WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JAMES EVERETT MILLER, ***Applicant***

vs.

BAYSIDE PATROL & INVESTIGATIONS, INC.,
EVEREST NATIONAL INSURANCE COMPANY, ***Defendants***

Adjudication Number: ADJ10870144
San Jose District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant Bayside Patrol & Investigations, insured by Everest National Insurance Company (defendant) seeks reconsideration of the July 22, 2024 Findings and Order Granting Cost Petition of David Bonemeyer (F&O), wherein the workers' compensation administrative law judge (WCJ) determined that applicant reasonably obtained vocational expert evaluation and reporting, and awarded reimbursement for the associated litigation costs.

Defendant contends the WCJ erred in awarding costs because the reporting was not reasonable or necessary at the time it was procured.

We have not received an answer from any party. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will deny reconsideration.

FACTS

Applicant claimed injury to his lumbar spine and left foot while employed as a security guard by defendant Bayside Patrol & Investigations, Inc., on February 12, 2017.

The parties selected Ali Soozani, D.O., Ph.D., to act as the Qualified Medical Evaluator (QME). Applicant has also obtained treatment from treating physicians Kiyokazu Yoshida, M.D., Ph.D., and Eldan Eichbaum, M.D.

Applicant was evaluated by QME Dr. Soozani on March 15, 2019, and declared to be permanent and stationary, and a Qualified Injured Worker (QIW). (Ex. C, Report of Kiyokazu Yoshida, M.D., dated June 8, 2020, at p. 3.)

On June 8, 2020, applicant's treating physician Dr. Yoshida referred applicant for a spine surgery consult. (Ex. C, Report of Kiyokazu Yoshida, M.D., dated June 8, 2020, at p. 1.)

On July 22, 2020, applicant underwent a lumbar spine MRI study. (Ex. D, Report of MRI Study/Sunnyvale Imaging, dated July 22, 2020.)

On August 3, applicant's counsel issued an initial retainer fee for the services of vocational expert Scott Simon. (Ex. 4, Check Copy from Applicant's Counsel, dated August 3, 2020.)

On October 5, 2020, vocational expert Mr. Simon issued a vocational evaluation report finding applicant not feasible for vocational retraining, and further determining that applicant had sustained an 80 percent loss of his future earnings capacity. (Ex. 6, Report of Scott Simon, dated October 5, 2020, at p. 24.)

On October 7, 2020, applicant was evaluated by spine specialist Dr. Eichbaum, who diagnosed applicant as having low back pain with lumbar radiculopathy, severe disc degeneration and foraminal stenosis with facet arthropathy at L4-5 and L5-S1. (Ex. E, Report of Eldan Eichbaum, M.D., dated October 7, 2020, at p. 2.) Dr. Eichbaum recommended that applicant undergo muti-level lumbar-spine fusion surgery. (*Ibid*.) On November 30, 2020, defendant's Utilization Review vendor authorized the requested surgery with a 3-day inpatient stay. (Ex. 9, Independent Medical Review Final Determination Letter, dated December 30, 2020, at p. 1.)

However, subsequent evaluations by applicant's health professionals determined that applicant's collateral health conditions would contraindicate surgery at that time. (Report of Ali Soozani, M.D., dated June 29, 2021, at p. 1.) On June 29, 2021, applicant was reevaluated by the QME, who determined that applicant had reached a permanent and stationary status. The QME increased his assessment of impairment from prior reporting and again found applicant to be a QIW in need of vocational rehabilitation. (*Id.* at p. 2.)

On January 30, 2023, the parties resolved the case in chief by Stipulations with Request for Award, agreeing that applicant was entitled to a Supplemental Job Displacement Voucher. The

parties reserved the issue of Labor Code[1] section 5811 costs related to the preparation of vocational expert reporting.

On March 9, 2024, applicant filed a petition seeking costs related to the vocational expert reporting of Mr. Simon.

On July 17, 2024, the parties proceeded to trial on the related issues of applicant's March 9, 2024 cost petition and the "reasonableness and need for vocational expert services." (Minutes of Hearing (Minutes), dated July 17, 2024, at p. 2:33.) The parties submitted the matter for decision without testimony.

On July 22, 2024, the WCJ issued his F&O, determining in relevant part that applicant's counsel reasonably retained the services of the vocational expert, and granting applicant's petition for costs in the amount of $7,375. (Findings of Fact No. 5; Order Nos. "a" & "b".)

Defendant's Petition contends the reporting of applicant's vocational expert "was obtained at a time when no dispute regarding the vocational rehabilitation existed, and at a time when the initial Permanent & Stationary status found by the QME was not being challenged and was no longer relied upon due to changes in medical treatments." (Petition, at p. 4:1.) In the absence of a relevant dispute, defendant asserts there was no reasonable purpose for obtaining vocational expert reporting, and that the WCJ erred in awarding corresponding litigation costs to applicant's counsel.

The WCJ's Report observes that at the time Mr. Simon was retained, "it was not entirely unreasonable" that applicant's counsel saw the case as potentially involving permanent and total disability. (Report, at p. 4.) Because "the report of Scott Simon had the potential to affect the [permanent disability] rating," the WCJ concluded that the costs for the preparation of the vocational expert report were reasonable. (*Id.* at p. 5.) Accordingly, the WCJ recommends that we deny the Petition.

DISCUSSION

I.

Former section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

[1] All further references are to the Labor Code unless otherwise noted.

(a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.

(b)

(1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.

(2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board." Here, according to Events, the case was transmitted to the Appeals Board on August 15, 2024, and the next business day that is 60 days from the date of transmission is Monday, October 14, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on the next business day after Monday, October 14, 2024, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on August 15, 2024, and the case was transmitted to the Appeals Board on August 15, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by Labor Code section 5909(b)(1) because

[2] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on August 15, 2024.

II.

Section 5811(a) provides, in relevant part, that "[i]n all proceedings under this division before the appeals board, costs as between the parties may be allowed by the appeals board." (Lab. Code, § 5811(a); see also *Johnson v. Workers' Comp. Appeals Bd.* (1984) 37 Cal.3d 235, 238 [49 Cal.Comp.Cases 716].)

In *Costa v. Hardy Diagnostic* (2007) 72 Cal.Comp.Cases 1492 (2007 Cal. Wrk. Comp. LEXIS 346) (Appeals Board en banc) (*Costa*), we held that the costs of evidence on and/or in rebuttal to a permanent disability rating are properly allowable under section 5811. (*Id.* at p. 1494.) With respect to reimbursement sought under section 5811 for vocational evidence, we also discussed the minimum requirements necessary to allow costs incurred in obtaining the reporting:

> [T]he costs of evidence on and/or in rebuttal to a permanent disability rating must be *reasonable and necessary at the time they were incurred*, and such determination will also be made on a case by case basis. We further note that as with medical-legal costs, which may be reimbursable even though the applicant is unsuccessful in his or her claim (see, e.g., *Subsequent Injuries Fund v. Industrial Acc. Com. (Roberson)* (1963) 59 Cal.2d 842, 844 [28 Cal.Comp.Cases 139, 140]; *Beverly Hills Multispecialty Group, Inc. v. Workers' Comp. Appeals Bd. (Pinkney)* (1994) 26 Cal.App.4th 789, 802 [59 Cal.Comp.Cases 461, 471]), *the expert evidence offered by an applicant does not necessarily have to successfully affect the permanent disability rating to be reimbursable*. At the same time, however, the WCAB has the discretion to balance the amount of such costs against the benefit obtained. (See *Jimenez v. San Joaquin Valley Labor* (2002) 67 Cal.Comp.Cases 74, 84–85, fn. 18 (Appeals Board en banc).) Moreover, as with medical-legal costs, reimbursement will not be allowed if the report and/or testimony is premised on facts or assumptions so false as to render it worthless. (See *Penny v. Workers' Comp. Appeals Bd.* (1983) 48 Cal.Comp.Cases 468 (writ den.); *Pacific Medical Associates, Inc. v. Workers' Comp. Appeals Bd. (Rodarte)* (1995) 60 Cal.Comp.Cases 526 (writ den.).) Furthermore, as medical-legal costs are not recoverable with respect to reports, for example, that are incapable of proving or disproving a disputed fact, or whose conclusions are totally lacking in credibility (see *Cal. Workers' Comp. Practice* (Cont. Ed. Bar, 4th ed., June 2007 Update) § 3.52, pp. 232–233), reports and testimony of a vocational rehabilitation expert must at least have *the potential to affect a permanent disability rating* in order for their costs to be recoverable.

(*Id.* at pp. 1498-1499, italics added.)

The following year, the court of appeal in *Barr v. Workers' Comp. Appeals Bd.* (2008) 164 Cal.App.4th 173 [73 Cal.Comp.Cases 763] (*Barr*) cited our reasoning in *Costa* with approval when it concluded that admissibility is not a prerequisite to a determination that a vocational report was reasonably and necessarily incurred, and thus reimbursable pursuant to section 5811. The court in *Barr* observed:

> [R]eports that are inadmissible for any number of reasons might be valuable in preparing for a hearing or to further settlement negotiations. Given that the WCAB is accorded generous flexibility by sections 5708 and 5709 to achieve substantial justice with relaxed rules of procedure and evidence and that SIF concedes the use of vocational rehabilitation experts is unregulated, we can find nothing in the Labor Code or general principles of due process to limit the WCAB's discretion to award costs in accord with the broad language used in section 5811.

(*Id.* at p. 179.)

Here, the parties agree that applicant was declared permanent and stationary and a QIW as of the date of the initial reporting of QME Dr. Soozani. (Petition, dated August 8, 2024, at p. 2:4; Applicant's Pre-trial Brief, dated July 12, 2024, at p. 1; see also Ex. C, Report of Kiyokazu Yoshida, M.D., dated June 8, 2020, at p. 3.) Applicant retained Mr. Simon to perform a vocational evaluation and to issue a report as of August 3, 2020. (Ex. 4, Check Copy from Applicant's Counsel, dated August 3, 2020.)

Defendant's Petition contends that the vocational expert "was obtained at a time when no dispute regarding the vocational rehabilitation existed, and at a time when the initial Permanent & Stationary status found by the QME was not being challenged and was no longer relied upon due to changes in medical treatments. Certainly at no point was there any medical indication or need to determine employability." (Petition, at p. 4:1.) Defendant submits that "[t]he timing of the vocational report clearly renders it incapable of proving or disproving Applicant's status as a qualified injured worker; not only did no dispute in this regard exist, but Applicant was also in the midst of preparing for surgery. This renders the expenses of the Vocational Expert futile and demonstrates the unreasonableness of obtaining a vocational opinion when no dispute existed." (*Id.* at p. 4:27.)

The WCJ's Opinion on Decision notes, however, that at the time the applicant retained his vocational expert, it was "not entirely unreasonable," given that there was the potential that applicant might be deemed permanently and totally disabled. (Opinion on Decision, at p. 3.)

We concur. Applicant obtained the reporting of Mr. Simon following the issuance in 2019 of the initial QME report of Dr. Soozani. Therein, the QME determined that applicant had sustained permanent disability as a result of his injuries to the lumbar spine and left foot, and that applicant was unable to return to his prior occupation and was thus a QIW. (Ex. C, Report of Kiyokazu Yoshida, M.D., dated June 8, 2020, at p. 3; Petition, dated August 8, 2024, at p. 2:4; Applicant's Pre-trial Brief, dated July 12, 2024, at p. 1.) Applicant's status as a QIW rendered applicant eligible for vocational retraining in order to reenter the labor market in a different occupation. Applicant's feasibility for such retraining was among the issues that Mr. Simon addressed in the October 5, 2020 report. (Ex. 6, Report of Scott Simon, dated October 5, 2020, at p. 24.)

Defendant asserts that because applicant did not file a written objection to the QME's findings with respect to permanent disability, there was no reason for applicant to obtain vocational reporting to rebut his permanent disability rating. Defendant asserts that applicant was "preparing" for spine surgery at the time the vocational reporting was obtained, and because there "had been no medical indication that his work restrictions would change," the use of a vocational expert was premature and not based on substantial medical evidence. (Petition, at p. 4:7.)

Defendant cites to no authority, however, for the proposition that a written objection to permanent disability is a necessary predicate to obtaining vocational expert reporting.

Moreover, we observe that applicant requested vocational expert reporting only *after* his primary treating physician Dr. Yoshida had noted a significant increase in symptoms related to applicant's lumbar spine of sufficient severity to require a referral for lumbar spine surgery consultation and an updated lumbar spine MRI study. (Ex. C, Report of Kiyokazu Yoshida, M.D., dated June 8, 2020, at pp. 3-4.) The MRI evaluation on July 22, 2020 demonstrated interval findings including "severe disc collapse" at L4-L5, as well as degenerative changes at L3-L4 and L5-S1. (Ex. D, Report of MRI Study/Sunnyvale Imaging, dated July 22, 2020.) Thus, applicant had experienced significant, documented interval changes to his medical condition at the time he retained Mr. Simon.

We also note that per the October 5, 2020 reporting of Mr. Simon, applicant had previously been approved for Social Security Disability benefits, "based solely upon the effects of his injury." (Ex. 6, Report of Scott Simon, dated October 5, 2020, at p. 2.) While such a finding is not determinative in workers' compensation proceedings, it is certainly relevant to an evaluation of whether the nature and extent of applicant's industrial injuries would benefit from an evaluation by a vocational expert.

We are thus persuaded that at the time applicant obtained vocational reporting from Mr. Simon, it was both reasonable and necessary for applicant to augment the record to address the nature and extent of his disability. As we noted in *Nunes v. State of California, Dept. of Motor Vehicles* [2023] 88 Cal.Comp.Cases 741 [2023 Cal. Wrk. Comp. LEXIS 30], "vocational evidence continues to be relevant to the issue of permanent disability, and may be offered to rebut a scheduled rating by establishing that an injured worker is not feasible for vocational retraining … [and] may also be considered by evaluating physicians as relevant to their determination of permanent disability, and may assist the parties and the WCJ in assessing those factors of permanent disability." (*Id.* at p. 752.) The requested vocational evaluation not only assessed applicant's feasibility for successful vocational rehabilitation following the determination that applicant was permanent and stationary and a QIW, but also evaluated and quantified applicant's diminished future earnings capacity in light of the changes to applicant's medical conditions and disability status. (See *Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262 [129 Cal. Rptr. 3d 704, 76 Cal.Comp.Cases 624]; *Contra Costa County v. Workers' Comp. Appeals Bd.* (2015) 240 Cal.App.4th 746 [193 Cal. Rptr. 3d 7, 80 Cal.Comp.Cases 1119].)

Based on the above, and following our independent review of the record, we concur with the WCJ that the applicant's solicitation of vocational expert opinion was reasonable and necessary at the time the reporting was requested. (*Costa, supra,* 72 Cal.Comp.Cases at p. 1499). We affirm the WCJ's award of reimbursement pursuant to section 5811, accordingly.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 9, 2024

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

JAMES EVERETT MILLER
LAW OFFICE OF DAVID P. BONEMEYER
LAW OFFICES OF SCHLOSSBERG & UMHOLTZ

SAR/abs

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