WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ROBERTO RODRIGUEZ, ***Applicant***

vs.

CITY OF LONG BEACH;
permissibly self-insured,
Defendants

Adjudication Number: ADJ18150938
Van Nuys District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER 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 grant reconsideration, amend Finding of Fact number 1 to include a finding that applicant sustained injury to his right ankle, and otherwise affirm the Findings of Fact.

I.

Former Labor Code section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, Labor Code section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
> (b)
> > (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.

> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under Labor Code section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on October 22, 2024 and 60 days from the date of transmission is Saturday December 21, 2024. The next business day that is 60 days from the date of transmission is Monday, December 23, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)[1] This decision is issued by or on Monday, December 23, 2024, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

According to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on October 22, 2024, and the case was transmitted to the Appeals Board on October 22, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on October 22, 2024.

[1] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

II.

An employee bears the burden of proving injury arising out of and in the course of employment (AOE/COE) by a preponderance of the evidence. (*South Coast Framing v. Workers' Comp. Appeals Bd.* (*Clark*) (2015) 61 Cal.4th 291, 297-298, 302 [80 Cal.Comp.Cases 489]; Lab. Code, §§ 3600(a) & 3202.5.) The Supreme Court of California has long held that an employee need only show that the "proof of industrial causation is reasonably probable, although not certain or 'convincing.'" (*McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413 [33 Cal.Comp.Cases 660].) "That burden manifestly does not require the applicant to prove causation by scientific certainty." (*Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692, 1701 [58 Cal.Comp.Cases 313].)

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].) To constitute substantial evidence ". . . a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board 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, 97].)

Here, we agree with the WCJ that applicant met his burden to show that he sustained injury to the right ankle, and with his conclusion that applicant was entitled to Labor Code section 4850 benefits from January 4, 2024 to present and continuing based on the agreed medical evaluation (AME) report of Arthur H. Fass, DPM, dated July 31, 2024. It is well-established that the relevant and considered opinion of one physician may constitute substantial evidence, even if inconsistent with other medical opinions. (*Place v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525].)

Defendant contends that the medical evidence relied upon is not substantial because the independent medical evaluation reports and deposition testimony provided by independent medical evaluator (IME) Scott E. Hardy, M.D., stated that Dr. Hardy would need to review the medical records of applicant's self-procured treaters before he could formulate an opinion regarding causation of injury to the right ankle. (Ex. C, May 8, 2024 Supplemental IME Report of Dr. Scott Hardy, p.7-8.; Ex. D, May 30, 2024 Deposition of Dr. Scott Hardy, p. 28:17-20.) We find defendant's argument unpersuasive. Defendant provides no explanation why they have not attempted to provide these records to Dr. Hardy, notably between the time of Dr. Hardy's last report dated May 8, 2024, and the time of his deposition testimony. Furthermore, defendant fails to identify any portion of Dr. Hardy's incomplete reporting that discredits Dr. Fass's AME reporting. Defendant fails to present evidence controverting the reasons or grounds for Dr. Fass's reporting which as discussed in the Report, relied on a thorough physical exam and history of applicant. Thus, the WCJ was presented with no good reason to conclude that Dr. Fass's opinion is unpersuasive—and we also conclude that it constitutes substantial medical evidence. (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114].)

Accordingly, we amend the Findings of Fact[2] to find that applicant sustained injury to the right ankle in addition to the cervical spine, thoracic spine, lumbar spine and both knees. We otherwise affirm the Findings of Fact.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings of Fact issued on October 4, 2024 by the WCJ is **GRANTED**.

[2] To the extent that it appears that the WCJ omitted the right ankle in his findings of body parts injured, we amend the Findings of Fact to include it here.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact issued on October 4, 2024 is **AFFIRMED** except that it is **AMENDED** as follows:

FINDINGS OF FACT

1. The Applicant, Roberto Rodriguez while employed during the period January 22, 1990 to July 27, 2023 as a fire engineer, Occupational Group Number 490, at Long Beach, California by the City of Long Beach, sustained injury arising out of and in the course of employment to his cervical spine, thoracic spine, lumbar spine, both knees and right ankle.

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WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 20, 2024

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

ROBERTO RODRIGUEZ
CITY ATTORNEY
LEWIS MARENSTEIN

LN/md

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I

INTRODUCTION:

On October 22, 2024, the Defendant filed a timely and verified petition for reconsideration dated October 22, 2024, alleging that the undersigned WCJ erred in his Findings of Fact and Award dated October 4, 2024. The Defendant contends that the undersigned WCJ erred in relying on the agreed medical evaluation report of Arthur H. Fass, DPM, dated July 31, 2024, in finding industrial injury to the right ankle and awarding Labor Code § 4850 benefits from January 4, 2024 to present and continuing.

STATEMENT OF FACTS:

The Applicant, while employed as a fire engineer during the period January 22, 1990 to July 27, 2023, sustained an industrial injury to his cervical spine, thoracic spine, lumbar spine and both knees due to cumulative trauma.
The parties appeared before the undersigned WCJ for an expedited hearing on October 2, 2024, regarding the compensability of the Applicant's right ankle and entitlement to Labor Code § 4850 benefits.

Based on the agreed medical evaluation report of Dr. Fass dated July 31, 2024, the undersigned WCJ issued his Findings of Fact & Award dated October 4, 2024, finding industrial injury to the right ankle and awarded the Applicant Labor Code § 4850 benefits from January 4, 2024 to present and continuing, subject to the one-year limitation set forth in § 4850, less sick leave monies paid to the Applicant during that period.

Aggrieved by the undersigned WCJ's decision, the Defendant filed its petition for reconsideration.

DISCUSSION:

While the WCAB may reject the findings of a WCJ and enter its own findings based on its review of the record, [Labor Code § 5907] when a WCJ's findings are supported by solid, credible evidence, they are to be accorded great weight and should be rejected only based on contrary evidence of considerable substantiality. [Lamb v. Workers' Comp. Appeals Bd. (1974) 39 Cal. Comp. Cases 310, 314.] In other words, an aggrieved party's professed dissatisfaction with the conclusions of a WCJ and the unsupported imputation of unreliability of the well-grounded evidence he or she has relied upon is not sufficient to disturb a WCJ's decision. [Shepard v. County of Los Angeles (2021) 2021 Cal. Wrk. Comp. P.D. LEXIS 151, *7-8 (Appeals Board noteworthy panel decision);

Lee v. Mitrant U.S.A. Corp. (2013) 2013 Cal. Wrk. Comp.P.D. LEXIS 610, *5 (Appeals Board noteworthy panel decision).]

For an expert's medical opinion to be substantial evidence it must be framed in terms of reasonable medical probability that is based on pertinent facts, an adequate examination, an accurate history and set forth proper reasoning in support of its conclusions. [Escobedo v. Marshalls (2005) 70 Cal. Comp. Cases 604, 621 (Appeals Board en banc).] Reports and opinions are not substantial evidence if they are known to be erroneous, based on facts no longer germane, contain inadequate medical histories and examinations, or are based on incorrect legal theories, surmise, speculation, conjecture, or guess. [Hegglin v. Workmen's Comp. Appeals Bd. (1971) 36 Cal. Comp. Cases 93, 97.]

Finally, if an agreed medical evaluator has been chosen by the parties and is deemed substantial evidence, a WCJ must rule consistent with the findings of that physician. [Power v. Workers' Comp. Appeals Bd. (1986) 51 Cal. Comp. Cases 114, 117]

In this case, the undersigned WCJ relied on the agreed medical evaluation report of Dr. Fass dated July 31, 2024, who, on page 11, found industrial injury to the right ankle and on page 12, wrote as follows:

> "The patient has been out of work using his personal time since 01/02/24. He should be considered to be on TTD and that his time off should be covered under workers' compensation. He is limited to no more than 10 minutes of standing and walking per hour, and no lifting, or carrying more than 10 pounds. There is no squatting or climbing ladders. This disability is likely permanent. I would advise the patient to apply for medical retirement from his occupation."

Finally, notwithstanding the Defendant's protested complaints regarding Dr. Fass, he did not speculate or guess in providing his opinion. He took an adequate medical history and conducted an adequate examination. Since his opinion relied on germane facts and reasonable probability, it was substantial medical evidence. As such, in matters that require scientific medical knowledge, a WCJ may not reject them merely because an aggrieved party is dissatisfied with them. [E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten) (1968) 71 Cal. Comp. Cases 1687, 1693.]

Therefore, for the reasons set forth above, the undersigned WCJ did not err in finding industrial injury to the right ankle and awarding Labor Code § 4850 benefits from January 4, 2024 to present and continuing.

RECOMMENDATION:

The undersigned WCJ respectfully recommends that the Defendant's petition for reconsideration dated October 22, 2024, be denied.

Date: October 22, 2024

DAVID L. POLLAK
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE