

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

NORMAN RAINEY, *Applicant*

vs.

**POST COMPANY GRADING CONTRACTORS, INC.;
STATE COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Number: ADJ8264803
Anaheim District Office**

**OPINION AND ORDERS
DENYING PETITION FOR RECONSIDERATION;
GRANTING PETITION FOR RECONSIDERATION
AND DECISION AFTER RECONSIDERATION**

Applicant and defendant State Compensation Insurance Fund (defendant) both seek reconsideration of the May 14, 2024 Findings and Order (F&O), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a heavy equipment operator from April 21, 2010 to April 21, 2011, sustained industrial injury to his neck, right shoulder, back, hernia, respiratory [system], thoracic spine, mid-back and atherosclerotic heart disease. The WCJ determined in relevant part, and with respect to applicant's Petition for New and Further disability, that applicant did not sustain injury to the hands, knees, internal or urological systems, and that the court lacked jurisdiction to award new and further disability to the left shoulder, feet and psyche. The WCJ further determined that development of the record was necessary with respect to the issues of permanent disability and apportionment.

Applicant contends that the appropriate standard for evaluating a petition for new and further disability is whether there has been demonstrable change in applicant's condition, and that the medical record supports a finding of the need for medical treatment to the psyche, the feet, and the left shoulder. Applicant further contends the WCJ erred in ordering development of the record.

Defendant contends the WCJ erred in ordering development of the record because the Agreed Medical Evaluator (AME) Dr. Angerman declared applicant to be permanent and

stationary more than five years from the date of injury, precluding consideration of any reports thereafter.

We have received applicant's answer to Defendant's Petition, and we have received defendant's answer to Applicant's Petition. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that both applicant's and defendant's Petitions be denied.

We have considered the allegations of the Petitions for Reconsideration 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 discussed below, we will deny defendant's petition, grant applicant's petition, rescind the F&O and substitute new findings of fact deferring all issues and ordering development of the record.

FACTS

Applicant sustained injury to his neck, thoracic spine, back, right shoulder, hernia, respiratory [system], and in the form of atherosclerotic heart disease while employed as a heavy equipment operator by defendant Post Company Grading Contractors, Inc., from April 21, 2010 to April 21, 2011.

The parties utilized Alexander Angerman, M.D. as the Agreed Medical Evaluator (AME) in orthopedic medicine, and Stanley Majcher, M.D., as the AME in internal medicine.

The parties entered into a stipulated Award of permanent disability, which was approved by a WCJ on November 20, 2014.

On February 10, 2016, applicant filed a Petition to Reopen, alleging new and further disability due to "increased symptomatology." The petition is not specific as to the body parts or conditions claimed to have sustained new and further disability.

On March 27, 2024, the parties proceeded to trial, placing in issue injury to the body parts of the left shoulder, mid back, hands, knees, feet, internal, heart, cardiovascular hypertension, high blood pressure, urological [system] and psyche. The parties also placed in issue the permanent and stationary date, permanent disability, apportionment, the need for further medical treatment, and attorney fees. The applicant testified, and the WCJ ordered the matter submitted for decision the same day.

On May 14, 2024, the WCJ issued her decision, finding in relevant part that applicant did not sustain injury arising out of and occurring in the course of employment to the hands, knees, internal – cardiovascular hypertension and high blood pressure, and urological [system]. (Finding of Fact No. 2.) The WCJ further determined that the court lacked jurisdiction to award new and further disability to the left shoulder, feet and psyche, and that the evidentiary record was inadequate to determine the extent of permanent disability and apportionment. (Findings of Fact Nos. 3 & 5.) The WCJ’s Opinion on Decision explained that with respect to the left shoulder, the medical record did not establish injury to the body part within five years of the date of injury; with respect to the mid-back, the WCJ noted it was unclear why this body part was in issue, given AME Dr. Angerman’s discussion of the body part in 2013; with respect to the hands, knees and feet, the WCJ found no evidence establishing injury arising out of and in the course of employment (AOE/COE). (Opinion on Decision, at p. 2.) Regarding applicant’s alleged hypertension and urological issues, the WCJ noted that AME Dr. Majcher had opined the condition to be nonindustrial. (*Id.* at p. 3.) As to applicant’s alleged psychiatric injury, the WCJ noted that applicant had complaints of depression within five years of the date of injury but produced no evidence of disability. (*Id.* at p. 4.) Finally, the WCJ noted that following the Award on November 20, 2014, applicant had returned to AME Dr. Angerman and reported increased symptoms, but that the AME had not commented on further disability. Because the AME is no longer available and has not issued a report addressing the issues raised in the petition to reopen, the WCJ ordered the record developed pursuant to Labor Code¹ section 5701. (*Id.* at p. 5.)

Applicant’s Petition contends the correct standard for determining whether applicant has sustained new and further disability is whether there has been a demonstrable change in applicant’s condition. (Applicant’s Petition, at p. 2:18.) Applying this standard, applicant submits that the record establishes demonstrable change to his psychiatric condition, feet, and left shoulder. (*Id.* at pp. 3-5.) Applicant also contends that because the record establishes additional permanent disability to these body parts, the court erred in ordering development of the record. (*Id.* at p. 6:1.)

Defendant’s Answer observes that a determination of new and further disability requires both a timely petition and evidence of new and further disability within five years of the date of injury. (Defendant’s Answer, at p. 3:3.) Defendant contends that once applicant has been deemed permanent and stationary beyond five years from the date of injury, there can be no further

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

assertion of permanent disability. (*Id.* at p. 3:21.) Per defendant, the possible time period in which applicant could be assessed for further permanent disability ended with the 2017 permanent and stationary reporting of AMEs. Defendant also submits that applicant has not met the threshold conditions necessary for a determination of psychiatric injury under section 3208.3. (Defendant's Answer, at p. 4:21.) With respect to the left shoulder, defendant contends that applicant has not established injury to the left shoulder within five years of the date of injury. (*Id.* at p. 6:14.) Defendant also asserts that the claim of additional injury to the feet is not supported in the medical record. (*Id.* at p. 7:13.) Finally, defendant agrees with applicant that the record should not be developed, averring the permanent and stationary reporting of the AMEs in 2017 forecloses further reporting or development of the record. (*Id.* at p. 8:2.)

Defendant's Petition contends that our jurisdiction in this matter is limited to the period between the prior award of November 20, 2014, and AME Dr. Angerman's May 25, 2017 supplemental report in which he found applicant to be permanent and stationary. Defendant's Petition states, "Nothing can confer jurisdiction on the Board after Dr. Angerman's May 25, 2017 report – not the parties and not the Board itself ... [a]pplicant may have incurred even further orthopedic disability after Dr. Angerman's May 25, 2017 P&S report, but that disability arose more than five years after the date of injury in this case and the Board has no jurisdiction to award disability for that further disability under sections 5804 and 5410." (Defendant's Petition, at p. 4:3.)

Applicant's Answer responds that the decisional authority cited in Defendant's Petition is not applicable to this record. (Applicant's Answer, at p. 1:22.)

The WCJ's Report observes that contrary to the assertions contained in Applicant's Petition, "[i]n order to establish new and further disability, new evidence must be provided ... [a] petition to reopen is not permitted to re-litigate a body part that should have been decided at the time of the initial stipulated award." (Report, at p. 4.) The WCJ asserts that the evidentiary record provides evidence of psychiatric complaints as well as complaints to the feet prior to the issuance of the Award, and that "[a]pplicant failed to provide evidence of new and further disability for the psyche; the reports submitted after the award merely restated the conditions as they existed prior to the award." (*Ibid.*) With respect to the shoulders, the WCJ observes that it remains applicant's burden to establish the existence of new and further disability arising out of the original injury, and arising within five years of the original injury, and that applicant has not met that burden here.

(*Id.* at p. 5.) The WCJ also notes that the reporting of Dr. Angerman was not completed prior to Dr. Angerman’s passing, and that the court “cannot provide an opinion and finding without a final report laying out Applicant’s disability, therefore, further development of the record is required.” (*Id.* at p. 6.)

DISCUSSION

Pursuant to section 5410, an injured worker who has previously received workers’ compensation benefits either voluntarily paid by the employer or pursuant to an award is entitled to claim benefits for “new and further disability” within five years of the date of injury. (*Sarabi v. Workers’ Comp. Appeals Bd.* (2007) 151 Cal.App.4th 920, 925 [72 Cal.Comp.Cases 778].) If a petition to reopen is filed within the five-year period, the Board has jurisdiction to decide the matter beyond the five-year period. (*Ibid.*)

Section 5410 provides:

Nothing in this chapter shall bar the right of any injured worker to institute proceedings for the collection of compensation within five years after the date of the injury upon the ground that the original injury has caused new and further disability. The jurisdiction of the appeals board in these cases shall be a continuing jurisdiction within this period. This section does not extend the limitation provided in Section 5407.

(Lab. Code, § 5410.)

Workers’ Compensation Appeals Board (WCAB) Rule 10536 (Cal. Code Regs., tit. 8, § 10536) provides, in relevant part, that “the jurisdiction of the Workers’ Compensation Appeals Board under Labor Code section 5410 shall be invoked by a petition setting forth specifically and in detail the facts relied upon to establish new and further disability.”

To recover additional benefits, the injured worker must not only file a timely petition to reopen but must also have suffered a “new and further disability” within that five-year period, unless there is otherwise “good cause” to reopen the prior award. (*Applied Materials v. Workers’ Comp. Appeals Bd.* (2021) 64 Cal.App.5th 1042, 1080 [86 Cal.Comp.Cases 331], citing *Sarabi, supra*, 151 Cal.App.4th at p. 926.) “New and further disability” means disability resulting from some demonstrable change in the employee’s condition, including a gradual increase in disability, a recurrence of TD, a new need for medical treatment, or the change of a temporary disability into a permanent disability. (*Ibid.*)

Section 5410 requires applicant to establish that “the original injury has caused *new and further* disability.” (Italics added.) California case law has applied section 5410 to cases involving new and further disability to the *original body part* (e.g., *Sarabi v. Workers’ Comp. Appeals Bd.*, *supra*, 151 Cal.App.4th 920, 922–923, 926–927 [industrial injury to right shoulder with additional claimed period of temporary disability related to worsening condition and need for further surgery on right shoulder]) or injury to a *new body part* which is alleged as a compensable consequence of the original injury. (See *Southern California Rapid Transit Dist., Inc. v. Workers’ Comp. Appeals Bd. (Weitzman)* (1979) 23 Cal.3d 158 [44 Cal. Comp. Cases 107] [employee injured in car accident on the way home from delivering required work release note for prior compensable injury] (*Weitzman*); *Liberty Mutual Ins. Co. v. Industrial Accident Com. (Walden)* (1964) 231 Cal.App.2d 501, 504, [29 Cal. Comp. Cases 293] [development of asthma found to be directly attributable to industrial injury to the back].) However, irrespective of whether the Appeals Board’s continuing jurisdiction is invoked because of new and further injury to an *original* body part or injury to a *new* body part as a compensable consequence of the original injury, the new and further disability must be a result or an effect of the prior compensable injury. (*Applied Materials, supra*, 64 Cal.App.5th 1042, 1080; *Sarabi, supra*, 151 Cal.App.4th at p. 926; *Weitzman, supra*, 23 Cal.3d 158.)

Applying these principles to the matter at bar, we first observe that applicant has timely invoked the continuing jurisdiction of the Workers’ Compensation Appeals Board (WCAB). The parties have stipulated that applicant’s injury was sustained from April 21, 2010 to April 21, 2011. (Award, dated November 20, 2014.) Applicant’s Petition to Reopen was filed on February 10, 2016. Accordingly, the Petition for New and Further Disability timely invoked the continuing jurisdiction of the WCAB. (Lab. Code, § 5410; Cal. Code Regs., tit. 8, § 10536.) Once invoked, the jurisdiction granted the WCAB by section 5410 continues until such time as the underlying petition is resolved.

We therefore disagree with the defendant’s contention that “nothing can confer jurisdiction on the Board after Dr. Angerman’s May 25, 2017 – not the parties and not the Board itself.”²

² Defendant’s Petition cites to our en banc decision in *Ruffin v. Olson Glass Co.* (1987) 52 Cal.Comp.Cases 335 [1987 Cal. Wrk. Comp. LEXIS 2444], wherein we wrote that “Labor Code Sections 5804 and 5410 deprive the WCAB of jurisdiction to award additional compensation for either temporary or permanent disability more than five years after the date of injury.” (*Id.* at pp. 342-343.) However, our opinion addressed applicant’s contention that the Appeals Board could reserve jurisdiction for *anticipated* disability, which we rejected as inconsistent with the grant of statutory

(Defendant’s Petition, at p. 4.) This is because no party is seeking to invoke the continuing jurisdiction of the Appeals Board after May 25, 2017. Rather, the continuing jurisdiction of the Appeals Board was invoked by the timely filing of a Petition for New and Further. Once invoked, the continuing jurisdiction of the Appeals Board continues until such time as the Petition for New and Further Disability has been resolved, whether amicably or by adjudication. On the other hand, we agree with defendant that a timely filing of a Petition to Reopen for New and Further Disability under section 5410 requires a showing that the alleged new and further disability existed within five years of the injury. (*Ibid.*) Here, however, a petition under section 5410 has been timely filed, and the WCJ has appropriately exercised the continuing jurisdiction of the Appeals Board in ordering development of the record to address the underlying issue of whether applicant has sustained new and further disability. We will deny Defendant’s Petition, accordingly.

Applicant’s Petition avers that pursuant to *Sarabi, supra*, 151 Cal.App.4th 920, and *Applied Materials, supra*, 64 Cal.App.5th 1042, new and further disability for purposes of section 5410 is disability resulting from some demonstrable change in the employee’s condition, including a gradual increase in disability, a recurrence of TD, a new need for medical treatment, or the change of a temporary disability into a permanent disability. (*Ibid.*)

While we agree with this assertion generally, we also note that insofar as new and further injury is claimed as to body parts that were previously injured during the five-year period following the original injury, the disability must be “new,” that is, disability beyond that which was previously in existence at the time of the original injury. Applicant may not assert new and further disability for disability that existed at the time of the original Award. “Evidence as to facts which are known and events which occur during the pendency of an original claim cannot be received in support of a claim for new and further disability ... [r]eopening after an award for new and further disability appears to require that the new and further disability arose after the original award.” (*Edgar v. Workmen’s Comp. Appeals Bd.* (1966) 246 Cal.App.2d 660 [31 Cal.Comp.Cases 376]; see also *Bolanos v. Workers’ Comp. Appeals Bd.* (2014) 79 Cal.Comp.Cases 1531 [2014 Cal. Wrk. Comp. P.D. LEXIS 145] [applicant barred from claiming new and further disability to psyche when he knew or should have known of existence of psyche injury before prior Stipulated Awards]; *Vargas v. UCLA Dept. of Nutrition* (November 10, 2010, ADJ1821485) [2010 Cal. Wrk.

authority under sections 5804 and 5410. Our analysis in *Ruffin* is not applicable with respect to the exercise of our continuing jurisdiction under section 5410 following a timely petition for new and further disability.

Comp. P.D. LEXIS 550] [no good cause to reopen for psychiatric injury when medical evidence existed of the injury existed at time of original settlement]; *Brown v. Workers' Comp. Appeals Bd.* (2006) 72 Cal.Comp.Cases 118 [2006 Cal. Wrk. Comp. LEXIS 443] (writ den.) [no good cause to reopen for new and further when applicant alleged neck/cervical spine based on information known at time of stipulated award]; *Ellis v. Workers' Comp. Appeals Bd.* (2002) 67 Cal.Comp.Cases 1494 [2002 Cal. Wrk. Comp. LEXIS 1572] (writ den.) [pet. for new and further barred, when applicant admitted that medical evidence allegedly establishing her neck and shoulder injury existed prior to time of trial and Amended Findings and Award].)

We also observe that applicant is alleging new and further disability arising out of injury to both *original* and *new* body parts. The November 20, 2014 Award noted applicant had sustained injury to his “neck, [thoracic] spine, back, right shoulder, hernia, respiratory, and [atherosclerotic] heart disease.” (Award, dated November 20, 2014.) Thus, applicant’s allegations of injury to the *left* shoulder, mid back, hands, knees, feet, urological system and psyche are newly claimed body parts. The newly claimed body parts may be compensable if applicant can establish that they are compensable consequence injuries sustained as a result or an effect of the prior compensable injury arising within five years of the original injury date. (*Applied Materials, supra*, 64 Cal.App.5th 1042, 1080; *Sarabi, supra*, 151 Cal.App.4th at p. 926; *Weitzman, supra*, 23 Cal.3d 158.)

With respect to the internal, heart, cardiovascular hypertension, and high blood pressure claims, medical evidence will be necessary to determine whether those body parts fall under the rubric of respiratory [system] and atherosclerotic heart disease as stipulated originally, or as new body parts injured as a compensable consequence of the original injury.

We agree with the WCJ that to the extent feasible the parties should return to the same medical evaluator who prepared the previous evaluation to resolve the medical dispute. (Lab. Code, §§ 4062.3(k); 4067.) Here, following the petition for new and further disability, the parties returned to Dr. Angerman, the original orthopedic AME and obtained supplemental reporting. However, because the orthopedic AME became unavailable prior to issuing final opinions regarding the issues presented, including permanent disability and apportionment, the WCJ has determined that the record must be developed. (Findings of Fact No. 5; Report, at p. 6.)

The Appeals Board 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, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56

Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) In our en banc decision in *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc), we stated that “[s]ections 5701 and 5906 authorize the WCJ and the Board to obtain additional evidence, including medical evidence, at any time during the proceedings (citations) [but] [b]efore directing augmentation of the medical record ... the WCJ or the Board must establish as a threshold matter that specific medical opinions are deficient, for example, that they are inaccurate, inconsistent or incomplete.” (*McDuffie, supra*, at p. 141.) The preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. (*Id.*) Here, the WCJ has determined that the prior orthopedic AME is no longer available to report in this matter, and that his opinions on final disability and apportionment were incomplete.

Moreover, section 4061(i) requires an AME or QME evaluation prior to proceeding on issues relating to the existence or extent of permanent impairment and limitations. (Lab. Code, § 4061(i). Accordingly, and for the above reasons, we discern no error in the WCJ’s order for development of the record.

We are also persuaded that the medical reporting adduced in response to the WCJ’s order for development of the record may alter the analysis of whether there is new and further disability as to the various body parts and conditions alleged herein. Accordingly, we will rescind the F&O and substitute new Findings of Fact deferring all issues, and ordering development of the record pursuant to section 5701.

We observe that the *framing* of the issues in this matter is analytically incomplete. The basis upon which the Appeals Board exercises its continuing jurisdiction is applicant’s Petition for New and Further disability, which remains pending at this time. Thus, upon return of this matter to the trial level, the issue of whether there is good cause to reopen applicant’s award for new and further disability must be decided in the first instance. For each body part claimed by applicant the WCJ must determine whether it is among the injured body parts listed in the November 20, 2014 Award. If the body part is an original injury, the WCJ should then determine whether applicant has sustained disability that is both new and further, that is, beyond that which existed at the time of the stipulated Award, using the standards for new and further disability described in *Sarabi, supra*, 151 Cal.App.4th 920, and *Applied Materials, supra*, 64 Cal.App.5th 1042. To the extent that applicant claims disability arising out of body parts that were *not* among the original stipulated

body parts, the WCJ must determine whether the disability is a compensable consequence of the original injury. Under either analysis, the disability must be determined to have been in existence within the five-year period permitted under section 5410. Once the record has been appropriately developed pursuant to section 5701, the WCJ may then address the issues of whether applicant has met his burden of establishing new and further disability, and if so, the nature and extent of that disability.

For the foregoing reasons,

IT IS ORDERED that defendant's June 7, 2024 Petition for Reconsideration is **DENIED**.

IT IS FURTHER ORDERED that applicant's May 31, 2024 Petition for Reconsideration is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the May 14, 2024 Findings and Order is **RESCINDED**, with the following substituted therefor:

FINDINGS OF FACT

1. Applicant NORMAN RAINEY, while employed from April 21, 2010 to April 21, 2011, as a heavy equipment operator, occupational group number 351, at North Tustin, California, by POST COMPANY GRADING CONTRACTORS INC., whose workers' compensation insurance carrier was State Compensation Insurance Fund, Old Republic Insurance Company, and Imperium Insurance Company, sustained injury arising out of and occurring in the course of employment to neck, right shoulder, back, hernia, respiratory, thoracic spine, mid-back, and atherosclerotic heart disease.
2. All other issues are deferred with jurisdiction reserved to the WCJ.

ORDER

IT IS ORDERED that the parties develop the record on the issue of whether applicant has sustained new and further disability and the nature and extent of any such disability, pursuant to Labor Code section 5701, *Tyler v. Workers' Comp. Appeals Bd.* (1997) 62 Cal.Comp.Cases 924, and *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138. All other issues are deferred with jurisdiction reserved by the Workers' Compensation Appeals Board.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, 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.

**NORMAN RAINEY
LAW OFFICE OF THOMAS F. MARTIN
STATE COMPENSATION INSURANCE FUND**

SAR/abs

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