WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ANTONIA RODRIGUEZ, *Applicant*

vs.

SAN DIEGO CONVENTION CENTER; AMERICAN SPECIALTY INSURANCE SERVICE, administered by GALLAGHER BASSETT SERVICES, *Defendants*

Adjudication Number: ADJ1715757
San Diego District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the Opinion on Decision and 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 Opinion on Decision and Report, both of which we adopt and incorporate, and for the reasons stated below, we will deny reconsideration.

Preliminarily, we note that former Labor Code[1] 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, 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.

[1] All further statutory references are to the Labor Code, unless otherwise noted.

Under 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 July 16, 2024, and 60 days from the date of transmission is September 16, 2024. This decision is issued by or on September 16, 2024, so that we have timely acted on the petition as required by 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 July 16, 2024, and the case was transmitted to the Appeals Board on July 16, 2024. 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 section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on July 16, 2024.

Next, we turn to the merits. In our recent decision in *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741 [2023 Cal. Wrk. Comp. LEXIS 30] (Appeals Board en banc) (*Nunes*), we discussed the role of vocational evidence in workers' compensation proceedings:

> Section 4660 provides that permanent disability is determined by consideration of whole person impairment within the four corners of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA Guides), as applied by the Permanent Disability Rating Schedule (PDRS) in light of the medical record and the effect of the injury on the worker's future earning capacity. (*Brodie, supra*, at p. 1320 ["permanent disability payments are intended to compensate workers for both physical loss and the loss of some or all of their future earning capacity"]; *Department of Corrections & Rehabilitation v.*

Workers' Comp. Appeals Bd. (Fitzpatrick) (2018) 27 Cal.App.5th 607, 614 [238 Cal.Rptr.3d 224, 83 Cal.Comp.Cases 1680] (*Fitzpatrick*); *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd. (Guzman)* (2010) 187 Cal.App.4th 808 [115 Cal.Rptr.3d 112, 75 Cal.Comp.Cases 837] (*Guzman*).)

However, the scheduled rating is not absolute. (*Fitzpatrick, supra*, at pp. 619–620.) A rating obtained pursuant to the PDRS may be rebutted by showing an applicant's diminished future earning capacity is greater than that reflected in the PDRS. (*Ogilvie v. Workers' Comp. Appeals Bd*. (2011) 197 Cal.App.4th 1262 [129 Cal.Rptr.3d 704, 76 Cal.Comp.Cases 624] (*Ogilvie*); *Contra Costa County v. Workers' Comp. Appeals Bd. (Dahl)* (2015) 240 Cal.App.4th 746 [193 Cal.Rptr.3d 7, 80 Cal.Comp.Cases 1119] (*Dahl*).) In analyzing the issue of whether and how the PDRS could be rebutted, the Court of Appeal has observed:

> Another way the cases have long recognized that a scheduled rating has been effectively rebutted is when the injury to the employee impairs his or her rehabilitation, and for that reason, the employee's diminished future earning capacity is greater than reflected in the employee's scheduled rating. This is the rule expressed in *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234 [193 Cal.Rptr. 547, 666 P.2d 989]. In *LeBoeuf*, an injured worker sought to demonstrate that, due to the residual effects of his work-related injuries, he could not be retrained for suitable meaningful employment. (*Id*. at pp. 237–238.) Our Supreme Court concluded that it was error to preclude LeBoeuf from making such a showing, and held that "the fact that an injured employee is precluded from the option of receiving rehabilitation benefits should also be taken into account in the assessment of an injured employee's permanent disability rating."
>
> (*Ogilvie, supra*, at p. 1274.)

Thus, "an employee may challenge the presumptive scheduled percentage of permanent disability prescribed to an injury by showing a factual error in the calculation of a factor in the rating formula or application of the formula, the omission of medical complications aggravating the employee's disability in preparation of the rating schedule, or by demonstrating that due to industrial injury the employee is not amenable to rehabilitation and therefore has suffered a greater loss of future earning capacity than reflected in the scheduled rating." (*Ogilvie, supra*, at p. 1277.) The court in *Ogilvie* thus affirmed the continued relevance of vocational evidence with respect to the determination of permanent disability. (*Applied Materials v. Workers' Comp. Appeals. Bd. (Chadburn)* (2021) 64 Cal.App.5th 1042 [279 Cal. Rptr. 3d 728, 86 Cal.Comp.Cases 331]; see also *County of Sonoma/Health Services Dept. v. Workers' Comp. Appeals Bd. (Helper)* (2023) 88 Cal.Comp.Cases 309 [2023 Cal. Wrk. Comp. LEXIS 4] (writ den.).)

(*Id*. at pp. 14-17.)

For the reasons stated by the WCJ in the Opinion on Decision and Report, we agree with the WCJ's reliance on the vocational expert opinion of Alejandro Calderon to find applicant suffered diminished future earning capacity on an orthopedic basis and is not amenable to vocational rehabilitation as explained in *LeBoeuf*.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 16, 2024

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

ANTONIA RODRIGUEZ
LAW OFFICE OF ROBYN PARK FREIBERG
GOLDMAN MAGDALIN STRAATSMA

PAG/oo

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

INTRODUCTION

1. Applicant's Occupation: Housekeeper, Occ. Group. No. 340
   Applicant's Age: 37
   Dates of Injury: December 8, 2002
   Parts of Body Alleged: Left Knee, Back, Left Shoulder, Left Elbow, Psyche and Internal Systems
2. Identity of Petitioner: AMERICAN SPECIALTY INS. Administered by GALLAGHER BASSETT SERVICES;
3. Timeliness: Petition was timely.
4. Verification: The Petition was verified.
5. Date of Issuance of Order: June 13, 2024
6. Petitioner's Contention(s):
   A. The applicant failed to meet her burden on non-feasibility of vocational rehabilitation because the reporting of Mr. Calderon (Vocational Expert) is not substantial evidence;
   B. Even if permanently and totally disabled apportionment should be applied to reduce the award.

II
STATEMENT OF FACTS

The defendant has set forth a detailed history of this case with appropriate citations to the record in excruciating detail in his Petition for Reconsideration dated July 3, 2024 starting at page 2, line 16 and ending on page 17, line 3. The case may be more simply stated thus:

The applicant sustained an admitted injury to her left knee, back, left shoulder, left elbow, psyche and internal system on December, 2002. The case settled by way of Stipulations and Award for 63% on August 17, 2006 (MOH/SOE December 11, 2023 page 3:2-5). Just before she settled her case, she attended a vocational rehabilitation program through Winchester Valley Vocation School. She took course work on doing income taxes and on computer use. She may also have had

classes in customer service and English as a second language. She remembered finishing all her courses but did not remember getting a certificate. She did not start looking for work because she was still getting physical therapy and treatment. She was trained for a sedentary job. (MOH/SOE 6/5/2024 page 2:19 to page 3:9). In fact, the applicant was off work and treating with an orthopedic surgeon (Dr. Lane), a pain management doctor (Dr. Blake Thompson) and a psychiatrist (Dr. Adam Lee) and had a revision left total knee arthroplasty on June 19, 2019. She also complained of pain to her left shoulder and elbow for which she had an MRI and for which the doctor (Dr. Lane) recommended conservative treatment consisting of physical therapy.

She was declared once again permanent and stationary by the orthopedic AME Dr. Jeffrey Bernicker on March 2, 2021 (Jt. Ex. 1). She was then re-evaluated by the Psychiatric AME, Dr. Robert Zink on November 17, 2021 (Jt. Ex. 5). She was evaluated by Alejandro Calderon, applicant's vocational expert on December 2, 2021 (App. Ex. 5) and June 9, 2022 (Applicant's Exhibit 6). The Defense Vocational expert, Mark Remas provided reports dated May 3, 2010 (Def. Ex. A), June 5, 2023 (Def. Ex. B), November 15, 2023 (Dr. Ex. C) and January 3, 2024 (Def. Ex. D).

The case came to trial on December 11, 2023. The primary issue was permanent disability, applicant claiming that she was 100% based on the medical reports and vocational reports of Alejando Calderon, with no apportionment. Defendant claimed that the applicant was less than 100% based on their vocational report which found feasibility was hampered by non-industrial factors and also by the apportionment of 25% to non-industrial factors pursuant to the report of Dr. Zink (AME Psychiatrist). The trial thereafter continued to January 31, 2024 where the applicant's direct examination testimony was taken. There was a change in defense counsel before the date of the next hearing, so the case was finally set on June 5, 2024 to complete the cross-examination of the applicant (MOH/SOE 6/5/2024 pages 1-4). The case submitted as of that date.

On June 13, 2024 a Findings and Award issued finding that the applicant was entitled to an unapportioned award of 100% based on the medical reports of Dr. Bernicker and Dr. Thompson (pain management specialist) which contained no nonindustrial apportionment and the vocational reports of Alejandro Calderon. It is from this Finding and Award that the defendant filed its timely, verified Petition for Reconsideration asserting that the finding of non-feasibility and failure to apportion at least 25% to non-industrial causes based on Dr. Zink's Ame report was in error.

III
DISCUSSION

CONTENTIONS

CONTENTION A: THE APPLICANT FAILED TO MEET HER BURDEN ON NON-FEASIBILITY OF VOCATIONAL REHABILITATION BECAUSE THE REPORTING OF MR. CALDERON (APPLICANT'S VOCATIONAL EXPERT) IS NOT SUBSTANTIAL EVIDENCE

This contention is in error and should be denied.

Dr. Jeffrey Bernicker issued a multiplicity of reports including those of March 2,2021 (Jt. Ex. 1), August 9, 2023 (Jt. Ex. 2); and October 23, 2023 (Jt. Ex. 3). In his March 2, 2021 report (Jt. Ex. 1), he found the applicant to be limited to sedentary work due to her back and left knee. He also found that the applicant had a restriction to her left upper extremity limiting her from repetitive work at or above shoulder level and lifting greater than 10 pounds below shoulder level. This report rates under the 1996 rating manual since this is a 2002 date of injury:

> BACK: 12. 1-70-3408-72-72 (sedentary work restriction
> LEFT KNEE: 2/3(14. 631-15-3408-17=17) 11 (atrophy)
> LEFT SHOULDER- 7. 3-5-340f-5-5 rated on no repetitive at or below shoulder level. The weight lifting is subsumed into the sedentary work restriction.

Dr. Bernicker found the restrictions to be 100% related to the industrial injury.

Furthermore, the restrictions on use of her left upper extremity erodes the number of sedentary jobs that she can do.

Dr. Daniel Bresler evaluated the applicant for disability related to internal medicine issues/hernia. He issued work restrictions of no heavy lifting or repeated bending and stooping which are subsumed into the sedentary work restriction. However, these work restrictions further erode the base of sedentary jobs. Dr. Bressler found no apportionment.

Dr. Robert Zink, Ph.D. was the psychologist AME. Dr. Zink found that the applicant had a GAF (Global Assessment of Functioning of 57). However, as this is a 2002 date of injury, the report was rated under the 8 categories of Function (note Dr. Zink found 25% to non-industrial causes). However he found that she had slight impairment in her ability to maintain a work pace appropriate to a given workload. The overall rating of Dr. link's report with apportionment is 75% (1.4-16-340D-13-13) = 9.75 or 10%.

Dr. Blake Thompson is the applicant's pain management doctor. He added an additional restriction that the applicant needed to have a brace on her left knee because of the thigh atrophy

to stabilize her leg and to use a three-point cane. He reviewed the report of Alexander Calderon, the applicant's vocational expert, and agreed with the conclusion. (Applicant's Exhibit 1-July 13, 2022, page 6; App. 2- May 3, 2022, page 1; and App. Ex. 3, Feb 10, 2022, page 6). The "pain" stems solely from the admitted orthopedic injuries she sustained for which Dr. Bernicker finds no apportionment. It is the pain that limits her concentration and ability to maintain an adequate work pace.

Applicant's vocational expert, Alejandro Calderon opined that the applicant's ability to compete in the open labor market continues to be "entirely eroded from an orthopedic perspective and chronic severe chronic pain symptomology, limited physical tolerances and stamina, and that her amenability to Vocational Rehabilitation Services for employment at this time remains non-feasible. (App. Ex. 5, December 2, 2021, pages 1, 2, 15, 17, 19 point 4, 21 most of page, page 22 (no apportionment to non-industrial causation; App. Ex. 6 June 9, 2023, pages 6-7 (Response)). Since his opinions are based on the reports of Dr. Thompson and Dr. Bernicker, and is limited to her limitations due to pain and the orthopedic injuries for which there is no apportionment, the applicant has met her burden on the issue of vocational feasibility.

Mark Remas, the defendant's vocational expert are not substantial evidence of vocational feasibility. Mr. Remas found that the applicant was employable in his report of May 3, 2010, Def. Ex. A This was before her multiple surgeries in 2013 and 2019 and the permanent and stationary report of Dr. Bernicker on March 2, 2021 (Jt. Ex. 1). Mr. Remas' opines in his report of June 5, 2023 (Def. Ex. B page 17) that "the applicant would have been able to work in a sedentary occupation from 2008 to 2016. This was before she had an injury involving her left shoulder and additional work restrictions. So, it is not germane to the current period. Mr. Remas outlined "nonindustrial factors of "reliance on Spanish, limited intellectual ability and limited comprehension in Spanish". His opinion was that due to Ms. Rodriguez subjective complaints combined with her non-industrial factors, Ms. Rodriguez will not return to work. Mr. Remas then finds "vocational apportionment" due to decrease in job market in electronic assembly etc. and limited literacy, language skills and general learning ability. He assigned "vocational apportionment" of 50% to these non-industrial factors. Pursuant to Nunez vocational apportionment is not valid. Therefore, the report is not substantial evidence of disability.

On November 15, 2023 (Def. Ex. C) Mr. Remas issued another report deleting his opinion on vocational apportionment due to the review of the Nunez case. In its place, Mr. Remas noted

non-industrial factors of "gap in employment (2002) to present", "lack of effort to return to work, inability to communicate in English, limited learning ability and limited educational development". He thus opined that she would be able to do sedentary work based on her industrial work restrictions. He further opined that because of Ms. Roriguez' nonindustrial factors, her access to sedentary jobs is extremely limited. Simply stated, she has the capacity to work but lacks the educational and language skills required to compete in the modern labor market". This report does not discuss her limitations with her upper extremities, her internal injuries or limitation due to pain from her orthopedic injuries.

Mr. Remas authored his final report on January 3, 2024 (Def. Ex. D). He changed none of his opinions. Taking into consideration the medical reports of Dr. Bernicker and Dr. Thomspon as well as the reports of Mr. Calderon, it is the undersigned's opinion that the reports of Mr. Calderon are better reasoned and constitute substantial medical evidence. The reports of Mr. Remas are not, and do not.

The applicant has met her burden to prove vocational non-feasibility. Therefore this contention should be denied.

CONTENTION B: EVEN IF PERMANENTLY AND TOTALLY DISABLED APPORTIONMENT SHOULD BE APPLIED TO REDUCE THE AWARD

Since the finding of the WCJ was based on the orthopedic medical reports for which there is no apportionment and the pain from those injuries the applicant is entitled to an un-apportioned award. This contention should be denied.

IV
RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied in its entirety.

DATE: July 16, 2024

LINDA F. ATCHERLEY
Workers' Compensation Judge

OPINION ON DECISION

ADJ1715757

ANTONIA RODRIGUEZ v. SAN DIEGO CONVENTION CENTER, ET AL.

STIPULATIONS:

The Stipulations of the parties as set forth in the Minutes of Hearing of December 11, 2023 are accepted as fact.

PERMANENT DISABILITY

Dr. Jeffrey Bernicker issued a multiplicity of reports including those of March 2, 2021 (Jt. Ex. 1), August 9, 2023 (Jt. Ex. 2); and October 23, 2023 (Jt. Ex. 3). In his March 2, 2021 report (Jt. Ex. 1), he found the applicant to be limited to sedentary work due to her back and left knee. He also found that the applicant had a restriction to her left upper extremity limiting her from repetitive work at or above shoulder level and lifting greater than 10 pounds below shoulder level. This report rates under the 1996 rating manual since this is a 2002 date of injury:

BACK: 12.1-70-340G-72-72 (sedentary work restriction

LEFT KNEE: 2/3(14.631-15-340G-17=17) 11 (atrophy)

LEFT SHOULDER- 7.3-5-340f-5-5 rated on no repetitive at or below shoulder level. The weight lifting is subsumed into the sedentary work restriction. Dr. Bernicker found the restrictions to be 100% related to the industrial injury.

Dr. Daniel Bresler evaluated the applicant for disability related to internal medicine issues. He issued work restrictions of no heavy lifting repeated bending and stooping which are subsumed into the sedentary work restriction. Dr. Bressler found no apportionment.

Dr. Robert Zink, Ph.D. was the psychologist AME. Dr. Zink found that the applicant had a GAF (Global Assessment of Functioning of 57). However, as this is a 2002 date of injury, the report is rated under the 8 categories of Function as follows (note Dr. Zink found 25% to non-industrial causes):

Group 1		Group II	
Ability to comprehend and follow instructions	Slight- 10%	Ability to perform complex or varied tasks	S- 3%

Ability to perform simple & repetitive tasks	V-Slight - 5%	Ability to relate to other people beyond giving & receiving instructions	S- 8%
Ability to maintain a work pace appropriate to a given workload	Slight – 10%	Ability to influence people	S-2%
		Ability to make generalizations, evaluation or decisions without immediate supervision	S-3%
		Ability to accept & carry out and responsibility to direction, control planning	S-M 4%

Total of Group one = 15 [10 + ½ 10)

Total of Group Two = 10 [8+ (3+2++3+4/5)]

Formula Group I total+ [(.45 [Group I/300)]x Group II amount]

10+[.45(10/300)] x 10) = 10 + .15 = 11.5 rounded to 13

Rating: 25% (1.4-13-340D- 10-10) 7.5 = 8%

Dr. Blake Thompson is the applicant's pain management doctor. He added an additional restriction that the applicant needed to have brace on her left knee because of the thigh atrophy to stabilize her leg and to use a three-point cane. He reviewed the report of Alexander Calderon, the applicant's vocational expert, and agreed with the conclusion. (Applicant's Exhibit 1-July 13, 2022, page 6; App. 2- May 3, 2022, page 1; and App. Ex. 3, Feb 10, 2022, page 6).

Applicant's vocational expert, Alejandro Calderon opined that the applicant's ability to compete in the open labor market continues to be "entirely eroded from an orthopedic perspective and chronic severe chronic pain symptomology, limited physical tolerances and stamina, but that her amenability to Vocational Rehabilitation Services for employment at this time remains non-feasible. (App. Ex. 5, December 2, 2021, pages 1, 2, 15, 17, 19 point 4, 21 most of page, page 22 (no apportionment to non-industrial causation; App. Ex. 6 June 9, 2023, pages 6-7 (Response)).

The defendant employed Mark Remas as their vocational expert. Mr. Remas found that the applicant was employable in his report of May 3, 2010, Def. Ex. A. This was before her multiple surgeries in 2013 and the permanent and stationary report of Dr. Bernicker. On June 5, 2023 (Def. Ex. 1), Mr. Remas completed another report. He had reviewed further medical reports and those of Mr. Calderon. Mr. Remas included the additional work restriction of Dr. Zink that the applicant could do work in a sedentary occupation that did not expose her risks of injury due to exposure to stress or concentration impairment. Mr. Remas opined on page 17 of Def. Ex A that "due to Ms. Rodriguez's continued subjective complaints combined with her non-industrial factors, it is reasonably certain Ms. Roriguez will not return to work and would not respond to or benefit from rehabilitation services…" Mr. Remas finds "vocational apportionment" due to decrease in job market in electronic assembly etc. and limited literacy, language skills and general learning ability she is limited to manually based assembly, inspection or production jobs. He then applies non-vocational apportionment of 50%. Pursuant to Nunez vocational apportionment is not valid. Therefore, the report is not substantial evidence of disability.

On November 15, 2023 (Def. Ex. C) Mr. Remas issued another report deleting his opinion on vocational apportionment due to the review of the Nunez case. In its place, Mr. Remas noted non-industrial factors of "gap in employment (2002) to present", "lack of effort to return to work, inability to communicate in English, limited learning ability and limited educational development". He thus opined that she would be able to do sedentary work based on her industrial work restrictions. He further opined that because of Ms. Roriguez' nonindustrial factors, her access to sedentary jobs is extremely limited. Simply stated, she has the capacity to work but lacks the educational and language skills required to compete in the modern labor market".

Mr. Remas authored another report on January 3, 2024 (Def. Ex. D). He changed none of his opinions.

Taking into consideration the medical reports of Dr. Bernicker and Dr. Thomspon as well as the reports of Mr. Calderon, it is the undersigned's opinion that the reports of Mr. Calderon are better reasoned and constitute substantial medical evidence.

Since the applicant's determination of vocational non-feasibility is based on the orthopedic work restrictions and her pain complaints, the applicant is entitled to an unapportioned award of 100% disability.

NEED FOR FURTHER MEDICAL TREATMENT

Based on the reports of Dr. Bernicker and Dr. Thompson there is a need for further medical treatment.

Date: June 13, 2024

LINDA F. ATCHERLEY
Workers' Compensation Judge