WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOSEPHINE MATIAS, ***Applicant***

vs.

QUEST DIAGNOSTICS;
TRAVELERS INSURANCE, ***Defendants***

Adjudication Number: ADJ10591850
Van Nuys District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of a February 26, 2024 Findings and Award (F&A) issued by a workers' compensation administrative law judge (WCJ) wherein the WCJ found applicant sustained injury arising out of and in the course of employment (AOE/COE) to the neck, low back, bilateral wrists (carpal tunnel syndrome), and bilateral shoulders. The WCJ found the current record insufficient with respect to whether applicant sustained injury AOE/COE to the nervous system/psyche, headaches, diabetes, and hypertension. The WCJ ordered parties to further develop the record and to meet and confer in an attempt to reach an agreement on Agreed Medical Evaluators (AMEs) to address injury AOE/COE as well "whole person impairment, permanent disability, and apportionment" where applicable. (F&A, p. 2.)

Defendant contends that although the WCJ has a duty to develop the record under Labor Code section 5701, this is limited by Labor Code section 5502 and relevant case law. (Petition for Reconsideration, p. 6.) Defendant further argues that the duty to disclose all available evidence at the time of a mandatory settlement conference (MSC) supersedes the WCJ's duty to develop the record. (*Id.*)

We have received an Answer from the applicant. The WCJ has prepared a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations in the Petition and have reviewed the Answer. Based upon our review of the record and the Report, which is adopted and incorporated herein, we are denying reconsideration.

We find it relevant here to discuss the distinction between a petition for reconsideration and a petition for removal. A petition for reconsideration is taken only from a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) A "final" order is defined as one that determines "any substantive right or liability of those involved in the case" or a "threshold" issue fundamental to a claim for benefits. (*Rymer v. Hagler 2* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (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]; *Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) Threshold issues include, but are not limited to, injury AOE/COE, jurisdiction, the existence of an employment relationship, and statute of limitations. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd.* (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Maranian*, *supra*, at 1075 ["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"].) Such interlocutory decisions include, but are not limited to, pre-trial orders regarding evidence, discovery, trial setting, venue, and other similar 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 February 26, 2024 F&A addresses both threshold and interlocutory issues. However, defendant's Petition only challenges the WCJ's decision regarding procurement of

additional medical-legal evidence. As such, we will consider defendant's Petition under the removal standard.

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 can show that substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a). The petitioner must also demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (*Id.*) In the instant case, we are not persuaded that substantial prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy if the matter ultimately proceeds to a final decision adverse to defendant.

Defendant argues that the WCJ's power to develop the record is limited by Labor Code section 5502(d)(3) and that the Appeals Board may not introduce new evidence "if a decision could be rendered on the existing record" and the party seeking to introduce the new evidence has "failed to show it was not available or could not have been discovered in the exercise of due diligence before the mandatory settlement conference." (Petition, p. 8.) Defendant alleges the current record is "devoid of any reporting" regarding applicant's additional claims and relies upon the case of *James McDuffie v. Los Angeles County Metropolitan Transit Authority* (*McDuffie*) (2002) 67 Cal.Comp.Cases 138. (*Ibid.*) As indicated by the WCJ, however, Dr. Marvin Petruszka's reports regarding applicant's psyche and internal claims are referenced in the reporting of the orthopedic AME, Dr. Feiwell. (See AME report of Dr. Feiwell, April 14, 2020, p. 3 and Report, pp. 4-5.) As such, evidence pertaining to applicant's additional claims is already a part of the record. As noted by the WCJ, Dr. Feiwell has yet to provide his own opinions regarding these findings. We do not believe it necessary, however, for Dr. Feiwell to provide his opinions regarding these findings as he is an orthopedic AME. We agree with the WCJ that the parties should meet and confer in an attempt to reach an agreement on AMEs to develop the record on the issue of AOE/COE for the additional claims of headaches, diabetes, hypertension, and injury to the psyche/nervous system. If agreement is not possible, the parties should then proceed with panels in the appropriate specialties.

IT IS ORDERED that defendant's Petition for Reconsideration of the February 26, 2024 Findings and Award is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 9, 2024

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

JOSEPHINE MATIAS
EQUITABLE LAW FIRM
LAW FIRM OF FRIEDMAN & BARTOUMIAN

RL/*cs*

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

The trial in this matter commenced on June 28, 2023. At that time the parties stipulated that Josephine Matias, age 59 on the date of injury, while employed during the period October 1, 1999, through June 17, 2015, as a lead phlebotomist, Occupational Group Number 220, at West Hills, California, by Quest Diagnostics, whose workers' compensation insurance carrier was Travelers, sustained injury arising out of and in the course of employment to her neck, low back, both wrists (in the nature of carpal tunnel syndrome); and claims to have sustained injury arising out of and in the course of employment in the nature of headaches, internal (in the nature of diabetes and high blood pressure), and psych/nervous system. A Findings and Award issued on February 26, 2024, in which it was found, inter alia, that applicant's injury had caused permanent partial disability, but that the current record is insufficient to determine the whole person impairment and permanent disability and is insufficient to determine apportionment. The parties were ordered to meet and confer in an attempt to reach agreement on Agreed Medical Evaluators in order to develop the record such that the issues of injury arising out of and in the course of employment in the nature of headaches, internal (in the nature of diabetes and high blood pressure), and psyche/nervous system, and any whole person impairment, permanent disability, and apportionment applicable thereto, may be determined. Defendant filed a timely verified petition for reconsideration of the February 26, 2024 Findings and Award. Petitioner contends the WCJ erred by: a) ordering the record to be developed when defendant contends applicant simply failed to meet her burden of proof; b) ordering the record to be developed when defendant contends there is no evidence as to the disputed body parts; c) ordering the record to be developed when defendant contends applicant's exhibits 1 through 10 were properly ordered excluded from evidence; and d) ordering the record to be developed when defendant contends applicant lacks credibility.

II
FACTS

Applicant was employed as a lead phlebotomist by Quest Diagnostics from October 1, 1999 through June 17, 2015. She filed an application for adjudication of claim on October 3, 2016 alleging, back, upper extremity, lower extremity, and nervous system injuries. A mandatory

settlement conference was held remotely on July 18, 2022. At that time the parties were ordered to file their pretrial settlement conference statement ". . . in EAMS by end of day." They did not. Defendant filed an unsigned pretrial settlement conference statement on July 19, 2022. Applicant's representative emailed his proposed amended pretrial conference statement to defense counsel on June 28, 2023. (See MOH of hearing dated 9/13/2023, page 2, lines 10 through 11). Despite these irregularities the parties stipulated that applicant had sustained injury arising out of and in the course of employment

> ". . . to her neck, low back, both wrists (in the nature of carpal tunnel syndrome, and right and left shoulders; and claims to have sustained injury arising out of and in the course of employment in the nature of headaches, internal (in the nature of diabetes and high blood pressure), and psych/nervous system." (See MOH of hearing dated 6/28/2023, page 2, lines 6 through 10).

Additionally, the parties agreed, on the record, that the issues for hearing included "Parts of the body injured, with applicant claiming headaches, internal (in the nature of diabetes and high blood pressure, and psych/nervous system."

At trial defendant offered the Agreed Medical Evaluator report of Lawrence A. Feiwell, M.D. dated April 14, 2020. Over applicant's objection the report was admitted into evidence and marked as defendant's exhibit "G". On page 3 of the report Dr. Feiwell reviews various reports from Marvin Petruszka, M.D. which diagnose the applicant with a number of problems including:

> . . . diabetes mellitus (2013) aggravated by work injury (industrial); hypertension (2013) aggravated by work injury (industrial); hypothyroidism (2013, non-industrial); depressive disorder/anxiety/sleep disorder (industrial); tachycardia (nonindustrial); dyspnea secondary to psychological stress (industrial); IBS manifested by constipation secondary to psychological factors (industrial; gastritis/GERD secondary to psychological factors (industrial); alopecia secondary to psychological factors (industrial); (Exhibit G, medical report of AME Lawrence A. Feiwell, M.D, dated 4/14/2020, page 3).

The matter proceeded to trial and a Findings and Award issued on February 26, 2024. It is from this Findings and Order that the defendant has filed a timely verified petition for reconsideration.

III

DISCUSSION

A

Failure to Meet Burden of Proof

Petitioner argues that because the court excluded applicant's exhibits one through 10 applicant is unable to meet her burden of proof that she sustained internal and psychiatric injuries. This argument fails to acknowledge that defendants own exhibits contain evidence of psychiatric and internal injuries. As indicated above, defendant's exhibit G, the AME report by Lawrence A. Feiwell, M.D, dated 4/14/2020, contains a review of various reports from Marvin Petruszka, M.D. which diagnose the applicant with a number of problems including:

> . . . diabetes mellitus (2013) aggravated by work injury (industrial); hypertension (2013) aggravated by work injury (industrial); hypothyroidism (2013, non-industrial); depressive disorder/anxiety/sleep disorder (industrial); tachycardia (nonindustrial); dyspnea secondary to psychological stress (industrial); IBS manifested by constipation secondary to psychological factors (industrial; gastritis/GERD secondary to psychological factors (industrial); alopecia secondary to psychological factors (industrial); (Exhibit G, medical report of AME Lawrence A. Feiwell, M.D, dated 4/14/2020, page 3).

Notwithstanding this review of records Dr. Feiwell fails to indicate whether he agrees, or disagrees with the opinions of Dr. Petruszka. Thus, Dr. Feiwell's reporting is incomplete. Where the WCJ finds the opinions of the experts to be incomplete and unpersuasive the WCJ may order development of the record. *McClune v. Workers' Comp. Appeals Bd.*, 62 Cal. App. 4th 1117.

B

Evidence of Internal and Psychiatric Injuries in the Record

Petitioner concedes that that under *McClune v. Workers' Comp. Appeals Bd.*, 63 Cal. Comp. Cases 261, a WCJ may develop the record if neither side has presented substantial evidence on which a decision could be based. (Petition for reconsideration, page 8, lines 13 through 16). However, petitioner mistakenly argues that this is a case in which ". . . the existing record is devoid of any reporting" on the contested issue. (Petition for reconsideration, page 8, lines 23 through 24). As indicated above, the reporting by AME Feiwell clearly includes a review of medical reporting which indicate internal and psychiatric industrial injuries. However AME Feiwell's reporting is incomplete in that he fails to indicate whether he agrees or disagrees with the reviewed medical opinions.

C

No Removal After Ruling Excluding Applicants Exhibits 1 Through 10

Petitioner agrees with this judge's ruling excluding applicants exhibits 1 through 10. However, petitioner appears to argue that applicant's failure to file a petition for removal of this WCJ's evidentiary ruling should somehow impact the applicant's ability to proceed in case number ADJ18423325. Case number ADJ18423325 was not set for trial before the undersigned. No issues with regard to case number ADJ18423325 were raised by the parties in the trial of this matter, ADJ10591850. Issues not in dispute at the trial level may not be raised for the first time on appeal by petition for reconsideration.

D

Applicant's Credibility

Petitioner argues that in its opinion the applicant was not credible and therefore the record should not be developed to determine whether she sustained injury in the nature of headaches, internal (in the nature of diabetes and high blood pressure), and psych/nervous system on a cumulative trauma basis. Expert medical evidence is necessary if an applicant is alleging a cumulative trauma injury or occupational disease. *Peter Kiewit Sons v. IAC (McLaughlin)* (1965) 30 CCC 188. That is the case here. While there is some evidence in the record that the applicant sustained these injuries on an industrial basis AME Feiwell's reporting is incomplete in that he fails to indicate whether he agrees or disagrees with this evidence. Applicant's credibility and the accuracy of the history that she gives to a medical examiner may have bearing on whether the examining physician's report is substantial medical evidence. However, petitioner did not challenge the substantiality of the opinions of AME Feiwell at trial.

IV

RECOMMENDATION

It is respectfully recommended the defendant's petition for reconsideration be denied.

DATE: April 2, 2024

Randal Hursh
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE