WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

LORENA SANTOS, *Applicant*

vs.

SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendant*

Adjudication Number: ADJ9417278
Goleta District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration[1] to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration filed by applicant Lorena Santos. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the August 29, 2022 Findings of Fact and Order, wherein the workers' compensation administrative law judge (WCJ) found, in relevant part, that applicant failed to present evidence substantiating any preexisting labor disabling permanent disability and that applicant is not entitled to benefits from the Subsequent Injuries Benefits Trust Fund (SIBF).

Applicant contends that there is sufficient evidence of applicant's preexisting disabilities through the medical reporting of Joseph R. Ambrose, DC, CCSP, and Gerald H. Markovitz, MD. Applicant further contends that Dr. Ambrose reviewed contemporaneous medical records preexisting the subsequent injury. Lastly, applicant contends that if the record is not deemed sufficient, we have the duty to develop the record rather than uphold a sweeping denial of benefits.

We received an answer from SIBTF. SIBTF contends that Dr. Markovitz never reviewed prior contemporaneous records. SIBTF further contends that although Dr. Ambrose reviewed records of treatment of applicant's symptoms from 2011 onwards, these records do not show any impairment by the time of the subsequent injury on September 10, 2012.

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[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.

The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we rescind the August 29, 2022 Findings of Fact and Order and return this matter to the trial level for further proceedings.

FACTS

As the WCJ stated in his Report:

> Applicant claimed she sustained two industrial injuries while employed at the Santa Maria Joint Union High School District. A specific injury and a continuous trauma claim.
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> Applicant was evaluated by Richard Scheinberg, M.D., in the capacity of an agreed medical examiner (AME). Dr. Scheinberg found a specific injury to her bilateral hips and bilateral shoulders, but also found applicant did not sustain a continuous trauma claim.
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> Applicant resolved both cases by way of Compromise & Release (C&R). This claim was settled via Compromise and Release (C&R).
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> In pursuit of her SIBTF claim, applicant was referred to Gerald Markovitz, M.D. in internal medicine, Arnold Gilberg, M.D.in psychiatry and Joseph Ambrose, D.C. for reporting to support the finding applicant has a pre-existing labor disabling permanent disability,
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> On June 20, 2022, an Opinion on Decision and Findings of Fact and Award issued finding applicant failed to meet her burden of proof in proving she had a pre-existing labor disabling permanent disability. (Report, p. 2.)

DISCUSSION

There are no requirements as to the origin of the preexisting disability; it may be congenital, developmental, pathological, or due to either an industrial or nonindustrial accident. (1 CA Law of Employee Injuries & Workers' Comp § 8.09 [1].) The purpose of the statute is to encourage the employment of the disabled as part of a "complete system of workmen's compensation contemplated by our Constitution." (*Patterson* (1952) 39 Cal.2d 83 [17 Cal.Comp.Cases 142]; *Ferguson v. Indus. Acc. Comm.* (1958) 50 Cal.2d 469, 475.)

The Supreme Court in *Ferguson* held that the "previous disability or impairment" contemplated by section 4751 "'must be actually 'labor disabling,' and that such disablement, rather than 'employer knowledge,' is the pertinent factor to be considered in determining whether the employee is entitled to subsequent injuries payments under the terms of section 4751." (*Ferguson, supra,* p. 477; *Escobedo v. Marshall*, 70 Cal.Comp.Cases 604, 619 (Appeals Board en banc).) The court further noted that "'the prior injury under most statutes should be one which, if industrial, would be independently capable of supporting an award. It need not, of course, be reflected in actual disability in the form of loss of earnings [as this court has already held in *Smith* v. *Industrial Acc. Com*. (1955) 44 Cal.2d 364, 367 [2, 3] [288 P.2d 64]], but if it is not, it should at least be of a kind which could ground an award of permanent partial disability. . . .'" (*Ferguson,* at p. 477, quoting Larson's Workmen's Compensation Law (1952) § 59.33 (vol. 2, p. 63).)

Further, the preexisting disability "need not have interfered with the employee's ability to work at his employment in the particular field in which he was working at the time of the subsequent injury. [citations]" (*Franklin v. Workers' Comp. Appeals Bd.* (1978) 79 Cal.App.3d 224, 238.) "The ability of the injured to carry on some type of gainful employment under work conditions congenial to the preexisting disability does not require a finding that the preexisting disability does not exist. [citations]." (*Ibid.*)

To prove a preexisting disability, there needs to be evidence prior to the subsequent injury of a medically demonstrable impairment.

> A preexisting disability cannot be established by a "retroactive prophylactic work restriction" on the preexisting condition placed on the injured after the subsequent industrial injury in absence of evidence to show that the worker was actually restricted in his work activity prior to the industrial injury. (*Hulbert* v. *Workmen's Comp. Appeals Bd., supra*, 47 Cal.App.3d 634, 640; *Gross* v. *Workmen's Comp. Appeals Bd., supra*, 44 Cal.App.3d 397, 404-405; *Amico* v. *Workmen's Comp. Appeals Bd., supra*, 43 Cal.App.3d 592, 606; see also *Bookout* v. *Workmen's Comp. Appeals Bd., supra*, 62 Cal.App.3d 214, 224-225.) Where the injured was actually under a prophylactic restriction for a preexisting condition at the time of the industrial injury, apportionment to a preexisting disability is proper. It is only the *retroactive* application of a prophylactic restriction to an otherwise nonexistent previous disability that is prohibited. (*Ibid*.)
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> The prohibition against "retroactive prophylactic work restrictions" to establish a preexisting disability is not inconsistent with the fact that prophylactic restrictions are ratable factors of permanent disability

> stemming from the industrial injury. (*Gross, supra*, 44 Cal.App.3d at p. 404.) Applying a prophylactic work restriction retroactively creates "a sort of factual or legal fiction of an otherwise nonexistent previous disability or physical impairment." (*Ibid*.) Apportionment involves a factual inquiry. (See *Mercier* v. *Workers' Comp. Appeals Bd., supra*, 16 Cal.3d 711, 716; see also, *State Comp. Ins. Fund* v. *Workers' Comp. Appeals Bd. (Gaba)* (1977) 72 Cal.App.3d 13, 16-17 [139 Cal.Rptr. 802].)
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> (*Franklin, supra,* 79 Cal.App.3d at p. 238.)

Here, Dr. Markovitz opined that applicant suffered impairment as a result of her seborrhea dermatitis and rosacea, irritable bowel syndrome, residual umbilical hernia, and fibromyalgia. (Exhibit 6, Dr. Markovitz's report dated March 15, 2019, pp. 3-5.) However, it is not clear from Dr. Markovitz's reports that these impairments were preexisting to the 2012 subsequent injury or that they were labor disabling at the time of the subsequent injury. Moreover, it appears that the medical reports that Dr. Markovitz reviewed in support of these internal conditions were dated after the subsequent injury, except for the reports suggesting that applicant suffered from fibromyalgia as early as 2011. (Exhibit 5, Dr. Markovitz's report dated October 22, 2018, p. 3; Exhibit 6, Dr. Markovitz's report dated March 15, 2019, pp. 1-3.)

While Dr. Ambrose reviewed medical records dated prior to the subsequent injury, his assignment of applicant's multiple orthopedic impairments as preexisting the subsequent injury is vague and generic. (Exhibit 8, Dr. Ambrose's report dated October 20, 2020, pp. 42-51.) He repeatedly prefaces his apportionment opinion with the following vague and generic phrase – "Based upon my examination and consultation with this applicant, as well as upon my review of the medical records provided and my clinical experience, it is my opinion . . ." – without providing any explanation as to how he came to the opinion that a certain percentage of applicant's impairment was preexisting and labor disabling. (See also, *id*., at p. 55 ["I came to the above opinions based on the current physical examination [*sic*] findings, available medical records/diagnostic reports for review, credibility of the patient, historical information as provided by the patients and clinical experience both evaluating and treating individuals with the same or similar conditions."].)

Furthermore, Arnold L. Gilberg, M.D., Ph.D., provided a psychiatric evaluation of applicant. He opined that applicant's psychiatric condition was mainly caused by the industrial injury. (Exhibit E, Dr. Gilberg's report dated October 4, 2018, p. 18.) He made no opinions regarding applicant's preexisting psychiatric condition. (*Ibid*.)

Accordingly, we agree with the WCJ that applicant failed to prove she suffered from preexisting labor disabling permanent disability. However, we do note the existence of several medical records prior to the subsequent injury noting orthopedic conditions and fibromyalgia. As such, we rescind the August 29, 2022 Findings of Fact and Order and return this matter to the trial level to further develop the record. (*Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 393-395 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; see §§ 5701 and 5906 and *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Bd. en banc).)

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the August 29, 2022 Findings of Fact and Order is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 16, 2026

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

LORENA SANTOS
GHITTERMAN, GHITTERMAN & FELD
DIR, OFFICE OF THE DIRECTOR LEGAL

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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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