OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 19105326
J. BELCHER	)
	)
	)
	)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Nikki L. McLaughlin, TAAP[1]
Mengun He, Supervising Attorney

For Respondent: Philip C. Kleam, Tax Counsel III

A. ROSAS, Administrative Law Judge: In an opinion dated March 18, 2021 (Opinion), the Office of Tax Appeals (OTA) sustained the action of respondent Franchise Tax Board for the 2017 tax year. Appellant J. Belcher timely filed a petition for rehearing (PFR) under Revenue and Taxation Code section 19048.

A rehearing may be granted where one of the following six grounds exists, and the substantial rights of the filing party (here, appellant) are materially affected: (1) an irregularity in the appeal proceedings that occurred prior to issuance of the Opinion and prevented fair consideration of the appeal; (2) an accident or surprise that occurred during the appeal proceedings and prior to the issuance of the Opinion, which ordinary caution could not have prevented; (3) newly discovered, relevant evidence, which the filing party could not have reasonably discovered and provided prior to issuance of the Opinion; (4) insufficient evidence to justify the Opinion; (5) the Opinion is contrary to law; or (6) an error in law in the appeals hearing or proceeding. (Cal. Code Regs., tit. 18, § 30604(a)(1)-(6).)

Appellant argues (1) that there was an error in law in the appeals hearing or proceeding, and (2) that OTA's Opinion is contrary to law. Appellant repeats many of the same or similar arguments and contentions made during the initial appeal. We will not address appellant's

[1] Ms. McLaughlin is a law student with the Tax Appeals Assistance Program.

repetitive arguments, which OTA has already considered and rejected. Instead, we will discuss those new arguments that are relevant to the issue of whether to grant a rehearing, including arguments about the burden of proof, presumptions, and inferences.

Only the Panel May Weigh the Evidence

At the heart of appellant's argument for a rehearing is that appellant disagrees with how the administrative law judges on the panel for the December 15, 2020 hearing (the Panel) weighed the evidence. Appellant submitted 42 separate exhibits totaling 458 pages, and respondent submitted 107 pages of evidence. Each page was admitted into evidence without objection. Thus, the issue is not that an error in law occurred because of an erroneous ruling on the admission or rejection of evidence. Rather, appellant argues that the Panel, in weighing the evidence, should have reached a different conclusion. A taxpayer has the burden of establishing reasonable cause (*Appeal of Xie*, 2018-OTA-076P), and appellant argues that the Panel should have concluded that appellant met the burden of proving reasonable cause.

"The Panel may use the California rules of evidence when evaluating the weight to give evidence presented in a proceeding before OTA." (Cal. Code Regs., tit. 18, § 30214(f)(4).) Thus, we will refer to the Evidence Code, the rules of evidence, and relevant case law in discussing the weight of the evidence. " 'Burden of proof' means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court." (Evid. Code, § 115.) The applicable standard of proof is by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(c).)

The burden of proof by the preponderance of evidence "means what it says, viz., that the evidence on one side outweighs, preponderates over, is more than, the evidence on the other side, not necessarily in number of witnesses or quantity, but in its effect on those to whom it is addressed." (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 325.) Appellant is correct that she provided hundreds of pages of evidence. But the *quantity* of evidence is not as important as the *quality* of that evidence, and we focus on the effect of such evidence. (*Ibid*.)

Although appellant disagrees with how the Panel weighed the quality of appellant's evidence, it is not for a party to decide whether a requisite degree of belief concerning a fact was indeed established in the mind of the trier of fact. Rather, it is up to "the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence .....' [Citation.]" (*Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern*

California (1993) 508 U.S. 602, 622 (*Concrete Pipe*).) After all, the trier of fact is the exclusive judge of the credibility of the evidence and can reject evidence as unworthy of credence. (*Oldenburg v. Sears, Roebuck & Co.* (1957) 152 Cal.App.2d 733, 742.)[2]

Here, the Panel weighed the evidence and made numerous factual findings, including the fact that appellant was diagnosed with Major Depressive Disorder (MDD) in November 2018. Although the hospital in question experienced administrative delays prior to appellant's diagnosis, based on the weighing of the evidence the Panel did not find that appellant was diagnosed with MDD at an earlier date.

The Panel Did Not Have To Adhere to an Alleged Presumption

Appellant argues that she established the presumption of the continuance of a condition. Specifically, appellant describes the condition at issue as the hospital's administrative delays that resulted in a delayed diagnosis of a severe mental illness. Appellant cites to Evidence Code section 606[3] and a case for "the general principle that a condition once shown to exist is presumed to continue" absent evidence to the contrary. (*Central Pacific Railway. Co. v. Alameda County, California* (1932) 284 U.S. 463, 468 (*Central Pacific*).) In *Central Pacific*, a party presented proof of the establishment of a road, which raised a presumption of that road's continuance; that is to say, having shown the establishment a road, the continuing existence of that road must be presumed until overcome by proof to the contrary. (*Ibid.*) *Central Pacific* is distinguishable both as to the condition at issue and the temporal element. The building of a road is not the same as the diagnosis of a severe mental illness. Moreover, appellant is not asking us to presume that an established fact continues to exist into the *future*. Rather, appellant asks us to presume that an established fact would have happened in the *past*.

In other words, appellant asks us to presume that she would have been diagnosed with MDD prior to November 2018, if not for the hospital's administrative delays. When a hospital experiences administrative delays, and, eventually, at a future date a patient is diagnosed with a

[2] Although appellant does not allege insufficient evidence to justify the Opinion (Cal. Code Regs., tit. 18, § 30604(a)(4)), cases evaluating the sufficiency of evidence presented at a bench trial are relevant because they point out the "great discretion accorded to the trial judge," who "weighs the evidence, determines the credibility of the witnesses, and finds the facts." (*U.S. v. Bales* (4th Cir. 1987) 813 F.2d 1289, 1293.)

[3] Evidence Code section 606 provides that the effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact. As such. appellant argues that respondent bore the burden of rebutting the "continuance" of appellant's condition (i.e., MDD) to the period of time prior to her diagnosis in November 2018.

severe mental illness, it does not necessarily or logically follow that but for the hospital's administrative delays, the patient would have been diagnosed with the severe mental illness much sooner.

The Panel Did Not Have To Adhere to an Alleged Inference

An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action. (*Fashion 21 v. Coalition for Humane Immigrant Rights of Los Angeles* (2004) 117 Cal.App.4th 1138, 1149 (*Fashion 21*), citing Evid. Code, § 600(b).) "Thus, an inference is not evidence but rather the result of reasoning from evidence. ' "An inference of fact must be based upon substantial evidence, not conjecture.....'It must be such that a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists[.]' " ' " (*Ibid.*, fns. omitted.) "It is up to the [trier of fact] to assess the credibility and judge the weight of the evidence proffered in support of and in opposition to the fact it is asked to infer." (*Id.* at p. 1150.)

Appellant cites a case for the principle that "[a]n inference that a state of affairs existed at a certain time may be reinforced by evidence that it continued to exist at a subsequent time." (*Pelletti v. Membrila* (1965) 234 Cal.App.2d 606, 613 (*Pelletti*).) Just as with the continuous condition from *Central Pacific*, *Pelletti* is also distinguishable both as to the condition at issue and the temporal element. In *Pelletti*, the condition at issue is a wanton state of mind, not a medical diagnosis; and the events in *Pelletti* took place during the same evening, unlike the events here, which occurred over a span of several months.[4]

Here, using direct evidence,[5] appellant proved by a preponderance of the evidence that she underwent knee replacement surgery in December 2016; that she felt depressed after the surgery and recovery; that she had about 30 sessions with a psychotherapist from April 2017 through May 2018; and that she was diagnosed with a severe mental illness known as MDD in November 2018. Appellant met the burden of proving many important facts. But based on the

[4] In *Pelletti*, the court indicated: "When defendant ran from the scene of the accident, he was performing a wanton act which gave specific proof of a state of mind of conscious indifference to the consequences of his conduct during the evening. This wanton state of mind after the accident is a factor which the jury could have considered as evidence of defendant's wanton state of mind at the time of the impact, i.e., that a single continuous state of mind existed throughout." (*Pelletti*, *supra*, 234 Cal.App.2d at p. 613.)

[5] See, e.g., Evidence Code section 410: " 'direct evidence' means evidence that directly proves a fact, without an inference or presumption, and which in itself, if true, conclusively establishes that fact."

evidence, the Panel could not logically and reasonably infer that appellant would have necessarily been diagnosed with MDD prior to November 2018—but for the hospital's administrative delays. Thus, appellant's testimony and the documentary evidence did not establish, by a preponderance of the evidence, the existence of a medical diagnosis of MDD on or by April 15, 2018.

There Was No Error in Law in the Appeals Hearing or Proceeding

Appellant argues that the Panel raised the burden of proof to something much greater than the requisite and minimal preponderance of the evidence standard, and that this constituted an error in law in the appeals hearing or proceeding. (Cal. Code Regs., tit. 18, § 30604(a)(6).) "Courts have found that a new trial may be granted based on an error in law if its original ruling as a matter of law was erroneous." (*Appeals of Swat-Fame, Inc., et al.*, 2020-OTA-045P at p. *2, fn. 2 (*Swat-Fame*), citing *Collins v. Sutter Memorial Hospital* (2011) 196 Cal.App.4th 1, 17-18.) "A claim on a petition for rehearing that there was an error in law is a claim of procedural wrong." (*Swat-Fame*, *supra*, at p. *2, fn. 2.) "For example, courts have found an error in law occurred when there was . . . an erroneous ruling on the admission or rejection of evidence..... " (*Ibid*., citing *Nakamura v. Los Angeles Gas & Elec. Corp*. (1934) 137 Cal.App. 487.) As indicated above, this is not about evidentiary rulings; instead, appellant seems to object to how the Panel weighed the evidence. But as indicated above, only the triers of fact (the Panel) can decide whether the preponderance of the evidence was met. (*Concrete Pipe*, *supra*, 508 U.S. at p. 622.)

For the sake of argument, however, if appellant had proved that she had MDD on or before April 15, 2018, appellant would still have failed to meet the burden of proving reasonable cause. Appellant focuses on the Panel's unwillingness to find that she had MDD prior to her diagnosis in November 2018. But appellant ignores the evidence showing her active participation in nontax matters. The Panel, as triers of facts, did not "see enough evidence of her inability to manage her other business affairs" during the time in question, despite appellant's difficulty doing so. (*Leslie v. Commissioner*, T.C. Memo. 2016-171.)

Furthermore, the alleged error in law must be prejudicial; that is, the error must likely have affected the outcome: "If it clearly appears that the error could not have affected the result of the trial, the court is bound to deny the motion." (*Bristow v. Ferguson* (1981) 121 Cal.App.3d 823, 826.) " 'Prejudice from error is never presumed but must be affirmatively demonstrated by

the appellant. [Citations.]' " (*Hernandez v. County of Los Angeles* (2014) 226 Cal.App.4th 1599, 1616.) Appellant cannot affirmatively demonstrate prejudice from the alleged error because, when a taxpayer such as appellant is able to exercise ordinary care and prudence with respect to nontax matters, the claimed mental illness or mental incapacity does not constitute reasonable cause. (*Carlson v. U.S.* (7th Cir.1997) 126 F.3d 915, 923.)

Thus, appellant's request for a rehearing based on error in law fails for two reasons: (1) how the Panel's chooses to weigh the evidence is not an error in law, and (2) appellant did not affirmatively demonstrate prejudice from the alleged error.

The Opinion Is Not Contrary to Law

Appellant disagrees with the Opinion's legal statement that "an inference is not evidence but rather the result of reasoning from evidence."[6] Appellant argues that this statement is contrary to law. To find that an opinion is against (or contrary to) law, we do not weigh the evidence; instead, we must determine whether that opinion is "unsupported by any substantial evidence." (*Appeal of Graham and Smith*, 2018-OTA-154P.) This requires reviewing an opinion "and indulging in all legitimate and reasonable inferences" to uphold that opinion. (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 907.) "The relevant question is not over the quality or nature of the reasoning behind the opinion, but whether the opinion can or cannot be valid according to the law." (*Swat-Fame*, *supra*, at p. *3.) In reviewing whether the Opinion can or cannot be valid according to the law, we note that the issue is whether the Panel was required to logically and reasonably infer, from the other facts or group of facts, that appellant had MDD prior to her diagnosis in November 2018.

Appellant's focus on the Panel's unwillingness to make such an inference is misplaced; as stated in the Opinion and repeated above, such inference does not explain appellant's active participation in nontax matters during the applicable time period. Appellant's argument that the Opinion was contrary to law as to the issue of inferences is incorrect and does not justify a rehearing.

[6] *Fashion 21*, *supra*, 117 Cal.App.4th at p. 1149.

Thus, we find that appellant has not satisfied the requirements for granting a rehearing, and we deny the PFR.

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Alberto T. Rosas
Administrative Law Judge

We concur:

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