WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

NANCY JOHNSON, *Applicant*

vs.

CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION; legally uninsured, administered by State Compensation Insurance Fund, *Defendants*

Adjudication Numbers: ADJ4265793 (GOL 0097124) (MF); ADJ3983602 (GOL 0097125); ADJ7323352
Goleta District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the Opinion and Decision After Reconsideration (ODAR) issued on February 2, 2026 by the Workers' Compensation Appeals Board (WCAB), wherein we rescinded the Joint Findings of Fact and Award issued on June 14, 2022 by the workers' compensation administrative law judge (WCJ) and substituted a new F&A that found, in pertinent part: (1) that applicant sustained injury arising out of and in the course of employment (AOE/COE) while employed by defendant on April 26,2001 and on February 1, 2022 as a firefighter to her lumbar spine and internal systems in the form of hepatitis (ADJ4265793 and ADJ3983602); (2) that applicant sustained injury AOE/COE while employed by defendant during the period from April 6, 2001 through March 6, 2002, to her neck, left shoulder, left knee, right knee, and internal system in the form of hepatitis C (ADJ7323352); (3) that applicant is entitled to temporary disability benefits during the period April 26, 2001 to December 6, 2004, less any ineligible periods under Labor Code section 3370[1], not to exceed 240 weeks; and (4) that applicant is entitled to a joint award of 100% permanent disability, without apportionment, beginning December 7, 2004 to present and continuing, less attorney fees.

Defendant contends that that the combined award of 100% permanent disability is not based on substantial evidence because Agreed Medical Evaluator (AME) Richard Scheinberg, M.D., parceled out permanent disability amongst the three industrial injuries; that no overlap exists

[1] Unless otherwise stated, all further statutory references are to the Labor Code.

between the cumulative injury and the two specific injuries, precluding a combined award; that it is entitled to conduct additional discovery to address any alleged defects in apportionment; and that the opinions of vocational expert reports of David Van Winkle were not substantial evidence. Finally, defendant argues that our September 6, 2022 "Opinion and Order Granting Petitions for Reconsideration" (Order) was an impermissible "grant-for-study" in violation of section 5908.5 under *Earley v. Workers' Comp. Appeals Bd.* (2023) 94 Cal.App.5th 1 [88 Cal.Comp.Cases 769]; and that both Petitions for Reconsideration were dismissed by operation of law pursuant to section 5909.

Applicant filed an Answer contending that the doctrine of invited error bars defendant from reopening the record again to allow it to meet its burden of proof on apportionment; that the reports of Mr. Van Winkle are substantial vocational evidence; and that *Earley* does not invalidate our decision.

We have considered the Petition for Reconsideration and the Answer, and we have reviewed the record in this matter. As discussed in our ODAR, which we adopt and incorporate, and as discussed below, we will deny reconsideration.

DISCUSSION

I.

Former 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 in Events 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."

Here, according to Events, the case was transmitted to the Appeals Board on February 27, 2026, and 60 days from the date of transmission is April 28, 2026. This decision is issued by or on April 28, 2026, 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 and Recommendation shall be notice of transmission.

Here, because the Petition for Reconsideration involves a decision of the Appeals Board, no Report was prepared by the WCJ, and no other notice to the parties of the transmission of the case to the Appeals Board was provided by the district office. Thus, we conclude that the parties were not provided with the notice of transmission required by section 5909(b)(1). While this failure to provide notice does not alter the time for the Appeals Board to act on the petition, we note that as a result the parties did not have notice of the commencement of the 60-day period on February 27, 2026.

II.

Defendant contends that our Order of September 6, 2022 was merely a "boilerplate" grant-for-study order that failed to comply with section 5908.5, and therefore, by operation of law, requires summary denial pursuant to former section 5909. We disagree.

Former section 5909 deems a petition for reconsideration denied by operation of law only when the Appeals Board fails to act within 60 days of filing. The Appeals Board acts within the meaning of section 5909 when it issues an order granting reconsideration within that statutory period, even when it grants reconsideration to permit further study of the record. (*Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 754–755 [33 Cal.Comp.Cases 350]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16]; *Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1075-1076 [65 Cal.Comp.Cases 508].) Once we grant reconsideration, the 60-day limitation is satisfied, and

the matter remains within the jurisdiction of the Appeals Board for issuance of a final decision on the merits. (Lab. Code, §§ 5901, 5906.)

Here, applicant and defendant filed their Petitions for Reconsideration on July 12, 2022, and on September 6, 2022, less than 60 days from the date of filing of the petition, we issued our Order. Accordingly, we acted within the time limits prescribed by former section 5909. Neither applicant nor defendant sought reconsideration or appellate review in response to our Order.

Defendant's reliance on the characterization of the September 6, 2022 order as "boilerplate" is unavailing. Even assuming that the order contained standardized language indicating that we granted reconsideration to permit further study of the factual and legal issues, such language does not render the order a nullity for purposes of former section 5909. The statutory requirement under section 5909 is that the Appeals Board act within 60 days. There is no requirement that a final decision issue within 60 days. The issuance of an order granting reconsideration, whether detailed or concise, constitutes timely action and preserves the Appeals Board's jurisdiction.

Nor does the holding in *Earley* compel a different result. *Earley* became final on September 11, 2023, a year after our Order, and addressed whether a grant-for-study order satisfies the separate requirements of section 5908.5 that a decision state the evidence relied upon and the reasons for the decision. It did not hold that such an order fails to constitute "action" under section 5909 or that it results in denial by operation of law. In the present case, any deficiency in the level of detail in the September 6, 2022 order does not negate the fact that we timely granted reconsideration within the statutory period. (*Earley, supra*, 94 Cal.App.5th at p. 11 ["Section 5908.5 sets the requirements for a decision. Section 5909 explains the consequence of no decision . . . Section 5909 does not apply here because in each of these cases the Board rendered some decision, not no decision."].)

Accordingly, we conclude that we timely acted on the Petitions for Reconsideration and that we retained jurisdiction to issue our subsequent decision after reconsideration.

III.

Defendant next contends that applicant failed to meet her burden of proving permanent total disability in accordance with *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234 [48 Cal.Comp.Cases 587] based on vocational expert Mr. Van Winkle. After a thorough review of

the record, we continue to conclude that his reports and testimony are the most persuasive and reliable evidence on this issue.

To constitute substantial evidence, a vocational expert must predicate their opinion on reasonable vocational probability, root their analysis in the underlying medical record, and establish a logical nexus between the medical restrictions and an employee's inability to compete in the open labor market. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).) The reports of Mr. Van Winkle meet this standard because his analysis strictly tethered his findings to the findings of AME Dr. Scheinberg. Mr. Van Winkle did not cherry-pick restrictions but incorporated the totality of AME Dr. Scheinberg's clinical picture, including: (1) the semi-sedentary limitation of intermittent sitting and standing; (2) the preclusion from at-or-above shoulder-level activities; (3) the preclusion from repetitive cervical rotation or flexion-extension; and (4) the impact of chronic pain and narcotic dependency.

Crucially, in his report dated April 10, 2019, AME Dr. Scheinberg reviewed Mr. Van Winkle's assessment and expressly concurred, stating that applicant is "not capable of resuming work nor is she able to undergo vocational rehabilitation." (WCAB Ex. TT, p. 5.) This alignment between the medical and vocational experts provides a high degree of evidentiary certainty.

Mr. Van Winkle's opinion is not merely conclusory. He performed a detailed "transferable skills" and "labor market" analysis, testing applicant's residual functional capacity against specific occupations. Mr. Van Winkle systematically demonstrated why roles such as Telemarketer, Bench Assembler, and Parking Lot Attendant are unavailable to applicant.

For example, he noted that, while a Bench Assembler may allow for sitting or standing, the role requires frequent neck flexion and rotation, expressly prohibited by AME Dr. Scheinberg. Similarly, VE Mr. Van Winkle noted that the "semi-sedentary" requirement, where an individual must change positions at will without disrupting the workflow, is a "highly restrictive" vocational profile that most entry-level employers cannot accommodate.

Finally, Mr. Van Winkle's reasoning is persuasive where he concludes that while a single "semi-sedentary" restriction might not preclude all employment, the cumulative effect of the cervical, lumbar, and upper extremity restrictions, when coupled with the cognitive "interference of chronic pain" and opioid use, effectively renders applicant unmarketable and untrainable.

IV.

Defendant further challenges the finding that applicant is entitled to a joint award of permanent disability without apportionment. The burden of proving apportionment rests with defendant. (*Pullman Kellogg v. Workers' Comp. Appeals Bd.* (*Normand*) (1980) 26 Cal.3d 450, 456 [45 Cal.Comp.Cases 170]; *Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1115 [71 Cal.Comp.Cases 1229].) To constitute substantial medical evidence, an evaluating physician must provide a reasoned explanation as to the "how and why" specific non-industrial factors or prior injuries are contributing to the current level of permanent disability. (*Escobedo*, *supra*, *70* Cal.Comp.Cases at p. 621.)

Defendant first points to AME Dr. Scheinberg's attribution of 50% of the right knee permanent disability to "degenerative arthritis." However, a mere diagnostic label is not a substitute for a legal explanation. He failed to identify any specific medical records, radiographic findings, or clinical history that demonstrated the existence of this condition prior to the industrial injuries, nor did he explain how such a condition would have resulted in disability absent the industrial trauma. Because this opinion is a bare legal conclusion, it does not meet the standard of substantial medical evidence.

Regarding the lumbar spine, defendant argues dividing the disability equally between the two specific industrial injuries is substantial medical evidence. While AME Dr. Scheinberg did suggest this 50/50 split, he provided no medical or physiological rationale for why to divide equally the disability between the 2001 and 2002 incidents. In the absence of a narrative explaining the distinct impact of each injury on the final permanent disability, his opinion fails to establish the "how and why" justifying the apportionment.

Defendant further challenges the vocational evidence, suggesting it ignores the medical apportionment. We disagree. Where medical apportionment is legally deficient, as is the case with the lumbar spine and right knee, a vocational expert may properly conclude that applicant is unable to compete in the open labor market without apportionment. (*Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 894, 903 (Appeals Board en banc) ["[I]n those instances where there is a significant question as to the validity of a physician's medical apportionment opinion, the vocational expert is free to offer their analysis in the alternative"].)

Finally, we address defendant's request for further development of the record. We note that, on January 14, 2020, we returned this case for the explicit purpose of addressing

apportionment deficiencies. Thus, defendant had many opportunities to seek supplemental reporting or depose AME Dr. Scheinberg to cure the conclusory nature of his reports. Having failed to do so, defendant cannot now complain of a record it failed to develop. To allow defendant another opportunity would result in even further protracted delay and unfairly prejudice applicant.

Accordingly, we affirm our joint award of 100% permanent disability without apportionment.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Opinion and Decision After Reconsideration issued on February 2, 2026 by the Workers' Compensation Appeals Board is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG L. SNELLINGS, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 28, 2026

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

NANCY JOHNSON
LAW OFFICE OF ALLAN FENTON
STATE COMPENSATION INSURANCE FUND

DLP/md

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