WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ARCEL MANNING, ***Applicant***

vs.

CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, legally uninsured and adjusted by STATE COMPENSATION INSURANCE FUND, ***Defendants***

Adjudication Number: ADJ11088696

Riverside District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in order to further study the factual and legal issues. This is our Opinion and Decision After Reconsideration.[1]

Applicant seeks reconsideration of the "Findings and Award" (F&A) issued on December 1, 2020, by the workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part, applicant sustained industrial injury during the cumulative period ending on December 14, 2017, to his cervical spine, shoulder, hands, lumbar spine, knees, kidneys, and in the form of hypertension. The WCJ further found that applicant's impairments should be combined using the Combined Values Chart (CVC) and not added, which resulted in applicant sustaining 85% permanent partial disability.

Applicant contends that the WCJ erred and should have added the impairments because the impairments to multiple body parts did not overlap one another.

We have received an answer from defendant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of the Petition for Reconsideration, the Answer, and the contents of the WCJ's Report. Based on our review of the record, as our Decision After

[1] Deputy Commissioner Schmitz was on the panel that issued the order granting reconsideration. A new panel member has been substituted in her place.

Reconsideration we will rescind the WCJ's December 1, 2020 F&A and return the matter to the trial level for further proceedings consistent with this opinion.

FACTS

Applicant worked as a correctional officer for the Department of Corrections and Rehabilitation when he sustained an admitted industrial injury through the cumulative period ending on October 14, 2017, to his lumbar spine, cervical spine, bilateral hands, bilateral knees, kidneys, and in the form of hypertensive heart disease. (Minutes of Hearing and Summary of Evidence (MOH/SOE), June 9, 2020, p. 2, lines 3-6.) This matter proceeded to trial primarily upon the issues of permanent disability and apportionment. (*Id.* at p. 3, lines 16-20.) The sole issue raised on reconsideration is whether applicant successfully rebutted the CVC.

Applicant was seen by two qualified medical evaluators (QMEs): Graham Woolf, M.D. (internal medicine), and Michael Einbund, M.D. (orthopedic surgery)

Dr. Einbund initially assigned 5% whole-person impairment (WPI) to applicant's cervical spine using the Diagnosis Related Estimate (DRE) II chart of the AMA Guides. (Joint Exhibit 8, Report of Michael Einbund, M.D. June 28, 2018, p. 11.) He assigned applicant 6% WPI to the lumbar spine, again using the DRE-II chart. (*Ibid.*) Applicant had no other orthopedic impairments. (See generally, *id.*)

In deposition, Dr. Einbund changed his impairment rating of the cervical spine to 17% based upon radiculopathy verified by imaging study, which documented stenosis of the cervical spine. (Joint Exhibit 12, Deposition of Michael Einbund, M.D., p. 7, line 25, through p. 10, line 16.) Dr. Einbund further obtained positive EMG studies verifying radiculopathy of the lumbar spine and increased the lumbar impairment to 12% using a DRE-III analysis. (Joint Exhibit 11, Report of Michael Einbund, M.D., August 12, 2019, p. 3.)

Dr. Einbund took the following history of impact upon activities of daily living:

> Due to residual pain in the neck, shoulders, wrists/hands the patient reports quite a bit of difficulty doing up buttons. He reports moderate difficulty with performing his usual work and household duties; performing his usual hobbies and recreational activities; lifting a bag of groceries to waist level; lifting a bag of groceries above his head; pushing up on his hands; preparing food; vacuuming, sweeping or raking; tying or lacing shoes; sleeping; opening a jar; carrying small suitcase in either upper extremity. He reports a little bit of difficulty driving; dressing; throwing.

> Due to residual pain in his low back and both knees the patient reports quite a bit of difficulty making sharp turns while moving quickly. He reports moderate difficulty performing his usual hobbies and recreational activities; getting in and out of a bath; putting on his shoes and socks; squatting; lifting an object from the floor, such as a bag of groceries; performing heavy activities around his home; going up and down stairs; running; hopping; rolling over in bed. He reports a little bit of difficulty performing light activities around his home; getting in and out of a vehicle; standing for one hour.

(Joint Exhibit 8, *supra* at p. 12.)

Dr. Woolf diagnosed applicant with hypertension and kidney disease. (Joint Exhibit 1, Report of Graham Woolf, M.D., March 12, 2018, p. 7.) He rated applicant's diseases jointly at 35% WPI. (*Id.* at p. 13.)

Applicant deposed Dr. Woolf, who testified as to CVC rebuttal as follows:

> Q The orthopedic QME in this manner, Dr. Michael Einbund has found impairment for Applicant's cervical spine and Applicant's lumbar spine. He was cross-examined much like you're being deposed here today. And he had the opinion that the cervical spine and the lumbar spine were completely separate and distinction body parts from the internal impairment, as you found it. And he found that from his perspective as an orthopedist opining as to the orthopedic body parts. So my question to you is are the internal body parts being involved here completely separate and distinct from the orthopedic body parts being described by Dr. Einbund?
>
> A So if you come from the first scenario that the heart disease was there first and then the kidney disease was related, it makes the kidney disease worse, then you've got a combined situation. But if the renal doctor -- if the nephrologist doctor says, Hey, these are two separate things, then you would add them. So that's how I would look at it.
>
> Q. I understand that your answering the question that I think You thought I was asking at the beginning of the question there. I'm asking you about internal versus orthopedic, not internal and internal.
>
> A. Those are added. Those are added.
>
> Q. So my question to you was the internal impairment that you've described in your reporting, is it separate and distinction from the orthopedic impairment that was done by Dr. Einbund?
>
> A. Yes.

Q. And because those impairments are separate and distinct, is it a more accurate description of Applicant's overall impairment from the standpoint of internal medicine that the impairment should be reduced one by a factor of the other using the combined values chart, or should it be added as separate and distinct and nonoverlapping and non[-]affecting each other to have the additive result of the impairment?

A. The orthopedic and the internal medicine impairment rating should be added.

Q. And the reason for that addition is that they are separate and distinct body parts?

A. They're totally separate.

Q. Would it be unfair to this Applicant to reduce one by the other?

A. Yes.

(Exhibit 7, Deposition of Graham Woolf, M.D., July 16, 2019, p. 25, line 1, through p. 26, line 21.)

Dr. Woolf restated his opinion on CVC rebuttal in supplemental reporting as follows:

> In my opinion, the WPI rating for the hypertension (which includes the kidney dysfunction) should be added to the orthopedic injuries as these are distinct, separate and non-overlapping impairments. The cardiac and kidney conditions have no bearing on the orthopedic conditions and vice versa. They are connected by the pain from the orthopedic injuries and the use of the NSAIDs but the actual impairments are not related. For example, the ADLs have been affected by the orthopedic issues which are not affected by the internal medicine issues. His weight affects the orthopedic injuries due to the excess strain on the joints whereas the weight affects the stress on the heart which contributes to the hypertension. Again, no apportionment to obesity is indicated in a peace officer with LVH.

(Joint Exhibit 5, Report of Graham Woolf, M.D., November 28, 2018, p. 5.)

DISCUSSION

In a recent en banc decision, the Appeals Board clarified the process for rebutting the CVC.

> One element of the PDRS is the Combined Values Chart (CVC). The purpose of the CVC is described within the PDRS, which cites to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition (2001) (AMA Guides), which is adopted and incorporated for purposes of rating permanent disability under the 2005 PDRS. (Lab. Code, §§ 4660, 4660.1; Hoch, Andrea, Schedule for Rating Permanent Disabilities, (2005), p. 1-11; AMA Guides, pp. 9-10.) In sum, impairment under the AMA Guides is designed to reflect how a disability affects a person's activities of daily living ("ADLs") (self-care, communication, physical activity, sensory function, non-specialized hand activities, travel, sex, and sleep). (AMA Guides, pp. 2-9.) CVC "values are derived from the formula A + B(1-A) = combined value of A and B, where A and B are the decimal equivalents of the impairment ratings." (AMA Guides, p. 604.)
>
> Impairments to two or more body parts are usually expected to have an overlapping effect upon the activities of daily living, so that generally, under the AMA Guides and the PDRS, the two impairments are combined to eliminate this overlap.

(*Vigil v. County of Kern*, 2024 Cal. Wrk. Comp. LEXIS 23 at *7-8, (Appeals Board en banc).)

> The Combined Values Chart (CVC) in the Permanent Disability Ratings Schedule (PDRS) may be rebutted and impairments may be added where an applicant establishes the impact of each impairment on the activities of daily living (ADLs) and that either:
>
> (a) there is no overlap between the effects on ADLs as between the body parts rated; or
>
> (b) there is overlap, but the overlap increases or amplifies the impact on the overlapping ADLs.

(*Id.* at *13.)

Here, applicant's deposition questioning appears to focus on rebutting the CVC by showing no overlap of ADLs; however, instead of discussing the issue of ADLs with Dr. Woolf, applicant instead focused his questioning on the issue of body parts. The Appeals Board noted that such an analysis is a significant point of confusion in CVC rebuttal: "We believe that one significant point

of confusion on the issue of overlap is that the analysis should focus on overlapping **ADLs**, not body parts." (*Id*. at *9 (emphasis in original).)

The parties proceeded to trial on an incorrect legal theory. Throughout the reporting in this matter the evaluators failed to establish whether the impact upon applicant's ADLs overlapped. If applicant's ADL impacts do overlap, the evaluators failed to opine on whether there was a synergistic impact upon the ADLs. In deposition, applicant focused on whether the body parts rated were distinct. That issue is irrelevant.

The overarching goal of rating permanent impairment is to achieve accuracy. (*Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd*. (*Almaraz-Guzman*) (2010) 187 Cal.App.4th 808, 822 [75 Cal.Comp.Cases 837].) The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd*. (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) The Appeals Board has a constitutional mandate to "ensure substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (Id. at p. 404.) The preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2003) 67 Cal.Comp.Cases 138 (Appeals Board en banc).)

Given our very recent holding in *Vigil*, which clarified the legal standard for rebutting the CVC table, and given that the parties litigated this issue using an incorrect legal standard, the prudent course of action is to return this matter to the trial level for further development of the record. Specifically, the parties need to address the appropriate standard for CVC rebuttal as outlined in *Vigil*, *supra*.

Accordingly, as our Decision After Reconsideration we will rescind the WCJ's December 1, 2020 F&A and return this matter to the trial level for further development of the record.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the December 1, 2020 Findings and Award is **RESCINDED.**

IT IS FURTHER ORDERED that this matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 29, 2024

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

ARCEL MANNING
WHITING, COTTER & HURLIMANN
STATE COMPENSATION INSURANCE FUND, LEGAL

EDL/mc

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