WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOHNY ROCHA, ***Applicant***

vs.

JCE BUILDINGS & DEVELOPMENT, INC.;
STATE COMPENSATION INSURANCE FUND, ***Defendants***

Adjudication Number: ADJ12063534
San Francisco District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

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 stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

In addition to the WCJ's well-reasoned report, we observe the following.

The WCJ has reviewed the reporting of both applicant's and defendant's vocational experts. The WCJ's Opinion on Decision explains in detail why she determined the reporting of applicant's expert to be the more well-reasoned and persuasive. (Opinion on Decision, pp. 17-19.) The WCJ noted that defendant's expert failed to explain how the positions in the open labor market for which applicant was ostensibly capable of retraining were compatible with the work restrictions identified in the medical-legal record.[1] (*Id.* at p. 17.) The WCJ also observed that the defense expert's reporting improperly excluded limitations identified by the orthopedic QME. (*Ibid.*) On the other hand, the WCJ found the reporting of applicant's vocational expert to be consistent with the work restrictions identified in the medical-legal record, as well as consistent with applicant's

[1] We observe that defendant's Petition describes applicant's immigration status without reference to the record or an accompanying assertion as to how applicant's status is relevant to the issues raised in the Petition. (Petition, at p. 3:3.) Given the potential for prejudice in the assertion, we admonish defense counsel to avoid similarly irrelevant and unsupported assertions in future pleadings. (Cal. Code Regs., tit. 8, § 10421.)

credible trial testimony. (*Id.* at p. 18.) We accord to the WCJ's credibility determinations the great weight to which they are entitled. (*Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Accordingly, we agree with the WCJ's determination that the reporting of applicant's vocational expert establishes that applicant is not feasible for vocational retraining, and as a result, is permanently and totally disabled. (*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].)

Having found that applicant was permanently and totally disabled, the WCJ next turned to the issue of apportionment.

In *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741 [2023 Cal. Wrk. Comp. LEXIS 30I] (Appeals Board en banc) (*Nunes I*), we held that Labor Code[2] section 4663 requires a reporting physician to make an apportionment determination and prescribes the standard for apportionment, but that the Labor Code makes no statutory provision for "vocational apportionment." (*Id.* at p. 743.)

We further held that vocational evidence may be used to address issues relevant to the determination of permanent disability. While the Permanent Disability Rating Schedule (PDRS) is presumptively correct (see *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd*. (2010) 187 Cal.App.4th 808, 826 [75 Cal.Comp.Cases 837]), "a rating obtained pursuant to the PDRS may be rebutted by showing an applicant's diminished future earning capacity is greater than that reflected in the PDRS." (*Nunes I, supra*, 88 Cal.Comp.Cases at p. 749.) Among the methods described for challenging a rating obtained under the PDRS was establishing that "the injury to the employee impairs his or her rehabilitation, and for that reason, the employee's diminished future earning capacity is greater than reflected in the employee's scheduled rating." (*Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262, 1274 [76 Cal.Comp.Cases 624] (*Ogilvie*).) Our opinion in *Nunes I* made clear that "[t]he same considerations used to evaluate whether a medical expert's opinion constitutes substantial evidence are equally applicable to vocational reporting … [i]n order to constitute substantial evidence, a vocational expert's opinion must detail the history and evidence in support of its conclusions, as well as 'how and why' any specific condition or factor is causing permanent disability." (*Id.* at p. 751.)

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

We further held that while vocational evidence may be used to rebut the PDRS, such vocational evidence must nonetheless address apportionment, and may not substitute impermissible "vocational apportionment" in place of otherwise valid medical apportionment. (*Id.* at pp. 743-744.) Examples of impermissible vocational evidence included assertions that applicant's disability is solely attributable to the current industrial injury because applicant had no prior work restrictions, or was able to adequately perform their job, or suffered no wage loss prior to the current industrial injury. (*Id.* at p. 754.) Accordingly, we concluded:

> Therefore, an analysis of whether there are valid sources of apportionment is still required even when applicant is deemed not feasible for vocational retraining and is permanently and totally disabled as a result. In such cases, the WCJ must determine whether the cause of the permanent and total disability includes nonindustrial or prior industrial factors, or whether the permanent disability reflected in applicant's inability to meaningfully participate in vocational retraining arises solely out of the current industrial injury.
>
> (*Ibid*.)

Here, the WCJ has determined that no evaluating physician has identified valid legal apportionment. Orthopedic Qualified Medical Evaluator (QME) Dr. Smolins has authored multiple medical-legal reports that detail the physician's clinical evaluation of the applicant, review of records, and diagnostic impressions. The QME has further identified industrial causation of applicant's injury resulting in permanent partial disability. (Ex. 106, Report of David Smolins, M.D., dated February 24, 2022, pp. 15-16.) With respect to the issue of apportionment, however, the *entirety* of the QME's opinion is as follows:

> Apportionment plays a role in regard to his lumbar spine. He had low back pain with right lower extremity radiating pain in the two months prior to the 03/07/19 date of injury. He was able to work full duty and described this as "air in his back." I find 20% of his lumbar spine preexisting and 80% to the date of injury 03/07/19. I do not find apportionment for the cervical spine or the thoracic spine.
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> (*Id.* at p. at p. 16.)

In *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 [2005 Cal. Wrk. Comp. LEXIS 71] (*Escobedo*) (Appeals Board en banc), we held:

> [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.
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> (*Id.* at p. 621.)

Thus, the apportionment opinion of the evaluating physician must address how and why nonindustrial and prior industrial factors are presently causing permanent disability. The WCJ's Opinion on Decision explains:

> Dr. Smolins opined that the applicant had low back pain radiating into the right lower extremity two months prior to the accepted injury, and assigned 20% of the overall lumbar spine impairment to unnamed "preexisting" conditions. There is no further explanation for how and why the prior pain contributed to the applicant's current level of impairment. Without any explanation of what the preexisting condition is, let alone how it contributes to the applicant's current impairment, Dr. Smolins' opinions on apportionment are not substantial evidence. I find that defendant has not met their burden of proving apportionment in this case.
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> (Opinion on Decision, p. 19.)

We concur with the WCJ's analysis. Because the defendant bears the burden of establishing the percentage of disability caused by nonindustrial or prior industrial factors, the WCJ appropriately determined that defendant did not meet the burden of proving nonindustrial apportionment. (*Escobedo, supra*, 70 Cal.Comp.Cases at p. 612.) Consequently, and as we observed in *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 894 [2023 Cal. Wrk. Comp. LEXIS 46], "in those instances where the WCJ determines that no evaluating physician has identified valid legal apportionment, applicant is entitled to an unapportioned award." (*Id.* at p. 898.)

We will affirm the F&A, accordingly.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

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

May 6, 2024

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

JOHNY ROCHA
FRANCO MUNOZ LAW FIRM
STATE COMPENSATION INSURANCE FUND

SAR/abs

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

Elizabeth Dehn, Workers' Compensation Judge, hereby submits her report and recommendation on the petition for reconsideration filed herein.

Introduction

On March 6, 2024, defendant State Compensation Insurance Fund filed a petition for reconsideration of my February 20, 2024 Findings of Fact and Award.

Defendant asserts that that I acted without or in excess of my powers, that the evidence does not justify the findings of fact and that the findings of fact do not support the order, decision or award.

Defendant's petition was timely filed and accompanied by the verification required under Labor Code section 5902 and Regulation 10940(c). Applicant, through his attorney, has filed an answer to the petition for reconsideration, recommending that it be denied.

Facts

Johny Rocha, while employed as a construction laborer for JCE Building and Development, sustained an accepted injury to his lumbar, cervical and thoracic spine on March 7, 2019 when he was lifting a heavy beam. On June 25, 2020, he underwent a lumbar spine decompression at L4-L5 performed by Dr. Rovner. Dr. Rovner subsequently recommended a lumbar fusion, which was non-certified by utilization review, and the applicant decided he did not want to pursue further surgery. The applicant also participated in a functional restoration program.

Dr. David Smolins served as the panel selected Qualified Medical Examiner and prepared multiple reports. In his February 24, 2022 report, Dr. Smolins declared the applicant's condition to be at maximum medical improvement. He provided a permanent disability rating of the cervical, thoracic and lumbar spine, including an Almarez/Guzman rating for the lumbar spine, and addressed apportionment. He recommended permanent work restrictions and filled out the physicians return to work voucher.

Steven Ramirez served as applicant's vocational expert, and opined that the applicant was not feasible for vocational rehabilitation and was permanently, totally disabled as a result of the March 7, 2019 injury. Scott Simon served as defendant's vocational expert, and opined that the applicant could return to work either using transferrable skills or benefit from on the job training.

This matter proceeded to trial in front of me on November 29, 2023 and concluded on January 17, 2024. After carefully considering the documentary evidence, and the testimony of the applicant, I found that the applicant was permanently and totally disabled. I found that the apportionment by Dr. Smolins was not substantial evidence, that the reporting of Scott Simon was not substantial evidence, and that the applicant rebutted the permanent disability schedule based on the reports from his vocational expert. It is from my February 20, 2024 Findings of Fact, Award and Opinion on Decision that defendant now seeks reconsideration.

Petitioner's Contentions

Defendant contends that their applicant's vocational expert used impermissible nonindustrial factors in determining that the applicant was permanently, totally disabled, that applicant failed to meet his burden to show the percentage of permanent disability directly caused by the industrial injury, and that applicant failed to show that he could not be retrained.

For the reasons discussed below, petitioner's contentions are without merit, and do not provide sufficient basis to grant reconsideration.

Discussion

1. **There is substantial evidence that the applicant is permanently, totally disabled as he is not amenable to vocational rehabilitation.**

With respect to permanent disability, the applicant holds the burden of proof by a preponderance of the evidence. (Labor Code section 3202.5.) Permanent impairment evaluations must be based on the AMA Guides to the Evaluation of Permanent Impairment. (Labor Code section 4660.1(b).) The scheduled permanent disability rating can be rebutted through the use of vocational evidence that the employee is not amenable to rehabilitation. (See, *LeBouef v. Workers'*

Comp. Appeals Bd. (1983) 34 Cal. 3d 234, 243 *Ogilvie v. Workers' Comp. Appeals Bd.,* (2011) 197 Cal. App. 4th 1262, 1277, *Nunes v. State of California, Department of Motor Vehicles* (2023) 88 Cal. Comp. 741 *Appeals Bd. en banc*.) However, a vocational expert's opinions are not considered substantial evidence if it relies on facts that are not germane or on an incorrect legal theory. (*Nunes, Supra,* at 754.)

I found that the applicant successfully rebutted the scheduled permanent disability rating provided by Dr. Smolins with the opinions of his vocational expert, Steve Ramirez. In formulating his opinions, Mr. Ramirez considered the work restrictions outlined by Dr. Smolins in both the February 24, 2022 report as well as the limitations on the return to work voucher, which did include restrictions for spine and the upper extremities. In addition, Mr. Ramirez considered the potential effects of the medications taken by the applicant on his ability to maintain a competitive work pace. Applicant's testimony at trial regarding the effects of the medication were consistent with the opinions of Mr. Ramirez. The applicant testified that the hydrocodone makes him feel like a zombie and interfered with concentration. (Testimony at November 29, 2023 trial, page 5, line 27-28. He was not able to concentrate well with norco which made him sleepy and lightheaded. (Id. at page 6 lines 15-19.) I found the unrebutted testimony of the applicant to be credible. Dr. Smolins, likewise, did not find any reason to question the credibility of the applicant. (Joint Exhibit 101. Page 5.)

I did not find the opinions of applicant's vocational expert, Scott Simon, to be substantial evidence. Dr. Smolins provided work restrictions for the upper extremity which were ignored by defendant's vocational expert. The PQME found right upper extremity symptoms that he related to the spine injury: he noted the applicant had achy right sided neck pain with radiation throughout the right upper extremity in the approximate C7 distribution with numbness in the right third and fourth fingers. (Joint Exhibit 106 at page 3.) Mr. Simon unilaterally attributed the restrictions to the upper extremities to a nonindustrial right shoulder problem, ignoring the findings of the QME of radicular upper extremity complaints. (Defendant's Exhibit B, page 5.)

2. There is no substantial medical evidence of apportionment to nonindustrial factors.

I found that the opinions of Dr. Smolins regarding apportionment were not substantial evidence. It is not entirely clear from the petition if defendant is challenging that finding. The

defendant has the burden of establishing the percentage of permanent disability caused by nonindustrial factors. (*Escobedo v. Marshalls, CNA Ins. Co.* (2005) 70 Cal. Comp. Cases 604, 614 (en banc.). In order to be considered substantial evidence on the issue apportionment, “a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, 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.)

Dr. Smolins assigned 20% of the overall lumbar spine impairment to unnamed “preexisting” conditions with no explanation for how and why the prior pain contributed to the applicant’s current level of impairment, let alone what the prior preexisting condition was. Therefore his opinion is not substantial evidence on apportionment. Merely finding apportionment to one body part, and not the other two, does not meet defendant’s burden of proof.

3. There is no evidence that the applicant benefitted from vocational retraining after the injury.

There is no evidence in evidence that the applicant benefitted from vocational retraining. Defendant appears to equate participation in a functional restoration program with vocational retraining. The reports from the Northern California Functional Restoration Program were not submitted, so there are no reports in evidence showing that applicant participated in, let alone benefitted from, vocational rehabilitation as part of his participation in this program as argued by defendant. A functional restoration program is medical treatment and recommended by the MTUS for treatment of chronic pain. (See, MTUS chronic pain guidelines page 335.) It is not vocational retraining.

The reports from the functional restoration program were reviewed by the panel QME Dr. Smolins. (Joint Exhibit 105, page 102, Joint Exhibit 106, page 5.) Dr. Smolins was aware of any benefit that applicant derived from his participation in the functional restoration program at the time he prepared his February 24, 2022 report, outlined permanent work restrictions and completed the return to work form. Applicant’s expert considered those work restrictions when he reached his conclusions that the applicant would not be amenable to rehabilitation.

Defendant also appears to argue that because Dr. Smolins recommended work restrictions there is evidence that that the applicant could benefit from vocational rehabilitation. The

recommendation of work restrictions does not necessarily mean that the applicant can return to work. A medical-legal evaluator states what work restrictions, if any, are needed as the result of an industrial injury. An employer can then use those work restrictions to determine if modified or alternative work is available. A vocational expert also uses those work restrictions to determine if there is any work in the open labor market that the applicant would be able to perform. In this case, applicant's vocational expert, Steve Ramirez, considered all of the work restrictions imposed by Dr. Smolins and found that the applicant would not be amenable to returning to work. I found the opinions of Mr. Ramirez to be persuasive, and based on those opinions, found the applicant permanent totally disabled.

Recommendation

For the foregoing reasons, I recommend that the March 6, 2024 Petition for Reconsideration be denied.

DATE: March 18, 2024

Elizabeth Dehn
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE