

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

MIGUEL A. CHAVEZ, *Applicant*

vs.

STATE OF CALIFORNIA – DEPARTMENT OF CORRECTIONS/CENTINELA STATE PRISON, legally uninsured, administered by STATE COMPENSATION INSURANCE FUND, *Defendants*

**Adjudication Number: ADJ9261579
San Diego District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted applicant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings and Order and Award (F&A), issued by the workers' compensation administrative law judge (WCJ) on February 25, 2020, wherein the WCJ found in pertinent part that applicant's Petition to Reopen was granted for the award of further medical treatment but that applicant did not sustain an increase in permanent disability so applicant was not entitled to additional permanent disability indemnity.

Applicant contends that the reports and deposition testimony of internal medicine qualified medical examiner (QME) Staley J. Majcher, M.D., are substantial evidence that applicant sustained 93% permanent disability as a result of the cumulative injury at issue herein.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We received an Answer from defendant.

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will rescind the F&A and return the matter to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

BACKGROUND

Applicant claimed injury in the form of hypertensive cardiovascular disease while employed by defendant as a correctional officer during the period from November 8, 2010, through November 8, 2011. Applicant was evaluated by QME Dr. Majcher, on April 30, 2012. Dr. Majcher concluded that applicant had 32% whole person impairment (WPI) as a result of the hypertensive

cardiovascular disease. (Joint Exh. 4, Dr. Majcher, April 30, 2012, p. 12.) The injury claim was settled by Stipulations With Request for Award; a WCJ issued the Award, including 54% permanent disability and future medical treatment, on January 14, 2014. Applicant filed a Petition to Reopen on November 30, 2015.

On May 2, 2016, applicant was re-evaluated by QME Dr. Majcher regarding the transient ischemic attack (TIA/stroke)¹ applicant had while at work on November 17, 2013. (Joint Exh. 3, Dr. Majcher, May 2, 2016, p. 1.) Dr. Majcher re-examined applicant and reviewed additional medical records pertaining to applicant's TIA/stroke. He diagnosed, "Hypertensive cardiovascular disease with history of neurological abnormalities associated with transient cerebral ischemia (inadequate flow of blood to the brain)" and concluded:

The applicant has a presumptive heart condition and has experienced neurologic abnormalities as a result of progression of his underlying hypertensive cardiovascular disease. His neurologic disorder is attributable to progression of hypertensive cardiovascular disease. ¶ ... Accordingly, I am concluding at this time that the applicant has not sustained new and further disability as a result of his industrial hypertensive cardiovascular disease because he continued to take medications which affected him adversely and contributed to blood pressure elevation as reflected in the medical records. ¶ ... As noted in the report of Dr. Sayed Monis dated 11/19/2013, the patient's neurologic symptoms resolved as noted by the specialist.
(Joint Exh. 3, p. 12.)

Dr. Majcher received applicant's May 2, 2016 echocardiogram to review, and in his June 13, 2016 supplemental report he stated:

In summary, the applicant now has objective evidence of two different types of heart disease, notably: Hypertensive cardiovascular disease, which was covered in my prior reports including 5/02/2016. ... There are no changes in regard to this form of heart disease. ¶ In regard to the patient's second form of heart disease, notably aortic stenosis, which refers to narrowing of one of the interior heart valves, notably the aortic valve, his condition has not reached maximum medical improvement.
(App. Exh. 4, Dr. Majcher, June 13, 2016, pp. 1 – 2.)

On November 13, 2017, Dr. Majcher re-evaluated applicant. Dr. Majcher concluded that applicant's condition was permanent and stationary as of the date of the evaluation, and he discussed applicant's diagnoses as follows:

¹ A TIA is a stroke that lasts only a few minutes, a temporary period of symptoms similar to those of a stroke. (Merriam-Webster Medical Dictionary.)

Hypertensive cardiovascular disease with history of stroke - I believe a more liberal conclusion is justified, and therefore, I am now concluding that the neurologic abnormalities associated with the patient's hypertensive cardiovascular disease are an extension of his underlying disability, and therefore, there is an industrial nexus to the stroke. ... applicant's condition is permanent and stationary ... I rate the applicant at 70% impairment of the whole person.

Valvular aortic heart disease - The patient has been evaluated by a cardiologist who did not detect any evidence of valvular heart disease, I agree with the conclusion that the patient does not suffer from valvular aortic heart disease.

Carotid artery atherosclerosis - applicant has sustained industrial aggravation of an underlying, nonindustrial disease condition.

Atherosclerosis involving arterial circulation to the lower extremities - the applicant has sustained industrial aggravation of an underlying, nonindustrial disease condition.

(Joint Exh. 2, Dr. Majcher, November 13, 2017, pp. 16 – 20.)

Dr. Majcher's deposition was taken on January 29, 2018. (Joint Exhibit 1, Dr. Majcher January 29, 2018, deposition transcript.) The testimony about the increase in whole person impairment for applicant's hypertensive cardiovascular disease, included:

Q. So the first requirement for Class 4 says that they have to have at least a Stage 1 hypertension ... despite the use of his medications?

A. Correct,

Q. And this may be looking at it simplistically but when you examined him in 2017, his blood pressure was 110/70, so that doesn't meet the very first requirement for Class 4 which is a minimum of Stage 1. ...

THE WITNESS: But does this mean that we accept the pressure reading after the stroke but the blood pressure reading was within Stage 1 to 3 when he had the stroke? Again, this may be a legal issue. But at the time when he had Stage 1-3 hypertension. Do you follow? But again, that may be a legal issue. When I evaluated [sic] him he's back to normal blood pressure. But which reading do you take per these Guides? I interpreted it as at the time of the stroke, but if I'm wrong and you have to use it as the date of my evaluation, I'd leave that up to the judge. (Joint Exhibit 1, p. 18)

Q: So at the time of your exam, November 13, 2017, if you use Mr. Chavez's condition at that time, what would your rating be?

A: I would put him at Stage 3.

Q: And where within Stage 3 would you put him?

A: The low range, 30 percent.

Q: And that's because he still has the presence of left ventricular hypertrophy, correct?

A: Correct.
(Joint Exhibit 1, pp. 19 - 20.)

The parties proceeded to trial on May 8, 2018, and the issue submitted for decision was the Petition to Reopen/permanent disability. (Minutes of Hearing and Summary of Evidence (MOH/SOE), May 8, 2018.) On June 15, 2018, WCJ ordered further development of the record.

On November 12, 2018, Dr. Majcher's deposition was taken again. The testimony about applicant's "new and further disability" included:

Q. ... And so is it your opinion that the new and further disability occurred at the time of the stroke?

A. Yes.

Q. Okay. And that date is November -- let me get the exact date for you -- November 17th, 2013.

A. Yes.

Q. And so it's your opinion that the new and further disability occurred on that date, correct, for the hypertensive cardiovascular disease?

A. Correct. ...

(Joint Exh. 5, Dr. Majcher, November 12, 2018, deposition transcript, pp. 24 – 25.)

On December 2, 2019, the parties returned to trial and the matter was submitted for decision. (MOH/SOE, December 2, 2019.)

DISCUSSION

“Permanent disability has been defined to mean any impairment of bodily or mental function which remains after maximum recovery has been attained from the effects of injury, ...” (*Brown v. Workmen's' Comp. Appeals Bd.*, (1971) 20 Cal.App.3d 903, 917 [36 Cal.Comp.Cases 627] (quotations/citations omitted).) An injured worker's condition is deemed permanent and stationary (P&S) when the level of impairment is stable and is unlikely to change with or without treatment for a reasonable period. (*California Ins. Guarantee Assn. v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 1528 [71 Cal.Comp.Cases 139]; *Sweeney v. Industrial Acc. Com.* (1951) 107 Cal.App.2d 155 [16 Cal.Comp.Cases 264]; Cal. Code Regs., tit. 8, § 10116.9(m).) A disability is considered permanent when the employee has reached maximal medical improvement, meaning his or her condition is well stabilized, and unlikely to change substantially in the next year with or without medical treatment. (Cal. Code Regs., tit. 8, §§ 10152, 9811(k), 9785(a)(8).)

In her Report, the WCJ stated:

On January 29, 2018, during his deposition, Dr. Majcher clarified his opinions on the WPI for Applicant's hypertensive cardiovascular atherosclerosis. He acknowledged that at the time of the November 13, 2017 examination, Applicant had a normal blood pressure reading (Joint Exhibit 1, page 18, lines 20-21). He opined that if he was supposed to assign a WPI to Applicant based on his readings at the time of his November 13, 2017 examination and Applicant's condition, he would assign Applicant a 30% WPI for his hypertensive cardiovascular atherosclerosis. (Joint Exhibit 1, page 19, lines 21-25 and page 20, lines 1-4). He also clarified that the 70% WPI that he assigned the Applicant in his previous report was based on Applicant's readings at the time of his 2013 stroke and taken from the medicals that were provided to him by the parties. Dr. Majcher also acknowledged that he was not sure which of the Applicant's readings he should use - the ones done at the time of Applicant's stroke that he reviewed in the medical reports provided by the parties or the readings that he did himself at the time of Applicant's MMI examination on November 13, 2017. (Report, pp. 4 – 5.)

As noted above, Dr. Majcher's testimony included:

But again, that may be a legal issue. When I evaluated [sic] him he's back to normal blood pressure. But which reading do you take per these Guides? I interpreted it as at the time of the stroke, but if I'm wrong and you have to use it as the date of my evaluation, I'd leave that up to the judge.
(Joint Exhibit 1, p. 18)

An award, order or decision by the Appeals Board must be supported by substantial evidence in light of the entire record. ((Lab. Code, §§ 5903, 5952; *Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 317-319 [33 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635-637 [35 Cal.Comp.Cases 16].) The Appeals Board's decision may be based on the opinion of a single physician which is substantial evidence. (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 159, 169 [48 Cal.Comp.Cases 566].) A medical opinion is not substantial evidence when based on incorrect facts, history or legal theory, or surmise, speculation, conjecture or guess. (*Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378 [35 Cal.Comp.Cases 525].) Here, it appears that Dr. Majcher believes applicant's WPI rating should be based on his condition at the time of the November 17, 2013 TIA/stroke, not at the time of the November 13, 2017 examination. Since permanent disability is the impairment which remains after the injured worker's condition has reached maximum medical improvement/permanent and stationary status, Dr. Majcher's understanding of when an injured worker's WPI is to be determined, is based on an incorrect legal

theory. Thus his opinions are not substantial evidence upon which a determination as to applicant's disability can be based.

The Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence pertaining to a threshold issue, or when it is necessary in order to fully adjudicate the issues. (Lab. Code §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) In our *en banc* decision, *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc), we stated, "Where the medical record requires further development either after trial or submission of the case for decision," the medical record should first be supplemented by physicians who have already reported in the case. "Only if the supplemental opinions of the previously reporting physicians do not or cannot cure the need for development of the medical record, should other physicians be considered." (*Id.*, at pp. 139, 142.) Under the circumstances of this matter, it appears that it would be appropriate for Dr. Majcher to be made aware of the appropriate timing and means for determining an injured worker's impairment, and that the parties then request that the doctor submit a supplemental opinion whereby he would provide a correct analysis of applicant's WPI and the cause thereof. Thereafter, if Dr. Majcher is unable to "cure the need for development of the medical record" it would be in the parties' interest to have applicant evaluated by an agreed medical examiner or in the alternative, for the WCJ to appoint a regular physician. (Lab. Code § 5701.)

Accordingly, we rescind the F&A and return the matter to the WCJ for further proceedings consistent with this opinion, and to issue a new decision from which any aggrieved person may timely seek reconsideration.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order and Award issued by the WCJ on February 25, 2020, is **RESCINDED** and the matter is **RETURNED** to the WCJ to conduct further proceedings consistent with this opinion, and to issue a new decision from which any aggrieved person may timely seek reconsideration.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 29, 2021

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

**LAW OFFICE OF O'MARA & HAMPTON
STATE COMPENSATION INSURANCE FUND
MIGUEL CHAVEZ**

TLH/pc

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