WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ESPERANZA ZAMBRANA, *Applicant*

vs.

STATE OF CALIFORNIA- IHSS, legally uninsured; administered by INTERCARE HOLDINGS INSURANCE, *Defendants*

Adjudication Number: ADJ14989612
San Francisco District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

Section 4663 of the Labor Code requires:

(a) Apportionment of permanent disability shall be based on causation.

(b) A physician who prepares a report addressing the issue of permanent disability due to a claimed industrial injury shall address in that report the issue of causation of the permanent disability.

(c) In order for a physician's report to be considered complete on the issue of permanent disability, the report must include an apportionment determination. A physician shall make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries. If the physician is unable to include an apportionment determination in his or her report, the physician shall state the specific reasons why the physician could not make a determination of the effect of that prior condition on the permanent disability arising from the injury. The physician shall then consult with other physicians or refer the employee to another physician from whom the employee is authorized to seek treatment or evaluation in accordance with this division in order to make the final determination.

(Lab. Code § 4663(a)-(c).)

We agree with the WCJ that defendant did not meet its burden of proof on the issue of apportionment. "[T]he mere fact that a report 'addresses' the issue of causation of the permanent disability and makes an 'apportionment determination' by finding the approximate relative percentages of industrial and non-industrial causation does not necessarily render the report one upon which the WCAB may rely." (*Escobedo v. Marshalls, CNA Ins. Co.* (2005) 70 Cal.Comp.Cases 604, 620 (Appeals Bd. en banc).) We agree with the WCJ that the Qualified Medical Evaluator Dr. Bestard's opinions regarding apportionment were contradictory and inconsistent and therefore did not constitute substantial evidence. Accordingly, we conclude that because there is no substantial evidence that supports valid legal apportionment, applicant is entitled to an unapportioned award. (See *id.* at p. 611; *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 894, 898 (Appeals Bd. en banc) ["if an evaluating physician identifies apportionment, but the WCJ determines that the apportionment analysis does not constitute substantial evidence and that development of the record is not otherwise warranted, applicant is entitled to an unapportioned award."].)

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the July 26, 2023 Findings of Fact, Award and Order is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ NATALIE PALUGYAI, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 28, 2023

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

ESPERANZA ZAMBRANA
JEFFREY M. GREENBERG
COLEMAN CHAVEZ & ASSOCIATES LLP

JMR/*ara*

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

Elizabeth Dehn, Workers' Compensation Judge, hereby submits her report and recommendation on the petition for reconsideration filed herein.

Introduction

On August 4, 2023, defendant filed a petition for reconsideration of my July 25, 2023 Findings of Fact, Award and Order.

Defendant asserts that the evidence does not justify the findings of fact and that the findings of fact do not support the award.

Defendant's petition was timely filed and accompanied by the verification required under Labor Code section 5902 and Regulation 10940(c). Defendant alleges that I erred in my finding that the finding that the panel Qualified Medical Examiner's opinions regarding apportionment were not substantial evidence, that I erred in issuing an award of permanent disability without any apportionment, and that I did not render a finding regarding causation for the neck and low back. To date, I am not aware of an answer having been filed by applicant.

Facts

Esperanza Zambrana filed a claim for a specific injury sustained on April 21, 2020 to the neck and back while employed as a caretaker by the State of California – IHSS. She went to the emergency room on the date of injury. (Joint Exhibit 102 at page 17.) She underwent cervical spine surgery on April 23, 2020. (Joint Exhibit 102 at page 18.)

The applicant was evaluated by panel selected QME Edward Bestard on July 9, 2021. (Joint Exhibit 101.) He did not have medical records available at the time of that evaluation but issued a supplemental report dated February 23, 2022 addressing causation, permanent disability and apportionment. He was also deposed on November 15, 2022, mainly on his opinions regarding apportionment. (Joint Exhibit 103.)

The matter proceeded to trial on June 14, 2023 at which time the parties stipulated that the applicant sustained an injury arising out of and in the course of employment to her neck and back on April 21, 2020 while employed by the State of California, IHSS. The issues for trial were permanent disability and apportionment, the need for further medical treatment, and the lien of EDD.

On July 25, 2023 I issued a Findings of Fact, Award and Order that the applicant sustained permanent partial disability of 47%, that the applicant was entitled to further medical treatment to the cervical spine, and that the Employment Development Department was not entitled to recovery on its lien. It is from that Findings of Fact, Award and Order that petitioner seeks reconsideration.

Petitioner's Contentions

Petitioner contends that I erred in finding that the QME's opinions regarding apportionment were not substantial medical evidence, and that I erred in not ordering further development of the record on the issue of apportionment. Petitioner also contends that I erred in not rendering an opinion on causation.

For the reasons discussed below, petitioner's contentions are without merit, and do not provide sufficient basis to grant reconsideration.

Discussion

1. Petitioner did not meet their burden of proof on the issue of apportionment.

The defendant has the burden of establishing the percentage of permanent disability caused by nonindustrial factors. (*Escobedo v. Marshalls, CNA Ins. Co.* (2005) 70 Cal. Comp. Cases 604, 614 (*en banc.*); Labor Code section 3202.5). In order to be considered substantial evidence on the issue apportionment, "a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (Id. at 621.) Defendant did not meet their burden of proof on the issue of apportionment in this case.

In this case, the mechanism of applicant's injury was significant: it was a fall at work, which necessitated a trip to the emergency room on the day of injury. (Summary of Evidence, page 5; Joint Exhibit 101, page 6.) Although Dr. Bestard did review voluminous medical records, looking at the summary that he included in his February 23, 2022 report, there is a lack of documented treatment or complaints for the cervical spine. He reviewed an April 4, 2007 note where the applicant was complaining of daily intermittent headaches with pressure and neck pain. (Joint Exhibit 102, page 3.) The next reference to symptoms in the neck was the emergency room visit for the April 21, 2020 fall. (Joint Exhibit 102 at page 17.) The prior spinal MRI that was performed on August 10, 2018 was taken following 5 days of acute progressive worsening back pain—there was no reference to neck or cervical spine pain. (Joint Exhibit 102 at page 13.) The applicant credibly testified that no doctor recommended neck surgery prior to the industrial injury. (Summary of Evidence, page 5.)

Dr. Bestard testified that as a result of the applicant's specific injury, her neck symptoms increased, which required medical treatment including a surgery. (Joint Exhibit 103 at page 11.) He then opined that her spinal condition would have required surgery regardless of the fall. (Id.) He also testified that the level of permanent disability that he provided was based on that surgery. (Joint Exhibit 103 at page 17.) His opinion that her spinal condition would have required surgery irrespective of the fall directly contradicts his testimony that the fall caused an increase in neck symptoms which required treatment that included surgery. A thorough review of the two reports and the deposition testimony in this case shows that Dr. Bestard did not he explain those contradictory statements.

As Dr. Bestard's opinions regarding apportionment are contradictory and inconsistent, and are not framed in terms of reasonable medical probability, they are not substantial evidence.

2. *There was no need for me to order further development of the record on the issue of apportionment.*

Petitioner contends that if I felt that the opinions of the PQME regarding apportionment were not substantial medical evidence then I should have ordered further development on the record on that issue. Petitioner was on notice at the time of the April 10, 2023 mandatory settlement conference of applicant's contention that the PQME's opinions regarding apportionment were not substantial medical evidence. (See, pretrial conference statement, EAMS Document ID 76685455.) Petitioner did not object to proceeding to trial even after being on notice that the apportionment determination may not be substantial evidence. Petitioner should not have a second chance to develop the record after it is determined that they did not meet their burden of proof.

3. *As the parties stipulated to injury arising out of and in the course of employment to the neck and low back, there was no need to make a finding on the issue.*

At the time of trial, the parties stipulated that the applicant sustained injury arising out of and in the course of employment to the neck and back. (Minutes of Hearing June 14, 2023 trial, page 2.) This stipulation was also set out in the paragraph under the heading of "stipulated facts" on page 1 of my opinion on decision, and in my Finding of Fact #1 in my Findings. The only issues submitted to me at trial were permanent disability, the need for medical care, and the lien of EDD.

Petitioner did not ask to be relived of that stipulation to injury AOE/COE before or after the trial, nor have they asked to be relieved of the stipulation in the petition for reconsideration. As the parties stipulated to injury AOE/COE on the day of trial, there was no need for me to render an opinion on causation of injury.

Recommendation

For the foregoing reasons, I recommend that the August 4, 2023 Petition for Reconsideration be denied.

DATE: August 15, 2023

Elizabeth Dehn
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE