WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

JOB MORAIDO, *Applicant*

vs.

COUNTY OF SAN DIEGO; permissibly self-insured, *Defendant*

Adjudication Number: ADJ1390885 (SDO 0353458)
San Diego District Office

OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.[1]

In the Findings, Award and Order of June 7, 2021, the Workers' Compensation Administrative Law Judge ("WCJ") found that on September 20, 2006, applicant, while employed as a HHSA Administrator III, Occupational Group No. 111, by the County of San Diego, permissibly self-insured, sustained injury arising out of and occurring in the course of employment ("industrial injury") to his bilateral upper extremities (including shoulders and wrists), gastroesophageal reflux disease ("GERD"), and psyche, causing permanent disability of 65% after apportionment. The WCJ also found that applicant did not meet his burden of rebutting the AMA Guides and the scheduled permanent disability rating.

Applicant filed a timely petition for reconsideration of the WCJ's decision. Applicant contends that he is entitled to a presumption of permanent and total disability pursuant to Labor Code section 4662(a), due to his brain injury and complex regional pain syndrome ("CRPS"). Applicant further contends that the evidence justifies a finding of permanent and total disability pursuant to *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234 [48 Cal.Comp.Cases

[1] Commissioner Deidra E. Lowe signed the Opinion and Order Granting Petition for Reconsideration dated August 30, 2021. As Commissioner Lowe is no longer a member of the Appeals Board, a new panel member has been substituted in her place.

587], and that a finding of permanent and total disability is not apportionable to non-industrial factors.

Defendant filed an answer.

The WCJ submitted a Report and Recommendation ("Report"). We adopt and incorporate the Statement of Facts (Section II) of the WCJ's Report, as set forth below. We do not adopt or incorporate the remainder of the Report.

Based on our review of the record and applicable law, including the Appeals Board's en banc decisions in *Nunes v. Cal. Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741 ("*Nunes* I") and *Nunes v. Cal. Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 894 ("*Nunes* II"), we find unresolved issues of permanent disability and apportionment that require further inquiry and new determination by the WCJ. Therefore, though we will affirm the parts of the WCJ's decision that have not been challenged upon reconsideration, we will rescind the WCJ's findings related to permanent disability and apportionment and replace them with findings that defer those issues, pending further proceedings and new determination by the WCJ.

The WCJ provides an overview of the relevant facts in Section II of his Report:

STATEMENT OF FACTS

> The Petitioner [applicant] was a longtime employee of the Defendant. He filed a claim for bilateral upper extremity injuries which the parties stipulated were the result of an injury on September 20, 2006. Ultimately, Petitioner added claims of compensable consequence injuries for GERD and psyche. Some of the injuries were admitted and some denied.
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> Over the long history of this claim, the Petitioner has had several different treating physicians. There have been several QMEs as well as AMEs reporting on behalf of the parties.
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> Originally, parties agreed to use Dr. Perlman as an AME for orthopedics. The Petitioner quotes from the reporting of Dr. Perlman but Dr. Perlman removed himself as the AME prior to any finalization of this claim. As such his opinion was considered incomplete on the facts and issues present at trial.
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> The parties also used Dr. Zink, Ph.D. as an AME for psyche injuries. By the time of trial, the parties relied upon PQME Dr. Lawrence Miller, M.D. for the orthopedic impairments, and Dr. Zink for the psyche impairments and Dr. Jonathan Green for the GERD impairment.
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> Due to disputes between the parties as to the nature and extent of the alleged impairments, the parties proceeded to trial on March 18, 2021. The issues at that

time were nature and extent of injuries claimed (parts of body), permanent disability, apportionment, temporary disability, permanent and stationary date, future medical [treatment], attorney's fees and the lien of EDD. Exhibits were offered and admitted. The Petitioner was the only witness [who] testified. Of note, the Petitioner was alleging that he was 100% permanently totally disabled by rebutting the Schedule for Rating [Permanent] Disabilities.

While several doctors did opine that it was highly unlikely the Petitioner would ever be able to return to the open labor market, both parties enlisted the services of vocational rehabilitation specialists to support [or] rebut this conclusion. The Petitioner used Alex Calderon. The Defendant used Nick Corso.

On June 7, 2021, the WCJ issued a Findings, Award and Order. The Petitioner was awarded permanent disability for injuries to his injuries to his bilateral upper extremities (including both shoulders and wrists), GERD and psyche. A permanent and stationary date was found. Additional temporary disability was denied. Future medical [treatment] and attorney's fees were awarded. A further finding was made that the lien of EDD was denied.

It was specifically found that due to the apportionment of the Petitioner's impairment to non-industrial factors as opined by Dr. Miller and Dr. Zink, that the Petitioner was not 100% permanently totally disabled. It was further found that the opinions and conclusions of Alex Calderon were not substantial evidence [and that] Petitioner had failed to rebut the [scheduled rating per] the AMA Guides.

On July 2, 2021, [applicant] filed a Petition for Reconsideration [contesting] the WCJ's determination that he had failed to rebut the Schedule and that he was not 100% permanently and totally disabled.

DISCUSSION

At the outset, we reject applicant's contention that he is entitled to a presumption of permanent and total disability pursuant to Labor Code section 4662(a). Applicant claims the presumption based on the disabilities resulting from the industrial injury to his bilateral upper extremities and to his psyche.

As relevant here, section 4662(a) provides as follows: "(a) Any of the following permanent disabilities shall be conclusively presumed to be total in character: […] (2) Loss of both hands or the use thereof. […] (4) An injury to the brain resulting in permanent mental incapacity."

As noted in the WCJ's Report, however, there is no evidence that applicant has lost the use of both hands and there is no evidence that the injury to applicant's psyche is properly characterized as "[a]n injury to the brain resulting in permanent mental incapacity." We agree with the WCJ that applicant's reliance upon the presumption of section 4662(a) is misplaced.

Nevertheless, we are persuaded that the WCJ must revisit the nature and extent of permanent disability in this matter. As a first step, we conclude the WCJ must revisit and ascertain the scheduled permanent disability rating. In response to applicant's allegation that he is permanently and totally disabled according to the medical opinion of Dr. Miller (Panel Qualified Medical Evaluator ("PQME") in pain management and internal medicine), the WCJ states in his Report:

> PQME Dr. Miller found that the Applicant was unable to return to the open labor market. His opinion was found to be substantial medical evidence on the issues presented to him concerning the Petitioner's claimed injuries. He found that the Petitioner had an overall orthopedic impermanent disability of 52%.

However, the record does not confirm that the orthopedic component of the scheduled permanent disability rating is 52%. In his report of December 13, 2019, Dr. Miller found that as a result of applicant's left thoracic outlet syndrome, and his complex regional pain syndrome ("CRPS") in the right upper extremity, he has Whole Person Impairment ("WPI") of 64%. (Joint exhibit 2, Miller report dated 12/13/19, p. 43.) A WPI of 64% would produce a significantly higher scheduled permanent disability rating than the 52% orthopedic rating found by the WCJ.

Defendant alleges in its answer (pp. 5-6) that in his deposition of July 13, 2020, Dr. Miller reduced applicant's WPI to 25% (from 64%, apparently) because applicant has some ability to use his right upper extremity for self-care, albeit with difficulty. (Joint exhibit 3, Miller deposition dated July 13, 2020, p. 29.) However, the substance of defendant's allegation cannot be verified because in EAMS, joint exhibit 3 consists of a version of Dr. Miller's deposition that is missing pages 14 through 29. Neither the parties nor the WCJ explain this gap in the record. Of course, the Board cannot make a decision based on a faulty or incomplete record. (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473 [Appeals Board en banc].)

Moreover, the portion of Dr. Miller's deposition that actually is in evidence includes testimony by the doctor that the severity of applicant's depression, his age and substance abuse, his bilateral upper extremity impairment, and his periods off work, make it unlikely that applicant can compete in the open labor market. (Joint exhibit 3, p. 45.) Although Dr. Miller's reliance upon applicant's depression and his alleged inability to compete in the labor market are outside the doctor's areas of expertise, our review of Dr. Miller's written reports and the incomplete copy of his deposition suggests that the doctor believed applicant may be medically restricted from all employment, without regard to his psychological condition or vocational prospects. In light of the

inconsistencies in the record relevant to the nature and extent of applicant's orthopedic impairment, we are persuaded that the WCJ must revisit the scheduled rating to ascertain whether it is 52% or 100% or something else.[2]

The next step is for the WCJ to revisit his analysis of apportionment, if any, before factoring it into the permanent disability rating. In his Opinion on Decision, the WCJ stated:

> In the case at bar, the Applicant failed to rebut the AMA Guides or the schedule. Dr. Zink opined that there was apportionment to non-industrial factors. Dr. Miller also noted the Applicant's cardiovascular condition which under the AMA Guides also is a rather substantial non-industrial factor existed [sic]. When these factors of apportionment are applied to the Applicant's claim, the only way to rebut the schedule is by having the vocational consultant reasonably and logically disassociate these non-industrial factors effect on the Applicant's employability as well as his amenability to vocational rehabilitation. The reporting of Alex Calderon failed to meet that burden.
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> Based upon the medical report of Dr. Zink, M.D. dated June 12, 2017, it is found that apportionment applies to the Applicant's claimed psyche injury. It is also found that the Applicant had a non-industrial cardiovascular condition that contributed to his overall claimed current level of disability as discussed above and his amenability to vocational rehabilitation but not to the strict rating of his permanent disability herein.

In reference to Dr. Miller's reporting, it appears that the WCJ found non-industrial apportionment to applicant's cardiovascular condition pursuant to Labor Code section 4663. Such an interpretation of the WCJ's decision is reasonable because the WCJ stated in his Opinion on Decision, "Dr. Miller…noted the applicant's cardiovascular condition *which under the AMA Guides also is a rather substantial non-industrial factor existed.*" (Sic.) However, the WCJ's rating formula for applicant's bilateral upper extremity disability included no such apportionment. Although the WCJ may have been confusing the issues of medical apportionment and (invalid) vocational apportionment, there is no question that medical apportionment must be based on substantial medical evidence and not on the WCJ's personal opinion. (Lab. Code, § 4663(c);

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[2] In his Opinion on Decision, the WCJ stated in a footnote that he followed Dr. Miller's opinion to add rather than to combine applicant's permanent impairments. In further proceedings at the trial level, the WCJ should revisit this issue in light of the Appeals Board's recent en banc opinion in *Vigil v. County of Kern* (2024) 2024 Cal. Wrk. Comp. LEXIS 23. In *Vigil*, the Board held that the Combined Values Chart ("CVC") in the Permanent Disability Rating 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.

Blackledge v. Bank of America (2010) 75 Cal.Comp.Cases 613 (Appeals Board en banc) [delineating the roles of WCJs and physicians in the adjudication process].)

In this case, the WCJ did not specifically refer to any medical evidence supporting apportionment of applicant's bilateral upper extremity disability based on his cardiovascular condition. The WCJ's conclusion that there should be apportionment of permanent disability based on applicant's cardiovascular condition is based on speculation and cannot be affirmed.

Likewise, we conclude that the WCJ must revisit apportionment of applicant's psychological disability. In his Opinion on Decision, the WCJ rated the psychiatric component of applicant's permanent disability at 24%, after 20% non-industrial apportionment of the disability based on the medical opinion of Dr. Zink, Agreed Medical Evaluator ("AME") in psychology. In his June 12, 2017 report, Dr. Zink provided the following opinion on apportionment:

> Thus there is a change in my apportionment opinion in this regard. Mr. Moraido did not have any emotional distress secondary to upper extremity injury problems prior to the CT injury of 2006 to the best on my understanding. Thus there is no psychological basis of which I am aware which would <u>further apportion</u> the psychological disability which is secondary to the upper extremity injuries to "Other Factors." Thus, all of this 80% of the overall Permanent Partial Psychological Disability is apportioned to the 09/15/06 CT injury. (80% of the 15% WPI equals 12% WPI)
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> My opinion is that 20% of the <u>cause</u> of the Residual Permanent Partial Psychological Disability is "Other Factors." (20% of the 15% WPI equals 3% WPI which is apportioned to the "Other Factors".)
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> This is a change from my prior opinion based upon the emotional impact of the worsening cardiac factors.
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> I continue to believe that the significant pre-injury Depressive Disorder in 1996 sensitized Mr. Moraido to further depressive feelings. It included some time away from work and the use of psychiatric medications, which he took thereafter for many years. This is detailed in my prior report.
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> Additionally, Mr. Moraido now has cardiac factors which are non-industrial per my understanding. He is going to see his cardiologist in the near future and will likely undergo a cardiac surgery as he has cardiac valve stenosis – according to Mr. Moraido. This will be a major surgery. His cardiac issues cause him some shortness of breath at the present time, and some occasional swelling in his feet. I believe this factor is a significant factor which does weigh upon Mr. Moraido's sense of security and creates some decreased emotional resilience and contributes overall to the Residual Permanent Partial Psychological Disability.

> However, I have not apportioned more of the Psychological Disability to "Other Factors" as I understand Mr. Moraido was functioning successfully in his job for many years prior to the injury which is the focus of the current Worker's Compensation case. Per my understanding, there is no preinjury history of psychological Worker's Compensation stress cases or formal findings of psychological disability on a Worker's Compensation basis.
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> (Joint exhibit 4, Zink report dated 6/12/17, p. 26.)

For several reasons, it is not clear that Dr. Zink's apportionment opinion rises to the level of substantial medical evidence. In finding 10% apportionment based on applicant's "cardiac issues," Dr. Zink ventured beyond his expertise in psychology, and as noted above the WCJ referred to no medical report establishing that applicant has sustained permanent disability due to his cardiovascular condition. Moreover, in stating that applicant's cardiovascular condition "is a significant factor which does weigh upon [his] sense of security and creates some decreased emotional resilience and contributes overall" to his psychological disability, Dr. Zink failed to describe in detail the exact nature of the apportionable disability. This means the doctor's opinion does not qualify as substantial evidence of apportionment under *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 [Appeals Board en banc].[3]

We further note that applicant testified at trial on March 18, 2021 that he had heart surgery to treat his cardiovascular condition - apparently the surgery took place after Dr. Zink's report of June 12, 2017 - and that applicant believed he was only restricted on a temporary basis. Applicant also testified that he is not currently treated for his heart condition and that he hadn't received any treatment for it in two or three years. (Summary of Evidence, 3/18/21, p. 9:7-10.) Thus it appears that Dr. Zink's apportionment opinion is based on an outdated medical history, which is not substantial evidence. (*Hegglin v. Workers' Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].)

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[3] Concerning apportionment of psychiatric disability within Dr. Zink's area of expertise, it appears the same is true of the doctor's statement that applicant's "significant pre-injury depressive disorder in 1996 sensitized [him] to further depressive feelings. It included some time away from work and the use of psychiatric medications, which he took thereafter for many years." Although we express no final opinion, this is not a detailed description of the exact nature of the apportionable disability; also lacking is an explanation of how and why the 1996 depressive disorder was causing disability at the time of Dr. Zink's evaluation in 2017. The WCJ should revisit the issue of apportionment of psychiatric disability at the trial level, mindful that applicant does not have the burden of disproving apportionment. Rather, the burden is on defendant to prove apportionment. (*Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1114 [71 Cal.Comp.Cases 1229].)

In the foregoing discussion, we addressed the need for the WCJ to revisit the scheduled permanent disability rating and to revisit the issue of apportionment. The scheduled rating must be ascertained in order to determine whether substantial vocational evidence, if any, rebuts it. In connection with that determination, the WCJ also must consider whether there is substantial medical evidence to support apportionment under Labor Code section 4663. If so, and consistent with the Board's opinions in *Nunes* I and II, the vocational experts must consider the medical basis for apportionment in evaluating applicant's vocational prospects and feasibility for vocational retraining. In turn, vocational evidence should be considered by the evaluating physicians relevant to their determination of permanent disability, which will assist the WCJ in assessing those factors of permanent disability. (*Nunes* I*, supra*, 88 Cal.Comp.Cases at 752-753.)

In this case, applicant retained Alejandro Calderon as his vocational expert and defendant retained Nick Corso as its vocational expert. Both experts provided an analysis of "vocational apportionment" in their reports. As noted before, in the *Nunes* decisions the Board disapproved "vocational apportionment," holding that although vocational evidence may be used to address issues relevant to the determination of permanent disability, the vocational apportionment may not substitute impermissible "vocational apportionment" in place of otherwise valid medical apportionment.

In this case, we conclude that both vocational experts must revisit and supplement their opinions in light of *Nunes* I and II. Here, Dr. Zink found medical apportionment of applicant's psychological disability, albeit that the doctor's apportionment opinion is problematic as discussed above. For different reasons, applicant's expert, Mr. Calderon rejected all medical apportionment and found no non-industrial "vocational apportionment." Further, Mr. Calderon relied upon the invalid theory that all of applicant's disability is industrial because he had no vocational disability before the industrial injury. (Exhibit 18, Calderon report dated June 12, 2020, pp. 53-55.)

We also have concerns about the opinion of defendant's expert, Mr. Corso. Mr. Corso's analysis of apportionment includes an extensive legal discussion and he offers various legal conclusions. These are beyond Mr. Corso's area of expertise. (Exhibit A, Corso report dated October 16, 2020, pp. 62-63.) Further, Mr. Corso's finding that applicant has no "additional ratable vocational disability" (exhibit A, p. 62) seems to disregard the serious medical impairments found by Dr. Miller and Dr. Zink. In finding applicant feasible for vocational rehabilitation, Mr. Corso appropriately considered the non-industrial factor of applicant's age, but it is uncertain

whether age – a biological fact - can be considered a "preferential" factor as assumed by Mr. Corso. (Exhibit A, p. 79.) Reading between the lines of Mr. Corso's report, it is clear he believed that applicant is insufficiently motivated to return to some form of work, but this ignores the fact that applicant was interested in teaching at the time of Mr. Corso's report of October 16, 2020. (Exhibit A, p. 64.) For the reasons discussed above, we are not persuaded that Mr. Corso's opinion is substantial vocational evidence. As with the opinion of Mr. Calderon, Mr. Corso's opinion should be supplemented to address the issues discussed above. It also appears that Mr. Corso did not consider the impact of applicant's GERD diagnosis, per Dr. Green, as it may relate to applicant's vocational feasibility. (Exhibit B, Green report dated April 21, 2018, pp. 12-13.)

In conclusion, we reiterate that according to *Nunes* I, vocational evidence continues to be relevant to the issue of permanent disability and may be offered to rebut a scheduled rating by establishing that an injured worker is not feasible for vocational retraining; vocational evidence may also be considered by evaluating physicians as relevant to their determination of permanent disability and may assist the parties and the WCJ in assessing those factors of permanent disability.

In this case, both vocational experts erred in assuming that vocational apportionment is valid, and this should be corrected with supplemental opinions that acknowledge *Nunes* I and II. Further, defendant's expert, Mr. Corso, should rethink his introduction of non-industrial "preferential" factors into his vocational analysis, which in our view obscures an assessment of whether the limitations arising out of applicant's industrial injury alone may have resulted in permanent and total disability. As for Mr. Calderon, the WCJ should revisit whether the psychological factors considered by Mr. Calderon are valid, because he relied in part on Dr. Morris, applicant's treating psychiatrist, as well as Dr. Zink, the AME in psychology. In addition, Dr. Miller, Dr. Zink and Dr. Green should review the supplemental vocational reports and determine whether or not there is any medical basis to conclude that applicant is not feasible for vocational rehabilitation.[4]

In summary, we conclude that this matter must be returned to the trial level for further proceedings and new decision on permanent disability and apportionment by the WCJ, consistent with *Nunes* I and II. The WCJ may further develop the record as necessary or appropriate to

[4] In his report of December 13, 2019, Dr. Miller found that applicant had no work restrictions, while also stating that applicant was "unable to re-enter the open labor market [and was] permanently disabled and receiving social security disability." (Joint exhibit 2, p. 44.) This paradoxical aspect of Dr. Miller's opinion could only have been confusing and unhelpful to the vocational experts in assessing applicant's vocational feasibility, if any.

resolve the issues discussed herein and the issues related to the Board's en banc opinions in *Nunes* I and II. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 [Appeals Board en banc].) We express no final opinion on the nature and extent of permanent disability, on apportionment, or on rebuttal of the scheduled permanent disability rating. When the WCJ issues a new decision on the outstanding issues, any aggrieved party may seek reconsideration as provided in Labor Code sections 5900 *et seq*.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings, Award and Order of June 7, 2021 is **AFFIRMED, EXCEPT** paragraph (a) of the Award is **RESCINDED AND DEFERRED,** and Findings 5, 6, 8 and 11 are **RESCINDED AND REPLACED** by the following new Findings 5, 6, 8 and 11:

FINDINGS OF FACT

5. The issue of permanent disability is deferred pending further proceedings and new determination by the WCJ, with jurisdiction reserved at the trial level.

6. The issue of rebuttal of the scheduled permanent disability rating is deferred pending further proceedings and new determination by the WCJ, with jurisdiction reserved at the trial level.

8. The issue of apportionment under Labor Code section 4663 is deferred pending further proceedings and new determination by the WCJ, with jurisdiction reserved at the trial level.

11. The issue of attorney's fees is deferred pending further proceedings and new determination by the WCJ, with jurisdiction reserved at the trial level.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that this matter is **RETURNED** to the trial level for further proceedings and new decision by the WCJ on the outstanding issues, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 9, 2024

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

JOB MORAIDO
LAW OFFICE OF MICHAEL K. WAX
SAN DIEGO COUNTY COUNSEL

JTL/*ara*

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