

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

SONALI SHAH, *Applicant*

vs.

**CVS PHARMACY and ACE AMERICAN INSURANCE COMPANY,
administered by SEDGWICK CLAIMS MANAGEMENT SERVICES;
AIG/NEW HAMPSHIRE INSURANCE COMPANY, administered by
SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants***

Adjudication Numbers: ADJ13012543 ADJ13404851

Los Angeles District Office

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

Applicant seeks reconsideration of the New and Amended Joint Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on November 30, 2023, wherein the WCJ found that applicant did not sustain a psychiatric injury arising out of and occurring in the course of employment (AOE/COE) while employed by defendant during the period from August 26, 2015, through August 26, 2016 (ADJ13404851); and that applicant did not sustain a psychiatric injury AOE/COE while employed by defendant during the period from March 17, 2000, through February 21, 2020 (ADJ13012543); the WCJ ordered that applicant take nothing by way of her injury claims.

Applicant contends she met her burden of proof that the actual events of employment were the predominate cause of her psychiatric injury, and that the employer's conduct toward applicant does not constitute good faith personnel actions.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be denied. We did not receive an Answer from defendant.

We have considered the allegations in the Petition and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration,

rescind the F&O, and return the matter to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

BACKGROUND

Applicant claimed a psychiatric injury as a result of stress while employed by defendant as a pharmacist during the period from August 26, 2015, through August 26, 2016 (ADJ13404851), and during the period from March 17, 2000, through February 21, 2020 (ADJ13012543).

On September 1, 2020, psychiatric qualified medical examiner (QME) Susan L. Marusak, M.D., evaluated applicant. Dr. Marusak took a history, reviewed the record, and performed various psychiatric diagnostic tests. Based thereon, she diagnosed “Generalized Anxiety Disorder,” assigned a 64 Global Assessment of Function (GAF) rating, and explained:

Causation is 80% to perceived versus actual supervisory harassment (by Ms. Garda Escari and Ms. Daria Park) to include racial and religious discrimination, and ageism; and 20% causal to personnel actions- the described write-ups and threat of termination, which is all deferred to the Trier-of-Fact. However, those write-ups may have been retracted, although this is unclear and requires further clarification. Nevertheless, with 80% causation to perceived versus actual stressors, if found compensable by the Trier-of-Fact, meets the threshold for compensability (>51%) without causation assigned to write ups/termination threats.

(App. Exh. 1, Susan L. Marusak, M.D., September 30, 2020, p. 52.)

After receiving and reviewing additional medical records, Dr. Marusak stated:

In considering causation from an industrial standpoint: causation is 80% to the perceived versus actual stress and harassment in the workplace; and 20% due to personnel actions which were not a substantial cause (40%) of her psychiatric injury. (i.e. the three counseling letters, which were all similarly and equally distressing to her, as well as the three yearly evaluations that states she needed improvement.) Thus, in regard to the Rolda analysis an equal percentage would be given to each of the six personnel actions at work (3 counseling letters and the three end of year evaluations). 20% causal was to the non-substantial personnel actions, the ultimate nature of which resides in the purview of the Trier-of-Fact in this case.

(App. Exh. 2, Susan L. Marusak, M.D., March 8, 2021, p. 28.)¹

¹ The doctor’s reference to “Rolda” was regarding our en banc decision, *Rolda v. Pitney Bowes* (2001) 66 Cal. Comp.Cases 241.

Dr. Marusak then reiterated her previously stated opinion that:

Causation was 80% to perceived versus actual supervisory harassment (by Ms. Escari and Ms. Park) to include perceived racial, religious discrimination and ageism; and 20% causal is to the described three write-ups, and 3 year-end evaluations form 2015-2019 and threat of termination, which are all deferred to the Trier-of-Fact. According to the applicant those write-ups may have been retracted, although this was unclear and requires further clarification. (App. Exh. 2, p. 31.)

The parties proceeded to trial on February 3, 2022. Over the course of six trials, there were three witnesses: applicant testifying on her own behalf, Daria Park and Kirsten Jennings testifying on behalf of defendant. (See Minutes of Hearing and Summary of Evidence (MOH/SOE), February 3, 2022, May 10, 2022, July 7, 2022, April 4, 2023, June 6, 2023, August 31, 2023.) The issues submitted for decision included injury AOE/COE. (MOH/SOE, February 3, 2022, pp. 3 – 5.)

DISCUSSION

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].) When deciding a medical issue, such as whether the applicant sustained a cumulative injury, the WCJ must utilize expert medical opinion. (See *Insurance Company of North America v. Workers' Comp. Appeals Bd. (Kemp)* (1981) 122 Cal.App.3d 905 [46 Cal.Comp.Cases 913].) To be substantial evidence a medical opinion must *inter alia* be based on pertinent facts, on an adequate examination and on an accurate history. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

In her initial report, Dr. Marusak stated:

Ms. Shah impressed me as a moderately credible, reliable historian, despite her poor recall for certain dates and details of the past, and her account was ably corroborated by information contained in the records provided for my review, including her recent deposition testimony taken in May 2020. There was no evidence of rambling, pressured, or retarded speech patterns. ¶ However, Ms. Shah was a somewhat difficult historian in that she would frequently jump from one thought to another prior to completing what she had started to say and thus her narrative had a lurching quality which made her difficult to follow at times, thus adding to the overall interview time. (App. Exh. 1, p. 42; see also p. 51, *Discussion of Credibility of the Applicant*, italics in original.)

In his Opinion on Decision, the WCJ stated:

Obviously, a doctor's opinion is only as valid as the history upon which it is based. Dr. Marusak unequivocally found predominate cause of the injury because of harassment and invidious discrimination as noted above. In reality, for the reasons stated above, I have not found a scintilla of evidence after six days of trial that the applicant's relationship with her employer could fairly be described in this manner.
(F&O, p. 7, Joint Amended Opinion on Decision.)

Based on our review of the record, it is clear that the history Dr. Marusak was given was not consistent with the testimony of the three witnesses taken over the course of the six trial dates. As noted, one of the requirements for a doctor's report, and the opinions stated in the report, to constitute substantial evidence is that it be based on an accurate history. (*Escobedo v. Marshalls, supra.*) As noted, in this matter, Dr. Marusak was given a history that was not consistent with the witnesses' trial testimony. Thus, her opinions do not appear to be based on an accurate history, and in turn her opinions do not constitute substantial evidence. Also as noted, a trial record, upon which a decision as to whether an applicant sustained a cumulative injury is based, must include an expert medical opinion that constitutes substantial evidence.

The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or where there is insufficient evidence to determine an issue. (Lab. Code, §5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [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).) It appears that under the circumstances of this matter, Dr. Marusak must be provided a copy of the WCJ's summary of the testimony of each trial witness, and that she be asked to submit a supplemental report addressing the issue of psychiatric injury AOE/COE. We, therefore, recommend that the WCJ schedule a status conference in order to facilitate the parties' further development the record, and to assure that it contains substantial evidence upon which the issues submitted for decision may be decided.

Accordingly, we grant reconsideration, rescind the F&O, and return the matter to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the New and Amended Joint Findings and Order issued by the WCJ on November 30, 2023, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the November 30, 2023 New and Amended Joint Findings and Order is **RESCINDED** and the matter is **RETURNED** to the WCJ to conduct further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 22, 2024

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

**SONALI SHAH
MARC BORENSTEIN, ESQ.
MICHAEL SULLIVAN, ESQ.**

TLH/mc

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