

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

SERGIO HERNANDEZ, *Applicant*

vs.

**AIRFOIL TECHNOLOGIES INCORPORATED and TRAVELERS PROPERTY
CASUALTY COMPANY OF AMERICA, *Defendants***

**Adjudication Number: ADJ9240550
Marina del Rey District Office**

**OPINION AND ORDER
GRANTING PETITION FOR RECONSIDERATION
AND DECISION AFTER RECONSIDERATION**

Applicant seeks reconsideration of the Findings of Fact and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on April 13, 2022, wherein the WCJ found that applicant did not sustain injury arising out of and in the course of employment (AOE/COE) to his respiratory system, lungs, or sinuses/loss of sense of smell; and the WCJ ordered that applicant take nothing by way of his injury claim.

Applicant contends the trial record contains substantial evidence, including the reports from Dr. Gerald Markovitz, that he sustained a cumulative injury AOE/COE, as claimed.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be denied. We received a Reply (Answer) from defendant.¹

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration, rescind the F&O, and return the matter to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

¹ Applicant also filed an "Answer to Defendant's Response." Applicant did not comply with the requirements of Appeals Board rule 10964 and the "Answer to Defendant's Response" will not be considered. (Cal. Code Regs., tit. 8, § 10964.)

BACKGROUND

Applicant claimed injury to his respiratory system, lungs, and sinuses/loss of sense of smell, while employed by defendant Airfoil Technologies during the period from September 1, 1992, through June 30, 2007. Applicant subsequently claimed injury to his head, nose, respiratory system, internal system, and in the form of a hernia, while employed by Praxair, Inc., during the period from July 4, 2007, through September 12, 2013 (ADJ9102211). That injury claim is not at issue herein.

Internal medicine-pulmonary disease qualified medical examiner (QME) Gerald H. Markovitz, M.D., evaluated applicant on August 28, 2019. Dr. Markovitz examined applicant, took a history, and reviewed the medical record. In the “Discussion” portion of his report, the doctor stated:

The patient was not a particularly good historian. In addition, I am missing medical records. He told me that he had been seeing a Dr. De Borde [Laborde], whose name might be spelled differently in the deposition. I would like to see all of those records. He states that he now sees a Dr. Munoz and I would like to see those records. He states he was diagnosed with asthma in 1995 by Dr. De Borde, but the records of Dr. Pham show asthma to have developed maybe a decade later. ¶ There are other discrepancies in terms of his work history. He told me that he was a machine operator for Airfoil but then only worked in the packing department at Praxair. Other documents describe him as a painter for Praxair and exposed to chemicals. For Airfoil, he may have only worked with sawdust. There must be objective documentation of his job duties at both of these employers. In addition, there must be Material Safety Data Sheets. This information will be necessary for me to review. ¶ The patient has asthma and has chronic sinus problems. To fully understand his asthma, I need to understand his sinus problems. I need to see the operative report and pathology report. (Joint Exh. BB, Dr. Markovitz, August 28, 2019, p. 15.)

Dr. Markovitz was provided additional medical reports to review and in his supplemental report, he stated:

As I stated in my original report, the patient was not a particularly good historian. The history in the medical-legal reports (both QME and treating) may then be inaccurate. This is why I prefer to review contemporaneous medical records if at all possible myself. ¶ For instance, the history provided by Dr. Zlotolow as recorded in the 3//10/14 report, page 2, paragraph 3, that the patient denies any respiratory, sinus, or allergy problems before working for the above company (Praxair) is not medically correct. The records of Dr. Pham clearly documented multiple visits between the years 2000 and 2007 for

bronchial asthma or bronchitis. In fact, he was seen as early as 1994 for sinusitis. ¶ Another example is the incorrect information recorded in the reports of Dr. Tirmizi. In his report of 5/29/14, page 2, paragraph 3, the applicant supposedly "categorically" stated that he had no problems prior to employment by Praxair. The applicant was asked if he ever had any claim against Airfoil for pulmonary condition or any problems while working at Airfoil, and he said he never had those problems. Again, the medical records tell a different story. ¶ ... Given the discrepancies I have summarized above, it would be useful to obtain the records of the allergist. Please obtain those records. ¶ Given these discrepancies, I would like to reevaluate the applicant to try to better understand his work at each employer. I understand that I have been asked to see him regarding his employment at Airfoil and that Airfoil sold its business to Praxair. If the parties agree, then my office will schedule a visit for a reevaluation. (Joint Exh. AA, Dr. Markovitz, June 12, 2020, pp. 5 – 6.)

The parties proceeded to trial on October 26, 2021. (Minutes of Hearing and Summary of Evidence (MOH/SOE), October 26, 2021.) The matter was continued and at the January 26, 2022 trial the parties were given the opportunity to file briefs and the WCJ ordered the matter submitted for decision as of March 14, 2022. (MOH/SOE, January 26, 2022, p. 1.) The issues submitted for decision were injury AOE/COE, statute of limitations, and date of injury. (MOH/SOE, October 26, 2021, p. 2.)

DISCUSSION

An award, order, or decision of the Appeals Board must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].) 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, and to be substantial evidence the medical opinion must set forth the reasoning behind the physician's opinion, not merely his or her conclusions; a mere legal conclusion does not furnish a basis for a finding. (*Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372 [35 Cal.Comp.Cases 525]; *Heggin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93]; *Granado v. Workers' Comp. Appeals Bd.* (1968) 69 Cal.2d 399 [33 Cal.Comp.Cases 647]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

Here, as noted above, QME Dr. Markovitz repeatedly said that applicant was not a good historian, and that various medical reports are inconsistent and conflict with the work and treatment history he was given by applicant. Dr. Markovitz concluded that he needed to review additional medical records and he that needed to re-evaluate applicant. Our review of the trial record indicates that Dr. Markovitz was not provided the additional medical records he requested, nor was given the opportunity to re-evaluate applicant. Thus, his reports are not substantial evidence on the issue of injury AOE/COE.

The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or where there is insufficient evidence to determine an issue. (Lab. Code, §5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) When the medical record requires further development, the record should first be supplemented by physicians who have already reported in the case. (See *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc).)

We note that in the Report, the WCJ indicated that he did not find applicant to be credible and, "Developing the record would not assist in rehabilitating the applicant's lack of credible testimony." (Report, p. 4.) However, Dr. Markovitz clearly requested additional records, including accurate assessments of applicant's work with Airfoil Technologies and Praxair, Inc. He indicated that the additional records as well as the re-evaluation of applicant, would help him address the discrepancies in the information he was provided by applicant. Under the circumstances of this matter, upon its return to the WCJ we recommend that the parties provide Dr. Markovitz the treatment records and employment information he requested and schedule a re-evaluation of applicant. Dr. Markovitz should be informed that the purpose of the re-evaluation is to enable him to clarify the underlying medical and employment issues necessary for the WCJ to make a final determination regarding the issues submitted for decision.

Accordingly, we grant reconsideration, rescind the F&O, and return the matter to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings of Fact and Order issued by the WCJ on April 13, 2022, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the April 13, 2022 Findings of Fact and Order is **RESCINDED** and the matter is **RETURNED** to the WCJ to conduct further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ MARGUERITE SWEENEY, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 1, 2022

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

**SERGIO HERNANDEZ
LEO HERNANDEZ & ASSOCIATES
LEWIS BRISBOIS BISGAARD & SMITH**

TLH/pc

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