WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

EDUARDO VEGA, *Applicant*

vs.

REDWOOD EMPIRE SAWMILL; ZURICH NORTH AMERICA, *Defendants*

Adjudication Number: ADJ10304125
Santa Rosa District Office

OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.[1]

In the Findings and Order of January 21, 2021, the Workers' Compensation Administrative Law Judge ("WCJ") found, in reference to the October 4, 2014 industrial injury to applicant's lumbar spine settled by the February 6, 2017 Stipulations and Award for 11 percent permanent disability, that "applicant…sustained no new disability on an industrial basis," as alleged in applicant's second, timely-filed Petition to Reopen of October 1, 2019.

The Findings and Order of January 21, 2021 also included several "discovery rulings." The WCJ denied admission of applicant's Exhibit 10 and Exhibits 14-21, consisting of the treatment records of NMCI Medical Clinic, Inc. ("NMCI"), because the parties stipulated that Dr. Martinovsky is the primary treating physician and the WCJ found no evidence rebutting the stipulation. The WCJ also denied admission of applicant's Exhibits 11 and 12, consisting of the reports of Mr. Jeff Malmuth - applicant's vocational expert - because the reports were produced in absence of medical evidence that applicant's condition had worsened "on an industrial basis."

Applicant filed a timely petition for reconsideration and removal of the WCJ's decision. Applicant alleges that his physical condition has deteriorated since the last trial on May 16, 2019,

[1] Commissioner Marguerite Sweeney signed the Opinion and Order Granting Petition for Reconsideration dated April 7, 2021. As Commissioner Sweeney is no longer a member of the Appeals Board, a new panel member has been substituted in her place.

that the WCJ erred in denying admission of medical treatment reports from Dr. Curtis Rollins/NMCI and vocational reports from Mr. Malmuth, and that the WCJ erred in failing to consider all the relevant evidence. Applicant further alleges that the medical opinion of Dr. Ciepiela, the Panel Qualified Medical Evaluator ("PQME") is not substantial evidence because the doctor failed to consider whether applicant's stenosis is mild, moderate or severe; the doctor failed to discuss the nature and extent of applicant's industrial injury; and the doctor failed to review the most recent MRI dated November 11, 2020. Finally, applicant alleges that any further development of the record should not include Dr. Ciepiela "due to his inherent and intractable bias," with the doctor acknowledging that he suffers from stenosis himself, for which he had surgery, while ascribing the same pathology to applicant.

Defendant filed an answer.

The WCJ submitted a Report and Recommendation ("Report").

We adopt and incorporate the statement of "Facts" found in Section II of the WCJ's Report, to the extent set forth in the attachment to this opinion. We do not adopt or incorporate the remainder of the WCJ's Report.

Based on our review of the record and applicable law, we find the medical and vocational record incomplete on the issue of whether or not applicant sustained new and further disability. (See *Telles Transport, Inc. v. Workers' Comp. Appeals Bd.* (2001) 92 Cal.App.4th 1159, 1164 (66 Cal.Comp.Cases 1290) [Board may not leave undeveloped matters which its acquired specialized knowledge should identify as requiring further evidence].) Therefore, we will rescind the Findings and Order of January 21, 2021 and return this matter to the trial level for further proceedings and new decision by the WCJ.

First, however, we observe that 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, 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 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 petition challenging a hybrid decision disputes a determination made on an interlocutory question, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions, i.e., significant prejudice or irreparable harm. (Cal. Code Regs., tit. 8, § 10955.)

In this case, the Findings and Order of January 21, 2021 includes "discovery rulings" that are in the nature of interlocutory rulings. However, we treat applicant's petition for reconsideration and removal of the Findings and Order as a petition for reconsideration because the decision also includes the WCJ's denial of applicant's petition for new and further disability, which resolved a threshold issue. Thus, the WCJ's decision is properly challenged by applicant's petition for reconsideration, and we consider and rule on the petition as such.

Turning to the merits, we are persuaded that the WCJ erred in denying admission of the treatment records of NMCI. In his Report, the WCJ provides two reasons for exclusion of these records. First, applicant stipulated that Dr. Martinovsky is the primary treating physician, not NMCI. Secondly, the WCJ stated that applicant was referred to NMCI by his attorney, not by Dr. Martinovsky; thus the NMCI records represent an improper attempt by applicant's attorney to obtain medical evidence in rebuttal to the PQME reports of Dr. Ciepiela. (See *Batten v. Workers' Comp. Appeals Bd.* (2015) 241 Cal.App.4th 1009, 1016 (80 Cal.Comp.Cases 1256) ("*Batten*") [Labor Code sections 4061 and 4605 preclude admission of an expert's report retained solely for the purpose of rebutting a PQME's opinion.].)

We disagree with the WCJ on both points. Applicant did stipulate to Dr. Martinovsky as his primary treating physician in the trial of his first Petition for New and Further Disability on May 16, 2019. That trial resulted in the WCJ's July 18, 2019 Findings and Order denying new and further disability, with the Board affirming the WCJ's decision on October 4, 2019. In the meantime, applicant filed his second Petition for New and Further Disability, which eventually proceeded to trial before the WCJ on November 2, 2020. At that trial, applicant notably did not stipulate to Dr. Martinovsky as his primary treating physician, and nothing in the record shows the

WCJ incorporated applicant's prior stipulation of May 16, 2019 into the trial minutes of November 2, 2020. Therefore, we conclude that the earlier stipulation is not a valid basis to restrict the record to Dr. Martinovsky's reports as primary treating physician.

We also disagree with the WCJ's conclusion that the NMCI reports were obtained solely to rebut Dr. Ciepiela's PQME reports, in violation of *Batten*. As a chronological matter, applicant began treating with Dr. Rollins of NMCI on November 1, 2019. (See applicant's proposed exhibit 21.) However, PQME Ciepiela did not see applicant for a reevaluation concerning applicant's second claim of new and further disability until January 13, 2020. Thus the chronology shows that applicant first visited Dr. Rollins and NMCI on November 1, 2019 to get treatment, not to obtain reports to rebut Dr. Ciepiela's later PQME reports dated January 13, 2020 and February 24, 2020. Further, the June 15, 2020 report of Dr. Jacobs, of NMCI, is addressed to defendant's claims representative and the report is designated as a treating physician's permanent and stationary report (PR-4). (See applicant's proposed exhibit 10.) The same report identifies Dr. Rollins as the primary treating physician at the time, with Dr. Jacobs evaluating the applicant as a secondary treating physician. There are no medical reports post-dating the June 15, 2020 report of Dr. Jacobs that contradict Dr. Rollins of NMCI being the primary treating physician. Further, in his January 13, 2020 report PQME Ciepiela reviewed and relied upon a record review that included the December 2, 2019 report of Dr. Rollins and Barbara Kulik, nurse practitioner - both of NMCI. Under these circumstances, we conclude that the WCJ erred in excluding the NMCI treatment records (applicant's Exhibit 10 and Exhibits 14-21) based on an outdated stipulation and on the WCJ's incorrect conclusion that the NMCI treatment reports were obtained solely to rebut PQME Ciepiela's latest medical reports.

We also disagree with the WCJ's exclusion of Mr. Malmuth's vocational reports from evidence. (Applicant's proposed exhibits 11 and 12.) In his Report, the WCJ states: "The solicitation of a vocational expert's opinion to rebut an 11% permanent disability finding by the panel QME is absurd. The reports were irrelevant and were therefore excluded. Moreover, they were based almost exclusively on medical reporting, which was ruled inadmissible, and therefore doubly irrelevant."

However, the WCJ's reasons for excluding Mr. Malmuth's vocational reports are unsupported by legal authority. We are aware of no legal yardstick pursuant to which evidence reaches a certain degree of "absurdity" so as to warrant its exclusion. The fact that the February

6, 2017 Stipulations and Award included a stipulation for modest permanent disability of eleven percent does not mean it was absurd for applicant to obtain a vocational report.[2] Further, the WCJ apparently did not exclude prior vocational reports authored by Mr. Malmuth when the WCJ issued his Findings and Order on July 18, 2019, denying applicant's first Petition for New and Further Disability. Even if the WCJ considers Mr. Malmuth's most recent reports to be extreme, in that Mr. Malmuth continues to opine that applicant's permanent disability has increased from eleven percent to something above seventy percent, Mr. Malmuth's alleged lack of proportion is an issue that goes to the weight or persuasiveness of his reports, not to their admissibility.

In summary, we conclude that the record is incomplete and requires admission of the NMCI medical reports and Mr. Malmuth's vocational reports, which must be considered anew by the WCJ. As for Dr. Ciepiela, we are not persuaded by applicant's allegation that this PQME is irredeemably biased. However, Dr. Ciepiela's comparison of his own condition of stenosis with applicant's stenosis, as a basis to determine whether or not applicant's industrial injury has resulted in new and further disability, is questionable and lends doubt to the substantiality of the doctor's medical opinion. Dr. Ciepiela also seems to suggest that medical treatment is apportionable in his report dated January 13, 2020. (See Exhibit I, p. 6.) This is legally incorrect. (*Hikida v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1249, 1261 [82 Cal.Comp.Cases 679].) The WCJ may further develop the medical record to clarify and resolve these issues, as he deems necessary or appropriate. (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473 [Appeals Board en banc].)

Aside from concluding that the WCJ must revisit this matter based on all admissible evidence as discussed above, we express no final opinion on the merits of applicant's latest Petition for New and Further Disability. When the WCJ issues a new decision, any aggrieved party may seek reconsideration as provided in Labor Code sections 5900 *et seq*.

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[2] The burden is on the injured employee to affirmatively demonstrate that "the employee's diminished future earnings are directly attributable to the employee's work-related injury, and not due to nonindustrial factors." (*Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262, 1275 [76 Cal.Comp.Cases 624].) In *Nunes v. State of California, Dept. of Motor Vehicles* (June 22, 2023) 2023 Cal. Wrk. Comp. LEXIS 30 [88 Cal.Comp.Cases 741], footnote 8, the Board stated that notwithstanding the statutory changes to the calculation of diminished future earning capacity (DFEC) made by Labor Code section 4660.1, *Ogilvie's* holding - that vocational evidence may be offered to rebut the permanent disability rating schedule - continues to apply to all dates of injury.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order of January 21, 2021 is **RESCINDED**, and this matter is **RETURNED** to the trial level for further proceedings and new decision by the WCJ, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 31, 2024

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

EDUARDO VEGA
KNOPP PISTIOLAS
MULLEN & FILIPPI

JTL/*ara*

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

II
FACTS

Applicant Eduardo Vega sustained compensable injury to his lumbar spine on October 4, 2014. He was evaluated by Dr. Ciepiela who acted as the only panel Qualified Medical Evaluator in the case. He was found to have sustained a DRE category II injury to his lumbar spine and to have sustained a 5% Whole Person Impairment. (See Defense Exhibit B, 2/11/2016 report of Dr. Ciepiela at pg, 10). Based on that report, the applicant entered into Stipulations with Request for Award dated 2/6/2017, which were approved by PWCJ Hink on the same date. (See EAMS Doc No. 62763826 and 62763829, respectively). Those stipulations recited that the applicant had sustained permanent disability…of 11%.

Just over a year later, on 2/12/2018, applicant filed a petition to reopen for new and further disability. The applicant was reevaluated by Dr. Ciepiela, who issued a supplemental report on November 5, 2018 finding that the applicant had not sustained any new and further industrial disability. He stated "From my perspective with the industrial injury, he was permanent and stationary as of December 8, 2015 and I provided an impairment rating in my February 11, 2016 report. There is no reason for me to change my opinion from an industrial perspective." (Defense Exhibit A, 11/5/2018 report of Dr. Ciepiela at pg. 19).

Applicant offered reporting from vocational evaluator Jeff Malmuth, who originally found that applicant had sustained a reduction of his access to the labor market of 79%, later changing his opinion to state that the applicant had lost his capacity to be rehabilitated and was totally [and] permanently disabled. Based on this reporting, as well as on some subsequent reporting by Dr. Martinovsky, applicant's primary treating physician, applicant filed a declaration of readiness to proceed and a hearing was held on May 16, 2019. The previously stipulated facts were incorporated by reference, but notably, two additional stipulations were made: That Dr. Ciepiela found no new and further impairment at re-evaluation on November 5, 2018 and that applicant's primary treating physician is Dr. Martinovsky. (See Minutes of Hearing and Summary of Evidence dated May 16, 2019).

The court found that the reporting of Dr. Ciepiela was persuasive, that the reporting of Jeff Malmuth was unpersuasive, and issued a Findings and Order that the applicant had not sustained new and further disability. (See Findings and Order dated July 18, 2019). Thereafter applicant filed a Petition for Reconsideration arguing that the court was in error in finding no new and further disability. On October 4, 2019, the Appeals Board issued it Opinion and Order Denying Petition for Reconsideration.

A few days before the Board's Opinion and Order Denying Reconsideration was issued, Applicant filed another Petition to Reopen for New and Further Disability, dated October 1, 2019. This petition followed the same pattern as the previous one. Additional doctor's reports were offered, allegedly "treating doctor's" reports from Drs. Rollins and Ritch, although no attempt was made to address the fact the parties had previously stipulated that Dr. Martinovsky was the primary treating physician. Jeff Malmuth's opinion was once again solicited.

The applicant was again reevaluated by Dr. Ciepiela, who once again found that the applicant had not sustained any new and further disability on an industrial basis.

[…]

The [WCJ's] order that the applicant did not sustain new and further disability was based on Dr. Ciepiela's [report of January 29, 2020, defense Exhibit I, pp. 5-6].