acknowledge that section 4060(c) is not a model of clarity and is susceptible to multiple interpretations. However, workers' compensation claims are initiated by the service of a claim

form in addition to the filing of opening documents with the Appeals Board. I believe that the reading of section 4060(c) as requiring the filing of a claim form followed by an *additional* waiting period prior to requesting a compensability evaluation is at odds with our objectives of expeditious delivery of reasonable benefits to injured workers. (Cal. Const., Art. XIV, § 4.) Moreover, section 3202 requires that we interpret the legislature's statutory framework with the goal of prompt delivery of benefits. (Lab. Code, § 3202.) Here, prompt delivery of benefits requires a prompt determination of compensability pursuant to sections 4060 and 4062.2. Consistent with these statutory and constitutional prescriptions, I believe we must interpret section 4060(c) in a manner that speeds the delivery of benefits, rather than impedes it.

I therefore conclude that applicant complied with the notice requirements set forth in sections 4060 and 4062.2, and that panel 7584902 was appropriately and validly issued. Accordingly, I would grant applicant's petition and amend Finding of Fact No. 8 to reflect that Panel No. 7584902 is valid.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 4, 2024

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

JUANA RODRIGUEZ
KNOPP PISTIOLAS
BAVA & ASSOCIATES

SAR/abs

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