

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

ALBERT DIAZ, Applicant

vs.

**STATE OF CALIFORNIA, CALIFORNIA MILITARY DEPARTMENT, legally
uninsured, administered by STATE COMPENSATION INSURANCE FUND,
*Defendants***

**Adjudication Number: ADJ12515673
Salinas District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.

In the Findings and Award of February 17, 2021, the workers' compensation judge (WCJ) found that applicant, while employed as a plumber II on November 15, 2018, sustained industrial injury to his lungs. The WCJ also found that applicant has "chronic lung disease" within the meaning of Labor Code section 4656(c)(3)(I), that applicant is entitled to temporary total disability indemnity from November 13, 2020 and continuing up to a maximum of 240 weeks, that applicant is entitled to further medical treatment to cure or relieve the effects of the injury, and that applicant is entitled to reimbursement for self-procured medical treatment provided by doctors Harrison and Proudell, subject to the lien of Anthem Blue Cross.

Defendant filed a timely petition for reconsideration of the WCJ's decision. Defendant contends that the WCJ erred in finding that applicant has "chronic lung disease" within the meaning of Labor Code section 4656(c)(3)(I), that applicant is not entitled to temporary total disability indemnity as found by the WCJ, and that applicant is not entitled to reimbursement for self-procured medical treatment.

Applicant filed an answer.

The WCJ submitted a Report and Recommendation (“Report”). We adopt and incorporate section II of the Report, which includes a statement of the relevant facts. We do not adopt or incorporate the remainder of the Report.

Based on our review of the record and applicable law, we conclude that further development of the medical record is required on the issue of whether applicant has “chronic lung disease,” and on the other issues discussed below. We will amend the WCJ’s decision accordingly, and we will return this matter to the trial level for further proceedings and new findings by the WCJ on the outstanding issues.

We begin by noting that Labor Code section 4656(c)(3)(I) states in relevant part: “[F]or an employee who suffers from the following injuries or conditions, aggregate disability payments for a single injury occurring on or after April 19, 2004, causing temporary disability shall not extend for more than 240 compensable weeks within a period of five years from the date of the injury: [...] (I) Chronic lung disease.”

In *Velez v. Elec. Source Co.* (2018) 2018 Cal. Wrk. Comp. P.D. LEXIS 368, the Board panel stated, “section 4656(c)(3)(I) refers to various “injuries or conditions” that are not specific diagnoses which must be made by the reporting physician. For example, amputations, severe burns and high-velocity eye injuries are not medical diagnoses. Chronic lung disease is a general term for a wide variety of persistent lung disorders or long-term respiratory problems including asthma, bronchitis, and pulmonary edema. (see U.S. National Library of Medicine, Medical Encyclopedia.)” (Electronic slip op., pp. 10-11.)

Although published Board panel opinions may be found persuasive and followed by other Board panels in appropriate circumstances, they do not constitute binding authority. The *Velez* panel’s mention of “chronic lung disease,” as not requiring a specific diagnosis by a reporting physician, is not persuasive because the case was decided on different facts. In *Velez*, substantial medical evidence demonstrated that as a result of applicant’s industrial injury she developed asthma, which the *Velez* panel justifiably characterized as a “chronic lung disease” under the facts of that case.

This case is different. Here, the record does not contain substantial medical evidence that applicant has “chronic lung disease” as a result of the Valley Fever he contracted, notwithstanding the fact that defendant has accepted the Valley Fever as an industrial injury. The WCJ states in his Report that he relied on applicant’s testimony about his disability and

work status to conclude that he has “chronic lung disease.” We disagree with the WCJ’s analysis on this point. Although it is a legal question whether applicant is entitled to expanded temporary total disability indemnity as set forth in section 4656(c)(3)(I), the question whether he actually has a medical diagnosis of “chronic lung disease” is a medical question, which requires expert medical opinion. As the Court of Appeal explained in *Peter Kiewit Sons v. Industrial Acc. Com.* (1965) 234 Cal.App.2d 831, 838-839 [30 Cal.Comp.Cases 188]: “Where an issue is exclusively a matter of scientific medical knowledge, expert evidence is essential to sustain a [WCAB] finding; lay testimony or opinion in support of such a finding does not measure up to the standard of substantial evidence. Expert testimony is necessary where the truth is occult and can be found only by resorting to the sciences.”

In this case, Dr. Lonkey served as the Panel Qualified Medical Evaluator (PQME) in the specialty of pulmonary medicine. In his report dated March 20, 2020, Dr. Lonkey included among his eight diagnoses the diagnosis that applicant has “residual abnormalities on chest x-ray relating to resolving coccidioidomycosis pneumonia.” (Exhibit J1, p. 19.) However, Dr. Lonkey did not state that applicant has “chronic lung disease” anywhere in his report dated March 20, 2020. The same is true of Dr. Lonkey’s report dated November 7, 2020. There, in diagnosis number nine, the doctor diagnosed applicant with “continued weakness, lassitude and malaise – likely secondary to deconditioning and possibly slow resolution of post-infectious state after coccidioidomycosis.” (Exhibit J2, pp. 7-8.) Again, however, Dr. Lonkey did not state that applicant has “chronic lung disease” anywhere in his report dated November 7, 2020.

As Dr. Lonkey’s reporting thus far has failed to resolve the issue of whether applicant has the medical diagnosis of “chronic lung disease,” we conclude that a supplemental medical opinion from Dr. Lonkey is required to further address and resolve the issue, consistent with the AMA Guides.¹ (*Telles Transport, Inc. v. Workers’ Comp. Appeals Bd.* (2001) 92 Cal.App.4th 1159, 1164 (66 Cal.Comp.Cases 1290) [The Board “may not leave

¹ On repeated occasions, but apparently to no avail, Dr. Lonkey requested that he be provided with applicant’s treatment records pertaining to Valley Fever. In further proceedings at the trial level, the WCJ may consider sanctions if the parties fail to provide Dr. Lonkey with all the medical records he needs to complete a supplemental report addressing the question whether applicant has “chronic lung disease.” (Lab. Code, § 5813.)

undeveloped matters which its acquired specialized knowledge should identify as requiring further evidence.”]; *Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613, 619-620 (Appeals Board en banc) [A physician’s “impairment evaluation includes a discussion of the employee's history and symptoms, the results of the physician's examination, the results of various tests and diagnostic procedures, *the diagnosis*, the anticipated clinical course, the need for further treatment, and the residual functional capacity and ability to perform activities of daily living (ADLs).”]; *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 (Appeals Board en banc) [preference for supplemental opinions from physicians who already have reported in a case].)

Defendant also challenges the WCJ’s findings on temporary disability and self-procured medical treatment. Although the WCJ found and awarded temporary disability indemnity from November 13, 2020 and continuing, there is no medical evidence in the record to support this determination. Dr. Lonkey did not address the issue in his final report of November 7, 2020. As with the issue of “chronic lung disease,” Dr. Lonkey should address the issue of temporary disability in issuing a supplemental report. Similarly, there is no medical evidence to support the WCJ’s finding that applicant is entitled to self-procured medical treatment, and the lien of Anthem Blue Cross does not appear in the record. Even though the WCJ reserved jurisdiction and directed the parties to adjust the issue of self-procured medical treatment, the extent to which applicant may be entitled to self-procured medical treatment requires evidence, and the treatment must be in accordance with the medical treatment utilization schedule. (Lab. Code, § 4604.5.) As with the other issues discussed above, further development of the record is required on self-procured medical treatment and the lien of Anthem Blue Cross.

In closing, we express no final opinion as to whether applicant has the medical diagnosis of “chronic lung disease,” and we express no final opinion on the other outstanding issues discussed above. When the WCJ issues new findings, any aggrieved party may seek reconsideration as provided in Labor Code sections 5900 *et seq.*

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award of February 17, 2021 is **AFFIRMED**, except that paragraphs (A) and (C) of the Award are **RESCINDED**, and Findings 5, 6, 7 and 9 are **AMENDED** to state as follows:

FINDINGS OF FACT

5. The issue of whether applicant has "chronic lung disease" within the meaning of Labor Code section 4656(c)(3)(I) is deferred pending further proceedings and determination by the WCJ, jurisdiction reserved.
6. The issues of self-procured medical treatment and the lien of Anthem Blue Cross are deferred pending further proceedings and determination by the WCJ, jurisdiction reserved.
7. The issue of temporary disability, if any, beyond the temporary disability described in Finding 4 is deferred pending further proceedings and determination by the WCJ, jurisdiction reserved.
9. The issue of attorney's fees is deferred pending further proceedings and determination by the WCJ, jurisdiction reserved.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that this matter is **RETURNED** to the trial level for further proceedings and new decision by the WCJ on the outstanding issues, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 22, 2021

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

**ALBERT DIAZ
RUCKA, O'BOYLE, LOMBARDO & MCKENNA
STATE COMPENSATION INSURANCE FUND**

JTL/bea

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

Defendant State Compensation Insurance Fund has filed a timely, verified Petition for Reconsideration from the Findings and Award of 2/17/2021, listing the usual statutory grounds. In the challenged F&A, I found that applicant had “chronic lung disease” and awarded TD from 11/13/2020, when defendant ceased payments, up to a maximum of 240 weeks; and reimbursement for self-procured treatment from his treating physicians. Petitioner contends the WCJ erred by finding that applicant has chronic lung disease within the meaning of Labor Code Section 4656(c)(3), by finding that he was temporarily totally disabled, and by finding that applicant reasonably and necessarily self-procured specified medical treatment for which Petitioner is liable. The Petition is without merit and should be denied.

II

STATEMENT OF MATERIAL FACTS

The following facts are undisputed: Applicant, Albert Diaz was employed on 11/15/18 as a plumber by the State of California, Department of Military, when he sustained injury AOE/COE to his lungs (coccidioidomycosis, aka “Valley Fever”). The primary treating physician on a self-procured basis is Dr. Harrison [(Minutes of Hearing/Summary of Evidence, 02/04/2021 (hereinafter “MOH”), p. 2)]. His primary treating doctors are Dr. Poudel and Dr. Harrison, who are being paid under his wife’s Anthem Blue Cross coverage, along with his medications (MOH, p. 4)

Applicant testified (MOH, pp.3-4) that he has been prescribed medication for his Valley Fever, by Drs. Poudel and Harrison, which he takes daily. Dr. Poudel is an infectious disease specialist. Dr. Harrison practices general medicine. He testified he is very weak and fatigued, with reduced

stamina and shortness of breath. He credibly testified he has not worked since 11/15/18, has not been offered work by his employer within the doctors' restrictions (QME Dr. Lonky reported he could do non-exertional, part-time work - -Ex. J-1, report of 11/7/20, p. 9), has not been released by his doctors to return to work, and that work as a plumber does not encompass light duty or part-time work in any event. However, he wants to return to work, when he is able.

The accepted injury to applicant's lungs resulted from his contracting coccidioidomycosis (Valley Fever) from exposure to spores in his work (reports of Stewart Lonky, MD, QME, Joint Exhibits J-1 and J-2). Ever since his discharge from the hospital on 12/5/18, applicant has remained under treatment by a pulmonologist and an infectious disease specialist (Lonky report, 3/20/2020, Ex. J-2, p.6). Dr. Lonky reported that throughout most of 2019, applicant was short of breath with minimal exertion, along with coughing, although this was not a "prominent feature" of applicant's illness. On page 19, Dr. Lonky noted that a pulmonary function study and repeat chest X-ray had been done. His diagnoses included abnormalities on the chest X-ray related to his disease. On p. 21, he stated that applicant had not had "a major complication from his coccidioidomycosis aside from the pulmonary embolism, which is now resolved" and that "...from a pulmonary illness perspective he should be considered to have resolved his infection and had adequate treatment..." by September of 2019.

However (p. 22), applicant's major problem was fatigue "caused by oxygen consumption and CO₂ production." The doctor requested pulmonary function testing (p. 23), so he could classify applicant's impairment under the AMA Guides. He thought any restrictions would either be due to the pulmonary embolism or to "...the nodules and residual infiltrates in his lungs." The fatigue was a "slowly resolving process." His pulmonary condition required applicant to be out of work and remain somewhat impaired with weakness and recovery. Dr. Lonky recommended continued treatment by a pulmonary medicine specialist and medical monitoring for

“...worsening infiltrates or the development of atelectasis or lung restriction.”

In his re-evaluation report (Ex. J-1, 11/7/20), Dr. Lonky noted (p. 5) that applicant’s treating physician, Dr. Harrison, had advised more exercise to “...increase lung function.” Applicant was still experiencing shortness of breath with minimal exertion, although he was no longer coughing. The chest examination revealed decreased breath sounds at the right base, but no rales, wheezes or rhonchi.

Served: 03/18/2021

**MICHAEL H. YOUNG
Workers’ Compensation
Administrative Law Judge**