WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

KEN JENSEN, *Applicant*

vs.

SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendants*

Adjudication Number: ADJ9489540
Santa Barbara District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of the Amended Findings and Award (F&A) issued on April 5, 2024, wherein the workers' compensation administrative law judge (WCJ) found as relevant that (1) while employed as a deputy director of social services during the period January 1, 2007 through February 16, 2013, applicant sustained injury arising out of and in the course of employment in the form of hypertension, cognitive impairment, and neurologic deficit; (2) no attorney fees have been paid in connection with the application for SIBTF benefits; (3) applicant's permanent disability start date is October 25, 2013; (4) applicant sustained an injury in the form of hypertension in the amount of 42 percent without adjustment for age, occupation, or apportionment; (5) applicant sustained an injury in the form of visual loss in the amount of 28 percent without adjustment for age, occupation, or apportionment; (6) applicant sustained an injury in the form of cognitive impairment in the amount of 5 percent without adjustment for age, occupation, or apportionment; (7) applicant meets the 35 percent permanent disability threshold from the subsequent industrial injury alone as required by Labor Code section 4751(b)[1] and is entitled to SIBTF benefits; (8) applicant is permanently totally disabled (100%); (9) the subsequent industrial injury resulted in a findings and award being issued on March 26, 2019; (10) applicant filed a claim for benefits under the Subsequent Benefits Injury Trust Fund (SIBTF) on or about March 3, 2022; (11) SIBTF is entitled to a credit right of $36,570.00; (12) defendant failed to meet its burden of proof to show the claim was untimely and the claim is not barred by the statute of limitations; (13)

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

defendant failed to meet its burden to prove with specificity the amount of its entitlement to offsets and/or credits beyond the credit provided for above; and (14) applicant's attorney is entitled to a 25 percent attorney fee.

The WCJ issued an award in applicant's favor in accordance with these findings.

Defendant contends that the WCJ erroneously (1) relied on the holding in *Bookout v. Workmen's Comp. Appeals Bd. (*1976) 62 Cal.App.3d 214 [41 Cal.Comp.Cases 595] to find that applicant meets the 35 percent permanent disability threshold from the subsequent industrial injury alone as required by section 4751(b); and (2) failed to find that the petition for SIBTF benefits was untimely.

We received an Answer from applicant.

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

We have considered the allegations of the Petition, the Answer, and the Report. Based on our review of the record, and for the reasons stated below, we will grant reconsideration, and, as our Decision After Reconsideration, we will affirm the F&A, except that we will amend to find that the subsequent industrial injury resulted in a findings and award which became final on May 3, 2018, and that the issue of the amount of the attorney's fee is deferred.

FACTUAL BACKGROUND

On August 10, 2016, the WCJ found that applicant sustained injury during the period of January 1, 2007 through February 16, 2013 in the form of hypertension, cognitive impairment and neurologic deficit; applicant is entitled to permanent disability award of 34 percent, equivalent to 159.00 weeks at the rate of $230.00 per week, in the total sum of $36,570.00 payable commencing October 25, 2013; and that there is a legal basis for apportionment as reflected in the above rating. (Findings of Fact and Award, August 16, 2016; Opinion on Decision, August 16, 2016.)

On August 24, 2016, applicant filed a petition for reconsideration, challenging the WCJ's finding of apportionment. (Petition for Reconsideration, August 24, 2016.)

On May 3, 2018, the Appeals Board issued its decision on the petition for reconsideration, affirming the finding of 34 percent permanent disability after apportionment. (Opinion and Decision After Reconsideration, May 3, 2018, p. 1.) The decision states:

On January 5, 2015, Dr. Hyman issued a supplemental report based on a medical record review. (Applicant's Exh. 2.) This review included the records of Michael S. Haverty, M.D., up to May 2014. Dr. Hyman said that Dr. Haverty's records show that applicant had "all normal blood pressures" from June 28, 2005 through October 22, 2010. (Id., at p. 2.) In November 2012, however, applicant's blood pressure was 154/100, although when repeated on the same day it was 145/90. (Id., at p. 2; see also Dr. Haverty's 11/9/12 medical notes [Defendant's Exh. A, at p. 1].) Dr. Hyman then recited:

These records suggest that he did in fact have preceding hypertension shortly before his [February 13, 2013] stroke. His blood pressure had to be repeated and it was borderline.
. . .
He was placed on blood pressure medication after the stroke but has evidence of hypertensive heart disease suggesting that the hypertension was pre-existing and longstanding.
. . .
Dr. Espy stated he did not attribute any of the mental or eye impairment he found to applicant's obesity or to his consumption of hypertensive medications. (Applicant's Exh. 6, at 18:23-19:9.) Dr. Espy indicated that applicant's stroke was the sole cause of his visual and mental status impairment. (Id., at 19:21-20:18.) Dr. Espy also declared that applicant's hypertension, his obesity, and his genetic makeup were all risk factors that combined to cause the hypertensive stroke. (Id., at 20:19-21:6.)

Dr. Espy, the neurologist who evaluated applicant at Dr. Hyman's request, issued his report on April 16, 2015. (Applicant's Exh. 5.) Dr. Espy opined that applicant's February 13, 2013 stroke was a right posterior temporal infarction with a left upper quadrant anopsia. (Id., at p. 3.) Dr. Espy then said:

. . . This was an arteriosclerotic narrowing of the right posterior cerebral artery and that hypertension was a major factor. Patient has also been left with increased fatigability and mild emotional lability. He also tells me that he has some mild memory issues as a result of the stroke. He has been able to live with the modifications and has missed little if any work. He is currently on a reduced daily hourly schedule working 7 hours a day rather than the long days he was putting in before.
. . .
On May 21, 2015, Dr. Hyman issued a supplemental report based on a review of Dr. Espy's April 16, 2015 report. (Applicant's Exh. 3.) Dr. Hyman said:

Consultation was obtained from C. Espy, M.D. In his 4/16/15 report, he agrees that the stroke is of a hypertensive nature.
. . .
Dr. Espy added that, absent the stroke, the impairment he found would not exist. (Applicant's Exh. 6, at 21:10-21:13.)

. . .

Dr. Espy then went on to say that applicant had various risk factors for a stroke, including: high blood pressure (id., at 8:8-8:16; 8:21-9:6); cholesterol and hyperlipidemia issues (id., at 9:9-9:17); being overweight (id., at 10:3-10:20); and a family history of stroke and heart attack (id., at 10:21-11:8). Dr. Espy opined that the high blood pressure alone was about a one-third cause (33% or 35%) of the stroke (id., at 8:8-8: 12; 8:21-9:6.) He further stated that applicant "was under a lot of stress at his workplace and that had an effect on his blood pressure," and that these work activities probably caused 33% of his impairment. (Id., at 8:13-8:23; see also 8:22-8:23 ["I think the stress level that he had made the blood pressure worse"]; 10:3-10:4 ["The high blood pressure, I think, was in part related and aggravated by industrial causes."].)

. . .

Dr. Espy stated he did not attribute any of the mental or eye impairment he found to applicant's obesity or to his consumption of hypertensive medications. (Applicant's Exh. 6, at 18:23-19:9.)

Dr. Espy indicated that applicant's stroke was the sole cause of his visual and mental status impairment. (Id., at 19:21-20:18.) Dr. Espy also declared that applicant's hypertension, his obesity, and his genetic makeup were all risk factors that combined to cause the hypertensive stroke. (Id., at 20:19-21:6.)

Dr. Espy added that, absent the stroke, the impairment he found would not exist. (Applicant's Exh. 6, at 21:10-21:13.)

. . .

Dr. Hyman opined that applicant's impairment was 35% industrially-caused because 35% of his hypertension was work-related, while the other 65% of his hypertension was due to non-industrial factors, particularly his family history of hypertension and his own obesity. (Id., at 7:7-7:8; 22:6-23:8.)[fn] That is, the stroke was a natural progression of the hypertension and is apportionable in the same fashion as the hypertension. (Id., at 7:9-7:11; see also 25:1- 25: 16.) It was applicant's hypertension that caused his stroke, not his obesity or family history, which are only risk factors. (Id., at 8:6-8:13; see also 12:25-13:2 ["it is the medical condition that causes the stroke, not the [risk] factor out there"].) Dr. Hyman further stated that work-related strokes can be caused by acute stress (e.g., where acute physical or emotional distress increases blood pressure and causes a blood vessel to rupture) or by cumulative trauma (e.g., where high blood pressure caused by continuous stress damages the walls of the arteries of the brain, allowing the damaged blood vessels to rupture spontaneously). (Id., at 9:1-10:6.)

. . .

Dr. Hyman opined that applicant's underlying hypertension was contributed to by his work-related stress, his family history of hypertension, his excessive salt intake, his alcohol consumption, and his obesity. (Id., at 10:10-10:20.) Dr. Hyman stated, however, that applicant's family history was the strongest contributing factor to his hypertension, which is why he found more nonindustrial

> apportionment than industrial apportionment. (Id., at 10:18-11:5.) Dr. Hyman added that "the science of apportionment is not precise, so in a hypertensive case, I look at the number of industrial and nonindustrial causes and sort of the weight of the nonindustrial and industrial causes." (Id., at 14:18-14:21.) As to applicant's impairment, Dr. Hyman specifically sent applicant to Dr. Espy to do a neurological assessment of applicant's impairment and he (Dr. Hyman) defers to Dr. Espy's impairment determinations regarding the stroke, but not Dr. Espy's causation assessment. (Id., at 17:17-18:11; 19:17-19:22.)
> (*Id.*, pp. 4-7.)

On March 3, 2020, applicant filed the application for SIBTF benefits, alleging that prior to his February 16, 2013 injury, he had pre-existing disabilities resulting from prior injury to his circulatory system. (Application for SIBTF Benefits, March 3, 2020, pp. 6-7.)

In the Amended Opinion on Decision, the WCJ states:

> **ATTORNEY FEES**
> Based on Exhibit 20, Applicant's agreement as to attorney fees for SIBTF benefits, the WCJ finds Applicant is entitled to a 25% fee. However, at the time of the request for the fee, Applicant's counsel is to provide specificity as to the 9 factors delineated in the agreement to support their request for this fee amount.
> (Amended Opinion on Decision, p. 3.)

> In the Report, the WCJ states:
> SIBTF offered no evidence as to why the SIBTF claim filed by Applicant was untimely or when he knew or in the exercise of reasonable diligence should have known he had a potential to recover benefits from SIBTF.
> (Report, p. 3.)

DISCUSSION

Preliminarily, we note that the F&A finds that the subsequent industrial injury resulted in a findings and award being issued on March 26, 2019. However, the record reveals that the date on which the subsequent injury resulted in a final determination was May 3, 2018, the date the decision affirming the finding of 34 percent permanent disability after apportionment was issued. (Opinion and Decision After Reconsideration, May 3, 2018, p. 1.) Since the pleadings record shows that findings were issued on a separate issue on March 26, 2019, we conclude that a clerical error occurred in the recording of the date of the final determination of the subsequent injury herein. Accordingly, we will amend the F&A to find that the subsequent industrial injury resulted in a findings and award which became final on May 3, 2018. (See *Toccalino v. Workers' Comp. Appeals Bd*. (1982) 128 Cal.App.3d 543 [180 Cal. Rptr. 427, 47 Cal.Comp.Cases 145, 154-155] (stating that

the Appeals Board may correct a clerical error at any time without the need for further hearings); *In re Candelario* (1970) 3 Cal.3d 702, 705, 91 Cal. Rptr. 497, 477 P.2d 729 (stating that the term "clerical error" includes all errors, mistakes, or omissions which are not the result of the exercise of the judicial function. In determining whether an error is clerical or substantive, it must be determined whether the mistake was made in rendering the judgment or in recording the judgment which was rendered).)

Defendant contends that the WCJ erroneously relied on the holding in *Bookout v. Workmen's Comp. Appeals Bd. (*1976) 62 Cal.App.3d 214 [41 Cal.Comp.Cases 595] to find that applicant meets the 35 percent permanent disability threshold from the subsequent industrial injury alone as required by section 4751(b).

In *Bookout*, the applicant was employed as an oil refinery operator and sustained a compensable injury to his back, which was rated at 65 percent permanent disability. (*Bookout*, *supra*, 62 Cal.App.3d at pp. 219–220.) The back disability included a limitation to semi-sedentary work. (*Id.*, p. 219.) Prior to his industrial injury, the applicant had a nonindustrial heart condition. (*Id*.) The heart condition contained two work preclusions: preclusion of heavy work activity and preclusion from excessive emotional stress. (*Id*., pp. 220–221.) The preclusion of heavy work activity was rated at 34.5 percent permanent disability. (*Id*., p. 220.) The preclusion from excessive emotional stress was rated at 12 percent permanent disability. (*Id*., pp. 220–221.)

At the trial level, the referee concluded that the heart condition precluding heavy work activity completely overlapped with the back disability limitation to semi-sedentary work. (*Bookout, supra*, 62 Cal.App.3d at p. 224.) The referee, thus, subtracted the preclusion of heavy work activity of 34.5 percent permanent disability from the 65 percent unapportioned permanent back disability and awarded applicant permanent disability of 30.5 percent for the industrial back injury. (*Id.*, pp. 219–221.) The referee then found that the applicant was not eligible for SIBTF benefits based on the finding of 30.5 percent after apportionment, which was less than the requisite minimum of 35 percent for a subsequent disability under section 4751(b). (*Id*., p. 221.) The Appeals Board affirmed both the 30.5 percent permanent disability award for the industrial back injury and the finding that applicant was not eligible for SIBTF benefits. (*Id*., pp. 218–219.)

The Court of Appeal concluded that the Appeals Board had properly determined applicant's permanent disability rating of 30.5 percent as a result of his compensable back injury, and that the disability resulting from the subsequent injury was compensable to the extent that it caused a

decrease in applicant's earning capacity, citing former section 4750 and *State Compensation Ins. Fund v. Industrial Acci. Com*. (*Hutchinson*) (1963) 59 Cal.2d 45, 48–49 (an employer is only liable for the portion of disability caused by the subsequent industrial injury) and *Mercier v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 711, 715–716 [41 Cal.Comp.Cases 205] (the fact that injuries are to two different parts of the body does not in itself preclude apportionment). (*Bookout*, *supra*, 62 Cal.App.3d at pp. 222–227.)

However, the Court of Appeal held that applicant was erroneously denied SIBTF benefits under section 4751(b). (*Bookout*, *supra*, 62 Cal.App. 3d at p. 228.) It explained that the referee incorrectly instructed the rating specialist to apportion 34.5 percent for the preexisting nonindustrial heart disability (based on a standard rating of 30 percent) from the total subsequent injury disability of 65 percent (based on a standard rating of 60 percent), rather than utilizing the total disability for the subsequent injury "standing alone and without regard to or adjustment for the occupation or age of the employee" as required by section 4751(b). (*Id*.; § 4751(b).) It interpreted the language of this requirement as excluding apportionment. Thus, the court held that the permanent disability attributable to applicant's subsequent injury for the purpose of meeting the 35 percent threshold requirement under the statute was the standard rating of 60 percent. (*Bookout*, *supra*, 62 Cal.App.3d at p. 228; § 4751(b).)

We therefore remain persuaded that *Bookout's* construction of section 4751(b) controls our evaluation of whether applicant meets the 35 percent permanent disability threshold from the subsequent industrial injury alone.

Additionally, in *Anguiano v. Subsequent Injuries Benefits Trust Fund*, 2023 Cal. Wrk. Comp. P.D. LEXIS 310 (Cal. Workers' Comp. App. Bd. November 7, 2023,[2] an Appeals Board panel affirmed its prior decision that the applicant met the 35 percent threshold requirement based upon on *Bookout's* holding that the calculation of permanent disability attributable to the applicant's subsequent injury for the purpose of meeting the threshold excludes apportionment—and the Court of Appeal for the Second District recently denied defendant's petition for writ of review thereon.

[2] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd*. (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [118 Cal. Rptr. 2d 105, 67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we may consider these decisions to the extent that we find their reasoning persuasive. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc).)

Nevertheless, we address defendant's argument that section 4751(b) should be interpreted in accordance with *Reina v. Workers' Comp. Appeals Bd.* (1998) 63 Cal.Comp.Cases 101 (writ den.) and *McMahan v. Workers' Comp. Appeals Bd*. (1984) 49 Cal.Comp.Cases 95 (writ den.).

In *Reina*, the court found that an applicant with a subsequent industrial injury disability that rated on a stipulated, unadjusted basis at less than the statutory criteria does not qualify for SIBTF benefits. We therefore do not view *Reina* as in conflict with *Bookout*.

In *McMahan*, the applicant received an award that he had sustained permanent disability of 37 percent as a result of a specific injury and that his cumulative injury resulted in permanent disability of 31½ percent after apportionment of 50 percent—and neither party sought reconsideration. Nevertheless, the applicant sought SIBTF benefits based upon the same cumulative injury; and, although the WCJ deemed the cumulative injury a subsequent injury, he concluded that it did not meet the 35 percent threshold for SIBTF benefits. Because we view the applicant's subsequent injury claim to be barred on separate grounds, we do not conclude that *McMahan* stands for the proposition that evaluation of whether a subsequent injury meets the 35 percent threshold from the subsequent industrial injury alone must include apportionment.

Accordingly, we are unable to discern merit to defendant's argument that the WCJ erroneously relied on the holding in *Bookout v. Workmen's Comp. Appeals Bd. (*1976) 62 Cal.App.3d 214 [41 Cal.Comp.Cases 595] to find that applicant meets the 35 percent permanent disability threshold from the subsequent industrial injury alone as required by section 4751(b).

We next address defendant's contention that the WCJ erroneously failed to find that the petition for SIBTF benefits was untimely.

We observe that the burden of proof rests upon the party holding the affirmative of the issue, and all parties shall meet the evidentiary burden of proof on all issues by a preponderance of the evidence. (§ 5705; *Lantz v. Workers' Comp. Appeals Bd*. (2014) 226 Cal.App.4th 298, 313 [79 Cal.Comp.Cases 488]; *Hand Rehabilitation Center v. Workers' Comp. Appeals Bd*. (*Obernier*) (1995) 34 Cal.App.4th 1204 [60 Cal.Comp.Cases 289].) "Preponderance of the evidence" is defined by section 3202.5 as the "evidence that, when weighed with that opposed to it, has more convincing force and the greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence." (§ 3202.5.)

In this regard, there are four Supreme Court cases that provide guidance for establishing that an applicant failed to timely file a SIBTF claim. (*Subsequent Injuries Fund v. Workmens'*

Comp. Appeals Bd. (*Talcott*) (1970) 2 Cal.3d 56, 65 [35 Cal.Comp.Cases 80]; *Subsequent Injuries Fund v. Workmens' Comp. Appeals Bd*. (*Pullum*) (1970) 2 Cal.3d 78 [35 Cal.Comp.Cases 96]; *Subsequent Injuries Fund v. Workmens' Comp. Appeals Bd.* (*Woodburn*) (1970) 2 Cal.3d 81 [35 Cal.Comp.Cases 98]; *Subsequent Injuries Fund v. Workmens' Comp. Appeals Bd.* (*Baca*) (1970) 2 Cal.3d 74 [35 Cal.Comp.Cases 94].) The Supreme Court in *Talcott*, the seminal case on this issue, provided:

> We should, in the absence of statutory direction and to avoid an injustice, prevent the barring of an applicant's claim against the Fund before it arises. Therefore, we hold that where, prior to the expiration of five years from the date of injury, an applicant does not know and could not reasonably be deemed to know that there will be substantial likelihood he will become entitled to subsequent injuries benefits, his application against the Fund will not be barred—even if he has applied for normal benefits against his employer—if he files a proceeding against the Fund within a reasonable time **after he learns from the board's findings** on the issue of permanent disability that the Fund has **probable liability**.
> (*Talcott*, *supra*, 2 Cal. 3d at p. 65 [Emphasis added].)

We interpret the holding in *Talcott* to mean that if applicant knew or could reasonably be deemed to know that there will be a substantial likelihood of entitlement to subsequent injuries benefits before the expiration of five years from the date of injury, then the limitation period to file a SIBTF claim is five years from the date of injury. However, if applicant did not know and could not reasonably be deemed to know that there was a substantial likelihood of entitlement to subsequent injuries benefits before the expiration of five years from the date of injury, then the limitation period to file a SIBTF claim is a reasonable time after applicant learns from the WCAB's findings on the issue of permanent disability that SIBTF has probable liability. (*Talcott*, *supra*; see also *Adams v. Subsequent Injuries Benefits Trust Fund* (June 22, 2020, ADJ7479135) [2020 Cal. Wrk. Comp. P.D. LEXIS 216].)

As to *Talcott's* first criterion, defendant contends that because the last date of applicant's cumulative trauma injury period was February 16, 2013, and the WCJ determined that applicant sustained 34 percent permanent partial disability, after apportionment, from the cumulative injury on August 10, 2016, applicant was "able to evaluate his SIBTF eligibility within five years of the date of injury" and thus should reasonably be deemed to have known that there was a substantial likelihood of entitlement to subsequent injuries benefits within five years of the date of cumulative injury, February 16, 2018. (Petition, p. 11:3.)

However, *Talcott* requires notice in the form of "findings on the issue of permanent disability that the [SIBTF] Fund has probable liability," and the record lacks any final determination on the issue of permanent disability on the cumulative trauma injury until May 3, 2018, a date more than five years from the date of cumulative injury. (*Talcott*, *supra*, at p. 65.) Given the absence of a final determination as to applicant's permanent disability, applicant was not on *Talcott* notice of a claim for SIBTF benefits within five years of injury.

Accordingly, we conclude that the record fails to establish that applicant knew or reasonably could have known that there was a substantial likelihood of his entitlement to SIBTF benefits within five years of injury.

As to *Talcott's* second criterion, defendant contends that applicant did not file the March 3, 2020 application for SIBTF benefits within a reasonable time after he knew or should have known that he had a likelihood of entitlement SIBTF benefits. Specifically, defendant argues that since applicant waited "for nearly two years" after the May 3, 2018 final determination of his permanent disability, the application could not have been filed within a reasonable time. (Petition, 14:23-24.)

Defendant's argument assumes that applicant knew or should have of his likely entitlement to SIBTF benefits because he received a final determination that his cumulative injury resulted in 34 percent disability after apportionment without addressing whether or when applicant had knowledge of facts that could likely establish his entitlement to SIBTF benefits.

Section 4751 provides:

> If an employee who is permanently partially disabled receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree of disability caused by the combination of both disabilities is greater than that which would have resulted from the subsequent injury alone, and the combined effect of the last injury and the previous disability or impairment is a permanent disability equal to 70 percent or more of total, he shall be paid in addition to the compensation due under this code for the permanent partial disability caused by the last injury compensation for the remainder of the combined permanent disability existing after the last injury as provided in this article; provided, that either (a) the previous disability or impairment affected a hand, an arm, a foot, a leg, or an eye, and the permanent disability resulting from the subsequent injury affects the opposite and corresponding member, and such latter permanent disability, when considered alone and without regard to, or adjustment for, the occupation or age of the employee, is equal to 5 percent or more of total, or (b) the permanent disability resulting from the subsequent injury, when considered alone and without regard to or adjustment for the occupation or

the age of the employee, is equal to 35 percent or more of total.
(§ 4751.)

In *Ferguson v. Industrial Acc. Com*. (1958) 50 Cal.2d 469 [23 Cal.Comp.Cases 108], the Supreme Court 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*, at p. 477.) 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 [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*, *supra*, (quoting Larson's Workmen's Compensation Law (1952) § 59.33 (vol. 2, p. 63).)

Under these authorities, defendant must establish that applicant knew or should have known that he had a labor disabling injury before he sustained the industrial injury giving rise to his application for SIBTF benefits—and that he failed to file the application within a reasonable time of obtaining such knowledge. Notwithstanding this burden, defendant "offered no evidence as to . . . when [applicant] knew or in the exercise of reasonable diligence should have known he had a potential to recover benefits from SIBTF." (Report, p. 3.)

Additionally, our reading of the record reveals no evidence that applicant knew he had a labor disabling injury that could give rise to a potential claim for SIBTF benefits at any time before the March 3, 2020 filing of the claim. Notably, the reporting and testimony of Drs. Hyman and Espy was that applicant had "all normal blood pressures" from June 28, 2005 through October 22, 2010; that applicant's February 13, 2013 stroke was the sole cause of his visual and mental status impairment; and that, absent the stroke, the impairment Dr. Espy found would not exist. (Opinion and Decision After Reconsideration, March 3, 2018, pp. 4-7.) Hence, while applicant's impairment resulting from subsequent injury was in part the result of his progressive hypertension, the record does not disclose that applicant had a prior labor disabling injury to the circulatory system, much less one which could "at least be of a kind which could ground an award of permanent partial disability." (*Ferguson*, *supra*; Application for SIBTF Benefits, March 3, 2020, pp. 6-7.)

Accordingly, we discern no merit to defendant's argument that applicant did not file the March 3, 2020 application for SIBTF benefits within a reasonable time after he knew or should have known that he had a likelihood of entitlement SIBTF benefits.

Lastly, we note that the F&A includes a finding that applicant's attorney is entitled to an attorney's fee of 25 percent but the Amended Opinion on Decision states that applicant's attorney is to provide "specificity as to the . . . factors to support their request for this fee amount." (Amended Opinion on Decision, p. 3.)

We observe that the WCJ "may determine, and allow as liens . . . a reasonable attorney's fee . . . and [order] the reasonable disbursements in connection therewith." (§ 4903(a).) To determine the amount of the attorney's fees, the WCJ must consider the responsibility assumed by the attorney, the care exercised by the attorney, the time involved, and the results obtained. (§ 4906(d); Cal. Code Regs., tit. 8, § 10844.)

Because the record before us fails to establish grounds for an attorney's fee in the amount of 25 percent, we conclude that record should be developed as the amount of the attorney's fee. Accordingly, we will amend the F&A to find that the issue of the amount of the attorney's fee is deferred.

Accordingly, we will grant reconsideration, and, as our Decision After Reconsideration, we will affirm the F&A, except that we will amend to find that the subsequent industrial injury resulted in a findings and award which became final on May 3, 2018, and that the issue of the amount of the attorney's fee is deferred.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Amended Findings and Award issued on April 5, 2024 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Amended Findings and Award issued on April 5, 2024 is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

***

10. The subsequent industrial injury resulted in a findings and award which became final on May 3, 2018.

***

15. The issue of the amount of the attorney's fee is deferred.

***

AWARD

f. Attorney's fees are deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

KATHERINE A. ZALEWSKI, CHAIR
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 28, 2024

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

KEN JENSEN
GHITTERMAN, GHITTERMAN & FELD
OFFICE OF THE DIRECTOR - LEGAL UNIT

SRO/oo

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