WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MATTHEW DANIELS, ***Applicant***

vs.

SUBSEQUENT INJURIES BENEFITS TRUST FUND, ***Defendants***

Adjudication Number: ADJ12273693
Salinas District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant Matthew Daniels seeks reconsideration of the December 4, 2023 Findings and Award, wherein the workers' compensation administrative law judge (WCJ) found that applicant is eligible for Subsequent Injuries Benefits Trust Fund (SIBTF) benefits, with a subsequent injury causing permanent disability of 66% and preexisting injuries causing 17% permanent disability, for a combined permanent disability of 83%.

Applicant contends that the WCJ failed to consider applicant's experts who made opinions on applicant's preexisting disabilities based on contemporaneous medical records, which would have given applicant a combined permanent disability of 100%.

We received an answer from SIBTF. 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, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we grant reconsideration, rescind the December 4, 2023 Findings and Award and substitute a new Findings and Award, which will defer the issue of SIBTF benefits.

FACTS

As the WCJ stated in her Report:

> Applicant, Matthew Daniels, while employed on 12/12/18 as a Stock Clerk, Occupational Group number 360, at Freedom, California, by Safeway, Inc., then permissibly self-insured, sustained injury AOE/COE to his bilateral knees. For purposes of SIBTF benefits, the case herein is Applicant's subsequent industrial injury (hereafter, SII). The parties to the claim settled by Compromise and Release on 4/22/21. In the C&R's addendum, the parties stipulated to 66% PD for the applicant's bilateral knees.
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> Applicant had two prior settlements that support his claim for SIBTF benefits. In ADJ8049145, a CT to 2/17/10 injury to his left wrist, was settled by C&R on 11/8/11, wherein the parties stipulated to PD of 7%; and, in ADJ10935541, a CT to 4/26/15 injury to his right wrist/hand/upper extremity was settled by C&R on 7/13/17, wherein the parties stipulated to PD of 10%. Based upon these facts, the court found that the SII caused permanent disability of 66%, that his prior injuries combined caused permanent disability of 17%, and that the percentage of permanent disability resulting from the combination of all disabilities is 83%.
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> Applicant maintains that he is permanently totally disabled based on reports obtained subsequent to the SII. On this basis, Applicant petitions for reconsideration. (Report, pp. 1-2.)

DISCUSSION

The WCJ based her finding that applicant sustained a combined permanent disability of 83% on the settlement of three injuries: (1) the settlement of a subsequent injury dated December 12, 2018 with a permanent disability of 66%; (2) the settlement of a preexisting injury ending on February 17, 2010 with a permanent disability of 7%; and (3) the settlement of a preexisting injury ending on April 26, 2015 with a permanent disability of 10%.

We note that a Compromise and Release is not a finding on the issue of permanent disability. The language in the Compromise and Release form specifically states that, "The parties wish to settle these matters to avoid the costs, hazards and delays of further litigation, and agree that a serious dispute exists as to the following issues (initial only those that apply)." (Defendant Exhibit D1, Compromise and Release for injury ending in April 26, 2015, ¶ 9; Defendant Exhibit D3, Compromise and Release for injury ending on February 17, 2010, ¶ 9; Defendant Exhibit D5, Compromise and Release for injury dated December 12, 2018, ¶9.)

In each of the three Compromises and Releases at issue, the "permanent disability" box is initialed. The fact that elsewhere in the Compromise and Release indicates the percentage of permanent disability is of no consequence. To be clear, the parties stipulated that the reporting by the medical-legal evaluators rated at 66%, 7%, and 10%; they did not stipulate as to the levels of applicant's permanent disability. A Compromise and Release is a compromise; it is not a finding of permanent disability.

Moreover, the Appeals Board's power to determine the adequacy of the Compromise and Release and issue an award based upon the release or compromise agreement is not a finding of permanent disability. (Lab. Code[1], § 5002; Cal. Code Regs., tit. 8, § 10700.) A finding of adequacy is not the same as a finding of permanent disability. (§§ 4660, 5002; Cal. Code Regs., tit. 8, § 10700.)

The WCJ further opined that applicant has not proven additional preexisting labor disabling conditions that would warrant a permanent disability greater than 83%. The WCJ stated in her Report that she found a paucity of contemporaneous medical records in the medical-legal reports of Michael Newman, D.C., Joshua Kirz, Ph.D., Bruce Dreyfuss, M.D., and the vocational report of Scott Simon, M.S., and that she found their reports assigned retroactive prophylactic work restrictions.

There are no requirements as to the origin of the preexisting disability; it may be congenital, developmental, pathological, or due to either an industrial or nonindustrial accident. (1 CA Law of Employee Injuries & Workers' Comp § 8.09 [1].) The Supreme Court in *Ferguson v. Indus. Acc. Comm.* (1958) 50 Cal.2d 469, 477 held that the "previous disability or impairment" contemplated by section 4751 "'must be actually 'labor disabling,' and that such disablement, rather than 'employer knowledge,' is the pertinent factor to be considered in determining whether the employee is entitled to subsequent injuries payments under the terms of section 4751." (See also *Escobedo v. Marshall*, 70 Cal.Comp.Cases 604, 619 (Appeals Board en banc).) The court further noted that "the prior injury under most statutes should be one which, if industrial, would be independently capable of supporting an award. It need not, of course, be reflected in actual disability in the form of loss of earnings [as this court has already held in *Smith* v. *Industrial Acc. Com*. (1955) 44 Cal.2d 364, 367 [2, 3] [288 P.2d 64]], but if it is not, it should at least be of a kind

[1] All statutory references are to the Labor Code unless otherwise indicated.

which could ground an award of permanent partial disability. . . .'" (*Ferguson,* at p. 477, quoting Larson's Workmen's Compensation Law (1952) § 59.33 (vol. 2, p. 63).)

Further, the preexisting disability "need not have interfered with the employee's ability to work at his employment in the particular field in which he was working at the time of the subsequent injury. [citations]" (*Franklin v. Workers' Comp. Appeals Bd.* (1978) 79 Cal.App.3d 224, 238.) "The ability of the injured to carry on some type of gainful employment under work conditions congenial to the preexisting disability does not require a finding that the preexisting disability does not exist. [citations]" (*Ibid.*)

To prove a preexisting disability, there must be evidence prior to the subsequent injury of a medically demonstrable impairment.

> A preexisting disability cannot be established by a "retroactive prophylactic work restriction" on the preexisting condition placed on the injured after the subsequent industrial injury in absence of evidence to show that the worker was actually restricted in his work activity prior to the industrial injury. (*Hulbert* v. *Workmen's Comp. Appeals Bd., supra*, 47 Cal.App.3d 634, 640; *Gross* v. *Workmen's Comp. Appeals Bd., supra*, 44 Cal.App.3d 397, 404-405; *Amico* v. *Workmen's Comp. Appeals Bd., supra*, 43 Cal.App.3d 592, 606; see also *Bookout* v. *Workmen's Comp. Appeals Bd., supra*, 62 Cal.App.3d 214, 224-225.) Where the injured was actually under a prophylactic restriction for a preexisting condition at the time of the industrial injury, apportionment to a preexisting disability is proper. It is only the *retroactive* application of a prophylactic restriction to an otherwise nonexistent previous disability that is prohibited. (*Ibid*.)
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> The prohibition against "retroactive prophylactic work restrictions" to establish a preexisting disability is not inconsistent with the fact that prophylactic restrictions are ratable factors of permanent disability stemming from the industrial injury. (*Gross, supra*, 44 Cal.App.3d at p. 404.) Applying a prophylactic work restriction retroactively creates "a sort of factual or legal fiction of an otherwise nonexistent previous disability or physical impairment." (*Ibid*.) Apportionment involves a factual inquiry. (See *Mercier* v. *Workers' Comp. Appeals Bd., supra*, 16 Cal.3d 711, 716; see also, *State Comp. Ins. Fund* v. *Workers' Comp. Appeals Bd. (Gaba)* (1977) 72 Cal.App.3d 13, 16-17 [139 Cal.Rptr. 802].)
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> (*Franklin, supra,* 79 Cal.App.3d at p. 238.)

Here, the WCJ admits there is some contemporaneous evidence of preexisting injury but concludes, without explaining, that it is insufficient to establish substantial medical evidence. Dr. Newman, Dr. Kirz, and Dr. Dreyfuss have reviewed applicant's medical records dating as far back as 2004. (Applicant Exhibit A1, Dr. Newman's report dated September 2, 2022, pp. 12-17; Applicant Exhibit A2, Dr. Kirz's report dated November 30, 2021, pp. 4-8; Applicant Exhibit A3, Dr. Dreyfuss' report dated October 17, 2022, pp. 2-8.) The WCJ does not explain how Drs. Newman's, Kirz's and Dreyfuss' opinions constitute retroactive prophylactic work restrictions or how their opinions are not based on contemporaneous evidence of preexisting injury. We note that a preexisting disability need not be rated as a permanent disability prior to the subsequent injury but there must be evidence prior to the subsequent injury from which a medical provider can determine preexisting disability that is labor disabling.

In order to constitute substantial evidence, expert medical opinion must be framed in terms of reasonable medical probability, be based on an accurate history and an examination, and must set forth reasoning to support the expert conclusions reached. (*E.L. Yeager 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 (Appeals Board en banc).) "[A] medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. (citations) Further, a medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. (citations)" (*Gatten*, *supra,* at p. 928.) "A medical report which lacks a relevant factual basis cannot rise to a higher level than its own inadequate premises. Such reports do not constitute substantial evidence to support a denial of benefits. (citation)" (*Kyle v. Workers' Comp. Appeals Bd (City and County of San Francisco)* (1987) 195 Cal.App.3d 614, 621.)

Accordingly, we grant reconsideration, rescind the December 4, 2023 Findings and Award, and substitute a new Findings and Award, which defers the issue of SIBTF benefits.

For the foregoing reasons,

IT IS ORDERED that applicant Matthew Daniels's Petition for Reconsideration of the December 4, 2023 Findings and Award is **GRANTED.**

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the December 4, 2023 Findings and Award is **RESCINDED,** and the following is **SUBSTITUTED** therefor:

Findings of Fact

1. Applicant, Matthew Daniels, while employed on 12/12/18 as a Stock Clerk, Occupational Group number 360, at Freedom, California, by Safeway, Inc., sustained injury AOE/COE to his bilateral knees.

2. At the time of injury, the employer was permissibly self-insured, administered by Sedgwick CMS, Inc.

3. The employee's earnings are subject to proof, along with the indemnity rates for temporary disability and permanent disability.

4. Applicant's earnings are sufficient to warrant the maximum rate for permanent disability.

5. The employer began PD advances as of 2/14/21 per the C&R in ADJ12273693.

6. Applicant's claim in ADJ12273693 (DOI 12/12/18) for injury to his bilateral knees settled by Compromise and Release on 4/22/21.

7. Applicant settled his claim in ADJ8049145 (CT to 2/17/10) for injury to his left wrist by Compromise and Release on 11/8/11.

8. Applicant settled his claim in ADJ10935541 (CT to 4/26/15) for injury to his right wrist/hand/upper extremity by Compromise and Release on 7/13/17.

9. The issue of SIBTF benefits is deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 26, 2024

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

MATTHEW DANIELS
WIESNER ENGLISH, P.C.
OFFICE OF THE DIRECTOR, LEGAL, OAKLAND

LSM/mc

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