WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DEANA JOHNSON, *Applicant*

vs.

DAVITA HEALTH CARE PARTNERS, INC.;
AMERICAN HOME ASSURANCE COMPANY,
administered by
SEDGWICK CLAIMS MANAGEMENT SERVICES, INC., *Defendants*

Adjudication Number: ADJ12953785

Sacramento District Office

OPINION AND ORDER
GRANTING PETITION
FOR RECONSIDERATION
AND DECISION
AFTER RECONSIDERATION

Applicant seeks reconsideration of the "Rulings on Evidence, Amended Findings of Fact, Awards & Orders; Opinion on Decision" (F&A) issued on June 6, 2024, by the workers' compensation administrative law judge (WCJ).

The WCJ found, in pertinent part, that applicant sustained a cumulative industrial injury to her bilateral wrists and hands, which resulted in 26% permanent partial disability after apportionment.

Applicant argues that the WCJ erred because applicant successfully rebutted the Permanent Disability Ratings Schedule (PDRS) to show that she is permanently totally disabled because the effect of her work restrictions precludes her from competing on the open labor market. Applicant further argues that defendant failed its burden of proof on apportionment.

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, we will grant

reconsideration, rescind the WCJ's June 5, 2024 F&A, and substitute a new F&A, which finds that defendant did not meet its burden of proof on apportionment and that applicant's injury caused 35% permanent disability. We will issue an award of 35% permanent partial disability.

FACTS

Applicant worked as a registered nurse when she sustained an admitted industrial injury through the cumulative period ending on March 28, 2019, to her bilateral wrists and hands. (Minutes of Hearing and Summary of Evidence, May 8, 2024, p. 2, lines 5-10.) Applicant was examined by agreed medical evaluator (AME) Joel Weddington, M.D., who authored six reports in evidence and was deposed twice. (Joint Exhibits 1 through 8.)

Dr. Weddington diagnosed applicant with CMC joint degenerative arthritis in her bilateral upper extremities. (Joint Exhibit 8, Report of Joel Weddington, M.D., January 7, 2021, p. 14.) He initially did not find applicant permanent and stationary and recommended surgical intervention. (See generally, *id*.)

Applicant's attempts to obtain surgery were reported as follows:

> At the time I saw the patient she reported that she was hesitant about surgery because she knows it will preclude her from her current job, which she loves, and that she was not interested in the surgery recommended by Dr. Goldberg because she was hoping to have a rare procedure in the form of a BioPro CMC implant, which is only done by a few doctors in California, including Dr. Jones. A second opinion requested with Dr. Jones had been denied.

(Joint Exhibit 7, Report of Joel Weddington, M.D., March 2, 2021, p. 1.)

It also appears that applicant's attempts to proceed with surgery were hampered by her surgeon's retirement and the COVID-19 pandemic. (Joint Exhibit 2, Deposition of Joel Weddington, M.D., p. 13, June 3, 2021, lines 2-17.)

Dr. Weddington ultimately found applicant permanent and stationary in the absence of surgery. (Joint Exhibit 7, *supra* at p. 5.) He assigned impairment to the upper extremities of 9% whole-person impairment (WPI) to the right and 8% WPI to the left. (Joint Exhibit 2, supra at p. 24, lines 3-21.) This was based on loss of function due to arthritis with a pain add-on in each wrist. (*Ibid*.) Dr. Weddington found a synergistic amplification of applicant's disabilities between the right and left hands and opined that the disabilities should be added and not combined. (Joint Exhibit 4, Report of Joel Weddington, M.D., June 27, 2023, p. 16.)

Dr. Weddington commented upon apportionment as follows:

> In my opinion approximately 75% of the disability in the bilateral wrists/thumbs is due to the industrial injury and approximately 25% is due to natural progression. CMC degeneration is common as individuals age, more in women than men, and can become severe without injuries or work exposure. In this case it appears that work hastened the progression of naturally occurring degeneration in this joint and acted as a significant aggravating factor. This fits my clinical experience with this condition and is supported by literature (previously reviewed). This opinion is to a reasonable degree of medical probability.

(Joint Exhibit 7, *supra* at p. 5.)

Dr. Weddington assigned industrial work restrictions of: "No heavy or repetitive gripping, grasping, or torquing with the hands." (*Ibid*.) Dr. Weddington reviewed the functional capacity evaluation (FCE) of Jagdeep Garcia, MPT and criticized it as follows:

> At the time of my evaluation on 1.7.21, the patient had moderately painful bilateral thumb arthritis which was stable and associated with fairly well-preserved grip strength and ROM. The FCE results I reviewed now reflect the thumb impairments I foW1d but also go beyond those findings to describe functional losses in multiple body parts (e.g., lower extremities and shoulders) and with activities (listed above) that are not expected to be significantly limited by CMCJ pain alone. I reconsidered my impairment ratings and feel that they remain accurate in reflecting the residual permanent effects of the work injury. Additional functional losses described in this FCE report appear to be associated with nonindustrial factors and should be addressed by the PMD on a nonindustrial basis, in my clinical judgment. I do agree with the FCE evaluator that she is unable to return to her regular work and this is medically reasonably and probably due at least in part to her industrial injury.

(Joint Exhibit 5, Report of Joel Weddington, M.D., May 31, 2022, p. 2.)

Dr. Weddington explained further in deposition as to why the FCE was not accurate. (See Joint Exhibit 1, Deposition of Joel Weddington, M.D., June 8, 2023, pp. 8-9.) The FCE limited applicant's lifting to 3 or 4 pounds, to which Dr. Weddington explained:

> Well, the patient needs a clinical re-evaluation, but I can be a little more specific by saying at my examination she had a 20- to 30-pound grip strength on each side and she had normal manual muscle testing strength. Those findings alone cause these material handling abilities to appear to be on the low end.

(*Id*. at p. 9 lines 2-8.)

Applicant was re-evaluated by Dr. Weddington who did not change his prior opinions on disability or apportionment. (See generally Joint Exhibit 4, *supra*.)

Applicant produced vocational evidence, *based upon the FCE*, that she was unable to rehabilitate and unable to return to the open labor market. (See generally, Applicant's Exhibits 1 and 2.) Defendant produced vocational evidence based upon the AME's work restrictions, which indicate that applicant is amenable to vocational rehabilitation. (Defendant's Exhibit A, p. 24.)

AME Dr. Weddington reviewed the reporting of the two vocational experts and opined as follows:

> After reviewing all of the above listed medical evidence, I have no change of opinions from those expressed in my AME reevaluation report. I continue to feel that Ms. Johnson is amenable to vocational rehabilitation and that she continues to be permanent and stationary.
>
> Mr. Simon's findings and conclusions appear to be medically appropriate and well-reasoned, in my opinion. I find no disagreement with them. He reported that medical evaluators as well as an in-depth functional capacity evaluation speak directly to her ability to minimally function at least at a sedentary level of exertion, and went on to state that with her (Ms. Johnson's) nursing expertise opens up a plethora of additional work assignments she could potentially engage in. He noted that she was able to continue for two years post injury in her part-time job as a telephone operator, leaving in 2021 due to cutbacks at that time due to Covid.
>
> In my 6.27.23 report I addressed Ms. Petrini's Vocational Rehabilitation Evaluation in detail and disagreed with her finding that "Ms. Johnson is not amenable to rehabilitation and is not suitable to compete in the open labor market. She has sustained a 100% loss of future earning capacity, labor market access and amenability to rehabilitation." I find no basis to change or modify that disagreement.
>
> I also stated in that report: "I did not see a discussion by Ms. Petrini on why her conclusions were more advanced than mine and seemingly out of step with those of other previous providers who found Ms. Johnson to have the ability to return to work in a less demanding capacity.

(Joint Exhibit 3, Report of Joel Weddington, M.D., September 11, 2023, pp. 4-5.)

DISCUSSION

To properly analyze whether applicant is permanently totally disabled, one must understand how permanent total disability rebuttal works.

As our Supreme Court has explained:

> Permanent disability is understood as the irreversible residual of an injury. (Citation.) A permanent disability is one which causes impairment of earning capacity, impairment of the normal use of a member, or a competitive handicap in the open labor market. (Citation.) Thus, permanent disability payments are intended to compensate workers for both physical loss and the loss of some or all of their future earning capacity.

(*Brodie v. Workers' Comp. Appeals Bd*. (2007) 40 Cal. 4th 1313, 1320, 57 Cal. Rptr. 3d 644, 156 P.3d 1100 (Brodie).)

The court in *Ogilvie* explained that the PDRS is rebuttable.

> Thus, we conclude that 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 v. Workers' Comp. Appeals Bd*., 197 Cal. App. 4th 1262, 1277, 129 Cal. Rptr. 3d 704.)

The standard for finding permanent total disability via *Ogilvie* rebuttal follows:

> The proper legal standard for determining whether applicant is permanently and totally disabled is whether applicant's industrial injury has resulted in applicant sustaining a complete loss of future earning capacity. (§§ 4660.1, 4662(b); see also 2005 PDRS, pp. 1–2, 1–3.) …
>
> A finding of permanent total disability in accordance with the fact (that is complete loss of future earnings) can be based upon medical evidence, vocational evidence, or both. Medical evidence of permanent total disability could consist of a doctor opining on complete medical preclusion from returning to work. For example, in cases of severe stroke, the Appeals Board has found that applicant was precluded from work based solely upon medical evidence. (See i.e., *Reyes v. CVS Pharmacy*, (2016) 81 Cal. Comp. Cases 388 (writ den.);

> see also, *Hudson v. County of San Diego*, 2010 Cal. Wrk. Comp. P.D. LEXIS 479.)
>
> A finding of permanent total disability can also be based upon vocational evidence. In such cases, applicant is not precluded from working on a medical basis, per se, but is instead given permanent work restrictions. Depending on the facts of each case, the effects of such work restrictions can cause applicant to lose the ability to compete for jobs on the open labor market, which results in total loss of earning capacity. Whether work restrictions preclude applicant from further employment requires vocational expert testimony.
> * * *
> … [P]er *Ogilvie* and as described further in *Dahl*, the non-amenability to vocational rehabilitation must be due to industrial factors. (*Contra Costa County v. Workers' Comp. Appeals Bd.*, (*Dahl*) 240 Cal. App. 4th 746, 193 Cal. Rptr. 3d 7.)

(*Soormi v. Foster Farms*, 2023 Cal. Wrk. Comp. P.D. LEXIS 170, *11-12, citing *Wilson v. Kohls Dep't Store*, 2021 Cal. Wrk. Comp. P.D. LEXIS 322, *20–23.)

The parties presumably choose an AME because of the AME's expertise and neutrality. (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114].) The Appeals Board will follow the opinions of the AME unless good cause exists to find his opinion unpersuasive. (*Ibid*.) Here, the AME found that applicant's FCE evaluation was not accurate and included consideration of non-industrial disability. We agree with the well-reasoned opinion of the AME. Applicant's vocational expert reporting rests upon the FCE opinion, which is not substantial medical evidence. Accordingly, applicant failed to rebut the PDRS.

Labor Code section 4663 requires any report addressing permanent disability to also address apportionment of disability. Defendant carries the burden of proof on apportionment. (§ 5705.) Apportionment of permanent disability must address causation of disability and must constitute substantial evidence. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 611, 620-621 (Appeals Board en banc).) To constitute substantial 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." (*Id*. at 621.) Causation of disability is not to be confused with causation of injury. (*Id*. at 611.)

Next, applicant argues that the apportionment opinion of the AME does not constitute substantial medical evidence. We agree. The AME's apportionment opinion rests upon the generalization that applicant's form of arthritis is common as people age. Even accepting this fact to be true, that does not explain how and why ***applicant's*** arthritis is, in-part, age related. The AME's apportionment opinion rests upon assumption and conclusions drawn solely from general statistics, and not on the specific facts of this case. An evaluator is free to explain generalizations of medicine as the starting point of an analysis, but it cannot also be the end point. The evaluator must detail the specific facts of the case that support why the generalized principle applies to the case at bar. The AME did not do this. Accordingly, the AME's apportionment opinion is not substantial medical evidence and defendant did not meet its burden of proof on apportionment.

Applicant's disability rating is as follows:

Left Wrist

16.04.02.00 - 8 - [1.4]11 - 311G - 13 = 16%

Right Wrist

16.04.02.00 - 9 - [1.4]13 - 311G - 15 = 19%

As applicant rebutted the Combined Values Chart, an issue no party has appealed, applicant's disabilities are added: 19% + 16% = 35% permanent disability.

Applicant's disability rating does not require the assistance of a DEU rater in this case. (See *Blackledge v. Bank of America* (2010), 75 Cal. Comp. Cases 613, 624-625 (Appeals Board en banc).)

Accordingly, we will grant reconsideration and as our Decision After Reconsideration we will rescind the WCJ's June 5, 2024 F&A, and substitute a new F&A, which finds that defendant failed its burden of proof on apportionment and that applicant sustained 35% permanent disability, and we award 35% permanent disability.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the June 6, 2024 F&A is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the June 6, 2024 F&A is **RESCINDED** with the following **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Deana Johnson who was fifty-seven (57) years old on the date of injury, while employed at Sacramento, California as a Registered Nurse II, Occupational Group Number 311, by DaVita Health Care Partners, Inc., during the cumulative period ending on March 28, 2019, sustained an injury arising out of and in the course of her employment to her bilateral wrists and hands.

2. At the time of injury the employer was insured by American Home Assurance Company.

3. Applicant's average weekly wage was $1,917.80 at the time of injury.

4. Applicant requires further medical care to cure or relieve from the effects of the industrial injury.

5. Defendant failed its burden of proof to show apportionment of applicant’s permanent disability.

6. Applicant sustained 35% permanent partial disability as a result of her industrial injury.

7. Applicant’s attorney performed services reasonably valued at 15% of the benefits awarded herein.

AWARD

AWARD IS MADE in favor of DEANA JOHNSON against AMERICAN HOME ASSURANCE COMPANY of:

a. Future medical treatment reasonably required to cure or relieve from the effects of the industrial injury.

b. Permanent partial disability of 35%, which is payable at the rate of $290.00 per week for 166.00 weeks beginning on March 2, 2021, for a total of $48,140.00, less credits for permanent disability advances paid on account thereof, and less attorney's fees of $7,221.00, payable to Eason & Tambornini, which is to be held in trust pending resolution of the lien of applicant's former attorney Paul Saltzen.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 22, 2024

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

DEANA JOHNSON
EASON & TAMBORNINI
WITKOP LAW

EDL/mc

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