WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

WILLIAM MCGAUGH, ***Applicant,*** **vs.** **MONTEREY PENINSULA UNIFIED SCHOOL DISTRICT; SUBSEQUENT INJURIES BENEFITS TRUST FUND; KEENAN & ASSOCIATES,** ***Defendants.***	**Case Nos. ADJ8243867** **ADJ8015702** **ADJ7226529** **(Salinas District Office)** **OPINION AND DECISION AFTER RECONSIDERATION**

We previously granted reconsideration in this matter to study the factual and legal issues. This is our Decision After Reconsideration.

Applicant William McGaugh seeks reconsideration of the Findings and Order (F&O) by the workers' compensation administrative law judge (WCJ) issued on August 10, 2015, which ordered that applicant take nothing from the Subsequent Injuries Benefits Trust Fund (SIF).

Applicant contends that a prior Findings, Award and Order (F&A), that applicant is 100% permanently disabled with 15% apportionment to a high school football injury and hip and other injuries, is res judicata and substantial evidence of preexisting labor disabling or ratable permanent disability and SIF liability.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending denial of reconsideration.

SIF answered alleging that applicant failed to prove labor disabling or ratable permanent disability prior to the industrial injury, which is required for SIF liability.

We have reviewed applicant's Petition for Reconsideration (Petition), the WCJ's F&O and Report, SIF's answer and the record. Based on our review, the WCJ's Report which we adopt and incorporate, and for the following reasons, we affirm the F&O.

FACTUAL AND PROCEDURAL BACKGROUND

Applicant sustained injury to his wrists, shoulders and neck while employed as a janitor by Monterey Peninsula Unified School District on October 22, 2009, and during the period ending on April 20, 2010.

A medical opinion was obtained from panel qualified medical evaluator Ana Maria Salinas, M.D. In a report dated July 18, 2013, Dr. Salinas noted that applicant had a prior workers' compensation right hip injury for which he had arthroscopic surgery and received a $5,000.00 settlement. (WCAB ex. W-11, p. 13.) Dr. Salinas also reported that applicant was permanent and stationary, had work restrictions and whole person impairment for the neck, shoulders and wrists. Dr. Salinas apportioned 85% to the industrial injuries, and 15% to applicant being a former football player and his very physical work as a custodian for another school and correctional officer. (WCAB ex. W-11, pp. 17-20.)

Dr. Salinas was deposed and testified that 15% disability of the neck and shoulders is attributable to applicant's history of being a football player. (WCAB ex. W-13, p. 25, lines 9-24.)

A medical opinion was also obtained from Philip Edington, M.D. In a report dated September 14, 2013, Dr. Edington indicated that applicant had glaucoma and work restrictions and 31% whole person impairment. (App. ex. A-1, pp. 10-11.) Dr. Edington also reported that discovery of applicant's condition after the industrial injury is coincidental, and in all likelihood applicant had difficulty with glaucoma for many years on an asymptomatic basis. Dr. Edington apportioned 100% of applicant's disability to nonindustrial causes. (App. ex. A-1, p. 10.)

Applicant and the Monterey Peninsula Unified School District proceeded to trial, and the WCJ issued the F&A and an Amended Findings, Award and Order (for clerical error) that applicant sustained 92% combined permanent disability after 15% apportionment based on the opinion of Dr. Salinas. The WCJ noted that Dr. Salinas did not apportion between the two industrial injuries because it was speculative.

Applicant proceeded with the claim against SIF to trial, and the parties stipulated to the findings of fact, exhibits and conclusions adjudicated in the prior F&A.

Applicant testified that he was a running back for his varsity high school football team for three

years, and afterwards had neck and shoulder pain and still had pain when he worked for the school district. (Summary of Evidence (SOE, p. 2, line 24 to p. 3, line 3.) Applicant did not proceed with football at Oregon State or as a professional because of career-ending hamstring injuries and his girlfriend was pregnant. (SOE, p. 3, lines 3-9.)

Applicant also testified that he worked as a corrections officer for the Department of Corrections in Missouri, and dislocated his right hip. (SOE, p. 3, lines 11-17.) Applicant settled the claim for $10,000, and received $1,000 for each percent of disability so that applicant had 10% disability. (SOE, p. 3, lines 17-18.) Applicant lost the settlement documents over time. (SOE, p. 3, line 18.) Applicant was having hip pain when he went to work at the school district. (SOE, p. 3, lines 19-20.)

Applicant testified further that he had problems reading in 2007 and 2009, and when he went to work at the school district. (SOE, p. 3, line 21 to p. 4, line 5.) Doctors told applicant that he probably had glaucoma for about 10 years based on his eye exams. (SOE, p. 4, lines 6-7.)

On cross-examination, applicant testified that he had hip surgery after the hip injury and it took a year and a half to recover. (SOE, p. 4, lines 20-21.) Applicant was also diagnosed with glaucoma after the industrial injury. (SOE, p. 4, lines 22-23.)

The WCJ issued the F&O, applicant petitioned for reconsideration, the WCJ issued the Report, SIF filed an answer, and we granted reconsideration to further study the factual and legal issues on October 26, 2015.

DISCUSSION

SIF liability is determined under Labor Code section 4751.[1] (*Ferguson v. Industrial Accident Comm.* (*Ferguson*) (1958) 50 Cal.2d 469, 474-475 [23 Cal.Comp.Cases 108]; *Franklin v. Workers' Comp. Appeals Bd.* (*Franklin*) (1978) 79 Cal.App.3d 224, 235 [43 Cal.Comp.Cases 224].)

Section 4751 provides:

> "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

[1] All further reference to statute is to the Labor Code unless stated otherwise.

> 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."

To establish entitlement to SIF benefits, the employee must show permanent disability or impairment before the industrial injury occurs. (§ 4751; *Ferguson, supra*, 50 Cal.2d at p. 474; *Franklin, supra*, 79 Cal.App.3d at p. 237.) The permanent disability or impairment existing before the industrial injury must be labor disabling, or constitute a basis for an award of permanent disability or impairment had it been industrially caused. (*Ferguson, supra*, 50 Cal.2d at p. 477; *Franklin, supra*, 79 Cal.App.3d at p. 237.) The preexisting permanent disability or impairment may be industrial or nonindustrial, or arise from any source, developmental, pathological or traumatic. (*Escobedo v. Marshalls* (*Escobedo*) (2005) 70 Cal.Comp.Cases 604, 614-621.) The existence of permanent disability or impairment before the industrial injury cannot be established by a retroactive prophylactic work restriction determined after the industrial injury, absent substantial evidence showing that the employee was actually restricted in work activity prior to the industrial injury. (*Franklin, supra*, 79 Cal.App.3d at pp. 238; *Escobedo, supra*, 70 Cal.Comp.Cases at p. 617.)

Applicant contends that the prior F&A, that there is 15% apportionment of permanent disability to the prior high school football injury and hip and other injuries, is res judicata of the preexisting labor disabling permanent disability required for SIF liability under section 4751.

We agree with the WCJ's Report that applying apportionment of permanent disability or impairment based on causation under section 4663 is different than finding the existence of permanent disability or impairment prior to the industrial injury for SIF liability under section 4751. Apportionment

based on causation may now include pathology, asymptomatic prior conditions or retroactive prophylactic work preclusions. (*Escobedo, supra*, 70 Cal.Comp.Cases at p. 617.) SIF benefits may not be payable for the apportioned pathology, asymptomatic prior condition or retroactive prophylactic work preclusion, unless there is substantial evidence the apportioned cause resulted in labor disabling or ratable permanent disability prior to the industrial injury. (*Escobedo, supra*, 70 Cal.Comp.Cases at p. 619.) Thus, there may be cases where there is apportionment based on causation lessening employer liability under section 4663, and permanent disability existing before the industrial injury is not shown for SIF liability under section 4751. (*Escobedo, supra*, 70 Cal.Comp.Cases at p. 619.) Accordingly, the 15% apportionment under the F&A is not res judicata that there was labor disabling or ratable permanent disability prior to the industrial injuries for SIF liability under section 4751.

Applicant also contends that the 15% apportionment to his high school football, hip and other injuries reported by Dr. Salinas is substantial evidence of labor disabling or ratable permanent disability prior to the industrial injuries.

As reported by the WCJ, applicant testified that he had complaints of pain from his high school football, hip and other injuries when he went to work for the school district. However, there was no testimony or substantial medical evidence that the high school football, hip or other injuries resulted in labor disabling or ratable permanent disability prior to the industrial injuries.

We add that Dr. Salinas' report did not indicate that applicant's high school football, hip or other injuries caused labor disabling or ratable permanent disability prior to the industrial injuries. Applicant also testified at trial that he lost the settlement documents pertaining to the industrial hip injury in Missouri, and it took a year and a half to recover after hip surgery. No medical reports were submitted in regard to the hip injury. We also note that Dr. Edington reported that applicant's glaucoma in all likelihood was asymptomatic for many years and was discovered after the industrial injury.

Accordingly, we affirm the F&O.

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For the foregoing reasons,

IT IS ORDERED that as our Decision After Reconsideration the Findings and Order dated August 10, 2015 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

MARGUERITE SWEENEY

I CONCUR,

RONNIE G. CAPLANE

JOSEPH RAZO

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

NOV 13 2015

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

MICHAEL MCCANN
OFFICE OF THE DIRECTOR – LEGAL UNIT
WILLIAM MCGAUGH
WILSON & WISLER, LLP

PR/ara

WILLIAM McGAUGH
ADJ7226529; ADJ8015702
ADJ8243867MF

v.

MONTEREY PENINSULA U.S.D.
KEENAN & ASSOCIATES

DANIEL H. ASTURIAS
Workers' Compensation
Administrative Law Judge

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

Applicant, William McGaugh, filed a timely and verified Petition for Reconsideration from the Findings and Order issued on 8/10/15. The Petition raises the statutory issues and contends that the findings are not consistent with the final decision in the regular issues issued on 7/25/14 which found that the applicant's permanent disability was apportioned to prior non-industrial injuries. That, as a consequence, the decision denying Applicant's Petition for Subsequent Injuries Benefits Trust Fund (SIBTF hereinafter) benefits is in error and should be reversed.

II

FACTUAL AND PROCEDURAL BACKGROUND

On 7/25/14, This WCJ issued a Finding and Award of permanent partial disability of 92% after adjustment for age, occupation and apportionment. The award found that 85% of Applicant's permanent partial disability was caused by his industrial exposure in the above cited case numbers and that 15% of the cause of the permanent partial disability was due to a high school football injury and a hip injury from work as a correctional officer in Arizona. There was no reconsideration sought and the Award is final. The applicant contends that since the original award of 7/25/14 apportioned 15% of applicant's permanent partial disability to high school football and other activities, that *res judicata* binds the Board which must as a matter of law find that applicant is entitled to benefits from the Subsequent Injuries Fund as 15% of his current impairment was due to these other activities and that 15% of the disability must of necessity have

pre-existed and have been the cause of "labor disabling" permanent partial disability before the injuries which gave rise to this claim.

In the underlying case, the only medical evaluations submitted were those of Dr. Ana Marta Salinas, M.D. In the doctor's report of 7/18/13, she concluded:

"There is apportionment in this particular patient. In the past, he has had work that has been very physical being a correctional officer and a custodian for another school as well as being a football player in the past. Therefore, fifteen percent (15%) is due to non-industrial factors and the remaining eighty-five percent (85%) is industrial in nature related to industrial injuries arising and occurring in the course of his employment with the Monterey Peninsula Unified School District (MPUSD), with reported dates of injury on October 22, 2009 and November 2, 2009, and zero percent (0%) is due to other factors."

This physician had examined applicant a number of times starting in December 2010 and had reviewed all medicals submitted to her with respect to applicant's industrial condition. She was the best and most suited and the only physician whose opinion was submitted respecting the cause of applicant's permanent disability. She concluded that 15% of applicant's final permanent disability was caused by his prior employments and by football injuries. As we are well aware apportionment is not necessarily, and in this case, certainly does not indicate that applicant had a pre-existing permanent partial disability of 15% but rather that these conditions were a cause of 15% of his final disability. This opinion was adopted by this WCJ and a final and unchallenged decision applied the apportionment to the Decision.

III

DISCUSSION

It is well settled that in order for the applicant to be entitled to benefits from SIBTF he must establish that he had a pre-existing labor disabling disability prior to the subsequent industrial injury. In this case, while there is evidence that the applicant testified that he has had "pain" since these original injuries, there is no independent medical evidence or testimony that he had sustained an injury playing football (hamstring strain and/or partial tear) and had suffered a hip injury as a correctional officer that resulted in permanent disability. While there is evidence that the applicant has some pain because of these injuries, there is no testimony or

medical evidence that these prior injuries were labor disabling in any way before his subsequent injury. In the Summary of Evidence, applicant indicated that he had been awarded a "10% disability" following his hip injury when working for the Department of Corrections in Missouri. But there is no indication that he suffered from any such ongoing impairment prior to his work as a custodian for the school district. He reports, "[H]aving hip pain when he went to work for the school district". But there is no indication that it interfered that with his regular arduous work activities as a maintenance worker while at the school district. Secondly, he indicated that he had suffered a football injury in high school, specifically a hamstring strain and/or partial tear. He notes that he still has trouble with the hamstring and some difficulty with stretching. If he sits on a hard object, he will feel a pain in the hamstring. But again, this testimony of "pain" is not in it of itself a ratable partial disability. There simply was no substantial evidence to support a finding that applicant had sustained a prior ratable partial disability to his body that existed prior to his subsequent industrial injuries.

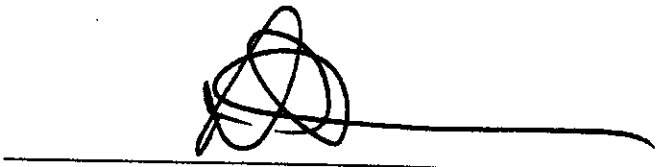
The Applicant's final tact is to argue that the matter is *res judicata*. That once a finding was made, that applicant's disability was caused in part by prior non-industrial events such as a high school football injury and/or an injury as a correctional officer as correctional officer that the 15% apportionment must, as a matter of law, must be applied as the partial ratable disability in the SIBTF case. This ignores the law that apportionment is a legally different standard than a finding of a pre-existing partially ratable partial disability in SIBTF case. In the former non-industrial symptomatic pathologies, conditions that need not cause prior ratable permanent partial disability can be found to be a cause of the applicant's final permanent disability and subject to apportionment. This is a product of the *Escobedo* case and the Legislature's Amendment of the labor code. In fact the *Escobedo* case notes that apportionment under the new law will result in finding of apportionment that does not of necessity allow for the injured worker to obtain benefits from SIBTF. The Board felt the legislature needed to address this issue. [*Escobedo v. Marshals (2005) 70 CCC 604, 620*] The legislature, however, has not amended the statutes with regard to the SIBTF and the applicant is still required to show not only that the prior

IV

RECOMMENDATION

It is recommended that the Petition for Reconsideration be Denied.

Respectfully submitted,



DANIEL H. ASTURIAS
Workers' Compensation
Administrative Law Judge

Served 9/14/2015 on the following: