

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

JOSE ROSALES, *Applicant*

vs.

SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendant*

**Adjudication Number: ADJ10175755
San Jose District Office**

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration¹ to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration filed by applicant Jose Rosales. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the June 21, 2022 Findings and Order, wherein the workers' compensation administrative law judge (WCJ) found, in relevant part, that applicant did not satisfy the threshold requirements of Labor Code, section 4751, in establishing entitlement to benefits from the Subsequent Injuries Benefits Trust Fund (SIBTF).

Applicant contends that the WCJ erred because (1) she required prior contemporaneous medical records to establish preexisting disability, (2) she ignored trial testimony as to his preexisting impairment, (3) there exists another pathway to meet the 5% eligibility threshold, namely, that the subsequent injury resulted in low back pain that radiated into applicant's left buttocks and that there is prior medical evidence noting right buttocks pain, and (4) the report of primary treating physician for the subsequent injury, Michael Newman, D.C., is not substantial evidence for purposes of SIBTF benefits and the WCAB should further develop the record on applicant's preexisting left shoulder disability.

We received an answer from SIBTF. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

¹ Commissioner Sweeney, who was previously a panelist in this matter, no longer serves on the Appeals Board. Another panelist has been assigned in her place.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. Based on the Report, which we adopt and incorporate, we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the June 21, 2022 Findings and Order is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 2, 2026

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

**JOSE ROSALES
LAW OFFICES OF ROBERT T. BLEDSOE
DIR, OFFICE OF THE DIRECTOR – LEGAL UNIT**

LSM/ara

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
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REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

- | | |
|-------------------------------|---|
| 1. Applicant's Occupation: | Production associate (340) |
| Applicant's Age: | 61 years old at time of alleged injury |
| Date of Injury: | 10/20/2015 |
| Parts of Body Injured: | Back, right shoulder |
| 2. Identity of Petitioner: | <u>Applicant</u> filed the petition. |
| Timeliness: | The petition was timely filed on 07/08/2022 |
| Verification: | The petition was properly verified. |
| 3. Date of Issuance of Order: | 06/21/2022 |
| 4. Petitioners Contends: | Petitioner contends the undersigned acted without or in excess of her powers and that evidence does not justify the findings of fact. Petitioner's proof of service is defective as it failed to serve all parties of record. |

Defendant did not file an Answer by the time of writing this report.

II

FACTS

Applicant sustained injury to his back and right shoulder while employed as a production associate by Telsa Motors on 10/202015. Said subsequent industrial injury claim settled by way of Compromise and Release agreement on 06/01/2017 based on report of Michael Newman, D.C. dated 12/01/2016. Subsequently, applicant filed an application for Subsequent Injuries Benefits Trust Fund (SIBTF) benefits alleging pre-existing disability to his back, right shoulder and lower extremities on or about 8/24/2018. Applicant utilized Drs. Christopher Chen and Rosein Tahami as his Qualified Medical Evaluators for his SIBTF claim. OD Legal for SIBTF did not obtain its own QME but relied on Dr. Newman's report in denying applicant's entitlement to SIBTF benefits. Matter proceeded to trial, was submitted for decision on 4/27/2022. The undersigned issued a Findings and Order on 6/21/2022 finding that applicant failed to meet the 5% opposite and corresponding threshold and was not entitled to SIBTF benefits. It is from this Findings and Order that applicant seeks relief.

III

DISCUSSION

Standard to qualify for SIBTF benefits under Labor Code § 4751

To be eligible for Subsequent Injuries Benefits Trust Fund (SIBTF) under Labor Code Section 4751, applicant must demonstrate that (1) he had pre-existing permanent partial disability; (2) the permanent disability from the subsequent industrial injury either (a) produces 35 percent disability or more or (b) 5 percent disability or more to an "opposite and corresponding member, (3) the combined pre-existing and subsequent permanent partial disability is greater than the subsequent permanent partial disability alone; and (4) the combined pre-existing and subsequent permanent partial disability is equal to 70 percent or more. To meet the 5% threshold, the prior disability or impairment must be a hand, an arm, a foot, a leg or an eye, and the permanent disability resulting from the subsequent injury must affect the opposite and corresponding member, but need not be opposite and corresponding body parts.

The legislative intent of the Labor Code § 4751 and the purpose of SIBTF benefits is both to encourage disabled persons to seek employment and to encourage employers to hire them. Chief requirement for SIBTF benefits is that the pre-existing condition must have been actually "labor disabling" prior to the occurrence of the subsequent industrial injury. *Ferguson v. Industrial Acc. Com. (1958) 50 Cal.2d. 469 (California Supreme Court)*. Applicant must establish that at the time of his industrial injury, he was suffering from a ratable pre-existing partial permanent disability, although it need not have caused actual earning loss; it must simply be a disability which partial permanent disability could be made if it were industrial. *Brown v. WCAB (1970) 20 Cal.App.3d 903*. A pre-existing permanent disability "is one which causes impairment of earning capacity, impairment of the normal use of a member, or a competitive handicap in the open labor market." *Franklin v. WCAB (1978) 79 Cal.App.3d 224*.

Further, a pre-existing disability cannot be established by a retroactive prophylactic work retraction on the pre-existing condition placed on the injured worker after the subsequent injury in absence of evidence to show that the work was actually restricted in his work activity prior to the industrial injury. Meaning, whether it can be demonstrated by competent evidence that the pre-existing condition did interfere or would have interfered with any type of work activity. *Franklin supra, also Ruiz v. Workers' Comp. Appeals Bd. (2013) 78 Cal.Comp.Cases 1182 (writ denied)*.

In the present case, applicant sustained subsequent industrial injury to his low back and right shoulder. Applicant does not dispute that the lumbar spine and right shoulder subsequent industrial injury does not meet the 35% threshold.² Applicant however contends he met the 5% opposite and corresponding threshold as he had prior partial disability to his left shoulder.

Applicant contends contemporaneous medical evidence is not an absolutely requirement in establishing pre-existing partial disability when meeting the 5% opposite and corresponding threshold. Applicant appears to misinterpret or misunderstand the law. While it may be true that extensive prior medical treatment records nor prior disability be required so long as competent evidence exists to establish pre-existing disability, it must be established with sufficient evidence. Meaning, regardless of lack of any contemporaneous medical records pre-existing disability, applicant must establish that at the time of his industrial injury, he was suffering from a ratable pre-existing partial disability for which an award for partial disability could be made had it been industrially caused and were labor disabling.

In the present case, there simply was not adequate medical history nor sufficient evidence to support pre-existing partial permanent disability to the left shoulder prior to applicant's subsequent industrial injury to his right shoulder. There lacked any documented left shoulder complaints or treatment to the left shoulder prior to his 2015 subsequent industrial injury.

Applicant's subsequent industrial injury was resolved based on Dr. Newman's med-legal report of 12/1/2016. Dr. Newman was applicant's treating physician for the subsequent industrial injury claim. Dr. Newman, in preparation for his med-legal report, conducted thorough evaluation of the applicant for his back and right shoulder injury. Dr. Newman's report included detailed history of all prior claims and complaints, supported by medical history. However, Dr. Newman's report did not include any complaints to the left upper extremity. At the time of this evaluation, applicant confirmed prior right hand injury as a child that resulted in 11 surgeries, 2011 prior 2011 industrial injury as well as 2014 prior industrial injury which he did not seek medical care.³ No complaints nor limitations to left shoulder was documented. Applicant did not report that he relied on his right upper extremity when working at Tesla to compensate for the alleged pre-existing left

² Said subsequent industrial injury claim was settled based on Dr. Newman's report who found 10% WPI to lumbar spine, 2% WPI to right shoulder with 3% WPI add on for pain which did not meet the 35% threshold.

³ Prior 2002 work injury resulted in disability precluding heavy lifting, repetitive bending and stooping and loss of 50% pre-injury capacity for lifting, bending and stooping

upper extremity disability. This would have been pertinent factor in causation and apportionment for the 2015 subsequent industrial injury.

Prior injury to the left shoulder was mentioned and documented for the first time in Dr. Chen's 7/26/2019 report for the purpose of SIBTF benefits. Extensive medical records reviewed by Drs. Chen and Dr. Tahami confirmed medical history of complaints and or treatments to other body parts to support impairment to other body parts alleged, but not for the left shoulder.⁴

Again, the undersigned did not find Dr. Chen's report to be substantial medical evidence with respect to the pre-existing left shoulder disability. The undersigned found Dr. Chen's report as to the pre-existing left shoulder disability to be speculative, not supported by factors or reasons disclosed in the report, that his opinion lacked foundation. Dr. Chen relied solely on applicant's reporting at the time of his evaluation and disregarded the absence of any left shoulder complaints in any of the reports he reviewed. Also, Dr. Chen's report was internally inconsistent, not supported by any sufficient evidence. It noted that applicant reported due to his pre-existing left shoulder injury, he relied on his right shoulder to work at Tesla, and that 2015 subsequent right shoulder injury worsened his pre-existing left shoulder condition. Again, nothing remotely close to this was reported prior to his evaluation with Dr. Chen, which would have been relevant as to causation and apportionment in the subsequent industrial claim.⁵ Per Dr. Chen's report, review of Dr. Adam's 4/15/2002 report documented average Jaymar measurement of 98 pounds on the right and 97 pounds on the left. Applicant is right hand dominant. In comparison, Jaymar grip strength at Dr. Chen's evaluation in 2019 was 27, 25, 23 kg (59.5, 55, 51 lbs) on the right and 36,23,30 kg (79, 51, 66 lbs) on the left. Yet, Dr. Chen noted in his report that since the 2011 left shoulder injury, applicant was not involved in any activity that worsened his left shoulder and his disability remained the same. Dr. Chen did not provide any basis for his opinion. There simply lacked any evidence to establish that applicant had prior partial disability to his left shoulder prior to his 2015 subsequent industrial injury.

⁴ Specifically, both SIBTF QMEs, Drs. Chen and Tahami, reviewed numerous records including reports of Dr. Newman who served as the primary treater for the 2015 sii claim as well as Dr. Teresa Wong who served as the Panel QME for the sii claim. None of the records reviewed referenced any prior complaints nor injury to the left shoulder while reporting other prior injuries.

⁵ Dr. Chen reported that with the right shoulder injury superimposed onto the pre-existing left shoulder condition, applicant's upper extremities condition was worsened beyond an additive factor. However, Dr. Chen did not provide any basis for his opinion other than applicant's self reporting.

Applicant further asserts the undersigned ignored applicant's testimony at trial which constitutes substantial evidence of pre-existing disability when unrebutted. Applicant relied on *Anzevino v. SIBTF*, 2008 Cal. Wrk. Comp. P.D. LEXIS 2. However, it is important to note significant distinctions with these two cases. Unlike the present case, in *Anzevino*, applicant testified in detail as to physical limitations of his pre-existing left upper extremity prior to his subsequent industrial injury to the right upper extremity supported by sporadic medical records that predated applicant's subsequent industrial injury. While the pre-existing medical records were not sufficient to establish pre-existing disability, the records existed in that applicant had complaints to the opposite and corresponding body part prior to his subsequent industrial injury, supported by applicant's unrebutted testimony at trial. Specifically, in *Anzevino*, applicant testified to experiencing cramping, avoiding repetitive gripping and grasping with left shoulder prior to the subsequent industrial injury, experiencing specific limitations due to cramping. Applicant also testified that he had physical therapy to his left upper extremity off and on during the course of 15 years prior to his industrial injuries. There was sufficient medical history and evidence to corroborate applicant's testimony. Relevant findings in that case was that applicant's testimony of applicant's pre-existing disability, specifically cramping of the hands and avoiding specific activities and physical limitations, coupled with supporting medical records documenting prior complaints and sporadic medical treatments were enough to establish pre-existing disability.

In the present case, while applicant and his brother's testimony at trial was unrebutted regarding applicant's 2011 injury, testimony at trial alone was not sufficient to establish prior partial disability to the left upper extremity. It is unrebutted that applicant fell from a tree while vacationing in Mexico and hurt his left shoulder. Testimony was not sufficient to go beyond this nor corroborated by any medical evidence. Unlike in *Anzevino* where injured worker sought physical therapy on and off for 15 years prior to his industrial injury, applicant testified he sought a "bone setter" once in Mexico right after the fall. Unlike *Anzevino*, left shoulder complaint was not documented nor mentioned anywhere prior to the SIBTF medical-legal evaluation within applicant's extensive medical history. Applicant testified he had a hard time with the left shoulder since the fall. Applicant did not testify as to any physical limitations or any disability. Testimonies were insufficient to establish partial disability had it been industrially caused and were labor disabling. Applicant's testimony could not be corroborated by any competent evidence.

Based on review of evidence as well as considering testimony of witnesses, the undersigned did not find substantial evidence to establish pre-existing partial disability to the left shoulder prior to applicant's 2015 subsequent industrial injury.

IV

RECOMMENDATION

It is respectfully recommended that the applicant's Petition for Reconsideration be denied for the reasons stated above.

DATE: 07/22/2022

Pauline H. Suh

Workers' Compensation Judge