WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JEFFERY BLUM, *Applicant*

vs.

STATE OF CALIFORNIA, CALIFORNIA HIGHWAY PATROL, legally uninsured; STATE COMPENSATION INSURANCE FUND, adjusted by STATE CONTRACT SERVICES, *Defendants*

Adjudication Number: ADJ10336191
Stockton District Office

OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION

Defendant seeks reconsideration of the Amended Findings of Fact, Orders, Award and Opinion on Decision issued on September 8, 2022, wherein the workers' compensation administrative law judge (WCJ) found in pertinent part that (1) applicant sustained new and further permanent disability over the previous Stipulations with Request for Award and Award dated June 11, 2018; (2) applicant's disability as to his back of 17 WPI remains the same as set forth in the Stipulations with Request for Award and Award dated June 11, 2018; (3) applicant's permanent disability has increased as to both knees, amounting to 7 whole person impairment (WPI) for the right knee and 6 WPI for the left knee, with apportionment allowed in accordance with the Stipulations with Request for Award and Award dated June 11, 2018; and (4) a reasonable attorney fee of fifteen percent of the new and further permanent disability is payable to applicant.

The WCJ ordered that applicant's petition for new and further disability is granted for permanent disability, and that the Stipulations with Request for Award and Award dated June 11, 2018 otherwise remains in effect.

Defendant contends that the WCJ erroneously failed to grant apportionment as to applicant's lumbar spine. Defendant further contends that the WCJ erroneously relied on the reporting of Qualified Medical Evaluator (QME) Nader Achackzad, M.D., on the grounds that it does not constitute substantial evidence and results from bias.

We received an Answer from applicant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations of the Petition, the Answer, and the contents of the Report. Based on our review of the record, and for the reasons stated below, we will deny the Petition.

FACTUAL BACKGROUND

In the Report, the WCJ states:

> This is a timely filed and verified petition for reconsideration by Defendant's Attorney of a final orders within the Findings of Fact, Orders and Opinion on Decision dated of 9-8-2022.
> . . .
> Defendant . . . asserts that they had not stipulated to no apportionment as to the lumbar back in the previous stipulations and that there is no legal support or case law where in this setting the Judge separates out the body parts in rating new and further disability.
>
> The Court used the Stipulations the parties had previously made 6/11/18 including page 7 paragraph 9 "other stipulations".
>
> The Court rated out the new and further disability by rating out each separate body part and applied apportionment where present. The combined value chart was used to arrive at the total new and further disability. This method was used by the parties in the previous stipulations.
>
> Defendant also challenges the QME Dr. Achackzad opinions as biased (first time that is raised) and [not constituting] substantial evidence as to his new ratings for the bilateral knee impairments.
> . . .
> The parties previously entered Stipulations with request for Award on 6/11/18 with Award (Stips) issuing the same date EAMS DOC 67325828 and 67325766.
>
> The permanent disability was arrived at by the parties stipulating to 17% permanent disability for the low back, 4% permanent disability for the left knee, and 4% permanent disability for the right knee, for a total of 23% permanent disability per the Combined Values Chart. See Stips supra and page 7 paragraph 9 for the specific PD rating strings stemming from the opinions of panel QME Dr. Achackzad dated 4/16/18 (Joint Ex. 102).
>
> Applicant filed his timely petition to reopen on 2/5/20, EAMS DOC 31540249.

Following the settlement by Stipulations with Request for Award, Applicant continued to seek treatment for his work injuries. This included diagnostic tests (MRIs) and ultimately, he underwent surgery for the right and left knee. (Amended Opinion on Decision, page 3)

The case came to trial on 6/30/22 solely on Applicant's Petition to Reopen. Minutes of hearing summary of evidence (MOH/SOE) 6/30/22. A decision issued on 8/19/22. Defendant filed a recon citing clerical error and the legal arguments herein. The Findings and Orders of 8/19/22 were rescinded to correct the clerical errors per 8 CCR 10961 (c). An amended Findings of Fact, Orders, Award and Opinion on Decision issued on 9/8/22.

. . .

QME, Dr. Nader Achackzad had the opportunity to exam[ine] Applicant at the time of the stipulations and again subject to Applicant's petition for new and further disability. He conducted a complete and thorough examinations of Applicant, reviewed all medical and non-medical records, got a complete and accurate history, expressed opinions and supported those opinions by explaining them. He also had his deposition taken twice. Joint 105 and 112.

. . .

There is no new and further disability to the lumbar back beyond what was stipulated to by the parties within the Stipulations with Request for Award and Award of 6/11/18 page 7 paragraph 9.

. . .

To be clear page 7 paragraph 9 states other stipulations and with it are ratings used to arrive at the PD amount for the previous Stips. It is quoted in part here.

THIS SETTLEMENT IS BASED ON THE P&S REPORT OF QME, DR. NADER ACHACKZAD DATED 4/16/18 WHICH RATES AT 15.03.01.00-8-11-490I-16-17 FOR LUMBAR.

There was no apportionment to the lumbar back because QME Dr. Achackzad did not opine there was at the time of the prior Stipulations. It was only after the prior stipulations were final and this petition to reopen filed that he clarified there was also apportionment to the spine.

The Court cannot revisit final determinations including awards to alter them based on apportionment when considering new and further PD on a petition to reopen. Apportionment including new opinions can only apply to new and further disabilities. There was no new and further disability to the lumbar spine. *Vargas v. Atascadero State Hospital* (*2006) 71 CCC 500, 506 (appeals board en banc)*

. . .

I found new and further disability to the knees based on what the evidence discloses. The MRIs show pathology which is certain and beyond reasonable medical probability. The Court knows conclusively that the Applicant had surgeries to both knees and MRIs to both knees and bilateral knee X-rays after the Stipulations and Award of 6/11/18 became final.

QME, Dr. Nader Achackzad joint 101 page 5, MRI of the right knee 11/4/19, joint 101-page 6 paragraph 2, X-rays bilat knees 4/4/19 joint 101-page 7 paragraph 1, MRI Left knee 9/29/20, page 3 joint 101, left knee surgery 10/30/20.

QME, Dr. Nader Achackzad based his impairment ratings on these findings, clinical experience and examination of the Applicant which included Applicant's subsequent change in condition as to the knees see immediately above.

. . .

A reading of the Deposition of the QME, joint 112 must be made. It does present moments of argument and interruptions, but it reveals what the QME was finding with reasonable medical probability. Dr. Achackzad believed that the FCE revealed an applicant less functionally limited than at the time of the Stips of 6/11/18. But he was clear that the Applicant did have new and further disability due to the pathology of the knees. This was revealed by both MRIs and other factors as quoted in Defendant's Petition for Reconsideration, dated 9/13/22 at page 38 of QME Dr. Achackzad deposition joint 112.

"…. the functional capacity is just give me some sense that he can perform his job. It's not 100 percent guaranteed that functional capacity is exactly what he does, and 24/7 or everyday job . . . It doesn't mean that he doesn't have problem. He clearly has pathology…. And down the road, compared to somebody else, which reasonable medical probability, he's going to have a lot of knee problem…" (pages 38:21-24, 39:15-40:1). Dr. Achackzad stated that, "His condition is he had two knee surgery. He has derangement. He has malalignment of the [knee]cap. He has patellofemoral syndrome. He has chondromalacia. He has meniscectomy. He has tons of problems." (Page 40:10-13)."

Again, the whole deposition is required to be read. In the above quoted sections on page 38, pages 37 and 39 should be reviewed for a complete understanding of the QME's opinion regarding the interplay between ratable pathology and the FCE.

QME Dr. Achackzad opined based on his clinical experience that in this situation the objective findings of pathology and other findings (see quote above) outweigh the FCE as to new and further permanent disability. This

is compliant with AMA Guides, §§ 1.2a, 1.2b, 1.5, 2.3, 2.5c, at pp. 5, 8, 11, 18, 19 and *Blackledge v. Bank of America, 75 Cal. Comp. Cases 613* (*Cal. Workers' Comp. App. Bd. June 3, 2010).*

When the whole deposition is read it is clear there is a difference of opinion between the Doctor and Defendant. QME Dr. Achackzad explained his opinion on impairment and the FCE and that it is not inconsistent to use the FCE to opine that Applicant can return to full duty and still find objective ratable factors of impairment which increases Applicant's permanent disability if explained. In the quoted section QME Dr. Achackzad explained his opinion.

. . .

[The allegation of bias] was not raised at trial and is here for the first time in Defendant's petition for reconsideration. I have read the deposition and all evidence and find a deference of opinion but not bias. I have been receiving Dr. Achackzads' reports for years and this is the first I have been presented with this question. Again, it was not raised at trial and not explained why it's here now.

The evidence of Dr. Achackzad' s reports are all a year old joint 100-105, 107, 108 except the last deposition which was 5/4/22 joint 112. Even that was a month and a half before the trial. It was not raised at trial and cannot be raised in the reconsideration petition.

. . .

There was a change in Applicant's medical condition leading to MRIs and surgeries to both knees after the previous stipulations were final. The MRIs were the basis for the new and further disability. . . .

Finally, there is no new and further PD to the lumbar back and thus no apportionment can be applied. Full apportionment to the knees new and further disability was allowed and applied.

(Report, pp. 1-7.)

DISCUSSION

Section 5909 provides that a petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within sixty days of filing. (Lab. Code, § 5909.) However, "it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice. . . ." (*Shipley v. Workers' Comp. Appeals Bd*. (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493]; see *Rea v. Workers' Comp. Appeals Bd*. (2005) 127 Cal.App.4th 625, 635 fn. 22 [70 Cal.Comp.Cases 312].) In *Shipley*, the Appeals Board denied applicant's petition for reconsideration because the Appeals Board had not acted on the petition within the statutory time

limits. (*Shipley*, *supra*, 7 Cal.App.4th at p. 1106.) The Appeals Board had not acted on applicant's petition because, through no fault of the parties, it had misplaced the file. (*Id*.)

The Court of Appeal reversed the Appeals Board, holding that the time to act on the petition was tolled during the period the file was misplaced. (*Shipley*, *supra*, 7 Cal.App.4th at p. 1107.) The Court emphasized that "Shipley's file was lost or misplaced through no fault of his own and due to circumstances entirely beyond his control." (*Shipley*, *supra*, 7 Cal.App.4th at p. 1107.) "Shipley's right to reconsideration by the board is likewise statutorily provided and cannot be denied him without due process. Any other result offends not only elementary due process principles but common sensibilities." (*Id.*, at p. 1108.)

Defendant's Petition was filed in EAMS on September 6, 2022; and, as the WCJ states in the Report, was timely. (Report, p. 1.) However, due to an internal processing error related to the Electronic Adjudication Management System (EAMS) used in the workers' compensation system, which was not the fault of any party in this matter, the Appeals Board failed to act within sixty days of its filing. As a result of this error, the Appeals Board did not receive notice of the Petition until November 21, 2022.

Like the Court in *Shipley*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Shipley*, *supra*, 7 Cal.App.4th at p. 1108.) Thus, the time within which the Appeals Board has to act on the Petition was tolled until November 21, 2022, and we therefore may adjudicate the Petition within sixty days of that date. Accordingly, we will address the merits of the Petition.

Defendant contends that the WCJ erroneously failed to grant apportionment as to applicant's lumbar spine. Specifically, defendant argues that because Dr. Achackzad opined that applicant suffered new and further disability to both knees with apportionment of fifteen percent based upon the parties' prior stipulation, and because Dr. Achackzad opined that applicant's disability to the lumbar spine is subject to apportionment of fifteen percent based upon observed degenerative changes, the WCJ was required to grant apportionment as to the lumbar spine.

We observe that section 5702 provides:

> The parties to a controversy may stipulate the facts relative thereto in writing and file such stipulation with the appeals board. **The appeals board may thereupon make its findings and award based upon such stipulation, *or* may set the matter down for hearing** and take further testimony or make the further investigation necessary to enable it to determine the matter in controversy.
> (§ 5702 [Emphasis added].)

Stipulations between counsel are a "substitute for proof" and binding on the parties "if within the authority of the attorneys," and on the court if "not contrary to law, court rule or policy." (*Greatorex v. Board of Administration* (1979) 91 Cal.App.3d 54, 58 [44 Cal.Comp.Cases 553].) Stipulations between counsel further "'the public policies of settling disputes and expediting trials...' (citation) 'and their use in workers' compensation cases should be encouraged.'" (*Fireman's Fund Ins. Co. v. Workers' Comp. Appeals Bd*. (*Allen*) (2010) 181Cal.App.4th 752, 764 [75 Cal.Comp.Cases 1]; see *County of Sacramento v. Workers' Comp. Appeals Bd*. (*Weatherall*) (2000) 77 Cal.App.4th 1114, 1121 [65 Cal.Comp.Cases 1].)

In *County of Sacramento v. Workers' Comp. Appeals Bd.* (*Weatherall*) (2000) 77 Cal.App.4th 1114, 1121 [65 Cal.Comp.Cases 1], the Court stated:

> Stipulations are designed to expedite trials and hearings and their use in workers' compensation cases should be encouraged. . . . If one party could, as a matter of right, withdraw from a stipulation . . . other parties could not rely upon the stipulation and, rather than being expedited, hearings would be subject to uncertainty and disruption in order for the parties to gather and present evidence on issues thought to have been laid to rest by the stipulation.
> (*Weatherall*, *supra*, Cal. App. 4th 1114, 92 [65 Cal.Comp.Cases 1, 5] (citations omitted).)

As stated by the WCJ in the Report, the record shows that the parties reached a final stipulation and award regarding the nature and extent of applicant's lumbar spine disability; and, in the absence of pleadings and proof that applicant sustained new and further disability to the lumbar spine, no grounds exist to reopen the issue of applicant's lumbar spine disability. (Report, p. 4; see also *Vargas v. Atascadero State Hospital* (2006) 71 Cal.Comp.Cases 500, 502, 505–507 (Appeals Board en banc) (stating that SB 899's "new apportionment statutes cannot be used to *revisit or recalculate* the level of permanent disability, or *the presence or absence of apportionment*, *determined under a final order, decision, or award* issued before April 19, 2004" and that SB 899's *apportionment to causation provisions apply to the issue of increased permanent disability alleged in any petition to reopen* that was pending on or filed after its effective date [emphasis added].)

Furthermore, as explained in *Huston v. Workers' Camp. Appeals Bd*. (1979) 95 Cal.App.3d 856 [44 Cal.Comp.Cases 798]:

> Where a stipulation has been "entered into through inadvertence, excusable neglect, fraud, mistake of fact or law, where the facts stipulated have changed or there has been a change in the underlying conditions that could not have been anticipated, or where special circumstances exist rendering it unjust to enforce the stipulation," a court may exercise its sound discretion and set aside the stipulation. [citations omitted.] But, "[w]hen there is no mistake but merely a lack of full knowledge of the facts, which . . . is due to the failure of a party to exercise due diligence to ascertain them, there is no proper ground for relief." [citation omitted.].
> (*Huston*, *supra*, 44 Cal. Comp. Cases at 804.)

In this regard, the parties entered their final stipulation regarding the lumbar spine disability before Dr. Achackzad's subsequent reporting on the issue of whether the lumbar spine disability was subject to apportionment. (Report, p. 4.) Because defendant entered into the stipulation based on the knowledge that it had at the time of the stipulation, Dr. Achackzad's subsequent reporting thereon may not serve as grounds to set aside the stipulation.

Instead, defendant's remedy was to file its own petition to reopen, and it did not do so. (See *Weitnauer v. Sacramento County Sheriff's Dep't* (2016) Cal.Wrk.Comp. P.D. LEXIS 171[1] (finding that the WCAB lacks jurisdiction under Labor Code section 5804 to issue an award which reduces applicant's permanent disability unless and until the defendant files a petition to reduce permanent disability within the statutory period or files a counter-petition within thirty days of applicant's Petition to Reopen for increased disability).) Accordingly, we are unable to discern support for defendant's contention that the WCJ erred by failing to grant apportionment as to applicant's lumbar spine.

We next address defendant's argument that the WCJ erroneously relied on Dr. Achackzad's reporting on the grounds that it does not constitute substantial evidence. Specifically, defendant contends that Dr. Achackzad relied upon applicant's functional capacity evaluation to allow applicant's return to work but failed to rely upon it to determine that applicant had new and further disability.

Here, the WCJ reasoned that Dr. Achackzad's reporting, including his deposition testimony, resolves the apparent conflict between the results of the functional capacity evaluation allowing applicant's return to work and his medical opinion that applicant sustained new and further disability to his knees. (Report, pp. 4-6.) The record clearly supports the WCJ's reasoning

[1] WCAB panel decisions are not binding but may be considered to the extent their reasoning is persuasive. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, fn. 7 (Appeals Bd. en banc).)

because it reveals that Dr. Achackzad evaluated the functional capacity evaluation in the context of his own examinations of applicant's knees as well as extensive evidence regarding the pathology of the knees, including the MRI reports, the record of knee surgeries, and the findings of malalignment of the kneecap, patellofemoral syndrome, and chondromalacia. (*Id*.) It follows that Dr. Achackzad's opinion that applicant sustained new and further disability to the knees was informed by adequate medical history and based on pertinent facts and adequate medical examination; and, as such, constitutes substantial medical evidence. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620-621 (Appeals Bd. en banc).) Accordingly, we are unable to discern error in the WCJ's reliance on Dr. Achackzad's reporting to find that applicant sustained new and further disability to his knees.

Having determined the merits of defendant's contentions, we nevertheless address defendant's assertions that Dr. Achackzad's reporting was biased in favor of applicant. Here again we concur with the WCJ that the allegation of bias was not raised at the trial and is therefore waived. (Report, pp. 1, 7; Labor Code § 5502(e)(3); see also *Gould v. Workers' Comp. Appeals Bd*. (1992) 4 Cal.App.4th 1059 [57 Cal.Comp.Cases 157], *Griffith v. Workers' Comp. Appeals Bd*. (1989) 209 Cal.App.3d 1260 [54 Cal.Comp.Cases 145]. Additionally, we would caution defendant that mere disagreement with the QME's reasoning or conclusions may not be construed as evidence of bias. Accordingly, we conclude that defendant's assertions that Dr. Achackzad's reporting was the result of bias are without merit.

Accordingly, we will deny the Petition.

IT IS ORDERED that the Petition for Reconsideration of the Amended Findings of Fact, Orders, Award and Opinion on Decision issued on September 8, 2022 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 18, 2023

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

JEFFERY BLUM
LAW OFFICES OF GARY NELSON
STATE COMPENSATION INSURANCE FUND

SRO/*cs*

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