WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

RICHARD BROWN, *Applicant*

vs.

SUBEQUENT INJURIES BENEFITS TRUST FUND, et. al., *Defendants*

Adjudication Number: ADJ4514112

Salinas District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of the amended "Findings of Fact" (Findings) issued on December 27, 2024, by the workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that applicant failed to meet the threshold for obtaining Subsequent Injuries Benefits Trust Fund (SIBTF) benefits because applicant's subsequent industrial disability caused 100% permanent total disability without apportionment.

Applicant argues that the WCJ incorrectly found that applicant's subsequent injury caused permanent total disability because the apportionment opinions of the various medical evaluators constituted substantial medical evidence.

We received an answer from SIBTF.

The WCJ filed a Report recommending that the Petition for Reconsideration be denied.

We have considered the allegations in the Petition for Reconsideration, the Answer, the contents of the Report, and we have reviewed the record. Based upon our review of the record, we will deny reconsideration.

FACTS

The WCJ found that applicant did not qualify for SIBTF benefits because applicant's subsequent injury rated to 100% permanent total disability. The WCJ rejected the apportionment opinions of applicant's evaluators. Per the WCJ's Report:

> Applicant has the burden of showing that they are entitled to benefits under Labor Code section 4751 by proving a pre-existing permanent partial disability; a subsequent compensable injury resulting in additional permanent partial disability; the combined pre-existing and subsequent permanent partial disability is greater than the subsequent permanent partial disability alone; and, the combined preexisting and subsequent permanent partial disability is equal to 70% or more. (*Todd v. SIBTF* (2020) 85 Cal.Comp.Cases 576, 581-582.)
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> The applicant established that he had pre-existing permanent partial disability. The applicant suffered a bilateral knee injury on 06/19/1991 when working for Bud of California (ADJ1235460.) Said claim was settled by C&R on 12/14/1994, per EAMS. No documentation is in file. The parties utilized Paul Clayman, M.D., as their AME to address Applicant's bilateral knees. (DEFT'S EX. D-28: AME report, Paul Clayman, M.D., 5/27/93.) Applicant's bilateral knee injury was considered permanent and stationary at that time. Dr. Clayman set forth subjective and objective factors and work restrictions, which would have yielded PD ratings per the 1988 PDRS. Dr. Clayman found 100% apportionment to the industrial injury. (Id., pp. 11-13.)
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> Per Applicant's SIBTF evaluator, Demeil Betoushana, D.C., The applicant had suffered a prior non-industrial left knee injury on 7/10/1980 that resulted in arthroscopic surgery with partial medial meniscectomy. (APPL'S EX. A-4: SIBTF report, Demeil Betoushana, D.C., 9/12/22, p. 140.) Regarding the 1980 non-industrial left knee injury, Dr. Betoushana stated, "Concerning the 07-10-80 specific nonindustrial injury Mr. Brown sustained to his left knee after falling off a bike and eventually needing arthroscopic surgery with partial medial meniscectomy, with reasonable medical probability it is my opinion that his condition was permanent, labor disabling, and ratable as of 07-08-83, which is one year following his 07-08-82 left knee surgery." (Ib., p. 139.) Dr. Betoushana did not provide a separate rating for the 1980 injury separate from the 1991 industrial bilateral knee injury.
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> Dr. Betoushana also indicated that the applicant had non-industrial bilateral carpal tunnel syndrome, which was diagnosed on 2/4/1998 by Dr. Ron Tintner, M.D. (Id., pp. 104-105.) Applicant underwent a right carpal tunnel release on 9/24/1998. Although a left carpal tunnel release was recommended at that time, the applicant did not have that surgery until 11/20/08. (Id., p. 101.)
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> At pages 143-144, Dr. Betoushana provided disability factors for Applicant's bilateral knees and wrists, before apportionment, as follows:

14.5 - 10% - 480H - 13 - 16% (knees)
7.7 - 30% - 480G - 33 - 38% (wrists)

The applicant demonstrated permanent partial disability existed prior to his 2/27/01 injury.

However, the second requirement that the subsequent industrial injury (SII) must have caused permanent *partial* disability is not met, because the applicant is permanently totally disabled as a result of the SII. In his 2/23/12 report, Dr. Robert Carson, the parties' AME, stated that the applicant had suffered permanent *total* disability as a result of his injury. Dr. Carson stated,

> By the old 1997 method, where we combined disabilities, in this case the neck and upper extremities along with the back and lower extremities, the patient has a subjective factor here of constant moderate pain in the neck, shoulders, right upper extremity, and back and lower extremities, and the objective factors of disability here include multilevel degenerative disc disease of the cervical spine, with positive MRI studies and electrical studies indicative of radiculopathy at C7 right side and C6 left side, along with the bilateral shoulder pain with MRI findings of tendinosis, partial rotator cuff tear, fraying of the biceps tendon, and anterior subacromial impingement syndrome, treatment postponed because of low back and neck issues being predominant, as well as the condition of his lower back, status post-operative six operative procedures with fusions from L3 to the sacrum.
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> Combining all of these injuries, the patient is totally and permanently disabled from useful work, in my opinion, in addition to his requirements for medication. (DEFT'S EX. D-1: AME report, Robert Carson, M.D., 2/23/12, p. 8.)

Alone, Dr. Carson's report would rate out to 100% under the 1997 PDRS for his orthopedic complaints alone. The applicant was evaluated by Lawrence Petrakis, M.D., who acted as the parties' AME for the 2/27/01 injury, who provided a ratable report. (APPL'S EX. A-13: AME report, Lawrence Petrakis, M.D., 5/12/09, pp. 13-17.)

Although Dr. Carson apportioned 20% of the disability to an alleged subsequent injury (CT to 11/26/02), his apportionment determination does not constitute substantial medical evidence. Dr. Carson wrote, "I stand by my original assessment of apportionment here since the Christmas Tree ladder incident was never accepted as a work injury and attribute 80 percent of the patient's impairment to the two days of heavy lifting and carrying of the heavy concrete parking barriers, and the other 20 percent to cumulative trauma covering the period mentioned above from his date

of hire to the last day of active duty for the City of Sand City." (Dr. Carson, 1/26/12, p. 9.) This opinion on apportionment does not meet the requirements of *Escobedo* in that the doctor's rationale was not explained.

> … [T]o be substantial evidence on the issue of the approximate percentages of permanent disability due to the direct results of the injury and the approximate percentage of permanent disability due to other factors, 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. Marshall* (2005) 70 Cal. Comp. Cases 604, 621 (en banc).)

Dr. Betoushana also apportioned 20% to the 11/26/02 CT, without explanation. (APPL'S EX. A-4, Betoushana, D.C., supra, p. 140.)

Dr. Morton Scheinbaum evaluated the applicant to address his psychological claim for the SIBTF case. Dr. Scheinbaum's 50% apportionment to a pre-existing non-industrial psyche condition does not constitute substantial medical evidence, either. Dr. Scheinbaum opined, "I would apportion 50% of the claimant's psychiatric impairment to the industrial injury of February 27, 2001, and 50% to nonindustrial, for the reasons as indicated above, predominantly related to the development of morbid obesity related to his Axis II personality disorder and the development of the complications related to the morbid obesity, both cerebrovascular and cardiovascular, but to also include chronic gastroesophageal reflux disease, chronic diabetes, insomnia, fatty liver and hiatal hernia, and chronic obstructive sleep apnea." (Dr. Scheinbaum, 12/6/22, pp. 132-133.) Dr. Scheinbaum stated that all of the alleged nonindustrial conditions such as the stroke of 2009, diabetes, fatty liver, etc., are related to the development of his morbid obesity. (APPL'S EX. A-6: SIBTF report, Morton J. Scheinbaum, M.D., 12/6/22., p. 131-132.)

With respect to the weight gain, Dr. Jonathan Ng, AME in internal medicine for the SII, found that Applicant's weight gain occurred subsequent to the industrial injury. (APPL'S EX. A-14: AME report, Jonathan Ng, M.D., 4/7/10, pp. 40-41.) Therefore, his weight gain and associated co-morbidities could not cause preexisting labor-disabling disabilities.

Without apportionment, Drs. Scheinbaum and Betoushana's reports rate out, as follows:

7.3 - 30% - 480H - 36 – 42 (shoulders)
12.1 - 75% - 480I - 81 – 85 (spine)
1.4 - 80% - 480E - 77 – 81 (psyche)
MDT = 100%

(Report, pp. 2-5.)

DISCUSSION

I.

Former Labor Code section 5909[1] 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.
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> (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.
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> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

(§ 5909.)

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 January 24, 2025, and 60 days from the date of transmission is Tuesday, March 25, 2025. This decision is issued by or on March 25, 2025, so that we have timely acted on the Petition as required by section 5909(a).

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.

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

According to the proof of service for the Report and Recommendation by the WCJ, the Report was served on January 24, 2025, and the case was transmitted to the Appeals Board on January 24, 2025. 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 January 24, 2025.

II.

As explained in our en banc decision in Todd:

> SIBTF is a state fund that provides benefits to employees with preexisting permanent disability who sustain subsequent industrial disability. The purpose of the statute is to encourage the employment of the disabled as part of a "complete system of [workers'] compensation contemplated by our Constitution." (*Subsequent Injuries Fund of the State of California v. Industrial Acci. Com*. (*Patterson*) (1952) 39 Cal. 2d 83 [244 P.2d 889, 17 Cal. Comp. Cases 142]; *Ferguson v. Industrial Acci. Com*. (1958) 50 Cal. 2d 469, 475 [326 P.2d 145]; *Escobedo v, Marshalls* (2005) 70 Cal. Comp. Cases 604, 619 [2005 Cal. Wrk. Comp. LEXIS 71] (Appeals Board en banc).)
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> SIBTF is codified in section 4751, which provides:
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> > If an employee who is permanently partially disabled receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree of disability caused by the combination of both disabilities is greater than that which would have resulted from the subsequent injury alone, and the combined effect of the last injury and the previous disability or impairment is a permanent disability equal to 70 percent or more of total, he shall be paid in addition to the compensation due under this code for the permanent partial disability caused by the last injury compensation for the remainder of the combined permanent disability existing after the last injury as provided in this article; provided, that either (a) the previous disability or impairment affected a hand, an arm, a foot, a leg, or an eye, and the permanent disability resulting from the subsequent injury affects the opposite and corresponding member, and such latter permanent disability, when considered alone and without regard to, or adjustment for, the occupation or age of the employee, is equal to 5 percent

> or more of total, or (b) the permanent disability resulting from the subsequent injury, when considered alone and without regard to or adjustment for the occupation or the age of the employee, is equal to 35 percent or more of total. (§ 4751.)

The preexisting disability may be congenital, developmental, pathological, or due to either an industrial or nonindustrial accident. (*Escobedo*, *supra*, 70 Cal. Comp. Cases at p. 619.) It must be "independently capable of supporting an award" of permanent disability, "as distinguished from [a] condition rendered disabling only as the result of 'lighting up' by the second injury." (Ferguson, supra, 50 Cal. 2d at p. 477.)

Furthermore, there is no specific statute of limitations with respect to the filing of an application against SIBTF; an application against the fund will not be barred "where, prior to the expiration of five years from the date of injury, an applicant does not know and could not reasonably be deemed to know that there will be substantial likelihood he will become entitled to subsequent injuries benefits, [] if he files a proceeding against the Fund within a reasonable time after he learns from the board's findings on the issue of permanent disability that the Fund has probable liability." (*Subsequent Injuries Fund v. Workmens' Comp. Appeals Bd*. (*Talcott*) (1970) 2 Cal. 3d 56, 65 [84 Cal. Rptr. 140, 465 P.2d 28, 35 Cal. Comp. Cases 80].)

In a claim for SIBTF benefits, an employee must establish that a disability preexisted the industrial injury. (§ 4751.) Evidence of a preexisting disability may include prior stipulated awards of permanent disability or medical evidence. In order to be entitled to benefits under section 4751, an employee must prove the following elements:

> (1) a preexisting permanent partial disability;
>
> (2) a subsequent compensable injury resulting in additional permanent partial disability:
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> (a) if the previous permanent partial disability affected a hand, an arm, a foot, a leg, or an eye, the subsequent permanent disability must affect the opposite and corresponding member, and this subsequent permanent disability must equal to 5% or [*582] more of the total disability, when considered alone and without regard to, or adjustment for, the occupation or age of the employee; or

> (b) the subsequent permanent disability must equal to 35% or more of the total disability, when considered alone and without regard to, or adjustment for, the occupation or the age of the employee;
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> (3) the combined preexisting and subsequent permanent partial disability is greater than the subsequent permanent partial disability alone; and
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> (4) the combined preexisting and subsequent permanent partial disability is equal to 70% or more. (§ 4751.)
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> Once the threshold requirements are met, section 4751 specifically provides that applicant "shall be paid in addition to the compensation due under this code for the permanent partial disability caused by the last injury compensation for the remainder of the combined permanent disability existing after the last injury … ." (§ 4751; emphasis added.) "[E]ntitlement to SIBTF benefits begins at the time the applicant becomes entitled to permanent disability payments." (*Baker v. Workers' Comp. Appeals Bd*. (*Guerrero*) (2017) 13 Cal. App. 5th 1040, 1050 [220 Cal. Rptr. 3d 761, 82 Cal. Comp. Cases 825].)

(*Todd v. Subsequent Injuries Benefits Trust Fund*, (2020) 85 Cal. Comp. Cases 576, 580-582 (Appeals Board en banc).)

The WCJ rejected applicant's claim for SIBTF benefits because the WCJ found applicant's subsequent industrial disability rated to 100% permanent total disability, without apportionment. We agree with the WCJ's analysis.

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).) "When the foundation of an expert's testimony is determined to be inadequate as a matter of law, we are not bound by an apparent conflict in the evidence created by his bare conclusions." (*People v. Bassett* (1968) 69 Cal.2d 122, 139.) Here, and for the reasons stated by the WCJ in the Report, we agree that the apportionment opinions offered by the evaluators did not constitute substantial medical evidence as they failed to adequately explain a basis for apportionment.

Applicant argues that the opinions of the evaluators should be given greater weight because the evaluators were selected as agreed medical evaluators (AMEs). (*Power v. Workers' Comp.*

Appeals Bd. (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114].) However, here, the doctors were utilized as AMEs *with the employer*, and not between applicant and SIBTF. The applicant settled his case against the employer. As SIBTF did not agree to use the evaluators, we afford no greater weight to their opinions in the SIBTF proceedings.

Accordingly, we deny applicant's petition for reconsideration.

For the foregoing reasons,

IT IS ORDERED that applicants petition for reconsideration of the Findings issued on December 27, 2024, is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 25, 2025

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

RICHARD BROWN
THE DILLES LAW GROUP
OFFICE OF THE DIRECTOR, LEGAL UNIT, OAKLAND
WITZIG, HANNAH, SANDERS & REAGAN, LLP

EDL/mc

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