WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CRYSTAL PERALTA, ***Applicant***

vs.

DERMALOGICA INC;
AIG CLAIMS administered by
BROADSPIRE BREA,
Defendants

Adjudication Number: ADJ14445198
Santa Ana 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.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

CRAIG SNELLINGS, COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 15, 2024

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

PREMIER PSYCHOLOGICAL SERVICES
PAPERWORK & MORE
COSTFIRST CORP

LN/pm

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

Applicant was employed as a manager by defendant and claimed to have sustained industrial injury arising out of and in the course of employment to her psyche, nervous system, and suffered stress. Applicant's claim resolved by way of Compromise and Release on June 7, 2022, with defendant continuing to dispute liability. The case proceeded to trial on issues regarding the lien of Premiere Psychological who allege a balance of $7,030.00.

In the undersigned's initial Findings and Award and Opinion on Decision, it was found that as defendant had denied Applicant's claim, compensability was to be determined under the procedures set forth in Labor Code section 4060 and that the services provided by Premiere Psychological were self-procured by Applicant for which defendant was not liable.

Lien Claimant filed a Petition for Reconsideration, alleging that the undersigned was incorrect and that the charges were valid medical-legal services for which the defendant remains liable. After review of the Petition, the undersigned determined that the original Findings, Order, and Opinion on Decision that issued contained an overly rigid analysis of Labor Code section 4060 and whether or not Dr. Michaels was Applicant's primary treating physician. Furthermore, the undersigned's analysis conflicted with 8 CCR 9793 and Labor Code 4604.

The undersigned issued an Amended Findings, Award, and Opinion on Decision finding that Applicant failed to show injury AOE/COE, that Dr. Michaels acted as Applicant's Primary Treating Physician, and that his report dated February 8, 2022 was a valid med-legal report for which the defendant was liable. Parties were then ordered to proceed to bill review for determination of the value of Lien Claimant's services.

Defendant is aggrieved of the undersigned's Findings, Award, and Opinion on Decision and filed a timely and verified Petition for Reconsideration disputing the findings that Dr. Michaels was Applicant's Primary Treating Physician and that the services were not of a med-legal nature.

DISCUSSION

Defendant's first contention is that no dispute existed when the reporting of Dr. Michaels was procured. The Court's holding in the Gill decision is instructive as to this issue.

In the Gill decision, the Court noted that Labor Code Section 4060 permits a medical-legal evaluation to determine compensability "at any time after the filing of the claim form." The Court also made citation to the Chavarria case, stating "Similarly in *Chavarria v. Crews of California*, Inc. (December 2, 2019, ADJ12402022) [2019 Cal. Wrk. Comp. P.D. LEXIS 534], the Appeals Board held that a party may request a QME panel per sections 4060 and 4062.2(b) by using a claim delay notice as a "mailing of a request for a medical evaluation." In Chavarria, the panel concluded that "[b]oth parties have the right to perform discovery regarding the causation of Applicant's injury while an employer determines whether to accept a claimed injury."

They further opined that "The stated purpose of amending sections 4060 and 4062.2 by SB 863 was to streamline the QME panel process to eliminate unnecessary delays. Requiring a party to potentially wait 90 days after the claim form has been filed for an employer to deny the claim (thereby unequivocally asserting a "dispute" regarding compensability) before requesting a panel creates unnecessary delay and hinders expeditious resolution of the claim.

Likewise, requiring a party to await mailing of a notice of delay in determining liability for an injury to trigger the QME panel process also creates unnecessary delay. (See Cal. Code Regs., tit. 8, § 9812(g) [the claims administrator must advise the employee if the administrator cannot determine whether the employer has any liability for an injury within 14 days after the date of knowledge of an injury].) Requiring a claim delay notice to trigger the QME panel process would necessitate waiting potentially the entire 14-day delay notice period, then an additional ten days plus the mailbox extension before a party could request a QME panel. This approach conflicts with the broad language of section 4060(c) permitting a request for a panel "at any time after the filing of the claim form." We decline to impose requirements on the process for requesting a QME panel not reflected in the Labor Code and that would inhibit the expeditious resolution of a claim." *Gill (Amarjeet) v. County of Fresno*, 2021 Cal. Wrk. Comp. P.D. LEXIS 51 (Cal. Workers' Comp. App. Bd. February 25, 2021)

In this matter, Applicant's claim was denied by defendant on December 23, 2022 due to a lack of factual or medical evidence. (Exhibit 4) While Gill discusses procurement of a Panel QME, I find no reason to distinguish between Applicant's ability to obtain a compensability examination from a PQME or a PTP as allowed by statute. While defendant alleges that no dispute existed, Applicant's claim was not accepted at the time Applicant's counsel requested Dr. Michaels issue a comprehensive med-legal report. Ultimately, defendant's denial letter was served the same day as Applicant's second service of their 4600 election letter and request for a comprehensive medical report. As such, a dispute regarding compensability did exist on the date of service of the second letter; however, under the holding of Gill, Applicant could properly request a report at the time in which it was first requested.

Defendant's second contention is that Labor Code section 4060 and 4062.2 are the only means by which a med-legal report can be obtained; this position is not supported by case law.

In the *Rico* case, the Court stated that "Labor Code Section 4060(b) specifically states that the parties are not liable for medical-legal reports that are not performed in compliance with that statute, except for those performed by the treating physician. Further, based on Labor Code 4064 the employer is liable for the cost of medical-legal evaluations obtained by the employee pursuant to section 4060. A medical-legal evaluation performed by employee's treating physician, is a medical- legal evaluation obtained pursuant to section 4060." *Rico v. Starcrest Products of California Inc.,* 2023 Cal. Wrk. Comp. P.D. LEXIS 107 (Cal. Workers' Comp. App. Bd. April 3, 2023)

The Court ultimately determined in that matter that "The report of Dr. Omid Haghighinia, D.C. was requested for the purpose of proving or disproving a contested claim. The initial report of March 28, 2022 is compensable as a medical-legal report."

The same reasoning was applied to med-legal examinations where the compensability of some body parts are still in issue, with the Court stating that "In essence, there are at least two tracks for an applicant to obtain medical-legal evaluations of disputed body parts, the PQME track and the treating physician track. The parties may pursue either or both of the tracks. Defendant's argument is without merit and contract to case law." *Vargas v. Barrett Business Servs.,* 2017 Cal. Wrk. Comp.P.D. LEXIS 317 (Cal. Workers' Comp. App. Bd. July 10, 2017)

Defendant's third argument alleges that Dr. Michaels was not Applicant's Primary Treating Physician when the evaluation was conducted. As this directly relates to defendant's fourth contention that the report of Dr. Michaels did not constitute a med-legal report because he was not Applicant's Primary Treating Physician, I will address both issues together.

In the Rico case previously discussed above the defendant also alleged that Dr. Haghighinia was not Applicant's Primary Treating Physician due to improper designation that was not served on defendant until after the examination. The opinion also notes that Dr. Hagahina was served with a letter designating him as Primary Treating Physician with the med-legal report being his initial report. *Rico v. Starcrest Products of California Inc.,* 2023 Cal. Wrk. Comp. P.D. LEXIS 107 (Cal. Workers' Comp. App. Bd. April 3, 2023)
In the present matter, Applicant's counsel initially elected Dr. Michaels as Primary Treating Physician on December 13, 2021, issuing their 4600 designation letter again on December 23, 2021. Defendant was clearly aware that Dr. Michaels was elected as Applicant's Primary Treating Physician. The present matter is distinguishable from Rico in that here defendant had notice prior to the denial and examination that Applicant had selected Dr. Michales as his treating doctor.

Under defendant's argument, any applicant with a denied claim would be foreclosed from obtaining a comprehensive report from a primary treating physician if their claim was denied prior to the applicant having been examined by the doctor. In practice this formulation places the "cart before the horse", as an applicant elects a primary treater and then is examined by the doctor; were the opposite to occur any reporter generated would be one that is self-procured by Applicant. I do not find that defendant's argument that the language of 8 CCR 9785(1)(1) creates a "timing issue" is the intended construction of that regulation.

Furthermore, defendant's argument that Dr. Michaels was not Applicant's Primary Treating Physician because he did not provide further treatment and only issued his initial report also does not prevent Dr. Michaels from acting as Applicant's primary treater. Defendant has continued to maintain their denial of the claim, as injury AOE/COE was one of the issues taken under submission at the lien trial. Defendant here attempts to use applicant's lack of treatment to disqualify Dr. Michaels as Applicant's treater yet Defendant denied the claim, effectively preventing any further treatment.

RECOMMENDATION

Based on the foregoing, it is respectfully requested that defendant's Petition for Reconsideration be denied.

Date: March 8, 2024

Jeremy Clifft
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE