

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

JULIE SCHNEIDER, *Applicant*

vs.

**COUNTY OF MENDOCINO;
PERMISSIBLY SELF- INSURED,
ADMINISTERED BY SEDGWICK,
*Defendants***

**Adjudication Number: ADJ16041574
Santa Rosa District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION
AND REMOVAL**

We have considered the allegations of the Petition for Reconsideration and Removal and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny both reconsideration and removal.

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 substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a); see also *Cortez, supra*; *Kleemann, supra*.) Also, 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(a).) For the reasons stated in the WCJ's report, 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 petitioner.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 28, 2024

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

**JULIE SCHNEIDER
LAW OFFICE OF FOWLER & BALL
LENAHAN SLATER LAW FIRM
EDD SDI**

LN/pm

*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**

I. INTRODUCTION

Defendant, by and through its counsel, Joel Kautz of Lenahan, Slater, Pearse & Majemik, LLP, filed a timely and verified Petition for Reconsideration and Removal challenging the Findings and Award dated March 6, 2024.

The applicant sustained an injury to her low back and neck during a cumulative trauma (CT) period from September 27, 2016 through September 27, 2017 while working as a data entry clerk. The applicant was 46 years old on the date of injury.

In the Findings and Award dated March 6, 2024, the undersigned WCJ found the applicant totally temporarily disabled (TTD) from September 27, 2017 through December 3, 2018, and deferred applicant's TTD status after December 3, 2018 pending further discovery. The undersigned WCJ further found that applicant's attorney was entitled to a 15% fee and EDD was entitled to reimbursement, both to be deducted from the TTD award.

Petitioner files for reconsideration regarding the finding of temporary disability from September 27, 2017 through December 3, 2018. *Petition, p.1, lines 21-23.* Petitioner files for removal regarding the finding that applicant's temporary disability status after December 3, 2018 is deferred pending further discovery. *Id, p.1, lines 23-26.*

II. FACTS

As stipulated by the parties, the applicant sustained an injury to her low back and neck on a CT basis through September 27, 2017 while working for the County of Mendocino as a data entry clerk. (MOH/SOE, p.2, lines 7-11.) The applicant testified that her last date of work for the County of Mendocino was September 26, 2017, and that she had neck surgery on September 29, 2017. (MOH/SOE, p.2, lines 44-46.) The applicant further testified that she left her employment with the County of Mendocino because, after the neck surgery on September 29, 2017, she was unable to work. (MOH/SOE, p.2, lines 27-29.) The applicant was approved for disability retirement on January 16, 2019. (MOH/SOE, p.3, lines 1-6.)

Dr. Scott Taylor served as the Qualified Medical Evaluator (QME). Dr. Taylor issued four QME reports and submitted to two depositions. (Joint Exh.1-

4; Def. Exh. M, N.) Dr. Taylor found that the applicant sustained temporary disability after her surgery on September 29, 2017 attributable to the CT through September 27, 2017. (Def. Exh. N, p.19, line 24 thru p. 20, line 6.) Dr. Taylor deferred the exact periods of temporary disability to the applicant's surgeon, Dr. McCormack. (Def. Exh. N, p.13, lines 5-10.)

Dr. McCormack certified that the applicant was unable to work as of September 27, 2017. (EDD Exh. 3.) The physician certifications each reference applicant's cervical fusion surgery on September 29, 2017 as the reason for applicant being temporarily disabled. (EDD Exhs. 3-6.) The last physician certification provided was signed by Dr. McCormack on November 1, 2018 and placed the applicant off work through December 3, 2018. (EDD. Exh. 6.)

A Findings and Award issued on March 6, 2024 finding the applicant totally temporarily disabled (TTD) from September 27, 2017 through December 3, 2018, and deferred applicant's TTD status after December 3, 2018 pending further discovery. It is from this Findings and Award that Petitioner seeks reconsideration and removal.

III. DISCUSSION

a. **THE TEMPORARY DISABILITY AWARD IS BASED ON SUBSTANTIAL MEDICAL EVIDENCE**

Applicant bears the burden of establishing injury and a right to benefits. The medical report upon which the Court relies must also be substantial medical evidence. To constitute substantial evidence" ... a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604,621 (Appeals Board en banc).)

It has been held that the opinion of a single medical expert may constitute substantial medical evidence and it is well-settled authority that the WCAB may choose the most appropriate and convincing evidence among conflicting medical evidence. (*Place v. Workers' Comp. Appeals Bd.* (1970) 3 Cal.3d. 372, 378.)

Petitioner asserts that the reporting and testimony of QME Dr. Taylor is not substantial medical evidence regarding the period of temporary disability awarded. Petition, p.4, lines 21-24. Specifically, Petitioner asserts that Dr. Taylor's testimony stating "he did the best with what he could" makes his

reporting speculative. Petition, p 5, lines 4-8. However, when Dr. Taylor's reporting and testimony are reviewed as a whole, the totality of the medical reporting rises to the level of substantial medical evidence.

Temporary disability was discussed by Dr. Taylor in his second deposition on January 10, 2024. (Def. Exh. N.) In that deposition, Dr. Taylor testified that the applicant was TTD for two years after her surgery on September 29, 2017 due to the CT injury. (Id. at p.6, lines 5-7.) Dr. Taylor based his analysis on Dr. McCormack's surgical reporting and review of the complete medical record. (Id. at pp.9-10, 17.) Dr. Taylor thereafter testified that it would be speculative to identify a temporary disability window, and then appeared to defer the TTD "window" to applicant's primary treating physician and/or Dr. McCormack. (Id. at p.13, lines 5-10.) However, at no time does Dr. Taylor backtrack on his opinion that the applicant was TTD post-surgery on September 29, 2017. What is solely in question is the period, or "window," of temporary disability. And although Dr. Taylor testified that he was not sure about the period of TTD, he did not change his prior opinion and found that it was reasonable to attribute the period of temporary disability to the CT injury. (Def. Exh. N, p.19, line 24 thru p. 20, line 6.)

Next, Petitioner asserts that Dr. McCormack's reporting only "estimates" applicant's return to work date as December 3, 2018. Petition, p.5, lines 22-26. However, there is no medical evidence that puts the applicant back to work before December 3, 2018. And, the applicant testified that her last date of work for the County of Mendocino was September 26, 2017 as she was not able to work anymore due to her injury. (MOH/SOE, p.6, lines 27-28, 44-45.)

Lastly, Petitioner asserts that because Dr. McCormack treated the applicant for prior injuries to the same body parts, somehow the EDD certifications by Dr. McCormack could not be related to applicant's 2017 cumulative trauma injury. Petition, p.5, lines 12-14. This does not follow. It is undisputed that the applicant has prior Awards for neck injuries in 2006 and 2011, and that the applicant continued to treat under those Awards. Whether the applicant treated under the prior Awards and/or with the same surgeon, Dr. McCormack, does not negate a finding of temporary disability for a new and accepted injury through September 27, 2017. Moreover, all of Dr. McCormack's EDD certifications reference applicant's September 29, 2017 surgery as the reason the applicant was off work. (EDD Exh. 3-6.)

b. THE COURT HAS A DUTY TO DEVELOP THE RECORD

The Court has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (Lab. Code sec. 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924].) In the en banc decision of *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board *en banc*), the board stated that "where the medical record requires further development either after trial or submission of the case for decision, the medical record should first be supplemented by physicians who have already reported in the case." (*Id.*, at pp. 139, 142.)

In the case at hand, the temporary disability period at issue was from September 28, 2017 through September 27, 2019. (MOH/SOE, p.2, lines 40-41.) The undersigned WCJ found temporary disability for the alleged period through December 3, 2018 based on the medical reporting, Petitioner asserts that the applicant failed to carry her burden of proof by not submitting medical reporting for any alleged periods of temporary disability after December 3, 2018, and therefore, additional discovery should not be allowed. *Petition, p.4, lines 11-20.*

However, pursuant to *McDuffie*, the Board has not only the power, but the obligation to develop the record when necessary "to ascertain the substantial rights of the parties and carry out justly the spirit and provisions" of the workers' compensation laws. (Labor Code sec. 5708.) There were no medical reports addressing the disputed temporary disability period of December 4, 2018 thru September 27, 2019, but the applicant testified that she did not return to work at all after September 26, 2017. Due to this conflict, the undersigned WCJ found itself duty-bound to develop the record on that issue per *McDuffie*.

IV. RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration be denied.

Date: April 3, 2024

Heidi K. Hengel
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE