

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

FARIBA FANA, *Applicant*

vs.

**REGENTS OF THE UNIVERSITY OF CA - UC SAN DIEGO, permissibly self-insured,
administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants***

**Adjudication Number: ADJ10171000
San Diego District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION**

Applicant has petitioned for removal, or in the alternative, reconsideration, of the Order Vacating the Findings, Award and Order (Order) issued by the workers' compensation administrative law judge (WCJ) on May 8, 2024. In that Order, the WCJ vacated the Findings of Fact and Award (F&A) issued on April 3, 2024 in which the WCJ found, in pertinent part, that applicant's industrial injury caused permanent disability of 100% without apportionment.

The WCJ found in her Order vacating that upon review of the petition for reconsideration filed by defendant in response to her F&A of April 3, 2024, the record needed development by way of a supplemental report from the Independent Medical Examiner (IME) Joshua Pal, M.D., as well as an opinion from another independent vocational rehabilitation expert. She thus issued an order vacating the April 3, 2024 F&A, and set the matter for a status conference on July 11, 2024.

Petitioner contends that the WCJ's F&A of April 3, 2024 was fully supported by the existing record, and that the reopening of the record in the absence of any inconsistencies is unwarranted. Petitioner asserts there was no good cause for the WCJ's rescission of her decision, and requests reinstatement of the findings of the WCJ that the applicant is 100% permanently and totally disabled.

Defendant filed an answer to applicant's petition.

The WCJ filed a Report and Recommendation on Petition for Reconsideration/Removal (Report) recommending denial of the Petition.

We have considered the Petition for Removal or the alternative Reconsideration (Petition), the Answer, the contents of the Report, and we have reviewed the record in this matter. Based upon our preliminary review of the record, we will grant applicant's Petition for Reconsideration. Our order granting the Petition is not a final order, and we will order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law. Once a final decision after reconsideration is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code section 5950 et seq.

I.

Preliminarily, we note the following in our review:

This matter was initially set for hearing on October 4, 2021. At that time, the parties went on the record and stipulated that: applicant was employed on July 14, 2015 as a Computer Programmer, Group No. 112 by the defendants, and sustained injury arising out of and in the course of employment to her left toe, right knee, back, and psyche CRPS; the employee's earnings at the time of injury was \$1,483.69 per week; the carrier has paid compensation at a weekly rate of \$290 for the period March 22, 2018 through February 9, 2019; the employer has furnished some medical treatment and applicant's primary treating physician is Dr. William Wilson; no attorney fees have been paid and no attorney fees have been made; and the parties have agreed on a vocational counselor in this case. (Minutes of Hearing, Summary of Evidence, October 4 2021, p.2-3.)

Applicant testified, and the matter stood submitted for decision after allowance for post-trial briefs.

On November 15, 2021, the WCJ issued a Findings, Award, and Order. The F&A found, in pertinent part that:

8. The existing medical record does not provide substantial evidence on applicant's condition either as to permanent disability, or apportionment,

9. The WCJ will therefore defer a ruling on applicant's overall level of permanent disability, apportionment and attorney's fees.

Applicant was Awarded Temporary Total Disability from January 1, 2018 through March 12, 2021 subject to the statutory maximum of 104 weeks.

The WCJ Ordered as follows:

1. The parties are directed to develop the medical record in accordance with the provisions of Finding No. 8, above,

2. The parties shall confer with the trial judge and each other at Status Conference on January 6, 2022, beginning at 1:30 p.m., to be scheduled for the Court to monitor the parties' plans and progress of discovery.

(Findings, Award and Order, November 15, 2021, pp.1-3.)

At the January 6, 2022 status conference, the WCJ encouraged the parties to meet and confer in order to agree upon a pain management specialist who specializes in CRPS.

The parties thereafter returned to the trial calendar after they were unable to agree upon an independent medical evaluator specializing in CRPS. Ultimately, the WCJ appointed Joshua Pal, M.D., as an independent medical evaluator¹ after requesting names of proposed doctors from the parties, and issued an Order on April 14, 2022 compelling applicant to attend an examination with Dr. Pal.

On March 6, 2024, the matter was again set for trial after the parties obtained the reporting and deposition testimony of Dr. Pal. The WCJ Ordered the matter off calendar, and issued a Notice of Intention (NIT) to admit the evidence and submit the case for decision. There were no Minutes of Hearing or Summary of Evidence other than the NIT.

On April 3, 2024, the WCJ issued her Findings of Fact and Award, which found, in pertinent part:

Stipulated Facts:

1. Applicant Fariba Fana. Born [], while employed on July 14, 2015, as a computer programmer (occupational group 112) at San Diego, California by defendant UC San Diego, sustained injury arising out of and in the course of employment to her left toe, right knee, back, psyche and chronic regional pain syndrome (CRPS).

¹ Section §28 states; For injuries occurring on and after January 1, 1991, whenever the term “independent medical examiner” is used in this case, the term shall mean “qualified medical evaluator.” (Cal. Labor Code § 28.) Here, however, it appears that the parties and the WCJ were referring to either an Agreed Medical Evaluator (AME), or the WCJs appointment of a “regular physician” per section 5701. (Cal. Lab. Code § 5701.)

7. The applicant was seen by a joint vocational rehabilitation expert Hall Mortimer.

8. The applicant was seen by a court appointed IME Dr. Joshua Pal.

Findings of Fact:

1. The applicant is entitled to retro temporary disability for the period January 1, 2018 through March 21, 2021 subject to the statutory maximum of 104 weeks.

2. The P&S date is March 21, 2021.

3. This injury caused permanent disability of 100% without apportionment. Payments subject to reduction for permanent disability already advanced, and attorney fees. See DEU commutation attached hereto.

4. There is a need for future medical treatment consistent with the opinion and recommendations of IME Dr. Joshua Pal.

5. The reasonable value of the services rendered by the applicant attorney is 15% of the permanent disability awarded. The fee is to be commuted using the Uniform Reduction Method, pursuant to the DEU Commutation of March 28, 2024, attached hereto.

On April 29, 2024, defendants filed their petition for reconsideration of this decision, and the WCJ thereafter issued the May 8, 2024 Order Vacating Decision that is the subject of applicant's Petition for Removal/Reconsideration.

II.

Our preliminary review includes the following:

Pursuant to the Findings of Fact, Award and Order of November 15, 2021, the WCJ found that the applicant sustained industrial injury to her left toe, right knee, back. Psyche and CRPS, awarded temporary disability benefits, and further found that the existing medical record did not provide substantial evidence on applicant's condition either as to permanent disability, or apportionment, The WCJ Ordered the parties to develop the medical record in accordance with same. (F&A&O, November 15, 2011, FF#8, Order #1.) Those Findings and Order became final, and causation of the CRPS was no longer in issue.

She thereafter issued an Order dated April 15, 2022 and served on April 18, 2022 compelling applicant to attend a medical evaluation with Dr. Pal. The Order indicated that:

“Dr. Pal review all medical records, reports, Minutes of hearing/Summary of Evidence and Findings & Award and Evaluate the Applicant. IME Dr. Pal is to render an opinion and report as to Applicant’s Permanent Disability/Whole Person Impairment.” (Order, April 18, 2022.)

Thus, the issue of industrial causation of applicant’s CRPS was no longer at issue, and the issues to be determined by Dr. Pal were that of permanent disability and whole person impairment.

The AMA Guides 5th Edition provides several different chapters in which a physician can rate impairment of CRPS (RSD and causalgia). The relevant chapters are: 1) Chapter 13.8 at page 343 (upper and lower extremities); 2) Chapter 16.5e at page 495 (upper extremities); and 3) Chapter 17.2m at page 553 (lower extremities). These chapters provide different diagnostic and impairment rating criteria. Table 16-16 is but one chapter in the AMA Guides, 5th Edition, and it relates to issues of diagnosis and rating CRPS in the upper extremity.

Moreover, in Master the AMA Guides Fifth, Cocchiarella and Lord, p. 250. , the writers of the Guides say that the use of Table 16-16 is optional. (*Hernandez v. Pearson Ford* 2016 Cal. Wrk. Comp. P.D. LEXIS 371.) (Cal. Workers' Comp. App. Bd. July 18, 2016.)

III.

Any decision of the WCAB must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [520 P.2d 978, 113 Cal. Rptr. 162] [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [475 P.2d 451, 90 Cal. Rptr. 355] [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [463 P.2d 432, 83 Cal. Rptr. 208] [35 Cal.Comp.Cases 16].)

In this regard, it has been long established that, in order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. (*McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413, 416-417, 419 [445 P.2d 313, 71 Cal. Rptr. 697] [33 Cal.Comp.Cases 660]; *Travelers Ins. Co. v. Industrial Acc. Com. (Odello)* (1949) 33 Cal.2d 685, 687-688 [203 P.2d 747] [14 Cal.Comp.Cases 54]; *Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692, 1700-1702, 1705 [20 Cal. Rptr. 2d 778] [58 Cal.Comp.Cases 313].)

Further, a medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. (*Granado v. Workers' Comp. Appeals Bd.* (1970) 69 Cal.2d 399, 407 [445 P.2d 294, 71 Cal. Rptr. 678] (a mere legal conclusion does not

furnish a basis for a finding); *Zemke v. Workmen's Comp. Appeals Bd.*, *supra*, 68 Cal.2d at pp. 799, 800-801 (an opinion that fails to disclose its underlying basis and gives a bare legal conclusion does not constitute substantial evidence); see also *People v. Bassett* (1968) 69 Cal.2d 122, 141, 144 [443 P.2d 777, 70 Cal. Rptr. 193] (the chief value of an expert's testimony rests upon the material from which his or her opinion is fashioned and the reasoning by which he or she progresses from the material to the conclusion, and it does not lie in the mere expression of the conclusion; thus, the opinion of an expert is no better than the reasons upon which it is based). (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

Here, it is unclear from our preliminary review whether the existing record is sufficient to support the order and decision of the WCJ, as well as whether further development of the record may be necessary with respect to the issues noted above.

IV.

Finally, we observe that under our broad grant of authority, our jurisdiction over this matter is continuing.

A grant of reconsideration has the effect of causing “the whole subject matter [to be] reopened for further consideration and determination” (*Great Western Power Co. v. Industrial Acc. Com. (Savercool)* (1923) 191 Cal. 724, 729 [10 I.A.C. 322]) and of “[throwing] the entire record open for review.” (*State Comp. Ins. Fund v. Industrial Acc. Com. (George)* (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. (See Lab. Code, §§ 5907, 5908, 5908.5; see also *Gonzales v. Industrial Acci. Com.* (1958) 50 Cal. 2d 360, 364.) “[t]here is no provision in chapter 7, dealing with proceedings for reconsideration and judicial review, limiting the time within which the commission may make its decision on reconsideration, and in the absence of a statutory authority limitation none will be implied.”; see generally Lab. Code, § 5803 [“The WCAB has continuing jurisdiction over its orders, decisions, and awards. . . . At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor.”].)

“The WCAB . . . is a constitutional court; hence, its final decisions are given res judicata effect.” (*Azadigian v. Workers’ Comp. Appeals Bd.* (1992) 7 Cal.App.4th 372, 374 [57 Cal.Comp.Cases 391; see *Dow Chemical Co. v. Workmen’s Comp. App. Bd.* (1967) 67 Cal.2d 483, 491 [62 Cal.Rptr. 757, 432 P.2d 365]; *Dakins v. Board of Pension Commissioners* (1982) 134 Cal.App.3d 374, 381 [184 Cal.Rptr. 576]; *Solari v. Atlas-Universal Service, Inc.* (1963) 215 Cal.App.2d 587, 593 [30 Cal.Rptr. 407].) A “final” order has been defined as one that either “determines any substantive right or liability of those involved in the case” (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers’ Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers’ Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]), or determines a “threshold” issue that is fundamental to the claim for benefits. Interlocutory procedural or evidentiary decisions, entered in the midst of the workers’ compensation proceedings, are not considered “final” orders. (*Maranian v. Workers’ Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) [“interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not ‘final’ ”]; *Rymer, supra*, at p. 1180 [“[t]he term [‘final’] does not include intermediate procedural orders or discovery orders”]; *Kramer, supra*, at p. 45 [“[t]he term [‘final’] does not include intermediate procedural orders”].)

Labor Code section 5901 states in relevant part that:

“No cause of action arising out of any final order, decision or award made and filed by the appeals board or a workers’ compensation judge shall accrue in any court to any person until and unless the appeals board on its own motion sets aside the final order, decision, or award and removes the proceeding to itself or if the person files a petition for reconsideration, and the reconsideration is granted or denied. . . .”

Thus, this is not a final decision on the merits of the Petition for Reconsideration, and we will order that issuance of the final decision after reconsideration is deferred. Once a final decision is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code sections 5950 et seq.

IV.

Accordingly, we grant applicant's Petition for Reconsideration, and order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

While this matter is pending before the Appeals Board, we encourage the parties to participate in the Appeals Board's voluntary mediation program. Inquiries as to the use of our mediation program can be addressed to WCABmediation@dir.ca.gov.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Removal and/or Reconsideration of the Order issued on May 8, 2024 by a workers' compensation administrative law judge is **GRANTED**.

IT IS FURTHER ORDERED that a final decision after reconsideration is **DEFERRED** pending further review of the merits of the Petition and further consideration of the entire record in light of the applicable statutory and decisional law.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 30, 2024

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

**FARIBA FANA
ZUCKERMAN & WAX
ELDON L. FLOYD & ASSOCIATES**

LAS/abs

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