

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

VICTORIA ENRIQUEZ, *Applicant*

vs.

**COUNTY OF SANTA BARBARA;
SUBSEQUENT INJURIES BENEFITS TRUST FUND (SIBTF). *Defendants***

**Adjudication Number: ADJ334261 (VNO 0513526)
Van Nuys District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted applicant's Petition for Reconsideration of the Finding of Fact and Order (F&O) issued on January 29, 2020, by the workers' compensation administrative law judge (WCJ), in order to further study the factual and legal issues.¹ This is our Opinion and Decision After Reconsideration.²

The WCJ concluded that applicant was not entitled to Subsequent Injury Benefit Trust Fund (SIBTF) benefits because she failed to prove that she had a pre-existing labor-disabling permanent disability. (Lab. Code, § 4751.)³

Applicant contends that the WCJ erred because the reporting of the agreed medical evaluator⁴ (AME) established that applicant's pre-existing disability was labor disabling. Applicant also contends that further development of the record as ordered previously by the Appeals Board was not possible due to the unavailability of the AME.

¹ Commissioner Sweeney was on the panel when we granted reconsideration but is no longer a member of the Workers' Compensation Appeals Board (WCAB). A new panel member has been appointed in her place.

² On June 4, 2020, an Order Approving Compromise and Release (OACR) was entered into EAMS. It does not appear that the OACR resolved the pending SIBTF issue addressed in our opinion. However, a copy of the Compromise and Release is not in EAMS. This should be corrected upon return to the trial level.

³ All future references are to the Labor Code unless noted.

⁴ To be clear, the agreement to use Dr. Plesons as a medical evaluator appears to have been between applicant and the employer. We will refer to Dr. Plesons as an AME in that regard. However, he does not constitute an AME as between the litigants in the case at bar.

Applicant filed a supplemental Petition for Reconsideration on March 3, 2020, which we have accepted and reviewed. (Cal. Code Regs., tit. 8, § 10964.)

We have received an answer from SIBTF. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of the Petition for Reconsideration, the supplemental Petition for Reconsideration, the answer, and the contents of the WCJ's Report. Based on our review of the record and for the reasons discussed below, as our Decision After Reconsideration we will rescind the January 29, 2020 F&O and return the matter to the trial level for further development of the record.

FACTUAL BACKGROUND

This matter was previously subject to a petition for reconsideration, which was granted on July 19, 2019. (Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration, July 19, 2019.) In our prior decision, we noted the following history of this case:

Preliminarily, we note that the issue of applicant's entitlement to SIBTF benefits was initially set for trial on June 15, 2016. The parties were given until July 15, 2016 to submit points and authorities regarding the issue of SIBTF liability, whereupon the matter would be submitted. Points and authorities were timely submitted by applicant and by SIBTF. However, on August 10, 2016, the WCJ issued an Order Vacating Submission and Ordering Further Discovery. "Specifically," wrote the WCJ in his Order, "the parties are to elicit an opinion from the AME, Dr. Plesons, whether Applicant had a preexisting labor disabling permanent disability, prior to the industrial injury." At an August 17, 2016 hearing, it was noted that "SIBTF will write letter to doctor." Nevertheless, despite the fact that the WCJ found that further development of the record was necessary, the fact that defendant was designated to contact Dr. Plesons, and the fact that applicant carries the burden of proof on the issue {Brown v. Workmen's Comp. Appeals Bd. (1971) 20 Cal.App.3d 903, 915 [36 Cal.Comp.Cases 627]}, no further evidence was procured or admitted into the evidentiary record.

Ultimately the WCJ rendered a decision on an evidentiary record he had previously found to be inadequate. Additionally, the WCJ did not adequately explain the basis behind his decision as required by Labor Code section 5313. In the further proceedings, the record must be further developed and the WCJ must explain the basis behind any findings in reference to the applicable law regarding entitlement to SIBTF benefits, which we summarize below.

(*Id.* at p. 2, lines 10-26.)

After ordering the parties to develop the record, this matter was resubmitted upon the exact same record as before. The WCJ analyzed the exact same record and issued a decision contrary to his prior decision. The WCJ's Opinion on Decision did not provide any analysis or reasoning, but simply concluded that applicant failed to meet her burden to prove her pre-existing disability was labor disabling.

Applicant explains that the prior reporting doctor is no longer available to develop the record. (Petition for Reconsideration, February 11, 2023, p. 4, lines 21-23.)

DISCUSSION

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.) The preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2003) 67 Cal.Comp.Cases 138 (Appeals Board en banc).)

Substantial justice is "[j]ustice fairly administered according to the rules of substantive law, regardless of any procedural errors not affecting the litigant's substantive rights; a fair trial on the merits." (Black's Law Dictionary (7th ed. 1999).)

Section 5313 requires the WCJ to produce "a summary of the evidence received and relied upon and the reasons or grounds upon which the [court's] determination was made." (Lab. Code, § 5313; see also *Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613, 621-622 (Appeals Board en banc).) The WCJ's opinion on decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc), citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350].) A decision "must be based on admitted evidence in the record" (*Hamilton, supra*, at p. 478), and must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb, supra*, 11 Cal.3d at p. 281; *Garza v. Workmen's*

Comp. Appeals Bd. (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) Where the issue in dispute is a medical one, expert medical evidence is ordinarily needed to resolve the issue. (*Insurance Co. of North America v. Workers' Comp. Appeals Bd.* (1981) 122 Cal.App.3d 905, 912 [176 Cal. Rptr. 365, 46 Cal.Comp.Cases 913]; *Peter Kiewit Sons v. Industrial Acc. Com.* (1965) 234 Cal.App.2d 831, 838 [30 Cal.Comp.Cases 188].)

This matter was tried, decided, and appealed. On July 19, 2019, we granted the appeal, noted the deficiencies in the record regarding applicant's need to prove a labor disabling injury pre-existed the industrial injury, and remanded for further development. Thereafter, the matter was resubmitted upon the exact same record.

To the extent that applicant argues that the record establishes her entitlement to SIBTF benefits, we reviewed this record in 2019, issued a decision establishing the deficiencies in the record, and ordered the parties to develop the record. Our prior decision stands.

The preferred procedure is to supplement the medical record by the physicians who have already reported in the case. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2003) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) However, where the prior physician is unavailable, the parties may proceed via evaluation with replacement physicians or the WCJ may order an examination of applicant to proceed with a regular physician. (Lab. Code, § 5701.) Where the prior physician is unavailable, it is not acceptable to resubmit the same record, which was already adjudicated to be deficient.

To enter a final judgment on applicant's SIBTF application, we require an opinion that constitutes substantial medical evidence addressing whether applicant's pre-existing non-industrial disability was labor disabling. Please obtain such evidence prior to resubmitting.

Accordingly, as our Decision After Reconsideration we rescind the January 29, 2020 F&O and return the matter to the trial level for further development of the record.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact and Order of January 29, 2020, is **RESCINDED** and that this matter is **RETURNED** to the trial level for further proceedings and decision consistent with the opinion herein.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



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.

**GHITTERMAN GHITTERMAN & FELD
OD LEGAL – LOS ANGELES
SUBSEQUENT INJURIES BENEFITS TRUST FUND
VICTORIA ENRIQUEZ**

EDL/oo

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