WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

TIFFANY NELSON, *Applicant*

vs.

HUMAN RESOURCES CONSULTANTS, INC.; PRO CENTURY INSURANCE COMPANY, ADJUSTED BY ILLINOIS MIDWEST INSURANCE COMPANY, *Defendants*

Adjudication Numbers: ADJ9910849; ADJ9914286

Sacramento District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration[1] of the March 6, 2024 Rulings on Evidence, Findings of Fact, Awards and Orders (F&A), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a human resource assistant/clerical worker on May 16, 2014, sustained industrial injury to her bilateral shoulders. The WCJ found that applicant's injury caused permanent disability of 23 percent, and that applicant did not rebut the scheduled rating under the 2005 permanent rating disability schedule (PDRS).

Applicant contends that the permanent disability percentages assigned by the orthopedic Qualified Medical Evaluator (QME) do not adequately describe the overall effects of the admitted industrial injury. Applicant also contends the reporting of applicant's vocational expert supports a determination that applicant has lost 85 percent of her access to the labor market.

[1] Commissioner Sweeney, who was previously a member of this panel, no longer serves on the Workers' Compensation Appeals Board. Another panelist has been assigned in her place.

We have received an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be granted and the decision amended to correct for computational error, but in all other respects denied.

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration and amend the WCJ's decision to award permanent disability without apportionment, but otherwise affirm the decision of March 6, 2024.

FACTS

Applicant alleged injury to her bilateral shoulders, bilateral upper extremities, and bilateral hands, while employed as a human resource assistance/clerical by Human Resources Consultants, Inc., on May 16, 2014. Defendant admits injury to the bilateral shoulders, and disputes injury to the bilateral upper extremities and hands.

The parties have selected Harry Khasigian, M.D., to act as the QME in orthopedic surgery. The parties have further obtained vocational reporting from Frank Diaz on behalf of applicant, and Thomas Sartoris, on behalf of defendant.

On February 8, 2024, the parties proceeded to trial and framed issues of, in relevant part, permanent disability, apportionment, and the need for further medical treatment. (Minutes of Hearing and Summary of Evidence (Minutes), dated February 8, 2024, at p. 3:27.) The WCJ ordered that "the issue of the liens regarding VE services of Mr. Diaz are deferred for both Mr. Metzinger's office and Diaz & Company." (*Id.* at p. 3:39.) The WCJ heard the testimony of applicant, and ordered the matter submitted for decision the same day.

The WCJ issued his F&A on March 6, 2024. Therein, the WCJ determined that based on the reporting of QME Dr. Khasigian, applicant had sustained 23 percent permanent disability to the bilateral shoulders after 50 percent apportionment of the right shoulder disability to nonindustrial factors. (Finding of Fact No. 6; Opinion on Decision, at p. 4.) The WCJ further evaluated applicant's assertion that she was entitled to a higher level of permanent disability based on the vocational expert reporting of Mr. Diaz. However, the WCJ ultimately concluded that

applicant's vocational expert had not successfully rebutted the presumptively correct rating under the PDRS. (Opinion on Decision, p. 4.)

Applicant's Petition avers the Permanent Disability that was assigned by Dr. Khasigian using the AMA Guidelines "does not adequately describe the overall effect of the injuries that the Applicant sustained as a consequence of her specific injury," and because a "failure of medical treatment [] caused the Applicant's left shoulder complaints and disabilities." (Petition, at p. 2:16.) Applicant challenges Dr. Khasigian's apportionment to applicant's age as discriminatory and legally impermissible. (*Id.* at p. 2:23.) Applicant further observes that pursuant to the vocational analysis of Mr. Diaz, applicant's ability to access the labor market had effectively been reduced by 85 percent as a result of her industrial injuries. (Petition, at 4:10.) Applicant also raises the issue of reimbursement for the litigation costs associated with the vocational reporting. (*Id.* at p. 5:13.)

Defendant's Answer responds that the WCJ appropriately concluded the vocational evidence does not rebut the scheduled rating, and that the opinions expressed by applicant's vocational expert rely on legally impermissible theories of vocational apportionment. (Answer, at p. 10:19.) Defendant also asserts that apportionment to "age-related factors" is legally permissible, and that the issue of reimbursement for the costs of the vocational expert reporting was deferred by the WCJ at trial. (*Id.* at p. 11:24.)

DISCUSSION

We begin our discussion with the issue of apportionment. Labor Code[2] section 4663 provides, in relevant part, that apportionment of permanent disability shall be based on causation. (Lab. Code, § 4663(a).) The statute further requires the evaluating physician to "make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries." (Lab. Code, § 4663(c).) Pursuant to section 4663(c) and section 5705, applicant has the burden of establishing the approximate percentage of permanent disability directly caused by the industrial injury, while defendant has the burden of establishing the approximate percentage of permanent disability

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

caused by factors other than the industrial injury. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 612-613 [2005 Cal. Wrk. Comp. LEXIS 71] (Appeals Board en banc) (*Escobedo*).)

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

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

> [T]o be substantial evidence on the issue of the approximate percentages of permanent disability due to the direct results of the injury and the approximate percentage of permanent disability due to other factors, a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions.
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> 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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> (*Ibid.*, italics added.)

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

Here, orthopedic QME Dr. Khasigian has identified permanent disability arising out of the injury to applicant's bilateral shoulders. With respect to the left shoulder, the QME has indicated applicant's disability is not subject to apportionment. However, with respect to the right shoulder, the QME has opined:

> With reasonable medical probability, 50 percent of the impairment is caused by conditions arising out of and in the course of employment due to compensatory movement and reaction to her right shoulder. Her shoulder findings are based upon overall degeneration, which is a continuum from her age and dominant right arm status. Therefore, 50 percent of her condition is caused by compensatory irritation of the right shoulder. With reasonable medical probability, 50 percent of her disability is related to her age of 73 as well as dominant right arm, with increased activity and function simply due to dominance.
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> (Ex. A, Report of Harry Khasigian, M.D., dated June 26, 2020, at p. 11.)

However, the QME's apportionment analysis does not offer *any* explanation of why 50 percent of applicant's residual impairment was caused by industrial factors, and why the remaining 50 percent was caused by nonindustrial factors, or why the physician identified 50 as the appropriate percentage figure. In addition, the QME's opinion fails to explain how each nonindustrial factor caused applicant's disability, and instead refers to an "overall degeneration" rather than a specific mechanism or pathology. Nor does the QME distinguish between applicant's age versus right hand dominance as independent factors giving rise to apportionment, or why a person's status as right-hand dominant would constitute a factor of apportionment. In short, the QME's opinion does not identify the factors of nonindustrial apportionment with particularity and does not adequately explain how and why those factors are presently causing 50 percent of applicant's residual permanent disability. (See *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741, 751 [2023 Cal. Wrk. Comp. LEXIS 30] (Appeals Board en banc) (*Nunes I*); *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 894 [2023 Cal. Wrk. Comp. LEXIS 46] (*Nunes II*); *Escobedo v. Marshalls, supra,* 70 Cal.Comp.Cases 604, 611.) Accordingly, we find that the apportionment opinions expressed

by the QME do not constitute substantial medical evidence and that applicant is entitled to an unapportioned award. (*Nunes II, supra,* 88 Cal.Comp.Cases 894, 898 ["It is axiomatic that in those instances where the WCJ determines that no evaluating physician has identified valid legal apportionment, applicant is entitled to an unapportioned award."].)

We will therefore grant reconsideration and amend the F&A to reflect applicant's entitlement to an unapportioned award. The WCJ's Opinion on Decision sets forth the ratings of applicant's left and right shoulder. (Opinion on Decision, at p. 4.) The right shoulder impairment of 8 percent adjusts to 15 percent permanent disability without apportionment. Combining the 15 percent right shoulder disability with the 17 percent left shoulder disability yields 29 percent disability, or 124.75 weeks of permanent disability at $290.00 per week. We will amend the WCJ's award to reflect 29 percent permanent disability, accordingly.

Applicant further contends that "with respect to the overall factors of Permanent Disability, the work restrictions that were given by Dr. Khasigian were far in excess of the findings and AMA Guidelines." (Petition, at p. 3:3.) Accordingly, applicant retained vocational expert Mr. Diaz "to review the medical records and the disabilities as given by the QMEs to see if they were consistent with the disability that was assigned to the Applicant." (*Ibid*.)

The February 10, 2021 report of Mr. Diaz reflects an interview and vocational testing of applicant administered by an assistant on October 22, 2020. The applicant's medical and vocational history are reviewed, along with applicant's reported functional limitations and pain tolerances. (Ex. 3, Report of Frank Diaz, dated February 10, 2021, at pp. 3-5.) Following an analysis of applicant's transferable skills, Mr. Diaz concludes that applicant has incurred a near, but not total, loss of labor market access. (*Id.* at p. 10.) In addition to applicant's bilateral upper extremity limitations, which "will limit the labor market available to her," Mr. Diaz also identifies other factors limiting applicant's access to the labor market. (*Id.* at p. 12.) These factors include applicant's "pain behavior" and the "synergy" of applicant's bilateral shoulders which create a greater level of disability when combined then individually. (*Id.* at pp. 13-14.) After surveying the various factors affecting applicant's ability to reenter the labor market, Mr. Diaz concludes that "Ms. Nelson, in all vocational probability, has incurred an eighty-five percent (85%) loss of labor market access." (*Id.* at p. 29.) Mr. Diaz' July 14, 2023 Supplemental Vocational Opinion submits that notwithstanding the apportionment identified by the QME, based on an individualized vocational assessment, "there is no substantial medical evidence in the record that establishes that

Ms. Nelson had any preexisting pathology or asymptomatic condition that contributed to her loss of labor market access." (Ex. 5, Report of Frank Diaz & Co., dated July 14, 2023, at p. 12.) The report further reiterates the prior conclusions reached by Mr. Diaz that applicant had lost 85 percent of her "labor market access." (*Id.* at p. 14.)

In assessing the reporting of applicant's vocational expert, the WCJ observed:

> Applicant asserted that the level established by adjustment of Dr. Khasigian's WPI is not accurate, and a higher level of permanent partial disability should be found based on the reporting of VRE [vocational rehabilitation expert] Frank Diaz. (App. Ex. 3 & 5) VRE Diaz gave his expert opinion that Applicant lost 85% of her labor market access. However, VRE Diaz has also applied his own *Kite* analysis to Applicant's disabilities and applied a vocational rehabilitation apportionment analysis which conflicts with the legally valid medical apportionment analysis of Dr. Khasigian. Additionally, VRE Diaz indicates Applicant is amenable to vocational rehabilitation and identifies several potential jobs.
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> Defendant submitted reporting from VRE Tom Sartoris in response to the reports from VRE Diaz. (Def. Ex. E & F) VRE Sartoris also concluded Applicant is amenable to vocational rehabilitation services.
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> Applicant credibly testified that she has worked as a Lyft driver since she stopped working for Employer and that she intends to resume doing this type of work. (MOH-SOE 2-8-2024 Page 6.) Based on VRE Diaz's improper application of *Kite* and use of invalid vocational apportionment theories along with his determination that Applicant is amenable to vocational rehabilitation combined with the VRE reporting of VRE Sartoris and Applicant's ability to secure self-employment it is found Applicant did not rebut by a preponderance of the evidence the rating established by the PDRS.
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> (Opinion on Decision, at p. 4.)

We concur with the WCJ's analysis. We also observe that applicant's vocational expert expressly relies on the reporting of Mohinder Nijjar, M.D., whose reporting is not a part of the evidentiary record. Moreover, to the extent that the vocational expert avers applicant's disability has increased due to a loss of "market access," it is not clear how this equates to diminished future earning capacity (DFEC), or that consideration of the DFEC as a method for rebuttal of the PDRS remains a valid legal approach. (Lab. Code, § 4660.1; see *Wilson v. Kohls Dep't Store* (December 6, 2021, ADJ10902155) [2021 Cal. Wrk. Comp. P.D. LEXIS 322]; *Soormi v. Foster Farms* (2023) 88 Cal. Comp. Cases 1125 [2023 Cal. Wrk. Comp. P.D. LEXIS 170]; see also *Nunes I*, supra, 88

Cal. Comp. Cases 741, 754 ["a vocational report is not substantial evidence if it relies upon facts that are not germane, marshalled in the service of an incorrect legal theory"].) Accordingly, we agree with the WCJ that applicant has not rebutted the scheduled rating.

Finally, we observe that applicant has raised the issue of reimbursement of costs related to the vocational expert reporting. However, the WCJ deferred this issue at the time of trial. (Minutes, at p. 3:39.) Any party wishing to further address this issue may seek a hearing by the filing of a Declaration of Readiness to Proceed.

In summary, we are not persuaded that applicant's vocational expert reporting constitutes substantial evidence, and therefore conclude that applicant has not rebutted the scheduled rating using the 2005 PDRS. However, following our independent review of the record occasioned by applicant's Petition, we conclude that the apportionment opinions expressed by the evaluating physicians are not substantial evidence. Consequently, we will grant applicant's Petition and amend the F&A to reflect an unapportioned award based on the scheduled rating.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of March 6, 2024 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of March 6, 2024 is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

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5. Applicant was shown to have 29% permanent partial disability after appropriate adjustments as a result of her industrial injury in ADJ9910849.

AWARDS AND ORDERS

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2. In ADJ9910849, Applicant is Awarded $36,177.50 in Permanent Partial Disability indemnity payable at $290.00 per week commencing October 5, 2016, less a reasonable attorney fee of $5,426.00. Thereafter, Defendant is entitled to credit for Permanent Disability Indemnity Advances subject to proof with WCAB jurisdiction reserved.
3. In ADJ9910849, Applicant's Attorney Fee Lien is Allowed in the amount of $5,426.00 to be paid from the Permanent Partial Disability Indemnity Awarded in Paragraph 2. Defendant is entitled to credit for the $3,067.00 paid to Applicant's Attorney per the prior Award of April 23, 2021, subject to proof with WCAB jurisdiction reserved.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 14, 2024

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

TIFFANY NELSON
METZINGER AND ASSOCIATES
BRADFORD & BARTHEL, LLP

SAR/mc

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