

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

HORACIO PEREZ, *Applicant*

vs.

**BAKER HUGHES, INC.; ACE AMERICAN INSURANCE COMPANY,
administered by GALLAGHER BASSETT, *Defendants***

**Adjudication Number: ADJ10714339
Bakersfield 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.

Applicant seeks reconsideration of the “Rulings on Evidence, Findings of Fact, Awards and Order; Opinion on Decision” (F&A) issued on December 15, 2021, by the workers’ compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that applicant was not 100% permanently totally disabled and instead awarded 90% permanent partial disability with a corresponding life pension.

Applicant argues that the WCJ erred in not following the opinions of applicant’s vocational expert because the opinions constituted substantial evidence to show that applicant is not amenable to vocational rehabilitation and has lost the ability to compete on the open labor market.

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 and for the reasons discussed below, as our Decision After Reconsideration we will rescind the WCJ’s December 15, 2021 F&A and return to the matter to the trial level for further development of the record.

FACTS

Applicant worked for defendant as a welder / mechanic helper when he sustained industrial injury to his right thumb and psyche on March 22, 2016. (Minutes of Hearing and Summary of Evidence, October 27, 2021, p. 2, lines 3-10.) Applicant claimed further injury in the form of right segmental dystonia extrapyramidal movement disorder and tremors. (*Ibid.*)

This matter primarily proceeded to trial on multiple issues, however, the sole issue upon reconsideration is applicant's level of permanent disability. (*Id.* at p. 2, line 40, through p. 3, line 20.) Applicant claims permanent total disability through vocational expert reporting. (*Id.* at p. 3, lines 11-14.)

1. Medical Evidence

Applicant was seen by three qualified medical evaluators (QMEs) in the specialties of orthopedic surgery, neurology, and psychology.

Dr. Robert Shorr, M.D., evaluated applicant in neurology and authored two reports in evidence. (Applicant's Exhibits 8 and 10.) Dr. Shorr took the following history of injury:

Mr. Perez reports that, on March 22, 2016, he and a co-worker were assigned to cut a coiled tubing spooler. The co-worker was operating the forklift and lifting the spooler so the claimant could put a 4x4 wooden block under the spooler. When the forklift went back or the spooler came forward it caught his right thumb. The claimant suffered a crush injury to the right thumb. The claimant was taken to Central Valley Occupational Medical Group, where he was seen by Dr. Freeseemann. Dr. Freeseemann referred the claimant to a hand surgeon, Alarick K Yung, M.D.

The claimant was taken to surgery the following day and had an open reduction and Internal fixation of the thumb. This included an amputation of the tip of the thumb. The claimant had a postoperative course of occupational/physical therapy. The claimant reports that he did have an increase in strength but the pain in the right upper extremity persisted. Because of severe hypersensitivity of the right thumb, Dr. Yung took the claimant back to surgery on January 4, 2017, for removal of digital neuromas.

The claimant had another course of occupational/physical therapy, approximately 25 visits, after the second surgery.

* * *

The claimant came under the care of Alexander P Soneru, M.D., another hand surgeon. The claimant was taken back to surgery by Dr. Soneru on January 25, 2018 for another excision of the neuroma in the right thumb. Following the thumb surgery, the claimant had postoperative occupational/physical therapy, approximately 18 visits, after this 3rd surgery.

The claimant has had pain management evaluation and treatment.

The claimant developed right hand tremors.

(Applicant's Exhibit 8, Report of QME Robert Shorr, M.D., March 12, 2019, pp. 2-3.)

Dr. Shorr assigned work restrictions, which precluded applicant's use of the right hand. (*Id.* at p. 39.) He assigned 50% whole-person impairment (WPI) due to applicant's loss of use of the right hand. Applicant is right-hand dominant. (*Ibid.*) Dr. Shorr found applicant's impairments to be 100% industrial. (*Id.* at p. 41.)

Dr. Shorr re-evaluated applicant and then modified his assignment of impairment to 25% WPI explaining as follows:

Since my last examination, the claimant has improved somewhat in that he can use the right upper extremity for some activities, such as showering. The claimant still is not able to use the right upper extremity for eating, gripping, grasping or any fine-finger-manipulation-type activities. The claimant can do some other self-care activities.

Although I agree with Dr. Brouman's findings and conclusions about the anatomical rating, I do [not] see how, given the sensory distortions and tremor/dystonia, that he will be able to use the right hand for any significant activities, such as gripping, grasping, torquing, torqueing, (*sic*) and fine-finger manipulations. The claimant is not able to use his dominant right hand for eating.

(Applicant's Exhibit 10, Report of QME Robert Shorr, M.D., June 25, 2020, p. 20.)

Dr. Shorr continued to opine that applicant was precluded from using the right upper extremity for work, but was capable of work with the left hand. (*Id.* at p. 21.)

Dr. Steven Brouman, M.D., evaluated applicant in orthopedic surgery and authored four reports in evidence. (Joint Exhibits 1 through 4.) Dr. Brouman assigned 19% WPI to the right hand including a 3% pain add-on. (Joint Exhibit 2, Report of Dr. Steven Brouman, M.D., October 11, 2017, pp. 16-17.) He assigned work restrictions as follows: "Regarding the right thumb, he should avoid heavy lifting over 15 pounds, for gripping, grasping, pushing, pulling,

squeezing, twisting or torquing of over 15 pounds of force.” (*Id.* at p. 17.) Dr. Brouman also found applicant’s impairments to be 100% industrial. (*Id.* at p. 18.)

Applicant was seen by QME Bobbie McDonald, Psy.D., who evaluated applicant’s psychological complaints and authored two reports in evidence. (Joint Exhibits 5 and 8.) Dr. McDonald diagnosed applicant with “Adjustment Disorder with Anxiety and Depressed Mood, Chronic.” (Joint Exhibit 8, Report of QME Bobbie McDonald, Psy.D., July 27, 2018, p. 6.) Dr. McDonald assigned a Global Assessment of Functioning score of 66. (Joint Exhibit 9, Report of QME Bobbie McDonald, Psy.D., June 5, 2019, p. 6.) Dr. McDonald assigned no work restrictions on a psychological basis. (*Ibid.*)

2. Vocational Evidence

Applicant retained vocational expert Paul Stanford, M.S., who authored four reports in evidence. (Applicant’s Exhibits 1 through 4.) Mr. Stanford noted problems with applicant completing vocational testing due to his inability to use the dominant hand. (Applicant’s Exhibit 1, Report of Paul Stanford, M.S., January 27, 2020, p. 7.) This resulted in applicant being unable to complete some vocational testing. (*Id.* at pp. 7-9.) The vocational testing that applicant completed placed him at or below the 10th percentile. (*Ibid.*)

Mr. Stanford found that applicant was not amenable to rehabilitation due to his complete inability to use the right dominant hand and very poor dexterity in the left hand. (*Id.* at p. 10.) Applicant had pre-injury access to 29% of the open labor market. (*Id.* at p. 9.) Post-injury applicant did not have access to the open labor market. (*Ibid.*) Mr. Stanford opined on applicant’s employability as follows:

As documented above in the Vocational Feasibility and Amenability to Rehabilitation section, when contemplating the limitations expressed by Dr. Brouman from strictly an orthopedic perspective, Mr. Perez would be limited to less than light work while also having difficulty holding and manipulating objects with his right hand and performing repetitive motions such as typing with the right hand. These restrictions effectively eliminate the capable performance of handling, gripping, grasping and manipulating which are paramount in performing light work.

Further, when also contemplating the neurological opinion of Dr. Shorr, Mr. Perez has lost complete use of his right upper extremity along with his experiencing segmental dystonia extra-pyramidal movement disorder, which causes tremors and fasciculations which severely compromise his ability to use his right hand in any functional manner. The only vocational opinion one can draw is the inability to use his dominant right upper extremity, even in an assistive manner, eliminates his ability to capably perform employment at any exertional level, **as his non-dominant left upper extremity has been tested to be far from having the dexterity needed to be productive and efficient in competitive employment.**

Based on the above, Mr. Perez is not a candidate to return to the open labor market and has lost 100% of his earning capacity.

(*Id.* at p. 11, (emphasis added).)

Defendant retained vocational expert Kelly Winn, who authored two reports in evidence. (Defendant's Exhibits C and D.) Ms. Winn took a history of applicant having a high-school education with training in welding. (Defendant's Exhibit C, Report of Kelly Winn, March 16, 2021, p. 11.) Ms. Winn took the same history of work restrictions as Mr. Stanford. However, Ms. Winn concluded that applicant is amenable to rehabilitation and can compete on the open labor market. (*Id.* at pp. 19-20.)

DISCUSSION

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.” (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) “When the foundation of an expert's testimony is determined to be inadequate as a matter of law, we are not bound by an apparent conflict in the evidence created by his bare conclusions.” (*People v. Bassett* (1968) 69 Cal.2d 122, 139.)

In the en banc decision in *Nunes v. State of California, Dept. of Motor Vehicles* (June 22, 2023) 2023 Cal. Wrk. Comp. LEXIS 30 [88 Cal.Comp.Cases 741] (“*Nunes I*”), the Appeals Board held that Labor Code section 4663 requires a **reporting physician** to make medical determinations in a case, including determinations on the issue of apportionment. The Board further held that vocational evidence may be used to address issues relevant to the determination of permanent

disability, and that vocational evidence must address apportionment, but that a vocational evaluator may not opine on issues that require expert medical evidence. The Board affirmed these holdings in *Nunes v. State of California, Dept. of Motor Vehicles* (August 29, 2023) 23 Cal. Wrk. Comp. LEXIS 46 [88 Cal.Comp.Cases 894] (“*Nunes IP*”).

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).)

In this case, applicant’s vocational expert’s report does not constitute substantial evidence as the evaluator has incorrectly and improperly interjected his own medical opinions into the case regarding applicant’s ability to use his left hand. A vocational evaluator does not create medical facts in a case. Vocational experts review the medical record created by the doctors and reach conclusions as to applicant’s vocational feasibility based upon that record. Applicant’s physical restrictions with the left hand is a medical issue, which requires medical evidence. If the vocational expert has cause to disagree with the work restrictions assigned, the parties must return to the medical experts to clarify applicant’s ability to use the left hand.

Although applicant failed to prove rebuttal of the permanent disability rating schedule (PDRS), applicant presents a credible argument that he may be precluded from work on the open labor market due to the industrial injury. As we have very recently clarified the roles of the medical and vocational evaluators, it would appear prudent to allow further development of the record on this issue. (See *Gangwish v. Workers’ Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284.)

Accordingly, as our Decision After Reconsideration we will rescind the December 15, 2021 F&A and return the matter to the trial level for further proceedings and 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 15, 2021 F&A is **RESCINDED** and this matter is **RETURNED** to the trial level for further proceedings and development of the record in accordance with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 5, 2024

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

**HORACIO PEREZ
RODRIGUEZ LAW AKA LAW OFFICE OF SYLVIA LOPEZ
DOMINGO, ELIAS & VU**

EDL/mc

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