WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MURIEL WINTER, ***Applicant***

vs.

SIMPLY DISCOUNT FURNITURE; HARTFORD INSURANCE COMPANY OF THE MIDWEST, administered by, ***Defendants***

Adjudication Number: ADJ11387984
Van Nuys District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition 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 deny reconsideration.

We observe, moreover, it is well-established that the relevant and considered opinion of one physician may constitute substantial evidence, even if inconsistent with other medical opinions. (*Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525].)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 9, 2021

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

MURIEL WINTER
MICHAEL BURGIS & ASSOCIATES
ALBERT & MACKENZIE

PAG/*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

Defendants Simply Discount Furniture and its insurer, Hartford Insurance Company of the Midwest administered by The Hartford, have through their counsel filed a petition for reconsideration of the Findings and Award dated January 15, 2021, which found and awarded ongoing temporary disability, up to a maximum of 104 weeks, to applicant Muriel Winter, age 51 at the time of her left knee injury of June 7, 2018 while employed as a visual designer by Simply Discount Furniture.

Defendants' petition contends that by the findings and award, the undersigned acted without and in excess of his power, and that the findings of fact do not support the decision, finding, or order, and the evidence does not justify the findings of fact. More specifically, the petition contends that the Panel Qualified Medical Evaluator (PQME) report of Gustav Salkinder, M.D. is substantial medical evidence and that the undersigned should have relied on the medical expert opinions of Dr. Salkinder instead of relying on the medical expert opinions of primary treating physician (PTP) Behnam Sam Tabibian, M.D. regarding maximal medical improvement (MMI) and temporary disability.

II
FACTS

At trial on October 26, 2020, the parties stipulated that Muriel Winter, while employed on June 7, 2018 as a visual designer, Occupational Group Number 360, at Saugus, California, by Simply Discount Furniture, sustained injury arising out of and in the course of employment to her left knee, and at the time of injury the employer's workers' compensation carrier was the Hartford Insurance Company of the Midwest. There was no evidence that applicant injured her right knee or bilateral lower extremities other than the left knee.

The parties also stipulated at trial that at the time of injury, the employee's earnings were $616.35 per week, warranting indemnity rates of $410.90 per week for temporary disability and $290.00 per week for permanent disability, and that the employer has furnished some treatment and that the primary treating physician (PTP) is Dr. Tabibian.

Based on the medical expert opinions of PTP Dr. Behnam Sam Tabibian, which were found to be more substantial and persuasive than those of the Panel Qualified Medical Evaluator (PQME), Dr. Gustav Salkinder, it was found that applicant, Muriel Winter, has not reached maximal medical improvement

(MMI), because ongoing treatment has not been provided, and per Dr. Tabibian and applicant's credible testimony at trial, her condition has worsened.

Also based on Dr. Tabibian, it was found that Ms. Winter's injury caused temporary disability from August 14, 2018 to present and continuing, for which she is entitled to indemnity at the weekly rate of $410.90 up to the maximum of 104 weeks under Labor Code section 4656 for all days during this period that applicant was not actually working at modified duties, less credit for all sums paid by defendants for both temporary and permanent disability benefits during this period, and less an attorney fee equal to 15% of any net temporary disability that is due after deduction of sums paid from the retroactive temporary disability indemnity owed. The issues of permanent disability and apportionment were deferred, because it was found that applicant has not reached Maximal Medical Improvement.

Based on the medical expert opinions of Dr. Tabibian, which actually appear to be corroborated by the opinions of PQME Dr. Salkinder in this respect, it was found that applicant will require further medical care, and may be entitled to reimbursement for self-procured medical care, subject to proof, in an amount to be adjusted by and between the parties, with the WCAB reserving jurisdiction in the event of a dispute. All issues not expressly addressed in the January 15, 2021 Findings and Award of temporary disability were expressly deferred.

Counsel for defendants filed a timely, verified petition for reconsideration dated February 8, 2021, essentially contending that the undersigned should have followed the opinions of the PQME instead of the PTP.

III
DISCUSSION

Defendants' petition correctly cites case law regarding substantial medical evidence. The Workers' Compensation Appeals Board (WCAB) has held, *en banc*, that "it is well established that any decision of the WCAB must be supported by substantial evidence." (*Escobedo v. Marshalls* (2007) 70 Cal. Comp. Cases 604, 620, citing Labor 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].) "In this regard, it has been long established that, in order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability." (*Escobedo*, cited above, 70 Cal. Comp. Cases 604, 620, citing *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413, 416-417, 419 [33 Cal. Comp. Cases 660], *Travelers Ins. Co. v. Industrial Acc. Com.* (*Odello*) (1949) 33 Cal.2d 685, 687-688 [14 Cal. Comp. Cases 54], *Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal. App.4th 1692, 1700-1702, 1705 [58 Cal. Comp. Cases 313].) "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 v. Marshalls*, cited above, 70 Cal. Comp. Cases 604, 620, citing *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.,* supra, 68 Cal.2d at p. 798.) "Further, a medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. (*Escobedo*, cited above, 70 Cal. Comp. Cases 604, 621, citing *Granado v. Workers' Comp. Appeals Bd.* (1970) 69 Cal. 2d 399, 407 (a mere legal conclusion does not furnish a basis for a finding), *Zemke v. Workmen's Comp. Appeals Bd.,* supra, 68 Cal.2d at pp. 799, 800-801 (an opinion that fails to disclose its underlying basis and gives a bare legal conclusion does not constitute substantial evidence), and *People v. Bassett* (1968) 69 Cal.2d 122, 141, 144 (the chief value of an expert's testimony rests upon the material from which his or her opinion is fashioned and the reasoning by which he or she progresses from the material to the conclusion, and it does not lie in the mere expression of the conclusion; thus, the opinion of an expert is no better than the reasons upon which it is based).)

As *Escobedo* summarized, a doctor's report must provide reasoning, not merely conclusions, that are based on relevant facts, an adequate history and examination, correct legal theories, and based on reasonable medical probability, not guesswork.

There is no dispute about injury in this case. At trial, it was stipulated that Muriel Winter injured her left knee while employed on June 7, 2018 as a visual designer, Occupational Group Number 360, at Saugus, California, by Simply Discount Furniture. The apparent reason the parties agreed to the occupational group number of 360 is the fact that although Ms. Winter was styled a "visual designer" by job title, her actual job duties involved moving furniture on a regular basis, and at the time of the specific injury of June 7, 2018, she was moving a section of a reclining sofa when her left knee made a snap sound (MOH/SOE 10/26/2020, p. 5, lines 22-23). She received injections, physical therapy, and acupuncture from Dr. Tabibian, but her treatment was interrupted by the COVID-19 pandemic (*Id*., p. 5, lines 24-25). Her knee condition got worse after the injury (*Id.*, p. 6, lines 1-2).

As explained in *California Institute of Technology v. Workers' Comp. Appeals Bd.* (Bonzo) (2010) 75 Cal. Comp. Cases 735, the opinions of a Panel QME do not have to be followed, and may be weighed against those of a treating physician. In this case, the medical expert opinions of Dr. Behnam Sam Tabibian were found to be more substantial, persuasive, and consistent with applicant's testimony than those of the Panel Qualified Medical Evaluator (PQME), Dr. Gustav Salkinder, in particular regarding whether applicant had reached Maximal Medical Improvement (MMI). It appears that she has not reached MMI

because ongoing treatment has not been provided, and per Dr. Tabibian and applicant's credible testimony, her condition has worsened. Dr. Salkinder does not explain *how* and *why* applicant's condition met the definition of MMI in the *AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition*, although he does provide a definition in his report. Unfortunately, Dr. Salkinder's definition of MMI appears to be taken from a New Mexico statute regarding unemployment benefits and not the AMA Guides, Fifth Edition.

Dr. Salkinder's report defines MMI as "the date after which further recovery from or lasting improvement to an injury can no longer be reasonably anticipated based upon reasonable medical probability, as determined by a healthcare provider" (Report of Dr. Salkinder dated 2/7/2020, Defendant's A, p. 18, lines 1-5), citing "51-1-1 NMSA 1978."

The AMA Guides, Fifth Edition definition of MMI is a "condition or state that is well stabilized and unlikely to change substantially in the next year, with or without medical treatment. Over time, there may be some change; however, further recovery or deterioration is not anticipated." This does differ from the definition on which Dr. Salkinder apparently relied, and it does not describe Ms. Winter's condition according to her PTP, Dr. Tabibian. Based on Dr. Tabibian's indication for additional physical therapy and referral to an orthopedic surgeon regarding a medial meniscus tear, it is found that Ms. Winter has not reached MMI as defined by the AMA Guides, Fifth Edition, and that the injury has caused temporary disability from August 14, 2018 to present and continuing, for which applicant is entitled to indemnity at the weekly rate of $410.90 up to the maximum of 104 weeks under Labor Code section 4656 for all days during this period that applicant was not actually working at modified duties, less credit for all sums paid by defendants for both temporary and permanent disability benefits during this period, and less an attorney fee equal to 15% of any net temporary disability that is due after deduction of sums paid from the retroactive temporary disability indemnity owed. Dr. Tabibian's opinions appear to be supported by reasoning, and not merely conclusions, which are based on relevant facts, an adequate history and examination, reasonable medical probability, not guesswork, and correct legal theories, including the use of the correct definition of MMI as set forth in the AMA Guides, Fifth Edition.

Defendant's petition argues that the award of temporary disability should be amended to a maximum of 104 weeks, but that is already in the award, so no amendment is required.

IV
RECOMMENDATION

It is respectfully recommended that the petition for reconsideration be denied.

DATE: 2/23/2021
Clint Feddersen
WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE