WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SARAH VAZQUEZ, *Applicant*

vs.

VALLEY FIRST CREDIT UNION, CYPRESS INSURANCE, ADMINISTERED BY BERKSHIRE HATHAWAY HOMESTATE COMPANIES, *Defendants*

Adjudication Number: ADJ10238805
Oakland District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant Valley First Credit Union, insured by Cypress Insurance (defendant) seeks reconsideration of the June 13, 2024 Findings, Award and Orders (F&A), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a department manager on November 18, 2014, sustained industrial injury to her left knee, low back, psyche, and left lower extremity in the form of Complex Regional Pain Syndrome (CRPS). The WCJ found that applicant sustained permanent and total disability.

Defendant contends the WCJ's decision is based in part on consideration of impermissible factors of disability arising out of compensable consequence psychiatric injury and nonindustrial headaches; that the award fails to adequately account for nonindustrial apportionment; and that the vocational expert improperly relies on work restrictions not imposed by any physician.

We have received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be granted to award litigation costs related to the vocational expert reporting, but otherwise denied on the merits.

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 rescind the F&A and return this matter to the trial level for development of the record.

FACTS

Applicant sustained injury to her left knee, low back, and psyche, and claims to have sustained injury arising out of and in the course of employment in the form of Complex Regional Pain Syndrome (CRPS) to her left lower extremity while employed as a department manager by defendant Valley First Credit Union on November 18, 2014.

The parties have selected Michael Post, M.D., to act as the Agreed Medical Evaluator (AME) in Physical Medicine & Rehabilitation. The parties have obtained consultative reporting from Steven Feinberg, M.D., also in Physical Medicine and Rehabilitation. The parties have selected Stephen Choi, M.D., as the Qualified Medical Evaluator (QME) in orthopedic medicine, and Harmony Satre, Ph.D., as the QME in psychology. Applicant has retained vocational expert Steve Ramirez, while defendant has retained vocational expert Scott Simon.

On March 11, 2024, the parties proceeded to trial and stipulated that applicant had sustained injury arising out of and in the course of employment to the left knee, low back and psyche, and claimed injury in the form of Complex Regional Pain Syndrome (CRPS) in the left lower extremity. The parties placed in issue whether applicant sustained injury in the form of CRPS, permanent disability, attorney fees, and litigation costs in connection with the vocational reporting. The WCJ heard applicant's testimony, and ordered the matter submitted for decision as of March 15, 2024.

On June 13, 2024, the WCJ issued the F&A, determining in relevant part that in addition to the stipulated body parts, applicant sustained injury in the form of CRPS to the left lower extremity. (Finding of Fact No. 1.) The WCJ further determined that applicant's injury resulted in permanent and total disability without apportionment. (Finding of Fact No. 4.) The accompanying Opinion on Decision detailed the WCJ's review of the medical, medical-legal, and vocational evidence, as well as the WCJ's determination that applicant's trial testimony was fully credible. The WCJ described the scheduled rating of permanent disability based on the reporting of AME Dr. Post, but also observed that a scheduled rating may nonetheless be rebutted by "vocational evidence that proves the [a]pplicant is not amendable to benefiting from vocational rehabilitation services, which is consistent with a total loss of earning capacity." (Opinion on Decision, at p. 7,

citing *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234, 242-243 [48 Cal.Comp.Cases 587, 594] (*LeBoeuf*).) In reviewing the admitted vocational evidence, the WCJ determined that the vocational reporting of applicant's expert Mr. Ramirez was the more comprehensive and persuasive, and based thereon, determined that applicant had successfully rebutted her scheduled rating. The WCJ thus concluded that applicant's disability was both permanent and total, based on her inability to be vocationally rehabilitated. (Opinion on Decision, at pp. 14-15.)

Defendant's Petition contends that Mr. Ramirez impermissibly included disability flowing from applicant's psychiatric sequelae and nonindustrial headaches to support his findings. (Petition, at p. 7:6.) Defendant also contends that applicant's vocational expert failed to consider nonindustrial apportionment in his conclusions and relied on work restrictions not reported by evaluating physicians. (*Id.* at p. 20:12.)

Applicant's Answer contends she has lost all access to the labor market as described in the vocational reporting of Mr. Ramirez and the functional capacity analysis in evidence. (Answer, at p. 10:1.) Applicant further contends that applicant's CRPS is wholly attributable to her industrial medical treatment and is therefore not subject to apportionment. (Answer, at p. 14:1.)

DISCUSSION

I.

Former Labor Code[1] section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
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> (b)
>
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
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> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

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

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board." Here, according to Events, the case was transmitted to the Appeals Board on September 6, 2024, and the next business day that is 60 days from the date of transmission is November 5, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on the next business day after November 5, 2024, so that we have timely acted on the petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on September 6, 2024, and the case was transmitted to the Appeals Board on September 6, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by Labor Code section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on September 6, 2024.

II.

Section 4660.1 provides:

> (a) In determining the percentages of permanent partial or permanent total disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and the employee's age at the time of injury.

[2] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

(b) For purposes of this section, the "nature of the physical injury or disfigurement" shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition) with the employee's whole person impairment, as provided in the Guides, multiplied by an adjustment factor of 1.4.

(c)

(1) Except as provided in paragraph (2), the impairment ratings for sleep dysfunction, sexual dysfunction, or psychiatric disorder, or any combination thereof, arising out of a compensable physical injury shall not increase. This section does not limit the ability of an injured employee to obtain treatment for sleep dysfunction, sexual dysfunction, or psychiatric disorder, if any, that are a consequence of an industrial injury.

(2) An increased impairment rating for psychiatric disorder is not subject to paragraph (1) if the compensable psychiatric injury resulted from either of the following:

(A) Being a victim of a violent act or direct exposure to a significant violent act within the meaning of Section 3208.3.
(B) A catastrophic injury, including, but not limited to, loss of a limb, paralysis, severe burn, or severe head injury.

(d) The administrative director may formulate a schedule of age and occupational modifiers and may amend the schedule for the determination of the age and occupational modifiers in accordance with this section. The Schedule for Rating Permanent Disabilities pursuant to the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition) and the schedule of age and occupational modifiers shall be available for public inspection and, without formal introduction in evidence, shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule. Until the schedule of age and occupational modifiers is amended, for injuries occurring on or after January 1, 2013, permanent disabilities shall be rated using the age and occupational modifiers in the permanent disability rating schedule adopted as of January 1, 2005.

(e) The schedule of age and occupational modifiers shall promote consistency, uniformity, and objectivity.

(f) The schedule of age and occupational modifiers and any amendment thereto or revision thereof shall apply prospectively and shall apply to and govern only those permanent disabilities that result from compensable injuries

received or occurring on and after the effective date of the adoption of the schedule, amendment, or revision, as the case may be.

(g) This section does not preclude a finding of permanent total disability in accordance with Section 4662.

(h) In enacting the act adding this section, it is not the intent of the Legislature to overrule the holding in *Milpitas Unified School District v. Workers' Comp. Appeals Bd.* (*Guzman*) (2010) 187 Cal.App.4th 808.

(i) The Commission on Health and Safety and Workers' Compensation shall conduct a study to compare average loss of earnings for employees who sustained work-related injuries with permanent disability ratings under the schedule, and shall report the results of the study to the appropriate policy and fiscal committees of the Legislature no later than January 1, 2016.

(Lab. Code, § 4660.1)

Subdivision (a) of section 4660.1 provides that permanent disability is determined by taking account of the nature of the physical injury or disfigurement, the occupation of the injured employee, and the employee's age at the time of injury. (Lab. Code, § 4660.1(a).)

Subdivision (c) of section 4660.1 prohibits increased impairment ratings for sleep dysfunction, sexual dysfunction, or a psychiatric order, unless the injured worker was a victim of, or exposed to a violent act or sustained a catastrophic injury. (Lab. Code, § 4660.1(c)(2).) As we wrote in our en banc decision in *Wilson v. State of CA Cal. Fire* (2019) 84 Cal.Comp.Cases 393 [2019 Cal. Wrk. Comp. P.D. LEXIS 29] (*Wilson*):

> Section 4660.1(c) does not bar an employee from claiming a psychiatric injury or obtaining treatment or temporary disability for a psychiatric disorder that is a compensable consequence of a physical injury occurring on or after January 1, 2013. Additionally, section 4660.1(c) does not apply to psychiatric injuries directly caused by events of employment. Section 4660.1(c)(1) only bars an increase in the employee's permanent impairment rating for a psychiatric injury that is a compensable consequence of a physical injury occurring on or after January 1, 2013. However, the employee may receive an increased impairment rating for a compensable consequence psychiatric injury if the injury falls under one of the statutory exceptions outlined in section 4660.1(c)(2).

(*Id.* at p. 403.)

Subdivision (d) of section 4660.1 provides that the administrative director may formulate a schedule of age and occupational modifiers, and that the schedule may be amended. (Lab. Code, § 4660.1(d).)

Here, the WCJ has rated applicant's CRPS and chronic pain in the lower extremity at 25 percent permanent disability and the lumbar spine at 7 percent permanent disability. Pursuant to the proscription of section 4660.1(c)(1), the WCJ has not rated applicant's psychiatric impairment. Combining the two percentages pursuant to the Combined Values Chart (CVC) yields 30 percent permanent partial disability. (Opinion on Decision, at p. 10.)

However, the scheduled rating is not absolute. (*Dept. of Corr. & Rehab v. Workers' Comp. Appeals Bd.* (*Fitzpatrick)* (2018) 27 Cal.App.5th 607, 619-620 [83 Cal.Comp.Cases 1680].) A rating obtained pursuant to the PDRS may be rebutted by showing applicant's diminished future earning capacity is greater than the factor supplied by the PDRS. (*Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624] *(Ogilvie)*; *Contra Costa County v. Workers' Comp. Appeals Bd.* (*Dahl*) (2015) 240 Cal.App.4th 746 [80 Cal.Comp.Cases 119] (*Dahl*).) In analyzing the issue of whether and how the PDRS could be rebutted, the Court of Appeal has observed:

> Another way the cases have long recognized that a scheduled rating has been effectively rebutted is when 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. This is the rule expressed in *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234 [193 Cal. Rptr. 547, 666 P.2d 989]. In *LeBoeuf*, an injured worker sought to demonstrate that, due to the residual effects of his work-related injuries, he could not be retrained for suitable meaningful employment. (*Id.* at pp. 237–238.) Our Supreme Court concluded that it was error to preclude LeBoeuf from making such a showing, and held that "the fact that an injured employee is precluded from the option of receiving rehabilitation benefits should also be taken into account in the assessment of an injured employee's permanent disability rating."
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> (*Ogilvie, supra*, 197 Cal.App.4th 1262, 1274.)

Thus, "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, supra,* 197 Cal.App.4th 1262, 1277.)

"The first step in any *LeBoeuf* analysis is to determine whether a work-related injury precludes the claimant from taking advantage of vocational rehabilitation and participating in the labor force. This necessarily requires an individualized approach … It is this individualized assessment of whether industrial factors preclude the employee's rehabilitation that *Ogilvie* approved as a method for rebutting the Schedule." (*Dahl, supra,* 240 Cal.App.4th 746.)

Here, the WCJ has relied upon the reporting of applicant's vocational expert Mr. Ramirez to determine that applicant has rebutted her scheduled rating. Mr. Ramirez's report, in turn, observes that applicant's work injuries effectively preclude vocational retraining, and by extension, preclude her reentry into the competitive labor market:

> While her test scores provide conflicting information, the fact she worked in a skilled occupation for 21 years would make her a potentially successful candidate for formal classroom training. However, when consideration is given to her complex regional pain syndrome and chronic pain in multiple body parts along with her psychiatric impairments in which she has a marked impairment in concentration and attention, she would be unable to sustain competitive employment. As such, she is not considered amenable to rehabilitation.
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> (Ex. 5, Report of P. Steven Ramirez, November 21, 2023, at p. 16.)

The WCJ thus concludes that the medical-legal reporting, "when coupled with the vocational feasibility opinion, demonstrate that applicant is totally and permanently disabled." (Finding of Fact No. 2(g).) In reaching this conclusion, the WCJ's Opinion on Decision notes defendant's objection to the consideration of applicant's psychiatric factors of disability pursuant to the prohibition of section 4660.1(c)(1), which precludes consideration of impairment ratings for psychiatric disorders. The WCJ nonetheless determined that "the fact that there might not be compensable PD is not determinative in this case, since the psychiatric effects of the injury, as outlined by the QME Dr. Satre, can and should be considered in as part of the *LeBoeuf* vocational analysis." (Opinion on Decision, at pp. 13-14.) Following a comprehensive review of the evidentiary record, the WCJ concludes:

> Having reviewed all the evidence in the record, I find that the Applicant does have CRPS, with associated significant and persistent and disabling pain as a

> result, along with psychiatric sequelae that affect her ability to concentrate, focus and work on a consistent basis and with consistent pace, and that the opinions of Steve Ramirez are more persuasive and better reasoned that those of Scott Simon, and I therefore find that the Applicant is not amenable to vocational rehabilitation as contemplated by *LeBoeuf* and she is therefore permanently and totally disabled.
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> (Opinion on Decision, at p. 14.)

Defendant's Petition renews their objection to the consideration of psychiatric sequelae in the determination of applicant's vocational expert that applicant is not feasible for vocational retraining. Defendant contends there is no authority that permits the consideration of psychiatric impairment otherwise barred from consideration under section 4660.1(c)(1) as part of an analysis of applicant's feasibility for vocational training. (Petition, at p. 10.) Defendant cites to our panel decision in *Schaan v. Jerry Thompson* (2022) 88 Cal.Comp.Cases 72 [2022 Cal. Wrk. Comp. P.D. LEXIS 264], wherein we affirmed the WCJ's determination that applicant's injury did not meet the catastrophic injury exception of section 4660.1(c)(2)(B) and was thus precluded from claiming impairment arising out of his psychiatric sequelae. (*Id.* at p. 12.) We also affirmed the WCJ's determination that applicant had not successfully rebutted his scheduled rating, noting that applicant's vocational expert reporting was subject to multiple evidentiary infirmities. (*Id.* at pp. 16-17.) The WCJ's Report in the instant matter observes: "A careful reading of *Schaan* makes clear the less than PTD finding of the judge in that case, was because he did not find the opinions of Applicant's vocational expert, Thomas Linder, to be persuasive because his opinions improperly considered Applicant's limited education in violation of the *Montana* case, because he appeared to consider work restrictions related to GERD and opiates that were not supplied by medical experts, and because he appeared to apply Labor Code sections 4660, when 4660.1 applied." (Report, at pp. 10-11.)

While we agree with the WCJ's assessment that the facts of *Schaan* limit its value as persuasive authority, we nevertheless note that the underlying issue of whether psychiatric disability is appropriately considered as part of a vocational rehabilitation analysis for dates of injury after January 1, 2013, has not been fully addressed in the current record. We acknowledge the WCJ's observation that he neither rated applicant's underlying psychiatric disability, nor did AME Dr. Post apportion any of the permanent disability associated with applicant's left knee/lower extremity injury to her psychiatric sequelae. (Report, at p. 11.)

However, applicant's vocational expert makes it clear that applicant's psychiatric sequelae were considered in the expert's conclusion that applicant is not feasible for vocational rehabilitation. Mr. Ramirez' report of November 21, 2023 reviews the submitted orthopedic, pain management and psychiatric reporting, and addresses "vocational causation and apportionment." Mr. Ramirez reasons that applicant's injuries resulted in "orthopedic, pain, and psychiatric deficits at a level that eliminated her ability to function in a competitive work environment." (Ex. 5, Report of Steve Ramirez, dated November 21, 2023, at p. 17.) Mr. Ramirez notes that he "utilized orthopedic, psychiatric, as well as pain factors as the criterion [sic] to consider as the most appropriate way to perform the vocational assessment for potential work activities." (*Id.* at p. 19.) The consideration of these factors resulted in the vocational expert concluding that "Ms. Vazquez' severe complex regional pain syndrome as well as pain in other body parts, along with her marked psychiatric impairment in attention and concentration in conjunction with the frequency and severity of her migraine headaches, she is 100% vocationally disabled, not amenable to rehabilitation, and she has lost 100% of her earning capacity." (*Id.* at p. 20.)

It thus appears that applicant's psychiatric sequelae were considered by the vocational expert in determining that applicant is not feasible for vocational rehabilitation. It is unclear, however, whether such a determination is consonant with the proscription found in section 4660.1(c)(1) from rating impairment for psychiatric sequelae injuries absent the catastrophic injury or violent act exceptions in subdivision (c)(2).

We also acknowledge the WCJ's conclusion that "the psychiatric effects of the injury … can and should be considered [as] part of the *LeBouef* vocational analysis." (Opinion on Decision, at p. 14.) However, the record cites to neither mandatory nor persuasive authority for this proposition. Nor does the record offer a substantive discussion of why consideration of psychiatric impairment that is otherwise prohibited for scheduled ratings would be permissible in the context of a vocational rehabilitation feasibility analysis under *LeBoeuf, supra,* 34 Cal.3d 234, and *Ogilvie, supra,* 197 Cal.App.4th 1262.

Defendant's Petition also contends that the finding of permanent and total disability fails to adequately consider the apportionment opinions of the evaluating physicians. (Petition, at p. 11:16.) Defendant notes neither Dr. Post nor Dr. Satre found applicant to be permanently totally disabled, and that the WCJ found the apportionment of AME Dr. Post to be valid. However, vocational expert Mr. Ramirez nonetheless concluded that applicant was not feasible for vocational

rehabilitation solely based on industrial factors, without consideration of the apportionment opinions of QME Dr. Satre or AME Dr. Post. Mr. Ramirez opined, "I found the industrial injuries to Ms. Vazquez to be the sole cause of her vocational disability … based on Dr. Post's report noting 100% causation/apportionment to the industrial injuries related to her left lower extremity/knee/complex regional pain syndrome impairments and 75% causation/apportionment for the lumbar spine; and 70% of Ms. Vazquez' psychiatric injury to industrial factors, per Dr. Satre's report." (Ex. 5, Report of P. Steven Ramirez, November 21, 2023, at p. 17.) Once again, we note that the vocational expert appears to be considering applicant's psychiatric sequelae. Moreover, the vocational expert offers no explanation of how the nonindustrial components of each injured body part were excluded from his analysis. In our en banc decision in *Nunes v. State of Cal., Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 894 [2023 Cal. Wrk. Comp. LEXIS 46], we noted that "when an evaluating physician identifies a valid basis for apportionment, such apportionment must be considered as part of any determination of permanent disability, including a vocational expert's evaluation of an injured worker's feasibility for vocational retraining." (*Id.* at pp. 899-900.) We also observed that "a finding of permanent and total disability notwithstanding the presence of valid nonindustrial apportionment is permissible, so long as the medical and vocational evidence establishes that the permanent and total disability arises solely out of industrial conditions or factors, that is, exclusive of nonindustrial or prior industrial conditions or factors." (*Id.* at p. 900.) However, a conclusory statement that factors of apportionment were considered is insufficient. The analysis must identify the factors of apportionment and explicate the methodology and/or reasoning employed by the vocational expert to exclude nonindustrial factors from the analysis of feasibility. (See *Nunes v. State of Cal., Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741, 753 [2023 Cal. Wrk. Comp. LEXIS 30] (Appeals Board en banc) ["factors of apportionment must be carefully considered…the vocational expert must disclose familiarity with the concepts of apportionment and set forth in detail the basis for the opinion"].) We therefore conclude that the current vocational reporting does not adequately address nonindustrial apportionment.

It is well established that decisions by the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35

Cal.Comp.Cases 16].) The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924] (*Tyler*); see *McClune v. Workers' Comp. Appeals Bd*. (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) In our en banc decision in *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 (Appeals Board en banc), we stated that "[s]ections 5701 and 5906 authorize the WCJ and the Board to obtain additional evidence, including medical evidence, at any time during the proceedings (citations) [but] [b]efore directing augmentation of the medical record . . . the WCJ or the Board must establish as a threshold matter that specific medical opinions are deficient, for example, that they are inaccurate, inconsistent or incomplete." (*Id.* at p. 141.) The principle of allowing full development of the evidentiary record to enable a complete adjudication of the issues is consistent with due process in connection with workers' compensation claims. (*Tyler, supra,* at p. 928.)

Based on our independent review of the record occasioned by defendant's Petition, we conclude that the current medical and vocational record must be developed pursuant to section 5701 to adequately address (1) the issue of applicant's permanent disability, (2) whether psychiatric impairment may be considered in a vocational rehabilitation feasibility analysis for dates of injury after January 1, 2013, and (3) whether apportionment applies to the analysis of vocational rehabilitation feasibility. We will therefore grant defendant's Petition, rescind the June 13, 2024 F&A, and return this matter to the trial level for development of the record.

Upon return of this matter, the WCJ may address the issue of applicant's claimed litigation costs in relation to the vocational reporting adduced herein.

We also offer the following nonbinding guidance to the parties and to the WCJ. The WCJ may wish to consider instructing the parties to obtain additional medical and/or vocational reporting responsive to the issues presented, including whether the permanent disability arising solely out of applicant's industrial injury is sufficient to preclude her meaningful participation in vocational rehabilitation. As we noted in *Nunes, supra*, "[v]ocational evidence may … be used to parse permanent disability caused by multiple body parts or systems." (*Nunes, supra*, 88 Cal.Comp.Cases 741, 751; see also *Lehman v. Walgreens* (February 3, 2017, ADJ8811286) [2017 Cal. Wrk. Comp. P.D. LEXIS 66] [vocational evidence used to distinguish between multiple

injured body parts to determine that applicant was permanently and totally disabled on a psychiatric basis alone, when applicant's psychiatric disability was not subject to apportionment].)

If the evidence establishes that applicant's non-feasibility for retraining is multifactorial and includes impairment arising out of psychiatric injury, the parties should specifically address whether applicant's injury qualifies for either of the exceptions to section 4660.1(c).[3] Additionally, the parties should address whether psychiatric impairment for dates of injury after January 1, 2013 may be considered in the determination that "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, supra*, 197 Cal.App.4th 1262, 1277.) Finally, if the evidence establishing that applicant's non-feasibility for vocational retraining is based on disability subject to valid legal apportionment and the vocational expert deems applicant not feasible for rehabilitation on a solely industrial basis, the reporting must identify the apportionment and explicate the methodology and/or reasoning employed by the vocational expert to exclude the apportioned disability from the analysis of feasibility. (*Nunes, supra,* 88 Cal.Comp.Cases 741, 753.)

[3] We discussed the relevant inquiry with respect to what constitutes a catastrophic injury in our en banc decision *Wilson v. State of CA Cal. Fire* (2019) 84 Cal.Comp.Cases 393 [2019 Cal. Wrk. Comp. P.D. LEXIS 29], wherein we noted that section 4660.1(c)(2)(B) does not define a "catastrophic injury," although the statute specifies that it includes, but is "not limited to" certain injuries: loss of a limb, paralysis, severe burn, or severe head injury.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of June 13, 2024 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of June 13, 2024 is **RESCINDED** and that the matter is **RETURNED** to the trial level for such further proceedings and decisions by the WCJ as may be required, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 1, 2024

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

SARAH VAZQUEZ
FARNSWORTH LAW GROUP
MICHAEL SULLIVAN & 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*