

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

DAWN KALEY, *Applicant*

vs.

SUTTER ROSEVILLE MEDICAL CENTER, permissibly self-insured, *Defendant*

**Adjudication Number: ADJ16663930
Sacramento District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Defendant seeks reconsideration of the November 14, 2024 Findings and Award (F&A) wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed by defendant as a registered nurse on September 25, 2021, sustained an industrial injury to her heart, which resulted in 5% permanent disability.

Defendant contends that Dr. Levy's findings are not substantial medical evidence because Dr. Levy has previously admitted that there is no "permanent aggravation" of applicant's symptoms and applicant's "mitral valve prolapse is a pre-existing, non-industrial condition." (Petition, p. 3.)

We have received an Answer from applicant. 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. For the reasons discussed below, we will deny the Petition.

FACTS

Applicant, while employed by defendant as a registered nurse on September 25, 2021 claimed an industrial injury to the heart as a result of receiving a COVID-19 vaccination that was

requested by defendant as a condition of employment after applicant acquired COVID-19 on August 1, 2021.

After the vaccination, applicant apparently experienced several symptoms, including palpitations, chest pains, anxiety, and racing heart. (Joint Exhibit AA, p. 7.) Applicant also experienced extreme fatigue with decreased exercise tolerance. (Joint Exhibit EE, p. 6.) Applicant had an abnormal echocardiogram (EKG) and was placed on metoprolol. (*Ibid.*) She was ultimately diagnosed with mitral valve prolapse. (Joint Exhibit CC. pp. 3, 12.)

The parties retained Dr. Richard Levy as the panel QME. Dr. Levy evaluated the applicant on March 18, 2022, April 7, 2023 and September 8, 2023. He issued a total of seven reports dated March 18, 2022, June 1, 2022 (original), June 1, 2022 (revised), July 15, 2022, April 7, 2023, September 8, 2023, and October 23, 2023. Dr. Levy was also deposed on March 20, 2024.

In his April 7, 2023 report, Dr. Levy found that “within reasonable medical probability” applicant’s “symptoms came about as a response to her employer’s demand of premature COVID vaccine.” (Joint Exhibit EE, p. 14.) He noted that “COVID-19 symptoms have been well-recognized as part of the vaccine profile in some patients” and “[g]iving the vaccine prematurely against medical recommendation, particularly in a potential anxious patient with or without pre-existing prolapse would likely aggravate symptoms.” (*Ibid.*) He indicated a 5% whole person impairment as a result of the mitral valve prolapse and found “no evidence from the medical records” that she had the condition “prior to her vaccine.” (*Id.*, p. 15.) He found “no basis to refute her history” and noted that she was a “valid historian.” (*Ibid.*) He apportioned 25% of the impairment, however, to potential prior undiagnosed and asymptomatic mitral valve prolapse. (*Ibid.*) At the time, he also found a 5% whole person impairment for applicant’s ectopy (palpitations). (*Ibid.*)

In his October 23, 2023 report, Dr. Levy reiterated that the cause of applicant’s mitral valve prolapse was “the stress of [the] vaccine” and “subsequent COVID symptoms and anxiety.” (Joint Exhibit GG, p. 4.) He reiterated that applicant had sustained a 5% whole person impairment as a result of the mitral valve prolapse but increased to non-industrial apportionment to 50% given “the probability of pre-existing mitral valve prolapse.” (*Ibid.*, p. 5.) He also removed impairment for applicant’s ectopy as she was no longer experiencing palpitations. “A pill in the pocket approach” was noted with respect to future medical for applicant’s heart. (*Ibid.*, p. 4.)

The parties proceeded to trial and on November 14, 2024, the WCJ issued an F&A finding that applicant sustained injury arising out of and in the course of employment (AOE/COE) to her heart resulting in 5% permanent disability, after apportionment, valued at \$290 weekly for 15 weeks, totaling \$4,350.00, with a continued need for future medical treatment to cure or relieve applicant from the effects of the injury.

DISCUSSION

I.

Preliminarily, former Labor Code section 5909¹ 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 under the Events tab 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 December 5, 2024, and 60 days from the date of transmission is February 3, 2025. This decision was issued by or on February 3, 2025, so that we have timely acted on the petition as required by section 5909(a).

¹ Unless otherwise stated, all further statutory references are to the Labor Code.

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 constitute notice of transmission.

Here, according to the proof of service for the Report, it was served on December 5, 2024, and the case was transmitted to the Appeals Board on December 5, 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 December 5, 2024.

II.

Turning to the merits of the Petition, defendant argues that the reports of Dr. Levy do not support the WCJ's finding of injury AOE/COE causing mitral valve prolapse and ventricular ectopy (palpitations) with an ongoing need for future medical care as the reports do not constitute substantial medical evidence.

It is well established that any award, order, or decision of the Appeals Board, including decisions by WCJs, must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) To constitute substantial evidence, an expert medical opinion must be framed in terms of reasonable medical probability, be based on an accurate history and examination, and must set forth reasoning to support the expert conclusions reached. (*E.L. Yeager v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).) “[A] medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. (citations) Further, a medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. (citations)” (*Gatten, supra*, at p. 928.) “A medical

report which lacks a relevant factual basis cannot rise to a higher level than its own inadequate premises. Such reports do not constitute substantial evidence to support a denial of benefits. (citation)” (*Kyle v. Workers’ Comp. Appeals Bd (City and County of San Francisco)* (1987) 195 Cal.App.3d 614, 621.)

Based upon our review of Dr. Levy’s reports, including his October 23, 2023 report, Dr. Levy took an accurate and adequate history of the injury, thoroughly examined the applicant, reviewed all medical records provided, and explained how and why the industrial work exposure caused applicant’s complaints. Dr. Levy also completed necessary testing including a treadmill test, exercise oximetry, and echocardiogram. (Joint Exhibit CC.) As such, we find that Dr. Levy’s reporting constitutes substantial medical evidence of injury AOE/COE to the heart and need for an award of future medical treatment to cure or relieve applicant from the effects of the injury.

Defendant contends that the COVID-19 vaccine did not cause permanent aggravation to applicant’s heart in the form of a mitral valve prolapse as the condition was already preexisting. An aggravation is an increase in the severity of a pre-existing condition where the underlying pathology is permanently moved to a higher level. An exacerbation is a temporary increase in the symptoms of a pre-existing condition that returns to its prior level within a reasonable period of time. The industrial aggravation of a pre-existing condition constitutes an injury for workers’ compensation purposes. (*Tanenbaum v. Industrial Acc. Com.* (1935) 4 Cal.2d 615, 617 [1935 Cal. LEXIS 590; *Zemke v. Workers’ Comp. Appeals Bd.* (1968) 68 Cal.2d 794 [33 Cal.Comp.Cases 358]; *Reynolds Electrical & Engineering Co. v. Workers’ Comp. Appeals Bd. (Buckner)* (1966) 65 Cal.2d 438 [31 Cal.Comp.Cases 421].) The Appeals Board has previously held that the aggravation of a prior condition constitutes an injury when the aggravation causes a need for medical treatment and a period of temporary disability. (*City of Los Angeles v. Workers’ Comp. Appeals Bd. (Clark)* (2017 W/D) 82 Cal.Comp.Cases 1404; *Johnson v. Cadlac, Inc.*, 2021 Cal. Wrk. Comp. P.D. LEXIS 194.)

In the instant case, we agree with Dr. Levy and the WCJ that the vaccine aggravated applicant’s ventricular ectopy and contributed to applicant’s mitral valve prolapse. (Report, p. 2; Joint Exhibit GG, pp. 4-5.) Even if applicant had preexisting mitral valve prolapse, after receiving the vaccination, it is clear that applicant experienced an aggravation in her condition. As reported by Dr. Levy, post vaccine, applicant experienced palpitations, chest pains, anxiety, and racing heart. (Joint Exhibit AA, p. 7.) She also experienced extreme fatigue with decreased exercise

tolerance. (Joint Exhibit EE, p. 6.) She tested abnormal in her EKG and was placed on metoprolol. (*Ibid.*; Joint Exhibit AA, p. 7; Joint Exhibit GG, p. 4.) Significantly, there are no medical reports or other evidence which indicate a prior history of the above symptomology, or which contradict Dr. Levy's findings. Accordingly, we deny defendant's Petition.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the November 14, 2024 Findings and Award is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

LISA A. SUSSMAN, DEPUTY COMMISSIONER
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 31, 2025

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

**DAWN KALEY
ELDER AND BERG
TWOHY, DARNEILLE & FRYE**

RL/cs

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