WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

VERONIKA HUSTED, ***Applicant***

vs.

NETNOLIMITS; FARMERS INSURANCE EXCHANGE, administered by FARMERS INSURANCE, ***Defendants***

Adjudication Number: ADJ10806309
Santa Barbara District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant Farmers Insurance Exchange (defendant) seeks reconsideration of the June 25, 2024 Findings and Award (F&A), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a Chief Technology Officer on June 5, 2014, sustained industrial injury to her back, left hip, psyche and bilateral knees. The WCJ found that applicant sustained permanent and total disability without apportionment.

Defendant contends that the WCJ erred in determining that the apportionment opinions of the evaluating medical-legal physicians were not substantial evidence.

We have received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will deny reconsideration.

FACTS

Applicant sustained injury arising out of and in the course of employment to her back, left hip, psyche, and bilateral knees while employed as a Chief Technology Officer by defendant Netnolimits on June 5, 2014. Defendant admits liability but disputes the nature and extent of the injury.

The parties have selected Jeffrey Berman, M.D., as the Agreed Medical Evaluator (AME) in orthopedics, Salvador Echeverria, M.D., as the Qualified Medical Evaluator (QME) in psychiatry, and Felix Lurye, M.D., as the QME in pain management. The parties have further obtained vocational expert reporting from David Van Winkle on behalf of applicant, and Kelly Bartlett on behalf of defendant.

On March 12, 2024, the parties proceeded to trial, framing issues, in relevant part, of permanent disability and apportionment. The WCJ heard applicant's testimony, and ordered the matter submitted on April 14, 2024.

On June 25, 2024, the WCJ issued the F&A, determining that applicant's disability was permanent and total. (Finding of Fact No. 6.) The WCJ further determined there was no legal basis for apportionment. (Finding of Fact No. 7.) The WCJ's accompanying Opinion on Decision explains that although the evaluating medical-legal physicians identified preexisting conditions as factors of apportionment, they failed to explain how and why applicant's preexisting conditions currently contributed to applicant's permanent disability.

Defendant's Petition for Reconsideration (Petition) contends the apportionment analysis of AME Dr. Berman constitutes substantial evidence because the AME identified longstanding complaints documented in the medical record occurring before her industrial injury of June 5, 2014. (Petition, at p. 8:19.) Defendant notes that apportionment is excused only under extremely limited circumstances, and that the unrebutted medical evidence supports a finding of apportionment to preexisting nonindustrial factors. (*Id.* at p. 9:25.)

Applicant's Answer responds that the apportionment analyses of the AME and both QMEs all fail to discuss the causal relationship between the claimed factors of apportionment and applicant's current permanent disability. (Answer, at p. 4:19.) Applicant further contends that to the extent that her disability arose out of her industrial medical treatment, it is not subject to nonindustrial apportionment. (*Id.* at p. 6:19.)

The WCJ's Report acknowledges that AME Dr. Berman reviewed medical records documenting applicant's numerous prior complaints, injuries, and treatment. (Report, at p. 2.) The WCJ observes, however, that the AME does not explain "the how and why the prior conditions caused or contributed to the level of permanent disability," and addresses his apportionment analysis to the question of causation of the injury, rather than causation of permanent disability. (*Ibid*.) Accordingly, the WCJ recommends we deny the Petition.

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.
>
> (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.

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 July 26, 2024, and the next business day that is 60 days from the date of transmission is September 24, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is

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

[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.

issued by or on the next business day after September 24, 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 July 26, 2024, and the case was transmitted to the Appeals Board on July 26, 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 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 July 26, 2024.

II.

Defendant's Petition contends that the apportionment analyses described by the orthopedic AME and the psychiatric QME constitute substantial evidence, and that the WCJ should have relied upon the described apportionment in issuing the award of permanent disability herein.

Section 4663 provides, in relevant part, as follows:

> (a) Apportionment of permanent disability shall be based on causation.
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> (b) Any physician who prepares a report addressing the issue of permanent disability due to a claimed industrial injury shall in that report address the issue of causation of the permanent disability.
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> (c) In order for a physician's report to be considered complete on the issue of permanent disability, it must include an apportionment determination. A physician shall 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. If the physician is unable to include an apportionment

> determination in his or her report, the physician shall state the specific reasons why the physician could not make a determination of the effect of that prior condition on the permanent disability arising from the injury. The physician shall then consult with other physicians or refer the employee to another physician from whom the employee is authorized to seek treatment or evaluation in accordance with this division in order to make the final determination.
>
> (Lab. Code, § 4663.)

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 v. Marshalls* (2005) 70 Cal.Comp.Cases 604 [2005 Cal. Wrk. Comp. LEXIS 71] (Appeals Bd. en banc) (*Escobedo*).) 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.) The report must describe in detail the exact nature of the apportionable disability, and "set forth the basis for the opinion so that the Board can determine whether the physician is properly apportioning under correct legal principles." *(Ibid.)*

AME Dr. Berman has evaluated applicant in orthopedic medicine. Dr. Berman's initial evaluation of July 8, 2019, identified multiple diagnoses relating to applicant's lumbar spine and left hip. The AME reviewed records regarding prior injuries sustained by applicant, including an industrial low back injury in 1998, and a nonindustrial cervical spine injury in 2000. Dr. Berman opined:

> By history, she does describe a prior lumbar injury although with recovery. Quite frankly, the records suggest otherwise. She did not describe a chronic and significant lumbar history yet the records clearly suggest this. There is documentation dating back to 1999 with regards to a previous lumbar industrial injury. Subsequent followup, however, noted that she did resolve.
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> …
>
> This documentation obviously establishes that she has had chronic and recurrent problems with regards to the lower back. There are underlying factors and a chronic history that obviously pre-existed this history of injury and employment.

> If indeed she was lifting and moving shelving and performing physical activities, then this may have further aggravated her condition. She also sustained a nonindustrial ankle sprain and had back complaints before this episode occurred. As one can see, this is complicated. There are obviously industrial and nonindustrial factors. At least preliminarily and absent any further evidence, this would be industrial if she did perform those activities. This would be superimposed on underlying factors with 50% being nonindustrial and 50% related to industrial aggravation.
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> With regards to the hip, this is not as clearly documented. There is, however, some documentation initially as to the hip. The hip is mentioned, although the hip may be more of a compensable consequence with chronic limping. She remained symptomatic despite surgery to the lower back. I would consider the hip as more of a compensable consequence to the back.
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> (Ex. 1, Report of Jeffrey Berman, M.D., dated April 3, 2018, at p. 56.)

In a reevaluation report of July 8, 2019, Dr. Berman noted his clinical examination of the applicant and review of additional medical records, along with updated findings on permanent disability. However, the AME's apportionment analysis merely reiterated his prior conclusion of 50 percent nonindustrial without additional explication. (Ex. 2, Report of Jeffrey Berman, M.D., dated July 8, 2019, at p. 9.) Similarly, Dr. Berman's March 16, 2021 report states:

> As it relates to causation, this is industrial. I have addressed this. I had a discussion on this in the last report of July 8, 2019. I had reviewed voluminous records. I provided a very lengthy analysis. I went on to conclude that there was 50% apportioned to non-industrial factors and 50% to industrial aggravation.
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> (Ex. 3, Report of Jeffrey Berman, M.D., dated March 16, 2021, at p. 21.)

Initially, we note that it is not clear from the reporting whether the AME is identifying factors of causation of the injury or apportioning the resulting permanent disability. The initial report of April 3, 2018 describes a preliminary impression of apportionment of 50 percent of the "underlying factors" as nonindustrial in etiology. However, the percentages are described as part of a discussion of causation of injury, and the only distinction offered is between nonindustrial factors versus industrial aggravation. There is no distinction drawn between causation of the injury and causation of permanent disability. Dr. Berman's report of March 16, 2021 similarly groups his analyses of the factors of causation of the injury and the resulting permanent disability together. We note, however, that "[s]ection 4663(a)'s statement that the apportionment of permanent disability shall be based on "causation" refers to the causation of the permanent disability, not

causation of the injury, and the analysis of the causal factors of permanent disability for purposes of apportionment may be different from the analysis of the causal factors of the injury itself." (*Escobedo, supra*, 70 Cal.Comp.Cases at p. 607.)

We further observe that insofar as the AME has identified apportionment to applicant's "chronic and recurrent problems with regards to the lower back," it is not clear from the reporting what *specific diagnoses or pathology* the AME is referring to. The AME has instead aggregated applicant's "chronic and recurrent problems with regards to the lower back," into a *single factor of apportionment*, and assessed a percentage of causation to that single factor without substantive discussion of how and why it is resulting in present permanent disability. (*Id.* at p. 63.)

Our decision in *Escobedo* summed up the 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.
>
> 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.)

Here, the AME has not identified with specificity *any* of the individual preexisting factors that are presently manifesting in permanent disability. Nor is there a discussion how each of these factors contributed to applicant's present levels of disability, or *how* and *why* the specific percentages assessed were determined. While we acknowledge that the AME has appropriately reviewed applicant's medical and vocational history, the reporting fails to identify or parse individual factors and conditions, or *how* and *why* each factor or condition is causing applicant's

present levels of permanent disability. Accordingly, we concur with the WJC's assessment that the apportionment analysis of the orthopedic AME does not constitute substantial evidence.

Psychiatric QME Dr. Echeverria also described permanent disability arising out of industrial exposures with nonindustrial apportionment. In a report dated May 24, 2023, the QME describes his apportionment analysis as follows:

> I apportion 20% of the psychiatric disability to pre-existing psychosocial history (loss of husband, financial stress, history of alcohol use, history of abusive relationships, history of chronic pain and ongoing pain medication use, history of previous psychiatric diagnosis of anxiety and depression that contribute to current psychiatric injury). Therefore, 80% is apportioned to industrial factors and 10% is apportioned to nonindustrial factors.
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> (Ex. 6, Report of Salvador Echeverria, M.D., dated May 24, 2023, at p. 14.)

The analysis here again improperly aggregates multiple independent aspects of applicant's medical and psychosocial history into a single composite factor of apportionment. In so doing, the QME fails to identify how and why each of these preexisting and nonindustrial factors are presently causing applicant's psychiatric disability, or how the QME arrived at his assessment of the particular percentages of industrial and nonindustrial disability. We also note evident clerical error in the QME's assessment of either 10 or 20 percent apportionment to nonindustrial factors. We therefore concur with the WCJ's assessment that the apportionment analysis of psychiatric QME Dr. Echeverria does not constitute substantial evidence.

Based on the foregoing, we are persuaded that neither the reporting of the orthopedic AME nor that of the psychiatric QME offers a substantial apportionment analysis. (*Escobedo, supra*, at 620 ["Even where a medical report 'addresses' the issue of causation of the permanent disability and makes an 'apportionment determination' by finding the approximate relative percentages of industrial and non-industrial causation under section 4663(a), the report may not be relied upon unless it also constitutes substantial evidence."].) None of the apportionment analyses adequately explains the mechanism for how the identified factors of apportionment are contributing to applicant's present permanent disability or set forth their reasoning with particularity. (*Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741, 751 [2023 Cal. Wrk. Comp. LEXIS 46] ("In order to constitute substantial evidence the opinions of both the evaluating physician as well as the vocational expert must detail the history and evidence in support of their

respective conclusions, including "how and why" a condition or factor is causing permanent disability.").)

We will deny reconsideration, 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

September 23, 2024

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

VERONIKA HUSTED
STOUT, KAUFMAN, HOLZMAN & SPRAGUE
LAW OFFICES OF SCOTT C. STRATMAN

SAR/abs

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