WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MAGDALENA ALCANTAR, *Applicant*

vs.

SALINAS VALLEY HEALTH, Permissibly Self-Insured, adjusted by ACCLAMATION INSURANCE MANAGEMENT SERVICES, *Defendants*

Adjudication Number: ADJ10755277
Salinas District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Applicant, acting in pro per, seeks reconsideration of the Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on March 7, 2024, whereby the WCJ found that applicant sustained injury arising out of and in the course of employment (AOE/COE) to her neck (with headaches), bilateral shoulders, gastroesophageal reflux, irritable bowel syndrome, and psyche. The F&O also denied applicant's Petition to Reopen for New & Further Disability under Labor Code section 5410, where applicant failed to show that she suffered any "new and further" disability or compensable consequence disability related to her original injury. The WCJ also found that applicant's claims were barred by the five-year statute of limitations set forth in Labor Code section 5410.

Applicant contends that the WCJ's decision is erroneous, where the medical evidence supported her claim of "new and further disability" arising from her industrial injury. Applicant also appears to challenge the WCJ's courtroom ruling denying her request for further discovery, which prevented her from gathering additional documents to support her petition to reopen.

We received an answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that we deny reconsideration.

We have considered the allegations in the Petition for Reconsideration, the answer, and the contents of the WCJ's Report with respect thereto.

Based upon our preliminary review of the record, we will grant applicant's Petition for Reconsideration. Our order granting applicant's Petition for Reconsideration is not a final order, and we will order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law. Once a final decision after reconsideration is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code section 5950 et seq.

I.

The undisputed facts of the matter are as follows:

On February 20, 2017, applicant filed a claim alleging injury to her neck, bilateral shoulders, back, bilateral arms, bilateral hands, bilateral wrists, headaches, sleep disturbance, side effects of medication, deconditioning, and psyche while employed by defendant as a clerk II during the cumulative trauma (CT) period ending August 22, 2016. (Application for Adjudication, February 20, 2017; Minutes of Hearing and Summary of Evidence (MOH/SOE), May 31, 2018, p. 2.)

On May 31, 2018, the matter proceeded to trial on multiple issues, including injury AOE/COE. On September 21, 2020, the WCJ issued a Findings and Award (F&A), finding that applicant sustained injury AOE/COE to her cervical spine (with headaches), bilateral shoulders, gastroesophageal reflux, irritable bowel syndrome (IBS) and psyche. The WCJ awarded 13% permanent disability (PD). (F&A, September 21, 2020, p. 1.)

On July 8, 2021, applicant filed a Petition to Reopen for New & Further Disability, arguing that her conditions had since worsened.

On February 29, 2024, the parties proceeded to trial on applicant's petition to reopen. The trial court admitted multiple new exhibits presented by defendant and applicant, who appeared in pro per. (MOH, February 29, 2024, pp. 6-8; see App. Exhs. 1-2; Def. Exhs. A-G.) These records included new medical reports from the Agreed Medical Evaluator (AME), Dr. Roger G. Nacouzi, M.D., and the Qualified Medical Evaluator (QME), Dr. Michel Q. Gagnon, D.C. Dr. Nacouzzi provided one report and found no additional/new and further disability. Dr. Gagnon found that applicant sustained a new "compensable consequence" injury to her ribs, and assigned 5% industrial PD thereto. (Def. Exh. B, Dr. Gagnon Supplemental QME Report, February 10, 2022, p. 2; Def. Exh. E, Dr. Gagnon Supplemental QME Report, February 2, 2023, p. 2.)

On March 7, 2024, the WCJ issued the disputed F&O, finding that applicant failed to demonstrate that her physical and psychological disabilities worsened as a result of a progression in her industrial injury in accordance with the requirements of Labor Code section 5410. The WCJ also found that applicant failed to demonstrate that her rib injury (and 5% new PD) was industrial for the purposes of section 5410. The WCJ also found that applicant's claims were barred by the five-year statute of limitations set forth in Labor Code section 5410. As a result, the WCJ denied applicant's petition to reopen and issued a take-nothing order.

II.

Labor Code section 5410 states in relevant part that: "Nothing in this chapter shall bar the right of any injured worker to institute proceedings for the collection of compensation within five years after the date of the injury upon the ground that the original injury has caused new and further disability. The jurisdiction of the appeals board in these cases shall be a continuing jurisdiction within this period." (Lab. Code, § 5410.)

Preliminarily, we note that the WCJ found that applicant failed to show that her existing conditions worsened, or that her 5% new PD manifested, within five years of her original injury per section 5410.

With respect to the 5% new PD assigned to applicant's rib injury, the WCJ found:

> Dr. Gagnon found that Applicant had suffered a new and compensable consequence injury to her ribs....but the reports indicated that this new compensable consequence did not become disabling, at the very earliest, until after 12/16/2021. Since this worsening did not occur until well after [8/22/2016], five years after the date of injury, it cannot be addressed by means of the Petition to Reopen....

(Opinion on Decision, p. 2.)

The WCJ also found that applicant failed to show that her 5% new PD was related to the original injury, i.e., industrial, for the purposes of section 5410.

With regard to these issues, we highlight the following legal principles that may be relevant to our review of this matter.

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].) "The term 'substantial evidence' means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion…It must be reasonable in nature, credible, and of solid value." (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (*Bolton*) (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.)

Medical evidence is required if there is an issue regarding the compensability of the claim. (Lab. Code, §§ 4060(c)(d), 4061(i), 4062.3(l).) A medical opinion must be framed in terms of reasonable medical probability, it must be based on an adequate examination and history, it must not be speculative, and it must set forth reasoning to support the expert conclusions reached. (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620-621 (Appeals Bd. 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].) Defendant holds the burden of proof on apportionment of permanent disability. (Lab. Code, § 5705; see also *Escobedo*, *supra*, 70 Cal.Comp.Cases at p. 613.)

Further, decisions of the Appeals Board "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) An adequate and complete record is necessary to understand the basis for the WCJ's decision. (Lab. Code, § 5313; see also Cal. Code Regs., tit. 8, § 10787.) "It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence." (*Hamilton*, *supra*, 66 Cal.Comp.Cases at p. 475.) The WCJ's decision must "set[] forth clearly and concisely the reasons for the decision made on each issue, and the evidence relied on," so that "the parties, and the Board if reconsideration is sought, [can] ascertain the basis for the decision[.] . . . For the opinion on decision to be meaningful, the WCJ must refer

with specificity to an adequate and completely developed record." (*Id*. at p. 476 (citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350].))

The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) The Appeals Board has a constitutional mandate to "ensure substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd*. (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id*. at p. 404.)

Here, it is unclear from our preliminary review of the evidence and the existing record as to whether the legal issues have been properly identified and addressed; whether the existing record is sufficient to support the decision, order, and legal conclusions of the WCJ; and/or whether further development of the record may be necessary. Thus, we will grant applicant's Petition for Reconsideration and order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

III.

Finally, we observe that under our broad grant of authority, our jurisdiction over this matter is continuing.

A grant of reconsideration has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination" (*Great Western Power Co. v. Industrial Acc. Com*. (*Savercool*) (1923) 191 Cal.724, 729 [10 I.A.C. 322]) and of "[throwing] the entire record open for review." (*State Comp. Ins. Fund v. Industrial Acc. Com*. (*George*) (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. (See Lab. Code, §§ 5907, 5908, 5908.5; see also *Gonzales v. Industrial Acci. Com*. (1958) 50 Cal.2d 360, 364 ["[t]here is no provision in chapter 7, dealing with proceedings for reconsideration and judicial review, limiting the time within which the commission may make its decision on reconsideration, and in the absence of a statutory authority limitation none will be implied."]; see generally Lab. Code, § 5803 ["The WCAB has continuing jurisdiction over its orders, decisions, and awards. . . . At any time, upon notice and after an

opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor."].)

"The WCAB . . . is a constitutional court; hence, its final decisions are given res judicata effect." (*Azadigian v. Workers' Comp. Appeals Bd*. (1992) 7 Cal.App.4th 372, 374 [57 Cal.Comp.Cases 391; see *Dow Chemical Co. v. Workmen's Comp. App. Bd*. (1967) 67 Cal.2d 483, 491 [62 Cal.Rptr. 757, 432 P.2d 365]; *Dakins v. Board of Pension Commissioners* (1982) 134 Cal.App.3d 374, 381 [184 Cal.Rptr. 576]; *Solari v. Atlas-Universal Service, Inc.* (1963) 215 Cal.App.2d 587, 593 [30 Cal.Rptr. 407].) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (Pointer) (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (*Kramer*) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]), or determines a "threshold" issue that is fundamental to the claim for benefits. Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final' "]; *Rymer*, *supra*, at p. 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer*, *supra*, at p. 45 ["[t]he term ['final'] does not include intermediate procedural orders"].)

Labor Code section 5901 states in relevant part that:

"No cause of action arising out of any final order, decision or award made and filed by the appeals board or a workers' compensation judge shall accrue in any court to any person until and unless the appeals board on its own motion sets aside the final order, decision, or award and removes the proceeding to itself or if the person files a petition for reconsideration, and the reconsideration is granted or denied.…"

Thus, this is not a final decision on the merits of the Petition for Reconsideration, and we will order that issuance of the final decision after reconsideration is deferred. Once a final decision is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code sections 5950 et seq.

IV.

Accordingly, we grant applicant's Petition for Reconsideration and order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the March 7, 2024 Findings and Order is **GRANTED**.

IT IS FURTHER ORDERED that a final decision after reconsideration is **DEFERRED** pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 20, 2024

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

MAGDALENA ALCANTAR
LUNA, LEVERING & HOLMES

AH/*cs*

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