WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

FERNANDO MURILLO TAPIA, *Applicant*

vs.

CPC LOGISTICS LLC and ACE AMERICAN INSURANCE COMPANY, administered by CANNON COCHRAN MANAGEMENT SERVICES, INC., *Defendants*

Adjudication Numbers: ADJ10913544, ADJ10913545
Sacramento District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted applicant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings and Order (F&O), issued by the workers' compensation administrative law judge (WCJ) in case number ADJ10913544, and in case number ADJ10913545, on March 12, 2020, wherein the WCJ found in pertinent part that in both cases, applicant sustained injury arising out of and occurring in the course of employment (AOE/COE), that the injuries did not cause any permanent disability, and that applicant does not need further medical treatment for either injury.

Applicant contends that the reports from orthopedic qualified medical examiner (QME) Kevin F. Hanley, M.D. are not substantial evidence and should not be the basis for the F&O as to either injury claim.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We received an Answer from defendant.

We have considered the allegations in the Petition, the Answer, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will rescind the F&O in case number ADJ1091344, we will rescind the F&O in case number ADJ10913545, and we will return both matters to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

BACKGROUND

Applicant claimed injury to his shoulders and upper extremities while employed by defendant as a truck driver/loader during the period from December 9, 2015, through December 9, 2016 (ADJ10913545). Applicant also claimed injury to his right foot and toes while employed by defendant on April 13, 2017 (ADJ10913544).

Applicant underwent a course of treatment from various providers including John C. Forsyth, M.D. (see e.g. App. Exhs. 3 – 7, 10 – 13, 22), Craig A. Wilkes, D.P.M. (App. Exhs. 14 – 18, 26), and Vincent C. Marino, D.P.M. (Def. Exh. E; App. Exhs. 23, 24.)

On May 16, 2018, applicant was evaluated by orthopedic qualified medical examiner (QME) Kevin F. Hanley, M.D. (Def. Exh. B, Dr. Hanley, May 16, 2018.) Dr. Hanley examined applicant, took a history, and reviewed the medical record.[1] As to applicant's right foot injury Dr. Hanley concluded:

> With regard to the 4/13/17 injury, this is at most a minimal injury that should not lead to essentially any impairment, disability, or loss of function once the toe fracture has healed. In this particular case, there is no reason to believe that that did not occur by the sixth week mark.
> (Def. Exh. B, p. 7.)

Regarding the shoulder injury, he stated:

> As to the shoulder condition, obviously he does have underlying problems with AC joint arthritis. He does have evidence that his rotator cuff on the right side appears to show some degenerative change and obviously, extensive and excessive work activities above the level of the shoulders with lifting, pushing, or pulling over 50 pounds would most likely make this symptomatic and maybe even progressively so. ¶ In summary it is my belief that Mr. Murillo did not sustain a permanent injury while working for CPC Logistics. He did sustain what may have been a very mild temporary aggravation in his shoulder but then the recurrence of symptomatology that took place without work exposure should not be considered a new temporary aggravation or the continuation of a permanent aggravation from the time he was at the workplace. The timetable just does not work for that.
> (Def. Exh. B, May 16, 2018, pp. 7 – 8.)

[1] However, as more fully discussed below, although he referred to treatment records, Dr. Hanley did not list and/or summarize the records he reviewed.

On November 27, 2018, applicant underwent an MRI of his right foot. The MRI report included the following:

> FINDINGS:
> There is linear hypointense [darker] signal abnormality of the distal shaft of the first distal phalanx [toe bone] with associated STIR [Short-TI Inversion Recovery] hyperintense [brighter] signal abnormality of the adjacent bone marrow. This appears to represent a nondisplaced fracture with subacute features. The remaining osseous structures are intact,
> There is moderate to severe attenuation and degeneration of the second and third metatarsophalangeal joint plantar plates without a full-thickness tear. There is also moderate attenuation and degeneration of the fourth metatarsophalangeal joint plantar plate, and mild attenuation and degeneration of the fifth metatarsophalangeal joint plantar plate, Moderate associated dorsiflexion of the second, third, and fourth proximal phalanges is noted. ¶ …
>
> IMPRESSION:
> 1. Findings concerning for a subacute healing nondisplaced fracture of the distal shaft of the first distal phalanx.
>
> 2. Nodular area of thickening and signal abnormality of the nailbed of the great toe measuring 5 x 2 mm. This is nonspecific, and correlation with physical exam is recommended.
>
> 3, Degeneration and attenuation of the second through fifth metatarsophalangeal joint plantar plates, most pronounced in the second and third metatarsophalangeal joints. Moderate associated dorsiflexion of the second, third, and fourth proximal phalanges is noted. However, there is no full-thickness plantar plate tear.
> 4. Mild pressure lesion of the plantar subcutaneous soft tissues at the level of the fifth metatarsal head.
> (App. Exh. 21, Jonah H. Hirschbein, M.D., November 27, 2018, MRI right foot.)

In his September 11, 2019 supplemental report, Dr. Hanley referred to his prior report and did not change any of his opinions, he stated:

> The MRI of the right foot done on 11/27/18 [clerical error] was clearly unnecessary. This gentleman's injury was a minor fracture to the tip of the right great toe. One would not anticipate any protracted or permanent consequences of such an injury, and his continued complaints of pain in the foot are not supported by the objective findings or the history of injury. … ¶ … With your letter to me dated 9/9/19, you have provided additional medical records in this particular case, starting with a 6/5/18 note from Dr. Forsyth and Dr. Forsyth's most recent report dated 4/2/19. There are subsequent notes from Dr. Marino,

and a 11/27/18 [clerical error] MRI report of the right foot from Dr. Hirschbein. I have reviewed all of these additional reports.
(Def. Exh. B, Dr. Hanley, September 11, 2019, pp. 2 and 3.)

The parties proceeded to trial on February 12, 2020. (Minutes of Hearing and Summary of Evidence (MOH/SOE), February 12, 2020.) The issues submitted for decision included: "1. Injury arising out of and occurring in the course of employment and parts of body in case number ADJ10913545 (CT). … 4. Permanent disability" [in both cases] (MOH/SOE, p. 3.)

DISCUSSION

To be timely, a petition for reconsideration must be filed with (i.e., received by) the WCAB within 25 days from a "final" decision that has been served by mail upon an address in California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, former § 10507(a)(1), now § 10605(a)(1), former § 10845(a), now § 10940(a); former § 10392(a), now § 10615(b) (eff. Jan. 1, 2020).) A petition for reconsideration of a final decision by a workers' compensation administrative law judge must be filed in the Electronic Adjudication Management System (EAMS) or with the district office having venue. (Cal. Code Regs., tit. 8, former § 10840(a), now § 10940(a) (eff. Jan. 1, 2020).)

The Division of Workers' Compensation (DWC) closed its district offices for filing as of March 17, 2020 in response to the spread of the novel coronavirus (COVID-19). In light of the district offices' closure, the Appeals Board issued an en banc decision on March 18, 2020 stating that all filing deadlines are extended to the next day when the district offices reopen for filing. (In re: COVID-19 State of Emergency En Banc (2020) 85 Cal.Comp.Cases 296 (Appeals Board en banc).) The district offices reopened for filing on April 13, 2020. Therefore, the filing deadline for a petition for reconsideration that would have occurred during the district offices' closure was tolled until April 13, 2020, and the Petition was timely filed.

Any award, order, or decision of the Appeals Board must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].) It is well established that the relevant and considered opinion of one physician, though inconsistent with other medical opinions, may constitute substantial evidence.

(see *Place v. Workers' Comp. Appeals Bd*. (1970) 3 Cal.3d 372 [35 Cal.Comp.Cases 525].) To be substantial evidence a medical opinion 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 (Appeals Board en banc).)

Here, the WCJ based his decision on the reports and opinions of Dr. Hanley. In the Opinion on Decision the WCJ explained that:

> Given Dr. Hanley's comments, the logical conclusion to reach on the facts of these cases is that applicant's injuries were temporary … and have long since resolved.
> (F&O, p. 6, Opinion on Decision p. 2.)

As noted above, Dr. Hanley examined applicant in reference to both of his injury claims. He concluded that applicant sustained, "… what may have been a very mild temporary aggravation in his shoulder…" but the aggravation of the pre-existing degenerative changes did not cause any permanent disability. However, he had previously stated that: "…work activities above the level of the shoulders with lifting, pushing, or pulling over 50 pounds would most likely make this symptomatic and maybe even progressively so." (Def. Exh. B, May 16, 2018, p. 7.) The Physical Demands Worksheet indicates that applicant frequently moved items weighing 26 – 50 pounds and that he frequently reached above both shoulders. (App. Exh. 1.) Aggravation is an increase in the severity of a pre-existing condition where the underlying pathology is permanently moved to a higher level. The acceleration, aggravation or 'lighting up' of a preexisting condition "is an injury in the occupation causing the same." (*Tanenbaum v. Industrial Acc. Com.* (1935) 4 Cal.2d 615, 617 [1935 Cal. LEXIS 590]; *Zemke v. Workmen's Comp. Appeals Bd*. (1968) 68 Cal.2d 794 [33 Cal.Comp.Cases 358].) If applicant's work progressively aggravated his pre-existing conditions, he may well have sustained a cumulative injury AOE/COE, with an increase in permanent disability.

Review of Dr. Hanley's reports does not indicate that he reviewed the Physical Demands Worksheet, that applicant testified was an accurate description of his job duties. (see App. Exh. 1; MOH/SOE, p. 6.) Absent review of the Physical Demands Worksheet, Dr. Hanley did not have an adequate history of applicant's work. He did not address the issue of whether applicant's job duties aggravated his pre-existing shoulder condition and in turn, whether the job duties caused an

increase in applicant's disability. Thus his reports are not substantial evidence regarding the cumulative injury claim. (*Escobedo v. Marshalls, supra.*)

Regarding the right foot specific injury claim, the November 27, 2018 MRI states that there were abnormalities in bone density and a partially torn/degenerated cartilage. In his supplemental report, Dr. Hanley did not discuss these abnormalities, instead he stated that the MRI "was clearly unnecessary." (Def. Exh. B, p. 2.) Absent a discussion of the cause, the extent, and the long term effects of the abnormalities shown in the right foot MRI, Dr. Hanley's report is not substantial evidence as to the issues of permanent disability and the need for future medical treatment.

Thus, the reports from Dr. Hanley do not constitute substantial evidence regarding the issues of injury AOE/COE and permanent disability in either of the two cases at issue herein.

Finally, as stated above (see footnote one), in his May 16, 2018 report, although Dr. Hanley reviewed medical records, he did not list and summarize those reports. In his supplemental report Dr. Hanley stated:

> In my reports I do not typically 'itemize' the medical records I received and reviewed. It is my assumption that whoever has forwarded me the records has already itemized those records and should be well aware of the records that were sent. (Def. Exh. B, p. 2.)

It appears that Dr. Hanley refuses to comply with the DWC rules including Rule 41 that requires:

> (c) All QMEs, regardless of whether the injured worker is represented by an attorney, shall with respect to his or her comprehensive medical-legal evaluation: …
> 2) Review 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. The report *must list and summarize* all medical and non-medical records reviewed as part of the evaluation.
> (Cal. Code Regs., tit. 8, § 41, italics added.)

The Appeals Board has the discretionary authority to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) Normally, when the medical record requires further development, the record should first be supplemented by physicians who have already reported in the case. (see *McDuffie v. Los Angeles County Metropolitan Transit Authority*

(2001) However, as discussed above, under the circumstances of this matter it is appropriate for the parties to have applicant evaluated by an agreed medical examiner or in the alternative, for the WCJ to appoint a regular physician. (Lab. Code § 5701.)

Accordingly, we rescind the F&O in case number ADJ1091344, we rescind the F&O in case number ADJ10913545, and we return both matters to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the March 12, 2020 Findings and Order, in case number **ADJ10913544**, is **RESCINDED,** and the March 12, 2020 Findings and Order, in case number **ADJ10913545**, is **RESCINDED**.

IT IS FURTHER ORDERED that both matters are **RETURNED** to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 10, 2021

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

BRADFORD BARTHEL
CRAIG MAYFIELD
FERNANDO MURILLO TAPIA

TLH/*pc*

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