WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MARIA RODRIGUEZ, *Applicant*

vs.

SOUTHLAND CARE CENTER, PERMISSIBLY SELF-INSURED; ADMINISTERED BY YORK RISK SERVICES, *Defendants*

Adjudication Number: ADJ6692602
Los Angeles District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration[1] in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Applicant seeks reconsideration of the June 10, 2019 Amended Findings and Orders (F&O), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a housekeeper on November 13, 2008, sustained industrial injury to the left foot, right and left ankle, left knee, left hip, low back and psyche. The WCJ found that the reporting of orthopedic Agreed Medical Examiner (AME) Dr. Craemer was substantial medical evidence, and that applicant had not sustained the burden of establishing new and further disability. The WCJ dismissed applicant's claim for new and further disability, accordingly.

Applicant contends it was error to have dismissed the petition for new and further disability, and that the reporting of AME Dr. Craemer is not substantial medical evidence for want of diagnostic testing and a correct forensic analysis. (Petition for Reconsideration (Petition), at 13:1.) Applicant further contends the WCJ should have relied on the reporting of panel Qualified Medical Examiner (QME) Dr. Borsada to find that applicant's diabetes was aggravated as a result of her industrial injuries.

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[1] Commissioner Lowe, who was on the panel that issued the grant for study, is no longer a member of the Workers' Compensation Appeals Board. Commissioner Razo has been substituted in her place.

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

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, which we adopt and incorporate except the second sentence of the second paragraph on page four, and we have reviewed the record in this matter. For the reasons discussed below, we will affirm the F&O.

FACTS

Applicant claimed injury to her left foot, bilateral ankles, left knee, left hip, low back, psyche and sleep disorder while employed as a housekeeper by defendant Southland Lutheran Care Center on November 13, 2008. Orthopedic AME Ray Craemer, M.D. evaluated applicant and issued a report dated August 30, 2010, finding injury arising out of and in the course of employment, and assessing temporary disability and whole person impairment. (Ex. X, report of AME Ray Craemer, M.D., dated August 30, 2010.) On March 7, 2012, a Findings, Award and Order issued, sustaining injury to all claimed body parts save sleep disorder, and awarding temporary and permanent disability.

Applicant filed a Petition to Reopen for New and Further Disability on June 13, 2013. Following the Petition to Reopen, Daniel Capen, M.D. continued to serve as applicant's primary treating physician, and authored multiple interim reports in 2013. On October 25, 2013, Dr. Capen opined that applicant remained Permanent and Stationary, but required compounded topical medications. (Ex. 14, interim reports of Daniel Capen, M.D., dated October 25, 2013, at p.78.) On February 27, 2014, Dr. Capen authored a report noting that applicant had undergone right knee surgery at Kaiser "since it was not a part of her claim and was not connected to her injury." (Ex. 14, interim reports of Daniel Capen, M.D., dated February 27, 2014, at p.45.) Applicant was experiencing significant difficulties with her activities of daily living, and required "home help services." (*Ibid.*)

On January 22, 2015, AME Dr. Craemer reevaluated applicant's orthopedic complaints, noting an interim history that included a successful July 1, 2013 surgery for a brain tumor, and a January 2014 right knee partial medical meniscectomy. (Ex. A, report of Ray L. Craemer, M.D., dated January 22, 2015, pp. 4-5.) Noting a general dearth of orthopedic medical records for 2013

and 2014, Dr. Craemer further noted applicant's response that she "was quite busy with the brain operation." After conducting a clinical examination of applicant and a review of the records, including the reporting of primary treating physician Dr. Capen, the AME concluded:

> There has been no interval change in the patient's condition. She remains at maximum medical improvement as previously outlined in my report of 8/30/10. There is no new and further disability. Her clinical history and objective findings have been very stable over the interval." (*Id*. at p. 24.)

Applicant sought treatment in internal medicine from secondary treating physician Ronald Zlotolow, M.D., whose first report issued May 7, 2015. The report notes applicant's preexisting diabetes mellitus, and a physical examination within normal limits. (Ex. 12, report of Ronald Zlotolow, M.D., dated May 7, 2015, Attachment A, p. 2.) The physician reviewed no medical records. However, noting applicant's report of change in her diabetes medication following her industrial injury, Dr. Zlotolow concluded that applicant's chronic pain aggravated her diabetic condition. On May 26, 2015, Dr. Zlotolow conducted a nerve conduction study, the results of which were unremarkable. (Ex. 11, report of Ronald Zlotolow, M.D., dated May 26, 2015.) On June 5, 2015, Dr. Zlotolow requested copies of applicant's past medical records and authorization for diagnostic studies. (Ex. 10, report of Ronald Zlotolow, M.D., dated June 5, 2015.) On October 21, 2015, Dr. Zlotolow again opined that chronic pain worsened applicant's diabetes mellitus. (Ex. 9, report of Ronald Zlotolow, M.D., dated October 21, 2015.) On November 10, 2015, Dr. Zlotolow issued a report that reviewed orthopedic records submitted, but which contained no records from applicant's private doctors concerning her diabetes mellitus. (Ex. 8, report of Ronald Zlotolow, M.D., dated November 10, 2015.)

Internal medicine QME Minal Borsada, M.D. authored a medical-legal evaluation of applicant on February 8, 2016, noting applicant's untreated obstructive sleep apnea, present in 2009. (Ex. 15, report of QME Minal Borsada, M.D., dated February 8, 2016, p. 19.) On June 8, 2016, QME Dr. Borsada issued a supplemental report, reiterating the diagnosis of a sleep disturbance with industrial causation. (Ex. 13, report of QME Minal Borsada, M.D., dated June 18, 2016, p. 19.)

On May 1, 2018, the parties deposed orthopedic AME Dr. Craemer. The AME provided no change to his previously stated opinions. (Ex. C, transcript of the deposition of Ray L. Craemer, M.D., dated May 1, 2018, at 61:8.)

The parties proceeded to trial on January 2, 2019, and framed issues of the petition for new and further disability and the substantiality of the AME reporting. (January 2, 2019 Minutes of Hearing, at 2:17.) In further trial proceedings held on April 8, 2019, applicant testified that her condition had worsened following her prior Award. (April 8, 2019 Minutes of Hearing and Summary of Evidence (Minutes), at 2:21.) Applicant testified to ongoing depression, her treatment for diabetes, and to difficulties in getting restful sleep. (*Id*. at 3:3.) Applicant testified her diabetes was first diagnosed 10 years ago, and that she has trouble with frequent falls due to numbness in her left leg. (*Id*. at 3:17; 4:10.)

The WCJ issued the F&O on June 10, 2019, finding AME Dr. Craemer's reporting to constitute substantial medical evidence and dismissing the June 13, 2013 petition for new and further disability.

The WCJ's opinion noted applicant's burden of establishing new and further disability within five years of the original date of injury pursuant to Labor Code section 5410. (Opinion on Decision, at p. 2.) However, the WCJ found that the contemporaneous medical evidence did not support changes to applicant's level of disability, but rather described no interval change. The WCJ observed that the AME's 2015 reporting reinforced this conclusion. (*Ibid.*)

Applicant's Petition contends the petition for new and further disability was dismissed based on the reporting of AME Dr. Craemer, which found no interval changes to applicant's disability levels. (Petition, at 10:12.) Applicant asserts that the reporting of Dr. Craemer is not substantial medical evidence because the AME ordered no diagnostic testing beyond that which was reflected in the existing medical record. (*Ibid.*) Applicant further contends the reporting of QME Dr. Borsada supports new and further injury in the form of aggravation of applicant's preexisting diabetes. (*Id*. at 10:18.)

The WCJ's Report maintains that applicant failed to demonstrate new and further disability within five years of the date of injury, as required under section 5410. The WCJ observes that the reporting of Dr. Capen in 2013 does not document any change in condition, while the reporting of Dr. Zlotolow was obtained only after the expiration of the five years allowed by statute. (Report, at p. 5.) The Report further notes that the lack of a complete record review significantly limits the evidentiary weight accorded the reports of secondary treater Dr. Zlotolow and internal medicine QME Dr. Borsada. (*Ibid.*) The Report also notes that the issue of sleep disturbance was previously raised and decided in the 2012 Findings and Award. With regard to applicant's contention that the

reporting of AME Dr. Craemer is not substantial because the AME ordered no additional diagnostic testing, the Report observes that:

> Testing is not a requirement for a report to amount to substantial medical evidence. Substantial evidence has been described as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and must be more than a mere scintilla. [Citations.]…Here, Dr. Craemer took a thorough history, conducted a thorough evaluation and reviewed the medical evidence provided. His deposition was taken and he did not change his opinion. Dr. Craemer's findings were not based on surmise, speculation, conjecture or guess. The court in this matter, finds that the AME report of Dr. Craemer meets the test for substantial medical evidence. (Report, at pp. 7-8.)

DISCUSSION

Labor Code section 5410 provides that an injured worker who has previously received workers' compensation benefits either voluntarily paid by the employer or pursuant to an award is entitled to claim benefits for "new and further disability" within five years of the date of injury. Section 5803 permits the reopening of a previously adjudicated case for "good cause" upon a petition filed by a party, also within five years from the date of injury. If a petition to reopen under either section is filed within the five-year period, the Board has jurisdiction to decide the matter beyond the five-year period. (*Sarabi v. Workers' Comp. Appeals Bd.* (2007) 151 Cal.App.4th 920, 925 [72 Cal.Comp.Cases 778].)

To recover additional benefits, the injured worker must not only file a timely petition to reopen but must also have suffered a "new and further disability" within that five-year period, unless there is otherwise "good cause" to reopen the prior award. (*Sarabi, supra*, 151 Cal.App.4th at p. 926.) An injured worker cannot confer jurisdiction on the WCAB by filing a petition to reopen before the five-year period has expired for anticipated new and further disability that may occur after the five-year limitation period has run. (*Ibid.*) "New and further disability" means disability resulting from some demonstrable change in the employee's condition, including a gradual increase in disability, a recurrence of TD, a new need for medical treatment, or the change of a temporary disability into a permanent disability. (*Applied Materials v. Workers' Comp. Appeals Bd.* (2021) 64 Cal.App.5th 1042, 1080 [86 Cal.Comp.Cases 331].)

Here, applicant's date of injury is November 13, 2008, and applicant must establish a "demonstrable change in condition" prior to the expiration of the five-year statutory period on November 13, 2013.

The WCJ noted that the reporting of primary treating physician Dr. Capen in 2013 continued to find applicant Permanent & Stationary. (Ex. 14, interim reports of Daniel Capen, M.D., dated October 25, 2013, at p.78.) Administrative Director Rule 10152 defines permanent and stationary as the time 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.) "This is so even though further medical treatment may be required to relieve the effects of the injury." (*J.C. Penney Co. v. Workers' Compensation Appeals Bd.* [2009] 175 Cal. App. 4th 818 [74 Cal. Comp. Cases 826, 830].)

Applicant contends that her continued permanent and stationary status would not preclude a finding of new and further disability where there is collateral evidence of a material change in condition, including a new need for medical treatment. (Petition, at 12:22.) Applicant contends the need for new medical treatment includes her right knee surgery and the alleged aggravation of her diabetic condition. (Petition, at 12:24.)

While we agree with that new and further disability may be established by, *inter alia*, a new need for medical treatment, the change in treatment must arise out of the industrial injury. (*Applied Materials v. Workers' Comp. Appeals Bd., supra,* 64 Cal.App.5th 1042, 1080.) Section 5410 is specific in its requirement that "the original injury has caused new and further disability." (Cal. Lab. Code § 5410.)

In order to constitute substantial evidence, expert medical opinion must be framed in terms of reasonable medical probability, be based on an accurate history and an examination, and must set forth reasoning to support the expert conclusions reached. (*E.L Yeager v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

Here, we agree with the WCJ that applicant has not met the burden of establishing that the original injury has caused new and further disability. With respect to the right knee surgery, Dr. Capen made no mention of the need for surgery prior to November 13, 2013, and his report of February 27, 2014 described the right knee as "not a part of applicant's claim and not connected

to her injury." (Ex. 14, interim reports of Daniel Capen, M.D., dated February 27, 2014, at p.45.) Additionally, while the applicant reported that the surgery was performed at Kaiser Permanente, no corresponding medical records were offered into evidence at trial. Applicant offers no medical evidence linking applicant's right knee surgery to the original injury, and AME Dr. Kraemer has opined that there is no causal relationship between the two. (Ex. C, transcript of the deposition of Ray L. Craemer, M.D., dated May 1, 2018, at 34:10.)

With respect to applicant's assertion of aggravation of her diabetic condition, we observe that neither the reporting of Dr. Zlotolow nor that of Dr. Borsada provided an assessment of whether the alleged change in applicant's condition transpired within five years from the original date of injury. Further, we agree with the WCJ's observation that any reporting addressing the alleged aggravation of applicant's diabetes would need to address applicant's other concurrent medical conditions, including her nonindustrial brain surgery, right knee surgery, and thyroid condition. (Report, at p. 6.) Accordingly, we find the reporting of Drs. Zlotolow and Borsada fail to establish a causal connection between applicant's industrial injury and the claimed need for new treatment, or that the need for new treatment arose within the five years of the original date of injury of November 13, 2008. Applicant has not met the burden of establishing a new and further disability, arising within five years of the date of injury. (Cal. Lab. Code § 5410.)

We wish to provide clarification of one assertion contained in the WCJ's Report, that "the filing of a petition alone does not confer jurisdiction on the appeals board, there must be a showing of new and further disability within the five years." (Report, at p. 4, para. 2.) The filing of a Petition for New and Further Disability under section 5410 does in fact invoke the jurisdiction of the Workers' Compensation Appeals Board. However, once that jurisdiction is invoked, it remains applicant's burden to establish the existence of new and further disability arising out the original injury, and arising within five years of the original injury. (Cal. Lab. Code §§ 5410; 5705.) The court of appeal has summarized the jurisdictional and burden of proof requirements as follows:

> First, under section 5410, "an injured worker who has previously received workers' compensation benefits either voluntarily paid by the employer or pursuant to an award is entitled to claim benefits for 'new and further disability' within five years of the date of injury." (*Sarabi, supra*, 151 Cal.App.4th at p. 925, italics added.) Second, "[s]ection 5803 permits the reopening of a previously adjudicated case for 'good cause' upon a petition filed by [any] party, also within five years from the date of injury. If a petition to reopen under either

> section is filed within the five-year period, the [WCAB] has jurisdiction to decide the matter beyond the five-year period." (*Ibid*.)
>
> To recover additional benefits, the injured worker must not only file a timely petition to reopen but must also have suffered a "new and further disability" within that five-year period, unless there is otherwise "good cause" to reopen the prior award. (*Sarabi, supra*, 151 Cal.App.4th at p. 926.) An injured worker cannot confer jurisdiction on the WCAB by filing a petition to reopen before the five-year period has expired for anticipated new and further disability that may occur after the five-year limitation period has run. (*Ibid*.) "New and further disability" means disability resulting from some demonstrable change in the employee's condition, including a gradual increase in disability, a recurrence of TD, a new need for medical treatment, or the change of a temporary disability into a permanent disability. (*Applied Materials, supra*, 64 Cal.App.5th 1042, 1080.)

Accordingly, we clarify that while the timely filing of a petition for new and further disability confers jurisdiction on the WCAB to decide the issue of new and further disability beyond the five-year period, applicant still must prove they have suffered new and further disability within that five-year period.

Here, we agree with the WCJ that applicant's burden of proving new and further disability within the five-year period was not met. Accordingly, we will affirm the June 10, 2019 F&O.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Amended Findings and Order to Reflect the Correct Defendant, dated June 10, 2019, is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

MARGUERITE SWEENEY, COMMISSIONER
PARTICIPATING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JULY 8, 2022

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

MARIA RODRIGUEZ
MOORE AND ASSOCIATES
SAMUELSEN, GONZALEZ, VALENZUELA AND BROWN

SAR/abs

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

Applicant, by and through her attorneys of record, has filed a timely verified Petition for Reconsideration challenging the Findings and Order issued on May 21, 2019 in which it was found the Petition for New and Further be dismissed per Labor Code section 5410.

II

FACTS

Applicant, born [], while employed on November 13, 2008, as a housekeeper, occupational group number 340, by Southland Care Center and York Risk Services sustained an injury arising out of and in the course of employment to her left foot, right and left ankle, left knee, left [hip], low back and psyche per the Findings & Award issued by the Honorable Judge Deweese on March 7, 2012.

Judge Deweese found the applicant did not sustain an injury in the form of sleep disorder. Judge Deweese in his Opinion on Decision wrote: "Applicant relied upon a medical report from Pedram Navab, D.O. to support her claim of industrially related sleep disorder. However, Dr. Navab's report was not found to be substantial medical evidence. He appeared to relate applicant's difficulty sleeping to a diagnosis of sleep apnea, but failed to adequately explain how the sleep apnea was related to her industrial injuries. He further failed to discuss the effects (if any) of applicant's pre-existing morbid obesity, diabetes and thyroid conditions on her sleep apnea. Moreover, based on applicant's trial testimony as well as statements made by Dr. Maibaum and AME Dr. Craemer, it was found that any difficulty sleeping was due to ongoing pain. In a recent panel decision (*Jones v. City of Long Beach* (1/17/2012) ADJ 6772869), the Board held that difficulty sleeping due to ongoing pain from a physical injury does not constitute a separate and distinct injury in the form of sleep disorder, and such symptoms are adequately compensated by the rating for the physical injury plus any pain add-on. Accordingly, it was found that applicant did not sustain injury arising out of or occurring in the course of employment in the form of sleep disorder."

Judge Deweese awarded 57% permanent disability based on the AME, Dr. Craemer's findings. There after the applicant filed a Petition to Reopen on June 7, 2013. There was no medical evidence cited in the Petition finding new and further disability. On March 9, 2015, defendant filed a Petition to Dismiss the Petition for New and Further. On March 12, 2015, applicant's attorney filed an Amended Application for Adjudication of Claim to include weight gain. A third Amended Application for Adjudication of Claim was filed on April 13, 2015 to include internal.

The parties returned to the AME, Dr. Craemer on January 22, 2015, who found the applicant did not sustain any new and further disability. Applicant's attorney filed a Petition to Strike Dr. Craemer's report on January 21, 2018 claiming defendant engaged in ex parte communication with the doctor when defendant advised the doctor they would not pay for his deposition. Dr. Craemer's deposition did proceed on May 1, 2018.

The matter proceeded to trial on January 2, 2109 and was continued to April 8, 2019 at which time it was submitted for a determination. Four issues were raised: 1) Whether applicant's Petition for New and Further should be dismissed per the deposition transcript of Dr. Craemer?; 2) Whether applicant's Petition for New and Further Should be dismissed per Labor Code section 5410?; 3) Whether the medical reports of the AME, Dr. Craemer constitute substantial medical evidence?; and 4) Whether the report of Dr. Craemer dated 1/22/15 should be stricken/excluded pending an order to develop the record?

Based on a review of the record it was determined the petition for new and further was to be dismissed because this WCJ does not have jurisdiction to award additional benefits pursuant to Labor Code section 5410. Furthermore, it was found if the petition was not dismissed, it would be denied. Dr. Craemer, the AME found the applicant did not sustain any new and further orthopedic disability. There was no substantial medical evidence the applicant sustained an internal or sleep injury. Furthermore, Judge Deweese had already found the applicant did not have an industrial related sleep disorder. It is from this decision applicant's attorney filed their Petition for Reconsideration.

III
DISCUSSION

The Petition for Reconsideration should be denied as applicant has failed to set forth evidence to support their assertion the applicant sustained any new and further disability within

the five years from the date of injury. Furthermore, Dr. Craemer's report amounted to substantial medical evidence and he determined the applicant did not sustain any new and further disability.

A Petition to Re-open must be filed within five years from the date of injury. Labor Code section 5410. The filing of a petition alone does not confer jurisdiction on the appeals board, there must be a showing of new and further disability within the five years. The appeals board has noted pursuant to Labor Code section 5410, any claim for "new and further disability" arising more than five years after the date of injury, regardless of whether a petition to reopen was timely filed is barred. The appeals board also stated, "Allowing compensation for new and further...disability commencing more than five years from the date of injury would render the limitations of LC 5410 meaningless, since, if such a rule were adopted, any applicant could avoid the prescriptions of LC 5410 and indefinitely extend the limitations period by simply filing a skeletal petition to reopen on the eve of the expiration of the five-year period." *Duran v. WCAB* (2007) 72 CCC 488 (writ denied). See also *Gomez v. WCAB* (2006) 71 CCC 1721 (Court of Appeal opinion unpublished in official reports); *Borba v. WCAB* (2004) 69 CCC 605 (writ denied); *Berry v. WCAB* (2004) 69 CCC 1320 (writ denied); *Fekkers v. WCAB* (2001) 67 CCC 92 (writ denied); *Beck (Hambrick) v. WCAB* (2000) 65 CCC 845 (writ denied); *Mart v. WCAB* (2011) 76 CCC 578 (writ denied*); Cohen v. Morton's Steakhouse*, 2011 Cal. Wrk. Comp. P.O. LEXIS 207; *McBee v. WCAB* (2011) 76 CCC 1230 (writ denied); *Kangas v. Redbud Community Hospital and Adventist Health System West,* 2014 Cal. Wrk. Comp. P.D. LEXIS 23. Here, applicant has failed to provide any evidence demonstrating she sustained new and further disability within the five year statute of limitation set forth in Labor Code section 5410. Applicant's attorney contends Dr. Capen, Dr. Zlotolow and Kaiser records support the applicant had new and further disability within five years, but this is not supported by the record. The only medical evidence documenting treatment within five years were orthopedic treatment reports from Dr. Capen (Applicant's Exhibit 14). The records however, do not document new and further disability. In fact, Dr. Capen notes the applicant's condition remained permanent and stationary. There were no Kaiser records submitted for review. Dr. Zlotolow's reports were obtained in 2015 (Exhibits 8 through 12).

The applicant's date of injury was November 13, 2008, thus the five year statute would have run on November 13, 2013. Dr. Borsada report is dated June 18, 2016 again outside the Statute of Limitations (Exhibit 13).

Applicant also failed to establish her pre-existing diabetes and sleep disorder were aggravated by her industrial injury within five years. First, there is no evidence showing the applicant's [sic] developed an aggravation of diabetes within five years from her injury. Dr. Borsada does find the applicant's orthopedic and psychiatric injury aggravated the applicant sleep and diabetes, but this was not obtained until 2016.

Second, the medical reports of Dr. Zlotolow and Dr. Borsada do not amount to substantial medical evidence. To properly address causation, especially when the condition is pre-existing, the doctor must know where the condition started in order to determine if it is had worsened. Dr. Zlotolow in his November 10, 2015 report (Applicant's Exhibit 8), and Dr. Borsada (Exhibit 13) note they have not seen any records from the applicant's private doctor concerning her diabetes mellitus. Furthermore, neither doctor addressed how the applicant's non-industrial brain surgery, non-industrial thyroid condition, and the non-industrial right knee injury resulting in surgery and subsequent use of a wheelchair for a period of time affected the applicant's diabetes and sleep disorder.

Third, Judge Deweese previously found the applicant's sleep disorder was nonindustrial. At the time the matter was originally tried, the applicant had been diagnosed with sleep apnea. Judge Deweese found the medical records failed to explain how the sleep apena was related to her industrial injury. He also noted the applicant's trial testimony as well as statements made to the doctors show the applicant's sleep disorder was due to ongoing pain.

Any claim for sleep disorder had already been decided and is res judicata. "The doctrine of res judicata precludes parties or their privies from relitigating a cause of action that has been finally determined by a court of competent jurisdiction. Any issue necessarily decided in such litigation is conclusively determined as to the parties or their privies if it is involved in a subsequent lawsuit on a different cause of action. The rule is based upon the sound public policy of limiting litigation by preventing a party who has had one fair trial on an issue from again drawing it into controversy. The doctrine also serves to protect persons from being twice vexed for the same cause." (*Bernhard v. Bank of America* (1942) 19 Cal. 2d 807, 810-811 [122 P.2d 892].) The WCAB is a constitutional court; hence, its final decisions are given res judicata effect. (*Dow Chemical Co. v. Workmen's Comp. App. Bd.* (1967) 67 Cal. 2d 483, 491 [62 Cal. Rptr. 757, 432 P.2d 365]; *Dakins v. Board of Pension Commissioners* (1982) 134 Cal. App. 3d 374, 381 [184 Cal. Rptr. 576*]; Solari v. Atlas-Universal Service, Inc.* (1963) 215 Cal. App. 2d 587, 593 [30 Cal. Rptr. 407].) The principle

applies to both subsequent civil actions and subsequent workers' compensation proceedings. (*Unruh v. Truck Insurance Exchange* (1972) 7 Cal. 3d 616, 633 [102 Cal. Rptr. 815, 498 P.2d 1063].)

Applicant's attorney having failed to meet his burden establishing a sleep disorder when the case was originally tried before Judge Deweese does not give him a second bite of the apple by filing a Petition to Reopen. Res Judicata bars all claims that were raised in prior actions and decided. Applicant's attorney had the right to file a Petition for Reconsideration if he did not agree with Judge Deweese's findings, but this was not done.

Applicant's main contention, Dr. Craemer's report does not amount to substantial medical evidence because the doctor failed to request diagnostic testing is unfounded. Dr. Craemer conducted a very thorough examination. Based on the fact the applicant's condition remained essentially the same as when he first examined her, additional testing was not warranted. Applicant's own treating doctor, Dr. Capen did not request any additional diagnostic testing. Testing is not a requirement for a report to amount to substantial medical evidence. Substantial evidence has been described as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and must be more than a mere scintilla. (*Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566].) Substantial evidence has been described as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and must be more than a mere scintilla. (*Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566].) The opinions of an AME are entitled to substantial weight absent a showing that they are based on an incorrect factual history or legal theory, or are otherwise unpersuasive in light of the entire record. (See, e.g., *Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775 [51 Cal. Comp. Cases 114]; *Siqueiros v. Workers' Comp. Appeals Bd.* (1995) 60 Cal.Comp.Cases 150 (writ denied).)

Here, Dr. Craemer took a thorough history, conducted a thorough evaluation and reviewed the medical evidence provided. His deposition was taken and he did not change his opinion. Dr. Craemer's findings were not based on surmise, speculation, conjecture or guess. The court in this matter, finds that the AME report of Dr. Craemer meets the test for substantial medical evidence.

IV
RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

Respectfully submitted,

PENNY BARBOSA
Workers' Compensation
Administrative Law Judge