WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MARISSA AGAMAO, ***Applicant***

vs.

MITSUBISHI MOTOR CREDIT OF AMERICA;
TOKIO MARINE MANAGEMENT, INC., ***Defendants***

Adjudication Numbers: ADJ205708; ADJ1690431; ADJ4513618
Los Angeles District Office

OPINION AND DECISION AFTER RECONSIDERATION

We granted reconsideration in order to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration of the Findings of Fact (Findings) issued by the workers' compensation administrative law judge (WCJ) on April 27, 2021. By the Findings, the WCJ found that applicant is not entitled to a qualified medical evaluator (QME) replacement panel and should not be compelled to attend an examination with the current QME.

Defendant contends that the WCJ's finding that applicant should not be compelled to attend an examination with the QME prevents it from completing necessary discovery.

We did not receive an answer from applicant. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny defendant's Petition.

We have considered the allegations of defendant's Petition for Reconsideration and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will vacate our previous Opinion and Order Granting Petition for Reconsideration, dismiss defendant's Petition as one seeking reconsideration, grant the Petition as one seeking removal and amend the Findings to issue a new finding that applicant must attend an examination with the QME (Finding of Fact No. 2). We will also add an order to reflect the amended finding of fact. We will otherwise affirm the Findings.

FACTUAL BACKGROUND

Applicant claims three injuries while employed as an administrative assistant by Mitsubishi Motor Credit of America: 1) to the bilateral upper extremities, neck, back, shoulders, psyche, sleep and left knee on December 1, 2003 (ADJ205708); 2) to the bilateral upper extremities, back, neck and shoulder through September 7, 2004 (ADJ1690431); and 3) to the bilateral upper extremities, eyes, high blood pressure, neurological system and sleep (ADJ4513618).

The parties initially utilized Dr. Dennis Ainbinder as an agreed medical evaluator (AME) until he retired. (Defendant's Exhibit A, Petition to Compel Attendance of Applicant at Medical Evaluation, September 15, 2020, p. 2.) A QME panel in orthopedic surgery was requested and issued on June 19, 2018. (Defendant's Exhibit C, QME Panel, June 19, 2018.) Dr. George Watkin was the remaining physician from the panel following both parties' strikes. (*Id.*)

Multiple examination appointments were scheduled with Dr. Watkin in 2018, for which applicant either did not show or the appointment was cancelled. (Defendant's Exhibit A, Petition to Compel Attendance of Applicant at Medical Evaluation, September 15, 2020, p. 2.)

On January 3, 2019, defendant filed a Petition for Order Compelling Attendance at PQME Medical Evaluation. The Petition requested that applicant be ordered to attend an examination with Dr. Watkin scheduled for February 28, 2019. On January 4, 2019, the WCJ issued a Joint Order to Compel Attendance of Applicant at Panel Qualified Medical Evaluation. (Defendant's Exhibit D, Joint Order to Compel Attendance, January 4, 2019.)

Applicant filed an objection to the Order on January 22, 2019. The dispute was set for trial on August 7, 2019. On that date, the WCJ issued an Order to Compel Attendance of Applicant at Panel Qualified Medical Evaluation and denying applicant's objection to defendant's Petition. (Defendant's Exhibit B, Order Compelling Attendance of Applicant, August 7, 2019.) The examination with Dr. Watkin was scheduled for October 10, 2019.

In his resulting report, Dr. Watkin reported the following as relevant:

> Ms. Agamao was scheduled to be seen today for Panel Qualified Medical Evaluation due to injuries she has claimed against Mitsubishi Motors. It is noted that she has missed two appointments and this was at least the fifth time this evaluation was scheduled. Unfortunately, this evaluation had to be terminated because her attorney did not want her to be seen unless he was in the room. From my point of view that is parte communication and not allowed.

> I am not prepared to offer any further opinions regarding her condition absent a full examination. I was willing to continue if the lawyer would agree for her to be seen without him present. She left the office without being seen.
>
> (Defendant's Exhibit E, Report of George Watkin, M.D., October 10, 2019, p. 58.)

On January 29, 2020, defendant filed another Petition for Order Compelling Attendance at PQME Medical Evaluation. Applicant filed an objection to defendant's Petition. (Applicant's Exhibit No. 4, Objection to Petition for Order Compelling Attendance at PQME, February 17, 2020.) Applicant also sent additional letters to defendant objecting to a QME evaluation. (Applicant's Exhibit No. 1, Objection to PQME letter to defendant, April 23, 2020; Applicant's Exhibit No. 2, Objection to PQME letter to defendant, March 29, 2020; Applicant's Exhibit No. 5, Objection to PQME letter to defendant, July 30, 2020.)

Defendant filed a third Petition for Order Compelling Attendance at PQME Medical Evaluation on September 15, 2020. In its Petition, it was noted that applicant had failed to attend an evaluation with Dr. Watkin set for September 2, 2020. (Defendant's Exhibit A, Petition to Compel Attendance of Applicant at Medical Evaluation, September 15, 2020, p. 4.)

The matter proceeded to trial on March 3, 2021 with the issues described as follows:

> 1. Attorney fees.
>
> 2. Discovery related issue. Applicant continues to fail PQME exams set with Dr. Watkin. Defendant seeks order for attendance at PQME exam with Dr. Watkin per Petition Compelling Attendance dated 9/15/20. Applicant has not provided proof, reason for replacement panel under CCR 31.5.
>
> It is Applicant's position that said appointment was terminated by the PQME Dr. Watkins due to the fact he would not allow Applicant's representative into the examination room.
>
> (Minutes of Hearing and Summary of Evidence, March 3, 2021, p. 3.)

Applicant testified at trial as follows in relevant part:

> The applicant went to the evaluation on 10/10/19, with Chris from Mr. Moore's office.
>
> The applicant was hoping that Chris would go to the evaluation with Dr. Watkin with her.
> …

Dr. Watkin got angry. Applicant never had any problems with any other doctors. The applicant thought that she was racially profiled. The applicant thought that where Dr. Watkin's office was located wasn't safe. The applicant is willing to go to another PQME or AME or neutral doctor.

The secretary at Dr. Watkin's office would not let Chris see the doctor with the applicant. When the applicant arrived at the office, applicant introduced herself, and the lady looked at the applicant from head to toe and that made the applicant feel very uncomfortable. Chris told the applicant that she had the right to let her go see the doctor with her. Dr. Watkin said you cannot bring anyone here because it would be ex parte. The applicant said if Chris cannot come in I'm going to cancel the appointment and then the applicant walked out.

The applicant asked Yessinia why I never received a copy of the new patient form. Yessinia said we assumed you were Mexican. Yessinia said she would send the new patient form. The applicant never received the new patient form. Yessinia accused the applicant of not answering her telephone calls.

The applicant feels that she cannot go to Dr. Watkin's office. The applicant would not feel comfortable going to Dr. Watkin's office. The applicant felt unsafe going to the office of Dr. Watkin by herself. The applicant felt unwelcomed by the doctor's staff. The way the woman looked at the applicant in the office the applicant assumed that she had had a bad day. The applicant thinks it was because of the applicant's past history with Dr. Watkin's office. The applicant felt hostility from Dr. Watkin's office.

The applicant was made to feel like a kid, like don't interrupt me. Dr. Watkin would not do the evaluation if Chris was with her. Applicant will not go to see Dr. Watkin. The applicant would not trust a report from Dr. Watkin.

(*Id.* at pp. 5-6.)

The WCJ issued the Findings as outlined above.

DISCUSSION

I.

Defendant sought reconsideration of the Findings. A petition for reconsideration may properly be taken only from a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.)[1] A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180;

[1] All further statutory references are to the Labor Code unless otherwise stated.

Safeway Stores, Inc. v. Workers' Comp. Appeals Bd. (*Pointer*) (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (*Kramer*) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]) or determines a "threshold" issue that is fundamental to the claim for benefits. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Id*. at p. 1075 ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final' "]; *Rymer, supra*, at p. 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer, supra*, at p. 45 ["[t]he term ['final'] does not include intermediate procedural orders"].) Such interlocutory decisions include, but are not limited to, pre-trial orders regarding evidence, discovery, trial setting, venue, or similar issues.

Here, the WCJ's Findings solely resolve discovery issues. The decision does not determine any substantive right or liability and does not determine a threshold issue. Accordingly, it is not a "final" decision and we will vacate our previous Opinion and Order Granting Petition for Reconsideration. Defendant's Petition will be dismissed as one seeking reconsideration.

II.

Defendant does not dispute the WCJ's finding that applicant is not entitled to a replacement QME panel. Administrative Director (AD) Rule 40 permits an injured worker to discontinue a medical-legal evaluation as follows:

> That subject to section 41(g), the injured worker may discontinue the evaluation based on good cause. Good cause includes: (A) discriminatory conduct by the evaluator towards the worker based on race, sex, national origin, religion, or sexual preference, (B) abusive, hostile or rude behavior including behavior that clearly demonstrates a bias against injured workers, and (C) instances where the evaluator requests the worker to submit to an unnecessary exam or procedure.
>
> (Cal. Code Regs., tit. 8, § 40(a)(2).)[2]

[2] AD Rule 41(g) states:

> If the injured worker terminates the examination process based on an alleged violation of section 35(k), 40, 41(a) or 41.5 of Title 8 of the California Code of Regulations, and the Appeals Board later determines that good cause did not exist for the termination, the cost of the evaluation shall be deducted from the injured worker's award. A violation of section 40 or of any part of section

It is acknowledged that a WCJ may order a replacement QME panel if the existing QME reveals a bias against the injured worker that constitutes a disqualifying conflict of interest as defined by AD Rule 41(c)(3). (See Cal. Code Regs., tit. 8, §§ 31.5(a), 41(c)(3) and 41.5(d)(4); *Beecham v. Swift Transportation Services* (November 27, 2017, ADJ10084731, ADJ10084732) [2017 Cal. Wrk. Comp. P.D. LEXIS 555] [the Appeals Board panel affirmed the WCJ's order for a replacement QME panel based on the QME's testimony regarding the employee's presumed "Negro blood" and how it impacted her evaluation].)[3]

As the moving party, applicant had the burden of proof to show by a preponderance of the evidence that she was entitled to a replacement QME panel. (Lab. Code, §§ 3202.5, 5705.) We agree with the WCJ that applicant has not met this burden.

The majority takes seriously the requirement that QMEs not engage in discriminatory conduct during an evaluation and their obligation to "[r]ender expert opinions or conclusions without regard to an injured worker's race, sex, national origin, religion or sexual preference." (Cal. Code Regs., tit. 8, § 41(c)(3).) Applicant's trial testimony contains vague references to feeling hostility from Dr. Watkin's staff. She also reports that Dr. Watkin "got angry" and that she felt "racially profiled," but provides no details as to why she felt this way. While Dr. Watkin may have expressed displeasure at applicant's request to have another person present during the examination, we are not prepared to conclude his response was racially motivated in the absence of specific evidence indicating that Dr. Watkin's conduct revealed bias against applicant. Therefore, we agree with the WCJ's conclusion that applicant is not entitled to a replacement QME panel and will retain this finding of fact.

> 41(a) or 41.5 by the evaluator shall constitute good cause for purposes of an Appeals Board determination. No party shall be liable for any cost for medical reports or medical services delivered as a result of an exam terminated for good cause.
>
> (Cal. Code Regs., tit. 8, § 41(g).)

[3] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board En Banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2, [54 Cal.Comp.Cases 145].)

III.

We disagree however with the WCJ's finding that applicant should not be compelled to attend an examination with Dr. Watkin.

Dr. Watkin's October 10, 2019 report reflects that he has already reviewed voluminous records. (Defendant's Exhibit E, Report of George Watkin, M.D., October 10, 2019, pp. 10-57.) He expressly stated in his report that he could not provide further opinions regarding applicant until his examination has been completed. Medical-legal discovery is consequently at a standstill until Dr. Watkin has an opportunity to finish his examination of applicant, which is necessary in order to provide his opinions regarding the medical-legal issues in dispute. The record shows multiple missed or cancelled appointments with the QME. Therefore, it appears an order compelling her attendance is necessary.

Applicant is cautioned that her case may be suspended and/or her right to benefits barred based on her refusal to submit to a medical examination with the QME. (See Lab. Code, §§ 4053, 4054.) Applicant may bring her attorney or her attorney's representative if she wishes to the examination with Dr. Watkin. (See Code Civ. Proc., § 2032.510(a).) Any observer present "shall not participate in or disrupt" the examination. (Code Civ. Proc., § 2032.510(b).)

Therefore, we will vacate the previous Opinion and Order Granting Petition for Reconsideration, dismiss defendant's Petition as one seeking reconsideration, grant the Petition as one seeking removal and amend the Findings as outlined herein.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Opinion and Order Granting Petition for Reconsideration issued by the Workers' Compensation Appeals Board on July 13, 2021 is **VACATED**.

IT IS FURTHER ORDERED that defendant's Petition for Reconsideration of the Findings of Fact issued by the WCJ on April 27, 2021 is **DISMISSED**.

IT IS FURTHER ORDERED that defendant's Petition for Removal of the Findings of Fact issued by the WCJ on April 27, 2021 is **GRANTED** and as the Decision After Removal of the Workers' Compensation Appeals Board, the Findings of Fact issued by the WCJ on April 27, 2021 is **AFFIRMED** except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

2. Applicant must attend a PQME examination with Dr. Watkin.

ORDER

IT IS ORDERED THAT applicant attend an examination with the QME Dr. Watkin at a date and time to be jointly determined by the parties. If applicant fails to attend or prevents said examination without good cause, these proceedings may be suspended pursuant to Labor Code section 4053 and benefits barred pursuant to section 4054 effective on the date of the scheduled examination.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

I DISSENT (see separate dissenting opinion),

/s/ MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 13, 2021

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

MARISSA AGAMAO
MOORE & ASSOCIATES
TOBIN LUCKS

AI/*pc*

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

DISSENTING OPINION OF COMMISSIONER SWEENEY

I respectfully dissent. I would also grant defendant's Petition as one seeking removal, but I would rescind the Findings of Fact and return the matter to the trial level for the WCJ to appoint a regular doctor to evaluate applicant per Labor Code section 5701. (Lab. Code, § 5701.)

As noted by the majority, AD Rule 40 permits an injured worker to discontinue a medical-legal examination where the evaluator engages in discriminatory conduct towards the worker. Applicant testified under oath at trial that Dr. Watkin's staff made assumptions about her ethnicity and engaged in hostile behavior toward her. She further testified that Dr. Watkin expressed anger towards her and made her feel racially profiled. The WCJ does not report that applicant was not credible in her testimony. In the absence of evidence refuting applicant's experience with the QME, I would accept applicant's sworn testimony that she felt discriminated against by Dr. Watkin and his staff. Bias by an evaluating physician is unacceptable and should be treated seriously. I would therefore not force applicant to return to Dr. Watkin for further examination.

Section 5701 provides the Appeals Board with the discretionary authority to appoint a regular physician to evaluate an employee. (Lab. Code, § 5701; see also Lab. Code, § 5906; *Tyler v. Workers' Comp. Appeals Bd*. (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd*. (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) In lieu of returning applicant to a physician who indicated bias towards her or replacing the QME panel, I would return this matter to the trial level for the WCJ to appoint a regular physician to evaluate applicant.

Therefore, I dissent.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 13, 2021

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MARISSA AGAMAO
MOORE & ASSOCIATES
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I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *abs*