WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

DOUA XIONG, *Applicant*

vs.

LINVATEC/CONMED;
TRAVELERS PROPERTY CASUALTY COMPANY, *Defendants*

Adjudication Number: ADJ8574617; ADJ9368439
Santa Barbara District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the May 10, 2024 Amended Joint Findings and Award (F&A), wherein the workers' compensation administrative law judge (WCJ) found that in Case No. ADJ8574617, applicant, while employed as an assembler on May 11, 2011, sustained industrial injury to her head. The WCJ found in relevant part that applicant sustained 5 percent permanent disability after apportionment to nonindustrial factors. The WCJ further found in Case No. ADJ9368439 that applicant, while employed as an assembler from November 26, 2011 to November 26, 2012, sustained industrial injury to her bilateral wrists and hands in the form of carpal tunnel syndrome and sleep [disorder]. The WCJ found in relevant part that applicant sustained 31 percent permanent disability after apportionment to nonindustrial factors.

Applicant contends that the WCJ's decision does not adequately disclose the evidentiary basis for the conclusions reached. Applicant further contends that the medical and vocational evidence supports a finding that she is permanently and totally disabled, without apportionment.

We have not received an answer from any party. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be granted to award permanent disability without apportionment, but denied as to applicant's assertions of permanent and total disability.

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons discussed below, we will grant the petition and award permanent partial disability without apportionment.

FACTS

Applicant has two pending claims of injury. In Case No. ADJ8574617, applicant claimed injury to her head and in the form of sleep disorder while employed as an assembler by defendant Linvatec/Conmed on May 11, 2011.

In Case No. ADJ9368439, applicant claimed injury to her bilateral wrists and hands in the form of carpal tunnel syndrome, thoracic outlet syndrome, bilateral upper extremities, neck, and in the form of sleep disorder while employed as an assembler by defendant Linvatec/Conmed from November 26, 2011 to November 26, 2012.

The parties have selected Robert Shorr, M.D., as the Qualified Medical Evaluator (QME) in neurology; Joseph Boban, M.D., as the QME in ophthalmology; and James D. Mays, M.D., as the QME in orthopedic medicine. Applicant has also obtained medical treatment and reporting from primary treating physician (PTP) Michael J. Behrman, M.D.

In addition, applicant has obtained the vocational expert reporting of Enrique N. Vega, while defendant has obtained vocational expert reporting from Robert Liebman.

The matter has been the subject of multiple trial settings, with the initial trial proceedings held on September 5, 2018.

On December 21, 2018, the WCJ appointed Peter M. Newton, M.D. as the regular physician pursuant to Labor Code[1] section 5701.

The parties proceeded to trial most recently on November 16, 2023, and in Case No. ADJ8574617, framed for decision in relevant part the issues of parts of body, specifically sleep, permanent disability and apportionment. In Case No. ADJ9368439, the parties further framed for decision in relevant part issues of parts of body, specifically thoracic outlet syndrome, bilateral upper extremities, neck and sleep, as well as permanent disability and apportionment. The WCJ heard the testimony of applicant, and ordered the matter submitted for decision.

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

On February 6, 2024, the WCJ vacated the order submitting, noting the need for clarification of QME Dr. Shorr's apportionment opinion.

On March 5, 2024, the WCJ determined that the record contained sufficient evidence responsive to the issue of apportionment between the two injuries, and ordered the matter submitted for decision. (Minutes of Hearing (Further) and Orders, dated March 5, 2024, at p. 2:9.)

On May 10, 2024 the WCJ issued the F&A. Therein, the WCJ determined that in Case No. ADJ8574617, applicant had sustained 5 percent permanent partial disability after apportionment to nonindustrial factors. In Case No. ADJ9368439, the WCJ determined that applicant sustained 31 percent permanent partial disability after apportionment to nonindustrial factors.

Applicant's Petition contends the WCJ's decision fails to comply with section 5313 because it does not adequately describe grounds upon which the court's determination was made. (Petition, at p. 2:8.) Applicant also asserts that QME Dr. Shorr's apportionment opinions are conclusory and invalid, and that she is entitled to an award of permanent and total disability based on the findings of vocational expert Mr. Vega. (*Id.* at p. 1:27.)

DISCUSSION

We begin our discussion by addressing applicant's contention that she is entitled to unapportioned awards in both pending cases because the apportionment analyses of Dr. Shorr do not constitute substantial medical evidence.

Section 4663 provides, in relevant part, that apportionment of permanent disability shall be based on causation. (Lab. Code, § 4663(a).) The statute further requires the evaluating physician to "make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries." (Lab. Code, § 4663(c).) Pursuant to section 4663(c) and section 5705, applicant has the burden of establishing the approximate percentage of permanent disability directly caused by the industrial injury, while defendant has the burden of establishing the approximate percentage of permanent disability caused by factors other than the industrial injury. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 612-613 [2005 Cal. Wrk. Comp. LEXIS 71] (Appeals Board en banc) (*Escobedo*).)

In order to comply with section 4663, a physician's report in which permanent disability is addressed must also address apportionment of that permanent disability. (*Escobedo, supra*, at p. 611.) However, the mere fact that a physician's report addresses the issue of causation of permanent disability and makes an apportionment determination by finding the approximate respective percentages of industrial and non-industrial causation does not necessarily render the report substantial evidence upon which we may rely. Rather, the report must disclose familiarity with the concepts of apportionment, describe in detail the exact nature of the apportionable disability, and *set forth the basis for the opinion that factors other than the industrial injury at issue caused permanent disability.* (*Id.* at p. 621.)

Our decision in *Escobedo* summarized the minimum requirements for an apportionment analysis as follows:

> [T]o be substantial evidence on the issue of the approximate percentages of permanent disability due to the direct results of the injury and the approximate percentage of permanent disability due to other factors, 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.
>
> For example, if a physician opines that approximately 50% of an employee's back disability is directly caused by the industrial injury, the physician must explain how and why the disability is causally related to the industrial injury (e.g., the industrial injury resulted in surgery which caused vulnerability that necessitates certain restrictions) and how and why the injury is responsible for approximately 50% of the disability. And, if a physician opines that 50% of an employee's back disability is caused by degenerative disc disease, the physician must explain the nature of the degenerative disc disease, *how* and *why* it is causing permanent disability at the time of the evaluation, and *how* and *why* it is responsible for approximately 50% of the disability.
>
> (*Ibid.*, italics added.)

Thus, a physician's apportionment analysis that fails to describe *how* and *why* nonindustrial factors are causally related to the industrial injury, and *how* and *why* those factors are presently responsible for the applicant's residual permanent disability may not constitute substantial medical evidence.

Here, neurology QME Dr. Shorr has identified permanent disability resulting from both applicant's specific and cumulative injuries. With respect to the specific injury of May 11, 2011,

Dr. Shorr has indicated that applicant sustained a mild traumatic head injury which aggravated pre-existing migraine headaches. (Ex. 18, Report of Robert Shorr, M.D., dated April 4, 2017, at p. 63.) With respect to apportionment, Dr. Shorr opined, "[i]n my best clinical judgment at least 35 percent of the current headache impairment will be apportioned to pre-existing headache condition with 65 percent apportioned to the industrial injury of May 11, 2011." (*Id.* at p. 69.) However, the QME's apportionment analysis does not offer any explanation of why 65 percent of applicant's residual impairment was caused by industrial factors, while the remaining 35 percent was caused by nonindustrial factors, or why the physician identified 35 as the appropriate nonindustrial percentage. In addition, the QME's opinion fails to explain how each nonindustrial factor caused applicant's disability, and instead refers to a "past history" of stress-related headaches rather than a specific mechanism or pathology.

Similarly, and with respect to applicant's cumulative injury from November 26, 2011 to November 26, 2012, Dr. Shorr opined that applicant's industrial injury resulted in significant insomnia, related to the pain and paresthesia of her upper extremities. (Ex. 18, Report of Robert Shorr, M.D., dated April 4, 2017, at p. 66.) Dr. Shorr opined that 20 percent of applicant's permanent disability was secondary to the diabetes mellitus, while 80 percent was deemed secondary to continuous trauma. (*Id.* at p. 70.) However, the QME's analysis does not explain how the diabetes mellitus is *presently* causing 20 percent of the impairment arising out of applicant's sleep disorder. To the extent that the QME opines that applicant was previously noncompliant with treatment recommendations for her diabetes, we observe that report does not explain with specificity how the applicant was not compliant with treatment recommendations, or how the alleged past noncompliance is presently translating into permanent impairment. (*Escobedo, supra*, at p. 621.)

Accordingly, the QME's opinion does not adequately explain how and why the identified factors of apportionment are presently causing 35 percent of applicant's residual permanent headache disability, or 20 percent of applicant's sleeping disorder related disability. (See *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741, 751 [2023 Cal. Wrk. Comp. LEXIS 30] (Appeals Board en banc) (*Nunes I*); *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 894 [2023 Cal. Wrk. Comp. LEXIS 46] (*Nunes II*); *Escobedo v. Marshalls, supra,* 70 Cal.Comp.Cases 604, 611.) Accordingly, we find that the apportionment opinions expressed by the QME do not constitute substantial medical evidence and that applicant

is entitled to an unapportioned award. (*Nunes II, supra,* 88 Cal.Comp.Cases 894, 898 ["It is axiomatic that in those instances where the WCJ determines that no evaluating physician has identified valid legal apportionment, applicant is entitled to an unapportioned award"].)

We will therefore grant reconsideration and amend the F&A to reflect applicant's entitlement to an unapportioned award. The WCJ's Opinion on Decision provides the ratings for applicant's headaches at 8 percent disability before apportionment. (Opinion on Decision, at p. 1.) With respect applicant's industrial cumulative injury, the Report also describes the addition of the left and right wrist disabilities for 20 percent impairment, which is then combined with the unapportioned 17 percent sleep impairment, for a final rating of 34 percent permanent disability. (Report, at p. 4.) Accordingly, we will amend the WCJ's award to reflect an unapportioned award of 8 percent permanent disability for the specific injury of May 11, 2011, and 34 percent permanent disability for the cumulative injury from November 26, 2011 to November 26, 2012.

Applicant's Petition also contends that she is permanently and totally disabled pursuant to the reporting of vocational expert Enrique Vega. (Petition, at p. 3:10.) Applicant contends that the reporting of Mr. Vega rebuts the Permanent Disability Rating Schedule because applicant is not feasible for vocational rehabilitation. (*Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262 [76 Cal.Comp. Cases 624]; *Contra Costa County v. Workers' Comp. Appeals Bd. (Dahl)* (2015) 240 Cal.App.4th 746 [80 Cal.Comp.Cases 1119]; *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234 [48 Cal.Comp.Cases 587].) However, the vocational expert relies on work restrictions and functional limitations beyond those identified by the Qualified Medical Evaluators and the regular physician to arrive at an "adjusted post-injury vocational profile." (Ex. 26, Report of Enrique Vega, M.S., dated June 21, 2021, at p. 9.) This adjusted vocational profile in turn forms the basis of the expert's determination that applicant is not feasible for vocational retraining. (*Id.* at p. 11.) In addition to exceeding the restrictions described in the medical record, the vocational expert does not persuasively explain how and why applicant's permanent work restrictions preclude her return in any capacity to the labor market. Rather, the expert's employability analysis concludes that applicant's post-injury aptitudes and abilities render her vocational profile to be "uncompetitive." The reporting does not adequately describe the expert's analysis of why applicant is not feasible for vocational rehabilitation. Based on the conclusory nature of the analysis, and the expert's reliance on functional limitations and work restrictions beyond those described in the medical record, we are not persuaded that applicant has

rebutted the presumptively correct scheduled rating. (*Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262 [76 Cal.Comp. Cases 624].)

In summary, we agree with the applicant that the evidentiary record does not establish valid apportionment to nonindustrial factors. We therefore conclude that applicant is entitled to an unapportioned award in each case. However, because applicant's vocational expert reporting does not establish that she is not feasible for vocational rehabilitation, applicant has not successfully rebutted the scheduled rating. Accordingly, we will grant applicant's petition and amend the Findings of Fact and Joint Award to reflect an unapportioned award of permanent partial disability as well as commensurate attorney fees.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of May 10, 2024 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of May 10, 2024 is **AFFIRMED,** except that is **AMENDED** as follows:

AMENDED JOINT FINDINGS OF FACT

(ADJ8574617)
(May 11, 20211)

…

7. Applicant has sustained permanent disability of 8 percent, equivalent to 24.00 weeks of indemnity payable at the rate of $230.00 per week, plus the 15 percent statutory increase set forth in Labor Code section 4658(d), less attorney fees as provided below, payable forthwith.
8. There is no legal basis for apportionment.

…

11. Applicant's attorney is entitled to attorney fees of $907.84 to be commuted from the final payments of permanent disability awarded herein.

ADJ9368439
(Nov. 26, 2011 – Nov. 26, 2012)

…

20. Applicant has sustained permanent disability of 34 percent, equivalent to 159.00 weeks of indemnity payable at $230.00 per week, plus the 15 percent statutory increase as forth in Labor Code section 4658(d), less attorney fees provided below, payable forthwith.
21. There is no legal basis for apportionment.

…

24. Applicant's attorney is entitled to 15 percent of any accrued, unpaid temporary disability awarded herein. Applicant's attorney is further entitled to attorney fees of $6,263.97 to be commuted from the final payments of permanent disability awarded herein.

AMENDED JOINT AWARD

…

b. Permanent disability as provided in Finding number 7 and 20;

…

f. Attorney fees as provided in Finding number 11 and 24.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

KATHERINE A. ZALEWSKI, CHAIR
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 15, 2024

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

DOUA XIONG
GHITTERMAN, GHITTERMAN & FELD
WOOLFORD ASSOCIATES

SAR/abs

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