

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

**JAMES WALKER, *Applicant***

**vs.**

**SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendants***

**Adjudication Number: ADJ13220119  
Van Nuys District Office**

**OPINION AND ORDER  
DENYING PETITION  
FOR RECONSIDERATION**

Subsequent Injuries Benefits Trust Fund (SIBTF) seeks reconsideration of the May 21, 2024 Findings and Award, wherein the workers' compensation administrative law judge (WCJ) found, in relevant part, that SIBTF is entitled to credit from the net non-taxable portion of applicant's disability retirement benefits from the Los Angeles County Employees Retirement Association (LACERA), with the exact amount to be adjusted by the parties with jurisdiction reserved.

SIBTF contends that it is entitled to credit from the full disability pension applicant received.

We received an answer from applicant James Walker. We are also in receipt of SIBTF's Request for Judicial Notice, which we grant based on Evidence Code, section 452(h).

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, the documents attached to the Request for Judicial Notice, the Answer, and the contents of the Report, and we have reviewed the record in this matter. Based on the Report, which we adopt and incorporate except for the first paragraph regarding the Petition for Reconsideration being untimely, and for the reasons discussed below, we deny reconsideration.

SIBTF's Petition for Reconsideration is timely. The WCJ is correct that any petition for reconsideration should have been filed within 20 days of the May 21, 2024 Findings and Award (dated May 17, 2024 but served on May 21, 2024), plus five days for service pursuant to WCAB Rule 10605 (Cal. Code of Regs., tit. 8, § 10605). Twenty-five days from May 21, 2024 is June 15, 2024, which is a Saturday. Pursuant to WCAB Rule 10600 (Cal. Code of Regs., tit. 8, § 10600), the time to file a Petition for Reconsideration is extended to the following Monday, June 17, 2024. SIBTF's Petition for Reconsideration was timely filed on June 17, 2024.

For the foregoing reasons,

**IT IS ORDERED** that SIBTF's Petition for Reconsideration of the May 21, 2024 Findings and Award is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

/s/ JOSEPH V. CAPURRO, COMMISSIONER

**I CONCUR,**

/s/ CRAIG SNELLINGS, COMMISSIONER

JOSE H. RAZO, COMMISSIONER  
CONCURRING NOT SIGNING



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**August 16, 2024**

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

**JAMES WALKER  
LEWIS, MARENSTEIN, WICKE, SHERWIN & LEE, LLP  
OD LEGAL – LOS ANGELES**

**LSM/oo**

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

**REPORT AND RECOMMENDATION**  
**ON PETITION FOR RECONSIDERATION**

**1**  
**INTRODUCTION**

Defendant Subsequent Injuries Benefits Trust Fund (SIBTF) has filed an unverified petition dated June 17, 2024 seeking reconsideration of the May 17, 2024 Findings and Award Re: SIBTF Benefits and Credit, which was served on the parties electronically on May 21, 2024. [OMITTED]

Turning to the merits of the petition, it contends that the undersigned acted without or in excess of his powers, that the evidence does not justify the findings of fact, and that the findings of fact do not support the order, decision and award. More specifically, the petition makes the following contentions, numbered here as they were in the petition, and with which the undersigned respectfully disagrees: (1) "[Labor Code] Section 4753 mandates that the board reduce an award of [SIBTF] benefits to the extent of any monetary payments received by the applicant for or on account of preexisting disability irrespective of how those disability benefits are calculated" (Petition for Reconsideration dated June 17, 2024, page 4, lines 15-16); (2) "The question, 'Which parts of a LACERA disability pension are disability-related?' is entirely nonsensical" (Id., page 7, lines 20-21); (2.1) "All compensation received from LACERA disability pensions are for or on account of disability" (Id., page 9, lines 9-10); (2.2) "[Francis] Boyd's testimony was irrelevant and should be disregarded" (Id., page 9, line 24); and (3) "[Labor Code] Section 3202 is inapplicable" (Id., page 11, line 8).

A timely, verified answer to the petition was filed by Robert J. Sherwin, counsel for applicant James Walker. The answer disagrees with the contentions of the petition and maintains that the undersigned correctly interpreted Labor Code Section 4753 to allow SIBTF a partial credit only for that portion of Mr. Walker's pension from the County of Los Angeles which was based on disability from prior injuries versus the portion based on service credit. The answer asserts that the facts as presented at trial demonstrated unequivocally that only a portion of the pension that Mr. Walker receives is based on his pre-existing disability, that defendant failed to offer any evidence to rebut this, and based on the evidence presented, the undersigned applied the evidence to the plain and unambiguous meaning of the statute dealing with credit.

## II FACTS

In this case, the parties stipulated that James Walker, while employed on April 1, 2020 as a deputy sheriff, Occupational Group Number 490, at Los Angeles, California, by the County of Los Angeles, permissibly self-insured, sustained injury arising out of and in the course of employment to his neck, shoulder, and low back, and based on the stipulated date of birth, Mr. Walker was 53 years of age when he retired. The parties further stipulate that Mr. Walker's earnings were maximum, resulting in maximum indemnity rates for both permanent and temporary disability, per Code, the employer has furnished some medical treatment, and, at least with respect to Subsequent Injury Benefits Trust Fund (SIBTF) benefits), no attorney fees have been paid, and no attorney fee arrangements have been made. The SIBTF stipulated to liability and that Mr. Walker's permanent disability (PD) is 100 percent, with 48 percent preexisting disability and 52 percent PD from the subsequent industrial injury. (Minutes of Hearing and Summary of Evidence of February 27, 2024, page 2, lines 3-14.)

The issues submitted for decision were SIBTF liability after pension credit and attorney fees. As noted on the record at trial, the sole contested issue is really SIBTF's entitlement to a reduction in liability under Labor Code Section 4753, and whether this issue was previously resolved by *Kehrer v. Workers' Comp. Appeals Bd.* (1999) 64 Cal Comp Cases 1302 (writ denied), where the Appeals Board, reversing the Workers' Compensation Judge in that case, held that the SIBTF was entitled to credit for disability retirement benefits under Section 4753, despite the fact applicant in that case could have chosen to file for regular retirement benefits.

The following exhibits were admitted into evidence at trial: Admitted as SIBTF'S Exhibit A was a Los Angeles County Employees Retirement Association (LACERA) packet dated December 9, 2022; admitted as SIBTF'S Exhibit B were LACERA statements dated February 20, 2024; admitted as Applicant's Exhibit 1 was a Form 1099 for the year 2023; and, admitted as Applicant's Exhibit 2 was a LA CERA check direct deposit dated December 31, 2023.

The contents of FileNet in case number ADJ13220119 were judicially noticed at trial for purposes of reference in connection with the decision, and trial testimony was taken. Applicant James Walker testified that he was a deputy sheriff for the County of Los Angeles. He is retired now. He took a disability retirement or pension from the County. He believes he is entitled to about

81 percent of his former income based on his years of service. His retirement package effective date was October 2021.

With respect to his 1099 form for year 2023, which was admitted as Applicant's Exhibit 1, Mr. Walker confirmed that it says in 2023 he received \$134,125.47 from LACERA, of which \$53,274.63 is taxable. Mr. Walker understands that this is because his disability retirement is 50 percent tax free, so the taxable portion is unrelated to the nontaxable portion.

Francis Boyd also testified at trial on behalf of applicant James Walker. Mr. Boyd is senior staff counsel at LACERA. Technically, he is not employed by the County of Los Angeles. LACERA administers pensions for the County. He is advisory counsel to LACERA regarding disability retirement issues since December 2014. He was previously an attorney for a private law firm in Orange County, where he handled Social Security disability and long-term disability claims.

According to Mr. Boyd, LACERA processes about 60 applications per month for disability retirement, and Mr. Boyd reviews them before they go to the Board of Retirement. He advises LACERA and sits at the counsel table each month, answering questions about disability retirement applications. Mr. Boyd advises on legal issues and represents the Board before Superior Court and Court of Appeal. Mr. Boyd also leads educational discussions for the State Association of County Retirement Systems (SACRS) and the National Association of Public Pension Attorneys (NAPPA).

Mr. Boyd testified that he is familiar with the process of applying for disability retirement for safety members. He agreed that the term safety members includes deputy sheriffs and firefighters as well as any sworn person such as District Attorney investigators. These individuals can retire with ten years' service at a minimum age of 50. Mr. Boyd thought that it may be less for safety members, but he did not recall the exact numbers. The Los Angeles County retirement system is under the Employees Retirement Law of 1937.

Mr. Boyd explained that there is a formula in Government Code Section 31676.1 that uses age and years of service to determine the amount of retirement payments. The employee is entitled to at least one half of average compensation or 50 percent of salary as a minimum. The amount could go higher than that based on years of service, in which case Mr. Boyd believes 50 percent is treated as the disability retirement portion. Mr. Boyd's belief is based on two Government Code Sections: Government Code Section 31676.1 contains the formula that uses years of service and

age, and Government Code Section 31727.4 says 50 percent of salary is disability pension, and this can be increased based on years of service to 81 percent, in Mr. Walker's case. There is a cost of living adjustment each March on all pensions.

Mr. Boyd pointed out that in Mr. Walker's case, a portion of his pension is taxable, and a portion is nontaxable. Mr. Boyd thinks that the part that is taxable is based on years of service, and the part that is not taxable is based on disability. There is an IRS letter on this subject. Mr. Boyd relies on IRS opinions for tax purposes. The IRS issued a private letter ruling in 1976 to Ventura County, which Mr. Boyd considers a sister program to Los Angeles County's retirement program. The IRS private letter says that disability retirement benefits are not taxable because they are analogous to workers' compensation benefits.

Upon cross-examination, Mr. Boyd explained that there is a minimum time to apply for retirement. However, at age 70, LACERA members are required to take whatever pension they are entitled to. Eventually, LACERA has to distribute the funds to the member at age 70.

Mr. Boyd was told that Mr. Walker applied for disability retirement, and most likely Mr. Boyd would have signed off on that application, if so. However, Mr. Boyd sees about 65 applications per month, so he cannot specifically recall Mr. Walker's application. Mr. Boyd agreed that a Los Angeles County employee can apply for a disability or years-of-service retirement. Normally, a member takes the years-of-service retirement while waiting for a disability pension retirement application to be processed because the disability pension retirement application can take a long time.

Mr. Boyd testified that he was not retained by applicant or applicant's attorney. He was just asked to testify at trial. He never met applicant's attorney Robert Sherwin in person. Mr. Sherwin just called Mr. Boyd and asked Mr. Boyd to testify. Mr. Boyd was not under subpoena.

### **III DISCUSSION**

Labor Code Section 4753 makes the following provision for credit to be deducted from SIBTF benefits:

Such additional compensation is not in addition to but shall be reduced to the extent of any monetary payments received by the employee, from any source whatsoever, for or on account of such preexisting disability or impairment, except as to payments being made to the employee or to which he is entitled as

a pension or other compensation for disability incurred in service in the armed forces of the United States, and except as to payments being made to him or to which he is entitled as assistance under the provisions of Chapter 2 (commencing with Section 11200), Chapter 3 (commencing with Section 12000), Chapter 4 (commencing with Section 12500), Chapter 5 (commencing with Section 13000), or Chapter 6 (commencing with Section 13500) of Part 3, or Part 5 (commencing with Section 17000), of Division 9 of the Welfare and Institutions Code, and excluding from such monetary payments received by the employee for or on account of such preexisting disability or impairment a sum equal to all sums reasonably and necessarily expended by the employee for or on account of attorney's fees, costs and expenses incidental to the recovery of such monetary payments.

Labor Code Section 4753 allows a credit for payments "for or on account of. . . preexisting disability or impairment" and the taxable portion of Mr. Walker's pension that is for or on account of his years of service, as opposed to the non-taxable portion that is for or on account of his disability, should not be part of the credit against SIBTF benefits allowed by the plain meaning of Section 4753. Based on the exhibits presented at trial, even without the expert testimony of LACERA's senior counsel, it is clear that one part of Mr. Walker's pension is clearly for or on account of his disability, and an additional part is clearly for or on account of his years of service, as explained by the testimony of Mr. Boyd and corroborated by all exhibits herein.

*Kehrer v. Workers' Comp. Appeals Bd.* (1999) 64 Cal Comp Cases 1302 (writ denied), which was cited in briefs that were submitted by counsel for SIBTF, can easily be distinguished from the present case insofar as the argument advanced by the applicant in *Kehrer* was that he could have applied for a service retirement instead of a disability retirement in the same amount, but he wanted the tax benefits of a disability-based retirement, so he chose that. In the present case, applicant James Walker is not arguing about what he could have obtained; he is using the basis of what he chose and is actually receiving, which is a disability retirement, a portion of which is clearly based upon his years of service. The hybrid nature of this nominal "disability retirement" that is in fact based upon both disability and years of service was explained by the testimony of Mr. Boyd at trial, and seems to be acknowledged by tax law, which does not tax the portion of Mr. Walker's retirement that is based on disability but does tax that portion that is based on years of service. Of course, tax law does not necessarily govern this determination, and the testimony of Mr. Boyd was not taken in lieu of the undersigned's own analysis of whether and to what extent Mr. Walker's pension is "for or on account of... preexisting disability or impairment" under Labor Code Section 4753, but the manner in which tax law bifurcates Mr. Walker's income, and the

opinion of an attorney who is probably the most knowledgeable expert on the subject of LACERA pensions, both support the conclusion of the May 17, 2024 Findings and Award Re: SIBTF Benefits and Credit that only part of Mr. Walker's pension is "for or on account of. . . preexisting disability or impairment."

Another writ denied case cited by counsel for SIBTF, *Ouellette v. Workmen's Comp. Appeals Bd.* (1969) 34 Cal Comp Cases 195 (writ denied), is inapplicable to the present case because the holding in *Ouellette* is only that SIBTF (which was then called SIF) is entitled to a credit for a service-connected disability pension notwithstanding the fact that the employee made contributions to the pension fund during his employment. Unlike the argument that was advanced in 1969 by Lordman Oullette, Mr. Walker is not taking the position that his pension should be wholly or partially exempt from SIBTF credit simply because he made payments toward his pension.

Counsel for SIBTF also cites *Subsequent Injuries Fund v. Industrial Accident Commission (Hanson)* (1963) 217 Cal.App.2d 322, which held that the Subsequent Injuries Fund was entitled to credit for Social Security disability benefits, even though the Social Security benefits were awarded for and on account of combined disabilities, and not just for "preexisting disability or impairment" as provided by Labor Code Section 4753. As with *Ouellette*, *Hanson* addresses an entirely different argument than the one made by Mr. Walker in the present case.

Although the undersigned agrees that there should not be any ambiguity as to what is meant by "monetary payments ... for or on account of such preexisting disability or impairment" in Labor Code Section 4753, in any event Section 3202 requires that Section 4753, and all of Divisions 4 and 5 of the Labor Code, "shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment." Section 3202 therefore mandates that the statutory language of Section 4753, to the extent that there can be any argument about what it means—for example, whether monetary payments can be divided into portions that are for or on account of a preexisting disability, and portions that are not-be construed in a way that extends benefits by narrowly interpreting their curtailment, and not in a way that curtails benefits by broadly interpreting "for or on account of" to include the portion of Mr. Walker's pension that can clearly and easily be traced to years of service instead of his level of disability or impairment. The undersigned does not doubt the legislature's clear intent to protect



SIBTF by providing a broad credit, but even that noble purpose is ultimately in service of the greater goal of protecting persons injured in the course of their employment.

Accordingly, while it is clear that Labor Code Section 4753 mandates that an award of SIBTF benefits be reduced to the extent of any monetary payments received by applicant for or on account of preexisting disability, the question of whether a particular payment is for or on account of preexisting disability requires an inquiry into the basis and purpose of funds paid, and accordingly the undersigned respectfully disagrees with the contention of counsel for SIBTF that credit for pension payments should be determined irrespective of how those payments were calculated. The undersigned also respectfully disagrees with counsel for SIBTF that the inquiry into which parts of Mr. Walker's pension are for or on account of preexisting disability is "entirely nonsensical" (Petition for Reconsideration dated June 17, 2024, page 7, line 2 1). On the contrary, the question of whether a monetary payment is "for or on account of such preexisting disability or impairment" should look beyond names to examine the reasons and accounting behind the payment. In this respect, Mr. Boyd's testimony, although not the sole basis for the decision regarding credit, was relevant and helpful. With respect to SIBTF counsel's contention that "Labor Code Section 3202 is inapplicable" (Id., page 11, line 8), Section 3202 states that its mandate of liberal constriction applies to all of Divisions 4 and 5 of the Labor Code, which includes Section 4753, so it does apply to any dispute over that section, including whether "monetary payments... for or on account of such preexisting disability or impairment" prohibits inquiry into the component parts of a monetary payment. The undersigned holds that it does not.

#### **IV CONCLUSION**

It is respectfully recommended that the petition be denied.

DATE: 7/1/2024

**Clint Feddersen**  
WORKERS' COMPENSATION  
ADMINISTRATIVE LAW JUDGE