WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

STEPHANIE AREVALO GARCIA, *Applicant*

vs.

PLANNED PARENTHOOD; AIG CLAIMS SERVICES, *Defendants*

Adjudication Number: ADJ13282654
Van Nuys District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the October 10, 2023 Findings of Fact and Order (F&O), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a medical assistant on July 18, 2019, sustained industrial injury to the lumbar spine and right wrist. The WCJ found good cause to replace Qualified Medical Evaluator (QME) Moshe Wilker, M.D.

Defendant contends that the WCJ's decision is not supported in the evidentiary record.

We have received a Response from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, applicant's Response, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will deny reconsideration.

FACTS

Applicant claims injury to the lumbar spine and right wrist while employed as a medical assistant by defendant Planned Parenthood on July 18, 2019. Defendant admits injury but contests the nature and extent of the injury.

The parties selected Moshe Wilker, M.D., to act as the orthopedic QME. Dr. Wilker evaluated applicant on March 26, 2021, and his report briefly recites applicant's presenting conditions, including low back pain radiating to the legs as well as right hand pain. (Ex. X1, Report of Moshe Wilker, M.D., dated March 26, 2021, p. 1.) Applicant claimed her injury had compromised a wide variety of activities of daily living, and that she "uses a walker since the fall." (*Ibid.*) Applicant was further noted to be on maternity leave. The QME reviewed the submitted medical record and diagnosed lumbar radiculitis and a right wrist ganglion cyst. The QME found industrial causation and corresponding impairment and opined to applicant's candidacy for lumbar spine fusion surgery. (*Id.* at p. 18.)

On October 13, 2021, Dr. Wilker reviewed surveillance films of applicant and noted "a significant discrepancy … as the patient told me she was using a walker outdoors all the time since the fall." (Ex. X2, Report of Moshe Wilker, M.D., dated October 13, 2021, p. 5.) Citing applicant's "lack of credibility," Dr. Wilker declared applicant to have reached maximum medical improvement, indicated she could return to work without restrictions, decreased his assessment of whole person impairment, and increased apportionment to nonindustrial factors. (*Ibid.*)

On March 25, 2022, the parties undertook the deposition of Dr. Wilker. Applicant's counsel inquired with respect to when applicant first began using a walker to assist in ambulation. Dr. Wilker testified, in relevant part, as follows:

> Q. Now, do you think that it would be important for a total understanding of the credibility of the applicant to assess with her, not only the activities of July 6, 2021, how much they entail physically, but also how she felt since you evaluated her four months prior, and whether was she undergoing any course of treatment that may have alleviated her?
> A. No.
> Q. None of that would be important for you to make a determination on the credibility of the applicant?
> A. No, not in this case, no.
> Q. Why not?
> A. Because her injury was in 2019, so it would be -- she presented to me in 2021 saying that since the fall she has been using a walker all the time when she is outside, and it would be incredibly unlikely that two years later out of the blue she would be able to do these activities without a walker for the whole day, that is just not possible. Everything is possible, but it is very unlikely.
>
> (Ex. X5, Transcript of the Deposition of Moshe Wilker, M.D., dated March 25, 2022, at p. 12:1.)

When asked about whether the applicant should be reevaluated with respect to her activities as depicted in the surveillance video, Dr. Wilker responded:

> If you want me to see her, I can see her. I have no objection to that, and I can listen to her explanation of it, of course, it would be good for her to defend herself, and she is going to say exactly what you just said, but, I don't see how that is going to change my mind.
>
> (Ex. X5, Transcript of the Deposition of Moshe Wilker, M.D., dated March 25, 2022, at p. 14:18.)

On May 27, 2022, Dr. Wilker issued a supplemental report in response to the inquiry of the parties with respect to applicant's right wrist ganglion cyst. Dr. Wilker noted no diminished range of motion or weakness, and that applicant's "history is not reliable therefore is likely an incidental finding on the MRI as it is not concordant with physical examination." (Ex. X3, Report of Moshe Wilker, M.D., dated May 27, 2022, at p. 2.)

On September 27, 2022, the parties once again undertook the deposition of Dr. Wilker. Applicant's counsel posed a hypothetical in which applicant was not prescribed a walker until the end of 2020.

> Q. Right. I'm just asking you about the date that the walker was prescribed. Assuming those facts are true that I just gave you, that she was, in fact, not given a walker or a cane until the end of 2020, then that's different from the history that you're showing and which you relied on in forming your opinion; correct?
> A. Well, let me -- two things. Okay? Number 1, just because she was prescribed it in 2020 doesn't mean that that wasn't just an order of a new one. But, Number 2, whether it was a new one or a reorder of a broken one, it still doesn't really change the fact that she verbally said one thing and the surveillance said another thing. It doesn't really matter what it was, whether it was a walker or it was something else. It's not so much the walker. It's the fact that she said something that was not true, according to the surveillance.
> Q. And what was not true according to the surveillance?
> A. She said that she uses a walker all the time, and according to the surveillance, she was not.
>
> (Ex. X6, Transcript of the Deposition of Moshe Wilker, M.D., dated September 27, 2022, at p. 10:4.)

The parties submitted additional medical records to the QME, including records detailing applicant's medical treatment both before and after the surveillance video was taken, and in a

supplemental report of November 4, 2022, the QME found no reason to change his prior opinions. (Ex. X4, Report of Moshe Wilker, M.D., dated November 4, 2022, at p. 4.)

On September 26, 2023, applicant filed an Amended Petition for a Replacement Panel QME, averring in relevant part, that Dr. Wilker's reporting was not substantial medical evidence, and that applicant would sustain significant prejudice if Dr. Wilker remained the as the designated QME.

On September 27, 2023, the parties proceeded to trial, framing issues including whether "Dr. Moshe Wilker should be replaced as the orthopedic panel [QME]." (Minutes of Hearing (Minutes), dated September 27, 2023, at 2:22.)

On October 10, 2023, the WCJ issued her Findings of Fact and Order (F&O), in which she found good cause to replace Dr. Wilker pursuant to DWC Rules 31.5(a)(13) and 41.5(d)(4)(E). The WCJ explained in her Opinion on Decision that the doctor's statements in deposition were sufficient to cause "a person aware of the facts to reasonably entertain a doubt that the evaluator would be able to act with integrity and impartiality." (Opinion on Decision, at p. 3.) The WCJ also noted that pursuant to applicant's Petition for a Replacement Panel, applicant was being criminally prosecuted for workers' compensation fraud, and that Dr. Wilker was a potential witness in the case, resulting in a conflict of interest pursuant to DWC Rule 41.5. (*Ibid.*) Accordingly, the WCJ ordered the issuance of a replacement panel of QMEs.

Defendant's Petition asserts the QME's conclusions with respect to applicant's impairment and capabilities were justified and reasonably explained by the doctor in deposition. Defendant contends that the WCJ's concerns regarding a potential conflict of interest are irrelevant given that the QME's opinions are substantial medical evidence, and there is "no precedent suggesting a doctor's opinion that a reevaluation would not likely alter his findings constitutes a lack of integrity and/or impartiality on its face." (Petition, at 7:13.) Defendant further argues there is no evidence submitted demonstrating the applicant has a criminal matter related to her workers' compensation claim. (*Id.* at p. 8:3.)

Applicant's Response to Defendant's Petition for Reconsideration (Response) avers the reports of Dr. Wilker are not substantial medical evidence because they failed to take an adequate medical history, including a history of applicant's multiple pregnancies and corresponding medical treatment in 2019 and 2020. (Response, at pp. 3-4.) Applicant further asserts the QME's report reflects an incomplete clinical examination, and that the medical-legal and future medical care

conclusions contained in the report are unsubstantiated by either diagnostic studies or clinical findings. (*Id.* at 11:2.) Accordingly, applicant contends the WCJ appropriately found Dr. Wilker did not engage in a full and thorough physical examination. Applicant contends that Dr. Wilker's initial note that applicant used a walker outside since the fall is not sourced in the evidentiary record, and that applicant indicated she used a walker to get around only as of the date of the March 26, 2021 evaluation. (Response, at p. 13:16; 14:18.) Applicant contends she was prescribed a walker in September, 2020, as part of her ongoing medical treatment for her pregnancy, but that the QME failed to make any inquiries with regard to when the walker was prescribed, by whom, or for what purpose. Applicant further asserts the QME failed to analyze applicant's medical history in conjunction with the submitted medical record. (*Id.* at p. 18:10; 19:5.) Applicant concludes that "the PQME had a duty to take into consideration all evidence presented to him even evidence that supported the applicant's position that the PQME was mistaken when he noted that applicant claimed to use a walker since the fall … However, PQME Dr. Wilker showed a clear bias against the applicant with his unwillingness to consider or even comment on any evidence that did not conform with his previously established opinions." (*Id.* at p. at 19:8.)

The WCJ's Report observes that "[t]he 'Soap Note' that reflected the doctor's observations about a walker were not produced by the PQME and were never made a part of the transcript." (Report, at p. 4.) Further, the QME had testified that irrespective of a reevaluation of applicant, "it would not change his mind and as such the fate of the applicant's workers' compensation injury is a *fait accompli."* (*Ibid.*)

DISCUSSION

If a decision includes resolution of a "threshold" issue, then it is a "final" decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc).) Threshold issues include, but are not limited to, the following: injury arising out of and in the course of employment, jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd.* (*Gaona*) (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the

WCAB or court of appeal. (See Lab. Code, § 5904.) Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision issues.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the petitioner challenging a hybrid decision only disputes the WCJ's determination regarding interlocutory issues, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions. Here, the WCJ's decision includes findings regarding threshold issues of employment and injury. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal. Although the decision contains a finding that is final, the petitioner is only challenging interlocutory findings/orders in the decision regarding a discovery dispute. Therefore, we will apply the removal standard to our review. (See *Gaona, supra*.)

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 280, fn. 2 [70 Cal.Comp.Cases 133].) The Appeals Board will grant removal only if the petitioner shows that significant prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a); see also *Cortez, supra; Kleemann, supra*.) Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10955(a).)

It is well established that decisions by the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) To constitute substantial evidence ". . . a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and

examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].)

Here, the WCJ has determined that the reporting of the QME is not substantial evidence, as it lacks a substantive analysis of applicant's medical history, findings on clinical examination, or discussion supporting the physician's conclusions. We agree. The initial report of Dr. Wilker offers minimal discussion of the applicant's presenting condition, no analysis of her relevant medical history or its relationship to the mechanism of injury and resulting impairment. The report describes no measurements taken, and provides no insight into the clinical examination, if any. The report offers conclusions but fails to substantiate those conclusions through discussion of the applicant's clinical presentation or medical history.

Generally, when a WCJ identifies deficiencies in the record, augmentation of the record begins by addressing the issues to the evaluating physician. (Lab. Code, §§ 5701, 5906; *Tyler v. Worker's Comp. Appeals Bd.* (1997) [56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 (Appeals Board en banc) ["the preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case"].) Allowing the parties and the evaluating physician the opportunity to cure any identified deficiencies in the medical-legal report advances the goals of a full adjudication based on a complete record.

Here, the WCJ has explained that the underlying reporting of the QME is deficient. In addition, there is a reasonable basis for the QME to address the relationship between applicant's medical history and the surveillance footage reviewed by the QME. Applicant has raised multiple issues relevant to the depictions contained in the surveillance video, including questions regarding when her walker was first prescribed, and by whom, and whether applicant informed the QME that she has used a walker since her industrial injury in 2019. Whether applicant's contentions in this respect prove persuasive is an issue to be addressed by the evaluating physician, and ultimately, by the WCJ.

However, the WCJ further observes that the QME's testimony has essentially foreclosed the possibility of an open and unbiased reevaluation of the facts and the parties' contentions. The QME has repeatedly testified that he is unlikely to change his opinion, irrespective of the facts or explanations advanced by applicant. When asked if applicant's explanation of the circumstances

surrounding her activities on the day of the surveillance footage would affect the QME's assessment of her credibility, the QME testified, "I cannot think of a single response that she would give me a rational or excusable response that would make me change my mind, so I would say no to that." (Ex. X5, Transcript of the Deposition of Moshe Wilker, M.D., dated March 25, 2022, at p. 28:9.)

We accord to the WCJ wide latitude in the determination of discovery disputes at the trial level. (Cal. Code Regs., tit. 8, § 10955(a); *Allison v. Workers' Comp. Appeals Bd.* (1999) 72 Cal.App.4th 654 [64 Cal.Comp.Cases 624]; *Hardesty v. McCord & Holdren, Inc.* (1976) 41 Cal.Comp.Cases 111 [1976 Cal. Wrk. Comp. LEXIS 2406].) Here, the WCJ has determined that based on the deficiencies in the record, the record must be developed. However, given the unequivocal testimony of the QME and a review of the balance of the QME's reporting, the WCJ has also determined that further development with the existing QME is unlikely to cure the deficiencies in the record.

Given the WCJ's latitude in the determination of discovery disputes, and the rationale provided in the WCJ's Report, and based on our independent review of the record occasioned by defendant's Petition, we discern no irreparable harm arising from the F&O. Applying the removal standard, we will deny reconsideration, accordingly.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

ANNE SCHMITZ, DEPUTY COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 21, 2023

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

STEPHANIE AREVALO GARCIA
LAW OFFICES OF ALI AZARAKHSH
GOLDBERG SEGALLA

SAR/abs

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