WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MARIO RODRIGUEZ, *Applicant*

vs.

MENLO CHURCH;
CHURCH MUTUAL INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ11994224
San Francisco District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

I.

Former Labor Code section 5909 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, Labor Code 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 Labor Code 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 March 26, 2025 and 60 days from the date of transmission is Sunday, May 25, 2025. The next business day that is 60 days from the date of transmission is Tuesday, May 27, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[1] This decision is issued by or on Tuesday, May 27, 2025, so that we have timely acted on the petition as required by Labor Code section 5909(a).

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. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on March 26, 2025, and the case was transmitted to the Appeals Board on March 26, 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 Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on March 26, 2025.

II.

A medical opinion must be framed in terms of reasonable medical probability, it must be based on an adequate examination and history, it must not be speculative, and it must set forth reasoning to support the expert conclusions reached. (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]*;*

[1] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

Escobedo v. Marshalls (2005) 70 Cal.Comp.Cases 604, 620-621 (Appeals Bd. 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].)

On the other hand, there must be some solid basis in the medical report for the doctor's ultimate opinion; the Appeals Board may not blindly accept a medical opinion which lacks a solid underlying basis, and must carefully judge its weight and credibility. (*National Convenience Stores v. Workers' Comp. Appeals Bd. (Kesser)* (1981) 121 Cal.App.3d 420, 426 [46 Cal.Comp.Cases 783].) In other words, the Appeals Board must look to the underlying facts of a medical opinion to determine whether or not that opinion constitutes substantial evidence, and accordingly, the expert's opinion is no better than the facts on which it is based. (*Turner v. Workers' Comp. Appeals Bd.* (1974) 42 Cal.App.3d 1036, 1044 [39 Cal.Comp.Cases 780].) We will not disturb the WCJ's conclusion that substantial medical evidence supported the Findings of Fact and Award of February 18, 2025.

Additionally, we have given the WCJ's credibility determination great weight because the WCJ had the opportunity to observe the demeanor of the witness. *(Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination(s). (*Id*.)

Finally, we note that applicant failed to serve his former counsel with his Petition for Reconsideration. Since applicant raises the issue of the amount of attorney's fees to be paid to his attorneys, this is an error in violation of Labor Code section 5905. Thus, we separately serve a copy of applicant's Petition on his former attorneys.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 23, 2025

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

MARIO RODRIGUEZ
DURARD, MCKENNA & BORG
GOLDMAN, MAGDALIN STRAATSMA

JMR/abs

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

Report and Recommendation on Petition for Reconsideration

and Notice of Transmission to WCAB

INTRODUCTION

Applicant, in pro per[1], seeks reconsideration of my February 18, 2025 Findings of Fact and Award (hereinafter "the F&A") wherein I found that applicant sustained 49% permanent partial disability a result of his industrial injury. I found that there was an overpayment of temporary disability indemnity. I awarded an attorney fee of 15% of the indemnity awarded.

On reconsideration, applicant contends that: the evidence does not justify the Findings of Fact; that he has discovered new evidence material to him which he could not with reasonable diligence have discovered and produced at the hearing; and that the Findings of Fact do not support the order, decision or award.

FACTS

1. Procedural background.

Applicant Mario Rodriquez suffered an accepted injury to multiple body parts on March 4, 2018, while employed by defendant Menlo Church as a facilities specialist. The matter proceeded to trial on November 7, 2024. The parties submitted documentary evidence. Applicant testified. The primary issues were permanent disability, apportionment, defendants' claim for temporary total disability indemnity overpayment and whether the record required further development.

On January 14, 2025, I vacated the submission and issued formal rating instructions. After service of the DEU rating, defendants filed a petition to strike the rating, contending that I erred in the rating of the cervical spine. I issued first amended rating instructions on January 28, 2025 leading to a second DEU rating. There was no objection to the amended rating. I re-submitted the case for decision on February 10, 2025 and issued the F&A February 18, 2025.

Applicant, in pro per, filed for reconsideration of the F&A on March 14, 2025. The petition is timely and verified.

2. Evidence at trial and decision.

The evidence at trial consisted of Agreed Medical Reports from: an orthopedist Victoria Barber, M.D.; a neuropsychologist James Cole, Ph.D.; a neurologist, Jacqueline Weiss, M.D.; and an ENT physician Joel Ross, M.D. Additionally, there was a transcript of Dr. Barber's deposition and a medical report offered by defendant regarding an injury which occurred after the instant industrial injury. Applicant testified. I did not find applicant's testimony persuasive. I summarized the evidence in my Opinion on Decision.

[1] Applicant dismissed his counsel after the trial.

Dr. Barber evaluated applicant on February 2, 2020. She reported that his condition was permanent and stationary on that date. (Joint exhibit 4). After reviewing medical records, she issued a report on April 7, 2020 (Joint exhibit 3) describing applicant's permanent disability. Dr. Barber relied upon applicant's statements regarding his physical limitations. After Dr. Barber issued those reports, defendants sent surveillance video taken of applicant in October 2019 to Dr. Barber which contradicted applicant's statements regarding his physical limitations. Accordingly, Dr. Barber issued a supplemental report on October 16, 2020. She revised her description of applicant's permanent disability and stated that his condition was permanent and stationary at the time he performed the physical activities on October 17, 2019 (Joint exhibit 1). Defendants paid temporary disability indemnity through March 2, 2020. Defendants sought and I found a temporary disability indemnity overpayment from October 17, 2019 through March 2, 2020.

In my F&A, I followed the reports of the Agreed Medical Evaluators. I found that applicant suffered injury arising from and within the course and scope of employment to his head, neck, back, right wrist, right knee, cognitive and vestibular systems. The injury resulted in 49% partial permanent disability, based on the formal permanent disability rating of the agreed medical reports. I awarded a 15% attorney fee to applicant attorney from the 49% indemnity awarded. I awarded applicant's permanent partial indemnity, less the attorney fee and less the temporary total indemnity overpayment.

3. Contentions on reconsideration.

Applicant contends:

1) The evidence does not justify the Findings of Fact;

2) Petitioner has discovered new evidence material to him which he could not with reasonable diligence have discovered and produced at the hearing; and

3) The Findings of Fact do not support the order, decision or award.

DISCUSSION

1. The Findings of Fact are supported by substantial evidence.

The issues raised by applicant are not entirely clear from a legal perspective[2]. As I understand applicant's arguments, he contends that the surveillance videos do not support the Findings of Fact regarding permanent disability and the permanent and stationary date, which led to a temporary disability overpayment. He maintains that interpretation of the surveillance videos is subjective. The surveillance only captures a brief period of time versus the overall impairment, pain, disability and long-term impact of his condition.

I relied on the reports of three separate agreed medical evaluators who reviewed the surveillance videos (Barber, Weiss and Cole). Each doctor took a history, reviewed all the pertinent records, conducted a physical examination and issued a comprehensive medical legal report. The

[2] Applicant does not describe any new evidence discovered.

agreed medical evaluation reports of all the examining physicians in this case constitute substantial evidence of applicant's permanent disability and his permanent and stationary date.

I acknowledge that surveillance videos show brief periods of activity. Here, however, the doctors' reviewed surveillance taken over the course of three separate days. It showed applicant involved in significant physical activity including painting, landscaping and tile work. The activities shown were inconsistent with applicant's statements about his physical abilities. I am convinced that the physicians had a valid basis for their opinions. The parties had the opportunity to cross-examine the physicians by way of deposition and supplemental reports. There were numerous supplemental reports and one physician deposition taken.

Accordingly, the findings regarding permanent disability and permanent and stationary date are supported by substantial evidence. Applicant also contends that I erred in the calculation of the attorney fee. I awarded a 15% attorney fee on the partial permanent disability indemnity awarded. Pursuant to Title 8, California Code of Regulations, section 10844, I considered that this was a case of above average complexity. It involved multiple body parts, multiple medical evaluations with many supplemental reports and one medical deposition. Despite strong surveillance evidence, applicant obtained a 49% partial permanent disability award. Applicant counsel represented applicant for many years, ultimately representing applicant at trial. Applicant presents no authority for his proposition that "the calculation should focus on ensuring that the 15% fee is derived from the total remaining compensation, after deductions for temporary disability overpayment. The attorney fee is reasonable. Here the temporary disability overpayment stemmed from applicant's own statements to the physician's which were inconsistent with applicant's conduct as revealed on surveillance video. Applicant counsel earned the fee awarded. The award is based on substantial evidence.

RECOMMENDATION

For the foregoing reasons, I recommend that applicant's Petition for Reconsideration, filed herein on March 14, 2025, be denied. This matter is being transmitted to the Appeals Board on the service date indicated below my signature.

Barry Gorelick
Workers' Compensation Judge
Workers' Compensation Appeals Board

The Report and Recommendation on Petition for Reconsideration was filed and served on all parties listed in the Official Address Record and the case was transmitted to the Appeals Board on this date.

Date: March 26, 2025

By: ATang