WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

MARIA ALICIA ORTEGA, ***Applicant***

vs.

CASA COLINA, Inc., Permissibly Self-Insured, ***Defendant***

Adjudication Number: ADJ12488612
Van Nuys District Office

OPINION AND ORDER
DENYING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) 1st Amended Findings of Fact and Order of December 12, 2023, wherein it was found that applicant did not sustain industrial injury to "internal, hemophilia and psyche" while employed as a housekeeper during a cumulative period ending July 8, 2019. The WCJ thus issued an order that applicant take nothing by way of her workers' compensation claim.

Applicant contends that the WCJ erred in finding that she did not sustain industrial injury. Applicant argues that the WCJ should have ordered further development of the medical record because the opinions of qualified medical evaluators internist Omar Tirmizi, M.D. and psychiatrist Mark McDonald did not constitute substantial medical evidence. We have received an Answer and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

For the reasons stated by the WCJ in the Report, which we adopt, incorporate, and quote below, we will deny the applicant's Petition.

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

1.	Minutes of Hearing	September 13, 2023
2.	Findings and Order	December 12, 2023
3.	Identity of Petitioner	Applicant
4.	Verification	Yes
5.	Timeliness	Petition is timely
6.	Petition for Reconsideration	January 3, 2024
7.	Proof of Service	Yes

II. FACTS AND PROCEDURAL HISTORY

Applicant, a now 58-year-old female, claims to have sustained a cumulative trauma injury to internal, hemophilia, and psyche during her employment for Casa Colina, Inc. as a housekeeper during the period December 8, 2016 through July 8, 2019. It is uncontroverted that she worked occasionally with a chemical product by the name of Peridox RTU. It is also uncontroverted that she has developed a hematological condition, Immune thrombocytopenia, hereinafter referred as "ITP."

Applicant filed the cumulative trauma injury claim on August 26, 2019. The parties utilized the services of Panel Qualified Medical Evaluators (PQMEs), Dr. Syed Tirmizi and Dr. Mark McDonald. PQME. Applicant claims to have developed a hematological blood condition due to exposure to a product by the name of Peridox RTU. (Defense Exhibit "A", QME report of Dr. Syed Tirmizi, December 11, 2019, pg. 2). The applicant was also evaluated by Panel QME in psychiatry, Dr. Mark McDonald, who issued a report, dated November 22, 2021. (Joint Exhibit 1, Dr. Mark McDonald November 22, 2021 report).

Panel QME Dr. Tirmizi issued an initial report, dated December 11, 2019 (Def. Exhibit A), wherein he found that applicant's hematological condition, Immune thrombocytopenia, hereinafter referred as "ITP" was not industrial. Panel QME in psychiatry, Dr. Mark McDonald, who issued a report, dated November 22, 2021, found that applicant's adjustment disorder and mixed anxiety with depressed mood was predominately caused by her chronic ITP condition and deferred the causation of the ITP to the internal QME. (Joint Exhibit 1).

The matter was set for Trial again on the issue of AOE/COE before the undersigned who issued a 1st Amended Findings & Order dated December 12, 2023. Thereafter, Applicant filed the instant 1st Amended Petition for Reconsideration on January 3, 2024.

Applicant's Petition for Reconsideration is based on the following grounds:

1. The evidence does not justify the findings of fact; and
2. The findings of fact do not support the order, decision or award.

Essentially, Applicant petitioner argues that (1) PQME Tirmizi lacks expertise[,] and his reporting is not substantial medical evidence, (2) PQME McDonald's reporting is not substantial medical evidence, and (3) the record needs development.

III.
DISCUSSION

A.

The Reporting of PQME Dr. Tirmizi Constitutes Substantial Medical Evidence and Does Not Require Development of the Medical Record

Applicant claims that the undersigned WCJ erred in determining that PQME Tirmizi's reporting constitutes substantial medical evidence based on reasonable medical probability.

In order to constitute substantial evidence, a medical opinion must be predicated on "reasonable medical probability." A medical opinion needn't be predicated on scientific certainty. *McAllister v. WCAB* (1968) 33 CCC 660; *Rosas v. WCAB* (1993) 58 CCC 313; *E.L. Yeager Construction v. WCAB (Gatten)* (2006) 71 CCC 1687, 1691. Panel QME Dr. Tirmizi issued an initial report, dated December 11, 2019, (Defense Exhibit "A") wherein he found that applicant's hematological condition, Immune thrombocytopenia, hereinafter referred as "ITP" was not industrial. He had reviewed literature for Peridox RTU, the chemical applicant alleged to have caused her condition, and found no correlation. Instead, the QME indicated that applicant's diagnosis is commonly due to infections or autoimmune disease/disorders. (Defense Exhibit "A", QME report of Dr. Tirmizi, December 11, 2019, pg. 5.) QME Dr. Tirmizi reviewed all available medical records and issued a supplemental report, dated July 18, 2020, (Defense Exhibit "B") continuing to find that there was no correlation between exposure to Peridox RTU, or other chemicals, and the development of ITP diagnosis/disorder.

QME Dr. Tirmizi was cross-examined on August 27, 2020 by applicant wherein the QME was asked whether there was a more appropriate physician to assess the ITP condition. In that deposition, the QME indicated "as I sit here today, no." (Defense Exhibit "E", Cross-Ex Dr. Tirmizi September 27, 2020, pg. 29 of cross ex, line 6-11). QME Dr. Tirmizi was asked to review the medical journal articles and Applicant's PTP Dr. Marvin Pietruszka's deposition testimony

regarding the ITP diagnosis. Dr. Tirmizi issued a report, dated March 11, 2021, disagreeing with Dr. Pietruszka's findings. QME Dr. Tirmizi's causation assessment remained unchanged[], and he continued to find that applicant did not suffer from an industrial condition. (Defense Exhibit "C").

Although the applicant believes that Peridox RTU exposure was the cause of her ITP condition, QME Dr. Tirmizi found that there is no association between chemicals and development of ITP. He continued to find that applicant's ITP is likely due to an autoimmune condition as noted in his initial report, supplemental reports and cross-examination testimony. QME Dr. Tirmizi's reporting and finding has not changed despite applicant's valiant efforts. The QME reporting fulfilled the requirements of California Code of Regulations Section 10682, and provided a thorough analysis as to the findings.

On the contrary, Applicant has provided no testimony to contradict the QME reporting or the medical record, nor were there any witnesses that could support the applicant's version of events. The applicant has not provided any substantial medical evidence, documentation or testimony to support that the ITP was AOE/COE. There is nothing to refute the findings of QME Dr. Tirmizi and the applicant has provided no evidence to support that Peridox RTU or any chemical used during her employment at Casa Colina has caused her ITP diagnosis and has not met her burden.

The applicant goes so far as to allege in her petition that QME Dr. Tirmizi is not qualified to comment on causation. This argument fails as well. In his cross-examination of August 27, 2020, QME Dr. Tirmizi was asked if he would defer to a hematologist or rheumatologist for causation of ITP. Dr. Tirmizi felt that he was able to assess industrial causation. In his deposition, Dr. Tirmizi states "At this point, no. I think I have, which I think is a reasonable job of based on whatever information I had. But perhaps after yours, my - - after your letter, I may change my mind. But as I sit here today, no." (Defendant Exhibit "E", cross-examination of Dr. Tirmizi September 27, 2020, pg. 29 of cross ex, line 6-11). In fact, the QME issued a report after the cross-examination at the request of the applicant's attorney. His opinion remained unchanged.

Interestingly, the applicant relies on the reporting of a pain management specialist (Dr. Marvin Pietruszka) and a chiropractor (Dr. Marina Russman) who certainly have less expertise than Dr. Tirmizi who is a Board-Certified Internist with subspecialty qualifications in Pulmonology, Sleep Medicine, and Critical Care Medicine. (App. Pet. Pg.7 lines 1-2).

B.

The Reporting of PQME Dr. McDonald Constitutes Substantial Medical Evidence

On 11/22/2021, PQME Dr. McDonald evaluated Applicant in the field of Psychiatry. He opined that 100% of Applicant's adjustment disorder with mixed anxiety and depressed mood, was caused by her chronic ITP condition while employed as a housekeeper at Casa Colina. Causation of ITP itself is deferred to the QME specialist. (Joint Exhibit 1, pg. 27). PQME McDonald makes a finding of psyche injury contingent on whether ITP is industrially related because he opined that 100 percent of Applicant's adjustment disorder with mixed anxiety and depressed mood, was caused by her chronic ITP condition. QME Dr. McDonald found that applicant's psych conditions were due to her ITP diagnosis and deferred the causation of the ITP to the internal QME. Since internal QME Dr. Tirmizi did not find an industrial correlation to the ITP diagnosis, and the undersigned finds that opinion substantial for the reasons stated above, the applicant did not meet her burden of proof for an industrial psych injury. The QME reporting fulfilled the requirements of California Code of Regulations Section 10682, and provided a thorough analysis as to their findings.

Applicant provided no testimony to contradict either QME reporting nor the medical record, nor were there any witnesses that could support the applicant's version of events. The applicant has not provided any substantial medical evidence, documentation or testimony to support internal, hemophilia, nor psyche injury AOE/COE. Applicant has not met her burden of proving AOE/COE.

C.

The Record Does Not Require Development

Applicant argues the record needs to be developed. It does not. Even though the Courts have construed the workers' compensation laws liberally in favor of extending benefits, an employee seeking benefits still carries the burden of proof by a pre-ponderance of evidence that an injury arose out of and in the course of employment. *Livitsanos v. Superior Court* (1992) 2 Cal.4th 744, 753, 753; 57 CCC 355, Labor Code (LC) §§3202, 3202.5, 3208, 5705. Medical evidence that lacks convincing force and probability of truth does not establish prima facie proof of a work connection. *Wehr v. Worker's Comp. Appeals Bd.* (1985) 165Cal.App.3d 188, 194; 50 CCC 165. It is well established that an Award must be based on legally competent evidence, not on mere speculation that an injury was industrially caused. *City and County of San Francisco v. IAC (Murdock)* (1953) 18 CCC 103. It has also been held that a medical expert's opinion is not substantial evidence to sustain a decision if the opinion is not based on relevant facts or assumes an incorrect legal theory. *Zemke v. WCAB* (1968) 68 Cal.2d794,

798; *Franklin v. WCAB* (1978) 79 Cal.App.3d 224, 235). The Applicant has failed to carry that burden here.

California Labor Code section 5502(d)(3) provides that discovery shall close on the date of the mandatory settlement conference (MSC). This generally means that no additional evidence may be obtained by the parties after an MSC. But in an en banc decision, McDuffie v. Los Angeles County Metropolitan Transit Authority (2002) 67 CCC 138 (appeals board en banc), the appeals board set forth the preferred procedure to be followed when the medical record requires further development either after trial or submission of the case for decision. First, the parties should obtain supplemental opinions from the physicians who have already reported in the case. Second, if the supplemental opinions of the previously reporting physicians do not or cannot cure the need for development of the medical record, a new physician may be selected under LC 4061 and LC 4062. Finally, if none of these procedures is possible, then the WCJ may resort to appointing a regular physician.

"The findings and conclusions of the appeals board on questions of fact are conclusive and final" as long as, "based upon the entire record," they are "supported by substantial evidence." (*LeVesque v. WCAB* (1970) 35 CCC 16, 25 fn. 19). So if the appeals board's findings are supported by inferences that may fairly be drawn from evidence even though the evidence is susceptible to opposing inferences, the reviewing court will not disturb the award. (*Crown Appliance v. WCAB (Wong)* (2004) 69 CCC 55 (writ denied)).

The medical reporting in this case is more than adequate and does not require development. Two panel QMEs issued five reports and PQME Tirmzi was cross-examined by Applicant and answered interrogatories via supplemental reporting. The reasoning is clear and meets all of the hallmarks of substantial medical evidence based upon reasonable medical probability. In contrast, the self-procured reporting obtained by applicant is not persuasive.

RECOMMENDATION

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

For the foregoing reasons,

IT IS ORDERED that Applicant's Petition for Reconsideration of the 1st Amended Findings of Fact & Order of December 12, 2023 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ _ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ _ CRAIG SNELLINGS, COMMISSIONER

I DISSENT,

/s/ _ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 4, 2024

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

MARIA ALICIA ORTEGA
MICHAEL BURGIS & ASSOCIATES
MULLEN & FILIPPI

DW/mc

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

DISSENTING OPINION OF CHAIR KATHERINE A. ZALEWSKI

I respectfully dissent. I would have granted applicant's Petition, rescinded the WCJ's decision, and returned this matter to the trial level for further development of the medical record in order for the applicant to be evaluated by a hematologist.

At his August 27, 2020 deposition, qualified medical evaluator internist Omar Tirmizi, M.D., who the WCJ relied upon to find no industrial injury, testified that a hematologist would have more expertise regarding the causation of immune thrombocytopenia (ITP). (August 27, 2020 deposition at pp. 27-29.)

I believe that the applicant should be afforded the opportunity of being evaluated by a hematologist so that the issue of industrial causation of applicant's ITP may be considered by the most appropriate medical specialty. The WCJ and the Appeals Board have a duty to further develop the record when there is a complete absence of (*Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 393-395 [62 Cal.Comp.Cases 924]) or even insufficient (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]) medical evidence on an issue. The WCAB has a constitutional mandate to ensure "substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) Since, in accordance with that mandate, "it is well established that the WCJ or the Board may not leave undeveloped matters" within its acquired specialized knowledge (*Id.* at p. 404), I would have granted reconsideration, rescinded the WCJ's decision, and returned this matter to the trial level for further development of the medical record.

I therefore respectfully dissent.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZAWLESKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 4, 2024

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

MARIA ALICIA ORTEGA
MICHAEL BURGIS & ASSOCIATES
MULLEN & FILIPPI

DW/oo/mc

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