

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

RUBEN FRAZIER III, *Applicant*

vs.

**STATE of CALIFORNIA DEPARTMENT OF CORRECTIONS and
REHABILITATION - FOLSOM STATE PRISON, legally uninsured, administered
by STATE COMPENSATION INSURANCE FUND/
STATE CONTRACT SERVICES, *Defendants***

Adjudication Number: ADJ10821987

Sacramento District Office

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

Defendant seeks reconsideration of the Findings issued by the workers' compensation administrative law judge (WCJ) on December 12, 2023, wherein the WCJ found in pertinent part that applicant's injury to his brain and nervous system, in the form of a stroke, arose out of and occurred in the course of his employment with defendant.

Defendant contends that the reports from internal medicine qualified medical examiner (QME) Massoud Mahmoudi D.O., and neurology QME Jonathan S. Rutchik, M.D., are not substantial evidence that applicant's stroke was cardiac based, so applicant did not meet his burden of proof.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be denied. We received an Answer from applicant.

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration, and affirm the Findings, except that we will amend the Findings to defer the issue of whether applicant's injury to his brain and nervous system, in the form of a stroke, constitutes

an injury arising out of and occurring in the course of employment (AOE/COE), (Finding of Fact #2); and we will return the matter to the WCJ for further proceedings consistent with this opinion.

BACKGROUND

Applicant claimed injury to his heart/cardiovascular system, to his gastrointestinal system, and to his brain/nervous system in the form of a stroke, while employed by defendant as a correctional officer during the period from October 20, 2015, through October 20, 2016.

The following is a brief summary of the numerous reports from Dr. Mahmoudi and Dr. Rutchik, and their deposition testimony, relevant to the issues addressed herein:

Internal medicine QME Dr. Mahmoudi evaluated applicant on November 29, 2017. Dr. Mahmoudi examined applicant, took a history, and reviewed the medical record he was provided.

The diagnoses included cerebrovascular accident, hypertension, and ventricular hypertrophy. (Joint Exh. AA, Massoud Mahmoudi D.O., December 18, 2017, p. 19.) The doctor stated, "I believe, within reasonable medical probability that the claimant's cardiac, brain, and the GI condition are industrial" and he requested that he be provided Veteran's Administration (VA) and "pre-injury" medical records. (Joint Exh. AA, p. 21.)

In a subsequent report Dr. Mahmoudi stated, "I do not see a need for referral to a cardiologist in this case. As I have noted multiple times in my reports, no cardiac source of emboli [blood clot] causing stroke was found and therefore, I defer the causation to a PQME neurologist not a cardiologist." (Joint Exh. JJ, Massoud Mahmoudi D.O., March 9, 2023, p. 2.)

At his deposition, Dr. Mahmoudi stated that if the neurologist ruled out neurological causes for the stroke, then the cardiovascular system would be the remaining plausible system. (Joint Exh. LL, Massoud Mahmoudi D.O., March 27, 2023, p. 46, deposition transcript.)

He then testified:

It's between cardiology and neurology. Neurology, if for sure says this is not neuro related, I guess then you wait for only cardiology opinion. Now, I can look at the results and the information I asked [sic] for. If -- again, if you still think that is not enough or doesn't convince the parties, then you're welcome to get a cardiologist.

(Joint Exh. LL, p. 47.)

Neurology QME Dr. Rutchik evaluated applicant on September 23, 2020. After examining applicant, taking a history, and reviewing the medical record, Dr. Rutchik diagnosed applicant as having: “Cerebrovascular accident (CVA) - Cerebral infarction due to unspecified occlusion or stenosis of left cerebellar artery [...] Hypertension [and] Ventricular hypertrophy.” (Joint Exh. MM, Jonathan S. Rutchik, M.D., September 23, 2020, p. 12.) Dr. Rutchik’s deposition was taken on April 28, 2023. At the deposition the doctor testified that:

He [applicant] had an embolism, ... as related to the vertebral artery. So, the stroke was in the vertebral artery, and he had an embolic event. Okay. ¶ And so it is most likely that that embolic event comes from all of the above issues. We're not clear on what the one issue or multi-factorial; one, ventricular hypertrophy; two, atrial flutter; three, hypertension. All of which, by the way, are cardiac issues contributing to stroke. ... ¶ ... But it does appear that there is a lot of evidence that his cardiac issues -- those three things we just mentioned -- are more likely than not a significant contribution to the embolic event. ... (Joint Exh. RR, Jonathan S. Rutchik, M.D., April 28, 2023, p. 11, deposition transcript.)

His testimony later included:

Q. Just to probably restate the obvious, your expertise is not in cardiology; is that correct?

A. That's correct.

Q. And do you still stand by your October 3rd, 2022,¹ report where you state that you would respectfully defer cardiovascular and pulmonary examinations to specialists [sic] in these fields?

A. Yes. ...

(Joint Exh. RR, pp. 25 - 26, deposition transcript.)

The parties proceeded to trial on November 9, 2023. They stipulated that applicant sustained injury AOE/COE to his heart/cardiovascular system, to his gastrointestinal system, and in the form of hypertension. (Minutes of Hearing and Summary of Evidence (MOH/SOE), November 9, 2023, p. 2.) The issues submitted for decision included parts of body injured: whether applicant’s brain/nervous system injury, in the form of a stroke, was industrial. (MOH/SOE, p. 3.)

¹ The date in the deposition transcript is actually October 3, 2023. This appears to be a clerical error since the deposition occurred on April 28, 2023, and the doctor had submitted a report dated October 3, 2022. (Joint Exh. RR, Jonathan S. Rutchik, M.D., October 3, 2022.)

DISCUSSION

It is well established that any award, order, or decision of the Appeals Board must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16]; *Universal City Studios, Inc. v. Workers' Compensation Appeals Bd. (Lewis)* (1979) 99 Cal.App.3d 647 [44 Cal.Comp.Cases 1133].) 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, and to be substantial evidence the medical opinion must set forth the reasoning behind the physician's opinion, not merely his or her conclusions; a mere legal conclusion does not furnish a basis for a finding. (*Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372 [35 Cal.Comp.Cases 525]; *Heggin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93]; *Granado v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 399 [33 Cal.Comp.Cases 647]; *Bracken v. Workers' Comp. Appeals Bd.* (1989) 214 Cal. App. 3d 246 [54 Cal.Comp.Cases 349]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

The threshold issue in this matter is whether applicant's brain/nervous system injury, in the form of a stroke, was an injury AOE/COE. (MOH/SOE, p. 3.) However, having reviewed the entire record it is clear that underlying the issue of injury AOE/COE is the issue of whether applicant's hypertension/heart/cardiovascular conditions were a causative factor as to applicant's stroke. Although Dr. Mahmoudi and Dr. Rutchik stated various opinions as to the cause of applicant's stroke, as noted above, they both ultimately deferred the issue to a cardiovascular specialist (cardiologist). (See e.g. Joint Exh. Ex. LL, p. 47 and Joint Exh. RR, pp. 25 – 26.) Based thereon, the opinions stated by the doctors are not substantial evidence and may not be the basis for an Appeals Board (including the WCJ) decision.

The Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence pertaining to a threshold issue, or when it is necessary in order to fully adjudicate the issues submitted for decision. (Lab. Code §§ 5701, 5906; *Kuykendall v. Workers' Comp. Appeals Bd.*, (2000) 79 Cal.App.4th 396 [65 Cal.Comp.Cases 264] *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].)

Normally, when the medical record requires further development, the record should first be supplemented by physicians who have already reported in the case. (See *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) However, under the circumstances of this matter, including the inconsistencies in the doctors' stated opinions and their apparent opposition to each other, it is clearly in the parties' interest to have applicant evaluated by a cardiologist (cardiovascular specialist) agreed medical examiner or in the alternative, to request that the WCJ appoint a cardiologist regular physician to evaluate applicant. (Lab. Code § 5701.)

Accordingly, we grant reconsideration, and affirm the Findings, except that we amend the Findings to defer the issue of whether applicant's injury to his brain and nervous system, in the form of a stroke, constitutes an injury AOE/COE, and we return the matter to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings issued by the WCJ on December 12, 2023, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the December 12, 2023 Findings are **AFFIRMED**, except that the Findings are **AMENDED** as follows:

FINDINGS OF FACT

* * *

2. The issue of whether applicant's injury to his brain and nervous system, in the form of a stroke, constitutes an injury arising out of and occurring in the course of employment, is deferred.

IT IS FURTHER ORDERED that the matter is **RETURNED** to the WCJ for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

CRAIG SNELLINGS, COMMISSIONER
PARTICIPATING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 1, 2024

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

**RUBIN FRAZIER III
FERRONE & FERRONE
STATE COMPENSATION INSURANCE FUND, LEGAL**

TLH/mc

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