WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DIANA BARRETT, *Applicant*

vs.

CITY OF YUBA CITY, permissibly self-insured, adjusted by YORK RISK SERVICES GROUP, INC., *Defendants*

Adjudication Number: ADJ12451507
Redding District Office

OPINION AND ORDER
GRANTING PETITION
FOR RECONSIDERATION
AND DECISION
AFTER RECONSIDERATION

Applicant seeks removal of the Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on March 3, 2021.[1] By the F&O, the WCJ found in relevant part that the report of the prior qualified medical evaluator (QME) may not be sent to the current QME. She also found that defendant's proposed QME letter is to be revised "to not discuss arguments or positions of one side."

Applicant contends that the WCJ erred in precluding review of the prior QME report by the current QME.

We received an answer from defendant. The WCJ issued a Report and Recommendation on Petition for Removal (Report) recommending that applicant's Petition be denied. The WCJ further recommended that defendant be advised that it can advise the QME that the claim was denied, but not provide the reason for the claim's denial to the QME.

We have considered the allegations of applicant's Petition for Removal, defendant's answer and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will grant the Petition as one seeking reconsideration and amend the F&O to permit provision of the prior QME's report to the current QME (Finding of Fact No. 5 and Order a). We will also amend the F&O to permit defendant to advise the QME of certain reasons for the claim's denial, but not further detail the contested facts about applicant's claim (Finding of Fact No. 7 and Order b).

[1] The F&O was dated March 2, 2021, but was not served until March 3, 2021.

FACTUAL BACKGROUND

Applicant claims injury to her psyche, hypertension and gastrointestinal system through December 6, 2018 while employed as an animal services manager by the City of Yuba City. Defendant has denied her claim in its entirety.

Helayna Taylor, Ph.D. was the original psychological QME and issued a medical-legal evaluative report regarding applicant dated February 25, 2019. Dr. Taylor has apparently retired and the parties have stipulated that she is no longer a QME. (Minutes of Hearing and Summary of Evidence, December 16, 2020, p. 2.) Robert Poston, Ph.D. is now the QME. (*Id.*)

The parties disputed which documents may be sent to the replacement QME, Dr. Poston, and the contents of defendant's proposed letter to the QME. The matter proceeded to trial on December 16, 2020 regarding the issue of "[w]hat documents should go to the pending QME Dr. Poston." (Minutes of Hearing and Summary of Evidence, December 16, 2020, p. 2.) Defendant objected in relevant part to provision of Dr. Taylor's report to Dr. Poston. (*Id.*) Applicant objected in relevant part to defendant's proposed QME cover letter. (*Id.*) Defendant's proposed cover letter to the QME stated that the "claim is denied due to lack of medical evidence to establish an injury, due to the good faith personnel defense, and due to the post-termination defense." (Defendant's Exhibit A, Proposed cover letter for QME Dr. Poston, p. 1.) The letter also contained factual details about applicant's employment with defendant and the basis for her psychiatric claim.

The WCJ issued the F&O as outlined above. The relevant findings of fact state as follows:

> 5. The question of which documents can be submitted to Dr. Poston resulted in the current trial. Exhibits 1 through 3 being Dr. Taylor's report, the 5/20/2020 County Claim Form and the 7/20/2020 Civil Complaint are not to be forwarded to Dr. Poston due to the need for Dr. Poston to make a determination based only on the medical record and his evaluation of the Applicant and also due to not being relevant to the issues upon which Dr. Poston is to make a determination.
> …
> 7. Exhibit A, the Defense proposed QME letter is to be revised to not discuss arguments or positions of one side. Both Counsels letters should be based solely on the facts surrounding the injury without commentary which could suggest a determination based on a defense or position.
>
> (F&O, March 3, 2021, p. 2.)

The WCJ ordered that certain exhibits were not to be forwarded to Dr. Poston, including Dr. Taylor's report. It was further ordered that the parties "only advise Dr. Poston of the facts surrounding Applicant's claim of injury and not include any subsequent events, happenings or

written documentation which is irrelevant to the issues PQME Poston is to determine at this time." (*Id.* at p. 3.)

DISCUSSION

I.

The WCJ's Report indicates that applicant's Petition was not timely filed. There are 25 days allowed within which to file a petition for reconsideration of a final decision or a petition for removal from a "non-final" decision that has been served by mail upon an address in California. (Lab. Code, §§ 5900(a), 5903;[2] Cal. Code Regs., tit. 8, former § 10843(a), now § 10955(a); former § 10507(a)(1), now § 10605(a)(1) (eff. Jan. 1, 2020).) This time limit is extended to the next business day if the last day for filing falls on a weekend or holiday. (Cal. Code Regs., tit. 8, former § 10508, now § 10600 (eff. Jan. 1, 2020).)

The F&O was served on March 3, 2021. Excluding the day the decision was served (per Code Civ. Proc., § 12, Civ. Code, § 10 and Gov. Code, § 6800), the deadline to file a petition challenging the decision was March 28, 2021, which was a Sunday.[3] The following Monday, March 29, 2021, was the next business day that the petition could be filed. (See Cal. Code Regs., tit. 8, former § 10508, now § 10600 (eff. Jan. 1, 2020).) Therefore, applicant's Petition was timely filed on March 29, 2021.

II.

If a decision includes resolution of a "threshold" issue, then it is a "final" decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc).) Threshold issues include, but are not limited to, the following: injury arising out of and in the course of employment, jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd.* (*Gaona*) (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or court of appeal. (See Lab. Code, § 5904.) Alternatively, non-final decisions may later

[2] All further statutory references are to the Labor Code unless otherwise stated.
[3] The Appeals Board takes judicial notice that March 28, 2021 was a Sunday pursuant to Evidence Code section 451(f). (Evid. Code, § 451(f).)

be challenged by a petition for reconsideration once a final decision issues.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the petitioner challenging a hybrid decision only disputes the WCJ's determination regarding interlocutory issues, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions.

The F&O included a finding that applicant claims injury AOE/COE while employed as an animal services manager by defendant. Employment is a threshold issue fundamental to the claim for benefits. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

III.

Although the decision contains a finding that is final, applicant is only challenging an interlocutory finding/order in the decision regarding whether the report of the prior QME can be provided to the current QME. Therefore, we will apply the removal standard to our review. (See *Gaona, supra*.)

Section 4062.3 provides in relevant part, as follows:

> (a) Any party may provide to the qualified medical evaluator selected from a panel any of the following information:
>
> > (1) Records prepared or maintained by the employee's treating physician or physicians.
> > (2) Medical and nonmedical records relevant to determination of the medical issue.
>
> (b) Information that a party proposes to provide to the qualified medical evaluator selected from a panel shall be served on the opposing party 20 days before the information is provided to the evaluator. If the opposing party objects to consideration of nonmedical records within 10 days thereafter, the records shall not be provided to the evaluator. Either party may use discovery to establish the accuracy or authenticity of nonmedical records prior to the evaluation.

(Lab. Code, § 4062.3(a)-(b).)

The trier of fact has the authority to determine what information may be provided to the QME if the parties cannot informally agree on what information to provide to the QME. (*Suon v.*

California Dairies (2018) 83 Cal.Comp.Cases 1803, 1814 (Appeals Board en banc).) However, decisions of the Appeals Board 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. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) 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).) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].)

An adequate history and examination by the current QME should include review of the previous QME's report in the absence of a basis for excluding the report from the record. The record reflects that Dr. Taylor's report was obtained in accordance with the Labor Code. She was replaced as the QME because she retired. The record does not indicate a basis to preclude review of her report by the current QME. (See e.g., *State Farm Ins. Co. v. Workers' Comp. Appeals Bd*. (*Pearson*) (2011) 192 Cal.App.4th 51 [76 Cal.Comp.Cases 69] [reports of an independent medical examiner should have been stricken because the applicant engaged in ex parte communication with the examiner prior to the evaluation]); *Batten v. Workers' Comp. Appeals Bd.* (2015) 241 Cal.App.4th 1009 [80 Cal.Comp.Cases 1256] [a report obtained from a private expert *solely* to rebut the opinion of the panel qualified medical evaluator is inadmissible].)

Furthermore, section 4062.3(a)(2) permits any party to provide medical records relevant to determination of the medical issues to a QME. (See also Cal. Code Regs., tit. 8, § 35(a)(2) [the employer shall provide to the medical-legal evaluator "[o]ther medical records, including any previous treatment records or information, which are relevant to determination of the medical issue(s) in dispute"].) This language is fairly expansive in what medical records may be provided to the QME. In determining whether medical records may be considered "relevant," it is noted that the Evidence Code defines relevant evidence as "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code,

§ 210.)[4] This definition has been characterized as "manifestly broad." (*In re Romeo C.* (1995) 33 Cal.App.4th 1838, 1843.)

Dr. Taylor conducted a psychological evaluation of applicant and addressed her psychiatric claim of injury. Causation for applicant's psychiatric claim remains in dispute since defendant has not accepted it as compensable. Dr. Taylor's report is consequently relevant to determination of the medical issues in dispute and may be provided to the current QME for his review.

With respect to the WCJ's concern that review of Dr. Taylor's report will impact the impartiality of Dr. Poston's evaluation, QMEs are required to "[r]eview all available relevant medical and non-medical records and/or facts necessary for an accurate and objective assessment of the contested medical issues in an injured worker's case before generating a written report." (Cal. Code Regs., tit. 8, § 41(c)(2), emphasis added.) Administrative Director (AD) Rule 41 further requires QMEs to reach conclusions as follows: "All conclusions shall be based on the facts and on the evaluator's training and specialty-based knowledge and shall be without bias either for or against the injured worker or the claims administrator, or if none the employer." (Cal. Code Regs., tit. 8, § 41(c)(4).) There is nothing in the record to indicate that review of Dr. Taylor's report will prevent Dr. Poston from conducting an objective evaluation of the record and rendering an impartial opinion regarding the contested medical issues. Consideration of Dr. Taylor's opinions does not preclude Dr. Poston from reaching different conclusions than Dr. Taylor. (See *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525] [the relevant and considered opinion of one physician may constitute substantial evidence upon which a determination may be made even if inconsistent with other medical opinions].)

Therefore, we will amend the F&O to permit provision of Dr. Taylor's report to Dr. Poston (Finding of Fact No. 5 and Order a).

IV.

In the F&O, the WCJ precluded specific disclosures from the parties' advocacy letters to the QME. For the reasons discussed below, we will also amend the F&O to allow defendant to state certain reasons for the claim's denial in its letter to the QME, but not further detail the

[4] It is acknowledged that the Appeals Board "shall not be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this division." (Lab. Code, § 5708.) However, the rules of evidence may provide guidance in addressing evidentiary disputes.

contested facts about applicant's claim.[5]

Medical-legal evaluators are required to "address all contested medical issues." (Lab. Code, § 4062.3(j); see also Cal. Code Reg., tit. 8, § 41(c)(2) [the QME must evaluate the record to make "an accurate and objective assessment of the contested medical issues"].) The QMEs must be apprised of what medical issues are actually contested in order to address those issues as part of the evaluation. Disclosure of whether a claim is accepted or denied, as well as the basis for the denial, may consequently be necessary to a QME's evaluation.

One of the reasons for defendant's denial of applicant's claim is for lack of medical evidence. The disclosure of this information is "relevant to determination of the medical issue" regarding whether applicant's psychiatric claim is compensable, i.e., the QME must determine whether there is evidence supporting industrial causation for her psychiatric complaints. (Lab. Code, § 4062.3(b).) Consequently, it is reasonable for defendant to disclose this reason for the claim denial to the QME in its advocacy letter. The QME is required to evaluate applicant and the record in order to come to objective conclusions regarding causation, irrespective of defendant's position. (See Cal. Code Regs., tit. 8, § 41(c)(2)-(4).) The mere disclosure that defendant denied the claim for a purported lack of medical evidence does not compel the QME toward a specific opinion.

Defendant also denied applicant's claim in part based on the good faith personnel action defense per section 3208.3(h). (Lab. Code, § 3208.3(h).) An analysis of whether a psychiatric claim is barred based on this defense requires a mix of medical and legal determinations. (See *Rolda v. Pitney Bowes, Inc.* (2001), 66 Cal.Comp.Cases 241 (Appeals Board en banc).) While the WCJ determines what constitute actual events of employment, the physician determines whether the psychiatric injury was predominantly or substantially caused by the event(s). It is therefore appropriate for Dr. Poston to be advised that defendant has raised this defense so that he may provide a proper causation analysis in accordance with *Rolda*.

However, whether applicant's claim is barred based on a post-termination defense is a legal question that is not relevant to determination of the medical issues to be addressed by the QME.

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[5] 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.

We can discern no basis to disclose this reason for the claim's denial to Dr. Poston in order for him to address the contested medical issues.

Therefore, we will also amend the F&O to permit defendant to advise the QME of certain reasons for the claim's denial, but not further detail the contested facts about applicant's claim (Finding of Fact No. 7 and Order b).

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings and Order issued by the WCJ on March 3, 2021 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order issued by the WCJ on March 3, 2021 is **AFFIRMED** except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

5. Exhibit 3, the 2/25/2019 report of the prior QME Dr. Helayna Taylor may be provided to the QME Dr. Poston. Exhibits 1 and 2 being the 5/20/2020 County Claim Form and the 7/20/2020 Civil Complaint are not to be forwarded to Dr. Poston due to not being relevant to the issues upon which Dr. Poston is to make a determination.

* * *

7. Exhibit A, defendant's proposed QME letter, must be revised to only disclose reasons for the claim's denial that are relevant to determination of the medical issues in dispute including the denial for lack of medical evidence and the good faith personnel action defense. Defendant's letter may not detail the contested facts about applicant's claim.

ORDERS

a. Exhibit 3, the February 25, 2019 report of QME Dr. Helayna Taylor may be provided to the QME Dr. Poston. Exhibits B through D and 1 and 2 may not be sent to Dr. Poston at this time.

b. Defendant's cover letter to the QME may only advise Dr. Poston of the claim's denial for lack of medical evidence and based on the good faith personnel action defense without further discussing the contested facts about applicant's claim. Both parties are ordered to comply with Labor Code section 4062.3 in sending any communication or information to the QME.

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WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 25, 2021

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

DIANA BARRETT
FREDERICK GIBBONS
LENAHAN SLATER

AI/*pc*

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