| **QME PROCESS REGULATIONS** | **RULEMAKING COMMENTS**  **2ND 15 DAY COMMENT PERIOD** | **NAME OF PERSON/ AFFILIATION** | **RESPONSE** | **ACTION** |
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| 33(a) | Commenter notes the Notice of 2nd 15-day changes states that the language of this subsection was amended to add clarity by enunciating that both Comprehensive Medical Legal Evaluations and Follow-Up Medical Legal Evaluations are considered new medical legal evaluations for purposes of this subsection and that adding the specific language provides clarity in the interpretation of the regulation.  Commenter opines that there is no cause or prejudice requirement to replace. Commenter states he has had one PQME that was used for five years replaced and has done the same for a PQME used for nine years for chiro with over ten reports issued.  Commenter opines that this is going to cost way more than if it was let be for everyone except the PQME’s. | Boone White  November 21,2023  Written Comment | The Administrative Director disagrees.  The original regulation does have a replacement provision for good cause. The regulation was originally amended to allow QMEs flexibility with respect to providing service when their current work load really did not allow them to schedule new appointments. The amendment related to the second 15 day comment period was simply to clarify what constitutes a “new medical legal evaluation appointment.” for purposes of the unavailability provision. It made clear that a QME’s inability to schedule a comprehensive or follow-up evaluation would qualify for purposes of determining when the QME’s work load qualified the QME for discretionary unavailability. | None. |
| 1(k), 11(b)(1), 11(h), 11.5, 11.5(i), 11.5(j); 55; 55.1 | Commenter is a DWC approved provider of QME continuing education and report writing courses and values the importance of educational preparation for appointment as a QME. Commenter understands the desire of the DWC to improve the overall quality of QME reports. Commenter is concerned that the proposed changes to the QME Regulations will not result in desired report quality but that the proposed changes will only result in an increased burden to current QME physicians while making appointment as a QME more difficult.  Commenter opines that mandating that 6 hours of report writing instruction be performed in-person will not result in improved QME report quality and that there is no data to suggest that live, “in-person” instruction results in improved learning or improved report quality.  Commenter states that the current 12-hour distance learning report writing course, which he has been providing for the past seven years, is comprehensive and has met with considerable positive feedback from the physicians who have completed the course. Commenter states that it is his understanding as a course provider that additional hours of course material will not improve report quality. It is his opinion that any additional hours devoted to the report writing course would best be employed by physicians in the preparation of the currently required sample QME report which must be completed to pass the Report Writing course.  Commenter states that he often must ask highly educated physicians to resubmit their sample reports to correct flaws and misunderstandings. Sometimes several drafts of a sample report are required before a report is satisfactory. The synthesis of the complex topics presented, and the preparation of the sample report takes a great deal of time, well above the current 12-hour course requirement. Commenter states that adding additional course content, in-person or otherwise, will not serve to improve report quality. Commenter opines that additional required in-person instruction hours could possibly serve to discourage physicians from devoting time to composing and refining the required sample QME report.  Commenter states that there is no evidence to suggest that in-person course work results in improved instruction. Commenter opines that the exact opposite is true and that distance learning is a more effective learning tool, especially for presenting complex coursework. Commenter has found that distance learning is an ideal method to convey the complex and varied topics required of the Report Writing Course. Some of the advantages of distance learning include:  - Distance learning via video streaming allows physicians to rewind and review complex topics and calculations**.**  - Complex topics can more accurately be developed and presented by the lecturer. This allows course registrant physicians to gain a clear and concise understanding of the topics presented.  - Physicians, by nature of their profession, work long hours. While utilizing distance learning, physicians can learn at their own time and their own pace. Complex topics are easier to comprehend when the mind is receptive and rested. Distance learning allows physicians to complete the required course work at times when they are best able to comprehend and retain the material presented. Physicians are by nature of their profession busy people. The ability to complete instruction via distance learning enables many physicians to complete the required Report Writing Course, when they otherwise would not.  Commenter opines that by altering the QME Regulations to require that 6 hours of Report Writing course work be performed in-person, the DWC will be discounting the clear advantages of distance learning I have just outlined.  Commenter states that adding additional in-person hours to the Report Writing course will result in the added expense of time and money to physicians who are considering service as a QME and will result in a decrease in the number of new physicians willing to complete the requirements to be appointed as a QME. In short, adding 6-hours of in-person requirement will likely discourage such participation.  Commenter states that the proposed amendments to the QME Regulations contain no instruction as to which educational provider will be responsible for reviewing, commenting and assisting the physician in completing the required sample QME report which must be drafted by all physicians to complete the Report Writing course. Will the sample report review be the responsibility of the 6-hour in-person provider, or will it be reviewed by the distance learning provider? A 6 hour in-person requirement would add confusion to the Report Writing course process, which could result in a disregard for the very important sample QME report.  Commenter recommends that the DWC remove the proposal to add 6 hours of in-person instruction to the Report Writing. | David Buch, BS, DC, QME  November 22, 2023  Written Comment | The Administrative Director disagrees.    Any steps taken by the Administrative Director to improve report quality in the QME program could be viewed as burdensome to the existing or prospective QMEs. However any additional burden must be weighed against the possibility of a very much-needed improvement in report quality. By contrast, the steps taken by the Administrative Director could be viewed as an opportunity for the physician to improve their report writing skills.  Requiring an in person component to the report writing course that must be taken upon passing the QME exam ensures that prospective QMEs engage in face-to-face time with the instructor where it is hoped that interaction and discourse will improve the participants understanding of the material. The only data supporting the benefit of in-person instruction is the unassailable fact that colleges and universities have not switched to total online instruction despite the availability of equipment to allow this possibility. In addition, there’s been a documented loss in learning occasioned by children having to participate in classes solely online during the pandemic. These two factors point up the usefulness of in-person instruction.  The Administrative Director respectfully asserts that if the current 12 hour requirement were sufficient, there would be no need to improve report quality. Therefore, it is only logical to try and expand the educational requirements in an effort to improve report quality.  The possibility that requiring in person instruction will discourage prospective QMEs has not proved to discourage chiropractors from wanting to join the QME program. This is proven to be true even though the existing 44 hour requirement for these physicians also contains an in person hourly requirement. However, these conditions have in no way discouraged chiropractic applicants over the course of the years of the existence of the QME program.  The regulation as currently configured takes advantage of the favorable properties of both distance-learning and in person instruction. The regulation as drafted provides flexibility for the continuing education providers to determine which portions of the required content are provided by the in person instructor as opposed to any distance-learning instruction. | None. |
| General Comment | Commenter opines that the amended QME regulations are long overdue and may significantly bolster the Administrative Director’s authority with respect to appointment and reappointment of quality QMEs . . .**I**F s/he uses it.  As a licensed psychologist, commenter has provided several hundred “bullet proof”Medical-Legal evaluations that have been successfully defended in open court as well as in depositions. As a QME commenter gets a great deal of “repeat business” from insurance companies as well as attorneys. [Commenter has included a copy of his resume which is available upon request.]  Commenter states that the audience for these reports are attorneys who must address legal questions before the court. Commenter wishes the best for the injured worker, but s/he is not his client; he does not provide therapy; and the QME report is not a progress note. Commenter opines that this may be regarded as obvious; however, given that most QME psychologists are trained to be therapists, it is not always obvious to them. [Commenter included an an attachment: “What is a Forensic Psychologist?” which is available upon request].  Commenter opines that most of those performing psychiatric QMEs—as well as the attorneys involved---do not understand Labor Code 3208.3 and the *DSM-IV-TR* legally control all psychiatric QMEs. This means:   1. *ALL psychiatric diagnoses must be rendered in accordance with the DSM-IV-TR,* **not** the AMA Guides; 2. *The DSM-IV-TR* (p. 34) *provides the behaviorally anchored rating scale that is mandated for use for the determination of* ***Global Assessment of Functioning*** *(GAF);* 3. *The GAF rating is the* **sole** *determinant of the* ***Whole Person Impairment*** *(WPI) rating;* 4. *Labor Code 4660 states the applicant’s WPI is* **strictly determined** *according to the mechanical process provided in the Schedule for Rating Permanent Disabilities (i.e. PDRS) , pp. 1-12--1-16, 2005 . . .* **not** the AMA Guides.   [Note: Commenter goes on at great length regarding on how to produce a proper psychiatric QME report. An entire copy of his letter is available, along with his attachments, upon request.] | Joseph Nevotti, Ph.D., QME  November 27, 2023  Written Comment | Noted.  A reply is not within the purview of rulemaking since the comment does not address any actions taken by the current rulemaking. | None. |
| 11.5(i)(4)  11.5(I)(5) | Commenter supports the relocations of these subsection for clarity. | Sara Widener-Brightwell, General Counsel  California Workers’ Compensation Institute (CWCI)  December 8, 2023  Written Comment | The Administrative Director agrees. | None. |
| 11.5(j) | Commenter recommends the following revised language:  Six (6) hours of instruction shall consist of on-site lecture, diadetic sessions and group discussion.  Commenter recommends the deletion of in person, or the clarification of the difference between in-person and on-site. | Sara Widener-Brightwell, General Counsel  California Workers’ Compensation Institute (CWCI)  December 8, 2023  Written Comment | The Administrative Director disagrees.  Currently, “in person” and “on site” mean the same thing as current regulation 55 defines “on-site” as the participants and the instructor being in the same location. | None. |
| 14(b)(2)(A) | Commenter recommends the following revised language:  At least 13 hours of the training shall consist of on-site instruction.  Commenter recommends deletion of in person, or the clarification of the difference between in-person and on-site. | Sara Widener-Brightwell, General Counsel  California Workers’ Compensation Institute (CWCI)  December 8, 2023  Written Comment | The Administrative Director disagrees.  Currently, “in person” and “on site” mean the same thing as current regulation 55 defines “on-site” as the participants and the instructor being in the same location. | None. |
| 50(e)  50(f) | Commenter recommends the following revised language:  The Administrative Director shall exercise the discretion granted herein to assess the presence and effect of any factors of mitigation as well as the factors to be considered in determining sanctions pursuant to section 65.  Commenter recommends rewording these sections for clarity. Commenter states that section 65 discusses sanctions, not penalties. | Sara Widener-Brightwell, General Counsel  California Workers’ Compensation Institute (CWCI)  December 8, 2023  Written Comment | The Administrative Director disagrees.  Dictionaries equate the meaning of sanctions and penalties. One accepted meaning of a sanction is a penalty. | None. |
| 55(c)(4)  55(d) | Commenter recommends the following revised language:  (c)(4) consistent with the topics in section 11.5(c) of Title 8 of the California Code of Regulations.  (d) The Administrative Director shall accredit an applicant who meets the definition of an educations provider in Section 1(q).  Commenter recommends the correction of typographical errors. | Sara Widener-Brightwell, General Counsel  California Workers’ Compensation Institute (CWCI)  December 8, 2023  Written Comment | The Administrative Director disagrees.  The remedies in the recommended changes are accounted for in the changes that are made in proposed regulation 55.1.  Typographical errors are also corrected. | None. |
| 63(c) | Commenter recommends the following revised language:  Good cause is evaluated with reference to the presence and effect of any factors of mitigation as well as the factors to be considered in determining sanctions pursuant to section 65.  Commenter recommends this rewording for clarify and to clarify that section 65 discusses sanctions and not penalties. | Sara Widener-Brightwell, General Counsel  California Workers’ Compensation Institute (CWCI)  December 8, 2023  Written Comment | The Administrative Director disagrees.  Dictionaries equate the meaning of sanctions and penalties. One accepted meaning of a sanction is a penalty. | None. |
| General Comment | Commenter has reviewed the proposed changes and has no comment at this time. | Andrea Guzman  Claims Regulatory Director  State Compensation Insurance Fund  December 11, 2023  Written Comment | Noted. | None. |
| General Comment | Commenter states that he has review the proposed changes to Title 8, California Code of Regulations §50 and §51 and has some concerns. Commenter opines that these regulations have to be viewed in light of the stated  goal of the Administrative Director of adding and keeping quality medical-legal providers in the  workers' compensation system and states that it is difficult to review these two regulations without considering the entire process and all of the regulations in conjunction with each other and with the above stated goals. | William Tappin  Tappin & Associates  December 11, 2023  Written Comment  Peter Mandell, MD  Chair, WC Committee  California Orthopaedic Association  December 11, 2023  Written Comment | Noted. | None. |
| 50(e) | Commenter states that the reappointment process can be difficult for a QME and he acknowledges that all QMEs need to be in compliance with all statutes, duties and regulations; however, he finds that the revisions to this subsection eliminates ambiguity.  Commenter notes that the language in this subsection gives a great deal of power to the Administrative Director to refuse to reappoint doctors for minor infractions and he opines that this is inconsistent with the goal of keeping Panel Qualified Medical Evaluators working in the system.  Commenter recommends that this subsection be refined to outline what exactly the likely discipline would be for various violations – similar to the California Medical Board model disciplinary rules, which are incorporated in the regulations under Title 8, California Code of Regulations, section 65.  Title 8, CCR, § 65 states the Administrative Director “believes that education is the most effective course of action in resolving less serious regulatory violations.” Title 8, CCR, § 65 also indicates the Administrative Director recognizes  “that mitigating or aggravating circumstances in a specific case may necessitate variance from these guidelines.” Commenter opines that it makes sense to look at the 10 or 12 most significant violations that the Division of Workers’ Compensation sees relating to medical-legal evaluators to try to organize DWC’s own model disciplinary rules that give clear guidance. This would allow some flexibility in the analysis of any given disciplinary situation in light of the circumstances of each particular factual presentation. | William Tappin  Tappin & Associates  December 11, 2023  Written Comment  Peter Mandell, MD  Chair, WC Committee  California Orthopaedic Association  December 11, 2023  Written Comment | The Administrative Director disagrees.  It is true that the subsection allows the Administrative Director to exercise discretion with respect to the decision to reappoint or deny reappointment to an evaluator. However, the explicit terms of the subsection require that the exercise of this discretion must be made with an assessment of the factors in regulation § 65. Regulation § 65 in fact enumerates a specific range of punishments for specific violations. | None. |
| 51(a)(5)  (Rejected Reports)  51(a)(2)  (Late Reports) | Commenter is concerned about the revised language relating to time frames. Commenter notes that the in the Supplemental Initial Statement of Reasons, page 10, it indicates section 54 previously authorized the Administrative Director to deny reappointment to a QME that had more than five evaluations rejected by a Workers’ Compensation Administrative Law Judge or the Appeals Board within a two-year period.  Commenter notes that section 51 lists a number of grounds to deny reappointment of QMEs. Section 51(a)(2) indicates, “Failure to comply with the evaluation time frames in sections 34 or 38 on at least three occasions during the calendar year.” Commenter finds this troubling and states that he has previously done a formal specific written response to denial of application for QME appointment on a case and discussed in detail what he refers to as the Doctrine of Proportionality. The principle of proportionality envisions that a public authority has to maintain a reasonable relation between discipline and the particular goals to be achieved. Commenter opines that any public authority should use means to reach those goals that infringe to the minimum extent possible on the rights of the parties being impacted. Commenter states that any administrative action which discriminates arbitrarily or uses excessive means to meet the desired goals can be quashed by the courts on grounds that it is violating the doctrine of proportionality. The doctrine is made up of four components including proper purpose; rational connections; necessary means; and a proper relation between benefit gained by realizing the proper purpose and the harm caused by punishment (otherwise known as judicial balancing).  Commenter states that using the Doctrine of Proportionality with respect to Title 8, California Code of Regulations §51(a)(2) raises a number of issues. Some medical-legal providers might do 12 medical-legal evaluations in a calendar year. That would mean 25% of them could be late before they are punished. Commenter opines that there is usually a direct correlation between the quality of the doctor and the doctor's evaluations and reporting and the number of times that doctor is selected as a Panel Qualified  Medical Evaluator. In this case, the doctor who does 12 medical-legal evaluations in a year versus a doctor, who does 200 evaluations in a year because he is an Agreed Medical Examiner and a Panel QME examiner and is always selected off the panels, and is used regularly as an Agreed Medical Examiner, is being punished for three late evaluations out of 200 and the other evaluators are being punished for three late evaluations out of 12. The ratio is 0.015 vs .25.  Commenter states that this is patently unfair and clearly not proportionate. Commenter opines that this impacts the most qualified medical-legal providers in the system. Commenter questions if these doctors should put through an arduous disciplinary process, even if eventually they become re-certified. Commenter opines that would be better to have a rolling late reporting requirement and attach additional rules relating to that. For example, one could have three reports per year up to 30  reports, or 10% of your reports could be late. For 30 to 60 reports, you could have six reports late,  and so on. Commenter states that it makes more sense to have a percentage of reports as  opposed to a fixed number given the variance in the quality of doctors and the number of  evaluations done by various physicians.  Commenter states that the second element that should be considered with respect to late reports is Title 8, California Code of Regulations §31.5(a)(12). That section indicates:  *"The evaluator failed to meet the deadline specified in Labor Code §4062.5 and §38 (medical evaluation time frames) of Title 8 of the California Code of Regulations and the party requesting the replacement objected to the report on the grounds of lateness prior to the date the evaluator served the report. A party requesting a replacement on this ground shall attach to the request for a replacement a copy of the party's objection to the untimely report."* (Emphasisadded)  In evaluating late reports, commenter opines that only late reports where there was an objection should be utilized.  Taking that approach is consistent with expeditious provision of benefits. Several cases have  discussed that issue. Commenter questions if it makes sense if a report is three, four or five days late to replace the doctor, request a new panel, get a new panel issued, try to agree on a doctor on the panel, set the appointment with a panel doctor, send the appropriate letters while waiting 20 days pursuant to  Labor Code §4062.3, and then wait for the appointment date and then allow another 30 days for the report. Commenter opines that this would slow down the process more than taking a more relaxed approach to the lateness of reports. Commenter states that it would be fair that late reports only be considered if there were a basis for a replacement panel because there was a written objection to the report on the grounds of lateness prior to the date the evaluator served report. Either party can object to a late report. If the parties fail to object, commenter opines that the Administrative Director should view that as a waiver and the medical-legal report should not be included in the late report category. | William Tappin  Tappin & Associates  December 11, 2023  Written Comment  Peter Mandell, MD  Chair, WC Committee  California Orthopaedic Association  December 11, 2023  Written Comment | The Administrative Director disagrees.  Subsection 51 (a)(2) carries over the exact language from previous regulation §51. The terms of the regulation make the decision to deny reappointment discretionary with the Administrative Director. The exercise of that discretion will come into play if the physician decides to appeal a decision to deny reappointment. At that point, mitigating circumstances such as the “doctrine of proportionality” could be considered by the Administrative Director.  The sheer volume of replacement requests due to failure to provide timely reports does not allow for the exploration of mitigating circumstances at the time of the replacement of the QME by the Administrative Director or their designee. In some cases, replacements are only handled by Administrative Law Judges who can in fact, on a case-by-case basis exercise discretion and apply any factors deemed relevant.  The commenter should be made aware that §31.5(a)(12) is observed by the Administrative Director. When a request for replacement is received based upon an untimely report, the request is reviewed for a timely objection. In addition, the physician’s office is contacted to verify whether or not the report was timely served. Replacements are only granted when there has been a timely objection and no response or proof provided of timely service by the physician. | None. |
| 51(a)(4) | Commenter notes that this subsection indicates that the Administrative Director may  deny reappointment to a QME if the QME refuses, without good cause, to perform a medical-legal evaluation. This section notes "good cause for not performing a medical-legal evaluation includes, but is not limited to, the factors in subsection §41(h) and §41(i). Those two sections state that the evaluator need not continue an examination where the injured worker or injured worker's representative uses abusive language toward the evaluator or staff or disrupts the operation of the evaluator's office in any way. Subsection (i) states that the evaluator need not continue a medical-legal evaluation where the injured worker is intoxicated or under the influence of medication, which impairs the injured worker’s ability to participate in the evaluation process.  Those two sections are relatively clear and significantly limited. However, Title 8, California  Code of Regulations §41.5 outlines conflicts of interest. Subsection (d)(4) indicates the conflict  of interest could be:  *"Any other relationship or interest not addressed by subdivisions (d)(l) through (d)(3) which would cause a person aware of the facts to reasonably entertain a doubt that the evaluator would be able to act with integrity and impartiality.*  (Emphasis added)  Commenter notes that the above-referenced section should be read in conjunction with 41.5(e), which states:  *"An Agreed Medical Evaluator or a Qualified Medical Evaluator may disqualify himself or herself on the basis of a conflict of interest pursuant to this section whenever the evaluator has a relationship with a person or entity in a specific case, including doctor-patient, familial, financial or professional, that causes the evaluator to decide it would be unethical to perform a comprehensive medical-legal evaluation examination or to write a report in the case.*"  Reading those Code sections, commenter opines that good cause to refuse assignment of a case could be based upon the above-referenced sections because the doctor could have a professional relationship with a carrier, administrator or employer, which is negative, and which would cause the doctor to feel it was unethical to perform a comprehensive medical-legal evaluation or write a report in the case. The doctor cannot exhibit bias. If a doctor feels, based upon a professional relationship, that  he has bias against an employer, administrator or carrier or applicant or applicant attorney, or defense attorney, he should disqualify himself from that evaluation. Commenter states that there are numerous carriers that continually refuse to pay doctors or pay them properly. Eventually, when this happens repetitively, doctors become upset. They do the work requested by those parties, and they go unpaid for it. Commenter opines that if the physician feels biased under those circumstances, they would be remiss in not disqualifying themselves based upon the professional relationship (negative in this case). Commenter notes that §41.5 seems to imply, but does not state, that the professional relationship is one that is positive. However, the professional relationship could be negative, causing a doctor to have to refuse the assignment. Commenter opines that it would be an ethical conflict if the physician felt animosity toward one of the parties involved in that particular case. | William Tappin  Tappin & Associates  December 11, 2023  Written Comment  Peter Mandell, MD  Chair, WC Committee  California Orthopaedic Association  December 11, 2023  Written Comment | The Administrative Director disagrees.  Regulation section 41.5 (e) specifically allows the physician to disqualify themselves on the basis of an enumerated conflict of interest. The Administrative Director expects that all physicians who are QMEs are mature enough to understand that an opinion formed about a particular insurance company based upon lack of or slow payment will not cause sufficient bias to generate a conflict. This result should obtain because there are existing statutes and regulations to settle issues of payment for services provided. In addition, professionalism should allow the physician to differentiate between an insurance company or third-party claims administrator that is financially responsible for payment and the injured worker who is the recipient of the evaluation services. | None. |
| 51(a)(5)  (Rejected Evaluations) | Commenter opines that this subsection relating to not being recertified for having more than five evaluations rejected within a two-year period by a Workers' Compensation Judge  or the Appeals Board originally submitted at a contested hearing should be phrased to state five evaluations rejected by five separate Judges or the Appeals Board. Commenter opines that  there are certain Judges who do not like certain doctors, and it may or may not be related to the reports themselves. The fact that a report is rejected should require the Division of Workers' Compensation to review that report to see if the rejection was, in fact, proper.  For example, commenter states that Workers' Compensation Judges are uncomfortable providing a take-nothing on a case based  upon a medical report and will often reject the report and assign an Independent Medical Evaluator/regular physician or indicate to the parties that he/she wants the parties to agree on an  Agreed Medical Examiner. If the doctor had a basis for finding no impairment or injury, it seems that the report might be rejected but valid. There needs to be a mechanism to review those reports to determine why they were rejected. Commenter opines that mere rejection should not be the standard. Title 8, California Code of  Regulations §51(a)(l2) says the Administrative Director can refuse certification if a medical provider has violated §41(a)(5) on three or more occasions during the most recent period of appointment. §4l(a)(5) relating to ethical requirements states:  *"Communicate with the injured worker in a respectful, courteous and professional manner.*"  Commenter recommends that this be deleted. If an applicant asserts that the doctor was disrespectful in the communication and was not courteous or professional, how is the doctor to refute that? What  kind of procedure or process is there to make that determination? Commenter states that it becomes a war of one person's statement versus another person's statement. Anything can be asserted against the provider. Commenter states that this is a denial of due process for the physician. For example, a particular defense attorney may not like that particular doctor and he will strike him from the panel. However, an applicant's attorney, who has an applicant who goes to a doctor that applicant's attorney does not like and obtains a report that the applicant's attorney and the applicant do not like, it could be asserted the doctor was disrespectful, was not courteous, and did not act in a professional manner. Commenter questions how a physician can refute that. When does the allegation have to be made? Prior to the report issuing? On the day of the exam? Doesn't the applicant have a right to  walk out of the examination if a doctor is disrespectful, discourteous or not acting in professional manner? Should that be a requirement before this rule is invoked? Commenter opines that this will lead to some degree of gamesmanship in the medical-legal system inconsistent with the aforementioned goals of expeditious provision of benefits to the injured worker and keeping  medical-legal providers in the system if possible. | William Tappin  Tappin & Associates  December 11, 2023  Written Comment  Peter Mandell, MD  Chair, WC Committee  California Orthopaedic Association  December 11, 2023  Written Comment | The Administrative Director disagrees.  The rejection of a medical-legal evaluation report by a Workers’ Compensation Appeals Court Judge only occurs after a determination by the judge that the report either does not amount to substantial medical evidence or violates the provisions of Title 8, California Code of Regulations § 10683. That regulation requires that the judge make a specific finding that may be included in the decision on the case, with respect to the rejection of the report. Whether or not a report constitutes substantial medical evidence is based upon case law, and the rejection under 8 CCR § 10683 is based upon failure to include one of the elements enumerated in 8 CCR § 10682. Therefore there are clear definable standards for rejection of the report that must be elucidated by the judge at the time of rejection. These requirements do not allow for rejection of a report based upon the personal bias of a judge.  If a physician feels for any reason that rejection of a report was improper, the physician may raise these objections and therefore is granted due process by virtue of the appellate procedures for the Administrative Director’s issuance of a denial of reappointment. This procedure also ensures the provision of due process for a denial of reappointment based upon a violation of proposed regulation § 51(a)(12). The physician is provided a hearing upon appeal of the denial of reappointment wherein an administrative law judge will determine the evidence presented as to the three or more violations of § 41()(5). | None. |
| General Comment | Commenter states that issues relating to non-recertification must be addressed. Commenter opines that there must be some proportionality involved in determining whether a doctor is recertified or not. Commenter states that the Labor Code requires the initial medical-legal report to be done in 30 days and the supplemental in 60 days. That is not part of the regulatory process.  Commenter opines that the initial comprehensive report should be done in 60 days and a supplemental in 30 days and individuals who do not timely send hundreds or thousands of pages of records to the doctor should be sanctioned. Most supplemental reports consist of answering a few questions for clarification or addition to the initial comprehensive report and can be finished quickly. However, they are put to the side because the doctor has 60 days and he wants to work on the initial comprehensive, where he is limited to 30 days. Commenter opines that it makes more sense if the doctor had 30 days from the date of the receipt of the cover letter and records as opposed to 30 days from the date of the appointment. Commenter recommends allowing more time for the comprehensive and less for the supplemental unless the supplemental was related to someone sending thousands of pages of records. In that case, regulations should be generated that sanctions would apply to any party who does not send those records that are in their  possession prior to the appointment date. Commenter opines that it is improper and unfair to send a doctor thousands of pages of records the day before an evaluation. There should be a regulation that requires records be sent in advance of the appointment (as required in psychiatric evaluations). Psychiatrists are the only specialists that can cancel appointments if they do not have records. All doctors should have the benefit of the records in order to render a substantial medical-evidence report based on the examination and review of the records. This is consistent with the expeditious provision of benefits to the applicant.  Commenter requests that the Division of Workers' Compensation establish priority in its goals. If the goal is expeditious provision of benefits and in conjunction with that keeping quality medical evaluators  in the system to do panel QME reports, AME reports and regular physician reports, it should  craft the regulations to assist these goals. Commenter opines that the three late reports issue and the issue of proportionality are very significant. Commenter does not believe that any doctor should be  considered to have a late report if the parties do not object prior to service of the report as outlined Title 8, California Code of Regulations §31.5(a)(l2). If the parties do not object, then the Division of Workers' Compensation should not consider it a late report. | William Tappin  Tappin & Associates  December 11, 2023  Written Comment  Peter Mandell, MD  Chair, WC Committee  California Orthopaedic Association  December 11, 2023  Written Comment | Noted.  However, the subject matter of this comment relates to statutory provisions that are beyond the scope of rulemaking.  In addition, suggestions provided are beyond the scope of the current rulemaking.  References to Title 8, California Code of Regulations §31.5(a)(l2) have been addressed in a prior response. As stated, a QME is not replaced for late reporting unless an objection has been verified. | None. |
| 11.5(j) | Commenter recommends that the entire Report-Writing course be taken on-line.  Commenter does not believe that it is workable to set-up this hybrid meeting requirement – 6 hours of instruction required to be in person and 10 hours of instruction may be distance learning and opines that it will delay physicians from becoming accredited as a QME.  Commenter’s organization receives orders for its on-line Report-Writing course throughout the year – not just when the DWC has scheduled a QME test. Some existing QMEs like to take the course as a refresher on writing a more rateable report. Others are physicians who have signed up for the DWC QME test. Commenter’s organization requires its members to take the Report-Writing course prior to taking the test. Therefore, when a member signs up for the DWC test or when they are considering signing up, they order the COA Report-Writing course. Physicians taking the COA Report-Writing course are required to take a post-meeting test and pass by 70%. They have a high pass rate of physicians who have taken the COA Report-Writing course, ultimately passing the DWC QME test – even when they have taken the course on-line.  Commenter states that in order for his organization to schedule an in-person course, they must have at least 10-15 attendees. COA wants to keep the registration fees low and the registration fees have to cover the costs of the course – faculty travel/hotel, F&B, AV costs, staff travel, arrange a hotel discount for attendees, etc. COA needs at least 10-15 attendees to break even on the course.  Commenter states that under this new system, when someone orders the on-line course, they must wait until there are 10-15 attendees before they can schedule the distance learning course. Alternatively, COA could pick a date for the course – probably closer to the scheduled DWC test date, and there are not enough attendees, the course would be need to be cancelled.  So, at best potential QMEs would have to wait to see if they would be able to take the Report-Writing as a distance learning course and at worst they will have to scramble at the last minute to find another course, should COA not proceed with the distance learning course.  In the Spring, COA is focused on holding a course to help existing QMEs earn their required CME hours. In the Fall, COA focus’ on new QMEs and will hold an in-person Report Writing course if there are at least 10-15 physicians wanting to take the course.  Course providers simply cannot afford to hold an in-person course for a small number of attendees; thus, the ability to offer the entire course as an on-line course has been attractive for course providers and potential QMEs.  Commenter recommends if there is concern that physicians are not actually viewing the on-line courses, DWC could require course providers to send in the test results of those physicians taking their on-line Report-Writing courses. | Peter Mandell, MD  Chair, WC Committee  California Orthopaedic Association  December 11, 2023  Written Comment | The Administrative Director disagrees.  Any steps taken by the Administrative Director to improve report quality in the QME program could be viewed as burdensome to the existing or prospective QMEs. However any additional burden must be weighed against the possibility of a very much-needed improvement in report quality. By contrast, the steps taken by the Administrative Director could be viewed as an opportunity for the physician to improve their report writing skills.  Requiring an in person component to the report writing course that must be taken upon passing the QME exam ensures that prospective QMEs engage in face-to-face time with the instructor where it is hoped that interaction and discourse will improve the participants understanding of the material. The only data supporting the benefit of in-person instruction is the unassailable fact that colleges and universities have not switched to total online instruction despite the availability of equipment to allow this possibility. In addition, there’s been a documented loss in learning occasioned by children having to participate in classes solely online during the pandemic. These two factors point up the usefulness of in-person instruction.  Physicians who are taking the report writing course as part of continuing education are not limited to or required to take six hours of the course in person. This requirement only applies to regulation § 11.5. Physicians taking the course as continuing education are governed by the provisions of regulation § 55.  The Administrative Director is aware that there are considerations with respect to breakeven costs for providing the report writing course. However, this problem could be solved by cooperation between continuing education providers for the provision of the in person requirement. This collaboration would ensure that there are sufficient attendees to make the in person component feasible. | None. |
| 11.5(n) | Commenter notes that this subsection states that the provider shall issue a certificate of completion to the physician if they have completed 12 hours of the course. Commenter recommends that this be changed to require the attendee to complete all 16 hours of the course. | Peter Mandell, MD  Chair, WC Committee  California Orthopaedic Association  December 11, 2023  Written Comment | The Administrative Director agrees. | The proposed regulation will be amended to comply with the recommendation. |
| 33(d) | Commenter notes that this subsection defines good cause for the QME to be unavailable and includes sabbaticals, or death or serious illness of an immediate family member. Commenter recommends that the definition also include if the QME is seriously ill to make clear that this would be “good cause.” | Peter Mandell, MD  Chair, WC Committee  California Orthopaedic Association  December 11, 2023  Written Comment | The Administrative Director disagrees.  The existence of the wording “including but not limited to" before some of the listings of good cause implies that all of the instances of good cause are not listed in the regulation. The serious illness of the QME would be assumed to be good cause and has acted as such throughout implementation of the provisions of the unavailability regulation, even prior to the amendments contained in this rulemaking. There is no anticipation of that interpretation of this regulation changing in the future. | None. |
| 35(a)(3) | Commenter notes that this subsection specifies that a letter outlining the issues to be addressed in the evaluation should be received by the QME no less than 20 days in advance of the evaluation. Commenter states that this section does not include is a statement as to what happens if the letter is not received. Should the QME move forward with the evaluation without the letter? Is the evaluation postponed?  Commenter requests that DWC clarify how to handle the evaluation if the letter is not received. | Peter Mandell, MD  Chair, WC Committee  California Orthopaedic Association  December 11, 2023  Written Comment | Noted.  An amendment to regulation § 35 (a)(3) is not contemplated by this rulemaking. However, the recommendation is a valid suggestion for future rulemaking. Traditionally, the better practice has been that the evaluator moves forward with the evaluation and utilizes the factors in regulation § 10682 as a guide to the parameters of the evaluation. | None. |
| 35(c) | Commenter notes that this subsection specifies that at least 20 days before the information is to be provided to the evaluator, the party provided such medical information shall serve it on the opposing party.  Commenter would like clarification on what would happen if this timeframe is not met. | Peter Mandell, MD  Chair, WC Committee  California Orthopaedic Association  December 11, 2023  Written Comment | Noted.  An amendment to regulation § 35 (c) is not contemplated by this rulemaking. However, the recommendation is a valid suggestion for future rulemaking. The exchange of information prior to it being sent to the evaluator is primarily intended to cut down on receipt by the evaluator of objectionable material or duplicate material. The remedies for a violation of this regulation are adequately addressed by the parties before a Workers’ Compensation Judge. | None. |
| 35(i)  35(h) | Commenter notes that this subsection now prevents the QME from contacting the PTP to request relevant medical records, yet subsection (j) allows the evaluator to consult with the PTP and not in the record new or addition information received from the treating physician. Commenter opines that these sections are not consistent with each other and he objects to the deleted language in subsection (i). Commenter opines that it should continue to be permissive for the QME to contact the PTP.  Commenter understands that this could be abused by the QME; however, in his previous comments he has recommend allowing the QME to obtain additional records as long as the number of additional records received does not create additional cost to the parties – meaning the total number of pages would be 200 or less. | Peter Mandell, MD  Chair, WC Committee  California Orthopaedic Association  December 11, 2023  Written Comment | The Administrative Director disagrees.  The two subdivisions of the regulation are not inconsistent. While the evaluator may not contact the primary treating physician to secure additional medical records, consultations with the primary treating physician to produce a complete report are still permissible. Any new information learned from the primary treating physician does not have to be in the form of a medical record.  The ability of the medical evaluator to obtain records that are not provided, and whether these records are billable is possibly the subject of a future rulemaking. | None. |
| 35.5(h) | Commenter agrees that evaluators should not discriminate against any injured worker, however, he opposes language in this section that says the QME/AME must attest that they did not discriminate in “any way” against the parties. This is very broad and leaves open to interpretation what some party may say that a QME discriminated against them. Commenter opines that it is unreasonable to ask the QME/AME to attest to such a broad statement.  Commenter recommends the following revised language:  “Each reporting evaluator shall include in the report a declaration under penalty of perjury that the evaluator did not discriminate based on race, color, religion, sex, national origin, disability, or age against the parties to the action or the injured worker in the evaluation process or in the content of the report.” | Peter Mandell, MD  Chair, WC Committee  California Orthopaedic Association  December 11, 2023  Written Comment | The Administrative Director disagrees.  The Administrative Director does not feel that the language is too broad. Discrimination is an evolving concept. Delineation of all of the specific means of discrimination is not feasible. However, any allegations of discrimination are thoroughly investigated with due process provided to the qualified medical evaluator during and after any investigation.  In addition, the terms of the regulation do not require any certain specific language beyond a declaration of nondiscrimination. Therefore, the language of the provided suggestion would satisfy the terms of the current proposed regulation. | None. |
| 50(g) | Commenter notes that this subsection requires the QME/AME to send in their two most recent reports in which there was an in-person evaluation. For those QMEs/AMEs doing remote evaluations, they may not be able to comply with this requirement. Commenter is unsure why the Division is tying the requirement to the setting of the evaluation.  Commenter recommends that the Division change this requirement and allow the QME/AME to submit a copy of their last two reports, regardless of whether the evaluation was in-person or remote. | Peter Mandell, MD  Chair, WC Committee  California Orthopaedic Association  December 11, 2023  Written Comment | The Administrative Director disagrees.  The regulation requires that the report be one where there was a “face-to-face evaluation". Regulation § 49 defines face-to-face time as “that time the evaluator is present with an injured worker”. Taken together, this means that the request under proposed regulation 50 (g) is limited to reports that are as a result of a comprehensive or follow up evaluation. There is no stated parameter in the regulation that specifically indicates remote evaluations are excluded. | None. |