

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

GLENN GARCIA, *Applicant*

vs.

**COUNTY of VENTURA, permissibly self-insured, administered by SEDGWICK CLAIMS
MANAGEMENT SERVICES, *Defendants***

**Adjudication Number: ADJ9015624
Oxnard 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 (F&O), issued by the workers' compensation administrative law judge (WCJ) on January 5, 2021, wherein the WCJ found that applicant did not sustain new and further disability and the WCJ ordered that applicant take nothing by way of his Petition to Reopen.

Applicant contends that the trial record contains evidence that he had injured additional body parts and had a higher level of disability than he was previously awarded per the May 15, 2015 Stipulations With Request for Award, and that his worsening arrhythmia (irregular heartbeat) is a proper basis for reopening the injury claim.

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&O 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 to his circulatory system and to his ears in the form of hearing loss, while employed by defendant as a fire fighter/battalion chief during the period from

September 19, 1977, through May 13, 2013.¹ The injury claim, regarding applicant's circulatory system (heart/hypertensive heart disease) was settled by Stipulations With Request for Award; a WCJ issued the Award on May 15, 2015. On February 29, 2016, applicant filed an Amended Application claiming injury to his neck, back, upper extremities, hips, and lower extremities, to his circulatory system, and to his ears in the form of hearing loss. Applicant also filed a Petition to Reopen on February 29, 2016 stating:

COMES NOW, the applicant, Glenn Garcia, pursuant to Labor Code Sections 5803, 5804, 5410 and 139.5 and respectfully requests that the above-entitled matter be reopened for new and further disability based upon information and belief. Medical evidence will be forthcoming.
(Petition to Reopen, February 29, 2016.)

Applicant filed an Amended Application on August 4, 2016, adding his digestive system and respiratory system to the injury claim.

Orthopedic qualified medical examiner (QME) Yuri Falkinstein, M.D., evaluated applicant on January 27, 2017. (Joint Exh. 4, Dr. Falkinstein, January 27, 2017.) Dr. Falkinstein examined applicant, took a history, and reviewed the medical record. The diagnoses included: cervical strain, right shoulder sprain, lumbar strain, left hip trochanteric bursitis, right knee sprain/post right knee arthroscopy, and partial left ankle Achilles rupture. (Joint Exh. 4, pp. 52 - 53.) Dr. Falkinstein concluded that applicant sustained a cumulative injury to his cervical spine, right shoulder, lumbar spine, left hip, and right knee during the period from May 13, 2012, through May 13, 2013. (Joint Exh. 4, pp. 53 and 58 - 59.)

On February 8, 2017, applicant was evaluated by orthopedic agreed medical examiner (AME) Alan Sanders, M.D. (Def. Exh. A, Dr. Sanders, February 8, 2017.)² After re-examining applicant, taking an interim history, and reviewing the medical record, Dr. Sanders concluded:

Therefore at this point in time I see no evidence of new or further disability from the 2013 claim, or a case previous to that, or from continual trauma. ¶ I saw the patient right up until and through the time of his retirement and he made no mention of these problems. They certainly could not have been significant.
(Def. Exh. A, p. 19.)

¹ See the July 18, 2013 Application for Adjudication of Claim [Application], the September 27, 2013 Amended Application, and the October 28, 2013 Amended Application.

² Dr. Sanders had previously evaluated applicant, as an AME, regarding a low back, right knee, and left hip injury, and a left ankle injury. (Def. Exh. A, pp. 1 - 4.) Although he evaluated applicant regarding the cumulative injury claim at issue herein, he was not an AME in this matter. (MOH/SOE, September 16, 2020, p. 3.)

Otolaryngology QME Alfred Roven, M.D., evaluated applicant on March 8, 2017. (Joint Exh. 10, Dr. Roven, March 8, 2017.) Dr. Roven's examination of applicant included various audio diagnostic tests and he diagnosed applicant as having sensorineural hearing loss and bilateral tinnitus. (Joint Exh. 10, p. 9.) Dr. Roven concluded, "This patient's injury happened at work because of progressive hearing loss as evidenced from the audiometric results shown above, secondary to loud noise exposure." (Joint Exh. 10, p. 10.)

The internal medicine/cardiology QME, Gerald M. Weingarten, M.D., evaluated applicant on March 6, 2017. (Joint Exh. 9, Dr. Weingarten, March 14, 2017.) Based on his examination of applicant, the history he was given, and his review of the medical record, Dr. Weingarten concluded:

He has already received an award for hypertension and cardiovascular with a 21% permanent impairment award. ¶ He has not had any further cardiovascular events since this award of 2015. He has not increased his medication. His blood pressure has been under control. He has had no significant change in his cardiac dysrhythmia. There has been no further impairment for cardiovascular disease. (Joint Exh. 9, p. 77.)

QME Dr. Falkinstein was provided additional medical records. Based on his review of the records Dr. Falkinstein modified his opinions as to apportionment for the lumbar spine, left hip, and right knee. (Joint Exh. 2, Dr. Falkinstein, October 23, 2017, pp. 39 – 40.)

Dr. Weingarten was provided a report of an August 29, 2018 MRI of applicant's heart, and in the supplemental report he stated:

Based upon this additional MRI, there was no evidence of hypertensive cardiovascular disease in Mr. Garcia. ¶ Based upon this additional information, my initial conclusions do not change in regard to causation, reason for opinion, permanent impairment, and medical treatment because there is no evidence of hypertensive heart disease in Mr. Garcia [sic]. ¶ Based upon the information available at this time, he would not come under a presumption for a heart condition.

(Joint Exh. 7, Dr. Weingarten, December 3, 2018, p. 2.)

On September 23, 2019, applicant was re-evaluated by Dr. Weingarten, "... in regard to injury to his digestive and respiratory systems..." (Joint Exh. 5, Dr. Weingarten, October 16, 2019, p. 3.) Dr. Weingarten re-examined applicant, took an interim history and reviewed additional medical records. Under the sub-heading Causation, the doctor stated:

1. I find no evidence of pulmonary disease.
2. Gastroesophageal reflux disease is not industrially related.

3. Irritable bowel syndrome is not industrially related.
(Joint Exh. 5, p. 9.)

The parties proceeded to trial on September 16, 2020. The issues identified by the parties included permanent disability/apportionment and whether applicant could amend the Application for Adjudication of Claim to allege new body parts after the injury claim was resolved by Stipulations with Request for Award/Award. (Minutes of Hearing and Summary of Evidence (MOH/SOE), September 16, 2020, p. 3.) The matter was continued to October 28, 2020 for applicant's testimony and it was submitted for decision on November 23, 2020. (MOH/SOE, October 28, 2020, p. 5.)

DISCUSSION

As a preliminary matter, applicant's Petition for Reconsideration was timely. Applicant filed the Petition on January 15, 2021. However, the Petition did not come to the attention of the Appeals Board until April 23, 2021. Applicant's Petition was not timely acted upon by the Appeals Board, which has 60 days from the filing of a petition for reconsideration to act on that petition. (Lab. Code, § 5909.)³ Here, however, through no fault of applicant, the timely-filed Petition did not come to the attention of the Appeals Board until after the expiration of the statutory time period. Consistent with fundamental principles of due process, and in keeping with common sensibilities, we are persuaded, under these circumstances, that the running of the 60-day statutory period for reviewing and acting upon a petition for reconsideration begins no earlier than the Appeals Board's actual notice of the petition, which occurred on April 23, 2021. (See *Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1107-1108 [57 Cal.Comp.Cases 493]; *State Farm Fire and Casualty v. Workers' Comp. Appeals Bd. (Felis)* (1981) 119 Cal.App.3d 193 [46 Cal.Comp.Cases 622, 624].)

Section 5410 states that:

Nothing in this chapter shall bar the right of any injured worker to institute proceedings for the collection of compensation within five years after the date of the injury upon the ground that the original injury has caused new and further disability. The jurisdiction of the appeals board in these cases shall be a continuing jurisdiction within this period. This section does not extend the limitation provided in Section 5407.

(Lab. Code, § 5410.)

³All further statutory references are to the Labor Code unless otherwise noted.

Section 5410 clearly states that an injured worker may institute proceedings for the collection of compensation (Petition to Reopen) based on the original injury having caused new and further disability. At the time that the May 15, 2015 Award was issued applicant had claimed injury to his to his circulatory system in the form of hypertensive heart disease and to his ears in the form of hearing loss. As noted above, it was not until the February 29, 2016, Amended Application that applicant claimed injury to his neck, back, upper extremities, hips, and lower extremities, in addition to his circulatory system, and to his ears. An injury is a “compensable consequence” when the subsequent injury is the direct and natural consequence of an original industrial injury; the subsequent injury is considered to relate back to the original injury (*Southern California Rapid Transit District, Inc. v. Workers’ Comp. Appeals Bd. (Weitzman)* (1979) 23 Cal.3d 158 [44 Cal.Comp.Cases 107]; *Rodgers v. Workers’ Comp. Appeals Bd.* (1985) 168 Cal.App.3d 567 [50 Cal.Comp.Cases 299].) However, here there is no medical evidence in the record indicating that applicant’s orthopedic conditions are in any way caused by or related to the circulatory system and/or ear injury initially claimed. It appears the orthopedic injury claims are essentially a new injury claim and are not subject to a section 5410 Petition to Reopen.

Pursuant to section 5803:

The appeals board has continuing jurisdiction over all its orders, decisions, and awards made and entered under the provisions of this division, and the decisions and orders of the rehabilitation unit established under Section 139.5. At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor. ¶ This power includes the right to review, grant or regrant, diminish, increase, or terminate, within the limits prescribed by this division, any compensation awarded, upon the grounds that the disability of the person in whose favor the award was made has either recurred, increased, diminished, or terminated.
(Lab. Code, § 5803.)

Appeals Board Rule 10534 states:

Petitions invoking the continuing jurisdiction of the Workers' Compensation Appeals Board under Labor Code section 5803 shall set forth specifically and in detail the facts relied upon to establish good cause for reopening.
(Cal. Code Regs., tit. 8, § 10534.)

The Second district Court of Appeal discussed the mechanisms of reopening a claim for "new and further disability" and for "good cause." The Court explained that:

[I]rrespective of whether or not there has been 'new and further disability,' 'good cause' to reopen under section 5803 may exist. [Citations.] ...

In the absence of 'good cause', the appeals board is powerless to act. [Citations] What constitutes 'good cause' depends largely on the circumstances of each case. [Citations.] ...

Through many court decisions it has become well settled that, in order to constitute 'good cause' for reopening, new evidence (a) must present some good ground, not previously known to the Appeals Board, which renders the original award inequitable, (b) must be more than merely cumulative or a restatement of the original evidence or contentions, and (c) must be accompanied by a showing that such evidence could not with reasonable diligence have been discovered and produced at the original hearing." [Citations.] ...

'Good cause' includes facts which for the first time develop subsequent to the decision sought to be reopened. [Citations]
(*Nicky Blair's Rest. v. Workers' Comp. Appeals Bd. (Macias)* (1980) 109 Cal.App.3d 941, 955 - 957 [45 Cal.Comp.Cases 876] citations omitted.)

The WCJ's Report quotes the History of Injury section of QME Dr. Falkinstein's January 27, 2017 report that states in part:

According to Mr. Garcia, during the course of his employment in 1977, he recalled injuring his neck, right shoulder, low back, hips, right knee, and left Achilles. He notes that he sustained these injuries during structure fires, emergency medical road rescues, riding on fire engines and hitting his head, neck, body and knee during the driving. ... ¶ In the 1980's, he recalled injuring his low back during the structure fires, carrying victims and carrying his gear. ... He notes that he continued to work regular duty through the 1990's, but he continued to injure his neck, right shoulder, low back, hips, and right knee and left Achilles during structural fires, brush fires, carrying victims, and wearing the equipment. ... ¶ In the 1990's, he recalled injuring his low back and hips during structure, crawling on the ground and rescuing individuals. ... ¶ In the 1990's, he notes that he tore his right shoulder while crawling through training towers. ... ¶ He worked regular duty through 2009, but with persistent pain in his neck, right shoulder, low back, hips, right knee, and left ankle/Achilles. He notes that carrying victims, fighting structural fires, and brush fires, and wearing his gear would aggravate his overall pain. ... In November 2009, he was involved in a vehicle accident while driving a company vehicle. He notes that he was on a surface street and at a stop sign when he was rear-ended. He injured his low back and left hip and right knee. ... ¶ He continued to work regular duty through March 2013, but with increasing pain in his neck, right shoulder, back, hips, right knee and left ankle. He notes that fighting fires and brush fires would aggravate his pain. He notes that he was able to assign other fire fighters the work he could not do. He stopped lifting hoses, carrying hoses and ladders. He

notes that he could not wear his helmet very long due to his neck pain.... (Joint Exh. 4, pp. 3 - 4.)

Having reviewed the entire record, we agree with the WCJ that applicant was fully aware of his orthopedic complaints caused by injuries sustained while working for defendant prior to entering into the May 15, 2015 Stipulations With Request for Award. Thus, applicant did not show good cause to reopen the award based section 5803. Nor did the Petition to Reopen “set forth specifically and in detail the facts relied upon to establish good cause for reopening” as required by Appeals Board Rule 10534, quoted above. (Cal. Code Regs., tit. 8, § 10534.)

Regarding the injury to applicant’s ears, the injury claim (as amended on September 27, 2013) included ear/hearing loss. (See September 27, 2013 Amended Application, p. 3.) The May 15, 2015 Stipulations With Request for Award, and the Award, did not address the ear injury. Unlike the orthopedic claims discussed above, the Petition to Reopen, as to the ear injury, was not a new claim to a previously unpled body part. Thus, the ear injury claim was an appropriate issue to be raised by the Petition to Reopen. Also, the report from otolaryngology QME Dr. Roven is substantial evidence that applicant sustained sensorineural hearing loss and bilateral tinnitus as a result of his years of employment by defendant as a fire fighter/battalion chief. Therefore, we will return the matter to the WCJ to address the issue of applicant’s bilateral ear cumulative injury claim.

Accordingly, we rescind the F&O 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 January 5, 2021 Findings and Order 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/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 13, 2022

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

**GLENN GARCIA
LEWIS, MARENSTEIN, WICKE, SHERWIN & LEE
ROBERSON & KIMBALL**

TLH/pc

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