WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

AME WELLS, *Applicant*

vs.

SUBSEQUENT INJURIES BENEFITS TRUST FUND (SIBTF), *Defendants*

Adjudication Number: ADJ10890286
Salinas District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks removal of the Findings of Fact, Order for Further Development of the Record (F&O) issued on June 11, 2024, wherein the workers' compensation administrative law judge (WCJ) found that (1) while employed as a registered nurse on November 18, 2016, applicant sustained injury arising out of and in the course of employment in the form of Irritable Bowel Syndrome (IBS) and Gastroesophageal Reflux Disease (GERD); (2) applicant's permanent disability resulting from subsequent injury when considered alone and without regard to apportionment or adjustment for occupation or age is equal to 35 percent or more of her total disability pursuant to Labor Code section 4751; (3) the issue of whether the combined effect of the last injury and the previous disability is a permanent disability equal to 70 percent or more of total disability under Labor Code section 4751 is deferred pending further development of the record; and (4) all other issues are deferred.

The WCJ ordered the parties to further develop the record on the issue of whether applicant's combined disabilities equal 70 percent or more of total disability.

Defendant contends that the WCJ (1) erroneously found that the record on the issue of whether the combined disabilities qualify applicant for SIBTF benefits should be further developed, resulting in significant prejudice or irreparable harm; and (2) is legally precluded from ordering further development of the record because she concluded that Dr. Mahawar's reporting "constituted an impermissible retroactive determination of impairment relative to the alleged preexisting non-industrial conditions." (Petition, p. 8:1-3.)

We received an Answer from applicant.

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

We have considered the allegations of the Petition, the Answer, and the contents of the Report. Based on our review of the record, and for the reasons stated below, we will treat the Petition as one for reconsideration and deny reconsideration.

FACTUAL BACKGROUND

In the Report, the WCJ states:

> In addition to the Order Compelling further development of the record, the WCJ issued the following Findings of Fact which are now final:
> . . .
> 5. Applicant sustained injury AOE/COE in the form of IBS and GERD.
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> 6. Applicant's subsequent injury when considered alone and without regard to apportionment or adjustment for the occupation or age of the applicant, is equal to 35% or more of total disability pursuant to Labor Code § 4751.
> . . .
>
> [T]he only evidence presented at trial on the SIBTF case was the reporting of Dr. Mahawar commissioned by the applicant. In unrebutted reports, Dr. Mahawar concluded applicant did, in fact, have pre-existing, labor-disabling disability resulting from migraine headaches, hypothyroidism, left ankle surgery, and a cholecystectomy. Dr. Mahawar supported his opinions with medical evidence pre-dating applicant's subsequent industrial injury.
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> In addressing whether or not the reporting could be relied upon to make an actual "finding" as to whether applicant met their burden of proof, the WCJ determined she could not make such a finding on the current record pending some clarification from Dr. Mahawar. Specifically:
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> **HYPOTHYROIDISM**
>
> Dr. Mahawar assigned 15% whole person impairment for applicant's hypothyroidism per table 10-2 of the AMA Guides, reporting "clinical evidence of hypothyroidism, and currently being treated with Synthroid daily." In reviewing the prescription histories contained in the medical-legal reporting of Dr. Feinberg, it is evident that applicant was on thyroid medication as of 12/14/2017 and continuing. While this is post-subsequent industrial injury of 11/18/16, it does support applicant's history of thyroid medication for hypothyroidism from approximately 2013 to the present given the records in 2013 establishing the presence of hypothyroidism and applicant's reporting of taking hypothyroid medications since that time.

While Table 10-2 of the AMA Guides provides a range of impairment from 0% to 15% for persons on medications for hypothyroidism, but Dr. Mahawar provided no basis for selecting the upper end of the range, especially in light of his history that applicant's condition has been well controlled under medication. Reconsideration and/or clarification of WPI was requested as follows:

Dr. Mahawar should also provide some analysis as to whether applicant could work in a cold environment with adjustment of medications and, if so, whether this would alter his opinion as to whether the condition is "labor disabling" as compared to simply a ratable disability. (Emphasis added).

MIGRAINE HEADACHES

In formulating his opinion on applicant's WPI for headaches, Dr. Mahawar relied on reporting of Dr. Centurion from 8/19/08 who diagnosed headaches with a history going back to childhood. She had not had a major migraine in several years, but she developed occasional "tension" headaches. On 4/16/2016, Dr. Centurion reported that applicant complained of more frequent migraine headaches triggered by neck tension. Dr. Mahawar then concluded applicant was permanent and stationary at that time, preceding her subsequent industrial injury in November of 2016.

Dr. Mahawar attempted to rate applicant's headaches by analogy under Table 13-11, Class 1, Cranial Nerve V (Trigeminal Nerve) based on the conclusion that applicant was having severe headaches 3-4 times per week prior to her industrial injury. In addition, there was no analysis of how or why the very upper end of the WPI range was selected.

Petitioner correctly noted that the WCJ opined Dr. Mahawar's resulting work restrictions were based on a conclusory opinion that applicant's severe headache pain would occur at least 3-4 times per month and last anywhere from one to three hours, severe enough to interfere with attention and concentration and to perform sustained and competitive work frequently, 1/3 to 2/3 of the day is not supported by the medical record and is not substantial medical evidence. Dr. Mahawar did not point to a contemporaneous medical report documenting this frequency of severe migraine headaches predating her industrial injury nor does he take a history from the applicant consistent with this description.

It was requested Dr. Mahawar consider the medical record in its entirety concerning applicant's headaches pre- and post-industrial injury and clarify his analysis of whole person impairment as well as whether there was any evidence that applicant's history of migraine headaches was labor-disabling prior to her industrial injury of 11/18/2016. (Emphasis added).

LEFT ANKLE

Dr. Mahawar concluded applicant had long-term effects from a left ankle fracture on 02/02/1989 as ever since then her ankle has caused her a degree of "difficulty with elevations, grades, stairs, deep chairs and long distances." (A-2, @ p. 63) These reported complaints are taken post 11/18/2016 industrial injury and mirror the definition of a Class 1 impairment for Station and Gait Disorders, at p. 336, Table 13-15, of the AMA Guides which provides for 1% to 9% WPI. Dr. Mahawar concluded applicant had 9% WPI due to the 1989 left ankle fracture apparently utilizing Almaraz/Guzman by analogizing to Station and Gait Disorders. There was no explanation or analysis when choosing the high end of the range.

Dr. Feinberg's report of 2/7/2022, beginning at p. 2, indicated applicant's left ankle was injured on 2/02/1989 after being pulled down on a playground at school. Xray's of the same day showed an oblique fracture extending through the medial aspect of the distal tibial metaphysis through the epiphysis into the articular surface. The fracture was not significantly displaced. She was casted the next day with instructions to keep her foot elevated and given pain medication (J-21). There are no further medical records pertaining to the left ankle.

Dr. Mahawar failed to acknowledge applicant's active lifestyle prior to her 11/18/2016, injury, which by applicant's own admission, included scuba diving, motorcycle riding, *and had climbed Mount Kilimanjaro*. (See attachment to Dr. Feinberg report dated 8/19/18, J-4). Moreover, the "History as Given by the Claimant" recorded by Dr. Mahawar did not mention any ankle complaints. It was difficult for the WCJ to reconcile applicant reporting that "Although she recovered from this fracture, it has continued to impact her life with ADL's such as walking, climbing stairs, and traveling long distances." (A-2, @ p. 63)

The WCJ requested Dr. Mahawar consider the medical record in its entirety concerning applicant's left ankle pre- and post-industrial injury and clarify his analysis as to whether there is whole person impairment attributable to the ankle, whether there are contemporaneous medical records that applicant's 1989 left ankle injury was labor-disabling prior to her industrial injury of 11/18/2016, and reconcile applicant's reported activities prior to her industrial injury and post ankle fracture, with subjective reporting at the time of the evaluation. (Emphasis added).

CHOLECYSTECTOMY

Dr. Mahawar concluded applicant had a ratable disability for Cholecystectomy per table 6-7 on page 133 of the AMA Guides (A-2 @ p. 61). History taken was applicant had an episode of abdominal pain in 2006 when she was diagnosed with gallstone and cholecystitis resulting in a laparoscopic cholecystectomy (gallbladder removal surgery) in 2006. She reported difficulty digesting fatty foods and avoids that. She also reported a history of acid reflux and pain in her abdomen on and off

since 2004. She was currently treating herself with avoiding processed food and spicy food, sometimes taking Mylanta as needed. (Id @ p. 2).

WCJ requested confirmation that applicant underwent a Cholecystectomy, as Dr. Mahawar stated, "Dr. Michael Lee documented on 7/31/12 that she had undergone a laparascopic cholecystectomy in 2006 by Dr. Hyde" (Id @ p. 61). The summary of Dr. Lee's report of 7/31/12, as reported by Dr. Mahawar @ p. 25, does not provide this history, rather applicant reports recurrent right upper quandrant pain, abnormal ultrasound, single inflamed hyperplastic polyp in ascending colon. Dx: GERD, IBS.

Dr. Mahawar was requested to review the complete medical file related to applicant's history of GERD, acid reflux, and IBS, to clarify opinion on whether the reported surgery caused heartburn and belching. In particular, whether applicant's GERD and IBS similarly would have caused these symptoms, i.e., prevent applicant from digesting fatty foods, and thereby completely overlap with applicant's GERD and IBS conditions.

Dr. Mahawar was also requested to provide basis for WPI at maximum end of range (14%) when applicant's cholecystectomy condition has been well stabilized since 10/31/2012. And provide further analysis how contemporaneous medical reports support this condition was labor disabling prior to 11/18/2016. (Emphasis added)

CONCLUSION

Whether the second prong of the threshold for compensability for SIBTF benefits was met was deferred pending further development of the record. In this case, Dr. Mahawar reviewed the medical record, interviewed and examined the applicant and drew conclusions based on his review of the totality of the evidence. While the evidence was unrebutted, the WCJ determined further development of the record was necessary regarding the assessment by Dr. Mahawar as to the extent of permanent disability in these four areas. And, if Dr. Mahawar amended any of his findings on permanent disability, whether that would impact his conclusions on whether the pre-existing condition was labor disabling.

. . .

[T]he WCJ herein did not make a "finding" that Dr. Mahawar's report was not substantial evidence on the issues of whether applicant had labor-disabling, permanent disability prior to her subsequent industrial injury for the four conditions outlined above. All four conditions had substantial medical evidence establishing ratable disability prior to applicant's subsequent industrial injury which served to support applicant's claims. Before following the unrebutted conclusions of Dr. Mahawar, the WCJ reviewed all medical evidence which resulted in the need for clarification and/or further analysis before a decision could be rendered as to the proper percentage of permanent disability related to applicant's pre-existing conditions, and to ultimately determine if the threshold has been met.
(Report, pp. 1-9.)

DISCUSSION

Preliminarily, we observe that if a decision includes resolution of a "threshold" issue, then it is a "final" decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc).) Threshold issues include injury arising out of and in the course of employment, jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd*. (*Gaona*) (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or court of appeal. (See Lab. Code, § 5904.) Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision issues.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the petitioner challenging a hybrid decision only disputes the WCJ's determination regarding interlocutory issues, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions.

Here, the WCJ's decision includes a finding regarding a threshold issue, i.e., while employed on November 18, 2016, applicant sustained injury arising out of and in the course of employment in the form of IBS and GERD. It follows that the WCJ's decision is a final order subject to reconsideration; and since the Petition only challenges the interlocutory finding that the record be further developed, the removal standard applies to our evaluation of its merits. (See *Gaona*, *supra*.)

Turning to the merits of the Petition, we observe that removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd*. (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App 4th 274, 280, fn. 2 [70 Cal.Comp.Cases 133].) The Appeals Board will grant removal only if the petitioner shows that significant prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955; see also *Cortez*, *supra*; *Kleemann*, *supra*.) In addition, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10955.)

Labor Code 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.
> (Lab. Code § 4751.)

In *Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal.Comp.Cases 576, 581-582 [2020 Cal. Wrk. Comp. LEXIS 35] (Appeals Board en banc), we stated that an employee must prove the following elements to recover subsequent injuries fund benefits:

> (1) a preexisting permanent partial disability;
>
> (2) a subsequent compensable injury resulting in additional permanent partial disability:
>
> (a) if the previous permanent partial disability affected a hand, an arm, a foot, a leg, or an eye, the subsequent permanent disability must affect the opposite and corresponding member, and this subsequent permanent disability must equal to 5% or more of the total disability, when considered alone and without regard to, or adjustment for, the occupation or age of the employee; or
>
> (b) the subsequent permanent disability must equal to 35% or more of the total disability, when considered alone and without regard to, or adjustment for, the occupation or the age of the employee;
>
> (3) the combined preexisting and subsequent permanent partial disability is greater than the subsequent permanent partial disability alone; and
>
> (4) the combined preexisting and subsequent permanent partial disability is equal to 70% or more. ([Lab. Code] § 4751.)

(*Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal.Comp.Cases 576, 581-582 (Appeals Board en banc).)

Defendant argues that the WCJ erred by finding that the record should be further developed on the issue of whether the combined disabilities qualify applicant for SIBTF benefits, resulting in significant prejudice or irreparable harm.

As stated by the WCJ in the Report, the only evidence presented relating to the issue of whether applicant is entitled to SIBTF benefits was the reporting of Dr. Mahawar, whose unrebutted medical opinion was that applicant had preexisting, labor-disabling disability resulting from migraine headaches, hypothyroidism, left ankle surgery, and a cholecystectomy. (Report, p. 3.) The WCJ further found that the record should be further developed "as to the extent of permanent disability in these four areas" so that "a decision could be rendered as to the proper percentage of permanent disability related to applicant's pre-existing conditions, and . . . [whether] the threshold [for SIBTF eligibility] has been met." (Report, p. 9.)

On this record, we discern no error in the WCJ's finding that the record should be further developed on the issue of whether the combined disabilities qualify applicant for SIBTF benefits. (See Lab. Code, § 5701, Lab. Code, § 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [65 Cal. Rptr. 2d 431, 62 Cal.Comp.Cases 924] (stating that the "principle of allowing full development of the evidentiary record to enable a complete adjudication of the issues is consistent with due process in connection with workers' compensation claims").)

Accordingly, we conclude that the finding that the record should be further developed resulted in no significant prejudice or irreparable harm to defendant.

Having determined that defendant failed to carry its burden for the remedy of removal, we nevertheless address defendant's argument that the WCJ is legally precluded from ordering further development of the record because she concluded that Dr. Mahawar's reporting "constituted an impermissible retroactive determination of impairment relative to the alleged preexisting non-industrial conditions." (Petition, p. 8:1-3.)

Here, defendant cites no grounds in the record indicating that the WCJ in fact concluded that Dr. Mahawar's reporting constituted an impermissible retroactive determination of permanent disability—and no legal authority for the proposition that such a determination is not permitted. Moreover, the record shows not that the WCJ concluded that Dr. Mahawar made a retroactive determination of applicant's preexisting permanent disability, but that further development of the record was necessary to determine the level of permanent disability from the preexisting injury.

(Report, p. 9.) Lastly, because other Appeals Board panels have found that contemporaneous medical evidence as to the level of preexisting disability is not required for subsequent determination of that issue, we are persuaded that it is permissible for Dr. Mahawar to opine as necessary for the WCJ to determine whether applicant qualifies for SIBTF benefits. (See, e.g., *Organista v. Subsequent Injuries Benefits Trust Fund*, 2023 Cal. Wrk. Comp. P.D. LEXIS 352.)[1]

Accordingly, we discern no merit to defendant's argument that the WCJ is legally precluded from ordering further development of the record.

Accordingly, we will treat the Petition as one for reconsideration and deny reconsideration.

[1] 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).)

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings of Fact, Order for Further Development of the Record issued on June 11, 2024 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 26, 2024

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

AME WELLS
DILLES LAW GROUP
OFFICE OF THE DIRECTOR – LEGAL UNIT

SRO/*cs*

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