WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

CHRISTINE GILROY, *Applicant*

vs.

KAISER PERMANENTE, permissibly self-insured, administered by SEDGWICK CMS, *Defendants*

Adjudication Number: ADJ15590671
Van Nuys District Office

OPINION AND ORDER GRANTING PETITION FOR REMOVAL AND DECISION AFTER REMOVAL

Defendant has filed a petition for removal from the order vacating submission, striking medical reports, and order to develop the record ("Orders") issued on May 31, 2024, by the workers' compensation administrative law judge (WCJ). The WCJ vacated submission of this matter, ordered the reporting of the current qualified medical evaluator (QME) stricken because it did not constitute substantial medical evidence, and ordered development of the record with the parties either agreeing upon an agreed medical evaluator or a replacement QME, but absent an agreement, the WCJ would appoint a regular physician pursuant to Labor Code section 5701.

Defendant contends that the WCJ erred in striking the reports of the QME based upon the finding that such reports are not substantial medical evidence, because the reporting constitutes substantial medical evidence.

We have not received an Answer from applicant. The WCJ filed a Report and Recommendation on Petition for Removal (Report) recommending that we deny removal.

We have considered the allegations of the Petition for Removal and the contents of the WCJ's Report. Based on our review of the record, we will grant removal and as our Decision After Removal, we affirm the May 31, 2024 Orders, except that we amend Order #2 to indicate

that the reporting of the QME is not substantial medical evidence and that returning to the QME does not appear fruitful at this time.

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).) Here, the WCJ errantly ordered the reporting of the current QME stricken from the record, which could cause the parties to conduct substantial discovery without the use of these records, thereby delaying the progress of the case. Accordingly, we conclude that defendant has established substantial prejudice or irreparable harm under the order striking evidence.

Whether a report is substantial evidence goes to the *weight* of the evidence, not the *admissibility*. (Cal. Code Regs., tit. 8, § 10682(c).) Thus, upon finding a report insubstantial, the report is not stricken from the record. The sole question here is how to develop the record further to ensure that the decision of the Appeals Board is based upon substantial evidence. To that extent, 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. (Citations.)" (*McDuffie*, *supra*, 67 Cal.Comp.Cases at 141.)

Here, and for the reasons discussed by the WCJ in the Report, the WCJ properly established that the current reports are inaccurate, inconsistent or incomplete, and thus defendant has not met

the standard for substantial prejudice or irreparable harm as to development of the record. Furthermore, the WCJ's decision to proceed with a regular physician appears prudent. However, and as noted above, we must correct the order to find that the prior reports of the QME in this matter are not stricken. It is merely a question as to what weight to give to those reports when the matter is resubmitted.

Accordingly, we grant removal and as our Decision After Removal, we affirm the May 31, 2024 Orders, except that we amend Order #2 to indicate that the reporting of the QME is not substantial medical evidence and that returning to the current QME does not appear fruitful at this time.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Removal from the Orders issued on May 31, 2024, by the WCJ is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Removal of the Workers' Compensation Appeals Board that the Orders issued on May 31, 2024, by the WCJ are **AFFIRMED**, except that Order #2 is **AMENDED** to read as follows:

> (2) The reports of Dr. Darakjian are not substantial medical evidence and it does not appear that returning to Dr. Darakjian for additional reporting would be fruitful.

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

SEPTEMBER 25, 2025

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

CHRISTINE GILROY
LAW OFFICES OF CHRISTINE T. NELSON
MICHAEL SULLIVAN & ASSOCIATES LLP

EDL/mt

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