

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

VICTOR ROMERO, *Applicant*

vs.

**SANTA BARBARA SMOKEHOUSE; COMPWEST INSURANCE COMPANY,
*Defendants***

**Adjudication Number: ADJ13703697
Santa Barbara District Office**

**OPINION AND ORDER DENYING
PETITION FOR
RECONSIDERATION**

Defendant seeks reconsideration of the February 21, 2025 Findings and Award (F&A) wherein the workers' compensation administrative law judge (WCJ) found, in relevant part, that applicant, while employed by defendant on June 11, 2020, "sustained injury arising out of and the in course of employment (AOE/COE) as a result of COVID 19 in the form of pulmonary fibrosis and chronic lung disease" thereby entitling applicant to "temporary disability greater than 104 weeks pursuant to Labor Code § 4656(c)(3)(H) & (I)[,] subject to a physician's finding of total temporary disability." (F&A, p. 1.) Pursuant to the WCJ's Opinion on Decision (OOD), panel Qualified Medical Evaluator (PQME), Dr. Gerald Markovitz, found that applicant reached "P&S/MMI" status as of the November 13, 2024 reevaluation. (OOD, p. 2.) As such, applicant is entitled to temporary disability through November 13, 2024. (*Ibid.*)

Defendant contends that the report of Dr. Markovitz is not substantial medical evidence and that defendant's "due process rights have been affected" by the WCJ's refusal to await issuance of his decision until after defendant's May 29, 2025 deposition of Dr. Markovitz. (Petition for Reconsideration (Petition), p. 9.)

We have not received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition and the contents of the Report, and we have reviewed the record in this matter. Based upon the Report and the OOD, which we adopt and incorporate herein, we will deny the Petition.

FACTS

Applicant claimed that, while employed by defendant as a manager on June 11, 2020, he contracted COVID-19 and as a result, developed pulmonary fibrosis and chronic lung disease, in addition to injury and symptoms to the head (headaches), psyche, reproductive system, and excretory system.

On April 27, 2021, the parties appeared at trial on the issue of injury AOE/COE. On July 7, 2021, a Findings of Fact issued wherein the WCJ found applicant had sustained injury AOE/COE in the form of COVID-19. The findings were not appealed and became final.

Thereafter, the parties proceeded with discovery and retained a number of PQMEs, including pulmonary PQME, Dr. Gerald Markovitz, neurology PQME, Dr. Mohamed Elsharif, urology PQME, Dr. Mark Vogel, psyche PQME, Dr. Dmitriy Sherman, and otolaryngology PQME, Dr. B. Chandler May.

Dr. Markovitz evaluated the applicant on January 26, 2022 and issued supplemental reports on July 11, 2022 and April 19, 2023. He was also deposed on August 8, 2024. (Exhibit 5.)

On November 13, 2024, Dr. Markovitz completed a reevaluation of the applicant and issued a report wherein he found applicant's "pulmonary fibrosis was an unfortunate sequelae of his COVID-19 infection" and that applicant "may be entitled to additional temporary disability benefits beyond the 104 weeks[.]" (Exhibit 6, p. 11.) He noted, however, that applicant had reached "P&S/MMI" status as of the date of the November 13, 2024 reevaluation. (*Ibid.*)

On January 10, 2025, applicant filed a Declaration of Readiness to Proceed to an expedited hearing on the issues of entitlement to medical treatment under section 4600 and temporary disability.

On January 29, 2025, the matter proceeded to an expedited hearing on the issues of attorney's fees; whether applicant developed pulmonary fibrosis and chronic lung disease on an industrial basis; and if so, whether it entitled applicant to temporary disability in excess of 104 weeks under section 4656(c)(3)(H)-(I). Earnings and section 5813 and 5814 sanctions, penalties, and costs were deferred.

On February 21, 2025, the WCJ issued an F&A which held that applicant, while employed by defendant on June 11, 2020, “sustained injury arising out of and the in course of employment as a result of COVID 19 in the form of pulmonary fibrosis and chronic lung disease” thereby entitling applicant to “temporary disability greater than 104 weeks pursuant to Labor Code § 4656(c)(3)(H) & (I)[,] subject to a physician’s finding of total temporary disability.” (F&A, p. 1.) In his OOD, the WCJ noted that per the November 13, 2024 report of Dr. Markovitz, applicant reached permanent and stationary status as of the date of the reevaluation and was therefore entitled to temporary total disability up to November 13, 2024. (OOD, p. 2.)

DISCUSSION

I.

Preliminarily, former Labor Code¹ 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, 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 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 under the Events tab 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.”

¹ All further statutory references will be to the Labor Code unless otherwise indicated.

Here, according to Events, the case was transmitted to the Appeals Board on March 25, 2025, and 60 days from the date of transmission is May 24, 2025, which is a Saturday. The next business day that is 60 days from the date of transmission is Tuesday, May 27, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)² This decision was issued by or on May 27, 2025, so that we have timely acted on the petition as required by section 5909(a).

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. Section 5909(b)(2) provides that service of the Report shall constitute notice of transmission.

Here, according to the proof of service for the Report, it was served on March 25, 2025, and the case was transmitted to the Appeals Board on March 25, 2025. 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 section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on March 25, 2025.

II.

Section 4656(c) states, in relevant part, that:

(1) Aggregate disability payments for a single injury occurring on or after April 19, 2004, causing temporary disability shall not extend for more than 104 compensable weeks within a period of two years from the date of commencement of temporary disability payment.

(2) Aggregate disability payments for a single injury occurring on or after January 1, 2008, causing temporary disability shall not extend for more than 104 compensable weeks within a period of five years from the date of injury.

(3) Notwithstanding paragraphs (1) and (2), for an employee who suffers from the following injuries or conditions, aggregate disability payments for a single injury occurring on or after April 19, 2004, causing temporary disability shall not extend

² 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.

for more than 240 compensable weeks within a period of five years from the date of the injury:

...

(H) Pulmonary fibrosis.

(I) Chronic lung disease.

(Lab. Code, § 4656(C)(1)-(3).)

In the instant matter, applicant has been diagnosed with “status-post severe case of COVID-19 pneumonia with mechanical ventilation.” (Exhibit 6, p. 9.) PQME, Dr. Markovitz, also concluded that as “an unfortunate sequelae of his COVID-19 infection,” applicant developed pulmonary fibrosis which entitled applicant to “additional temporary disability benefits beyond the 104 weeks[.]” (*Id.* at p. 11.) He noted that applicant “would be considered to have a chronic lung disease” because of ongoing symptoms of pulmonary fibrosis. (*Ibid.*) Based upon the results of his pulmonary function breathing test, however, applicant was deemed “P&S/MMI” as of the date of the November 13, 2024 reevaluation. (*Ibid.*)

Defendant contends that Dr. Markovitz’s report is not substantial medical evidence. As explained in *Hamilton v. Lockheed Corporation* (Hamilton) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc), a decision “must be based on admitted evidence in the record” (*Id.* at p. 478) and must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952, subd. (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. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) “The term ‘substantial evidence’ means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion...It must be reasonable in nature, credible, and of solid value.” (*Braewood Convalescent Hospital v. Workers’ Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.) A medical opinion proffered as substantial evidence must be framed in terms of reasonable medical probability, be based on pertinent facts, an adequate examination, and history, set forth reasoning in support of its conclusions, and not be speculative. (*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 Bd. en banc).) Reasonable medical probability, however, does not require that applicant prove causation by “scientific certainty.” (*Rosas v. Workers’ Comp. Appeals*

Bd. (1993) 16 Cal.App.4th 1692, 1700- 1701 [58 Cal.Comp.Cases 313].) Also, “[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.)

Based upon our review of the November 13, 2024 report of Dr. Markovitz, we find that Dr. Markovitz provided adequate reasoning and relied upon relevant facts and history, including a thorough examination of the applicant and detailed analysis of various medical records including diagnostic exams pertaining to applicant’s pulmonary functioning. Although, as defendant points out, applicant’s “diffusing capacity and lung volumes have improved,” we note that per Dr. Markovitz, applicant still has “symptoms of effort intolerance” and “diminished aerobic capacity based on [applicant’s] history and the available cardiopulmonary exercise test.” (Petition, p. 6; Exhibit 6, pp. 10-11.) Due to ongoing symptoms of pulmonary fibrosis, Dr. Markovitz therefore concluded that applicant had developed chronic lung disease although applicant reached “P&S/MMI” status as of the date of the November 13, 2024 reevaluation based upon pulmonary function tests. (*Id.* at p. 11.) In our analysis, we found no evidence of bias, speculation, or inexperience on the part of Dr. Markovitz and no evidence, proffered by defendant or otherwise, to rebut Dr. Markovitz’s findings. As such, we find that the November 13, 2024 PQME report of Dr. Markovitz constitutes substantial medical evidence.

Lastly, we agree with the WCJ that although applicant was found to be entitled to additional temporary disability, none was awarded at the time of the January 29, 2025 expedited hearing. (Report, pp. 2-3.) As such, “if there is additional development of the record needed following the [May 29, 2025] deposition of Dr. Markovitz, the Court can address it at that that time.” (*Id.* at p. 2.)

Accordingly, we deny defendant’s Petition.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the February 21, 2025 Findings and Award is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 22, 2025

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

**VICTOR ROMERO
WOLFF-WALKER LAW FIRM
LAW OFFICES OF STUART NAGEL**

RL/cs

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