

**WORKERS' COMPENSATION APPEALS BOARD  
STATE OF CALIFORNIA**

**MARISSA AGAMA, *Applicant***

**vs.**

**MITSUBISHI MOTOR CREDIT OF AMERICA;  
TOKIO MARINE MANAGEMENT, INC., *Defendants***

**Adjudication Numbers: ADJ205708 (LAO 0849968); ADJ1690431 (LAO 0849967);  
ADJ4513618 (LAO 0875439)  
Los Angeles District Office**

**OPINION AND ORDER  
DENYING PETITION  
FOR REMOVAL**

Applicant seeks removal of the Opinion and Decision After Reconsideration (Opinion) issued by the Workers' Compensation Appeals Board (Appeals Board) on September 13, 2021. By the Opinion, the Appeals Board in a split decision amended the Findings of Fact (Findings) issued by the workers' compensation administrative law judge (WCJ) on April 27, 2021 to find that applicant must attend an examination with the qualified medical evaluator (QME). The WCJ's decision was otherwise affirmed.

Applicant contends that she will be subject to significant prejudice and irreparable harm if she is compelled to utilize the current QME, George Watkin, M.D.

We did not receive an answer from defendant.

We have considered the allegations of applicant's Petition for Removal. Based on our review of the record and for the reasons discussed below, we will deny applicant's Petition.

By the April 27, 2021 Findings, the WCJ found that applicant is not entitled to a QME replacement panel and should not be compelled "at this time" to attend an examination with the QME. Defendant sought reconsideration of the Findings solely challenging the finding by the WCJ that applicant should not be compelled to attend an examination with the QME, Dr. Watkin. Applicant did not challenge the WCJ's Findings or file an answer in response to defendant's Petition for Reconsideration.

The Appeals Board initially granted defendant's Petition to further study the factual and legal issues. In the subsequent Opinion, the Appeals Board acknowledged that the Findings were not a final decision and consequently vacated the previous Opinion and Order Granting Petition for Reconsideration. A majority of the panel affirmed the WCJ's Findings except with respect to whether applicant must be compelled to attend an examination with Dr. Watkin (Finding of Fact No. 2). This finding was amended to state that applicant must attend a PQME examination with Dr. Watkin.

Applicant continues to argue that there must be a replacement QME panel for Dr. Watkin. This issue was decided in the WCJ's April 27, 2021 Findings, which applicant did not challenge and the finding for which was not revised by the Appeals Board in the September 13, 2021 Opinion. There are 25 days allowed within which to file a petition for removal from a "non-final" decision that has been served by mail upon an address in California. (Cal. Code Regs., tit. 8, former § 10843(a), now § 10955(a); former § 10507(a)(1), now § 10605(a)(1) (eff. Jan. 1, 2020).) This time limit is extended to the next business day if the last day for filing falls on a weekend or holiday. (Cal. Code Regs., tit. 8, former § 10508, now § 10600 (eff. Jan. 1, 2020).) To be timely, however, a petition for removal must be filed with (i.e., received by) the WCAB within the time allowed; proof that the petition was mailed (posted) within that period is insufficient. (Cal. Code Regs., tit. 8, former § 10845(a), now § 10940(a); former § 10392(a), now § 10615(b) (eff. Jan. 1, 2020).)

Applicant's Petition was filed on October 6, 2021. This was more than 25 days after the service of the WCJ's April 27, 2021 decision and beyond whatever extension of time, if any, the petitioner might have been entitled to under WCAB Rule 10600. To the extent, applicant is still contesting whether she is entitled to a replacement QME panel, her Petition is untimely with regard to the WCJ's Findings on that issue.

To the extent applicant is challenging the finding in the Appeals Board's Opinion that she must attend an examination with the QME Dr. Watkin, we will deny applicant's Petition. 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 substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, former § 10843(a),

now § 10955(a) (eff. Jan. 1, 2020); 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, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020).) Here, we are not persuaded that substantial prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy if the matter ultimately proceeds to a final decision adverse to applicant.

Therefore, we will deny applicant's Petition.

For the foregoing reasons,

**IT IS ORDERED** that applicant's Petition for Removal of the Opinion and Decision After Reconsideration issued by the Workers' Compensation Appeals Board on September 13, 2021 is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ DEIDRA E. LOWE, COMMISSIONER**

**I CONCUR,**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**I DISSENT (see separate dissenting opinion),**

**/s/ MARGUERITE SWEENEY, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**November 30, 2021**

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

**MARISSA AGAMAO  
MOORE & ASSOCIATES  
TOBIN LUCKS**

***AI/pc***

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 SWEENEY**

I respectfully dissent per my previous dissenting opinion. I would grant applicant's Petition and return the matter to the trial level for the WCJ to appoint a regular doctor to evaluate applicant per Labor Code section 5701 or provide the parties with the opportunity to agree to an agreed medical evaluator (AME). (Lab. Code, § 5701.) Per my previous opinion:

As noted by the majority, AD Rule 40 permits an injured worker to discontinue a medical-legal examination where the evaluator engages in discriminatory conduct towards the worker. Applicant testified under oath at trial that Dr. Watkin's staff made assumptions about her ethnicity and engaged in hostile behavior toward her. She further testified that Dr. Watkin expressed anger towards her and made her feel racially profiled. The WCJ does not report that applicant was not credible in her testimony. In the absence of evidence refuting applicant's experience with the QME, I would accept applicant's sworn testimony that she felt discriminated against by Dr. Watkin and his staff. Bias by an evaluating physician is unacceptable and should be treated seriously. I would therefore not force applicant to return to Dr. Watkin for further examination.

Section 5701 provides the Appeals Board with the discretionary authority to appoint a regular physician to evaluate an employee. (Lab. Code, § 5701; see also Lab. Code, § 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) In lieu of returning applicant to a physician who indicated bias towards her or replacing the QME panel, I would return this matter to the trial level for the WCJ to appoint a regular physician to evaluate applicant.

There is nothing in the record to indicate that applicant was previously non-compliant with doctor's appointments or that she has raised issues of bias with other physicians. This suggests that applicant honestly felt discriminated against by Dr. Watkin and his staff. I continue to believe the Appeals Board should value and respect her request to be evaluated by another physician rather than return her to Dr. Watkin.

Therefore, I dissent.



**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ MARGUERITE SWEENEY, COMMISSIONER**

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**MARISSA AGAMAO  
MOORE & ASSOCIATES  
TOBIN LUCKS**

*AI/pc*

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