

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

JAVIER PASCACIO, *Applicant*

vs.

**JACOBO FARM SERVICES; STAR INSURANCE COMPANY ADJUSTED BY
MEADOWBROOK INSURANCE GROUP, *Defendants***

**Adjudication Number: ADJ8410465
Fresno District Office**

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Applicant Javier Pascacio seeks reconsideration of the December 16, 2020 Findings of Fact and Order (F&O), wherein the workers' compensation administrative law judge (WCJ) found that applicant filed a timely, valid Petition to Reopen on January 7, 2016. However, because the applicant had not suffered any new and further disability arising within five years of the date of injury, the WCJ dismissed the Petition to Reopen.

Applicant's Petition for Reconsideration and, in the alternative, for Removal (Petition) contends that because his treating physician identified the need for surgery within five years of the date of injury, applicant may claim new and further disability. Applicant further contends that trial in this matter was premature pending a determination on whether a surgical procedure will proceed.

Defendant has filed an answer.

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

treat the petition as a Petition for Reconsideration, rescind the December 16, 2020 F&O, and return the matter to the trial level for development of the record.

FACTS

Applicant sustained injury to the low back while employed as a general laborer by defendant Jacobo Farm Services (defendant) on May 25, 2012. Applicant's claim was resolved by Stipulated Award on January 5, 2015 at 17% permanent disability to the low back.

On September 29, 2015, applicant was evaluated by Dr. Calhoun at the WorkMed clinic. Applicant complained of chronic lumbar spine pain with radicular symptoms radiating to the left leg. (Ex. K, report of Jeffrey Lundeen, M.D., dated May 15, 2018, p.2.) Dr. Calhoun requested a neurosurgical evaluation, MRI and EMG/NCV studies, and recommended modified duty. (*Ibid.*)

On January 5, 2016, applicant filed a Petition to Reopen, alleging his condition had worsened.

An April 22, 2016 MRI to the low back demonstrated mild changes but was otherwise "non-diagnostic" with no indication of nerve root impingement or compression. (*Ibid.*)

Applicant received follow-up treatment with Dr. Nazarian who prescribed medication and physical therapy. (Ex. K, report of Jeffrey Lundeen, M.D., dated May 15, 2018, p.3.) Applicant stated that the requested physical therapy was never approved. (*Ibid.*) Applicant continued thereafter to treat with Dr. Nazarian, who referred applicant to an orthopedic surgeon for consultation in October 2016. (*Ibid.*)

On November 9, 2016, Timothy Watson, M.D. evaluated the applicant, reporting a history of prior diagnoses of disc problems, as well as discectomy in 2013. (Ex. 20, Report of Timothy Watson, M.D., November 9, 2016, p.5.) Applicant reported "about a year and a half" of relief, but that the pain was beginning to return. Applicant described increased pain and symptoms including weakness or shaking in the knees, ankles and toes. Dr. Watson reviewed the April 22, 2016 MRI to the low back, and noted that "treatment options were discussed at length [with the applicant], including observation, medical management, therapy, interventional pain management with possible injections and surgical treatment." (*Ibid.*) Applicant indicated he was not interested in surgery, which Dr. Watson felt would "probably be a lumbar decompression and fusion." (*Ibid.*)

On December 29, 2016, Dr. Watson re-evaluated applicant, and again discussed surgical intervention, including anterior, posterior and combined approaches to surgery. (Ex. 21, report of

Timothy Watson, M.D., December 29, 2016, p.2.) Dr. Watson indicated a desire to review the 2013 operative report, and the need for updated MRI studies. Dr. Watson stated:

Ultimately, the patient is in the middle [of] school and after discussing the complexity of the surgery he feels that it would be better probably to have it done in the summer. I suggested [a] repeat MRI study maybe in March and maybe follow-up in April when he is ready for surgery and scheduling at that point and what type of surgery we would do we could discuss again. No surgery planned at this date and time. (*Ibid.*)

On May 15, 2018, orthopedic Agreed Medical Examiner Jeffrey M. Lundeen, M.D. reevaluated the applicant. The AME reviewed the relevant medical history and conducted a clinical examination of applicant. The AME found no new periods of temporary disability, and no change in the levels of permanent disability. (Ex. K, Report of Jeffrey M. Lundeen, M.D., May 15, 2018, pp.11-12.)

On August 28, 2019, defendant filed a Declaration of Readiness to Proceed. Applicant objected on September 11, 2019. The matter was continued for various reasons until June 15, 2020, at which time a Mandatory Settlement Conference was held, and the matter set for trial.

On June 17, 2020, Nicholas Orme, M.D. evaluated the applicant and noted the receipt of an MRI and a plan to refer applicant for surgery. (Ex. 23, Report of Nicholas Orme, M.D., June 17, 2020, p.8.)

On June 23, 2020, Dr. Orme issued a Request for Authorization for a neurosurgical consult. (Exhibit 24, report of Nicholas Orme, M.D., dated June 23, 2020, p.1.) The request was approved by Utilization Review on July 1, 2020. (Exhibit 25, Careworks Utilization Review determination, dated July 1, 2020.)

The parties appeared at trial on October 6, 2020 and raised the issue of the validity of the Petition to Reopen, permanent disability and apportionment. (October 6, 2020 Minutes of Hearing and Summary of Evidence (Minutes) at 2:19.) Defendant asserted there was no new and further disability. Applicant objected to the adjudication of “non-psychiatric injury/disability” on the grounds that surgery was being considered, and the need for surgery arose prior to five years from the date of injury.

The WCJ issued the F&O on December 16, 2020, finding that applicant had filed a valid, timely Petition to Reopen (F&O, Findings of Fact No. 1), but that applicant had not sustained any

new and further disability arising within five years of the date of injury (F&O, Findings of Fact No. 3). Accordingly, the WCJ dismissed the Petition to Reopen.

Applicant's Petition contends that the surgery deemed medically necessary by Dr. Watson in December, 2016 was sufficient to invoke the continuing jurisdiction of the Workers' Compensation Appeals Board. Applicant further contends that the trial in this matter was premature pending the ongoing inquiry as to the medical necessity of the contemplated surgical intervention. Defendant filed a January 15, 2021 Answer contending Agreed Medical Examiner Dr. Lundeen evaluated applicant more than five years from the date of injury and determined there to be no new and further disability.

DISCUSSION

Applicant's petition seeks reconsideration, and in the alternative, removal, from the December 16, 2020 F&O. California Code of Regulations, title 8, section 10955 provides that in seeking removal a petitioner must "demonstrate that reconsideration will not be an adequate remedy after the issuance of a final order, decision or award." (Cal. Code Regs., tit. 8, § 10955.) A "final" order has been defined as one "which determines any substantive right or liability of those involved in the case." (*Safeway Stores, Inc. v. Workers' Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39 [43 Cal.Comp.Cases 660].) This case involves a decision determining substantive rights of the parties involved, i.e., applicant's challenge to determination that he has sustained no new and further disability. Therefore, the WCJ's decision is a final order and reconsideration, not removal, is the proper remedy. (*Maranian v. Workers' Comp. Appeals Bd. (Maranian)* (2000) 81 Cal.App.4th 1068, 1074–1075 [65 Cal.Comp.Cases 650].)

Turning to the substantive issues presented, we observe that Labor Code section 5410 confers the Workers' Compensation Appeals Board with continuing jurisdiction over a prior award when a timely petition is filed within five years of the date of injury.¹ The section provides:

Nothing in this chapter shall bar the right of any injured worker to institute proceedings for the collection of compensation within five years after the date of the injury upon the ground that the original injury has caused new and further disability. The jurisdiction of the appeals board in these cases shall be a

¹ All further statutory references are to the Labor Code unless otherwise stated.

continuing jurisdiction within this period. This section does not extend the limitation provided in Section 5407.

However, for an applicant to recover additional temporary or permanent disability benefits, he or she must not only have filed a petition to reopen within five years from the date of injury, but must also have suffered a “new and further disability” within that five-year period, unless there is otherwise “good cause” to reopen the prior award. An injured worker therefore cannot confer jurisdiction on the Board by filing a petition to reopen an award before the five-year period has expired for anticipated new and further disability to occur thereafter. (*Sarabi v. Workers' Comp. Appeals Bd.* (2007) 151 Cal. App. 4th 920, 926, [72 Cal. Comp. Cases 778] (*Sarabi*); *Nicky Blair's Rest. v. Workers' Comp. Appeals Bd.* (1980) 109 Cal. App. 3d 941 [45 Cal. Comp. Cases 876].)

In this case there is no dispute that applicant’s January 5, 2016 Petition to Reopen was filed within five years of the May 25, 2012 date of injury. However, the WCJ found that applicant had not established new and further disability within five years of the date of injury.

Applicant’s Petition contends that the development of the need for a new surgery is sufficient to establish new and further disability under *Sarabi, supra*, 151 Cal. App. 4th 920, and that Dr. Watson’s assessment that applicant was a surgical candidate in 2016, together with the previously filed Petition to Reopen, was sufficient to confer jurisdiction.

The WCJ’s Report observes that while Dr. Watson discussed a *possible* surgery with applicant in 2016, the record reflects no repeat MRI as described by Dr. Watson, no request for surgical authorization submitted to Utilization Review, and no follow-up evaluation. (Report, at p.5.) The Report further observes applicant was evaluated in 2018 by the Agreed Medical Examiner who found no new periods of temporary disability, no new permanent disability, and no need for surgery at the time, although it was left open as part of future medical care. Accordingly, the WCJ found that applicant had not carried the burden of establishing new and further disability within five years of the date of injury.

However, the requisite showing necessary to support an assertion of new and further disability is not limited to temporary or permanent disability, but may also be supported by evidence of changes in applicant’s condition and/or treatment regimen. In *Sarabi v. Workers' Comp. Appeals Bd., supra*, 151 Cal. App. 4th 920, applicant sustained right shoulder injury on August 28, 1999, resulting in findings and award issuing December 15, 2000. Applicant underwent an additional right shoulder surgery on January 18, 2002, and filed a November 15, 2002 petition

to reopen alleging a “change in condition had resulted in further periods of temporary disability.” (*Id.* at 922.) On May 26, 2004, applicant’s orthopedic surgeon stated applicant was temporarily disabled and needed further right shoulder surgery, and that the physician had repeatedly requested that this surgery take place. On August 17, 2004, the orthopedic agreed medical examiner reported applicant required right shoulder surgery and temporary total disability. The disability was postponed several times to allow applicant to treat for nonindustrial conditions before he could be medically cleared for surgery. (*Id.* at 923.) A subsequent dispute arose as to whether the continuing jurisdiction of the Appeals Board was timely invoked. The court of appeal held that applicant’s timely filing of a petition to reopen, along with the need for additional surgery in 2004 was sufficient to invoke the Board’s continuing jurisdiction:

“[N]ew and further disability” has been defined to mean disability... result[ing] from some demonstrable change in an employee's condition... [citation],” including a “gradual increase in disability.” (*Nicky Blair's Restaurant v. Workers' Comp. Appeals Bd.* (1980) 109 Cal.App.3d 941, 955 [167 Cal. Rptr. 516].) ““Historically, a change in physical condition necessitating further medical treatment ha[s] been considered new and further disability... [Citation.]” Thus, “[c]ommonly, new and further disability refers to a recurrence of temporary disability, a new need for medical treatment, or the change of a temporary disability into a permanent disability.” [Citation.]’ ”

...

[T]he need for surgery was clear as early as May 26, 2004, when Dr. McCarthy made his recommendation for right shoulder surgery, or at the latest by August 17, 2004, when Dr. Edington opined that Sarabi had a TTD and needed right shoulder surgery. Because Sarabi's disability worsened and further medical treatment in the form of right shoulder surgery became necessary within the five-year period, Sarabi suffered “new and further disability” within the meaning of section 5410 and the Board had jurisdiction to award him additional TTD benefits. (*Sarabi, supra*, at 926.)

More recently, the court of appeal in *Applied Materials v. Workers' Comp. Appeals Bd.* (2021) 64 Cal.App.5th 1042 [86 Cal.Comp.Cases 331] (*Applied Materials*), defined new and further disability similarly, as “disability resulting from some demonstrable change in the employee’s condition, including a gradual increase in disability, a recurrence of TD, a new need for medical treatment, or the change of a temporary disability into a permanent disability.” (*Id.* at 1080.) In *Applied Materials*, the applicant sustained injury to her neck and right arm on November 27, 2001. The applicant settled her claim in 2005 by way of stipulated Award. (*Id.* at 1054.) Applicant then filed a timely petition to reopen for new and further disability in October,

2006. When the parties eventually appeared for trial in 2017, defendant contended that the applicant had not suffered new and further disability “because her alleged new and further disability arose more than five years after November 27, 2001, the date of injury for its claim.” (*Id.* at 1080.) Defendant asserted the reports of the orthopedic AME and QME found no evidence of any new and further disability due to applicant’s 2001 injury. However, the court of appeal rejected this argument, noting that the applicant’s *treatment* for injury to her psyche, including evaluations with at least eight doctors between May, 2005 and November, 2006 “satisfied the definition of new and further disability in *Sarabi*.” (*Id.* at 1081.)

Based on our review of the record, we believe applicant has established demonstrable change in his condition as evidenced by the new need for medical treatment. Applicant underwent a left L5-S1 microdiscectomy procedure on October 4, 2013. AME Dr. Lundeen declared applicant to be permanent and stationary on July 10, 2014. (Ex. 2, report of Jeffrey Lundeen, M.D., dated July 10, 2014, at p.9.) The applicant later told Dr. Watson that following his 2013 surgery, he enjoyed about a year and a half of relief, but that his symptoms were returning despite the surgery. (Ex. 20, report of Timothy Watson, M.D., November 9, 2016, p.5.) Thereafter, applicant sought treatment from multiple physicians for his worsening back condition, including evaluations with Dr. Calhoun in September, 2015, and Dr. Nazarian in May, 2016, (Ex. 1, report of Jeffrey Lundeen, M.D., May 15, 2018, pp.2-3.) After physical therapy and medication management were unsuccessful, Dr. Nazarian referred applicant for a surgical evaluation with orthopedic surgeon Dr. Watson. In the November 9, 2016 evaluation with Dr. Watson, applicant reported symptoms of weakness in both ankles and in both great toes with walking down stairs, some shaking of the knees, and pain up to 4 on a 4 scale. (Ex. 20, report of Timothy Watson, M.D., November 9, 2016, p.1.) Dr. Watson felt that surgical intervention should be considered, and discussed it with applicant, but applicant did not wish to proceed with surgery at that time. The topic of surgery was again raised by Dr. Watson in the December 29, 2016 evaluation, at which time applicant agreed that surgery “would be better probably to have it done in the summer.” (Ex. 21, report of Timothy Watson, M.D., dated December 29, 2016, p.2) On this record, we are persuaded that a new need for medical treatment arose within five years of the date of injury. The jurisdiction afforded under section 5410 was conferred after the applicant had petitioned for new and further disability on January 5, 2016, and when “a new need for medical treatment” arose as documented by Dr. Watson

in 2016. (*Sarabi, supra*, 151 Cal.App.4th 920, at 926; *Applied Materials, supra*, 64 Cal.App.5th, at 1080.)

We also observe that just as in *Sarabi*, where applicant's treatment was deferred for treatment of nonindustrial conditions, a delay in the contemplated treatment does not preclude the Board's continuing jurisdiction following a timely petition under section 5410. Applicant's treating physician Dr. Orme requested authorization for applicant to receive a surgical consultation, which Utilization Review certified as medically necessary on July 1, 2020. (Exhibit 25, Careworks Utilization Review determination, dated July 1, 2020.) Additionally, applicant testified at trial that he was unaware of the authorization for surgery, and wished to have the surgery "because he wants to get better and be able to work and support himself." (October 6, 2020 Minutes at 4:16.)

We acknowledge the May 15, 2018 report of AME Dr. Lundeen, which found no new temporary or permanent disability. (Ex. K, Report of Jeffrey M. Lundeen, M.D., May 15, 2018, pp.11-12.) However, the report was written before Dr. Orme's June 23, 2020 request for neurosurgical consult, and before the Utilization Review certified the request. (Exhibit 24, report of Nicholas Orme, M.D., dated June 23, 2020, p.1; Exhibit 25, Careworks Utilization Review determination, dated July 1, 2020.) In order for a report to be substantial medical 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, 611 [2005 Cal. Wrk. Comp. LEXIS 71](Appeals Bd. en banc).) Additionally, a medical report is not substantial evidence where it "based on facts no longer germane, on inadequate medical histories and examinations." (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93]; *Granado v. Workers' Comp. Appeals Bd.* (1970) 69 Cal.2d 399 [33 Cal.Comp.Cases 647]; *Escobedo, supra*, at 621.) Here, an updated medical history including developments occurring after Dr. Lundeen's evaluation in 2018, such as the applicant's referral for neurosurgical consult and the utilization review authorization are necessary for the AME reporting to be considered substantial evidence. Additionally, we observe that just as in *Applied Materials*, a finding of no new additional permanent or temporary disability does not preclude a finding of continuing *jurisdiction* based on a new need for medical treatment. (*Applied Materials, supra*, 64 Cal.App.5th, at 1080.)

Accordingly, applicant has raised a timely, colorable assertion of continuing jurisdiction under the standards set forth in *Sarabi* and *Applied Materials* of a demonstrable change in condition, including a new need for medical treatment, occurring within five years of the date of injury. Applicant has met the standard necessary to confer the continuing jurisdiction of the WCAB under section 5410. However, the record is not clear whether surgical intervention is medically necessary, and whether applicant is willing to undergo the requested surgery. Additionally, the AME reporting should be updated to reflect medical developments occurring after the applicant's last AME evaluation in 2018.

The WCAB has the discretionary authority to develop the record when the record does not contain substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924] ["principle of allowing full development of the evidentiary record to enable a complete adjudication of the issues is consistent with due process in connection with workers' compensation claims (citations)"]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261]; *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc).)

Here, for the reasons explained above, and in order to fully adjudicate the issues, we will rescind the December 16, 2020 Findings and Order Dismissing the Petition to Reopen and return the matter to the trial level for further development of the record. When the WCJ issues a new decision, 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 December 16, 2020 Findings of Fact and Order be **RESCINDED** and that this matter is **RETURNED** to the trial level for such further proceedings and decisions by the WCJ as may be required, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ MARGUERITE SWEENEY, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 15, 2022

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

**JAVIER PASCACIO
PRUSSAK, WELCH & AVILA
LAUGHLIN, FALBO, LEVY & MORESI**

SAR/abs

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