

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

JOYCE SIMON, *Applicant*

vs.

SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendant*

**Adjudication Number: ADJ4648071 (AHM 0111251)
Anaheim District Office**

**OPINION AND ORDER
DENYING PETITION FOR RECONSIDERATION**

Applicant, who is representing herself, seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Order of February 5, 2024, wherein it was found that applicant's application for Subsequent Injuries Benefits Trust Fund (SIBTF) benefits was barred by the statute of limitations. In this matter, in a Findings, Award and Order of August 2, 2013, it was found that while employed on May 20, 2003 as a financial counselor, applicant sustained industrial injury to her lumbar spine, right wrist, and in the form of fibromyalgia causing permanent disability of 75% after apportionment.

Applicant contends that the WCJ erred in finding that her claim for SIBTF benefits is barred by the statute of limitations. We have received an Answer from SIBTF and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

We will deny applicant's Petition for the Reasons stated by the WCJ in the Report, which we adopt, incorporate and quote below. We note that in the Report, the WCJ cites to the Supreme Court case of *Subsequent Injuries Fund v. Work[ers'] Comp. Appeals Bd. (Talcott)* (1970) 2 Cal.3d 56, 65 [35 Cal.Comp.Cases 80] for the proposition that an injured worker has a "reasonable time from when they learn from the Board finding on permanent disability" to file for SIBTF benefits. (Report at p. 3.) This recitation of *Talcott* was generally correct prior to the enactment of SB 899 in April of 2004, since any finding of apportionment would have specified if it was made under former section 4663 or under former section 4750. Under the statutory scheme in place prior to SB 899, "the liability of the [SIBTF] was correlated to the liability of the employer [under former section 4750]." (*Franklin v. Workers' Comp. Appeals Bd.* (1978) 79 Cal.App.3d 224, 239-240 [43

Cal.Comp.Cases 310].) Thus, if a disability was apportionable under former section 4750, and the other prerequisites for SIBTF liability were met, the applicant was entitled to SIBTF benefits. Conversely, “[i]f there can be no apportionment to preexisting disability under section 4750, there can be no [SIBTF] liability.” (*Franklin*, 79 Cal.App.3d at p. 250.)

However, now apportionment is either to a prior award of permanent disability under section 4664, or to the expansive category “factors both before and subsequent to the industrial injury, including prior industrial injuries” pursuant to current Labor Code section 4663. Therefore, while the requirements for SIBTF benefits require a labor disabling permanent disability just as they did prior to the enactment of SB899, a finding of apportionment pursuant to Labor Code section 4663 is not tantamount to a finding of a labor disabling prior disability in the sense that a finding of apportionment under former Labor Code section 4750 was. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 619 [Appeals Board en banc].) Accordingly, applicant is now afforded a reasonable time from when they knew or should have known of SIBTF’s probable liability for benefits, which now does not necessarily run from findings on permanent disability and apportionment in the underlying case.

However, in this case applicant has never specified when she first knew or should have known that her preexisting disability was labor disabling. While a defendant generally has the initial burden to show that a claim has been filed outside the statute of limitations, “as a general rule, where a claimant asserts exemptions, exceptions, or other matters which will avoid the statute of limitations, the burden is on the claimant to produce evidence sufficient to prove such avoidance.” (*Permanente Medical Group v. Workers’ Comp. Appeals Bd. (Williams)* (1985) 171 Cal.App.3d 1171, 1184 [50 Cal.Comp.Cases 491].) Contrary to showing when she first knew or should have known she had pre-existing labor disabling permanent disability, applicant persists in continuing to argue that her claim should not have been apportioned at all. In any case, we note that while doctors are no longer called upon in underlying benefits hearings to state whether prior disability was labor disabling, applicant had a long, documented history of symptomatic low and cervical spine complaints and treatment continuing until her May 20, 2003 injury, which qualified medical evaluator orthopedist Larry A. Danzig, M.D. found to be subject to apportionment (December 3, 2004 report at p. 35), and which was relied upon by the WCJ issuing the underlying findings of permanent disability. (August 2, 2013 Opinion on Decision at pp. 1-2.)

Applicant also argues in her Petition that her date for filing for SIBTF benefits should run from the Appeals Board decision in *Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal.Comp.Cases 576 [Appeals Bd. en banc]. However, the holding in *Todd* did not affect applicant's entitlement to SIBTF benefits. Applicant's 75% permanent disability award in 2013 was already sufficient to entitle her to SIBTF benefits if she had any additional pre-existing labor disabling permanent disability. (Lab. Code, § 4751.) In any case, we note that applicant filed her application for SIBTF benefits prior to the issuance of the *Todd* decision.

With those clarifications, we otherwise deny applicant's Petition for the reasons stated by the WCJ in the Report which we adopt, incorporate and quote below.

REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION JUDGE ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

Applicant filed a timely and verified Petition for Reconsideration under Labor Code §5903 following the court's Findings and Order dated 2/5/24 finding Applicant's Application for SIBTF benefits was not timely. Applicant contends her Application was timely because there was invalid apportionment and denial of due process, and the court imposed collateral estoppel. It should be noted Applicant's Petition for Reconsideration violates Cal. Code of Reg. §10945(c)(2) as Applicant included excerpts of emails and medical reports within the petition. At the time of this report, defendant had filed an answer to the Petition for Reconsideration.

II. STATEMENT OF FACTS

Applicant sustained injury arising out of and occurring in the course of employment on 5/20/2003 to the lumbar spine, right wrist and in the form of fibromyalgia. Judge Christine Nelson issued a Findings, Award, and Order on 8/2/2013 awarding the Applicant permanent disability of 75%, after apportionment, and further medical treatment. **Opinion on Decision and FA&O, EAMS Doc ID 49288346.**

On 4/16/2015, Applicant was declared a vexatious litigant by the WCAB. **Opinion and Decision After Removal, EAMS Doc ID 56117061.**

On or around 1/9/2019, Applicant filed an Application for Subsequent Injuries Fund Benefits. Associate Chief Judge Ellen Flynn rejected the filing because Applicant had not included a proof of service showing the Subsequent Injuries

Fund had been served. **Vexatious Litigant Pre-Filing Review, EAMS Doc. ID 69443449.** Applicant refiled the Application for SIBTF Benefits with a proof of service on 9/10/2019. **Application for SIBTF Benefits, EAMS Doc ID. 71104712.** On 8/31/2022, Applicant filed a Declaration of Readiness re SIBTF benefits. On 10/5/2022, the matter was set for trial regarding SIBTF benefits. Parties submitted on the evidentiary record at trial on 12/27/2023. After reviewing the evidence submitted, the court found Applicant's Application for SIBTF benefits was not timely filed.

It is from this Finding and Order that Applicant petitions for Reconsideration under Labor Code §5903.

III. DISCUSSION

As to Applicant's assertion that Judge Nelson's apportionment of Applicant's permanent disability to nonindustrial factors was invalid, the court offers the following:

The court did not make any findings regarding apportionment. Judge Nelson's decision was issued over 10 years ago and Applicant had filed Petitions for Reconsideration which were dismissed and denied. The 8/2/2013 decision became final, not subject to reopening or modification. The numerous petitions for reconsideration led to Applicant being declared a vexatious litigant. The court will not address the issue any further.

As to Applicant's assertion the court denied Applicant's due process, the court offers the following:

The general limitation period for SIBTF claims is within 5 years from the date of injury. Labor Code §5410. Applicant's date of injury in this case was 5/20/2003; therefore, Applicant would have had until 2008 to file a SIBTF claim.

In *Subsequent Injuries Fund v. Workmens' Comp. Appeals Bd. (Talcott)* (1970) 2 Cal.3d 56, 65 [35 Cal.Comp.Cases 80], the court stated there is a judicially created exception of Labor Code §5410 where, during that five-year period, the worker litigated the claim and did not know or could not reasonably be deemed to have known of a potential SIBTF claim, then the Applicant is allowed a reasonable time from when they learn from the Board finding on permanent disability, that there will be a likelihood of entitlement to subsequent injuries benefits. Applicant argues that the triggering date should be 11/18/2015 when the Supreme Court of California denied review. This argument is flawed because *Talcott* stated Applicant is allowed a reasonable time from when they learn from the court finding on permanent disability. Here, Applicant learned about her finding of permanent disability on 8/2/2013. Therefore, the "reasonable time" began on 8/2/2013.

Applicant initially filed an Application for SIBTF benefits on 1/9/19, however, this filing was rejected by Chief Associate Judge Flynn for failure to include service on SIBTF. Applicant did not refile the application until 9/10/19. Applicant asserts she served all parties 2/28/19 and it took Judge Flynn 7 months to process, however, this is incorrect. The date stamp on the proof of service indicates it was not filed until 9/10/19. **Application for SIBTF Benefits, EAMS Doc ID 31786926.** The court did not deny Applicant's due process. Six years is not a reasonable amount of time to allow an Application for SIBTF benefits to be filed. As stated in defendant's Answer to Petition for Reconsideration, no appellate court has allowed more than one year from the last furnishing of normal benefits to file an Application for SIBTF benefits. *State of California v. Ind. Acc. Com. (Busch)*(1962) 198 Cal.App.2d 818.

As to Applicant's assertion the undersigned judge imposed collateral estoppel, the court offers the following:

The court did not make any findings regarding collateral estoppel. The court reviewed all of the evidence submitted by both parties. It appears the Applicant is attempting to re-litigate issues which were determined years ago. Applicant asserts the court should not have granted SIBTF's right to trial. If the court had done that, it would have denied defendant's due process. Defendant timely raised the defense of statute of limitations and had the right to have the issue litigated at trial.

IV. RECOMMENDATION

It is the undersigned's recommendation that Applicant's Petition for Reconsideration be denied and the WCAB uphold and affirm the Findings and Order of the undersigned judge dated 2/5/24.

For the foregoing reasons,

IT IS ORDERED that Applicant's Petition for Reconsideration of the Findings and Order of February 5, 2024 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 3, 2024

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

**JOYCE SIMON
DEPT OF INDUSTRIAL RELATIONS, OFFICE OF THE DIRECTOR, LEGAL UNIT**

DW/oo

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