

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

**ROSA HERRERA, *Applicant***

**vs.**

**KAISER FOUNDATION HOSPITAL, Permissibly Self-Insured,  
Adjusted by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants***

**Adjudication Number: ADJ11087566  
Oakland District Office**

**OPINION AND ORDER  
DENYING PETITION FOR  
RECONSIDERATION**

Defendant seeks reconsideration of the December 21, 2020 Opinion and Order Granting Reconsideration and Decision After Reconsideration wherein the Appeals Board granted applicant's Petition for Reconsideration and found that applicant is entitled to total temporary disability from May 28, 2020 to September 17, 2020 and deferred the issue of applicant's entitlement to temporary disability after that date.

Defendant contends that there is no substantial medical evidence that applicant was temporarily disabled from May 28, 2020 to September 17, 2020 and that based on newly discovered evidence received after the expedited hearing, applicant was not temporarily disabled during that time period. Defendant also contends that given the WCJ's finding that applicant lacked credibility, the Appeals Board should not have awarded temporary disability based on applicant's testimony.

For the reasons discussed in our December 21, 2020 Opinion and for the reasons discussed below, we will deny reconsideration.

As an initial matter, Labor Code section 5909 provides that a petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within 60 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].) 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 of section 5909. The Appeals Board did not act on defendant's petition because it had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board's decision holding that the time to act on defendant's petition was tolled during the period that the file was misplaced. (*Id.*) Considering that defendant timely sought reconsideration and its petition did not come to the attention of the Appeals Board until after March 15, 2021, we find that our time to act is tolled.

In this case, the issue of applicant's entitlement to temporary disability was determined by the workers' compensation administrative law judge (WCJ) and the Appeals Board based on the medical evidence. The WCJ summarized applicant's trial testimony, but did not make explicit findings on the credibility of that testimony. The WCJ found that applicant was not entitled to additional temporary disability based on the reports of the panel qualified medical evaluator (PQME), which the WCJ found more persuasive than the reports of applicant's primary treating physician (PTP). (September 29, 2020 Opinion on Decision, p.6.) The WCJ explicitly stated that she did not determine whether the PTP's reports were substantial medical evidence. (*Id.* at p. 7.) The Appeals Board determined that the PTP's reports were substantial medical evidence. The Appeals Board also found that the contemporaneous reporting of applicant's primary treating physician was more persuasive than the stale PQME reporting. It is well-established that the relevant and considered opinion of one physician may constitute substantial evidence, even if inconsistent with other medical opinions. (*Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal. 3d 372, 378-379 [35 Cal. Comp. Cases 525].) Here, applicant's changed circumstances were not addressed by the PQME and were addressed by her PTP.

Turning to defendant's contention that reconsideration should be granted on the basis of newly discovered evidence, Labor Code section 5903(d) provides that a petitioner must demonstrate that "he or she could not, with reasonable diligence, have discovered and produced [the evidence] at the hearing." (Lab. Code, §5903(d).) WCAB Rule 10974 states in part:

Where reconsideration is sought on the ground of newly discovered evidence that could not with reasonable diligence have been produced before submission of the case ... the petition must contain an offer of proof, specific and detailed, providing: ...

(c) A description of any documentary evidence to be offered;

(d) The effect that the evidence will have on the record and on the prior decision;  
and

(e) As to newly discovered evidence, a full and accurate statement of the reasons why the testimony or exhibits could not reasonably have been discovered or produced before submission of the case.

A petition for reconsideration sought upon these grounds may be denied if it fails to meet the requirements of this rule, or if it is based upon cumulative evidence.

(Cal. Code Regs., tit. 8, § 10974.)

In this case, the petitioner sought to rely on a PQME report prepared after the expedited hearing and a Report by Vladimir Bokarius MD, that was prepared before the hearing but received after the hearing. At the August 20, 2020 Expedited Hearing, the record does not reflect that defendant told the court that reports were pending. (August 20, 2020, Minutes of Hearing and Summary of Evidence.) Defendant did not request that the record remain open for pending reports. In addition, in its Petition for Reconsideration, defendant did not describe any efforts to schedule applicant for an earlier evaluation with the PQME. With respect to the Dr. Bokarius report, defendant alludes to “efforts to secure the report prior to the hearing,” but does not describe those efforts in detail. (Petition for Reconsideration, p. 4.) Because defendant failed to show that this evidence could not have been reasonably discovered or produced before submission of this case, we will deny its petition.

For the foregoing reasons,

**IT IS ORDERED** that defendant's Petition for Reconsideration is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**I CONCUR,**

**/s/ KATHERINE WILLIAMS DODD, COMMISSIONER**

**/s/ MARGUERITE SWEENEY, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**May 13, 2021**

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

**ROSA HERRERA  
LAW OFFICE OF BRIAN ITO  
STANDER REUBENS THOMAS KINSEY**

**MWH/oo**

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