WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

AGUSTIN CONTRERAS, *Applicant*

vs.

ASPEN ENTERPRISES; TRUCK INSURANCE EXCHANGE, administered by FARMERS, *Defendants*

Adjudication Number: ADJ433569 (SAL0113639)
Salinas District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of the Amended Findings of Fact and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) in this matter on October 30, 2024. In that decision, the WCJ found in pertinent part that applicant failed to rebut the 2005 Permanent Disability Rating Schedule, and sustained permanent disability to the left knee of 24%.

Petitioner contends that the existing evidence supports a finding that the applicant has successfully rebutted the rating schedule based upon the Agreed Medical Evaluator (AME) as well as the reporting of vocational evaluators Tom Sullivan and James Westman. Petitioner further asserts he is unable to benefit from vocational rehabilitation and is thus unable to compete in the open labor market. Petitioner requests that reconsideration be granted and that a finding issue that the applicant is permanently totally disabled as a result of his industrial injury.

We have received an Answer from defendant.

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 Answer, and the contents of the Report, and we have reviewed the record in this matter. Based upon our preliminary review of the record, we will grant applicant's Petition for Reconsideration. Our order granting the Petition for Reconsideration is not a final order, and we will order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law. Once a

final decision after reconsideration is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code[1] section 5950 et seq.

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:

> (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 Management 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 November 27, 2024 and 60 days from the date of transmission is Sunday, January 26, 2025. The next business day that is 60 days from the date of transmission is Monday, January 27, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on Monday, January 27, 2025, so that we have timely acted on the petition as required by section 5909(a).

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

[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.

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. 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 November 27, 2024, and the case was transmitted to the Appeals Board on November 27, 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 section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on November 27, 2024.

II.

PROCEDURAL HISTORY

As set forth in the Minutes of Hearing and Summary of Evidence (MOH/SOE) dated September 30, 2024, the parties stipulated, in pertinent part, that the applicant, while employed on July 11, 2205 as a nursery worker, occupational group number 421, at Watsonville, California, by defendant, sustained injury arising out of and in the course of employment (AOE/COE) to his left knee.

The issues in dispute at trial were listed as follows:

1. Permanent disability and apportionment.
2. Need for further medical treatment.
3. Attorney's fees.
4. Whether the Applicant has rebutted the 2005 Permanent Disability Rating Schedule.

(Minutes of Hearing and Summary of Evidence (Minutes), dated September 30, 2024, pp. 2-3).

Exhibits were admitted into evidence, applicant testified at trial, and the matter thereafter stood submitted for decision.

On October 29, 2024, the WCJ issued her initial F&A, and on October 30, 2024, she issued an amended F&A in which she found that applicant sustained injury AOE/COE to her left knee, and that the AMA Guides had not been rebutted. Permanent disability of 24% for applicant's left knee was awarded, less reasonable attorney's fees of 15%, and future medical care.

It is from this amended F&A that applicant seeks reconsideration.

III.

Preliminarily, we note the following in our review:

Petitioner takes issue with the findings of the WCJ, including the finding that applicant failed to rebut the Permanent Disability Rating Schedule (PDRS) based upon the existing evidence. Petitioner contends that the report of Vocational Evaluator (VE) Tom Sullivan is the most significant vocational report and fully supports the conclusion that Applicant's injury has precluded him from benefiting from vocational rehabilitation and competing in the open labor market, as it is the closest vocational evaluation to the Permanent and Stationary date identified by the AME, Dr. Mark Anderson and is squarely based upon the work restrictions set forth by Dr. Anderson. (Petition, p. 13.)

The WCJ addresses the vocational evidence presented by the parties in her Report, in part, as follows:

> The WCJ did not find Mr. Sullivan's report persuasive. The report became stale given applicant's reliance on his cane had greatly diminished over time (having weaned himself off of using a cane due to his PTP's recommendation) while Mr. Sullivan concluded in discussing applicant's hire ability that "his use of a cane was a *substantial* obstacle in providing a healthy impression of someone able to work… he relies on his cane for balance and stability." (emphasis added). He further ruled out jobs due to reliance on a cane such as working at a mini mart where he would have difficulty stocking shelves due to the cane. And, effectively ruled out work as an assembly worker due to reliance on a cane (A-5, @ p. 30).
>
> In comparing and contrasting the reports of the remaining vocational experts, the WCJ took issue with Mr. Westman limiting his vocational analysis to light duty jobs while based on reports of AME Mark Anderson, he categorized Mr. Contreras as being limited to sedentary work. Specifically, at p. 17 of his report, Mr. Westman summarized the work restrictions provided by Dr. Anderson as follows: "Dr. Anderson also outlines additional restrictions including the need to avoid squatting, kneeling, or stairclimbing more than 1-hour per day. These work restrictions along with Dr. Anderson's endorsement of Mr. Contreras' need for part-time utilization of a cane for ambulation effectively limits Mr. Contreras to select jobs in the Sedentary occupational base." (A-1, @ p. 17)

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In contrast, defendant's vocational expert, Scott Simon was more credible, recognizing and addressing, applicant's pre-injury access to the labor market based on limited transferable skills, monolingual Spanish-speaking, and primary school education, concluding applicant only had access to 2% of the labor market *before* his injury. Mr. Simon correctly pointed out that Mr. Westman analyzed occupations outside of applicant's "sedentary" capabilities, questioning his motive as making applicant appear more disabled than he was. Mr. Simon also took issue with Mr. Westman utilizing the Occupational Employment Statistics Manual to indicate that 99% of jobs in Santa Clara County region were inaccessible. Mr. Simon correctly pointed out that Mr. Contreras did not reside in Santa Clara County and further noted that said manual was not at all designed from these kinds of evaluations. (D-5, @ p. 4)

The WCJ agreed with Mr. Simon that Mr. Westman failed to analyze any sedentary jobs for Mr. Contreras, rather he made a general reference to the use of a cane and indicated that would interfere with his work and productivity. This completely negated applicant's testimony wherein he stopped using a cane because Dr. Gowda recommended to stop using it to learn to walk without it in order to not mess up his other leg (SOE @ p. 5, lines 7-9). It also was contrary to "part-time" use of a cane when Mr. Westman concluded that applicant would not be able to perform sedentary work where a lot of time was spent sitting down and then having to carry light objects to and from an indoor job setting in which he would be precluded due to use of his cane. Applicant testified and reported to his physicians and vocational experts that he did not use a cane indoors, and that he was able to cook and do household chores without difficulty. He only used a cane when walking on uneven ground or for long distances. Interference with a sedentary job due to part-time use of a cane was not supported by the record but was significantly relied upon by Mr. Westman when he concluded applicant was precluded from 99% of sedentary jobs. As Mr. Simon astutely noted, "Mr. Westman is adding in a factor of work capacity and limitations that is neither present in the medical record nor presented by the applicant." (D-5, @ p. 5).

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Based on the totality of the evidence, including the AME reports of Dr. Anderson, the vocational expert reporting, and applicant's testimony, applicant did not meet their burden of rebutting the Permanent Disability Rating Schedule. At most, there is some support to develop the record given applicant's reliance on a cane has substantially changed over time. In fact, he has weaned himself off of using his cane based on his primary treating physician's recommendation. Nonetheless, the vocational evidence provided did not persuade the WCJ that applicant could not be trained to work in an unskilled, sedentary position *including* the part-time restriction of using a cane. Since part-time use of a cane is no longer a reality, this would further support a finding that applicant could perform duties in an unskilled, sedentary position.

(Petition, pp. 3-6.)

IV.

Any decision of the WCAB must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [520 P.2d 978, 113 Cal. Rptr. 162] [39 Cal.Comp.Cases 310]*; Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [475 P.2d 451, 90 Cal. Rptr. 355] [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [463 P.2d 432, 83 Cal. Rptr. 208] [35 Cal.Comp.Cases 16].)

In this regard, it has been long established that, in order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. (*McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413, 416-417, 419 [445 P.2d 313, 71 Cal. Rptr. 697] [33 Cal.Comp.Cases 660]*; Travelers Ins. Co. v. Industrial Acc. Com. (Odello)* (1949) 33 Cal.2d 685, 687-688 [203 P.2d 747] [14 Cal.Comp.Cases 54]*; Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692, 1700-1702, 1705 [20 Cal. Rptr. 2d 778] [58 Cal.Comp.Cases 313].)

A medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely their conclusions. (*Granado v. Workers' Comp. Appeals Bd.* (1970) 69 Cal.2d 399, 407 [445 P.2d 294, 71 Cal. Rptr. 678] [a mere legal conclusion does not furnish a basis for a finding]; *Zemke v. Workmen's Comp. Appeals Bd., supra,* 68 Cal.2d at pp. 799, 800-801 [an opinion that fails to disclose its underlying basis and gives a bare legal conclusion does not constitute substantial evidence]; see also *People v. Bassett* (1968) 69 Cal.2d 122, 141, 144 [443 P.2d 777, 70 Cal. Rptr. 193] [the chief value of an expert's testimony rests upon the material from which his or her opinion is fashioned and the reasoning by which he or she progresses from the material to the conclusion, and it does not lie in the mere expression of the conclusion; thus, the opinion of an expert is no better than the reasons upon which it is based]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

Further, the WCJ has the discretionary authority to develop the record when the record does not contain 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, 394 [62 Cal.Comp.Cases 924] ["principle of allowing full development of the evidentiary record to enable a complete adjudication of the issues is consistent with due process in connection with workers' compensation claims (citations)"]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261]; *McDuffie v. Los Angeles*

County Metropolitan Transit Authority (2001) 67 Cal.Comp.Cases 138 (Appeals Bd. en banc).) The WCJ, ". . . may not leave undeveloped matters which its acquired specialized knowledge should identify as requiring further evidence." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 404 [65 Cal.Comp.Cases 264].)

Thus, it is unclear from our preliminary review whether the existing record constitutes substantial evidence sufficient to support the findings and award as well as the legal conclusions of the WCJ, as well as whether further development of the record may be necessary with respect to the issues noted above.

Reconsideration is therefore granted for this purpose and for such further proceedings as we may hereafter determine to be appropriate.

V.

In addition, under our broad grant of authority, our jurisdiction over this matter is continuing.

A grant of reconsideration has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination" (*Great Western Power Co. v. Industrial Acc. Com*. (*Savercool*) (1923) 191 Cal.724, 729 [10 I.A.C. 322]) and of "[throwing] the entire record open for review." (*State Comp. Ins. Fund v. Industrial Acc. Com*. (*George*) (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. (See Lab. Code, §§ 5907, 5908, 5908.5; see also *Gonzales v. IndustrialAcci*. *Com*. (1958) 50 Cal.2d 360, 364.) ["[t]here is no provision in chapter 7, dealing with proceedings for reconsideration and judicial review, limiting the time within which the commission may make its decision on reconsideration, and in the absence of a statutory authority limitation none will be implied."]; see generally Lab. Code, § 5803 ["The WCAB has continuing jurisdiction over its orders, decisions, and awards. . . . At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor.].)

"The WCAB . . . is a constitutional court; hence, its final decisions are given res judicata effect." (*Azadigian v. Workers' Comp. Appeals Bd*. (1992) 7 Cal.App.4th 372, 374 [57

Cal.Comp.Cases 391; see *Dow Chemical Co. v. Workmen's Comp. App. Bd*. (1967) 67 Cal.2d 483, 491 [32 Cal.Comp.Cases 431]; *Dakins v. Board of Pension Commissioners* (1982) 134 Cal.App.3d 374, 381 [184 Cal.Rptr. 576]; *Solari v. Atlas-Universal Service, Inc.* (1963) 215 Cal.App.2d 587, 593 [30 Cal.Rptr. 407].) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp*. *Appeals Bd.* (*Pointer*) (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]), or determines a "threshold" issue that is fundamental to the claim for benefits. Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Maranian v. Workers' Comp*. *Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) ["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"].)

Labor Code section 5901 states in relevant part that:

> No cause of action arising out of any final order, decision or award made and filed by the appeals board or a workers' compensation judge shall accrue in any court to any person until and unless the appeals board on its own motion sets aside the final order, decision, or award and removes the proceeding to itself or if the person files a petition for reconsideration, and the reconsideration is granted or denied. …

Thus, this is not a final decision on the merits of the Petition for Reconsideration, and we will order that issuance of the final decision after reconsideration is deferred. Once a final decision is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to sections 5950 et seq.

VI.

Accordingly, we grant applicant's Petition for Reconsideration, and order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

While this matter is pending before the Appeals Board, we encourage the parties to participate in the Appeals Board's voluntary mediation program. Inquiries as to the use of our mediation program can be addressed to WCABmediation@dir.ca.gov .

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings and Award issued on October 30, 2024 is **GRANTED**.

IT IS FURTHER ORDERED that a final decision after reconsideration is **DEFERRED** pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 27, 2025

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

AGUSTIN CONTRERAS
A. KEITH LESAR, ESQ.
LAW OFFICES OF SCOTT C. STRATMAN

LAS/abs

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