WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RICARDO SOTO, *Applicant*

vs.

SYSCO CORPORATION / SYSCO SAN FRANCISCO and ZURICH AMERICAN administered by CORVEL CORPORATION, *Defendants*

Adjudication Number: ADJ10652804
Oakland 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 Orders (F&O), issued by the workers' compensation administrative law judge (WCJ) on May 10, 2021, wherein the WCJ found in pertinent part applicant did not sustain injury arising out of and occurring in the course of employment (AOE/COE) to his back, left knee, left ankle, nervous system in the form of anxiety, psyche, or in the form of sexual dysfunction, or sleep disorder; and that applicant did not sustain any new and further disability.

Applicant contends that proceeding to trial was a denial of his due process rights and that the October 1, 2020 report from orthopedic qualified medical examiner (QME) Bruce Huffer, M.D. is not substantial evidence.

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 for Reconsideration (Petition) and the Answer, and the contents of the Report. Based on our review of the record, for the reasons stated by the WCJ in the Discussion portion of the Report (pp. 9 – 12), which we adopt and incorporate by this reference thereto, and for the reasons discussed below, we will affirm the F&O.

BACKGROUND

Applicant initially claimed injury to his right lower extremity, right hip, right femur, right

knee, right ankle, left knee, and left ankle, while employed by defendant as an order selector on May 8, 2015. The injury claim was resolved by the WCJ's October 17, 2019 Findings and Award, finding that applicant sustained injury AOE/COE to his right lower extremity, right femur, and right knee, that the injury caused 30% permanent disability, and that applicant did not sustain injury to his right hip, right ankle, left knee, or left ankle. On April 23, 2020, applicant filed a Petition to Reopen alleging that his "industrial injuries have worsened."

Orthopedic QME Dr. Huffer re-evaluated applicant on August 24, 2020. (Def. Exh. I, Dr. Huffer, August 24, 2020.)[1] Dr. Huffer examined applicant and reviewed the records he was provided, including the transcript of applicant's July 15, 2020 deposition. The doctor concluded:

> Again, the only area that was injured back in 2015 involves the right lower extremity. ¶ As to the question whether the applicant's current complaints represent a new problem versus an aggravation or contribution to a pre-existing problem, the answer to that is no. There was simply one specific injury five years ago involving the right lower extremity. There has not been any exacerbation per se, no pre- existing problems involved.
> (Def. Exh. I, p. 18.)

Defendant filed a declaration of readiness to proceed on October 16, 2020, identifying the Petition to Reopen, and "no evidence of new and further disability" as the issues to be tried. Applicant objected to the declaration of readiness to proceed on November 4, 2020, and on November 16, 2020, applicant filed an Amended Application to include brain, sleep loss, anxiety, and sexual dysfunction.

At the December 2, 2020 Mandatory Settlement Conference (MSC) the WCJ continued the matter for further discovery. (See December 2, 2020 Minutes of Hearing.) At the January 13, 2021 MSC, applicant objected to the matter being set for trial. Over applicant's objection, the WCJ closed discovery and set the matter for trial. (See January 13, 2021 pre-trial conference statement.)

Applicant filed a Petition for Removal contending that having the matter proceed to trial, as calendared by the WCJ, was a violation of his due process rights. The matter was tried on April 8, 2021. The issues submitted for decision included applicant's claim of injury to his psyche and nervous system (anxiety), and in the form of sexual dysfunction and sleep disorder; and applicant's objection to the matter proceeding to trial. (Minutes of Hearing and Summary of Evidence

[1] Dr. Huffer had previously evaluated applicant on June 6, 2017. (see Def. Exh. B, June 6, 2017 [five exhibits, pp. 1 – 111] and Def. Exh. A, October 16, 2017.)

(MOH/SOE), April 8, 2021, pp. 3 – 4.) We issued the Opinion and Order Denying Petition for Removal on April 12, 2021.

DISCUSSION

In her report, the WCJ refers to notes she made in the January 13, 3021 pre-trial conference statement wherein she stated:

> Based on my review of EAMS, relevant law, and statements of counsel, I do not find applicant exercised due diligence as to further discovery and do not find good cause to continue or otoc [order taking off calendar] the matter.

Later in the Report, the WCJ stated:

> I am not persuaded that applicant was denied due process in that he was allowed a significant period of time, even up to the date of trial, to obtain reports from treating physicians and all the exhibits applicant offered at trial were received into evidence.
> (Report, p. 11.)

Pursuant to Appeals Board rules 10534 and 10536:

> 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 jurisdiction of the Workers' Compensation Appeals Board under Labor Code section 5410 shall be invoked by a petition setting forth specifically and in detail the facts relied upon to establish new and further disability.
> (Cal. Code Regs., tit. 8, § 10536.)

Based on our review of the record, including the Electronic Adjudication Management System (EAMS) ADJ file, we see that applicant's Petition to Reopen asserts that applicant "alleges his industrial injuries have worsened" and that he "asserts his right to have the matter re-opened due to his allegation of a new and further disability." However, the Petition to Reopen does not set forth specifically and/or in detail any of the facts relied upon as the basis for his petition. More importantly, the record contains no medical evidence to support applicant's assertion that his condition had worsened or that his disability had increased during the period from October 17, 2019, (the date of the initial Findings and Award) through April 23, 2020 (the date the Petition to Reopen was filed). For example, the medical records provided to Dr. Huffer for his August 24,

2020 re-evaluation of applicant, pre-dated the October 17, 2019 Findings and Award. Also, we note that all of applicant's trial exhibits submitted at the April 8, 2021 trial (other than those previously submitted at the August 21, 2019 trial), are documents/reports that were issued well after the Petition to Reopen was filed. Thus, it appears that at the time the Petition to Reopen was filed, there was no medical evidence that supported applicant's claim that his "industrial injuries have worsened." Further, there is no medical evidence in the record that support applicant's contentions contained in the November 16, 2020 Amended Application. There is no explanation in applicant's Petition, or elsewhere in the record, as to why no discovery was undertaken in support of the contentions made in the Petition to Reopen and the Amended Application, prior to the December 2, 2020 MSC.

As explained by the WCJ in the Report:

> [T]here was no substantial medical evidence offered to establish applicant sustained injury to his psyche, nervous system (anxiety), sexual dysfunction or sleep disorder arising out of and in the course of his employment with defendant on 05/08/2015.
> (Report, p. 12.)

Thus, we agree with the WCJ, that applicant's counsel did not exercise due diligence as to further discovery pertaining to the April 23, 2020 Petition to Reopen, prior to, nor after, the December 2, 2020 MSC, and in turn, we agree that proceeding with the trial was not a denial of applicant's right to due process.

Regarding the issue of whether Dr. Huffer's October 1, 2020 report is substantial evidence, it is well established that the relevant and considered opinion of one physician, though inconsistent with other medical opinions, may constitute substantial evidence. (See *Place v. Workers' Comp. Appeals Bd*. (1970) 3 Cal.3d 372, [35 Cal.Comp.Cases 525].) When a physician's report is well-reasoned, is based on an adequate history and examination, and sets forth the reasoning behind the physician's opinion, not merely his or her conclusions, the report constitutes substantial evidence. (*Granado v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 399 [33 Cal.Comp.Cases 647]; *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408 [33 Cal.Comp.Cases 660]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

Applicant argues that:

> Dr. Huffer did not perform a thorough [sic] examination and apparently filed a false declaration under penalty of perjury regarding the length of time his [he] spent fact-to-fact [face-to-face] with Applicant…
> (Petition, p. 9.)

At the trial applicant initially testified that he spent about five to fifteen minutes at the most with Dr. Huffer and that his physical examination consisted of the doctor having him stand up and bend over. (MOH/SOE, April 8, 2021, p. 6.) The WCJ's summary of applicant's subsequent testimony included:

> Dr. Huffer, the doctor in San Jose, hit him with a little thing on his knees. He did not do measurements. All he did was ask him how much he could bend, then his back, and that is all he did. That doctor in San Jose told him to move his legs forward and backward. He did not have him do movements with his legs. Applicant was sitting on a bed, and that is when Dr. Huffer did the thing on his knees. He checked applicant's back.
> (MOH/SOE, April 8, 2021, p. 11.)

The October 1, 2020 report by Dr. Huffer indicates that the doctor spent one hour re-evaluating applicant with the assistance of a Spanish interpreter. (Def. Exh. I, p. 3.) The report includes Dr. Huffer's summary of his discussion with applicant regarding the interim history of the injury. (Def. Exh. I, pp. 14 – 15.) In the Physical Examination section of the report, Dr. Huffer discusses his examination of applicant's back, right knee, left knee, and ankles. (Def. Exh. I, pp. 16 – 17.)[2]

Applicant is correct that the WCJ did not make a finding that applicant was not credible, but clearly the WCJ found Dr. Huffer's discussion of his examination of applicant to be more credible that applicant's testimony about the length of the examination. Based on our review of the record we see no reason to disturb the WCJ's decision.

Accordingly, we affirm the F&O.

[2] It is also important to note that Dr. Huffer stated, I declare under penalty of perjury that the information contained in this report … is true and correct to the best of my knowledge and belief…" Otherwise stated, Dr. Huffer signed the report under penalty of surgery. (see Def. Exh. I, p. 21.)

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Orders issued by the WCJ on May 10, 2021, is **AFFIRMED.**

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

CRAIG SNELLINGS, COMMISSIONER
PARTICIPATING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 13, 2022

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

RICARDO SOTO
KNOPP PISTIOLAS
HAWORTH, BRADSHAW, STALLKNECHT & BARBER

TLH/*pc*

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

DISCUSSION

APPLICANT'S CONTENTIONS

The Findings That Applicant while employed by Defendant did not sustain injury to his psyche, nervous system (anxiety), sexual dysfunction, sleep disorder, low back, left knee or left ankle on 05/08/2015 and that Applicant Failed to Establish he sustained New and Further Disability as alleged in his Petition to Reopen filed on 04/23/2020 are Supported by the Evidence received at Trial, and the Relevant Law

In his Petition for Reconsideration, applicant contends he was denied due process because after he filed his amended application on 11/11/2020 and requested an updated report from his primary treating doctor, I closed discovery at the 01/13/2021 MSC. Applicant's claim is without merit. After a trial in front of me on 08/21/2019 in this matter (and in ADJ10925995), I issued Findings and Award wherein I found that with respect to this case, applicant's industrial injury to his right lower extremity, right femur and right knee caused permanent partial disability of 30 percent and a need for future medical treatment and that applicant did not sustain industrial injury to his right hip, right ankle, left ankle or left knee as compensable consequences. Applicant then filed a Petition to Reopen on 04/23/2020. Defendant filed a DOR on 10/16/2020 identifying the Petition to Reopen and no evidence of new and further disability as issues. Applicant filed an Objection stating he intended to secure vocational expert evidence and further medical legal reports, that he had not received the recent PQME report, that he intended to forward it to the treating doctor for a medical legal report, and that he might need to request a supplemental from the PQME. At the MSC on 12/02/2020, per the parties' joint request, I continued the matter to 01/13/2021 to allow further discovery as to the primary treating physician. I did not close discovery. In the interim, applicant filed an Amended Application on 11/16/2020 adding brain, sleep loss, anxiety, and sexual dysfunction. At the 01/13/2021 MSC, over applicant's objection I closed discovery and set the matter for trial. The 01/13/2021 pretrial conference statement reflects the following statements by me:

> "Case initially resolved on 10/17/2019 via Finding and Award. Applicant filed a Petition to reopen on 4/23/2020. Applicant was evaluated by the PQME on 8/24/2020 who submitted a report dated 10/1/2020. Defendant filed DOR on 10/16/2020 and Applicant filed an Objection on 11/4/2020 stating it had not received the PQME report and needed to forward it to the PTP and that A may request a PQME supplemental report. Applicant then filed amended Application. I continued the 12/2/2020 MSC to allow for further discovery to 1/13/2021. Defendant has filed a Pet to Dismiss and applicant has filed a Response. Applicant was seen by his PTP on 1/7/2021 and may offer reports of attending doctors at trial. Based

on my review of EAMS, relevant law, and statements of counsel, I do not find applicant exercised due diligence as to further discovery and do not find good cause to continue or otoc the matter."

As applicant failed to demonstrate any efforts to conduct any other discovery in this matter and because I had already continued the 12/2/2020 MSC to 01/13/2021 to allow additional time for discovery, I did not find good cause to either continue the matter or order it off calendar. I then set the matter for trial on 04/08/2021 which allowed applicant a little under three months to obtain reporting from his treating physician. Applicant timely filed a Petition for Removal. At the 04/08/2021 trial, I again did not find good cause to either continue the matter or order it off calendar and trial proceeded on that date. Applicant offered as exhibits reports of Dr. Curtis Rollins dated 02/12/2021 and 01/07/2021 and a 04/07/2021 report of Dr. Rich Jacobs and those treating physician reports were received into evidence. Defendant also offered as an exhibit a 01/27/2020 report of Dr. Curtis Rollins and a note from Dr. Martinovsky dated 09/13/2019, both of which were received into evidence. Applicant testified again at the 04/08/2021 trial. Although I considered the reports of the treating doctors at the 04/08/2021 trial, I found the opinions and reports of the medical-legal evaluator to be more persuasive. On 04/12/2021, four days after trial, the Appeals Board denied applicant's Petition for Removal. Accordingly, I am not persuaded that applicant was denied due process in that he was allowed a significant period of time, even up to the date of trial, to obtain reports from treating physicians and all the exhibits applicant offered at trial were received into evidence.

Insofar as applicant is contending that Dr. Huffer's 10/01/2020 report is not substantial medical evidence and that I erred in relying on it for my findings, that contention is without merit. In order to constitute substantial medical evidence, a medical opinion must be predicated on reasonable medical probability. Also, a medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. Further, a medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd*. (*Gatten*) (2006) 145 *Cal. App. 4th 922, 928 [71 Cal Comp Cases 1687*].) Applicant does not contend Dr. Huffer's opinions are based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess, or that Dr. Huffer failed to set forth the reasoning behind is opinions. Applicant appears to claim that Dr. Huffer did not perform a thorough examination and apparently filed a false declaration under penalty of perjury as to the length of time he spent face-to-face with applicant. Applicant testified at the 04/08/2021 trial that he spent about five to fifteen minutes at the most with Dr. Huffer and that that time included his physical examination that consisted of the doctor having him stand up and bend

over. (M.O.H. dated 04/08/2021 at pages 6 - 12) However, Dr. Huffer's 10/01/2020 report reflects he re-evaluated applicant on 08/24/2020 for one hour with the assistance of a Spanish interpreter, reviewed correspondence from counsel, applicant's deposition testimony of 07/15/2020, and treating records of Dr. Gary Martinovsky and Dr. Fred Samimi. In his report, Dr. Huffer noted applicant stated he feels worse than the time of the last evaluation, had a myriad of complaints to multiple areas including up to 7/10 to 10/10 pain and weakness in his right knee, constant 7/10 pain into the lumbar spine area, 6/10 pain in his left knee, and 6/10 pain in his bilateral ankles. Dr. Huffer's report further reflects his understanding that applicant has continued to treat with the NMCI clinic every month and is being given a muscle relaxant, flexeril, docusate, gabapentin, bupropion and naproxen. Dr. Huffer opined that as to applicant's subjective complaints regarding the lumbar spine, the left knee, and the bilateral ankles, at his young age it is simply unclear what would be the explanation for those areas involving subjective complaints and that the subjective complaints are not supported by the objective findings. Dr. Huffer's report also reflects applicant has a number of Waddell signs and that it appears from the history taking and examining the applicant there is a degree of exaggeration of his symptoms to all of the aforementioned areas, and certainly, that the subjective complaints cannot be supported by the objective findings. In his report, Dr. Huffer further states that as to the question whether applicant's current complaints represent a new problem versus an aggravation or contribution to a pre-existing problem, the answer to that is no. There was simply one specific injury five years ago involving the right lower extremity. (Defendant's Exhibit I at pages 1, 17 - 18) Furthermore, there was no substantial medical evidence offered to establish applicant sustained injury to his psyche, nervous system (anxiety), sexual dysfunction or sleep disorder arising out of and in the course of his employment with defendant on 05/08/2015.

Based on the foregoing, I remain persuaded that based on the evidence at trial and the relevant law, applicant while employed by defendant did not sustain injury to his psyche, nervous system (anxiety), sexual dysfunction, sleep disorder, low back, left knee or left ankle on 05/08/2015 and failed to establish that he sustained new and further disability as alleged in his Petition to Reopen filed on 04/23/2020.